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FREEDOM OF SPEECH, SHIELDING CHILDREN, AND TRANSCENDING BALANCING

The government has a strong interest in shielding children from unsuitable—because sexually explicit or (perhaps) profane—speech. So says the Court, and so say even many who generally frown on the regulation of sexually explicit material.[1] At the same time, the Court has held, much speech of this sort is constitutionally valuable. How can these strong competing claims, the government interest and the constitutional right, be reconciled?

The Court's official answer is strict scrutiny: Speech to adults may be restricted to serve the compelling interest in shielding children, but only if the restriction is the least restrictive means of

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[1] See, for example, *Sable Communications v FCC*, 492 US 115 (1989); *Reno v ACLU*, 117 S Ct 2329 (1997); *Ginsberg v New York*, 390 US 629, 649–50 (1968) (Stewart concurring) (distinguishing children's rights to access speech from adults' rights); *Paris Adult Theatre I v Slaton*, 413 US 49, 113 (1973) (Brennan dissenting, joined by Stewart and Marshall) (arguing that obscenity is constitutionally protected "at least in the absence of distribution to juveniles"); *Pope v Illinois*, 481 US 497, 513, 517 (1987) (Stevens dissenting, joined by Brennan and Marshall) ("government may not constitutionally criminalize mere possession or sale of obscene literature, absent some connection to minors"); *Sable Communications v FCC*, 492 US 115, 134 (1989) (Brennan dissenting in part, joined by Marshall and Stevens) ("To be sure, the Government has a strong interest in protecting children against exposure to pornographic material that might be harmful to them."). But see *Ginsberg*, 390 US at 650 (Douglas, joined by Black, dissenting) (arguing against any such restrictions).

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doing so.[2] In *Reno v ACLU*,[3] the Court applied this framework to strike down the Communications Decency Act, a statute which pretty much banned not-for-pay online distribution of material containing "patently offensive" speech about "sexual or excretory activities." The decision was widely considered a great victory for free speech,[4] and I agree that it reached the right result.

Nonetheless, I believe that the logic of the *ACLU* opinion is deeply flawed, and that the flaws in the opinion reveal serious problems with the strict scrutiny framework. The opinion, I will argue, rests on a factually incorrect assertion. It fails to confront the critical normative judgment about the real sacrifice that free speech demands. The strict scrutiny framework that *ACLU* applies ultimately underprotects speech. And by following this framework, the opinion misses an opportunity to synthesize the cases into a different framework that's more accurate and more useful.

Below, I briefly describe the *ACLU* case (Part I), explain my criticism of the opinion (Parts II and III), present several alternative approaches to dealing with the problem (Part IV), and suggest how both the criticism and the alternatives might be generalized to other areas of free speech law (Part V).

I. Reno v ACLU

A. The Communications Decency Act

In 1996, Congress passed the Communications Decency Act (CDA). Its most controversial provision—the only one I will focus on here—provided that

> (d) Whoever
> (1) in interstate or foreign communications knowingly . . .
> (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication

[2] See cases cited in Part III.A.

[3] 117 S Ct 2329 (1997).

[4] For example: "Senator Patrick J. Leahy . . . who was an opponent of the legislation, said, '. . . This is a victory for the First Amendment.' " *Supreme Court Strikes Down Communications Decency Act*, Facts on File World News Digest 473 A1 (July 3, 1997). "Free speech scored an important victory last week, when the U.S. Supreme Court ruled that freedom of expression applies to the Internet." Editorial, Denver Post E4 (July 6, 1997). See also Michael Loftin, *Victory for the First Amendment*, Chattanooga Times A8 (July 14, 1997).

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> that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs . . .
>
> shall be fined under Title 18, or imprisoned not more than two years, or both.[5]

Most places on the Internet are generally open to everyone, child or adult; there's no way to check readers' ages, short of the expensive (and imperfect) proxy of demanding and verifying their credit card numbers. Therefore, the CDA would have essentially banned material that "depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs"—which I will call "indecent" material for short[6]—from all parts of the Internet except those that charge people for access using credit cards.[7] Because most of the Internet is now available for free, and because this free access is

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[5] Pub L No 104-104, 110 Stat 56 (1996), codified at 47 USC § 223(d). Two other provisions barred communicating indecency "knowing that the recipient of the communication is under 18 years of age" and communicating indecency "to a specific person or persons under 18 years of age." 47 USC §§ 223(a)(1)(B), (d)(1)(A). If these provisions were interpreted narrowly, to cover only speech to a particular person whom the speaker knows to be a minor, they might well be constitutional, at least as applied to indecent speech that is also "harmful-to-minors"; Justice O'Connor so argued in her dissent. *ACLU*, 117 S Ct at 2354–55 (claiming that this was the best reading, and that even if the ban on indecent speech was overbroad in including more than just "harmful-to-minors" speech, it was not substantially overbroad); see Part IV.B.2.a.i (discussing distinction between "harmful-to-minors" and "indecent"). The majority struck down the provisions because it thought they could not be so narrowly read. Id at 2348–50.

[6] See *ACLU*, 117 S Ct at 2345 ("assum[ing] arguendo" that "indecent" was synonymous with "patently offensive [depiction or description] of sexual or excretory activities or organs"); *FCC v Pacifica Foundation*, 438 US 726, 740–41 (1978) (accepting a similar FCC definition of "indecent").

[7] Free sites can't practically use credit card numbers for verification because the verification costs money, apparently about $1 per transaction. *ACLU v Reno*, 929 F Supp 824, 846 finding of fact no. 99 (ED Pa 1996).

If there were a way in which a cyberspace speaker could, for free, check a would-be listener's age—perhaps by checking some reliable "cyber ID" that the listener could cheaply procure for himself—the matter might be different; a requirement that cyberspace speakers check such IDs would still allow them to provide their speech without charge to adults. The Court did not believe, however, that such a scheme was possible today, 117 S Ct at 2349–50, and from my knowledge of computer software, I'm not sure how it would be possible any time in the foreseeable future.

The main proposal that I've heard—that adults pay a dollar or two for an "adult ID" that they can later use, with no charge, to access any adult Web site—just won't work. Even if speakers could check the listener's ID at no cost, the very absence of a charge means that "free speech activists" could buy adult IDs and then widely post them, encouraging any interested minors to use them. The only way to effectively deter such ID sharing is by making sure that the ID owner gets charged every time the ID is used, the very thing that adult IDs supposedly avoid.

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widely considered one of the Internet's great strengths, this naturally struck many as a very broad restraint.

Moreover, as Justice Stevens's majority opinion[8] pointed out, the restraint was made broader by its vagueness. "Could a speaker confidently assume," the opinion asked, "that a serious discussion about birth control practices, homosexuality, the First Amendment issues raised by the Appendix to [*FCC v Pacifica Foundation*, the 'Seven Dirty Words' case], or the consequences of prison rape would not violate the CDA?" Justice Stevens was correct in thinking that the answer to this is "no"; while one might hope that prosecutors and juries wouldn't read the law this broadly, the text gives no such assurance. The statutory definition was potentially broad enough to cover such speech, with no safe harbor for speech that has substantial value, or for speech that doesn't appeal to prurient interests.

Thus, the Court faced a speech restriction that would have at least deterred, and quite possibly punished, a considerable amount of generally presumptively protected speech. At the same time, the restriction was said to be justified by a government interest to which the Court had paid considerable respect—the interest in shielding children from offensive material. Either the right or the interest had to at least partly yield.

B. THE COURT'S CHOICE OF LEVEL OF SCRUTINY

The Court could have avoided the full force of this conflict by fitting the CDA into one of the boxes where speech restrictions are more freely permitted than in other areas.

Low-value speech: If the CDA could have been seen as limited to "low-value" speech, the Court could have let the government prevail while theoretically imposing little sacrifice of free speech, because the burdened speech would be (by hypothesis) not very valuable. This wouldn't have entirely eliminated the free speech sacrifice—low value does not equal no value—but it would have made it seem less momentous.

But though Justice Stevens had in the past been the Court's

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[8] Justice Stevens wrote for seven Justices; Justice O'Connor, joined by Chief Justice Rehnquist, concurred in the judgment on this point, and dissented on the question discussed in note 5.

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leading proponent of this approach,[9] his opinion didn't even mention it. This might have been because the CDA covered much material that would be hard to call low value,[10] or because many of the other Justices are uncomfortable with the idea of treating "indecent" speech as low value.[11] In either event, the Court declined to take this escape route.

Secondary effects: The government urged the Court to treat the CDA as an essentially content-neutral law, justified not by the content of "indecent" speech, but by its supposed "secondary effects."[12] The Court correctly rejected this argument. Whatever the possible merits of the "secondary effects" doctrine in other contexts, the danger that speech will corrupt its listeners is a classic primary effect. "Listeners' reaction to speech is not a content-neutral basis for regulation";[13] a law "justified by the [government's] desire to prevent the psychological damage it felt was associated with viewing [indecency] [must be analyzed] as a content-based statute."[14]

The broadcasting analogy: The Court could also have concluded that online speech is entitled to the lesser constitutional protection afforded broadcast radio and television. For three decades, the Court has formally treated restrictions on broadcasting quite differently from similar restrictions on speech in other media.[15] The

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[9] See *FCC v Pacifica Foundation*, 438 US 726 (1978) (Stevens plurality); *Young v American Mini Theatres, Inc.*, 427 US 50 (1976) (Stevens plurality).

[10] See 117 S Ct at 2344. But see *Pacifica*, 438 US at 745–46 (Stevens plurality) (suggesting that "patently offensive words dealing with sex and excretion" are of "slight social value").

[11] Compare *R.A.V. v City of St. Paul*, 505 US 377, 390 n 6 (1992) (stressing that the two opinions that most clearly urged different treatment for "low-value" speech—Justice Stevens's plurality opinions in *Young* and *Pacifica*—"did not command a majority of the Court").

[12] *City of Renton v Playtime Theatres, Inc.*, 475 US 41 (1986).

[13] *Forsyth County v Nationalist Movement*, 505 US 123, 134 (1992); see also *R.A.V. v City of St. Paul*, 505 US 377, 394 (1992); *Boos v Barry*, 485 US 312, 321 (plurality), 334 (concurrence) (1988); *ACLU*, 117 S Ct at 2342 ("the purpose of the CDA is to protect children from the primary effects of 'indecent' and 'patently offensive' speech, rather than any 'secondary' effect of such speech").

[14] *Boos v Barry*, 485 US 312, 321 (1988) (plurality).

[15] Thus, the interest in providing the public with a balanced presentation of the issues has been held to trump the free speech rights of broadcasters but not of newspaper publishers. Compare *Red Lion Broadcasting Co. v FCC*, 395 US 367 (1969) (broadcast radio and television) with *Miami Herald Pub. Co. v Tornillo*, 418 US 241 (1974) (newspapers). The interest in shielding people from unwanted exposure to profanity has been held to trump the free speech rights of broadcasters but not of people on the street. Compare *FCC v Pacifica Foundation*, 438 US 726 (1978) with *Cohen v California*, 403 US 15 (1971). See *FCC*

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ACLU Court, though, refused to extend the broadcast test to the Internet. The Internet, the Court held, shares none of the "special justifications for regulation" that led to diminished protection for broadcast speakers: There is no "history of extensive government regulation of the . . . medium," no "scarcity of available frequencies at [the medium's] inception," and no specially " 'invasive' nature" to the medium that would make it easy for people to encounter offensive material by accident.[16] This holding was important but not surprising, because the broadcasting cases have generally had rather little gravitational force; in *Turner Broadcasting v FCC* (1994),[17] for example, the Court refused to extend them even to cable television.[18]

C. RECONCILING THE INTEREST AND THE RIGHT

Thus, the Court acknowledged that the CDA imposed a heavy burden on free speech: It restricted a great deal of presumptively fully protected speech based on its content, and did so in a fully protected medium.[19] But this cannot be the end of the inquiry, because orthodox free speech doctrine holds that even such a heavy burden may sometimes be imposed in the pursuit of a "compelling

v League of Women Voters, 468 US 364 (1984) (formally acknowledging that the broadcasting test is different from the test used for other media).

[16] 117 S Ct at 2343.

[17] 114 S Ct at 2445 (1994).

[18] A four-Justice plurality in *Denver Area Educ. Telecom. Consortium v FCC*, 116 S Ct 2374 (1996), did speak favorably of the broadcast indecency rules in the cable context; and the references in some *Denver Area* opinions to the supposed "novelty" of cable television and the concomitant need to take small steps seemed to foreshadow a similarly cautious decision about the Internet. See id at 2402 (Souter concurring) ("And as broadcast, cable, and the cyber-technology of the Internet and the World Wide Web approacb the day of using a common receiver, we can hardly assume that standards for judging the regulation of one of them will not have immense, but now unknown and unknowable, effects on the others. . . . In my own ignorance I have to accept the real possibility that 'if we had to decide today . . . just what the First Amendment should mean in cyberspace, . . . we would get it fundamentally wrong,' " quoting Larry Lessig, *The Path of Cyberlaw*, 104 Yale L J 1743, 1745 (1995)); id at 2398 (Stevens concurring) ("it would be unwise to take a categorical approach to the resolution of novel First Amendment questions arising in an industry as dynamic as this"). Still, even if the *Denver Area* Court was in a cautious mood about new technologies, this mood had seemingly dissipated by the time of *ACLU*.

[19] As a general matter, the "free speech price"—the burden on constitutional rights imposed by a restriction—turns not only on the constitutional value of the restricted speech, but also on any collateral costs, such as the danger that the proposed restriction will be administered unfairly, *Grayned v City of Rockford*, 408 US 104 (1972), or that the restriction will skew public debate. For purposes of this discussion, though, I will focus primarily on the constitutional value of the lost speech.

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governmental interest." Given the choice between sacrificing free speech and sacrificing the compelling interest, sometimes free speech will have to yield.[20]

One possible solution, of course, would be to say that shielding children from "patently offensive" descriptions of sex and excretion is not a compelling interest. Maybe such materials are somewhat harmful to children's upbringing; maybe children have no constitutional right to receive such material, and adults have no right to communicate it to them; but, the argument would go, the harm is not great enough to justify restraints on communication among adults. Better to sacrifice the shielding of children than to restrict speech.[21]

The Court, however, has not taken this view. In *Sable Communications v FCC*, the Court noted that "there is a compelling interest in protecting the physical and psychological well-being of minors . . . [by] . . . shielding minors from the influence of literature that is not obscene by adult standards,"[22] and *ACLU* did not contradict this.[23] One might still argue, of course, that this interest extends

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[20] See, for example, *Burson v Freeman*, 504 US 191, 198 (1992) (plurality); *Austin v Michigan Chamber of Commerce*, 494 US 652, 655 (1990); *Boos v Barry*, 485 US 312, 334 (1988) (plurality); *Board of Airport Comm'rs v Jews for Jesus, Inc.*, 482 US 569, 573 (1987); *Cornelius v NAACP Legal Defense and Educ. Fund, Inc.*, 473 US 788, 800 (1985); *United States v Grace*, 461 US 171, 177 (1983); *Perry Educ. Ass'n v Perry Local Educators' Ass'n*, 460 US 37, 45 (1983).

Some readers have suggested that these cases do not truly represent the law, and that the Court's approach to content-based restrictions comes closer to an absolute ban, with a few narrow exceptions. I agree that the Court *should* follow that sort of more categorical approach, and that the Court in practice does sometimes seem to do so, paying only lip service to strict scrutiny. See Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U Penn L Rev 2417 (1996). In fact, my goal in this article is to suggest that the Court should depart from strict scrutiny in cases such as *ACLU*. Nonetheless, the Court has repeatedly asserted that strict scrutiny is the official rule, and the *ACLU* opinion certainly speaks the language of strict scrutiny.

[21] Compare *Ginsberg v New York*, 390 US 629, 652–55 (1968) (Douglas dissenting) (denying the government's right to ban even knowing distribution of sexually explicit material to specific minors).

[22] *Sable*, 492 US at 126. Some have suggested that this statement may be dictum; I don't think it is, but even if it is, it's well-considered and forceful dictum, dictum that the Court seems to contemplate lower courts will follow, and that the lower courts have indeed followed. See *Dial Information Services Corp. v Thornburgh*, 938 F2d 1535 (2d Cir 1991); *Information Providers' Coalition v FCC*, 928 F2d 866 (9th Cir 1991).

