The Intractable Obscenity Problem 2.0: The Emerging Circuit Split over the Constitutionality of "Local Community Standards" Online

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“And he roused a certain craving passion in her . . . ; she had to go on after 
he had finished, in the wild tumult and heaving of her loins, while he 
heroically kept himself up, and present in her . . . till she brought about her 
own crisis, with weird little cries.”¹ The above, and other vivid, erotic 
passages, resulted in uncensored copies of D. H. Lawrence’s Lady Chatterley’s 
Lover being banned in the United States for decades.² The U.S. Post Office 
routinely seized any uncensored copies of the novel found in the mail.³ In 
1959, however, the United States District Court for the Southern District of 
New York lifted the ban, and within a year, the book had nearly topped the 
New York Times best-seller list.⁴ In 1999, New York City threatened to withhold funding from the Brooklyn 
Museum of Art after the museum refused to remove from public view a Chris 
Ofili canvas depicting the Virgin Mary.⁵ Ofili sparked the controversy 
by depicting the venerated mother of Jesus with a bare breast and by using 
elephant dung and photographs of female genitalia to supplement more 
traditional painting supplies.⁶ Ofili’s work has since been featured in galleries

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3. See id. (noting that eventually, the U.S. Post Office was sued for continually confiscating the novel).
4. Id.
5. Gary Younge, After the Elephant Dung: Chris Ofili, GUARDIAN (Jan. 16, 2010), http://www.guardian.co.uk/artanddesign/2010/jan/16/chris-ofili-gary-younge-interview (describing former New York Mayor Rudolph Giuliani’s attempts to force the museum to remove the painting, which he described as “horrible and disgusting”). Giuliani also initiated a federal lawsuit to compel the museum “to censor its choice of artists.” Id. The court eventually ruled against Giuliani on First Amendment grounds. Id.
6. Id.
on several continents, and he was even offered a position with Britain’s renowned Royal Academy.7

A blurred boundary has long existed between art and obscenity, between work intended to “needle, question, [and] open up . . . content to new interpretation”8 and work with no “serious literary, artistic, political, or scientific value.”9 This distinction is extremely significant in the legal realm because obscenity falls wholly outside the protection of the First Amendment.10 As a result, distribution of obscenity is punishable as a criminal offense and often carries harsh penalties and prison sentences.11

Despite the severe potential sanctions, however, no precise legal definition of obscenity exists.12 Instead, courts have relied on a broad, vague test rooted in “contemporary community standards” to determine whether material is obscene.13 Consequently, obscenity is a “legal conclusion” reached by the trier of fact using a test set forth by the Supreme Court in Miller v. California.14 As a result, publishers of potentially obscene material can rarely predict with any accuracy whether they will face criminal prosecution.15

7. Id.
11. See, e.g., 18 U.S.C. § 1462 (2006) (stating that one who distributes obscene materials may be fined and sentenced to a maximum of five years in prison for a first offense, and additional offenses carry a ten-year maximum penalty). The five-year prison term is comparable to sentences issued to “drug traffickers, firearms offenders and racketeers.” See Adam Pollack, The Typical Time Served by Federal Criminals, YAHOO! CONTRIBUTOR NETWORK (Jan. 22, 2010), http://wwwassociatedcontent.com/article/2614977/the_typical_time_served_by_federal.html. State laws also provide for severe penalties. See, e.g., GA. CODE ANN. § 16-12-81(c) (2007) (describing the maximum penalty for distributing obscene materials as three years in prison, a $10,000 fine, or both).
12. See Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). As Justice Potter Stewart famously remarked, obscenity may be nearly impossible to define, “[b]ut I know it when I see it.” Id.
13. See Miller, 413 U.S. at 24.
15. STUCKEY ET AL., supra note 14, 4.02. (recognizing that “neither distributors nor prosecutors” can conclusively declare material obscene because the current legal regime relegates that decision to the trier of fact); Debra D. Burke, Cybersmut and the First Amendment: A Call for a New Obscenity Standard, 9 HARV. J.L. & TECH. 87, 108–10 (1996) (declaring that current obscenity law “fails to provide meaningful guidance” to either publishers or law enforcement because juries may reach opposing conclusions both “over time and across jurisdictions”); see W. Doug Waymire, Alexander v. United States: When a Picture's Worth 1000 Years, 26 U. TOL. L. REV. 237, 267–68 (1995) (noting that the “inherent residual vagueness” of any obscenity definition may cause publishers to suppress speech voluntarily that approaches “the fringe of constitutional protection” in order to avoid prosecution (quoting Paris Adult Theatre I v. Slaton,
Technological advances and the development of new methods of publication have exacerbated the dilemma facing putative publishers. In particular, the rapid expansion of the Internet, fueled by increasing ease of access and popular mobile technology, has introduced even greater uncertainty into an already ambiguous area of the law, accompanied by potentially ominous results. Obscenity status is currently determined by applying the 413 U.S. 49, 84 (1973) (Brennan, J., dissenting)). Thus, the uncertainty caused by the procedural aspects of current obscenity law (i.e., allowing the trier of fact to make subjective evaluations), the lack of a firm substantive definition of obscenity, and the harsh criminal sanctions imposed on violators may operate as a de facto prior restraint on speech. See id. (citing Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations, 413 U.S. 376, 390 (1973)).

16. See Burke, supra note 15, at 111 (noting that previously “tolerable” deficiencies in obscenity law become “intolerable” in the context of online speech).

17. See AARON SMITH, HOME BROADBAND 2010, PEW INTERNET & AM. LIFE PROJECT 6 (Aug. 11, 2010), available at http://www.pewinternet.org/~/media/Files/Reports/2010/Home%20broadband%202010.pdf (estimating that sixty-six percent of American adults had a home broadband connection in May 2010, compared to six percent in April 2001); see also Obama Announces New U.S. Broadband Connection Funding, CNN (July 2, 2010), http://www.cnn.com/2010/POLITICS/07/01/obama.broadband.connection/index.html (explaining that $795 million in Recovery and Reinvestment Act funds were devoted to expanding broadband access to rural communities with “little or no” broadband service). In addition to increased home access by individuals, many businesses and most academic institutions now offer free Internet access to consumers. See Reno v. ACLU, 521 U.S. 844, 850 (1997) (“Most colleges and universities provide [Internet] access for their students and faculty . . . .”); Claire Cain Miller, Aiming at Rivals, Starbucks Will Offer Free Wi-Fi, N.Y. TIMES, June 15, 2010, at B1 (announcing that Starbucks would offer free and unlimited Internet access to customers to compete with many independent coffee houses and larger chains, such as McDonald’s); Jen Trolio, Top 20 Wired Colleges: #2 M.I.T., PCMAG.COM (Dec. 20, 2006), http://www.pcmag.com/article2/0,2817,2073459,00.asp (touting M.I.T.’s sprawling campus network, which consists of over “3,000 wireless access points”).

18. See Matthew Ingram, Mary Meeker: Mobile Internet Will Soon Overtake Fixed Internet, GIGAOM (Apr. 12, 2010, 2:27 PM PT), http://gigaom.com/2010/04/12/mary-meeker-mobile-internet-will-soon-overtake-fixed-internet/ (reporting that Mary Meeker, respected Internet and technology analyst, predicted that the number of mobile-Internet users will surpass the number of stationary-Internet users within five years). Meeker also predicted that mobile-Internet traffic will increase four-thousand percent by 2014. Id.


20. See Robert F. Goldman, Put Another Log on the Fire, There’s a Chill on the Internet: The Effect of Applying Current Anti-Obscenity Laws to Online Communications, 29 GA. L. REV. 1075, 1076–78 (1995) (providing a hypothetical example in which online communications involving nudity, intended for an academic, adult audience, may nonetheless subject the publisher and the Internet-service provider to criminal sanctions); see also United States v. McCoy, 678 F. Supp. 2d 1336, 1340 (M.D. Ga. 2009) (discussing the prosecution of a Minnesota resident by federal authorities in Georgia for publishing fictional works describing sexual and violent
“contemporary community standards” of a particular local community.21 Material published on the Internet, however, is ubiquitous and is available notwithstanding geographic boundaries or limitations.22 To avoid fines and prison sentences in restrictive communities, Internet publishers are forced to censor the content available to all users—content that would otherwise be constitutionally protected in more liberal communities.23 Thus, currently controlling obscenity precedents, when applied to Internet materials, may result in the suppression of immense amounts of free speech.24 Given the Internet’s vast capacity both to benefit and harm society by facilitating encounters with young children). Federal agents, based in Georgia, pursued charges against the defendant predicated solely on fictional works published online. McCoy, 678 F. Supp. 2d at 1340. A federal magistrate judge in Minnesota denied the government’s request for a search warrant because the published material was not obscene under Miller. Id. at 1340–41. On appeal, a federal district court judge also refused to issue the requested warrant, agreeing that the material was not obscene. Id. at 1341. The judge also noted that the fictional works were not publically available to Georgia residents, and that federal agents obtained the materials only after they emailed the author and requested them. Id. Federal judges in Georgia and Texas, however, granted the warrants, and, despite the Minnesota court’s explicit holding that the fictional works were not obscene under Minnesota standards, a Georgia grand jury indicted the defendant for transporting obscenity. Id. at 1340–41. Although the defendant filed numerous motions to dismiss, a federal judge for the Middle District of Georgia denied them, leaving the defendant facing the possibility of criminal sanctions due to his writings. See id.

21. See Miller v. California, 413 U.S. 15, 30 (1973) (“The adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community . . . [so t]o require a State to structure obscenity proceedings around . . . a national ‘community standard’ would be an exercise in futility.” (first emphasis added)); STUCKEY ET AL., supra note 14, § 4.02.

