Aligning Cyber-World Censorship with Real-World Censorship

JACOB WERRETT[†]

I. INTRODUCTION

Should six-year-old children be able to access "the largest pornography store in the history of mankind?"[1] They can.[2] Should eleven be the average age at which a child first views pornography? It is.[3] Should children between the ages of twelve and seventeen represent the largest group of pornography consumers? They do.[4] It is puzzling that a quintessentially adult activity has increasingly edged-out Saturday morning cartoons, homework, piano lessons, and T-ball games. Perhaps social consensus is that teenagers are best served by searching out porn 150 billion times a year.[5] But, I doubt it.

[†] University of Utah, B.A.; University of Connecticut School of Law, J.D., candidate 2010. Jacob Werrett is a partner and former principal broker of Thornton Walker, Inc., a real estate brokerage in Salt Lake City, Utah. He expresses special thanks to his wife Kim for her support.

[1] *Crimes Against Children: The Nature and Threat of Sexual Predators on the Internet: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 105th Cong. 32 (1997) (statement of Cathy Cleaver, Dir. of Legal Policy, Family Research Council).

[2] Amanda Russo, Ashcroft v. ACLU: *Congress' Latest Attempt to Get COPA Passed Depends on the Effectiveness and Restrictiveness of Filtering Software*, 6 LOY. L. & TECH. ANN. 83, 83 (2006).

[3] Amy Wanamaker, *Censors in Cyberspace: Can Congress Protect Children from Internet Pornography Despite* Ashcroft v. ACLU*?*, 50 ST. LOUIS U. L.J. 957, 957 (2006).

[4] *Id.*

[5] Family Safe Media, Pornography Statistics, http://familysafemedia.com/pornography_statistics.html#anchor10 (last visited Feb. 27, 2010) [hereinafter Family Safe Media] (reporting that in 2006, there were over 300 billion web searches for terms like "XXX," "Playboy," "Free Porn," "Adult Sex," "Porn," and "Adult DVD"). *See also* Wanamaker, *supra* note 3 and accompanying text (reporting that teenagers are the largest group of pornography users online).

Juxtaposing limitations on children's exposure to speech in the real-world versus the cyber-world reveals many inconsistencies. For example, an eight-year-old child is not allowed into a strip club with a main street address, but is welcome to enter the same strip club at its URL address. Additionally, a ten-year-old child cannot enter an adult bookstore and buy a pornographic book or video,[6] but can enter the same bookstore and purchase pornographic books and videos online. Many arguments can be made about why these inconsistencies are appropriate, justifiable, and perhaps even preferable to the alternative—limiting constitutionally protected speech. Admittedly, the Internet is a unique medium of communication and First Amendment safeguards for speech and press are a time-honored and important fourth check against our federal government. This article discusses what can be done to bring the unchecked cyber-world into step with the real world without undermining—what some believe is—the crowning characteristic of cyberspace: the fact that it is "the most participatory form of mass speech yet developed,"[7] a medium "as diverse as human thought."[8]

At first glance, censorship case law seemingly zigzags back and forth upholding a bizarre patchwork of conflicting ideals—one set for the real world and another for the cyber-world. For example, in *Ginsberg v. New York* the Court upheld the constitutionality of a New York statute that prohibited selling "obscene material," including pornographic magazines, to children.[9] Similarly, in *Renton v. Playtime Theaters*, the Court upheld a zoning ordinance that prohibited adult movie theatres "within 1,000 feet of any residential zone . . . church, park, and within one mile of any school," holding that the statute was justified in light of substantial evidence showing the adverse effects on neighborhood children and community improvement efforts.[10] In *Pacifica v. Federal Communications Commission*, the court found that the Federal Communications Commission (FCC) had authority to prohibit certain speech that was patently indecent from being broadcast on the radio.[11] These cases

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[6] Ginsberg v. New York, 390 U.S. 629, 641 (1968) (upholding a law prohibiting the sale of adult material to minors). *See also id.* at 636 ("Material which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined.").

[7] Reno v. ACLU, 521 U.S. 844, 863 (1997).