[23] The opinion stresses that the Court has "repeatedly recognized the governmental interest in protecting children from harmful materials," and calls this an "important purpose." 117 S Ct at 2346. A footnote says that the law's challengers "do not dispute that the Government generally has a compelling interest in protecting minors from 'indecent' and 'patently offensive' speech," id at 2340 n 30; another part of the opinion says that the *Sable* Court "agreed that 'there is a compelling interest in protecting the physical and psychologi-

not to all patently offensive descriptions of sex and excretion, but only to extremely explicit ones, or only to those that appeal to prurient interests, or to some other narrow category; but *ACLU* did not rest on such an argument.[24]

So in some situations free speech to adults may be restricted in order to shield minors. But, the Court said, not here. Why?

D. APPLYING STRICT SCRUTINY

The CDA is invalid, the Court said, because it is possible to protect speech in this context without *any* sacrifice of shielding of children. The CDA is simply insufficiently "carefully drafted," simply lacks "precision."[25] The conflict that might require hard trade-offs between a precious constitutional right and a compelling government interest was, the Court said, in fact absent.

The Court explained that the burden on free speech "is unacceptable if less restrictive alternatives would be *at least as effective* in achieving the legitimate purpose that the statute was enacted to serve." Though the Court has "repeatedly recognized the governmental interest in protecting children from harmful materials," that interest "does not justify an *unnecessarily broad* suppression of speech addressed to adults." Congress must "desig[n] its statute to accomplish its purpose 'without imposing an *unnecessarily great* restriction on speech.'" The government bears a "heavy burden to explain why a less restrictive provision *would not be as effective* as the CDA." And given the "possible alternatives, such as requiring that indecent material be 'tagged' in a way that facilitates parental control of material coming into their homes, making exceptions for messages with artistic or educational value, providing some tolerance for parental choice, and regulating some portions of the Internet—such as commercial Web sites—differently than others, such as chat rooms," the government hasn't discharged this burden.[26]

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cal well-heing of minors' which extended to shielding them from indecent messages that are not obscene by adult standards," id at 2343.

[24] For a more detailed discussion of the uncertainty about exactly what speech the compelling interest covers, see Part IV.B.2.a.i.

[25] 117 S Ct at 2346.

[26] All quotes in this paragraph are from *Reno,* 117 S Ct at 2348 (emphasis added).

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If the four phrases I italicized in the previous paragraph are correct, then Congress might have been able to have its cake and eat it too: It could have restricted speech less without sacrificing any shielding of children. The alternatives the Court identifies would be "at least as effective," and thus make the broader restraint imposed by the CDA "unnecessarily broad" and not "carefully drafted." (If they would not have been as effective, then the CDA would have been a "[ ]necessarily broad suppression" and a "[ ]necessarily great restriction," because it would have been necessary in order for Congress to fully accomplish its purpose.[27])

Tastes great *and* less filling! If the Court is right, then there really was no excuse at all for the CDA being passed. If the Court is right.

II. The Court's Error

A. No Equally Effective Alternatives

But the Court is wrong. None of the Court's proposed alternatives to the CDA—or any other alternatives I can imagine—would have been as effective as the CDA's more or less total ban.

1. Compulsory Tagging

Consider the Court's first proposed alternative—"requiring that indecent material be 'tagged' in a way that facilitates parental control of material coming into their homes." This is actually a pretty good alternative: Under it, parents who use special "filter" software can make their computers block access to any material that's tagged as indecent.[28] And it could be made better still if parents didn't have to spend time or money finding and buying the best filters, for instance, if the government made the software available for free, and service providers such as America Online had an op-

[27] Even if one reads "unnecessarily" more loosely, the other two quotes remain: The Court is suggesting that the test is whether there are alternatives that would be at least as effective.

[28] Of course, even this shielding will be ineffective if Internet speakers fail to properly rate their materials; but this risk of noncompliance would have been no less present with the CDA than with the self-rating scheme.

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tion that easily turned it on.[29] Some parents still wouldn't use it, but perhaps one might say that they've chosen to let their children have unlimited access, so the government interest in shielding their children would then become less than compelling. (This latter view is controversial, but let's assume it for now.)

But even with this, compulsory tagging isn't "at least as effective" as the CDA in serving the CDA's "important purpose of protecting children from exposure to sexually explicit material." Filters work only on those computers on which they are installed and activated, and parents have little control over the computers used by their children's friends.

True, unusually conscientious parents may ask their children's friends' parents whether they have shielding software installed. But even conscientious parents often don't know every home that their teenagers might visit; and even for younger kids, what can one do when the other parent says, "Shielding software? Yeah, I think I have that option on, maybe"? Should one come over to check? What if the other parent says, "Yes, I definitely have the shielding software turned on," but turus out to be wrong? What if, unbeknownst to the other parent, his child has found some instructions for disarming the filter software, put on the World Wide Web by a helpful "anti-censorship" activist?[30]

And so long as even a significant minority of homes in a particular social circle don't use shielding software—whether intentionally or carelessly—most kids in the circle will be able to get access

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[29] If need be, the government might mandate that service providers make such filtering easily available, though the market would probably do the same without government intervention.

[30] See *http://www.glr.com/nurse.html*, a Web page that purports to give this sort of information for various kinds of shielding software; see also Declan McCullagh, *The CyberSitter Diaper Change*, Netly News (Dec 20, 1996) (my thanks to Declan for pointing the *www.glr.com* Web page out to me). Putting such instructions online is not currently illegal; it is probably even constitutionally protected speech. See *Brandenburg v Ohio*, 395 US 444 (1969). Even if it is not constitutionally protected, it seems hard to stop, given the ease of anonymous communication online, and the possibility of people posting the instructions from foreign countries.

I don't know whether these instructions are still effective; I imagine that software manufacturers would try to change their software to prevent these disabling techniques from working. Nonetheless, my 12 years as a computer programmer lead me to believe that there will always be some way for a user to disable software that's installed on a computer that is under his control. Shielding software that's installed on a service provider's computer (e.g., shielding that's done through America Online) is harder to disable, but easier to avoid: One need only sign on to the service through the account of a friend whose parents have not turned on the shielding option.

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to indecent material. They'll be able fairly quickly to find out who has the unshielded computer, and then come over to see what they want to see.[31] With online materials (unlike, say, with dial-a-porn), the kids don't even have to come over; a child who uses an unshielded computer can pull down the material, remove the tag, and forward it to others.[32]

Congress might try to fight even this by (1) requiring tagging, (2) making it illegal for people—including children—to forward material with removed tags, and (3) making it illegal for people to let their unshielded computers be accessed by others' children. In theory, this might outlaw as much exposure of children to indecent material as the CDA would have.

But in practice, trying to deter Web site operators is much more effective than trying to deter kids from forwarding material to other kids, or trying to make parents police who is using their kids' unshielded computers.[33] Children are much less likely to know the law or to follow it, especially since the chances of a 12-year-old being prosecuted for e-mailing an indecent picture to another 12-year-old seem quite slim. And holding insufficiently watchful parents liable for access by their children's friends seems hardly fair or effective.[34]

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[31] The interest in shielding children isn't just an interest in shielding them from unintentional exposure; it has always been understood as an interest in shielding children even from their own intentional attempts to get harmful material. See *Ginsberg v New York*, 390 US 629 (1968); *ACLU*, 117 S Ct at 2348 (listing proposed alternatives that aim to shield children against their own will).

[32] As I point out in Eugene Volokh, *Freedom of Speech in Cyberspace from the Listener's Perspective*, 1996 U Chi Legal F 377, 434, tagging might have a countervailing strength: People may be more willing to comply with a tagging requirement than with a general prohibition, because the personal cost of compliance to them is lower. Someone may be unwilling to refrain from indecent speech altogether (especially if he can't be punished because he's posting from abroad or is reliably anonymous), but might be happy to tag his speech so long as this still lets him communicate to adults. If this conjecture is correct, then maybe in the aggregate tagging would indeed be at least as effective as a ban. But this is quite speculative; the greater compliance with a tagging requirement may easily be outweighed by the ease with which minors can find and use unshielded computers. (Since writing the *Legal Forum* article in late 1995, I have come to believe that this ease of avoiding the filters will indeed be a very big factor.) In any event, the Court, the lower courts, and the briefs never even mentioned this argument.

[33] One could imagine the government doing both—going after both the Web site operators and the private users, for instance, to keep kids from passing along materials they got from Web sites that are overseas and thus outside the CDA's reach. But even if the government prosecutes private users, a combined restraint on both operators and private users would be much more effective than going after private users alone.

[34] One reader suggested that the Court might be conceptualizing the interest not as shielding children from all indecency, but rather as returning the world to the way it was

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Compulsory tagging would thus provide considerably less shielding than the CDA would. It may be fairly effective; it may be as effective as you can get without very greatly burdening speech; but it's not "at least as effective" as the CDA.[35]

2. Other Suggested Alternatives

What about the second alternative, "making exceptions for messages with artistic or educational value"? Well, *if* the government's

pre-cyberspace: a place where determined minors can find indecency, but where the task is hard enough that many minors will be dissuaded from it, or will at least realize that what they're doing is bad enough that adults have tried hard to stop it. But whether or not the Court was thinking this way, the opinion contains not a hint of this approach. Moreover, the compulsory tagging alternative would *not* return the world to its pre-cyberspace mode: As I discuss in the text, even with a tagging requirement, minors can access online indecency much more easily than they can access, say, dial-a-porn or print indecency, because online materials (unlike phone conversations or magazines) can easily be forwarded by one child to many others.

[35] The CDA's opponents also argued that "[b]ecause so much sexually explicit content originates overseas, . . . the CDA cannot be 'effective.' " See 117 S Ct at 2347 n 45 (citing Appellee American Library Ass'n et al. Brief, 1997 WL 74380 at *33–34); *ACLU v Reno,* 929 F Supp 824, 882 (ED Pa 1996) (separate opinion of Dalzell) (accepting this approach). The Court declined to reach this argument, and I believe the argument is unsound.

Few speech restrictions can eliminate all the harm at which they're aimed—consider, for instance, copyright law, libel law, and campaign contribution restrictions, all of which are in some measure underenforced and in some measure circumventable. But the Court has never held that "narrow tailoring" requires that the law entirely accomplish the interest it's trying to serve. The Court's cases that have upheld speech restrictions under strict scrutiny—*Burson v Freeman,* 504 US 191 (1992) (plurality), *Austin v Michigan Chamber of Commerce,* 494 US 562 (1990), and *Buckley v Valeo,* 424 US 1 (1976)—seem to suggest that it's enough that the law advance the interest to some degree, a sensible requirement. See Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny,* 144 U Pa L Rev 2417, 2429 n 56 (cited in note 35) (discussing this point).

The CDA did indeed seem likely to reduce the amount of indecent material available to children. It would have deterred U.S. residents, and perhaps even foreign corporations that have American affiliates, from posting indecent material either on U.S. sites or foreign sites (merely putting the material off-shore wouldn't immunize someone who is subject to U.S. jurisdiction from CDA liability). See Daniel E. Troy and David J. Goldstone, *Foreign Entities Whose Web Sites Violate U.S. Laws Relating to Drug Advertising, Securities Offerings or Obscenity May Subject American Affiliates to Prosecution,* Nat'l L J (Nov 18, 1996), at B9. To avoid the CDA, an American would have to actually move overseas (and perhaps even sell all his U.S. property), something few people are willing to do.

Of course, where there's money to be made, foreign content providers might take up some of the slack caused by the decrease in U.S.-based supply. But precisely because this effect would be money driven, it would largely apply to for-sale material, which generally requires credit card payment and is thus less accessible to minors. (Some sellers of indecent material do put up free teasers, but in my limited experience these have tended to be—for obvious marketing reasons—rather tamer than the for-sale matter.) And the CDA might in the long term help reduce even entirely foreign indecency; implementing the CDA in the United States might make it easier for the U.S. government to lobby other countries to follow suit. See U.S. Reply Brief in *ACLU v Reno,* 1997 WL 106544, *16 ("Such a law sets an example for other countries and puts the United States in a position to urge them to establish effective controls.").

The reduction of the total amount of indecent material should reduce the amount of

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interest in "protecting children from exposure to sexually explicit material" is sufficiently strong only when the material is artistically and educationally valueless, then this alternative would be as effective as the CDA at serving this limited interest. But the Court nowhere says that this is the relevant government interest, and nowhere explains why this would be so. Rather, the Court acknowledges the government interest in "protecting children from exposure to sexually explicit material" (or even "indecent material") with no qualifiers.[36] Maybe a CDA with an artistic/educational value exemption would not be dramatically less effective at serving this broader interest; but it certainly wouldn't be "at least as effective" as the CDA itself.

How about "providing some tolerance for parental choice"? Well, this sounds fine, but how exactly could this "tolerance" be implemented? If the Court is saying only that Congress must provide an exception for parents sending material directly to their children—and if the government interest is limited to protecting children from indecent material when their parents think the material is harmful—then that would indeed be a less restrictive and equally effective alternative. But if that's all the Court is saying, then the decision has been almost entirely for nought; Congress could tomorrow reenact a ban that's as broad as the CDA, and one that interferes as much with people's communications to consenting adults, subject to this one small exception. Surely that can't be all the Court is saying: Among other things, if it were, the statute couldn't be facially invalidated as *substantially* overbroad.[37]

More likely, the Court might be suggesting that Congress "pro-

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material that's easily accessible to minors. Of course, determined and Net-skilled minors could still scour the Net search engines looking for all the indecency that's available without a credit card; it's hard to protect the highly motivated and intelligent from their own appetites. But less committed or knowledgeable minors might give up when their first few searches didn't find any free matter, or might end up seeing only a little indecent material rather than a lot. And by reducing the number of new free Web sites containing indecency, the CDA would help filter manufacturers keep up with newly created Web sites (see Part III.B.3), thus making the CDA-plus-filters a considerably better shield than filters alone.

This doesn't mean that the CDA would have been a perfect or even a terribly powerful tool for shielding children; wise parents would have had to rely on both the CDA and shielding software, and even that would have been imperfect. But the CDA, despite its imperfections, would have served the government interest to a considerable degree.

[36] See Part IV.B.2.a.i for a more thorough discussion of whether the interest extends only to sexually explicit "obscene-as-to-minors" material or to indecent materially more generally.

[37] See *New York v Ferber*, 458 US 747 (1982).

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vide some tolerance for parental choice" by giving parents some means by which their children can freely surf the Web with no continuous intervention by parents—that parents should have some option by which they can free their children of the Act's burden. This assumes that the government has no sufficient interest in shielding children whose parents don't want the shielding, itself a contested proposition.[38] But even if the interest is so limited, no such option could be as effective as the Act in shielding the children whose parents *do* want the shielding. Any "electronic note from my mother" system is just too easy to evade.

Finally, "regulating some portions of the Internet—such as commercial Web sites—differently than others, such as chat rooms" would likewise be less effective than the CDA at shielding children. Wherever the regulations are less restrictive, they'll also be less effective. Again, they might be fairly effective, reasonably effective, not ineffective. But they won't be "at least as effective."

3. Fact Findings Below

Perhaps the Court's error would have been understandable if the Court had been led into it by erroneous fact findings at trial. But the district court never evaluated the supposed effectiveness of the Court's proposed alternatives.

The chief alternative dealt with at trial was filtering software: programs that, when run on a personal computer, block access from that computer to a list of "dirty" Internet locations. The list is maintained and frequently updated by the software manufacturers; the software can also block access to a range of locations (e.g., all Web pages at *http://www.playboy.com/*) or to materials that contain certain forbidden words. These filter programs could be modified to accommodate a mandatory tagging scheme, but the trial court findings focused only on filters as such, not on filters plus tagging.[39]

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[38] See Part IV.2.a.ii.