22. Reno, 521 U.S. at 853 (acknowledging that the infrastructure of the Internet defies attempts to restrict access to materials geographically, as there is no “centralized point” from which either users or Internet publishers can be denied access); Mitchell P. Goldstein, Congress and the Courts Battle over the First Amendment: Can the Law Really Protect Children from Pornography on the Internet?, 21 J. MARSHALL J. COMPUTER & INFO. L. 141, 203 (2003) (explaining that a person’s geographical location presents no barrier when trying to access material on the Internet).

23. See Ashcroft v. ACLU, 535 U.S. 564, 578 (2002) (plurality opinion) (noting that the broad scope of a prior, unconstitutional statute, in conjunction with the variations in local community standards, would have forced Internet publishers to restrict speech permissible in more liberal communities to avoid sanctions in other communities in which the speech would run “afoul of community standards”).

24. See id. at 587 (O’Connor, J., concurring in part) (noting that the inclusion of a local community standard may render a statute unconstitutional if a party successfully establishes “substantial overbreadth”); see also Clay Calvert & Robert D. Richards, Adult Entertainment and the First Amendment: A Dialogue and Analysis with the Industry’s Leading Litigator and Appellate Advocate, 6 VAND. J. ENT. L. & PRAC. 147, 163–64 (2004) (discussing a controversial list, promulgated among producers of adult videos, that was designed to minimize producer liability by suggesting voluntary restrictions on certain potentially permissible content); Michael J. Gray, Applying Nuisance Law to Internet Obscenity, 6 I/S: J. L. & POL’Y FOR INFO. SOC’Y 317, 325 (2010) (noting that haphazard enforcement of obscenity laws, coupled with severe sanctions, can chill online speech).
communication, and the potential that it may emerge as the predominant medium for publishing and disseminating speech, the chilling of Internet speech raises critical legal issues.

To prevent the suppression of otherwise constitutional speech, some courts, legislators, and commentators have proposed a national community standard to evaluate whether online material is obscene. The Supreme Court, however, in a split 2002 decision, *Ashcroft v. ACLU*, held that statutory criteria defining obscenity by referring to local "community standards" were not unconstitutional. Notably, only three Justices were willing to declare definitively that local community standards are constitutional in the context of

25. See Hillary Rodham Clinton, Sec'y of State, Remarks on Internet Freedom at the Newseum (Jan. 21, 2010) (transcript available at http://www.state.gov/secretary/rm/2010/01/135519.htm). Specifically, the Secretary of State proclaimed:

> Now, in many respects, information has never been so free. . . .
> 
> . . . [President Obama has] defended the right of people to freely access information, and said that the more freely information flows, the stronger societies become. . . .
> 
> [A]ccess to information helps citizens hold their own governments accountable, generates new ideas, encourages creativity and entrepreneurship. . . .
> 
> . . . [But t]he same networks that help organize movements for freedom also enable Al-Qaida to spew hatred and incite violence against the innocent.

Id.; see also *RICHARD WORTLEY & STEPHEN SMALLBONE, U.S. DEP'T OF JUSTICE, PROBLEM-ORIENTED GUIDES FOR POLICE, PROBLEM-SPECIFIC GUIDE SERIES, GUIDE NO. 41: CHILD PORNOGRAPHY ON THE INTERNET* (May 2006), available at http://www.cops.usdoj.gov/files/rc/Publications/e04062000.pdf (expressing the prevalent concern among law enforcement officials that the rise of the Internet has "dramatically changed the scale and nature of the child pornography problem").

26. See John Fine, *Net to Newspapers: Drop Dead*, *BUSINESSWEEK*, July 4, 2005, at 24 (discussing the possibility that the Internet may eventually drive traditional publications out of business); Laurie Petersen, *Internet Ad Spending to Overtake All Other Media by 2011: VSS, MEDIA POST NEWS* (Aug. 7, 2007, 6:00 AM), http://www.mediapost.com/publications/?fa=Articles.showArticle&art_id=65282 (stating that a major private-equity firm predicted that online advertising would generate more revenue than any other form of media, including broadcast television and traditional periodicals, by 2011).

27. See *Ashcroft*, 535 U.S. at 587 (O'Connor, J., concurring in part) ("[A]doption of a national standard is necessary in my view for any reasonable regulation of Internet obscenity."); *Id.* at 589 (Breyer, J., concurring in part) ("I write separately because I believe that Congress intended the statutory word 'community' to refer to the Nation's adult community taken as a whole, not to geographically separate local areas."); United States v. Kilbride, 584 F.3d 1240, 1254 (9th Cir. 2009) ("[A] national community standard must be applied in regulating obscene speech on the Internet."); *H.R. REP. NO. 105-775*, at 28 (1998) ("The Committee recognizes that the applicability of community standards in the context of the Web is controversial, but understands it as an 'adult' standard, rather than a 'geographic' standard, and one that is reasonably constant among adults in America . . . ."); Mark Cenite, *Federalizing or Eliminating Online Obscenity Law as an Alternative to Contemporary Community Standards, 9 COMM. L. & POL'Y* 25, 25–26 (2004) (noting that the concerns expressed by the concurring Justices in the *Ashcroft* opinion may warrant the adoption of a national standard).

28. *Ashcroft*, 535 U.S. at 585 (holding that the use of local community standards alone did not render the statute unconstitutional). The Court expressly refused to comment on potential overbreadth concerns, vagueness, or the likelihood that the statute could survive strict scrutiny. *Id.* at 585–86.
online obscenity. The other four opinions all questioned the applicability of local standards, and two Justices openly endorsed the adoption of a national standard to judge Internet obscenity. Thus, although eight Justices concurred in the ultimate judgment, the legal analysis behind each decision varied significantly.

The highly fractured Ashcroft ruling recently led to a circuit split over whether a local or national community standard should govern Internet obscenity. The Ninth Circuit, in United States v. Kilbride, interpreted Ashcroft to require that a jury be instructed to consider national community standards when deliberating on obscenity charges arising from distribution of images via email. Precedent required the court to interpret the Ashcroft holding as "that position taken by those Members who concurred in the judgments on the narrowest ground." Five of the Justices who concurred in the Ashcroft judgment did not disregard the potential overbreadth problems inherent in the use of a local community standard, as the plurality did, and five of the Justices "viewed the . . . national community standard as not or likely not posing [serious constitutional] concerns by itself." Thus, the Ninth Circuit determined that a national community standard was required to evaluate online obscenity under Ashcroft.

29. See id. at 583 (noting that although Justices John Paul Stevens and Anthony M. Kennedy concurred in the judgment, they questioned the "applicability of [the] community standards jurisprudence to the Internet").

30. See id. at 587 (O'Connor, J., concurring in part) ("[R]espondents' failure to prove substantial overbreadth on a facial challenge in this case still leaves open the possibility that the use of local community standards will cause problems for regulation of obscenity on the Internet . . . in future cases."); id. at 589–90 (Breyer, J., concurring in part) (observing that because the statutory language referred to a national, adult standard rather than local standards, the Court could avoid examining the statute to determine the existence of a "serious First Amendment problem"); id. at 593 (Kennedy, J., concurring in the judgment) ("[T]he variation in community standards might well justify enjoining enforcement of the Act."); id. at 603 (Stevens, J., dissenting) (decrying the potential use of local community standards as "a sword, rather than a shield," when applied to online speech).

31. Id. at 587 (O'Connor, J., concurring in part) (stating that a national standard is imperative for the "reasonable regulation" of online speech); id. at 589–90 (Breyer, J., concurring in part).

32. See supra notes 29–31 and accompanying text.

33. See United States v. Little, 365 F. App'x 159, 164 (11th Cir. 2010) (per curiam) (stating that the Ninth Circuit’s justification for applying a national standard to Internet obscenity relied on Supreme Court dicta instead of the Court’s ruling); United States v. Kilbride, 584 F.3d 1240, 1254 (9th Cir. 2009) (interpreting the Ashcroft opinion as allowing the application of a national community standard to online-obscenity prosecutions); United States v. Stagliano, 693 F. Supp. 2d 25, 31–32, 31 n.8 (D.D.C. 2010) (rejecting the Ninth Circuit’s interpretation of Ashcroft).

34. Kilbride, 584 F.3d at 1244, 1254.

35. Id. at 1253–54 (quoting Marks v. United States, 430 U.S. 188, 193 (1977)).

36. Id. at 1254.

37. Id.
Both the Eleventh Circuit and the United States District Court for the District of Columbia, however, have refuted the Ninth Circuit's interpretation of Ashcroft to varying degrees. In United States v. Little, the defendants appealed a federal conviction for online distribution of obscene materials and claimed, in part, that the use of a local community standard to judge Internet obscenity amounted to a violation of their First Amendment rights. The Eleventh Circuit refused to follow Kilbride and claimed that the Ninth Circuit's decision was based solely on dicta; instead, it found that Ashcroft validated the use of local community standards regardless of the medium of transmission.

Similarly, in United States v. Stagliano, the defendants were prosecuted for interstate trafficking of obscene materials, and the United States District Court for the District of Columbia also refused to interpret Ashcroft as requiring application of national standard. The court rejected the defendants' argument that the federal criminal statutes were overbroad as applied to Internet speech solely because the statutory criteria defining the obscenity test included local community standards. Thus, both the Eleventh Circuit and the United States District Court for the District of Columbia have issued opinions that are diametrically opposed to the Ninth Circuit's decision in Kilbride.

