# Supreme Court collection

## **Reno v. American Civil Liberties Union (96-511)** 521 U.S. 844 (1997)

| Syllabus | Opinion [ Stevens ] | Concurrence [ O ] |
|---|---|---|
| HTML version PDF version | HTML version PDF version | HTML version PDF version |

O'CONNOR, J., Concurring Opinion

SUPREME COURT OF THE UNITED STATES

**521 U.S. 844**

Reno v. American Civil Liberties Union

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

96-511 Argued: March 19, 1997 --- Decided: June 26, 1997

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

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

Appellees bring a facial challenge to three provisions of the CDA. The first, which the Court describes as the "indecency transmission" provision, makes it a crime to knowingly transmit an obscene or indecent message or image to a person the sender knows is under 18 years old. 47 U. S. C. A. § 223(a)(1)(B) (May 1996 Supp.). What the Court classifies as a single " 'patently offensive display' " provision, see *ante*, at 11, is in reality two separate provisions. The first of these makes it a crime to knowingly send a patently offensive message or image to a specific person under the age of 18 ("specific person" provision). § 223(d)(1)(A). The second criminalizes the display of patently offensive messages or images "in a[ny] manner available" to minors ("display" provision). § 223(d)(1)(B). None of these provisions purports to keep indecent (or patently offensive) material away from adults, who have a First Amendment right to obtain this speech. *Sable Communications of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989) ("Sexual expression which is indecent but not obscene is protected by the First Amendment"). Thus, the undeniable purpose of the CDA is to segregate indecent material on the Internet into

certain areas that minors cannot access. See S. Conf. Rep. No. 104-230, p. 189 (1996) (CDA imposes "access restrictions . . . to protect minors from exposure to indecent material").

The creation of "adult zones" is by no means a novel concept. States have long denied minors access to certain establishments frequented by adults.[n1] State shave also denied minors access to speech deemed to be "harmful to minors."[n2] The Court has previously sustained such zoning laws, but only if they respect the First Amendment rights of adults and minors. That is to say, a zoning law is valid if (i) it does not unduly restrict adult access to the material; and (ii) minors have no First Amendment right to read or view the banned material. As applied to the Internet as it exists in 1997, the "display" provision and some applications of the "indecency transmission" and "specific person" provisions fail to adhere to the first of these limiting principles by restricting adults' access to protected materials in certain circumstances. Unlike the Court, however, I would invalidate the provisions only in those circumstances.

Our cases make clear that a "zoning" law is valid only if adults are still able to obtain the regulated speech. If they cannot, the law does more than simply keep children away from speech they have no right to obtain--it interferes with the rights of adults to obtain constitutionally protected speech and effectively "reduce[s] the adult population . . . to reading only what is fit for children." *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957). The First Amendment does not tolerate such interference. See *id.*, at 383 (striking down a Michigan criminal law banning sale of books--to minors or adults--that contained words or pictures that " 'tende[d] to . . . corrup[t] the morals of youth' "); *Sable Communications*, *supra* (invalidating federal law that made it a crime to transmit indecent, but nonobscene, commercial telephone messages to minors and adults); *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983) (striking down a federal law prohibiting the mailing of unsolicited advertisements for contraceptives). If the law does not unduly restrict adults' access to constitutionally protected speech, however, it may be valid. In *Ginsberg* v. *New York*, 390 U.S. 629, 634 (1968), for example, the Court sustained a New York law that barred store owners from selling pornographic magazines to minors in part because adults could still buy those magazines.

The Court in *Ginsberg* concluded that the New York law created a constitutionally adequate adult zone simply because, on its face, it denied access only to minors. The Court did not question--and therefore necessarily assumed--that an adult zone, once created, would succeed in preserving adults' access while denying minors' access to the regulated speech. Before today, there was no reason to question this assumption, for the Court has previously only considered laws that operated in the physical world, a world that with two characteristics that make it possible to create "adult zones": geography and identity. See Lessig, Reading the Constitution in Cyberspace, 45 Emory L. J. 869, 886 (1996). A minor can see an adult dance show only if he enters an establishment that provides such entertainment. And should he attempt to do so, the minor will not be able to conceal completely his identity (or, consequently, his age). Thus, the twin characteristics of geography and identity enable the establishment's proprietor to prevent children from entering the establishment, but to let adults inside.