[39] The trial court's opinion and the Supreme Court briefs did discuss "tagging," but in the context of a very different sort of tagging provision. The CDA provided a defense for content providers who used "reasonably effective" means of preventing minors from accessing their material; at trial, the government suggested that a provider's decision to tag its material might allow it to fit within that defense. The district court correctly rejected this contention: Tagging, standing alone, is not a reasonably effective way of preventing minors from accessing the page, because so many minors use computers that don't run filtering

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And the three-judge district court was careful not to overstate the effectiveness of those alternatives that it considered. The court never found that any alternative would be "at least as effective" as the CDA; it found only that "a reasonably effective method . . . will soon be widely available"[40]—surely the word "reasonably" ought to be a clue that the alternative might not be "equally effective." None of the three separate opinions suggested that there were any equally effective alternatives. The three-judge district court in *Shea v Reno*, another case that struck down the CDA, and that was pending before the Court when *ACLU* was decided, likewise never said there were any equally effective alternatives.[41] Rather, *Shea* avoided reaching this question by holding that "[e]ven if . . . nothing short of a total ban on indecent communication could be as effective," the law would still be unconstitutional.[42]

The briefs before the Supreme Court likewise didn't focus on compulsory tagging as an alternative, probably because the party that had the most to gain from raising the matter—the ACLU—didn't want to be seen as endorsing compulsory tagging, which is itself a speech restriction (albeit one milder than the CDA).[43] Still, the government's opening brief did generally argue that "There Are No Alternatives That Would Be Equally Effective in Advancing the Government's Interests."[44] The government's reply brief likewise claimed that shielding software was "not effective," and that while it "could provide part of the answer to the problem of indecency of the Internet, it could not provide the full answer. The district court did not conclude otherwise."[45]

Three of the four amicus briefs filed on the government's side explicitly pointed out that filters alone would not be "as effective"

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software. The district court never decided whether the different sort of tagging proposed by the Court—a compulsory tagging requirement—would be as effective as the CDA.

[40] *ACLU v Reno*, 929 F Supp 824, 842 finding of fact no. 73 (ED Pa 1996).

[41] *Shea v Reno*, 930 F Supp 916 (SDNY 1996).

[42] Id at 941.

[43] See, for example, Bill Pietrucha, *ACLU Wary of White House Censorship Goals*, Newsbytes (July 17, 1997), describing ACLU's hostility to even a noncompulsory universal self-rating system.

[44] U.S. Brief, 1997 WL 32931, *40; see also id at *23.

[45] U.S. Reply Brief, 1997 WL 106544, *13. See also Amicus Brief of Family Life Project, 1997 WL 22917, *19.

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as filters plus the CDA because "children have access to many computers which will not employ software filtering devices such as in . . . neighbors' homes."[46] Even the ACLU's own brief said that the inquiry into whether "there are no 'equally effective' alternatives . . . misstates the relevant legal test. It is always true that only an 'absolute ban' on adult speech 'can offer certain protection against assault by a determined child.' "[47] Wherever the Court got the erroneous notion that the alternatives would be equally effective, it wasn't from the findings below or from any concessions by the government.

B. THE PROBLEMS CAUSED BY THE ERROR

The Court's error is more than just a harmless misstatement. To begin with, it's unfair to Congress. A Congress that restricts speech even though there are equally effective but less restrictive alternatives available—that implements a genuinely "unnecessary" restriction—is either incompetent or flagrantly unconcerned with the First Amendment: It's depriving us of free speech without getting us any benefit in return. In the Court's words, "[t]he CDA's burden on protected speech cannot be justified if it could be avoided by a more carefully drafted statute."[48] When the Court then says that the burden is indeed unjustified, it must be because Congress was the opposite of "careful"—either careless or uncaring.

In reality, Congress wasn't acting that badly. It did sacrifice some free speech, but this sacrifice was necessary to shield children as well as possible. Such a trade-off may be unconstitutional, and the Court's trade-off—sacrificing some shielding of children in order to more thoroughly protect free speech—may be better. But this assertion is much less damning than a claim that Congress actually bought nothing with the trade-off it made.

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[46] Amicus Brief of Members of Congress (Coats et al), 1997 WL 22918, *22–23; see also Amicus Brief of Morality in Media, 1997 WL 22908, *25 ("Technology on home computers does not protect children or teens when they access computers elsewbere, for example, at a friend or relative's home"); Amicus Brief of Enough is Enough et al, 1997 WL 22958, *20 ("Cbildren can reach the Internet in the homes of their friends and neigbbors, where computers may have no filters installed.").

[47] ACLU Brief, 1997 WL 74378, *36. But see American Library Ass'n Brief, 1997 WL 74380, *34–35 (arguing that filtering was indeed at least as effective as the CDA).

[48] 117 S Ct at 2346.

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Furthermore, as Part III.B.3 discusses in more detail, the Court's error makes *ACLU* a much less useful benchmark for future cases. The Court's First Amendment doctrine is "given meaning through the evolutionary process of common law adjudication,"[49] in which the facts of a case can be compared and contrasted with the facts of earlier ones. If the facts in the original case are incorrectly stated or analyzed, then the case will be of extremely limited precedential value.

But most importantly, the Court's stress on equal effectiveness risks dramatically *under*protecting speech in future cases. The pregnant negative in the Court's reasoning is that, had there really been no equally effective alternatives (as in fact there are not), the CDA should have been upheld.

Other cases have in fact stated this pregnant negative as a positive: Speech restrictions, these cases say, are valid if they are "necessary to serve a compelling state interest,"[50] and alternatives that "fall short of serving [the] compelling interest[]"[51] aren't enough to rebut the claim of necessity. After all, there are always alternatives that are less restrictive but ineffective, for instance, having no government action at all, or perhaps just having the government urge people to go along voluntarily. But only the equally effective alternatives show that the restriction is in fact unnecessary—not needed to accomplish the interest.[52] The Court has said

[49] *Bose Corp. v Consumers Union*, 466 US 485, 502 (1984); *Ornelas v United States*, 116 S Ct 1657, 1662 (1996) (same as to the Fourth Amendment); *Thompson v Keohane*, 116 S Ct 457, 466–67 (1995) (same as to *Miranda* cases).

[50] For example, *Burson v Freeman*, 504 US 191, 198 (1992) (plurality); *Simon & Schuster, Inc. v Members of the N.Y. State Crime Victims Board*, 502 US 105, 118 (1991); *Perry Education Ass'n v Perry Local Educators' Ass'n*, 460 US 37, 45 (1983). See *Board of Trustees v Fox*, 492 US 469, 476 (1989) ("If the word 'necessary' is interpreted strictly, [a requirement that restrictions may be no more expansive than 'necessary'] would translate into the 'least-restrictive-means' test").

[51] *Burson v Freeman*, 504 US 191, 206 (1992) (plurality); *Buckley v Valeo*, 424 US 1, 28 (1976) (disclosure of contributions is not an adequate means of preventing corruption or appearance of corruption because "Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption").

[52] See, for example, *Information Providers' Coalition v FCC*, 928 F2d 866, 873 (9th Cir 1991) (concluding that a proposed alternative was inadequate because it "does not completely bar or totally impede" access by minors to indecency, and because it " 'would be insufficient to achieve realistically the goal of the statute: the protection of children' "); *Blount v SEC*, 61 F3d 938, 944 (DC Cir 1995) (speech restrictions are constitutional if they effectively advance a compelling interest, and are "narrowly tailored to advance the compelling interests asserted, i.e., . . . less restrictive alternatives to the rule would accomplish the government's goals equally or almost equally effectively").

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similar things in other strict scrutiny contexts,[53] and lower court free speech decisions echo this view.[54]

As Part III will explain, these cases are somewhat ambiguous about just how effective the alternatives must be. One could read them as saying that a speech restriction is constitutional if there are no equally effective alternatives, or one could read them (and I think they are probably best read this way) as saying that the restriction is constitutional if there are no more or less equally effective alternatives.

But this ambiguity only makes *ACLU*'s emphasis on the alternatives being "at least *as* effective" particularly dangerous. A lower court, a legislator, or an executive official can easily read *ACLU*—coupled with the other cases—as choosing the "equally effective alternative" test: If none of the alternatives is "at least as effective" at serving the compelling interest, then the alternatives all "fall short of serving" the interest, the restriction is "necessary to serve" the interest, and therefore survives First Amendment scrutiny.

If this pregnant negative is accepted, then presumably Congress could just reenact the CDA whenever it gets enough evidence—which, for the reasons described above, should not be hard to do—that the alternatives would not be equally effective. Of course, in practice the Court may be unlikely to revisit the CDA's constitutionality simply in the face of more factual findings (though why

[53] *Maine v Taylor*, 477 US 131 (1986) (upholding state law that discriminated against interstate commerce under strict scrutiny because there was "no reason to believe that [a less restrictive alternative] would protect [the government interest] as effectively as a ban"); *American Party of Texas v White*, 415 US 767, 781 (1974) (upholding ballot access restriction under strict scrutiny because the law was a measure "taken in pursuit of vital state objectives that cannot be served equally well in significantly less burdensome ways"); see also *Hernandez v New York*, 500 US 352, 377 (1991) (Stevens dissenting) ("the State cannot make race-based distinctions if there are equally effective nondiscriminatory alternatives"); *Storer v Brown*, 415 US 724, 761 (1974) (Brennan dissenting) ("Naturally, the Constitution does not require the State to choose ineffective means to achieve its aims"; applying strict scrutiny to ballot access restriction); *Globe Newspaper Co. v Superior Court*, 457 US 596, 606–09 (1982) (holding that right of access to criminal trials may "not be restricted except where necessary to protect the State's interest," and striking down the law because the "interest could be served just as well" by a less restrictive alternative).

[54] See, for example, *Dial Information Services Corp. v Thornburgh*, 938 F2d 1535, 1541 (2d Cir 1991) ("in order for [challengers of a dial-a-porn restriction] to prevail, it must be determined that there are other approaches less restrictive than the [challenged law] but just as effective in achieving its goal of denying access by minors to indecent dial-a-porn messages"); *In re NBC v Cooperman*, 116 AD2d 287, 293, 501 NYS2d 405, 409 (1986) (prior restraints may not be imposed without "a determination that less restrictive alternatives would not be just as effective in assuring the defendant a fair trial").

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shouldn't it, if constitutionality ultimately turns on a fact question?), but what about future bans, in cyberspace and out? They would be constitutional so long as there was no equally effective alternative for shielding children, a factual predicate that would almost always be met. As the Supreme Court has recognized, and as even the CDA's opponents acknowledged, only an "absolute ban" "can offer certain protection against assault by a determined child."[55] And yet surely this would be the wrong result, one that's inconsistent with the result in *ACLU* and with other cases, such as *Butler v Michigan* (which I discuss more below).[56]

III. Harmless Hyperbole?

A. The "pretty much equally effective alternative" test

I think it's not too much to ask that the Court's factual assertions be literally accurate,[57] but I recognize that many might fault me for being a bit too persnickety here. Maybe Justice Stevens was just engaging in harmless hyperbole: Maybe he meant that the burden on speech is unacceptable if "less restrictive alternatives would be at least *pretty much* equally effective"; that Congress hadn't proven that "a less restrictive provision would not be *more or less* as effective as the CDA."

In fact, the Court has seemed to suggest this sort of rule in some

[55] *Denver Area Educ. Telecom. Consortium v FCC*, 116 S Ct 2374, 2392 (1996); ACLU's Brief in *Reno v ACLU*, 1997 WL 74378, *36.

[56] 352 US 380 (1957); see Part III.E.

[57] One reader suggested that the *ACLU* opinion should be read not for its literal language, but for its general "mood": Put together with the opinions handed down the same week in *City of Boerne v Flores*, 117 S Ct 2157 (1997), and *Printz v United States*, 117 S Ct 2365 (1997), *ACLU* sends Congress a general signal to pay more attention to what it's doing, and to not pass popular but ill-considered feel-good legislation that jeopardizes important constitutional principles.

This, though, strikes me as an entirely unsound approach for the Court to take: I don't believe that anything in the Constitution gives the Court a license to strike down laws just because it thinks that Congress hasn't thought hard enough about them. Moreover, if the Court does this, it should at least explain that this is what it is doing, and give Congress some sense of just how much consideration and what kind of consideration Congress must give to statutes like this one. Even if Justice Stevens takes this sort of approach to constitutional adjudication, I would be amazed if all the other Justices in the majority—including Justices Scalia and Thomas—take the same view. Compare *Sable Communications v FCC*, 492 US 115, 133 (1989) (Scalia concurring) ("Neither due process nor the First Amendment requires legislation to be supported by committee reports, floor debates, or even consideration, but only by a vote.").

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earlier child shielding cases, including *Sable Communications v FCC* and *Denver Area Educational Telecommunications Consortium v FCC*;[58] though the cases aren't entirely clear, this is probably the best way of putting the strict scrutiny test.[59] Maybe the Court meant to say only that some alternatives—perhaps the compelled tagging system—would probably be almost as effective as the CDA.

B. THE PROBLEMS WITH READING RENO V ACLU THIS WAY

1. Fostering Confusion among Lower Courts and Government Officials

There are, however, serious difficulties even with this reading of *ACLU*. To begin with, hyperbole makes bad caselaw. Lower courts might well think that they ought to read Supreme Court opinions literally, and that "at least as effective" means "at least as effective."[60] Quite likely some courts will read *ACLU* this way, while others impose a "pretty much equally effective alternative" standard; likewise for legislators and executive branch officials. This is hardly a recipe for coherent decision making.

2. Hiding the Normative Judgment

More importantly, the Court's factually erroneous claim that there are "*equally* effective" alternatives hides a significant and potentially controversial normative decision. By saying there are

[58] *Denver Area*, 116 S Ct at 2393. See also *Blount v SEC*, 61 F3d 938, 944 (DC Cir 1995) (speech restrictions are constitutional if they effectively advance a compelling interest, and are "narrowly tailored to advance the compelling interests asserted, i.e., . . . less restrictive alternatives to the rule would accomplish the government's goals equally or almost equally effectively"); and see, in another strict scrutiny context, *Wygant v Jackson Board of Educ.*, 476 US 267, 280 n 6 (1986) (interpreting "narrowly tailored" as mandating an inquiry into whether there are less restrictive means that "promote the substantial interest about as well and at tolerable administrative expense").

[59] See Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U Pa L Rev at 2418–24 (cited in note 20), which cites more cases that establish this as the test and explains the test in more detail. See also id at 2438–40 (responding to the argument that strict scrutiny includes a "balancing" component).

[60] Compare *Dial Information Services Corp. v Thornburgh*, 938 F2d 1535, 1541 (2d Cir 1991) ("in order for [challengers of a dial-a-porn restriction] to prevail, it must be determined that there are other approacbes less restrictive than the [challenged law] but just as effective in achieving its goal of denying access by minors to indecent dial-a-porn messages"); *In re NBC v Cooperman*, 116 AD2d 287, 293, 501 NYS2d 405, 409 (1986) (prior restraints may not be imposed without "a determination that less restrictive alternatives would not be just as effective in assuring the defendant a fair trial").

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equally effective alternatives, alternatives that involve no loss of shielding for children, the Court could claim as a *descriptive* matter that the alternatives would be a win-win or at least a win-draw situation. But a requirement that the alternatives be merely "fairly effective," "almost as effective," or "pretty much equally effective" would mean some shielding of children would indeed be sacrificed. If the Court had to frankly admit that the alternatives would be a win for one side's concerns (free speech) at the expense of the other's (shielding children), then the Court would have had to give a *normative* explanation of why the losing side had to bear this loss.

The Justices would thus have had to say something like: "Any alternative to the CDA would sacrifice some shielding of children, and shielding children is a compelling government interest. But we think the benefits of protecting adults' access to free speech, even indecent speech, outweigh these costs. We realize Congress may have reached a different normative judgment, and concluded that even a small sacrifice of shielding was too high a price. But we disagree with Congress's normative judgment, for the following reasons. . . ."

There would have been nothing illegitimate about this frank substitution of the Court's own normative judgment for Congress's; I argue in Part IV that the Court should have done something quite like this. But the Court should acknowledge this normative disagreement, rather than trying to hide behind incorrect empirical claims.

3. Denying Lower Courts an Important Benchmark

The Court's decisions are supposed to give guidance to government officials and lower courts. Subjective standards that turn on differences in degree, such as a "pretty much equally effective alternative" standard, provide little constraint on their face.

To make such a standard useful, the Court must use each case to set a benchmark. Where "the content of the rule is not revealed simply by its literal text," it must be "given meaning through the evolutionary process of common law adjudication";[61] this requires the Court to confront the facts in each case, and explain why any particular alternative is or is not "pretty much equally effective."

[61] See note 49.

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Consider the position in which Congress now finds itself. *ACLU* suggested that the CDA's goals might be accomplished by a compulsory tagging scheme, which "requir[es] that indecent material be 'tagged' in a way that facilitates parental control of material coming into their homes."[62] Some legislators have been considering such an alternative.[63] Should the legislators (and eventually the President and the courts) conclude that the proposal is constitutional?