This Comment traces the development of general obscenity law and the First Amendment concerns underlying the Kilbride, Little, and Stagliano decisions, beginning with the assimilation of British common law concepts into American jurisprudence. Next, it traces the evolution of American obscenity jurisprudence, including the adoption of the current governing test and the extension of that test to various mediums of communication. This Comment then analyzes the Ninth and Eleventh Circuit decisions, as well as the decision from the United States District Court for the District of Columbia, in light of both prior precedent and concerns over whether those precedents are appropriate to regulate online obscenity. Finally, this Comment discusses the legal concerns that plague the use of "local community standards" to determine whether online material is obscene. Ultimately, this Comment concludes that adopting a bifurcated standard for online obscenity, based on a distinction between active and passive dissemination, is the most effective method for minimizing constitutional overbreadth and the suppression of protected speech.

38. See infra notes 39-43 and accompanying text.
39. United States v. Little, 365 F. App'x 159, 161–63 (11th Cir. 2010) (per curiam). Instead, the defendant, relying on the Ashcroft concurrences and dissent, argued that the court should apply a national community standard. Id. at 163–64.
40. Id. at 164.
42. Id. at 33.
43. See supra notes 37–42 and accompanying text.
I. THE EVOLUTION OF AMERICAN OBSCENITY JURISPRUDENCE

The First Amendment states that “Congress shall make no law ... abridging the freedom of speech ...”44 Constitutional jurisprudence, however, indicates that the freedom of speech is not absolute.45 The state may regulate speech given a sufficiently important or compelling interest.46 States have used this rationale to restrict obscene materials, and laws criminalizing the publication of such materials date back to the colonial era, appearing as early as 1712.47 The Supreme Court did not address the extent to which the First Amendment sheltered obscenity, however, until 1957.48

In Roth v. United States, the Court considered a First Amendment challenge to federal obscenity statutes and bluntly pronounced that “obscenity is not within the area of constitutionally protected speech.”49 The Court held that the “lewd and obscene” generally did not promote beneficial social discourse and thus could be excluded in the interests of “order and morality.”50

44. U.S. CONST. amend. I.
46. See supra note 45. The sufficiency of the state interest varies depending upon whether the regulation at issue targets the content of speech. Compare Playboy, 529 U.S. at 813 (requiring a compelling interest to regulate speech based on content), with Turner Broad. Sys., 520 U.S. at 189 (allowing content-neutral regulations based upon only “important” state interests).
47. See Roth v. United States, 354 U.S. 476, 482-83 (1957) (noting that Massachusetts specifically banned obscene speech mocking religious ceremonies in 1712 and that by the beginning of the nineteenth century, every state criminalized either blasphemy or profanity).
48. Id. at 481 (“[T]his is the first time the question [of whether obscenity falls within the protection of the First Amendment] has been squarely presented to this Court, either under the First Amendment or under the Fourteenth Amendment . . . .”).
49. Id. at 485.
50. Id. (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1941)). But see Lawrence v. Texas, 539 U.S. 558, 577-78 (2003) (declaring that private conduct may not be prohibited on the basis of the majority’s view of perceived immorality). Justice Antonin Scalia, dissenting in Lawrence, argued that by precluding morality as a basis for legislation, the Court’s decision essentially invalidated obscenity laws. Lawrence, 539 U.S. at 590 (Scalia, J., dissenting). Indeed, in the wake of Lawrence, there have been multiple substantive due process challenges to the government’s ability to regulate obscenity. See, e.g., United States v. Stagliano, 693 F. Supp. 2d 25, 37 (D.D.C. 2010) (addressing the defendants’ argument that the obscenity statutes under which they were charged were unconstitutional because Lawrence restricted the government from citing morality as a legitimate interest); United States v. Handleby, 564 F. Supp. 2d 996, 1008 (S.D. Iowa 2008) (addressing the defendant’s argument that Lawrence invalidated federal obscenity statutes); United States v. Extreme Assocs., Inc., 352 F. Supp. 2d 578, 586 (W.D. Pa. 2005) (discussing the defendant’s argument that Lawrence precludes the government from regulating obscenity solely on moral grounds), rev’d by United States v. Extreme Assocs., Inc., 431 F.3d 150, 162 (3d. Cir. 2005).

Courts, however, have generally refused to invalidate obscenity statutes. Some have read Lawrence as only belonging to a line of substantive due process cases involving fundamental
Although modern legal theory has eschewed such broad exemptions from First Amendment protection,\(^5\) the Court today still recognizes a "limited" exception for obscenity.\(^5\) Thus, governmental authorities may constitutionally proscribe speech that is deemed obscene,\(^5\) including regulating the electronic transmission of obscene materials.\(^5\)

A. Early Attempts to Define Obscenity Coherently and the Rejection of the British Common Law Test

Traditionally, courts have struggled to delineate obscene speech from constitutionally protected, albeit offensive and sexually charged, speech.\(^5\) In the late-nineteenth and early-twentieth centuries, several American courts

\(^{51}\) See Stagliano, 693 F. Supp. 2d at 37–38; Handley, 564 F. Supp. 2d at 1008 (noting that Lawrence involved "personal sexual relations in the privacy of an individual’s home"). Other courts have simply held that the Supreme Court has previously rejected the argument that the right to privacy, implicated in Lawrence, precluded obscenity regulations. See United States v. Coil, 442 F.3d 912, 916 (5th Cir. 2006) (discussing the Supreme Court’s continued refusal to interpret the right to privacy as protecting commercial transactions or distribution of obscene material); Handley, 564 F. Supp. 2d at 1008 (adopting the conclusion of the Third Circuit’s opinion in Extreme Associates Inc.); Extreme Assocs. Inc., 431 F.3d at 159 (declaring that the Supreme Court previously distinguished the right to privacy and the corollary freedom to possess obscenity in the home from statutes criminalizing the distribution of obscenity to members of the public).

Furthermore, Lawrence is explicitly limited to private conduct. See Lawrence, 539 U.S. at 578. Thus, Lawrence’s holding does not affect obscenity statutes criminalizing the dissemination of obscene material.

\(^{52}\) Id. at 383.

\(^{53}\) Id. at 383–84. The state, however, may not criminalize mere possession of obscene materials at home, for doing so violates the First and Fourteenth Amendments. Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one’s own home."). The right to possess obscene material in private, however, implies no "correlative right" to distribute such material. United States v. 12 200-Foot Reels of Super 8mm. Film, 413 U.S. 123, 128 (1973). The right to private possession also creates no “zone of constitutionally protected privacy [that] follows such material when it is moved outside the home area.” United States v. Orito, 413 U.S. 139, 141–42 (1973). Thus, obscenity statutes criminalizing the sale or dissemination of obscene materials do not violate First Amendment rights.

\(^{54}\) United States v. Thomas, 74 F.3d 701, 708–09 (6th Cir. 1996) (holding that the federal statute criminalizing the distribution of obscene materials included electronic transmissions, based on both the plain language of the statute and congressional intent to design comprehensive legislation governing the interstate distribution of obscenity); STUCKEY ET AL., supra note 14, § 4.02 (stating that obscene electronic materials may be regulated).

\(^{55}\) See, e.g., Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 704–06, 705 n.1 (1968) (Harlan, J., concurring in part and dissenting in part) (referring to an “intractable obscenity problem” and noting that thirteen previous obscenity rulings produced fifty-five separate opinions).
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adopted an obscenity standard based on British common law.\textsuperscript{56} That standard, culled from \textit{Regina v. Hicklin}, determined obscenity by evaluating the effect that the work's isolated, obscene passages had on "particularly susceptible persons."\textsuperscript{57} The test, however, eventually fell into disfavor with American jurists.\textsuperscript{58} As the \textit{Roth} court noted, "[t]he \textit{Hicklin} test . . . might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press."\textsuperscript{59} Thus, one of the earliest Supreme Court obscenity precedents reflected a desire to avoid the undue suppression of speech in the quest to prohibit obscenity.\textsuperscript{60}

Moreover, in \textit{Roth}, the Supreme Court adopted the standard developed by American courts to replace \textit{Hicklin}.\textsuperscript{61} The emerging standard evaluated potentially obscene work by asking "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."\textsuperscript{62} According to the Court, "prurient interest" is different from mere sexual arousal; it denotes "itching, morbid, or lascivious longings" and "shameful" desire.\textsuperscript{63} Thus, the modern test was far narrower than \textit{Hicklin} because it allowed potentially obscene passages to be analyzed in context, judged those passages from the position of an average

\begin{itemize}
\item \textsuperscript{56} See \textit{Roth} v. United States, 354 U.S. 476, 488-89, 489 n.25 (1957) (identifying the British test as the "early leading standard" for defining obscenity).
\item \textsuperscript{57} \textit{Id.} at 488-89 (citing \textit{Regina v. Hicklin}, [1868] 3 Q.B. 360, at 371).
\item \textsuperscript{58} See id. at 489 & n.26 (noting that multiple American courts adopted a different standard, perhaps due to dissatisfaction with the \textit{Hicklin} test's overly broad reach); \textit{United States v. Kennerley}, 209 F. 119, 120-21 (S.D.N.Y. 1913) (finding that precedent compelled the court to apply the \textit{Hicklin} test despite the unfortunate potential to "reduce [its] treatment of sex to the standard of a child's library in the supposed interest of a salacious few").
\item \textsuperscript{59} \textit{Roth}, 354 U.S. at 489.
\item \textsuperscript{60} See id.
\item \textsuperscript{61} As early as 1907, the New York Court of Appeals tried to moderate the effects of the overly strict \textit{Hicklin} standard. See \textit{People v. Eastman}, 81 N.E. 459, 460 (N.Y. 1907) (per curiam) (holding that statutory language banning "indecent" material was intended to punish only obscene material and not intended to "regulate manners"); see also \textit{United States v. Dennett}, 39 F.2d 564, 568 (2d Cir. 1930) (noting that the \textit{Eastman} court adopted a standard less rigorous than \textit{Hicklin}).
\item \textsuperscript{62} \textit{Roth}, 354 U.S. at 489.
\item \textsuperscript{63} \textit{Id.} at 487 n.20, 488 (quoting \textit{WEBSTER'S NEW INTERNATIONAL DICTIONARY 1996} (2d ed. 1949)).
\end{itemize}
community member, and required prurient arousal. The Roth court approved the narrower test because its safeguards substantially reduced the probability of inadvertently punishing protected speech. By adopting this test, the Court hoped to reduce the risk that protected speech would be punished in an attempt to regulate the obscene.