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

Cyberspace differs from the physical world in another basic way: Cyberspace is malleable. Thus, it is possible to construct barriers in cyberspace and use them to screen for identity, making cyberspace more like the physical world and, consequently, more amenable to zoning laws. This transformation of cyberspace is already underway. Lessig, *supra,* at 888-889. *Id.*, at 887 (cyberspace "is moving . . . from a relatively unzoned place to a universe that is extraordinarily well zoned"). Internet speakers (users who post-material on the Internet) have begun to zone cyberspace itself through the use of "gateway" technology. Such technology requires Internet users to enter information about themselves--perhaps an adult identification number or a credit card number--before they can access certain areas of cyberspace, 929 F. Supp. 824, 845 (ED Pa. 1996), much like a bouncer checks a person's driver's license before admitting him to a nightclub. Internet users who access information have not attempted to

zone cyberspace itself, but have tried to limit their own power to access information in cyberspace, much as a parent controls what her children watch on television by installing a lock box. This user based zoning is accomplished through the use of screening software (such as Cyber Patrol or SurfWatch) or browsers with screening capabilities, both of which search addresses and text for keywords that are associated with "adult" sites and, if the user wishes, blocks access to such sites. *Id.*, at 839-842. The Platform for Internet Content Selection (PICS) project is designed to facilitate user based zoning by encouraging Internet speakers to rate the content of their speech using codes recognized by all screening programs. *Id.*, at 838-839.

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

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

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

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

The analogy to *Ginsberg* breaks down, however, when more than one adult is a party to the conversation. If a minor enters a chat room otherwise occupied by adults, the CDA effectively

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

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

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

Whether the CDA substantially interferes with the **First Amendment** rights of minors, and thereby runs afoul of the second characteristic of valid zoning laws, presents a closer question. In *Ginsberg*, the New York law we sustained prohibited the sale to minors of magazines that were "harmful to minors." Under that law, a magazine was "harmful to minors" only if it was obscene as to minors. 390 U. S., at 632-633. Noting that obscene speech is not protected by the **First Amendment**, *Roth* v. *United States*, **354 U.S. 476**, 485 (1957), and that New York was constitutionally free to adjust the definition of obscenity for minors, 390 U. S., at 638, the Court concluded that the law did not "invad[e] the area of freedom of expression constitutionally secured to minors." *Id.*, at 637. New York therefore did not infringe upon the **First Amendment** rights of minors. Cf. *Erznoznik* v. *Jacksonville*, **422 U.S. 205**, 213 (1975) (striking down city ordinance that banned nudity that was not "obscene even as to minors").

The Court neither "accept[s] nor reject[s]" the argument that the CDA is facially overbroad because it substantially interferes with the **First Amendment** rights of minors. *Ante*, at 32. I would reject it. *Ginsberg* established that minors may constitutionally be denied access to material that is obscene as to minors. As *Ginsberg* explained, material is obscene as to minors if it (i) is "patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable . . . for minors"; (ii) appeals to the prurient interest of minors; and (iii) is "utterly without redeeming social importance for minors." 390 U. S., at 633. Because the CDA denies minors the right to obtain material that is "patently offensive"--even if it has some redeeming value for minors and even if it does not appeal to their prurient

interests--Congress' rejection of the *Ginsberg* "harmful to minors" standard means that the CDA could ban some speech that is "indecent" (*i.e.*, "patently offensive") but that is not obscene as to minors.