The Court suggested that compulsory tagging might be a "less restrictive alternative" to the CDA, but didn't say it was a constitutional alternative. It is, after all, either a content-based speech restriction (you may not post material that's indecent but not tagged), compelled speech (you must tag), or a content-based burden on speech (indecent material is specially burdened by the tagging requirement). Under any of these views, the tagging requirement would be subject to strict scrutiny,[64] and would itself be unconstitutional if there's a still less restrictive alternative that would be pretty much equally effective.

The clearest candidate for a still less restrictive alternative is a pure filtering scheme: Parents would use filters on their computers—assume again that the government would provide them for free, or require service providers (such as America Online) to do so—and the filter manufacturers would monitor the Net, find indecent material, and program the filters to block access to this matter. Filters can indeed screen out a great deal of indecent material; but filters are less effective than filters coupled with compulsory tagging, because they rely exclusively on the filter manufacturers' thoroughness. Even the best filter producer can't check every Web page as soon as it's put up, and of course the producers

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[62] 117 S Ct at 2348.

[63] See, for example, Thomas Goetz, *The CDA Next Time*, Village Voice 33 (July 8, 1997).

[64] *Riley v National Federation of the Blind*, 487 US 781 (1988). But see *Meese v Keene*, 481 US 465 (1987) (concluding, with no discussion of the compelled speech question, that a requirement that foreign-financed films be labeled "propaganda" does not violate the First Amendment). *Meese v Keene* seems to me to be an outlier. See Harry T. Edwards and Mitchell N. Berman, *Regulating Violence on Television*, 89 Nw U L Rev 1487, 1509–10 (1995) (suggesting that *Meese* is hard to square with the rest of compelled speech caselaw, and that it can best be read as a narrow support for "value-neutral and connotatively empty" tagging, which would not include ratings that "isolate and foreground one aspect or theme of a program"); Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech* § 19:7 (Clark Boardman Callaghan, 1994) (criticizing *Meese* as "deeply fraudulent").

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can't screen individual newsgroup posts, chatroom conversations, and discussion list messages.[65]

So, given this, are filters a "pretty much equally effective alternative"? If *ACLU* had actually adopted this test, the Court would have had to describe the difference in effectiveness between the CDA and compulsory tagging (and the other alternatives), and to explain why this difference was so small as to be constitutionally insignificant. Then a legislator, President, or judge assessing the constitutionality of a compulsory tagging scheme could have used *ACLU* as a benchmark for determining whether the difference between tagging and pure filtering was likewise constitutionally insignificant.

But *ACLU* never acknowledged that the alternatives involved *any* sacrifice of effectiveness, so the Court didn't have to explain how much sacrifice of effectiveness was acceptable and how much would be too much. As a benchmark for judgments of "pretty much equal effectiveness," *ACLU* is largely useless. If "pretty much equal effectiveness" is the right test, then *ACLU* is an odd precedent for it: It neither properly sets forth the test, nor applies it in a way that provides a comparison point for future cases.

4. Neglecting to Show That the Alternatives Really Are Pretty Much as Effective

So far, I've argued that it was a bad idea for the Court to speak of "equally effective" if it meant "pretty much equally effective." But is the *ACLU* result right even under a "pretty much equally effective alternative" test?

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[65] Some filters have options—which I call "clean-list filtering"—that allow access *only* to material that's been explicitly found to be clean, and can thus shield children from any material that hasn't yet been checked. See Response of Appellees ALA et al, No 96-511, at 23. But precisely because a child can see a page only if it's been certified clean, any such program will give children access to only a fraction of the clean material on the Web. Screeners almost certainly couldn't check even close to all the existing Web resources, and any new resources, including new pages at existing sites, might go unchecked for a long time. Clean-list filters thus may shield children better than compulsory tagging, but only at the price of rendering Internet access largely useless to them. I don't think the government must accept such an access-crippling alternative as being pretty much equally effective. See Volokh, *Freedom of Speech in Cyberspace from a Listener's Perspective*, 1996 U Chi Legal F at 431 and n 183 (cited in note 32) (giving more detailed argument). But compare *ACLU v Reno*, 929 F Supp 824, 883 (ED Pa 1996) (Dalzell concurring in the judgment) (suggesting that parents could, as an alternative to the CDA, just "deny their children the opportunity to participate in the medium until they reach an appropriate age").

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The most credible of the alternatives that the Court suggested is tagging. If indecent material is tagged, then a computer with properly functioning filter software can block the tagged material. From the computer user's perspective, the material will be as inaccessible as if it had never been posted online. And compliance with the tagging requirement should, if anything, be at least as high as compliance with the CDA.

But, as Part II.A.1 shows, tagging doesn't stop children from seeing indecent material at the homes of friends whose parents don't use shielding software. So long as there's one such child in a social circle, the others can use his computer, or even have him e-mail them the indecent material. Of course, if he does the latter, he might be violating the law (assuming the compulsory tagging statute applies to private forwarders), but that's not going to much deter many children.

This is a pretty big loophole, considerably bigger than the one found tolerable in the dial-a-porn case (*Sable*). The proposed less restrictive alternatives in *Sable*—such as a credit card requirement or a requirement that a householder specifically ask the phone company to enable area code 900 phone calls[66]—would have been quite effective. Though children might get their hands on their parents' credit cards, or use a phone at the home of someone who has enabled 900 calls, they would be deterred by the fact that the parents or the phone subscriber would see the unauthorized charge and hold the child responsible for it. If parents did let their child have access, or if the child had his own credit card, he'd still be less likely to invite other children to use the card or the phone, because this would cost more money. A child who gets access to dial-a-porn at least can't forward it to many friends at the touch of a button.[67] Even if the alternatives in *Sable* were "extremely effective [so that] only a few of the most enterprising and disobedient young people would manage to secure access to such messages,"[68] the same is harder to say about the alternatives to the CDA.

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[66] *Sable*, 492 US at 128 (mentioning credit card alternative); *Information Providers' Coalition v FCC*, 928 F2d 866 (9th Cir 1991) (discussing both alternatives in detail); *Dial Information Services Corp. v Thornburgh*, 938 F2d 1535 (2d Cir 1991) (same).

[67] Of course, one could tape-record a dial-a-porn conversation, make copies, and hand them out to friends, but compare to this the ease with which one can download an image and then instantly forward it by e-mail.

[68] *Sable*, 492 US at 130.

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So tagging would probably provide considerably less shielding of children than the CDA would. How much less is impossible to measure, but there's reason to think it would be quite a bit less. According to some estimates, over 6 million children have access to the Internet today.[69] If even only half the children's parents would like them shielded, and if even only 20% of those will get access to indecent material under tagging but not under the CDA, the result is 600,000 children whose parents want shielding but who remain unshielded. It's not clear how, given this, compulsory tagging would be "pretty much equally effective."[70]

5. Failing to Explain *Butler v Michigan*

The final flaw with a "pretty much equally effective" standard is that it's inconsistent with the Court's first, and in some ways most important, ruling in this area: The 1957 holding in *Butler v Michigan.*[71]

Butler struck down a law that banned *all* distribution, to anyone, in any medium, of material deemed unsuitable for minors: The government, the Court held, may not "reduce the adult population to reading only what is fit for children."[72] I think this is right, for the reasons given by the Court in the various cases holding that sexually themed material—outside the narrow category of obscenity—is entitled to constitutional protection.

But under a "pretty much equally effective" alternative standard—"the Government may . . . regulate the content of constitu-

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[69] The estimates vary, and are likely to change considerahly over time. The estimate to which I refer puts the number at 6.7 million. *Kids Online: Evolving from a Niche,* Jupiter Communications Interactive Content (June 1, 1997) ("Currently, 6.7 million or 11 percent of all children between the ages of two and 17 access the Internet from home. Jupiter projects that this number will swell to more than 20.3 million or 31 percent by 2002."). The same research firm estimated the number at 4 million in 1996. Lawrie Mifflin, *New Guidelines on Net Ads for Children,* NY Times D5 (April 21, 1997); see also *Internet Working Group Meeting,* National Association of Attorneys General Consumer Protection Report (July 1996) (using estimate of 3.8 million); David Hayes, *Child-Friendly Internet Sites: Fine Fun, or Sly Salesmanship?* Kansas City Star A1 (March 29, 1996) ("as many as 4 million children have access to the Internet and 1 million use it regularly").

[70] This may ouly be a small fraction of all children, but the important point is that it's a high number: If the interest in shielding children is indeed compelling, then the fact that 600,000 children out of 6 million are unshielded is a serious problem, even if the 5.4 million other children are being shielded.

[71] 352 US 380 (1957).

[72] Id at 383.

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tionally protected speech in order to promote a compelling interest [in shielding children] if it chooses the least restrictive means"[73] that are still "almost equally effective"[74]—the law in *Butler* would have been valid. It serves the same interest that the Court seemed to accept in *ACLU*, and did accept in *Sable:* shielding children from the supposedly harmful effects of indecent material. And no less restrictive alternative is even close to equally effective.

The obvious alternative to the total ban is a ban on distribution of the material to children,[75] but of course that's much less effective than a total prohibition. Once the material is allowed to adults, some of it will inevitably fall into the hands of minors. An underage teenager might stumble across material owned by an adult friend, or by a friend's parents; adults might easily sell it or give it to the teenager in private transactions that will be hard to discover.

If the material were totally banned, the government could seize it as contraband at the border, at the manufacturer, or at any place in the chain of distribution—a powerful tool for ensuring that the material will be kept away from minors. But so long as the material may lawfully be distributed to adults, it can be intercepted only when the government has concrete evidence that it's being distributed to children, evidence the government will only have for a tiny fraction of those materials that are actually falling into children's hands.

Allowing the distribution of indecent material to adults thus requires the government to make a significant sacrifice of its supposedly compelling interest in shielding children. *Butler* correctly concluded that it's better to pay this price than to pay the price of depriving adults of all access to indecent speech. But this is a judgment that the "pretty much equally effective alternatives" test doesn't accommodate.[76]

ACLU at times seemed to acknowledge *Butler*. "[T]he Government," the Court said (indirectly quoting *Butler*), "may not 'reduc[e] the adult population . . . to . . . only what is fit for chil-

[73] *Sable Communications v FCC*, 492 US 115, 126 (1989).

[74] For example, *Blount v SEC*, 61 F3d 938 (DC Cir 1995).

[75] 352 US at 383.

[76] *Butler* didn't have to ask whether there were pretty much equally effective alternatives, because it was decided before the Court began to apply the strict scrutiny framework to speech restrictions.

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dren.' " " 'Regardless of the strength of the government's interest' in protecting children, '[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.' "[77]

But given this occasional acknowledgment, why the assertion in *Sable* that the government may indeed "regulate the content of constitutionally protected speech in order to promote a compelling interest [in shielding children] if it chooses the least restrictive means to further the . . . interest"?[78] Why the seeming pregnant negative in *ACLU* that the absence of equally effective alternatives would make the speech restriction valid?

IV. The "Balancing" Metaphor and Five Concrete Doctrinal Options

A. THE "BALANCING" METAPHOR

As I mentioned above, in most free speech controversies the question is about trade-offs. How much free speech should we be willing to sacrifice in order to shield children, or to achieve any other government interest? Conversely, how much shielding of children—or how much of any other important value—must we sacrifice in order to protect free speech? Behind every framework for scrutiny of speech regulations lurks a judgment about the trade-offs that must be paid.

One cliché response is that the Court must reach this judgment by "balancing," and in a certain (largely tautological) sense this is true: The judgment by definition requires deciding when the sacrifice of one value is "weightier" than the sacrifice of another. In a perfect world, we would "weigh" the value that would be lost by the burden on speech against the value that would be lost by the burden on the competing government interest.[79]

But this sort of "balancing" is not an answer; it's just a way of reframing the question. Balancing sounds manageable because the

[77] 117 S Ct at 2346.

[78] 492 US at 126. The "regulation" at issue in *Sable* was in fact a total ban on indecent speech in a particular medium.

[79] Of course, the value lost by the speech restriction includes not just the value of the lost speech itself, but also the risk of unfair application of the restriction, the risk that public debate will be skewed by the restriction, and various other costs. See note 19.

metaphor conjures up a familiar real-life device: a balance scale used for weighing two physical objects. The balance scale, though, works only because it uses a reliable physical process that unerringly compares a single, easily commensurable, attribute of two items.[80] No physical device can tell us whether some lump of government interest "weighs" more—is of greater "constitutional gravity"—than some chunk of free speech right. The statement "courts should balance" thus simply invites the question "How?"

Referring the matter to one's unarticulated intuitions—the scale in each judge's conscience—is, even if legitimate, simply impractical. The Supreme Court makes law for tens of thousands of legislative, executive, and judicial decision makers in American government. "Trust your instincts" is not a useful legal rule in such a system, especially (as the Court has repeatedly held) in free speech cases.[81]

Because of this, the Court has done its free speech "balancing" by creating relatively concrete doctrinal structures that help decide when a competing government interest "outweighs" the free speech value. Thus, for instance, under *Brandenburg v Ohio*, the need to prevent violence "outweighs" the right to advocate violence only when the speech is intended to lead to imminent injury, and is in fact likely to do so; otherwise, the speech right "outweighs" the government interest.[82] The Court had to reconcile—one might say balance—two competing concerns, but in doing so it produced a rule that says more than simply "Balance!"

The Court's task in child-shielding cases should likewise be to set forth a rule that reconciles the competing concerns in a way that other decision makers can adequately implement—to draw a more concretely applicable line that will still generally produce the right results.[83] There are five basic approaches to this problem.

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[80] An oversimplification, but close enough for our purposes.

[81] See, for example, *Grayned v City of Rockford*, 408 US 104, 108 (1972) (condemning vague speech restrictions because they invite "arbitrary and discriminatory enforcement"); *Smith v Goguen*, 415 US 566, 574–76 (1974) (same).

[82] 395 US 444 (1969). Of course, the *Brandenburg* formula itself has some play in its joints; I claim only that it's more concrete than simple "balancing," not that it's mechanical.

[83] See Melville B. Nimmer, *Nimmer on Freedom of Speech: A Treatise on the First Amendment* § 2.02 (1984) (praising categorical balancing as a substitute for ad-hoc balancing in the First Amendment context); Kathleen M. Sullivan, *The Supreme Court 1991 Term, Foreword: The Justices of Rules and Standards*, 106 Harv L Rev 22, 69, 83–95 (1992) (noting how the Court translates mushy abstract principles into more administrable, even if somewhat less

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B. FIVE CONCRETE DOCTRINAL OPTIONS

1. The Current Official Approach: "Compelling Interest Trumps"

The official strict scrutiny approach, set forth in *Sable*, is that the First Amendment tolerates the sacrifice of as much speech as it takes to shield children from indecency. True, the sacrifice must be genuinely "necessary"—there must be no alternatives that exact a lower free speech price without significantly sacrificing the government interest. But if the only way to really satisfy the interest is to restrict speech, then the government may do it.[84]

I call this the "compelling interest trumps" approach,[85] and as I argued above in Part III.B.5, I believe it is unsound. As *Butler* correctly holds, the government may not reduce adults to reading only what is fit for children. This is true even though letting adults access indecent material would necessarily sacrifice a great deal of shielding of children—even though a total ban would genuinely be the only means to effectively further the interest. For *Butler* and the result in *ACLU* to be right, the First Amendment must sometimes demand significant sacrifice of the government interest. But the "compelling interest trumps" approach does not reflect this principle.

It may seem odd to characterize this approach as government-friendly, because the conventional wisdom is that strict scrutiny in free speech cases is "fatal in fact."[86] But the test says that when

theoretically satisfying, categorical rules); Alex Kozinski and Eugene Volokh, *A Penumbra Too Far*, 106 Harv L Rev 1639, 1644–45, 1651–53 (1993) (same).

[84] See cases cited in Part II.B.

[85] This approach actually represents a family of possible tests, which differ in the degree to which they would tolerate some sacrifice of shielding. One possible test would say that any restriction is constitutional so long as there are no alternatives that are less restrictive but genuinely equally effective. Other tests may say that a restriction is constitutional only if all the alternatives are substantially less effective, with different definitions of "substantial." Likewise, the other approaches I describe below also represent families of possible tests.