B. Adoption of the Current Governing Paradigm: The Miller Test and Contemporary Community Standards

The Roth standard served as the foundation for the current obscenity test that was announced in Miller v. California. In Miller, the defendant was convicted for violating California's obscenity law by mailing unrequested, sexually explicit material. The Court held that the state’s interest in regulating obscene material was legitimate “when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles,” such as sending material through the mail. The Court outlined a three-pronged test to guide judges and juries in assessing obscenity while preventing infringement of a person’s First Amendment rights; the trier of fact should determine

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

The first two prongs of the test rely on community standards, despite the second prong’s lack of an explicit reference to such a standard.

The Court also addressed the scope of the relevant community to be considered. The Court rejected the use of a national standard to judge obscenity because, historically, courts have allowed “triers of fact to draw on

64. See supra notes 61–63 and accompanying text.
65. Roth, 354 U.S. at 489 (noting that the modern test, unlike the Hicklin standard, possessed safeguards that rendered it constitutional).
66. See id.
67. Miller v. California, 413 U.S. 15, 18 n.2, 24 (1973) (adopting the Roth definition of “obscene materials” and using its language as the basis for the first prong of the Miller test).
68. Id. at 17–18.
69. Id. at 18–19.
70. Id. at 24 (citations and internal quotations omitted).
71. See Pope v. Illinois, 481 U.S. 497, 500 (1987) (holding that community standards determine whether a work is patently offensive); STUCKEY ET AL., supra note 14, § 4.02(1)(b) (citing Miller, 413 U.S. at 30) (noting that local “community standards” were intended to be applied to the second prong of the Miller test).
72. Miller, 413 U.S. at 30–32.
73. See id. at 32–33 (holding that diverse community standards should not be “strangled by the absolutism of imposed [national] uniformity”).
the standards of their community” and “a national ‘community standard’ would be an exercise in futility.” However, the Court acknowledged that applying a local standard might chill some speech, especially in cases involving the risk of criminal prosecution for publishers who misjudge vague community standards. But, the majority reasoned that an average national standard would also chill speech because publishers would be unable to provide sexually oriented materials to communities with more permissive standards. The Court concluded that although the “fundamental First Amendment limitations on the powers of the States do not vary from community to community, . . . this does not mean that there are, or should or can be, fixed, uniform national standards [to judge obscene material].” Thus, the Court explicitly favored the use of a local community standard over a national standard.

C. Expanding the Influence of Community Standards and the Miller Test

Over the past several decades, the Supreme Court has refined the Miller test and expanded its influence. Not only has the Court approved the use of the Miller test to define obscenity at the federal level, but it has also extended Miller to encompass various modes of communication.

1. Incorporating the Miller Test into Federal Statutes

In Hamling v. United States, the Court approved the inclusion of community standards in a federal statute. The statute at issue in Hamling proscribed the distribution of obscene materials through the mail. The Miller Court upheld the use of jury instructions based on California state standards and referenced the standards of Maine and Mississippi, implying that state boundaries mark the limit of the local community. Id. The Court, however, also referenced the standards of Las Vegas and New York City, suggesting that a smaller local community also may be considered. Id.

74. Id. at 30 (first emphasis added).
75. Id. at 33 n.13 (internal citations omitted).
76. Id.
77. Id. at 30. Although the Court was emphatic that a national standard was unconstitutional, the scope of the local community was never clearly defined. See Cenite, supra note 27, at 35. The Miller Court upheld the use of jury instructions based on California state standards and referenced the standards of Maine and Mississippi, implying that state boundaries mark the limit of the local community. Id. The Court, however, also referenced the standards of Las Vegas and New York City, suggesting that a smaller local community also may be considered. Id.
78. Miller, 413 U.S. at 30.
79. See infra Part I.C.1–2.
80. See infra Part I.C.1.
81. See infra Part I.C.2.
82. Hamling v. United States, 418 U.S. 87, 105 (1974); see also Nitke v. Ashcroft, 253 F. Supp. 2d 587, 603 (S.D.N.Y. 2003) (per curiam) (citing Hamling, 418 U.S. at 94) (noting that Hamling was the first case in which the Supreme Court approved the use of local community standards in a federal statute).
83. See Hamling, 418 U.S. at 91.
chilling effect on speech.84 Consequently, the enactment of a federal obscenity statute did not mandate the creation of a uniform national standard.85

By upholding the statute, the Court also implicitly increased liability for any publisher mailing potentially obscene material.86 Congress enacted the statute to permit obscenity prosecutions in districts where the mail was either sent or received, as well as "any Federal district through which the obscenity passed while it was on its route through the mails."87 Thus, because individuals lack control over mail-delivery routes, Hamling extended Miller’s reach to jurisdictions not deliberately targeted by distributors.88

2. The Extension of the Miller Test to Various Methods of Dissemination

The Supreme Court has since extended the Miller test to other mediums of communication.89 In Sable Communications, Inc. v. FCC, the Court upheld a federal statute banning obscene “dial-a-porn” phone calls.90 The petitioners, purveyors of adult phone conversations, argued that the statute unconstitutionally created a de facto national standard.91 To avoid prosecution in less tolerant communities, the petitioners asserted that their content would have to conform to the most restrictive local standards in the nation.92 Citing Hamling, the Court rejected the petitioners’ facial challenge and reaffirmed the permissibility of subjecting distributors to varying local standards, even under federal law.93 The Court noted that Sable was “free to tailor its messages . . . to the communities it chooses to serve”94 by using operators or call-screening

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84. Id. at 106; see also Nitke, 253 F. Supp. 2d at 603 (citing Hamling, 418 U.S. at 106) (noting that the inclusion of local community standards in a federal statute would not “materially alter a pornographer’s risk calculus” because the potential for prosecution already existed under varying state community standards).
85. See Hamling, 418 U.S. at 105–06.
86. See Cenite, supra note 27, at 38–39 (citing Hamling, 418 U.S. at 144 (Brennan, J., dissenting)) (discussing Justice William J. Brennan, Jr.’s critique of Hamling and its impact on distributors who were unwilling to impose the increased self-censorship required by the Court’s decision).
87. Id. at 38 (quoting Hamling, 418 U.S. at 144 (Brennan, J., dissenting)).
88. See Hamling, 418 U.S. at 143–44 (Brennan, J., dissenting) (declaring that the statute at issue premised criminal liability on the “chancy course” the mail may take en route to its destination); Cenite, supra note 27, at 39 (stating that applying Justice Brennan’s reasoning to the Internet could subject Internet publishers to liability in any jurisdiction through which the electronic information passes).
89. See Cenite, supra note 27, at 38–40 (discussing the extension of Miller to adult telephone services and Internet bulletin-board services).
91. Id. at 124.
92. Id. (“Sable argues that the legislation . . . places message senders in a ‘double bind’ by compelling them to tailor all their messages to the least tolerant community.”).
93. Id. at 125 (citing Hamling, 418 U.S. at 106).
94. Id.
technology. Thus, local community standards are constitutionally applicable to obscenity transmitted via telephone.

In *United States v. Thomas*, the Sixth Circuit "extended the *Sable* reasoning to an online bulletin board system." The controversy in *Thomas* arose from federal convictions for the interstate transportation of obscene materials via the Internet. The defendants appealed, arguing that the application of local community standards chills speech when applied to "computer technology." Specifically, the defendants claimed that publishers providing electronic content would be forced to tailor the available content to the strictest local community standards. The court, however, noted that the potential for infringement of First Amendment rights existed only when publishers were unable to control access to content. Access to this particular bulletin board was strictly limited to subscribers, each of whom had completed an application that included the person's address. The court found that, because the defendants could limit their speech to specific geographical areas based on the applications, no First Amendment rights were infringed, and the defendants could be held to varying local community standards.

The *Thomas* decision likely marked *Miller*’s zenith. The sudden and rapid growth of the Internet reenergized the ebbing constitutional debate concerning local community standards, as foreshadowed by the issues raised in *Thomas*. One year after *Thomas*, the Supreme Court expressed concerns that applying community standards to Internet content would allow those most likely to be offended—the most restrictive communities—to judge speech intended for a national audience in *Reno v. ACLU*. The Court noted that individual modes of dissemination may require varying degrees of scrutiny that would be based, in part, on the risk of undesired exposure to obscene or indecent material and

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95. Id. (suggesting alternative technological means by which companies operating telephone services could restrict access to particular geographic areas); Cenite, *supra* note 27, at 39–40.
96. *Sable Commc'ns, Inc.*, 492 U.S. at 125–26 ("There is no constitutional barrier under *Miller* to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others.").
97. Cenite, *supra* note 27, at 40; *see* United States v. Thomas, 74 F.3d 701, 711–12 (6th Cir. 1996) (noting that the defendants had a screening system in place that allowed them to regulate membership and access to the obscene materials based on geography, and that *Sable* explicitly allowed the courts to require such regulations, regardless of cost to the publisher); STUCKEY ET AL., *supra* note 14, § 4.02 (noting that the situation in *Thomas* differed from previous cases because the defendants knew and could control who accessed the obscene materials).
98. *Thomas*, 74 F.3d at 705–06.
99. Id. at 711.
100. Id.
101. *Id*.
102. *Id*.; Cenite, *supra* note 27, at 40.
103. *Thomas*, 74 F.3d at 711–12.
104. *See supra* notes 16–20 and accompanying text.
the invasiveness of the medium of communication. However, the Court found that the Internet, much like adult telephone services, possessed neither of these qualities because it required users to take "affirmative steps to receive the communication." Consequently, the Court held that the Internet was not subject to enhanced scrutiny under the First Amendment, but it did not determine whether contemporary community standards alone could render a statute unconstitutional.