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

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

1. See, e.g., Alaska Stat. Ann. § 11.66.300 (1996) (no minors in "adult entertainment" places); Ariz. Rev. Stat. Ann. § 13-3556 (1989) (no minors in places where people expose themselves); Ark. Code Ann. §§ 5-27-223, 5-27-224 (1993) (no minors in poolrooms and bars); Colo. Rev. Stat. § 18-7-502(2) (1986) (no minors in places displaying movies or shows that are "harmful to children"); Del. Code Ann., Tit. 11, § 1365(i)(2) (1995) (same); D. C. Code Ann. § 22-2001(b)(1)(B) (1996) (same); Fla. Stat. § 847.013(2) (1994) (same); Ga. Code Ann. § 16-12-103(b) (1996) (same); Haw. Rev. Stat. § 712-1215(1)(b) (1994) (no minors in movie houses or shows that are "pornographic for minors"); Idaho Code § 18-1515(2) (1987) (no minors in places displaying movies or shows that are "harmful to minors"); La. Rev. Stat. Ann. § 14:91.11(B) (West 1986) (no minors in places displaying movies that depict sex acts and appeal to minors' prurient interest); Md. Ann. Code, Art. 27, § 416E (1996) (no minors in establishments where certain enumerated acts are performed or portrayed); Mich. Comp. Laws § 750.141 (1991) (no minors without an adult in places where alcohol is sold); Minn. Stat. § 617.294 (1987 and Supp. 1997) (no minors in places displaying movies or shows that are "harmful to minors"); Miss. Code Ann. § 97-5-11 (1994) (no minors in poolrooms, billiard halls, or where alcohol is sold); Mo. Rev. Stat. § 573.507 (1995) (no minors in adult cabarets); Neb. Rev. Stat. § 28-809 (1995) (no minors in places displaying movies or shows that are "harmful to minors"); Nev. Rev. Stat. § 201.265(3) (1997) (same); N. H. Rev. Stat. Ann. § 571-B:2(II) (1986) (same); N. M. Stat. Ann. § 30-37-3 (1989) (same); N. Y. Penal Law § 235.21(2) (McKinney 1989) (same); N. D. Cent. Code § 12.1-27.1-03 (1985 and Supp. 1995) (same); 18 Pa. Cons. Stat. § 5903(a) (Supp. 1997) (same); S. D. Comp. Laws Ann. § 22-24-30 (1988) (same); Tenn. Code Ann. § 39-17-911(b) (1991) (same); Vt. Stat. Ann., Tit. 13, § 2802(b) (1974) (same); Va. Code Ann. § 18.2-391 (1996) (same).

2. See, e.g., Ala. Code § 13A-12-200.5 (1994); Ariz. Rev. Stat. Ann. § 13-3506 (1989); Ark. Code Ann. 5-68-502 (1993); Cal. Penal Code Ann. § 313.1 (West Supp. 1997); Colo. Rev. Stat. § 18-7-502(1) (1986); Conn. Gen. Stat. § 53a-196 (1994); Del. Code Ann., Tit. 11, § 1365(i)(1) (1995); D. C. Code Ann. § 22-2001(b)(1)(A) (1996); Fla. Stat. § 847.012 (1994); Ga. Code Ann. § 16-12-103(a) (1996); Haw. Rev. Stat. § 712-1215(1) (1994); Idaho Code § 18-1515(1) (1987); Ill. Comp. Stat., ch. 720, § 5/11-21 (1993); Ind. Code § 35-49-3-3(1) (Supp. 1996); Iowa Code § 728.2 (1993); Kan. Stat. Ann. § 21-4301c(a)(2) (1988); La. Rev. Stat. Ann. § 14:91.11(B) (West 1986); Md. Ann. Code, Art. 27, § 416B (1996); Mass. Gen. Laws, ch. 272, § 28 (1992); Minn. Stat. § 617.293 (1987 and Supp. 1997); Miss. Code Ann. § 97-5-11 (1994); Mo. Rev. Stat.

§ 573.040 (1995); Mont. Code Ann. § 45-8-206 (1995); Neb. Rev. Stat. § 28-808 (1995); Nev. Rev. Stat. §§ 201.265(1), (2) (1997); N. H. Rev. Stat. Ann. § 571-B:2(I) (1986); N. M. Stat. Ann. § 30-37-2 (1989); N. Y. Penal Law § 235.21(1) (McKinney 1989); N. C. Gen. Stat. § 14-190.15(a) (1993); N. D. Cent. Code § 12.1-27.1-03 (1985 and Supp. 1995); Ohio Rev. Code Ann. § 2907.31(A)(1) (Supp. 1997); Okla. Stat., Tit. 21, § 1040.76(2) (Supp. 1997); 18 Pa. Cons. Stat. § 5903(c) (Supp. 1997); R. I. Gen. Laws § 11-31-10(a) (1996); S. C. Code Ann. § 16-15-385(A) (Supp. 1996); S. D. Comp. Laws Ann. § 22-24-28 (1988); Tenn. Code Ann. § 39-17-911(a) (1991); Tex Penal Code Ann. § 43.24(b) (1994); Utah Code Ann. § 76-10-1206(2) (1995); Vt. Stat. Ann., Tit. 13, § 2802(a) (1974); Va. Code Ann. § 18.2-391 (1996); Wash. Rev. Code § 9.68.060 (1988 and Supp. 1997); Wis. Stat. § 948.11(2) (Supp. 1995).