[86] Gerald Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv L Rev 1, 8 (1972); compare *Bernal v Fainter*, 467 US 216, 219 n 6 (1984) (citing Gunther). See, for example, Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U Chi L Rev 46, 53 (1987) ("Strict scrutiny almost invariably results in invalidation of the challenged restriction."); Roger Pilon, *A Court Without a Compass*, 40 NY L Sch L Rev 999, 1006 (1996) ("strict scrutiny . . . lead[s] almost invariably to a finding of unconstitutionality"); Richard G. Wilkins, Richard Sherlock, and Steven Clark, *Mediating the Polar Extremes: A Guide to Post-Webster Abortion Policy*, 1991 BYU L Rev 403, 420–21 (" 'strict scrutiny' [in, among other things, free speech cases] almost always results in a finding of constitutional invalidity"); Book

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there is no other comparably effective way of serving a compelling interest, the speech restriction should be upheld.[87] And the test includes no inquiry into the magnitude of the burden on speech; even serious burdens might thus pass strict scrutiny.[88]

And the Court has used strict scrutiny to uphold speech restrictions. In *Buckley v Valeo*, the Court upheld a restriction on campaign contributions, and a ban on speech (and not just contributions) that is coordinated with a candidate, advocates a candidate's election, and costs more than $1,000.[89] In *Austin v Michigan Chamber of Commerce*, the Court upheld a ban on speech by corporations in support or opposition to candidates.[90] A plurality in *Burson v Freeman* upheld a ban on campaign-related speech within 100 feet of a polling place.[91] In *Riley v National Federation for the Blind*, the Court said that a requirement that charity fundraisers make certain statements passed strict scrutiny.[92] And though the Court in *Sable* struck down a dial-a-porn ban, it did so on the grounds that other (presumably permissible) speech restrictions would be less burdensome.[93]

Lower courts have followed suit. Two courts of appeals upheld the post-*Sable* dial-a-porn restrictions.[94] The Washington Supreme Court upheld an injunction banning "the use of the words 'murder,' 'kill,' and their derivatives" in abortion clinic picketing, on

Note, *Freedom to Offend*, 105 Yale L J 1415, 1417 (1996) ("strict scrutiny, a process that is almost always fatal to the regulation").

[87] See Part III.A.

[88] Some suggest that strict scrutiny includes a "cost-benefit weighing" as part of the test itself, but I do not believe this is so. See Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U Pa L Rev at 2438–40 (cited in note 20).

[89] 424 US 1, 25–28, 45 (1976). Of course, most effective speech to a mass audience, except perhaps some kinds of cyberspace speech, costs far more than $1,000.

[90] 494 US 652 (1990).

[91] 504 US 191 (1992).

[92] 487 US 781, 799 n 11 (1988) (dictum, but confident- and considered-sounding dictum, saying that it was permissible to compel fundraisers to disclose that they were professionals, though not permissible to compel them to disclose what fraction of the collected funds went to the charity). Compare id at 803–04 (Scalia concurring in part and in the judgment) (disagreeing with the Court's approval of such speech compulsions).

[93] 492 US 115, 128–31 (1989) (pointing out that a total ban was unnecessary because lesser speech restrictions would do a pretty much equally good job).

[94] *Dial Information Service Corp. v Thornburgh*, 938 F2d 1535 (2d Cir 1991) (upholding such restrictions under strict scrutiny); *Information Providers' Coalition v FCC*, 928 F2d 866 (9th Cir 1991) (same).

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the theory that the ban was narrowly tailored to the "compelling State interest in preventing the [physical, emotional and psychological harm arising] when such words are heard by children."[95] Other cases have used strict scrutiny to uphold speech compulsions aimed at better informing would-be charitable contributors;[96] bans on anonymous political speech, aimed at better informing voters;[97] bans on all political speech within 600 feet of polls, including speech not related to items on the ballot;[98] restrictions on speech by judicial candidates, aimed at "protecting public confidence in the integrity of the judiciary";[99] and bans on public display of "obscene-as-to-minors" material.[100] Whether these decisions are right or wrong, they suggest that courts are willing to apply strict scrutiny in a way that upholds many restrictions.

As I have argued in another article, strict scrutiny still seems demanding largely because courts are often correctly unwilling to live by it.[101] *ACLU* is good evidence for that proposition.

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[95] *Bering v Share*, 106 Wash 2d 212, 234, 241, 245, 721 P2d 918, 931, 935, 937 (1986), cert dismissed for want of jurisdiction, 479 US 1050 (1986).

[96] *State v Christian Action Network*, 491 SE2d 61 (W Va 1997) (upholding, despite *Riley*, a requirement that all printed solicitations include the statement "West Virginia residents may obtain a summary of the registration and financial documents from the Secretary of State, State Capitol, Charleston, West Virginia 25305. Registration does not imply endorsement.").

[97] *Griset v Fair Political Practices Comm'n*, 8 Cal 4th 851, 884 P2d 116, 35 Cal Rptr 2d 659 (1994) (upholding a ban on anonymous mailings by candidates to prospective voters, on the grounds that this serves the compelling interest in "a well-informed electorate"), cert denied, 514 US 1083 (1995). The case was held pending *McIntyre v Ohio Elections Comm'n*, 514 US 334 (1995)—a decision that struck down a ban on anonymous fliers related to ballot measures—but the Court then denied cert. Note that *Griset* was not justified as a means of avoiding corruption of candidates; it involved speech by the candidate's own committee, not an anonymous contribution to the candidate.

[98] *Schirmer v Edwards*, 2 F3d 117 (5th Cir 1993). *Burson v Freeman* upheld only a 100-foot buffer zone.

[99] *In re Kaiser*, 111 Wash 2d 275, 288–89, 759 P2d 392, 399–400 (1988) (compelling interests in preserving the "good reputation of the judiciary" and the "integrity of the judiciary" justify restricting a judicial candidate's "statements of party affiliation [and] statements regarding the motives of [an opponent's] attorney supporters"); *In re Complaint Against Harper*, 77 Ohio St 3d 211, 225, 673 NE2d 1253, 1265 (1996) (holding that "truthful criticism of the judiciary in a dignified manner" is protected but only "so long as the criticism is done fairly, accurately, and upon facts, not false representations").

[100] *American Booksellers v Webb*, 919 F2d 1493 (11th Cir 1990); *Crawford v Lungren*, 96 F3d 380 (9th Cir 1996).

[101] Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U Pa L Rev 2417, especially 2441–43 (cited in note 20).

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2. The "Substantial Burden Is Unconstitutional" Approach

What might substitute for the "compelling interest trumps" framework? One option is what I call the "substantial burden is unconstitutional" approach: If the law imposes a substantial burden on generally protected speech, then it is per se impermissible, even if this means we must sacrifice a significant amount of shielding of children.

The underlying principle is that the freedom of speech need not be just a presumption that can be rebutted by strong enough claims of countervailing government interest. The First Amendment may instead be seen as embodying a judgment that some speech must be protected even if it unavoidably causes harm.[102]

Under this view, the interest in shielding children might be seen as strong enough to justify modest restrictions on speech that's unsuitable for minors;[103] not every restriction need be considered an unconstitutional abridgement. Even relatively slight content-based restrictions are usually presumptively unconstitutional,[104] but such small prices may be worth paying when the strong government interest in shielding children is implicated. (As I discuss below, even *Ginsberg v New York*'s ban on distribution to children of obscene-as-to-minors material imposed some burden on protected speech among adults.) But if the proposed restriction imposes a substantial burden on the free speech right, then under this framework it cannot stand.

[102] Such rights are common in existing constitutional jurisprudence: The privilege against self-incrimination, the Double Jeopardy Clause, and the Ex Post Facto Clause, for instance, cannot be overcome by showing a compelling interest. Even if enforcing the Double Jeopardy Clause will set some murderers free to kill again, the judgment embodied in the Clause prevails: The release of some who might be guilty is a harm that must be accepted in order to get the henefits that the constitutional guarantee provides. See Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U Pa L Rev at 2456 (cited in note 20).

[103] I intentionally say "unsuitable for minors," instead of "indecent" or "obscene as to minors," to refer to whatever definition of unsuitability the Court chooses to use. I argue in Part IV.B.2.a.i that indecent (but not ohscene-as-to-minors) speech should not be seen as unsuitable for minors; but my general "substantial burden is unconstitutional" framework can work no matter where the Court draws the unsuitability line.

[104] See, for example, *Riley v National Federation of the Blind*, 487 US 781 (1988) (using strict scrutiny to strike down requirement—which the Court treated as equivalent to a content-based restriction—that charitable fundraisers reveal the fraction of collected funds that are actually given to the charity); *Carey v Brown*, 447 US 455 (1980) (using strict scrutiny to strike down content-based restriction on nonlabor picketing, though the restriction applied only to residential picketing). I agree these restrictions should be viewed with serious concern; I only suggest that these are fairly slight restrictions.

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Of course, this view rests on a contested assumption—that avoiding substantial burdens on sexually themed or profane speech among adults is more important than shielding minors from such speech—but this is an assumption that the First Amendment itself supports. The First Amendment protects speech even when it causes significant harm, perhaps including eventual violence. The theory of the First Amendment is that restricting speech is in the long run presumptively more harmful than permitting the speech.[105] And all the speech that we're discussing here is not obscene as to adults, and is thus constitutionally valuable; as *ACLU* points out, some of it may well be related to significant political, artistic, and scientific matters.[106]

First Amendment doctrine does sometimes allow even substantial burdens on constitutionally valuable speech that is seen as too immediately harmful to tolerate. For instance, the government may sometimes ban newspapers from publishing certain military secrets, even if the publication is valuable to national debate;[107] the government may in narrow circumstances ban advocacy of violent conduct, even though the advocacy might contribute to political discussion.[108] The risk of imminent violence or death will always weigh heavily, even against the strongest of constitutional guarantees.[109]

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[105] See Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U Pa L Rev at 2444–52 (cited in note 20).

[106] 117 S Ct at 2344, 2347–48.

[107] See, for example, *Florida Star v B.J.F.*, 491 US 524, 532 (1989) (quoting *Near v Minnesota*, 283 US 697 (1931), for the proposition that "publication of the sailing dates of transports or the number and location of troops" might be unprotected); *Haig v Agee*, 453 US 280, 309 (1981) (revelation of the names of U.S. intelligence agents that has "the declared purpose of obstructing intelligence operations and the recruiting of intelligence personnel" is "clearly not protected by the Constitution"); *United States v Progressive, Inc.*, 467 F Supp 990 (WD Wis 1979) (holding that instructions for creating H-bombs may be restrained). But see *New York Times v United States*, 403 US 713 (1971), striking down an injunction against publication of *The Pentagon Papers*; though this case theoretically left open the possibility that the *Times* might be criminally punished for the publication, many now assume that publications such as this are constitutionally protected.

[108] See *Brandenburg v Ohio*, 395 US 444 (1969). One might argue that advocacy intended at producing imminent aud likely unlawful conduct is constitutionally valueless, but I doubt it: It seems to me no less valuable in the abstract than advocacy aimed at producing unlawful conduct at some future date. The *Brandenburg* exception seems to me to be justified by the gravity of the harm the speech can produce, rather than by its perceived lack of value.

[109] Compare *City of Richmond v J.A. Croson Co.*, 488 US 469, 520 (1989) (Scalia concurring) (proposing near-absolute ban on race classifications, but suggesting that "a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates—can justify an exception to the [color-

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But these provisions are very much exceptions (and narrow ones at that), and should require extremely powerful justifications, more powerful than the justifications needed for laws that don't substantially burden valuable speech.[110] They should not be lightly extended absent strong evidence of dramatic, imminent harm. While there is a broad intuitive consensus that sexually themed or profane speech may indeed be in some measure unsuitable for minors, such a general sense of long-term corruption strikes me as inadequate justification for allowing substantial burdens on valuable speech, especially when this supposed corruption is compared to the dangers that the First Amendment routinely demands that we run.[111]

Substantial burden tests are well known in constitutional law. In *Planned Parenthood v Casey*, for instance, the Court concluded that the government has a strong interest in protecting potential human life, but the woman's right to a pre-viability abortion must nonetheless prevail: Any substantial burdens on the right are per se invalid, though lesser burdens are presumptively constitutional.[112] Other doctrinal frameworks, such as those for religious freedom before *Employment Division v Smith*, freedom of expressive association, and the right to marry also include a substantial burden inquiry, though they at least theoretically allow even substantial burdens on the right so long as the law passes some form of heightened scrutiny.[113]

Even some of the Court's free speech tests fit well with a "substantial burden" framework, though they generally aren't explained this way. Libel law, for instance, rests on the notion that

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blindness] principle"); *Lee v Washington*, 390 US 333, 334 (1968) (Black concurring) (taking a similar view).

[110] I refer here only to restrictions imposed by the government as sovereign, rather than the government acting as employer, K–12 educator, proprietor of a nonpublic forum, and so on. For the usual reasons, I think the government properly has more power to control its own money and its own property than to control the behavior of private persons.

[111] See *Pacifica*, 438 US at 767–75 (Brennan dissenting).

[112] 505 US 833 (1992). Under *Casey*'s substantial burden test, a law is unconstitutional if it has the effect of creating a substantial burden *or* if it was intended to create such a burden. I would not borrow the intent inquiry from *Casey*, because it seems both difficult to apply (perhaps even inherently indeterminate) and rarely dispositive.

[113] *Jimmy Swaggart Ministries v Board of Equalization*, 493 US 378 (1990) (religious freedom); *Roberts v U.S. Jaycees*, 468 US 609 (1984) (rigbt of expressive association); *Zablocki v Redhail*, 434 US 374 (1978) (right to marry). But see Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U Pa L Rev at 2449–50 (cited in note 20) (suggesting that in some religious freedom contexts, the Court applies a rule of per se invalidation, rather than strict scrutiny).

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the important interest in protecting reputation justifies some speech restrictions, so long as they do not substantially restrain valuable speech. The Court has concluded that false statements of fact are generally constitutionally valueless,[114] so the impact of libel law on false statements is seen as a constitutionally insignificant burden; but the Court has recognized that libel rules can incidentally burden constitutionally valuable truthful speech, and has therefore often inquired into the magnitude of the burden created by various rules.[115] The "compelling interest trumps" approach is not used here: For instance, the actual malice test is a considerably less effective alternative to traditional strict liability when it comes to protecting public figures' reputations from false defamatory statements, but the Court has nonetheless rejected strict liability (and even a negligence test) because it would impose too great a burden on speech.[116]

To make this approach work for restrictions on material that's supposedly unsuitable for minors, the Court would have to do two things: (*a*) Identify what speech lacks substantial constitutional value when communicated to minors. Even a total ban on distributing such speech to minors would thus not create a substantial burden, so long as it's really limited to distribution to minors. (*b*) Determine when a burden on valuable speech (to adults or minors) qualifies as insubstantial.[117]

a) Identifying Speech That Lacks Value When Communicated to Minors

i) Indecent versus "obscene as to minors." As of 1975, the Court had concluded that (1) there is no constitutional value in communications to minors (except perhaps by or with the approval of

[114] See *Gertz v Robert Welch, Inc.*, 418 US 323, 340 (1974) ("there is no constitutional value in false statements of fact"). But see *New York Times Co. v Sullivan*, 376 US 254, 291–92 (1964) (suggesting that even knowing falsehoods about the government generally, rather than about a particular government official, might be constitutionally protected).

[115] See, for example, *Sullivan; Gertz.*

[116] *Sullivan*, 376 US at 254; see also *Gertz*, 418 US at 323 (requiring "actual malice" for punitive or presumed damages even when the plaintiff is a private figure).

[117] In this section, I assume that less-than-substantial burdens would be considered per se constitutional (or subjected to rational basis scrutiny, which if honestly applied is tantamount to the same thing). Nonetheless, the Court might also decide that even such slightly burdensome restrictions should be subjected to some serious scrutiny; this is explored in Part IV.B.3.

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their parents) that are "obscene as to minors"—essentially communications that fit the three-prong obscenity test, but with a "for minors" qualifier on each prong[118]—but (2) there is value in communications to minors that fall outside this category.[119] This makes sense under the logic of obscenity law. Assume communicating obscenity to another person is generally constitutionally worthless as speech, because it appeals to prurient interests, is patently offensive, and lacks serious value.[120] Then communicating to a minor material that appeals to the minor's prurient interests, is patently offensive when distributed to minors, and lacks serious value for that minor would likewise be generally worthless. Even a total ban on such communications to people whom the speaker knows to be minors wouldn't substantially burden worthwhile speech, because it would ban only the speech that is, by assumption, valueless.[121]

In *FCC v Pacifica Foundation*, however, the Court went beyond this, holding that government may regulate speech even to shield minors from material that is merely indecent—that "refer[s] to excretory or sexual activities or organs" in a "patently offensive" way.[122] This includes material that doesn't appeal to the prurient interest, and may even cover material that has significant artistic,

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[118] *Ginsberg v New York*, 390 US 629 (1968). *Ginsberg* involved a somewhat different formulation of the obscenity standard than is now the law after *Miller v California*, 413 US 15 (1973); however, it seems fair to assume that *Ginsberg* still stands, but with the three prongs modified to match the three-prong *Miller* test. See, for example, *ACLU*, 117 S Ct at 2356 (O'Connor dissenting in part); *Virginia v American Booksellers Ass'n, Inc.*, 484 US 383, 387 (1988) (discussing a state statute whose "definition of 'harmful to juveniles' is a modification of the *Miller* definition of obscenity, adapted for juveniles").