Several years later, in Ashcroft v. ACLU, the Supreme Court addressed the applicability of local community standards to obscene materials on the Internet. Ashcroft arose from a challenge to the federal Child Online Protection Act (COPA). In an attempt to avoid the statute being characterized as unconstitutionally overbroad, Congress codified the three-prong Miller test in COPA’s definition of “[m]aterial that is harmful to minors.” Yet, despite the inclusion of the Miller test, the Third Circuit still

106. Id. at 868.
107. Id. at 868–70.
108. Id. at 870.
109. See id. at 870, 878–79 (noting that the statute at issue was not narrowly tailored to its underlying goals, as demonstrated by the uncertainty of the statute’s scope and the legislature’s failure to consider less restrictive mechanisms to prevent minors from accessing harmful materials).
110. Ashcroft v. ACLU, 535 U.S. 564, 566 (2002) (plurality opinion) (“This case presents the narrow question whether the Child Online Protection Act’s ... use of ‘community standards’ to identify ‘material that is harmful to minors’ violates the First Amendment.”).
111. Id. at 566, 571–72. Congress enacted COPA to punish the knowing dissemination of material that is harmful to minors for commercial purposes via the Internet. See Child Online Protection Act, 47 U.S.C. § 231(a)(1) (2006).
112. See Ashcroft, 535 U.S. at 569–70 (acknowledging that COPA was drafted as a response to the demise of previous legislation). The Supreme Court was dissatisfied with Congress’s first attempt at regulating online obscenity—the Communications Decency Act of 1996 (CDA)—and found it to be overbroad and unconstitutional. See Reno, 521 U.S. at 874; supra text accompanying notes 104–05. The CDA endeavored to prevent minors from being exposed to online obscenity, but it suppressed too broad a range of speech that was permissible for adults. Reno, 521 U.S. at 874. The Court observed that some of the overbreadth concerns stemmed from the failure to integrate the Miller test fully. Id. at 873–74.
113. See 47 U.S.C. § 231(e)(6). The statute encompasses any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—
   (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
   (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
   (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

Id.
found the statute overbroad based on the application of contemporary community standards to the Internet.\textsuperscript{114} The Supreme Court reversed the Third Circuit in its highly fragmented \textit{Ashcroft} decision.\textsuperscript{115} The plurality, comprised of three Justices, distanced itself from the Court’s prior statement that “the ‘community standards’ criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message.”\textsuperscript{116} Instead, the plurality noted that COPA, unlike previous acts, codified all three elements of the \textit{Miller} test, including the “prurient interest” and “serious value” requirements.\textsuperscript{117} The Court reasoned that the use of local community standards in conjunction with the two limiting criteria did not infringe on First Amendment rights despite the presence of varying community standards.\textsuperscript{118}

Citing \textit{Sable}, the plurality also noted that the publisher should bear the burden of complying with various local standards.\textsuperscript{119} The Court determined that publishers who were unable or unwilling to bear the costs of targeting their material were still free to utilize a different medium to disseminate their material.\textsuperscript{120} Thus, the plurality held that the application of community standards to Internet publications alone did not render the statute unconstitutional, regardless of any actual variance in local community standards.\textsuperscript{121}

Justice Sandra Day O’Connor wrote separately to address “the constitutionality and desirability of adopting a national standard for obscenity

\begin{footnotes}
\item[114] ACLU v. Reno, 217 F.3d 162, 173–74 (3d Cir. 2000), rev’d by Ashcroft, 535 U.S. at 572–73. In making its decision, the Third Circuit relied on the argument that local community standards, in the context of a national online forum, would allow the most restrictive communities to dictate the content available nationwide. \textit{See id.} at 174 (quoting Reno, 521 U.S. at 877–78). Interestingly, this particular issue was raised by the court sua sponte during oral argument. \textit{Id.} at 173–74 (noting that neither the district court, the parties, nor the amicus had emphasized the constitutional concerns generated by local community standards).
\item[115] \textit{See} \textit{Ashcroft}, 535 U.S. at 566, 586, 589, 591, 602.
\item[116] \textit{Id.} at 577 (quoting \textit{Reno}, 521 U.S. at 877–78).
\item[117] \textit{Id.} at 578.
\item[118] \textit{Id.} at 580. The plurality placed particular emphasis on the inclusion of a “serious value” requirement because it was not intended to be judged by community standards. \textit{Id.} at 579 (“This is because ‘the value of [a] work [does not] vary from community to community based on the degree of local acceptance it has won.’” (quoting Pope v. Illinois, 481 U.S. 497, 500 (1987))). Instead, the serious value requirement was to be evaluated from the standpoint of a reasonable person, allowing appellate courts to establish a national minimum for socially redeeming material as a matter of law. \textit{Id.} (citing \textit{Reno}, 521 U.S. at 873).
\item[119] \textit{Id.} at 581 (quoting \textit{Sable Communications, Inc.} v. FCC, 492 U.S. 115, 125–26 (1989)).
\item[120] \textit{Id.} at 583 & n.14. \textit{But see infra} note 185 and accompanying text (arguing that individuals, small businesses, and public-interest organizations derive particular benefits from the Internet, not available through traditional publication mediums).
\item[121] \textit{Ashcroft}, 535 U.S. at 585.
\end{footnotes}
for regulation of the Internet." Justice O'Connor concurred in the judgment only because the ACLU had failed to demonstrate any actual, significant variance in local community standards. But Justice O'Connor argued that reliance on local community standards might place an undue burden on publishers, given their inability to control geographic access to online content. Refuting Miller's assertion that a national standard was "unascertainable" due to national diversity, Justice O'Connor noted that the Court had approved state standards despite the lack of uniform views in any given state population. Thus, Justice O'Connor concluded that "adoption of a national standard [was] necessary . . . for any reasonable regulation of Internet obscenity."

Justice Stephen G. Breyer's concurrence was premised on his belief that the legislative history of COPA indicated that Congress intended for community standards to be evaluated in the context of "the Nation's adult community taken as a whole." Furthermore, Justice Breyer distinguished this case from Hamling and Sable on the grounds that the characteristics of the Internet limited a publisher's ability to target particular regions. Thus, Justice Breyer's opinion also advocated for the eventual adoption of a national standard to assess online obscenity.

Finally, Justice Anthony M. Kennedy, joined by Justices David H. Souter and Ruth Bader Ginsburg, also concurred in the judgment. Justice Kennedy echoed Justice Breyer's concern that Hamling and Sable may be inapplicable to Internet-obscenity cases due to the "distinct attributes" of the Internet and the technical obstacles in controlling the dissemination of information to certain areas. Justice Kennedy maintained that, in analyzing the reach of the First Amendment, the Court must assess the unique characteristics of each medium. Ultimately, Justice Kennedy noted that local standards may

122. Id. at 586 (O'Connor, J., concurring in part).
123. Id. (agreeing that the respondents had not demonstrated that the statute was overbroad and therefore unconstitutional).
124. Id. at 587 (expressing concern that such a burden could "potentially suppress an inordinate amount of expression").
125. Id. at 588–89. According to Justice O'Connor, the Internet enhances the plausibility of a national community standard because it functions to expose even those in isolated communities to a multiplicity of views and to sustain a national discourse. Id. at 589.
126. Id. at 587, 589 ("[A] national standard is not only constitutionally permissible, but also reasonable.").
127. Id. at 589–90 (Breyer, J., concurring in part). Justice Breyer stated that interpreting the statute otherwise "would provide the most puritan of communities with a heckler's Internet veto affecting the rest of the Nation." Id. at 590.
128. Id. at 590–91.
129. See id. at 591 (Kennedy, J., concurring).
130. Id. at 594–95.
131. Id. ("The economics and the technology of each medium affect both the burden of a speech restriction and the Government's interest in maintaining it.").
present specialized First Amendment burdens in the context of the Internet, but he concluded that the appropriate community standard could not be determined until the lower court completed a more thorough factual assessment of the statute and its reach. Thus, although eight Justices concurred in the judgment reversing the Third Circuit, they espoused multiple divergent legal rationales for their decisions.

D. Post-Ashcroft: The Emergence of a Circuit Split as to the Constitutionality of Local Community Standards Online

1. The Ninth Circuit Interprets Ashcroft to Require National Community Standards to Evaluate Online Obscenity

In United States v. Kilbride, the Ninth Circuit interpreted Ashcroft to allow the use of a national community standard to assess obscenity distributed via bulk e-mail. The Ninth Circuit invoked Supreme Court precedent to aid in interpreting the divergent Ashcroft opinions, stating that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” According to the Ninth Circuit, the plurality opinion in Ashcroft held “that application of either a national community standard or local community standards to regulate Internet speech would pose no constitutional concerns by itself.” Accordingly, it determined that the plurality represented the broadest rationale for reversing the Third Circuit’s ruling in Ashcroft.

The Ninth Circuit read the concurring opinions, however, as representing slightly narrower views. The court found that Justices O’Connor and Breyer concurred with the plurality’s decision that the use of a national standard would generally not create First Amendment concerns, but dissented from the plurality’s view that a local standard also generated few constitutional

132. Id. at 597.
133. Id. at 601–02 (stating that a finding of overbreadth would necessarily depend on a variety of factors not adequately addressed by the lower courts, including a determination of what material is “to be taken as a whole” and of how community standards vary across jurisdictions with respect to that specific material).
134. See supra notes 122–33 and accompanying text.
135. United States v. Kilbride, 584 F.3d 1240, 1244, 1254 (9th Cir. 2009).
136. Id., at 1253–54 (quoting Marks v. United States, 430 U.S. 188, 193 (1977)) (internal quotation marks omitted). The Kilbride court also noted that the Ninth Circuit previously invoked the Marks doctrine to support its finding that the concurring opinion of a lone Justice represented the narrowest position of the Court. Id. at 1254 (quoting United States v. Williams, 435 F.3d 1148, 1157 n.9 (9th Cir. 2006)).
137. Id. at 1254.
138. See id.
139. Id. at 1252–53 (“Justice Thomas’s blanket dismissal of the overbreadth problem . . . was not joined by a majority of the Court.”).
concerns. Thus, according to the Ninth Circuit, five Justices held the narrow view that use of a national standard created few constitutional implications. Furthermore, the court stated that Justices Kennedy, Souter, and Ginsburg agreed with Justices O'Connor and Breyer that using the local community standard presented grave First Amendment concerns. The Ninth Circuit found that Justices O'Connor and Breyer's concurrences controlled because those opinions embodied the narrow holdings extrapolated from Ashcroft. Thus, the Ninth Circuit was persuaded "that a national community standard must be applied in regulating obscene speech on the Internet, including obscenity disseminated via email."

2. Circuits Retaining Local Community Standards Under Ashcroft

Conversely, the Eleventh Circuit has refused to adopt a national standard in the aftermath of Ashcroft. In United States v. Little, which arose from alleged offenses under federal obscenity statutes for marketing obscene videos online, the defendants appealed their convictions and claimed that the use of local community standards under Miller violated their First Amendment rights. The appeal specifically referred to the Ashcroft concurrences and dissent, and the court noted the Ninth Circuit's holding in Kilbride. The Eleventh Circuit, however, viewed the language relied upon in Kilbride as dicta. In particular, the Eleventh Circuit noted that the language in Justice O'Connor's opinion reflected her personal opinion, not necessarily her legal conclusions. Moreover, the court viewed Justice Kennedy's concurring decision to remand as requiring no decision as to whether the statute embodied a local or national standard, implying that further commentary on the benefits and dangers of those standards were dicta. Thus, the Eleventh Circuit found that Miller's local-community-standards test still prevailed.

140. Id. at 1254.
141. Id.
142. Id.
143. Id. ("[W]e must view the distinction Justices O'Connor and Breyer made between the constitutional concerns generated by application of a national and local community standards as controlling.").
144. Id.
145. See infra notes 148–51 and accompanying text.
147. Id. at 163–64 (noting that appellants argued for the application of a national community standard based on the Ashcroft concurrences and dissent, an argument supported by the Ninth Circuit in Kilbride).
148. Id. at 164.
149. Id. at 164 & n.10.
150. Id.
151. Id. at 164.
Similarly, the United States District Court for the District of Columbia held that Ashcroft left Miller and the local-standards test intact.\textsuperscript{152} The defendant in United States v. Stagliano claimed that the federal obscenity statutes under which he was charged were unconstitutionally overbroad as applied to Internet publishers because they incorporated Miller's local-community-standard test to judge obscenity.\textsuperscript{153} The district court, interpreting Ashcroft, noted that five Justices had indeed held that applying local community standards to an online setting under COPA risked creating potential overbreadth issues.\textsuperscript{154} But, the court also stated that the majority of the Justices concurring in the Ashcroft judgment also held that the use of local community standards alone did not render the statute overly broad absent a substantially stronger showing of actual variation in community standards.\textsuperscript{155} Furthermore, the district court observed that the challenged federal criminal statutes regulated far less material than COPA.\textsuperscript{156} Thus, if inclusion of local community standards in COPA did not create substantial suppression of protected speech, application of those same local standards to a less inclusive criminal statute could not logically violate the First Amendment.\textsuperscript{157} Therefore, the court rejected any interpretation of Ashcroft that required application of a national community standard.\textsuperscript{158}

II. AN ACCURATE READING OF ASHCROFT REJECTS THE OPPOSING POSITIONS OF THE NINTH AND ELEVENTH CIRCUITS

Based on prior law and contemporaneous commentary, the Ninth Circuit's analysis of Ashcroft in Kilbride is only partially correct. Invoking the Marks doctrine, which defines the holding of a fragmented decision as the "narrowest

\textsuperscript{153} Id. at 29.
\textsuperscript{154} Id. at 31 & n.7. Only Justice Breyer, however, found a national standard to be appropriate despite the lack of evidence on whether highly variable local community standards actually existed. See id. at 31 n.8. The district court concluded that Justice Breyer's concurrence was not the narrowest holding and was therefore not controlling. Id.
\textsuperscript{155} Id. at 31 & n.8.
\textsuperscript{156} Id. at 32–33. The statutes at issue included 18 U.S.C. §§ 1462, 1465, and 1466 and 47 U.S.C. § 223(d), all of which prohibit the interstate transport or distribution of obscene materials. Id. at 28. The defendants challenged § 1465 and § 223(d) specifically because each statute criminalized the "use of an interactive computer service" to traffic obscenity. Id. at 29; see also 18 U.S.C. § 1465 (2006 & Supp. III 2009); 47 U.S.C. § 223(d) (2006 & Supp. III 2009). The court distinguished the challenged statutes from COPA, observing that COPA generated powerful constitutional concerns due to the broad range of materials it regulated. Stagliano, 693 F. Supp. 2d at 32. COPA purported to cover all material harmful to minors, but the federal obscenity statutes at issue merely regulated obscenity, which is a far narrower class of speech. Id. at 32–33.
\textsuperscript{157} Stagliano, 693 F. Supp. 2d at 31–33.
\textsuperscript{158} Id. at 31 n.8 (disagreeing with the Ninth Circuit's holding that Ashcroft required a national community standard to evaluate online obscenity).
grounds” on which five Justices agree, the Ninth Circuit constructed two separate, narrow holdings: that application of local community standards may generate First Amendment concerns, and that a national standard would likely not.

A. Properly Interpreted, Ashcroft Provides for Continued Challenges to the Use of a Local Standard in the Online Context

The first holding extrapolated in Kilbride, that a local standard may be constitutionally questionable, is a valid reading of the various Ashcroft opinions. Rather than viewing this discussion as dicta, as suggested by the Eleventh Circuit, the concerns expressed by the concurring Justices in Ashcroft reveal the varying legal rationales underlying the ultimate decision to vacate the lower court’s holding declaring local community standards unconstitutional. Although eight Justices concurred in the judgment, only the plurality was willing to definitively declare local community standards constitutionally sound. Justices O’Connor, Kennedy, and Breyer on the other hand, questioned the constitutionality of local standards as applied to the Internet, based on serious concerns that the use of local community standards would suppress vast swaths of protected speech. Due to these concerns, the


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

161. See Stagliano, 693 F. Supp. 2d at 31 nn.7-8 (noting that five Justices expressed concerns that local standards, applied in the context of the Internet, may serve to stifle otherwise protected speech). But see United States v. Little, 365 F. App’x 159, 163-64 (11th Cir. 2010) (per curiam) (referring to remarks in Ashcroft that advocated for a national standard as mere dicta).

162. See supra text accompanying notes 148-49.

163. See Ashcroft v. ACLU, 535 U.S. 564, 586-87 (2002) (O’Connor, J., concurring in part) (joining with the plurality not because the use of local community standards was constitutional per se, but because the litigant had failed to prove significant, actual variation in community standards); id. at 590 (Breyer, J., concurring in part) (concurring in the judgment not because local standards were constitutionally valid, but because the legislative history of COPA indicated that Congress intended community standards to be national, which would present no constitutional concerns); id. at 593 (Kennedy, J., concurring in part) (finding that “community standards” may still present constitutional concerns despite the plurality’s view to the contrary). Thus, the remarks of the concurring Justices are far from dicta, particularly because of the ability of future litigants to challenge the application of local community standards to online content.

164. See id. at 583 (plurality opinion) (acknowledging that although Justices Stevens and Kennedy expressed reservations concerning the applicability of local community standards to Internet speech, the plurality concluded that no medium-specific standard was warranted); Stagliano, 693 F. Supp. 2d at 31 n.8 (stating that although the plurality in Ashcroft upheld COPA despite any actual variation in community standards, the five concurring Justices acknowledged the potential constitutional ramifications that could result given sufficient actual variation in community standards).

165. See Stagliano, 693 F. Supp. at 31 & n.7. Justice O’Connor concurred in the judgment solely because the ACLU had failed to prove that significant variations in local community
five concurring Justices welcomed future constitutional challenges to the use of local standards to judge online obscenity, given sufficient and substantial evidence of varying community standards.\footnote{See supra notes 122–33 and accompanying text.} Therefore, the Ninth Circuit properly held that one may still challenge local community standards under the First Amendment.