[119] *Erznoznik v City of Jacksonville*, 422 US 205, 213 and n 10 (1975).

[120] Right or wrong, that's what *Miller* held.

[121] Of course, the "obscene-as-to-minors" test poses formidable practical problems, because what's suitable for a 17-year-old may not be suitable for a 7-year-old. In theory, the proper approach would be to apply to each minor a test that's based on that minor's age: A bookseller selling to a 15-year-old would thus have to ask whether the material is "obscene as to 15-year-olds," and a Web page owner required to tag his page would have to tag it with something like "obscene as to 12-year-olds but permissible for 13-year-olds." Practically, though, such fine rating is extremely difficult, and imposes far too high a burden on speakers and distributors. An alternative is to have a uniform standard for all minors, but should the standard be what's suitable for 17-year-olds, which would underprotect younger children, or what's suitable for 7-year-olds, which would overrestrict speech to older children? These are difficult problems, and might counsel against having any sort of obscene-as-to-minors test. *Ginsberg*, though, seems to require us to muddle through with this inquiry as best we can.

[122] 438 US 726, 739 (1978).

literary, or scientific value, even for minors. *Sable* seemed to echo this, acknowledging that the government has a compelling interest in prohibiting "indecent" telephone communications to minors, or at least those that are sexually themed.[123] *ACLU* seemed to agree, though it was ambiguous on the point.[124]

This leaves much uncertain. Could the government, for instance, prohibit all indecent communications to minors, such as selling or even giving a 16-year-old a copy of Carlin's *Seven Dirty Words*? *Sable* and *Pacifica* suggest this might be constitutional,[125] while *Ginsberg* and *Erznoznik* suggest otherwise. Likewise, even if tagging schemes are generally constitutional, it's not clear whether Congress could constitutionally require tagging of indecent material or only of obscene-as-to-minors material. At some point, the Court will have to decide on the right standard.

"Obscene as to minors" seems to be the better solution. By definition, material that's "indecent" but not "obscene as to minors" either has serious artistic, literary, political, or scientific value for minors, or does not appeal to minors' prurient interests. If it has value for minors, then it ought to be protected. If it doesn't appeal to minors' prurient interests, then it's not clear why it should be treated differently than equally nonprurient material that deals with offensive topics other than sex or excretion.

More concretely, as *ACLU* pointed out, a lot of speech that might be considered "patently offensive"—"serious discussion about birth control practices, homosexuality, the First Amendment issues raised by [indecency itself], or the consequences of prison rape"[126]—does have considerable value. The one item the Court has held "indecent," the Carlin "Seven Dirty Words" monologue, is no less valuable than most humorous social commentary;[127] and

[123] *Sable*, 492 US at 125.

[124] Compare 117 S Ct at 2340 n 30 (stating that the CDA's challengers "do not dispute that the Government generally has a compelling interest in protecting minors from 'indecent' and 'patently offensive' speech") and id at 2343 (stating that *Sable* "agreed that 'there is a compelling interest in protecting the physical and psychological well-being of minors' which extended to shielding them from indecent messages that are not obscene by adult standards") with id at 2348 (neither accepting nor rejecting the argument that the First Amendment may tolerate "a blanket prohibition on all 'indecent' and 'patently offensive' messages communicated to a 17-year-old").

[125] See *Pacifica*, 438 US at 749 (Stevens plurality) ("Bookstores and motion picture theaters . . . may be prohibited from making indecent material available to children").

[126] 117 S Ct at 2344.

[127] See *Action for Children's Television v FCC*, 852 F2d 1332, 1340 n 13 (DC Cir 1988).

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it's not clear why the government has a compelling interest in shielding children from it.

But even if one disagrees with my judgment, and concludes that the line should be drawn at indecency, my basic point remains: The Court must identify which speech is valueless as to minors, and use this definition in determining whether or not a restriction substantially burdens valuable speech.

ii) Rights of parents. The Court must also decide whether parents have a constitutional right to communicate—and to authorize others to communicate—"obscene-as-to-minors" material to their children. *Ginsberg* suggested as much,[128] as did *ACLU.*[129]

Doctrinally, this is not a trivial question; *Ginsberg* also suggested that the government has an interest in shielding children against the harmful effects of certain material, independent of the interest in protecting parental decisions about child-rearing.[130] If "obscene-as-to-minors" speech is indeed valueless to minors, one can argue that it remains valueless when it is communicated or tolerated by parents, and that parents should have no more right to expose their children to such speech than they would have with regard to simple obscenity.

Nonetheless, it is probably sounder to leave parents, rather than the government, with the ultimate decision here. Children of the same age vary widely in maturity, and parents usually know their child's maturity better than do prosecutors, judges, or juries. If parents believe there's educational value in giving their children access to supposedly "obscene-as-to-minors" material, there's good reason to defer to that judgment. And the notion that parents

[128] 390 US at 639 (stressing that "the prohibition against sales to minors does not bar parents who so desire from purchasing the [obscene-to-minors] magazines for their children").

[129] 117 S Ct at 2341 (stressing that "the statute upheld in *Ginsberg* was narrower than the CDA [in part because] 'the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children' "); id at 2348 (describing "possible alternatives such as requiring that indecent material be 'tagged' in a way that facilitates parental control of material coming into their homes" and "providing some tolerance for parental choice"). But see id at 2356–57 (O'Connor dissenting in part) (suggesting that there is "no support [in the record] for the legal proposition that [e-mail between family members is] absolutely immune from regulation").

[130] 390 US at 639–40. *ACLU* did not squarely confront this distinction, speaking generally of a "governmental interest in protecting children from harmful materials."

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should, absent some powerful reason to the contrary, have discretion about how to raise their children buttresses this view.[131]

Of course, this deference to parents' views is only a presumption: Parents generally can't, for instance, make it legal for their 12-year-olds to have sex or to drop out of school, even if the parents think the children are mature enough to do so. But though exposure of children to "obscene-as-to-minors" material may be harmful, the harm seems considerably smaller than the possible harms of early sex or of lack of education. This relatively modest harm ought not be enough to rebut our normal deference to parental decisions, especially when free speech rights are also implicated.[132]

b) Identifying Insubstantial Burdens on Valuable Communications

Butler holds that banning all distribution of materials that are unsuitable for children is too great a burden on the free speech rights of adults, and surely this is correct. Though anything less than a total ban will increase the chances that some of the materials will leak out to children, that's a price the First Amendment requires us to pay.

But other burdens may not be so troublesome. Consider the law upheld in *Ginsberg*; though the law purports to ban only "knowing[]" sales to minors, it does in fact burden sales to at least some adults. Because the law essentially requires sellers to make "a reasonable bona fide attempt to ascertain the true age of such minor,"[133] many sellers are reluctant to sell to adults who look underage and who don't have proof of age handy. Those adults are therefore burdened in their access to constitutionally protected material.

Moreover, the law burdens the right of underage-looking adults to buy anonymously, because proof of age generally includes a per-

[131] *Meyer v Nebraska*, 262 US 390 (1923); *Pierce v Society of Sisters*, 268 US 510 (1925).

[132] This obviously involves a tough and subjective call about how harmful various behaviors are to children, but such calls are inevitable whenever one accepts the notion of broad but not unlimited parental rights. See, for example, *Meyer v State of Nebraska*, 262 US 390, 402–03 (1923); *Pierce v Society of Sisters*, 268 US 510, 534–35 (1925); *Prince v Massachusetts*, 321 US 158, 166–67 (1944). Compare Justice Holmes's thoughtful dissent in *Bartels v Iowa*, 262 US 404 (1923), a companion case to *Meyer*.

[133] *Ginsberg*, 390 US at 644.

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son's name. The law also burdens sellers, who must take the time and effort to check the age of the young-looking adults; and it burdens publishers, who lose some adult potential readers as a result.

Finally, the *Ginsberg* statute burdens the rights of minors to receive material that's protected as to them, and the rights of writers, publishers, and sellers to communicate such material to them. The "obscene-as-to-minors" standard is vague, and as *Reno v ACLU* points out, even laws that are not vague enough to be unconstitutional tend to make speakers cautious.[134] A seller might well be reluctant to sell any sexually oriented material to a minor, even if a jury would ultimately conclude that this material wasn't "obscene as to minors." Minors might therefore find it hard to get material that they're theoretically entitled to read (though determined minors will probably find some store that will sell it to them).[135]

I don't want to overstate these burdens: They do seem relatively slight. In a sense they may be seen as incidental to a ban on only supposedly unprotected speech (distribution to minors of obscene-as-to-minors material). But the law explicitly applies whenever the distributor "[has] reason to know . . . or [has] a belief or ground for belief which warrants further inspection or inquiry of . . . the character and content of [the] material [and] the age of the minor,"[136] thus effectively requiring the distributor to investigate all borderline cases, including those where the material is ultimately found to be protected or the customer is found to be an adult. This is not merely a burden imposed by a general law that is not focused on speech (such as tax law or contract law);[137] the burden applies to a content-based category of speech, and necessarily interferes in some measure with the distribution of the speech to people who have a right to receive it.

Ginsberg thus shows that, while the most serious burdens on protected speech—such as a total ban—are unconstitutional, slighter

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[134] 117 S Ct at 2344.

[135] Id at 2346 ("Given the vague contours of the coverage of the statute, it unquestionably silences some speakers whose messages would be entitled to constitutional protection.").

[136] *Ginsberg*, 390 US at 646, quoting N Y Pen L § 484-h(1)(g).

[137] See Stone, *Content-Neutral Restrictions*, 54 U Chi L Rev at 105–09 (cited in note 86) (distinguishing incidental restrictions that aim at broad classes of conduct from restrictions that target speech); *Arcara v Cloud Books, Inc.*, 478 US 697, 706–07 (1986) (same).

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burdens may not be.[138] We might hesitate to ask courts to draw lines between slight burdens and substantial burdens, and I believe the Court is generally correct in avoiding such line-drawing for most content-based speech restrictions.[139] But so long as we are committed to allowing some restrictions on speech that's unsuitable for children, some such line-drawing is inevitable there.

Most hard cases involve burdens that are in between *Ginsberg* and *Butler*. In *Pacifica*, for instance, adult listeners were deprived of the opportunity to hear material for free during the day and evening,[140] and speakers were deprived of the opportunity to reach the normal radio audience. In *ACLU*, adult users were deprived of the opportunity to see material for free in cyberspace, and speakers were deprived of the opportunity to reach cyberspace users who didn't want to pay for the speech. In the compelled rating scheme suggested by *ACLU*, adult users would not be appreciably burdened, but speakers would have to take the time and effort to rate their material, and might suffer a hard-to-measure loss to the effectiveness of their message caused by the compelled statement.[141]

The Court's evaluation of these burdens must turn on its judgment as to (1) the value of the burdened speech, and (2) the significance of the interference with the size of the speaker's audience and with the adult listeners' ease of accessing the material.[142] It would be best if the Court could articulate some rules about this, but even if it can only make ad-hoc decisions, these decisions can

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[138] See text accompanying note 150.

[139] See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm & Mary L Rev 189, 225–27 (1983).

[140] *Pacifica*, 438 US at 726, hinted that the rule might be different during the times of day when children are unlikely to be in the audience. *Action for Children's Television v FCC*, 932 F2d 1504 (DC Cir 1991), struck down a 24-hour ban on indecency; *Action for Children's Television v FCC*, 58 F3d 654 (DC Cir 1995) (en banc), held that it would be constitutional for the FCC to limit indecent broadcasts to the hours from 12 midnight to 6 A.M.

[141] See Edwards and Berman, *Regulating Violence on Television*, 89 Nw U L Rev at 1509–10 (cited in note 64).

[142] This general test should, I believe, be applicable to all media; nonetheless, it might play out somewhat differently in different contexts. Some media, for instance, might generally be less time sensitive than others, so certain delays may be substantial burdens in one medium but not in another. See, for example, the text accompanying note 150. Likewise, in some new media, predicting the effect of a regulation may be hard enough that the magnitude of the burden would be even more uncertain than it usually is. In these situations, a court might choose to err on the side of striking the regulation down unless it's fairly clear that it will not be substantially burdensome.

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be used as benchmarks by other decision makers, so long as the facts in each case are candidly described.

I would suggest that any restriction that substantially reduces a speaker's audience—as the rules in *Pacifica* and *ACLU* would have—or that makes it substantially harder for adults to get the material they want should be seen as an impermissible substantial burden. Justice Powell was right that the FCC's action in *Pacifica* "[did] not prevent willing adults from purchasing Carlin's record [or] from attending his performances."[143] Likewise, the CDA would have allowed indecent speech so long as it was posted on sites that charged users through credit cards. Nonetheless, the *ACLU* Court was correct to stress the breadth of the restriction and to suggest that it "threaten[ed] to torch a large segment of the Internet community."[144] The CDA—like the regulation in *Pacifica*—substantially burdened listeners by making it considerably more expensive (and, in *Pacifica*, more time consuming) for them to get this information. As importantly, the laws substantially burdened speakers by requiring them to sell their speech rather than distributing it for free, thus dramatically reducing the size of their audience.[145]

Of course, others may want to draw the substantiality threshold higher. One court, for instance, has borrowed the "adequate alternative channels" test from the framework used for content-neutral time, place, or manner restrictions.[146] Under this view, burdens

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[143] 438 US at 760. See also id at 750 n 28 (plurality) ("Adults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear these words.").

[144] 117 S Ct at 2350.

[145] As this discussion suggests, I disagree with the *Pacifica* holding, and find it hard to reconcile with *ACLU*. Justice Stevens tried to distinguish *Pacifica* in *ACLU* by arguing that "The breadth of the CDA's coverage is wholly unprecedented. Unlike the regulations upheld in *Ginsberg* and *Pacifica*, the scope of the CDA is not limited to commercial speech or commercial entities," id at 2347, but this is just plain wrong. The *Ginsberg* law was not limited to commercial speech: Sales of magazines do not qualify as commercial speech; see *Virginia State Bd of Pharmacy v Virginia Citizens Consumer Council, Inc.*, 425 US 748, 761 (1976)). The *Pacifica* regulation was not limited either to commercial speech or commercial entities; in fact, the broadcast at issue in *Pacifica* was noncommercial speech carried by a nonprofit, noncommercial radio station. See *FCC v League of Women Voters*, 468 US 364, 370 (1984) ("Appellee Pacifica Foundation is a nonprofit corporation that owns and operates several noncommercial educational broadcasting stations"; I believe that Pacifica has been nonprofit since its founding, and know of no evidence that it changed character from 1978 to 1984)). Justice Stevens's other attempts to distinguish *Pacifica* from *ACLU*, 117 S Ct at 2342, are not as obviously factually wrong, but still strike me as unpersuasive.

[146] *American Booksellers v Webb*, 919 F2d 1493 (11th Cir 1990). See Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 Hastings

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that leave open adequate alternative channels are deemed insubstantial, and therefore permissible. I don't agree: The adequate alternative channels test, at least as used by the Court, is generally quite tolerant of government regulation, even when the regulations significantly reduce the size of the audience and make it considerably harder for potential viewers to get the speech. This has been criticized even for content-neutral regulations,[147] but given the special concerns involved with content-based regulations,[148] it seems particularly inappropriate here.

In any event, though, even if some would draw the "substantial burden" line in a slightly different place than I would, I hope I have shown that the "substantial burden is unconstitutional" framework is generally the sounder one. Even when some restrictions on a certain category of speech (here speech that's unsuitable for minors) are allowed, the Court should recognize that some burdens are per se unconstitutional, even if they are genuinely necessary to maximally serve the compelling government interest.

c) Results the Rule Would Likely Yield

The "substantial burden is unconstitutional" framework would produce the following results:

i) Butler. The ban on all distribution of material that is unsuitable for minors would be unconstitutional, for a reason compatible with the Court's: The restriction greatly burdens constitutionally protected speech to adults.

ii) Ginsberg. The ban on sale of "obscene-as-to-minors" material to people the seller knows to be minors would be constitutional, for a reason again compatible with the Court's: The restriction bans only constitutionally valueless speech to minors, and imposes only a slight burden on valuable communications.