\footnote{United States v. Kilbride, 584 F.3d 1240, 1254 (9th Cir. 2009).}

\footnote{Id.}

\footnote{Id.}

\footnote{See Ashcroft v. ACLU, 535 U.S. 564, 564–86 (2002).}

\footnote{Id. at 577–78. In a previous ruling involving COPA’s predecessor, the Court “noted that the “community standards” criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message.” Id. at 577 (quoting Reno v. ACLU, 521 U.S. 844, 877–78 (1997)). This statement may be construed as acknowledging one of the principle rationales for adopting a national standard, if not as tacit support for it. Justice Thomas, however, took great
Thomas's opinion both denies the utility of and need for applying a national community standard. Moreover, Justice O'Connor's remarks supporting a national standard have been widely considered dicta. Thus, contrary to the Ninth Circuit's holding, a majority of the Ashcroft Justices did not adopt the notion that a national standard presented few constitutional issues. One of the two holdings constructed by the Ninth Circuit is therefore flawed, invalidating its conclusion that "a national community standard must be applied in regulating obscene speech on the Internet."

Equally invalid, however, is the Eleventh Circuit's dismissal of the Ashcroft concurring opinions as undeserving of any weight. As the United States District Court for the District of Columbia noted in Stagliano, the concerns of the concurring Justices relating to the potential constitutional infirmities of a local standard are clearly relevant because they indicate that future facial and as-applied challenges to the use of local standards may be successful if sufficient proof of divergent local community standards exists. Thus, although courts may be free to find local standards inapplicable to online obscenity, the ability of the courts to adopt broad national standards remains questionable in light of Ashcroft and the Ninth Circuit's flawed reasoning in Kilbride.
C. Policy Favors Adoption of a National Standard

Although the legal justification for adopting a national standard remains tenuous, a clear policy preference exists in favor of adopting a national standard. Assessing obscenity based on local standards presents legitimate First Amendment concerns. Despite obscenity being viewed as outside the purview of First Amendment protection, the state may not suppress substantial quantities of otherwise-protected speech while attempting to regulate obscenity. In an online context, however, using various local standards to judge obscenity requires Internet publishers to abide by the restrictions of the least tolerant community to minimize the risk of criminal prosecution, thereby creating First Amendment issues.

Internet speech is particularly susceptible to the vagaries of local standards and threats of criminal penalties because a substantial number of Internet publishers are actually unsophisticated individuals or small organizations, potentially foreclosed from publishing freely through more traditional mediums. Additionally, these individual users or small organizations may be particularly susceptible to the suppressive effects of local standards because

180. See infra notes 188–94 and accompanying text.

181. See supra Part II.A (arguing that Ashcroft may be read as allowing future challenges to the use of local community standards if significant quantities of constitutional speech are suppressed and an undue burden is placed on Internet publishers).

182. See Miller, 413 U.S. at 23.

183. See Virginia v. Hicks, 539 U.S. 113, 118 (2003); Stagliano, 693 F. Supp. 2d at 29; Cenite, supra note 27, at 56 (noting that regulatory schemes should be assessed based on the volume of protected speech suppressed, even when the “goal is regulating unprotected expression”).

184. See Ashcroft, 535 U.S. at 590 (Breyer, J., concurring in part) (“To read the statute as adopting the community standards of every locality in the United States would provide the most puritan of communities with a heckler’s Internet veto affecting the rest of the Nation.”); Cenite, supra note 27, at 56–57 (detailing the concerns associated with the “least tolerant community” conundrum).

185. See Reno v. ACLU, 521 U.S. 844, 853 & n.9 (1997) (noting that the Internet makes publication much easier and allows individuals and community organizations, in addition to commercial entities and government organizations, to disseminate information); Martin H. Redish & Kirk J. Kaludis, The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma, 93 NW. U. L. REV. 1083, 1131 (1999) (designating the Internet as the “new marketplace of expression” because it allows individuals to disseminate information publically, bypassing traditional intermediaries such as the “institutional media”); Christopher S. Yoo, Free Speech and the Myth of the Internet as an Unintermediated Experience, 78 GEO. WASH. L. REV. 697, 697 (2010) (noting that the Internet may allow individuals to communicate with a wide-ranging audience and thereby avoid traditional media “gatekeepers” from influencing or restricting content); see also Eugene Volokh, Cheap Speech and What It Will Do, 104 YALE L.J. 1805, 1821 (1995) (theorizing that the decreased costs of transmitting information electronically could allow public-interest organizations, such as the ACLU, to communicate with their members more frequently, and could also allow them to generate additional support for initiatives by reaching nonmembers more easily); supra note 17 and accompanying text (noting that a majority of adult Americans now have personal broadband-Internet access).
they may lack the financial and legal resources necessary to protect themselves against liability or to fight criminal prosecution.\textsuperscript{186} Thus, using local community standards presents an even greater threat to speech disseminated by individuals or small businesses.\textsuperscript{187}

Using a national standard to evaluate Internet obscenity would suppress far less speech.\textsuperscript{188} A “minimal” national standard, as proposed by some commentators, would entirely eliminate overbreadth concerns because only material judged obscene by the most permissive communities would result in criminal charges.\textsuperscript{189} A minimal national standard, however, would likely violate the rationale underlying \textit{Miller}.\textsuperscript{190} Thus, an “average” national standard, based on neither the most restrictive nor permissive community standards, may be more appropriate because it would likely comply with \textit{Miller}’s philosophical underpinnings and would suppress only the most egregious forms of obscenity.\textsuperscript{191} An average national standard may result in

\begin{itemize}
\item[186.] See Karen M. Markin, \textit{It’s Not the Thought that Counts: A Political Economy of Obscenity}, 58 S.C. L. \textsc{Rev.} 883, 893 (2007) (stating that in the “vast majority” of the reviewed obscenity cases, the government pursued actions against small businesses, which lacked the funds needed to fight the prosecution, rather than against larger publishers or corporations). Moreover, the Supreme Court was “aware that police action against small businesses could be quite effective in silencing obscene discourse.” \textit{Id.} The government also tried to suppress speech by creating adverse economic conditions for publishers of potentially obscene material. See Ross A. Keene, \textit{The Threat of Multiple Prosecutions as Prior Restraint}, 40 \textit{FED. B. NEWS \& J.} 383, 384 (1993) (describing a Justice Department strategy of repeatedly charging multiple individuals and corporations in various jurisdictions because eventually, the cost of defending against the criminal charges would become prohibitive).
\item[187.] \textit{See supra} notes 185–86 and accompanying text.
\item[188.] \textit{See Cenite, supra} note 27, at 57 (stating that a national standard would restrict the “influence of the least tolerant community” in the context of online obscenity).
\item[189.] \textit{Id.} at 59.
\item[190.] \textit{See Miller v. California}, 413 U.S. 15, 33 (1973) (noting that the Court intended the community-standards test to reflect the views of the average citizen rather than the views of a particularly sensitive individual). Thus, under \textit{Miller}, a legal regime that allows the most permissive communities to define the national standard for obscenity would be as intolerable as allowing the most restrictive to dictate the boundaries of permissible content. \textit{See id.}
\item[191.] \textit{See Cenite, supra} note 27, at 58–59. Cenite provides an excellent hypothetical to illustrate the quantity of speech potentially suppressed under local, minimal national, and average national standards. \textit{Id.} at 59–61. In the hypothetical, a nation is comprised of three equivalent communities, and each community rates obscene material on a scale ranging from one (least obscene) to ten (most obscene). \textit{Id.} at 59. Two of the communities allow obscene materials rated as high as eight, but the third allows only material rated at two or below. \textit{Id.} at 59–60. For online obscenity, a local standard would allow the third community to dictate the standard for the other two communities, essentially suppressing all material rated three or higher in every community. \textit{Id.} at 60. Thus, materials rated three through eight would be suppressed in two-thirds of the nation even though those portions of the nation would allow the materials, resulting in twelve “units” of suppressed speech. \textit{Id.} A minimal national standard, on the other hand, would punish distributors who disseminated materials rated nine or ten, which would result in no suppression of speech or overbreadth. \textit{Id.} at 61. Finally, an average national standard would suppress material rated higher than six (the average maximum permissible rating) in all three communities, which would result in the suppression of some speech in the more permissive communities. \textit{Id.} 60–61.
\end{itemize}
some overbreadth, but far less than the current application of local community standards.192 Furthermore, publishers could easily discern and understand a national standard, reducing the cost and need to research and comply with myriad local restrictions.193 As a matter of policy, a national standard is far superior to a local standard because it suppresses less speech.194

Critics of the national standard raise several objections to this approach.195 First, a national standard would continue to suppress otherwise-protected speech.196 However, although a national standard may suppress some speech, it would suppress less speech than local standards.197 Second, critics claim that a national standard is a practical impossibility.198 Such criticism, however, ignores the fact that local community standards may also encompass large areas marked by a diversity of opinions.199

Third, critics claim that using a national standard may create legal complications.200 Previous obscenity precedents have held, for example, that

The total amount of speech suppressed under the average national standard would, however, only be four units. See id. Thus, an average national standard has the potential to eliminate some of the more severe overbreadth concerns that plague the local standards in an online context. See id. at 59–60.

192. See supra notes 188, 191.

193. See supra note 27, at 57.

194. See supra notes 188–93 and accompanying text; see also Reno v. ACLU, 521 U.S. 844, 874–75 (1997) (noting that no government interest can justify the “unnecessarily broad suppression of speech addressed to adults,” particularly when less restrictive means of promoting that government interest exist); Sable Communications, Inc. v. FCC, 492 U.S. 115, 130–31 (1989) (invalidating a statute that was not narrowly tailored to the “compelling interest of preventing minors from being exposed” to harmful material because the statute suppressed material that adults were otherwise permitted to access); Roth v. United States, 354 U.S. 476, 489 (1957) (discarding the Hicklin test in favor of a less restrictive standard to avoid undue unconstitutional restriction “of the freedoms of speech and press”).