L J 867, 952 (1994); Gillian E. Metzger, Note, *Unburdening the Undue Burden Standard: Orienting Casey in Constitutional Jurisprudence*, 94 Colum L Rev 2025, 2064 (1994).

[147] Compare Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U Pa L Rev 615, 716–17 (1991); see also id at 642 ("[T]he Court believes that if adequate alternative channels of communication remain, then a regulation restricting a particular alternative will have no more than a minimal effect on speech. This test can also have degrees of strictness. The Court has sometimes described the requirement as one of ample alternative channels, which appears to set a high standard. In practice, however, the Court has often applied an 'adequate' alternatives test, not an 'ample' alternatives test.").

[148] *ACLU*, 117 S Ct at 2348–49 (adequate alternative channels inquiry inapplicable to content-based restrictions); Stone, *Content Regulation*, 25 Wm & Mary L Rev 189 (cited in note 139).

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iii) Pacifica. The restriction on broadcasting "indecent" material would be unconstitutional, even if it is necessary to most fully serve the interest in shielding children, because it substantially burdens communications to adults.[149] And if profane speech has constitutional value even when the listener is a minor, then the restriction would also create a substantial burden on communications to children.

iv) Sable. The dial-a-porn ban would be unconstitutional, not because there are less restrictive but pretty much equally effective alternatives, but because the ban substantially burdens communications to adults.

v) Post-Sable dial-a-porn cases.[150] After *Sable,* Congress passed the Helms Amendment, which, as implemented by the FCC, prohibits access to dial-a-porn unless (*a*) the phone service subscriber specifically tells the phone company to allow area code 900 calls on his line, or (*b*) the dial-a-porn service asks for a credit card number. Such a law would be upheld—as it in fact was by the courts of appeals, though on least restrictive alternative grounds—because it doesn't substantially burden speakers or listeners. It does prevent dial-a-porn calls by people who don't have their own phone line and who don't have credit cards, but without a personal phone bill or a credit card, one generally lacks the mechanism to pay for the calls anyway. The only appreciable burden is a slight delay for

[149] Some commentators have suggested that a han on broadcast indecency during afternoon hours would he permissible, on the grounds that "the public [is not] in any serious way restricted if the government requires that Carlin's monologue not be broadcast until after six o'clock or in the evening." C. Edwin Baker, *The Evening Hours During Pacifica Standard Time,* 3 Vill Sports & Ent L J 45, 54 (1996). But it seems to me that even if the burden on listeners of having to wait until 6 P.M. is seen as insubstantial, the burden on the broadcaster is suhstantial indeed: There are many more listeners tuned in during the morning and late-afternoon drive-time hours than there are after 6 P.M. See, for example, *A New Eastman Radio Study,* Mediaweek 8 (April 29, 1996) (77% of radio listeners tune in during morning drive time and 81% during the afternoon drive time, hut only 57% listen between 7 P.M. and midnight). Professor Baker's conclusion that the burden is slight may be based on his view that broadcasters' rights are not particularly significant hy themselves, and are properly seen as derivative of the listeners' rights, id at 53–54; I do not share this view, and it's not entirely clear where the Court stands on this question. Compare *Red Lion Broadcasting Co. v FCC,* 395 US 367, 390 (1969) ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount") with *FCC v League of Women Voters,* 468 US 364, 378 (1984) ("Unlike common carriers, broadcasters are entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public duties") (internal quotation marks omitted).

[150] *Dial Information Services Corp. v Thornburgh,* 938 F2d 1535 (2d Cir 1991) (upholding Helms Amendment, as implemented by FCC regulations); *Information Providers' Coalition v FCC,* 928 F2d 866 (9th Cir 1991) (same).

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those who don't have credit cards, and who thus have to wait until the phone company unblocks their phone lines; but dial-a-porn seems not to be a particularly time-sensitive medium, so this delay is not a substantial burden.

vi) ACLU. The CDA would be unconstitutional because—as I discuss above—banning not-for-pay communications substantially burdens speech to adults, even if the material is still available for sale.[151]

vii) Hypothetical tagging requirement for "obscene-as-to-minors" material. Such a requirement would be constitutional because it does not impose a substantial burden. Its chief burdens are that it (*a*) requires people who put potentially obscene-as-to-minors material online to take the time and effort to rate it; (*b*) tempts people who put on borderline material to err on the safe side and rate it "obscene as to minors" even if it probably doesn't fit within the category; (*c*) risks depriving minors of such misrated-for-safety's-sake material; and (*d*) in some measure alters the speaker's message by compelling them to include the rating. The first three burdens, though, are no greater than what the Court upheld in *Ginsberg*, and they seem modest though not negligible. The fourth burden is harder to evaluate, but strikes me as likewise modest.[152]

viii) Hypothetical tagging requirement for "indecent" material. Such a requirement would be unconstitutional if the government's compelling interest extends only to shielding children from "obscene-as-to-minors" matter. Even slight content-based burdens, such as a tagging requirement, shonld be unconstitutional in the absence of a compelling interest.[153] If the compelling interest extends only to obscene-as-to-minors matter, then compelled ratings may be

[151] If cyberspace speakers could somebow automatically ask a would-be listener for a "cyber ID"—analogous to checking an ID under the *Ginsberg v New York* law—and this verification didn't cost any money, then the law might not substantially burden not-for-pay speech to adults. But to my knowledge no such scheme will be possible any time in the near future. See *ACLU*, 117 S Ct at 2349–50; note 7 above.

[152] Some have argued that a tagging requirement, even if not very burdensome for people who are in the business of distributing speech, is quite burdensome for others, such as individuals or nonprofit organizations distributing such material for free. Compare *ACLU*, 117 S Ct at 2347–48 (seeming to distinguish professional speakers from amateurs). I'm not sure this is true, but I agree that the substantial burden framework should at least in some measure be attentive to such nuances: A burden that's insubstantial in one medium or as to one class of speakers may well be substantial in other contexts.

[153] See, for example, *Riley v National Federation of the Blind*, 487 US 781 (1988). But see *Meese v Keene*, discussed above in note 64.

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applied only to such material, not to indecent speech, violent speech, or other categories.

ix) Ban on public display and unattended sales of "obscene-as-to-minors" material. Many states bar public display and unattended sales, in places where minors might be present, of "obscene-as-to-minors" materials.[154] These restrictions have generally been upheld,[155] but they would probably be unconstitutional under the "substantial burden" analysis. Bans on public display—for instance, on murals, paintings hanging in restaurants, and the like—do substantially burden the displayer's ability to communicate to the public. Bans on unattended sales (or unattended browsing) are a lesser burden, but probably still a substantial one, because forcing the publications out of a newsrack and into a bookstore or an attended newsstand will probably substantially decrease their audience.

As the above shows, applying the "substantial burden is unconstitutional" approach would involve some hard calls. Setting the "substantiality" threshold higher might uphold bans on public display of "obscene-as-to-minors" matter, and perhaps even the *Pa-*

[154] For example, Ala Code §§ 13A-12-200.1(3), 13A-12-200.5 (1994) (probably prohibiting only display for sale); Ariz Rev Stat Ann § 13-3507 (West 1989) (prohibiting any display in any "place where minors are invited as part of the general public"); Fla Stat Ann § 847.0125 (West 1994) (prohibiting only display for sale); Ga Code Ann § 16-12-103(e) (Michie 1996) (prohibiting any display in any place "where minors are or may be invited as part of the general public"); Ind Code Ann § 35-49-3-3(2) (Burns 1994) (prohibiting any display "in an area to which minors have visual, auditory, or physical access"); Kan Stat Ann § 21-4301c(a)(1) (1995) (prohibiting display in commercial establishments only); La Rev Stat Ann § 14:91.11 (West 1995) (prohihiting any display "at a newsstand or any other commercial establishment which is open to persons under the age of seventeen years"); Minn Stat Ann § 617.293 (West 1987 & Supp 1996) (prohihiting commercial display); NM Stat Ann § 30-37-2.1 (1997) (prohibiting display only while offering for sale "in a retail establishment open to the general public," and "in such a way that it is on open display to, or within the convenient reach of, minors who may frequent the retail establishment"); NC Gen Stat § 14-190.14(a) (1993) (prohibiting display in commercial establishments only); 21 Okla Stat Ann §§ 1040.75, 1040.76 (West 1983 & Supp 1997) (prohibiting all display, "including but not limited to . . . commercial establishment[s]"); Tenn Code Ann § 39-17-914(a) (1991) (prohibiting display for sale or rent); Tex Penal Code Ann § 43.24 (Vernon 1994) (prohibiting all display, whenever person is "reckless about whether a minor is present who will be offended or alarmed by the display"); 13 Vt Stat Ann §§ 2801(8), 2804a (Equity 1974 & Supp 1997) (prohihiting display "for advertising purposes").

[155] See, for example, *Crawford v Lungren*, 96 F3d 380 (9th Cir 1996) (upholding ban on unattended coin-operated newsrack sales of "harmful to minors" material); *American Booksellers v Webb*, 919 F2d 1493 (11th Cir 1990) (upholding ban on display, in a place accessible to minors, of any material that's "harmful to minors"); *Davis-Kidd Booksellers, Inc. v McWherter*, 866 SW2d 520 (Tenn 1993) (same).

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cifica regulation. Setting it lower might invalidate the hypothetical "obscene-as-to-minors" tagging requirement, and perhaps even the Helms Amendment and the law upheld in *Ginsberg*. Nonetheless, the rule creates a zone of fairly easy cases,[156] and in the hard cases focuses decision makers on the important question.

3. The "Substantial Burden/Less Restrictive Alternative Hybrid" Approach

The "substantial burden is unconstitutional" test would generally uphold any restriction on material unsuitable for minors (whether that is defined as indecent material or obscene-as-to-minors material) if the restriction imposes an insubstantial burden on free speech.[157] One might, however, argue that even minor burdens should be unconstitutional if they provide only slight marginal gains to the government interest—if there's a less restrictive but pretty much equally effective alternative. Even a small speech cost, the argument would go, can be justified only by a significant shielding benefit.

But whatever the merits of inquiries into "pretty much equally effective alternatives" in other strict scrutiny contexts, I doubt that such an inquiry would be particularly helpful here. Less restrictive alternatives will rarely be clearly pretty much as effective as more restrictive ones. This is particularly evident in *ACLU*, where few alternatives would work nearly as well as a total ban on free online material. Likewise, the alternative given in *Butler* to a total ban on the distribution of explicit material—a ban on distributing such material to children—is much less effective than the total ban. The alternatives to bans on broadcast indecency, such as restrictions on day and evening broadcasts, are likewise considerably less effective.[158]

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[156] See Frederick Schauer, *Easy Cases*, 58 S Cal L Rev 399 (1985).

[157] I use the phrase "unsuitable for minors" advisedly here: Though I argue that the government should be able to burden—even insubstantially—only that speech which is "obscene as to minors," rather than merely "indecent," I recognize that others might take a different view. The "substantial burden" test is flexible enough to accommodate any definition of "unsuitability."

[158] The dial-a-porn ban struck down in *Sable* may have been something of an exception; the alternatives eventually upheld in *Information Providers' Coalition v FCC*, 928 F2d 866 (9th Cir 1991), and *Dial Information Services Corp. v Thornburgh*, 938 F2d 1535 (2d Cir 1991), did seem to be pretty much as effective as the ban. See the discussion in Part III.D.

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These alternatives are less restrictive than a total ban because, unlike the ban, they aim to segregate two categories of people: (1) adults (and minors whose parents choose not to shield them), who should have access to the materials, and (2) all other minors, who shouldn't have access. But any such attempted segregation will also be less effective, because it will necessarily lump some minors from the second category together with the people in the first. Compelled tagging of online material (as opposed to a ban on free online indecency) protects the access rights of people who don't have filters running on their computer, but this class of people will necessarily include some minors who are visiting friends whose computers are unshielded. Chauneling broadcast indecency to 10 P.M. through 6 A.M. (as opposed to totally banning it) protects the access rights of adults who are awake between 10 and 6, but also gives access to some minors who are up during those times. Allowing the distribution of explicit materials to adults (as opposed to totally banning such distribution) protects the access rights of adults, but also gives access to some minors who get the material from those adults.

Thus, while I think the substantial burden/less restrictive alternative hybrid approach is plausible, I suspect it would usually (if properly applied) reach the same results as the "substantial burden is unconstitutional" framework: Less restrictive means will almost always be less effective. I also suspect that the extra inquiry into less restrictive alternatives would be complicated and error prone, tending to lead courts into the same kinds of empirical mistakes that the *ACLU* Court fell into. These two points, I think, counsel in favor of the simpler "substantial burden is unconstitutional" framework. On the other hand, because the hybrid approach might at least theoretically protect speech more than a pure substantial burden framework would—without unduly sacrificing the government's ability to shield children—many free speech maximalists may support it.

4. The "Cost-Benefit Weighing" Approach

As I mentioned above, in theory the most appealing approach may be a sliding-scale one: If there is value in shielding children, then as a restriction provides more shielding (as compared to the next best alternative), we should be willing to tolerate a greater

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burden on the countervailing value of free speech. Thus, consider two examples:

A ban on unattended coin-operated newsracks containing obscene-as-to-minors (not just indecent) material. Striking down the ban would allow minors easy access to some hardcore matter. Upholding the ban would substantially interfere with distribution of the material to adults: Many publications are sold through newsracks precisely because newsracks make it easier for people to buy the publications, and thus substantially increase the publication's audience; requiring the material to be sold through attended newsstands would probably substantially decrease the audience. Nonetheless, while the burden is substantial, it is not a total ban, and perhaps is less substantial than the burden imposed by the CDA.[159]

Time restrictions on broadcast indecency. Here, at least before V-chip-like technology became available, there really were no less restrictive but pretty much equally effective alternatives to a total ban.[160] Striking down the ban would expose minors to whatever indecency people broadcast. Upholding the ban would substantially burden free speech, though not as much as the law in *Butler*, which applied to all media. Following some hints given by *Pacifica*, Congress and the FCC limited the indecency ban to 6 A.M. TO 10 P.M.,[161] which made it less burdensome but also less effective. Any even less burdensome restrictions would be less effective still.

My sense is that many people who generally favor strong free speech protections nonetheless support the newsrack ban and perhaps even some broadcast time restrictions:[162] The extra shielding

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[159] Compare *Crawford v Lungren*, 96 F3d 380 (9th Cir 1996), which upheld such a newsrack restriction under a weighing approach.

[160] Though the D.C. Circuit has in fact struck down such a total ban, see note 140, it didn't suggest that there were any pretty much equally effective alternatives to the ban. Its conclusion was instead based on the proposition that the total ban was just too grave a burden.

[161] Actually, the new indecency restriction applied to the 6 A.M.–10 P.M. period for public broadcasters, and the 6 A.M.–12 midnight period for commercial broadcasters. The D.C. Circuit held this was impermissibly discriminatory, and that though a flat 6 A.M.–12 midnight ban would have been constitutional, the public broadcaster exemption had to be applied to all stations. *Action for Children's Television v FCC*, 58 F3d 654 (DC Cir 1995) (en banc).

[162] See, for example, C. Edwin Baker, *The Evening Hours During Pacifica Standard Time*, 3 Vill Sports & Ent L J 15 (1996) (suggesting that while the *Pacifica* ban swept too broadly, a ban on daytime broadcasts might be permissible); Arnold H. Loewy, *Obscenity, Pornography, and First Amendment Theory*, 2 Wm & Mary Bill Rts J 471, 491 (1993) (suggesting that "a more carefully tailored effort at channeling, such as a prohibition of scatological speech on Saturday morning television," might be appropriate).

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of children seems enough to "outweigh" the substantial, but not very great, burden on free speech. Some lower court decisions dealing with newsrack restrictions, general restrictions on public display of obscene-as-to-minors material, and even the CDA itself in fact use something like this weighing approach.[163] Justice Scalia's *Sable* concurrence likewise argues that "the more pornographic"—and thus presumably the more harmful—the material, "the more reasonable it becomes to insist upon greater assurance of insulation from minors."[164]

One might therefore try to directly implement a "cost-benefit weighing" approach, in which the government decision maker (legislator, executive official, or judge) "weighs" the magnitude of the burden on speech against the maguitude of the extra shielding that the law would provide. Thus, under this test, the *ACLU* Court would have "weighed" the marginal speech burden imposed by the CDA (compared to that imposed by alternatives, such as a tagging requirement)—which is quite high, since a ban is much more burdensome than tagging—against the level of marginal shielding that the CDA provides relative to the alternatives, which the Court thought was minimal but which in fact was probably quite high.