196. See Miller v. California, 413 U.S. 15, 32 n.13 (1972) (noting that even if a national standard was implemented, speech would still be restricted in the most permissive communities).

197. See supra notes 191–92 and accompanying text.

198. See Miller, 413 U.S. at 30 (opining that the nation is too diverse to encapsulate the views of all fifty states into a single standard).

199. See Ashcroft v. ACLU, 535 U.S. 564, 588–89 (1973) (O’Connor, J., concurring in part) (noting that diverse opinions exist in local communities such as California, which has a population of 33 million people and “includes both Berkeley and Bakersfield”).

200. Meredith Leigh Friedman, Keeping Sex Safe on the Information Superhighway: Computer Pornography and the First Amendment, 40 N.Y.L. Sch. L. Rev. 1025, 1046–47 (1996) (noting that obscenity cases are factually rich and need careful “case-by-case” consideration); Jason Kipeness, Revisiting Miller After the Striking of the Communications Decency Act: A Proposed Set of Internet Specific Regulations for Pornography on the Information Superhighway,
burdening publishers with the tasks of ascertaining the individual standards of each locality and restricting the dissemination of their materials to specific geographical areas may be significant but is not unconstitutional. Yet, these obscenity precedents may be inapplicable in an online setting due to the technological limitations that prevent Internet publishers from targeting specific geographic areas.

Some of these obscenity precedents might still apply in certain settings. The holding in Hamling, however, is not as easily dismissed by those seeking to eliminate local standards online because Hamling did not rely on the ability of a particular speaker to target a geographical area. In fact, Hamling affirmed a statute expressly enacted to allow criminal prosecution of publishers disseminating obscenity through the mail in any district through which the mail passed. Because publishers cannot control the course the mail takes, Hamling permitted the prosecution of publishers in areas that they had not targeted and in districts in which they had not intentionally offered their material. Thus, Hamling may not be dismissed cavalierly based on the inability of Internet publishers to target certain communities. As a result, any proposed national standard must distinguish the Internet from other forms of communication, without relying solely on technological limitations and geographical audiences.

202. See Ashcroft, 535 U.S. at 587 (O'Connor, J., concurring in part) (reasoning that cases involving online obscenity are distinguishable from prior decisions, such as Hamling and Sable, “given Internet speakers' inability to control the geographic location of their audience”); id. at 590 (Breyer, J., concurring in part) (“The technical difficulties associated with efforts to confine Internet material to particular geographic areas . . . potentially weaken the authority of prior cases in which they were not present.”); id. at 595-96 (Kennedy, J., concurring) (cautioning that different methods of communication must be analyzed individually to account for economic factors and technological concerns). But see id. at 580-82 (plurality opinion) (explaining that Hamling was not predicated upon the ability to limit distribution geographically, and that Sable mentioned such an ability “only as a supplemental point”).
203. See Hamling v. United States, 418 U.S. 87, 144 (1974) (Brennan, J., dissenting) (explaining that the majority utilized community standards due to the uncertain path that materials may travel through the mail); Ashcroft, 535 U.S. at 582 (acknowledging that the Hamling decision neither relied on nor even mentioned a publisher's ability to target specific communities).
204. See supra note 87 and accompanying text.
205. See Cenite, supra note 27, at 38.
III. ADOPTING A BIFURCATED STANDARD FOR EVALUATING ONLINE OBSCENITY BEST REDUCES OVERBREADTH AND ACCOUNTS FOR PRIOR PRECEDENT

Adopting a bifurcated standard that distinguishes between active and passive modes of dissemination is within the boundaries set by prior precedent. As the Court explained in Miller, the state has a “legitimate interest in prohibiting dissemination . . . of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles.” Furthermore, the Court recently noted that different methods of communication require varying levels of regulation based on the invasive nature of the medium, the risk of exposure to juveniles, and actions required to access the material.

When a publisher utilizes an active mode of dissemination—requiring few, if any, affirmative steps to access the material—greater regulation may be required. Conversely, less stringent regulation may be appropriate for passive dissemination, which requires a concerted effort to view questionable content. Thus, active modes of dissemination should be judged using the more-restrictive local community standards, and passive modes should be judged using the less restrictive national standard when technological limitations prevent publishers from restricting access to their materials in certain communities.

Hamling and Miller seemingly upheld the use of local, restrictive standards for active dissemination because both involved materials shipped through the mail. Materials distributed through the mail, and even e-mail that circulates obscene material, exemplify active dissemination because they require no

206. See Ashcroft, 535 U.S. at 594–95 (Kennedy, J., concurring) (stating that “each mode of expression” must be analyzed individually); see also Reno v. ACLU, 521 U.S. 844, 868–70 (1997) (noting that various mediums of communication merit varying levels of regulation, based on invasiveness, risk of unwanted exposure to obscene or indecent material, and whether “affirmative steps” are needed to access the material (quoting Sable, 492 U.S. at 127–28)).


208. See supra note 206.

209. See Reno, 521 U.S. at 868–69 (noting that broadcast media, such as radio and television, is more “invasive” than other forms of communication because audiences may be accidentally exposed to potentially obscene material; therefore, heightened regulation and scrutiny is appropriate).

210. See id. at 869–70 (refusing to apply any increased “First Amendment scrutiny” to the Internet).

211. See infra notes 215–16 and accompanying text.

212. See Hamling v. United States, 418 U.S. 87, 91 (1974); Miller, 413 U.S. at 18–19 (declaring that materials distributed through the mail carry a “significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles,” thus providing the state with a legitimate interest in regulating that particular mode of dissemination).
affirmative effort to be viewed, thereby increasing the risk of exposure to juveniles and unwilling recipients.

Prior precedent also supports using a national standard for passive modes of dissemination, but only when technology impedes the publisher’s ability to limit distribution of materials to specific geographic areas. Sable, for example, involved a telephone business that provided access to obscene materials only after the customer dialed a specific telephone number and agreed to pay a fee. The mode of dissemination in Sable was passive rather than active. Moreover, the Sable Court explicitly noted that technology allowed the distributing business to limit access to certain geographical areas. Similarly, in Thomas, the Sixth Circuit applied a local standard because the Internet publisher distributed materials through the mail and utilized an application process that revealed the geographic location of users. Thus, in cases involving passive dissemination, the ability to target geographic audiences is dispositive.

Distinguishing prior case law based on active and passive modes of dissemination removes the legal barriers preventing courts from applying national standards to Internet-obscenity cases. The majority of Internet publishers merely display material on websites that require users to actively seek the material, and thereby engage in passive dissemination. Because those Internet publishers have little control over accessibility due to technological limitations, prior precedent is inapplicable and a national standard should be applied.

213. See supra notes 206, 212.
214. See infra notes 215–17 and accompanying text.
215. Sable Commc’ns, Inc. v. FCC, 492 U.S. 115, 117–118 (1989) (describing the “dial-a-porn” business model); see also Reno, 521 U.S. at 869–70 (distinguishing the telephone service in Sable from more invasive modes of dissemination because gaining access to the adult telephone messages required users to exert effort).
216. Sable Commc’ns Inc., 492 U.S. at 125 (noting that the company could “hire operators to determine the source of the calls” or develop a more sophisticated screening system to block certain calls); see also Ashcroft v. ACLU, 535 U.S. 564, 587 (2002) (O’Connor, J., concurring in part) (“[G]iven Internet speakers’ inability to control the geographic location of their audience, expecting them to bear the burden of controlling the recipients of their speech . . . may be entirely too much to ask . . . .”). But see id. at 582–83 (plurality opinion) (stating that the ability of a publisher to control distribution of potentially obscene materials is irrelevant because publishers unwilling to subject themselves to varying community standards may simply avoid using the Internet as a mode of dissemination).
218. See Reno, 521 U.S. at 852 (finding that the majority of Internet information is accessed though webpages, each with a singular address, comparable to a telephone number). Users may access the information by entering the web address or by clicking on a link. Id. Thus, “users seldom encounter such [sexually explicit] content accidentally” because many webpages require users to bypass a warning. Id. at 854. The majority of Internet publishers engage in passive dissemination. See supra notes 207, 210 and accompanying text.
IV. CONCLUSION

Despite the Ninth Circuit's erroneous holding that Ashcroft requires the application of a national standard to online obscenity cases, a national standard may still be applicable in certain circumstances. As a matter of general policy, national standards in the online context are far superior to local standards. Under Hamling and Miller, however, local standards remain constitutional for Internet publishers engaged in active dissemination—such as sending bulk e-mail—despite the possibility of chilling speech.

Publishers engaged in passive dissemination may be held to local standards only if technology permits the publisher to target certain communities or to restrict the availability of its material to specific geographic areas. Because technology currently prohibits Internet publishers from enacting such restrictions, the application of local standards may present constitutional overbreadth concerns. Adopting an average national standard for such publishers would clearly suppress less speech than applying a local standard while adhering to the principles in Miller. Because the Internet provides unparalleled opportunities for individuals and public organizations to be heard in the "marketplace of expression," a national standard for assessing online obscenity is imperative to avoid suppressing otherwise-protected speech.

219. See supra Part II.B.
220. See supra notes 214–17 and accompanying text.
221. See supra Part II.C (noting that the threat of suppressing free expression diminishes with a national as opposed to a local standard for judging obscenity).
222. See supra notes 206, 212 and accompanying text.
223. See supra text accompanying notes 214–17.
224. See supra note 22 and accompanying text.
225. See supra notes 23–28 and accompanying text.
226. See supra Part II.C.
227. See Redish, supra note 185, at 1131.