But for the reasons I discussed above in Part IV.A, I don't believe this approach can be practically administered by the many judicial, legislative, and executive officials throughout the country. The "compelling interest trumps" and "substantial burden is unconstitutional" tests provide some definiteness because they involve the comparison of something, for instance, the degree of burden on speech, against a fixed benchmark that is similar in kind, such as a threshold burden: How large is the burden here relative to the burdens recognized as substantial or insubstantial by prior cases? Cost-benefit weighing, on the other hand, in each case demands a comparison of two things (the burden and the benefit) that are very different, a much harder proposition.

[163] See, for example, *Shea v Reno*, 930 F Supp 916, 941 (SDNY 1996) (asking whether "the benefits . . . achieved [by the CDA] would outweigh the burden . . . imposed on the First Amendment rights of adults"); *Carlin Communications, Inc. v FCC*, 837 F2d 546, 555 (2d Cir 1988) ("the State may not regulate at all if it turns out that even the least restrictive means of regulation is still unreasonable when its limitations on freedom of speech are balanced against the benefits gained from those limitations"); *American Booksellers v Webb*, 919 F2d 1493 (11th Cir 1990); *Crawford v Lungren*, 96 F3d 380 (9th Cir 1996).

[164] 492 US at 132.

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The one free speech doctrine that explicitly tries to use cost-benefit weighing—the *Pickering* test for speech restrictions imposed by the government as employer—supports this skepticism. *Pickering* specifically calls for sliding-scale "balanc[ing]" of "the interests of the [employee], as a citizen, in commenting upon matters of public concern" against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[165] The Court has acknowledged that "such particularized balancing is difficult,"[166] and this seems an understatement. From all I've seen of the lower court decisions, the test is essentially indeterminate in all but the easiest cases, cases that could well be resolved through more categorical rules. This indeterminacy is troubling even when the government is acting as employer, a context in which the Court properly accepts greater speech restrictions, but would be especially improper when evaluating laws imposed by the government acting as sovereign.[167]

Cost-benefit weighing in the child shielding context would also work only if the Court does what it has so far avoided doing: if it actually determines the extent of the harm caused by indecent or "obscene-as-to-minors" speech—rather than just the presence of some nontrivial harm—and thus the true benefit of shielding. There is something of a consensus that some such benefit exists, which is probably enough to justify trying to realize this benefit through less than substantially burdensome restrictions. But once one must "weigh" even substantial free speech burdens against the purported benefits of shielding, one can't avoid having to determine just how serious these benefits are. The relatively uncontroversial claim that the benefits exist will not be very helpful here: One will need some agreement on at least the rough magnitude of the benefits, compared to the magnitude of the speech burden, and such an agreement may be hard to achieve.[168]

[165] *Pickering v Board of Education*, 391 US 563, 568 (1968); see also *Rankin v McPherson*, 483 US 378, 388 (1987).

[166] *Connick v Myers*, 461 US 138, 150 (1983).

[167] See *Waters v Churchill*, 114 S Ct 1878, 1886–88 (1994) (plurality) (discussing differences in the First Amendment tests appropriate when the government is acting as sovereign and when the government is acting as employer).

[168] Compare *Ginsberg v New York*, 390 US 629, 641–43 (1968) (expressing uncertainty about whether "obscene-as-to-minors" speech is really harmful to minors, but concluding that a restriction on such speech is permissible because the speech is constitutionally valueless).

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The weighing approach seems theoretically most satisfying, because it promises a full recognition and comparison of both the costs to free speech of regulation and the costs to minors of adult freedom. But for the reasons given above, it would probably be practically intractable, especially given the need for the Court to provide meaningful constraints to other government actors.

5. The "Multiple Speech Subclasses" Approach

We can avoid some of the administrative problems of a sliding-scale approach by trying to approximate it through a sort of graduated step-ladder—what I call the "multiple speech subclasses" framework, in which the Court sets up different levels of tolerable burden for different kinds of speech, based on perceived differences in harm. Applying this framework doesn't require direct comparison of burden and benefit, but only of burden against threshold burden.

For instance, the Court might say that merely indecent speech is fairly harmless, that any loss of shielding against indecent speech is thus of rather little consequence, and that any burden beyond the mildest should therefore be impermissible. This would be a "substantial burden is unconstitutional" approach, with a low threshold of substantiality. On the other hand, the Court might conclude that obscene-as-to-minors speech is more harmful (because it appeals to prurient interests), that the loss of shielding against that kind of speech is thus more important, and that even fairly substantial—but not very great—burdens on the speech should therefore be allowed. This would also be a "substantial burden is unconstitutional" approach, but with a higher substantiality threshold.[169]

This framework is less attentive than pure cost-benefit weighing to fine differences in weights on both sides, and is thus both theoretically less perfect and practically more administrable. It would require only a few up-front decisions about the price we should be willing to pay for the freedom to communicate various kinds

[169] In judging the sacrifice of shielding, the Court could also look at the efficacy of less restrictive alternatives: It might, for instance, say that if the less restrictive alternatives are equally effective, any burden is unconstitutional; if they are pretty much equally effective, substantial burdens are unconstitutional; and if they are not at all effective, only very large burdens (however defined) are unconstitutional. For the reasons explained in Part IV.B.3, though, I think this sort of framework will probably not be that useful.

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of speech, rather than a fresh weighing in each case. A good analogy is the libel law framework, which sets up different tests for private concern speech, private figure/public concern speech, and public figure/public concern speech, each tolerating a different level of incidental burden on constitutionally protected expression.[170]

I suspect even this framework would probably be too complex to be workable; the "substantial burden is unconstitutional" approach discussed in Part IV.B.2 would be practically superior. Nonetheless, even some version of the "multiple speech subclasses" framework is better than the orthodox strict scrutiny "compelling interest trumps" test.

6. Summary

I have argued that, where speech that's supposedly unsuitable for children is concerned, the Court should focus primarily on the burden that the restriction imposes on valuable speech. The Court should draw benchmarks that distinguish permissible insubstantial burdens from impermissible substantial ones, benchmarks that government decision makers can consult in the future.

Laws that impose sufficiently substantial burdens, I've argued, are unconstitutional even if they're genuinely necessary to shield children; the "compelling interest trumps" framework is therefore unsound. And while it seems appealing to "weigh" the degree of the burden in each case against the benefit the law brings, such a "cost-benefit weighing" framework is practically unadministrable.

I've identified three alternatives to these frameworks: (*a*) "Substantial burden is unconstitutional," which strikes down all substantial burdens and allows all insubstantial ones. (*b*) "Substantial burden/less restrictive alternative hybrid," which strikes down all substantial burdens *and* those insubstantial burdens that are not genuinely necessary to shield children, and allows only those burdens that are both insubstantial and necessary. (*c*) "Multiple speech subclasses," which sets different levels of permissible burden for different subclasses of unsuitable-for-minors speech.

The "substantial burden is unconstitutional" framework is the

[170] See *Dun & Bradstreet, Inc. v Greenmoss Builders, Inc.*, 472 US 749 (1985) (private concern); *Gertz v Robert Welch, Inc.*, 418 US 323 (1974) (public concern/private figure); *New York Times Co. v Sullivan*, 376 US 254 (1964) (public concern/public figure).

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simplest of the three, and I think the best. Though it's in some respects theoretically less satisfying than the others, because it seems to sometimes overprotect speech and sometimes underprotect it, it's probably practically more effective. "Less restrictive alternative" inquiries are, if done candidly, largely fruitless in this area; and defining one level of "unsuitability for minors" and one "substantiality" threshold seems hard enough that I doubt courts can effectively define multiple levels of unsuitability and multiple thresholds of substantiality.

Nonetheless, the choice between these three frameworks is a close call. They all recognize that some burdens are high enough to be impermissible even if the burdens are really necessary to shield children. They all accept, as the Court and much of the country seem to accept, that certain kinds of burdens on material that is unsuitable for minors are slight enough to be allowed. And because they require that burdens be compared against threshold burdens, rather than commanding an amorphous case-by-case weighing of burden on speech against increase of shielding, they are all relatively practically administrable. Each of them would have yielded a better—more honest and more precedentially valuable—opinion in *ACLU* than the Court produced using the orthodox "compelling interest trumps" framework.

V. Conclusion: Applications to Other Kinds of Speech Restrictions

This article has focused on one particular set of speech restrictions—restrictions on material that's supposedly unsuitable for minors. I have argued that:

1. *ACLU* reached the right result but erred in its reasoning.
2. This error sheds light on a deeper problem: The Court's official test in this area—strict scrutiny, with its "compelling interest trumps" approach—is unsound, and if applied candidly would lead to wrong results.
3. Instead of compensating for the unsound test's errors by misapplying it, the Court should design a test that's better suited to the concerns raised by the interest in shielding children.
4. Directly "weighing" the burden of a restriction against its benefits is not feasible in a system in which the Court must create administrable rules for a myriad other government actors.

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5. Rather, the best solution is one that tolerates certain less-than-substantial burdens on a narrow class of speech, but that categorically invalidates any burdens that are substantial.

Much of this, I believe, is also applicable to other free speech contexts. *ACLU* is just one of many cases in which, as I have argued in a recent article,[171] the Court has fudged the facts in order to reach the right results under its strict scrutiny framework. This felt need to fudge strongly suggests that the strict scrutiny framework is itself unsound in these cases: Speech must often be protected even though protecting it unavoidably causes substantial costs to compelling government interests—even though there are *no* less restrictive but pretty much equally effective alternatives to speech suppression.[172] The line drawn by the "compelling interest trumps" test inadequately reconciles the values at stake in such cases.

I propose that instead the Court should return to the framework it generally followed as it was developing libel law, obscenity law, and various other major free speech doctrines:

1. A strong presumption that speech restrictions justified by the communicative impact of speech are unconstitutional.[173]

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[171] Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U Pa L Rev 2417 (cited in note 20).

[172] Thus, for instance, speech by political candidates in wartime is constitutionally protected even if it can gravely hurt the war effort, and even if banning it is the only effective way to win the war quickly and save soldiers' lives. Id at 2425–31. Speech that advocates violence is constitutionally protected even though it indeed tends to encourage future violence, and even though other means of preventing the future violence can't entirely, or even close to entirely, undo the damage that the speech has done. Id at 2432–36. Some kinds of disclosures by fundraisers cannot be compelled even though compelling them is the only effective way of preventing misperceptions on the contributors' part. Id at 2441–42. Independent expenditures advocating the election of a candidate are constitutionally protected despite the danger of corruption they unavoidably pose. Id at 2442. (Even those who disagree with *Buckley v Valeo* and conclude that the government should be able to restrict independent campaign-related expenditures would probably agree that *some* expenditures must be constitutionally protected despite their potential for causing corruption. Newspapers regularly spend many thousands of dollars in labor and newsprint explicitly endorsing candidates and sometimes quietly boosting them through favorable news coverage; and many politicians will think twice before saying no to a publisher whose efforts can mean so much in a future election. Nonetheless, I take it that a ban on endorsements by newspapers would be widely agreed to be unconstitutional, despite the risk of corruption that such assistance poses.)

I don't want to repeat the entire explanation of my thesis here, but I hope my point about *ACLU* makes it more plausible: Strict scrutiny is a flawed approach for dealing with the constitutionality of content-based speech restrictions.

[173] I speak here of restrictions imposed by the government as sovereign. The presumption might be considerably weaker (or perhaps even nonexistent) when the government is acting

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2. A recognition that certain classes of restrictions are constitutional, either because they do not substantially burden valuable speech, or (in rare situations) because, despite their substantial burden on valuable speech, they are genuinely so crucial that we must sometimes substantially sacrifice speech in their name.

3. Development of individual bodies of law to deal with these classes of restrictions.

Thus, libel law evolved from a conclusion that some restrictions on false and defamatory speech would serve an important interest without substantially burdening valuable expression.[174] Obscenity law evolved from a (controversial) judgment that restrictions on some sexually explicit material would likewise not substantially burden valuable speech. Incitement law recognized that some burdens even on core political advocacy might be needed to preserve life and limb, though even that most important of interests must often yield to free speech rights. Similar rules should be developed for those areas (which, I hope, will be relatively few) where—as with speech unsuitable for minors—the Court believes some additional restrictions are proper.

I am not particularly happy about the Court fragmenting First Amendment doctrine this way, and there certainly is great appeal to a simple, consistent Grand Principle that explains all free speech law. Perhaps one day such a principle may evolve from the Court's experience with the individual subtests;[175] in particular, I think versions of the substantial burden approach outlined above have promise in some (though not all) areas.[176] But so far the Court has not found a principle that is both broad and accurate.

in other contexts, for instance as employer, K–12 educator, proprietor of a nonpublic forum, speaker, and so on.

[174] *Gertz v Robert Welch, Inc.*, 418 US 323 (1974).

[175] Consider the expressive conduct test and the time/place/manner restriction test, which evolved separately, but have ultimately proven to be largely manifestations of the same principle. *Ward v Rock Against Racism*, 491 US 781 (1989).

[176] The substantial burden framework might help explain the *Buckley v Valeo* distinction between contributions and independent expenditures: A restriction on contributions, as *Buckley* pointed out, poses a relatively modest burden on speech, precisely because independent expenditures are available as an alternative. On the other hand, a restriction on independent expenditures as well as contributions would be a tremendous burden on a person's ability to communicate his views about a candidate. Even if banning expensive speech about candidates is necessary to minimize corruption, such a broad restraint on speech cannot be justified.

Likewise, the solution that I've proposed to the constitutional questions surrounding workplace harassment law, see Eugene Volokh, *Freedom of Speech and Workplace Harassment Law*, 39 UCLA L Rev 1791 (1992), may be best understood as focusing on the substantiality

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For now, I would be satisfied with the Court jettisoning its current, unsound, Grand Principle, and reawakening to the need to look for better (even if more particularistic) approaches; and there's reason to think the Court is indeed prepared to do so. Justice Stevens himself has often criticized the strict scrutiny framework.[177] Justice Kennedy has at times explicitly urged that it be rejected and replaced by a more categorical approach similar to the one described above.[178] A recent opinion by Justice Thomas, while formally using strict scrutiny, in effect urged a substantial-burden-like test, one that would reject certain laws even if they are necessary to accomplish certain interests that the Court has found compelling.[179]

Believing as I do in rather strong free speech protection, I hope the Court will make the areas of permissible regulation as narrow as possible; and I recognize that discarding existing rules always poses a risk that the new rules will be worse. Nonetheless, the current situation is already not very good. The strict scrutiny test would on its face uphold certain restrictions that ought not be upheld; and though the Court has tended to avoid these results, it has done so only by creating precedents that, because of their lack of candor, make the law even murkier. Given this, there's much to be gained from rejecting strict scrutiny and confronting the important questions more openly and clearly.

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of the burden on speech. Restrictions on unwanted one-to-one speech, I argue, are not substantially burdensome on valuable communications, because they still allow people to freely speak to colleagues other than the unwilling listener. (In my view, continued communication that is received *only* by unwilling listeners is of relatively slight constitutional value.) On the other hand, restricting one-to-many speech, such as posters or overheard lunchroom conversations or company newsletters or department-wide e-mail, does indeed substantially burden people's ability to communicate with potentially willing listeners.

[177] See, for example, *Eu v San Francisco County Democratic Central Comm.*, 489 US 214, 234 (1989) (Stevens concurring).

[178] *Simon & Schuster, Inc. v Members of the N.Y. State Crime Victims Board*, 502 US 105, 124–28 (1991) (Kennedy concurring in the judgment); *Burson v Freeman*, 504 US 191, 213 (1992) (Kennedy concurring). I disagree with Kennedy's ultimate conclusion in *Burson*, compare Eugene Volokh, *Freedom of Speech and the Constitutional Tension Method*, 3 U Chi Roundtable 223 (1996), but I generally agree with his overall framework.

[179] *Colorado Republican Fed. Campaign Comm. v FEC*, 116 S Ct 2309, 2329 (1996) (Thomas concurring in part and dissenting in part).

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