[8] *Id.* at 852.

[9] *Ginsberg*, 390 U.S. at 635 (noting that while the magazines were not obscene for adults, the content was obscene for minors and "obscenity is not within the area of protected speech or press"); *Reno* 521 U.S. at 865.

[10] Renton v. Playtime Theatres, 475 U.S. 41, 44 (1986).

[11] FCC v. Pacifica Found., 438 U.S. 726, 735 (1978).

illustrate that the Supreme Court has supported many federal laws narrowly tailored to protect the development of minors.

At the other end of the spectrum, courts have struck down several federal statutes aimed at censoring Internet speech to protect children. The two primary attempts to limit the sale of indecent speech by commercial entities on the Internet were passed by the House and Senate, but neither held up under judicial scrutiny. The Communications Decency Act (CDA) was the first major attempt.[12] In 1996, Congress added the CDA as a "second thought" amendment to a larger proposal.[13] The CDA prohibited knowingly transmitting obscene or indecent messages to children under the age of eighteen via the Internet.[14] This statute was struck down by the Supreme Court as an undue burden on First Amendment protected speech.[15] Indeed, the CDA had not been carefully considered by Congress, and some have been highly critical of the awful stage it set for future attempts to make the Internet safe for children. Larry Lessig found the CDA a "law of extraordinary stupidity, it practically impaled itself on the First Amendment."[16] And Professor Preston elaborated that it was "[t]hrown together without much thought, the CDA had techies nearly strangling their mouses in the vehemence of submitting their criticisms *en blog*."[17] The Child Online Protection Act (COPA) was the second major attempt by Congress to protect children through cyber-regulation.[18] In 2004, Congress created COPA in response to the overturned CDA, but failed to heed several direct warnings by the Supreme Court, that such a law would be unconstitutional.[19]

Wide-open Internet is not predominantly the fault of the Supreme Court. No doubt, Congress made colossal blunders in the legislation process. Each law Congress created fell short of the censorship standards required under the appropriate constitutional review for content regulated

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[12] 47 U.S.C. § 223 (2006).

[13] Cheryl Preston, *The Internet and Pornography: What If Congress and the Supreme Court Had Been Comprised of Techies in 1995-1997?*, 1 MICH. ST. L. REV. 61, 62 (2008).

[14] 47 U.S.C. § 223(d) (2006).

[15] Reno v. ACLU, 521 U.S. 844, 874 (1997) ("We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech.").

[16] LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 174 (1999).

[17] Preston, *supra* note 13, at 64. She further remarked: "In spite of what might have been noble congressional intentions, the CDA was awful." *Id.* at 62.

[18] 47 U.S.C. § 231 (2006).

[19] Ashcroft v. ACLU, 542 U.S. 656, 660 (2003). Admittedly, Congress tailored the statute more narrowly on the second round and as a result the COPA statute was significantly better, however, it did miss the mark in several important ways, including: (1) using the community standards wording which the former Reno court warned may be independent grounds for finding the statute unconstitutional and (2) banning a certain type of speech instead of simply channeling it.

speech—strict scrutiny.[20] Perhaps just as surprisingly, Congressional efforts since the CDA and COPA have either failed to catch momentum and have become largely irrelevant or have failed to heed the specific warnings of the Supreme Court in both *Reno v. ACLU* and *Ashcroft v. ACLU*. Examples of these more recent attempts to protect children online are discussed in the following sections.

From one perspective, the Internet is a special "marketplace of ideas" and may deserve greater protection from censorship than other media.[21] On the other hand, the Internet is used in 1.5 billion homes,[22] accessible by even the youngest children, and may be one of the most pervasive mediums available; and perhaps as such, should be regulated more heavily than less pervasive mediums.[23]

This article presents guidelines and ideas for creating a constitutionally sound federal statute to protect children online. Part II discusses and analyzes past precedent to catalyze a discussion of how to create legislation to protect children online that will meet constitutional standards; the section also discusses successful and unsuccessful legislative attempts to protect children in cyberspace. Part III analyzes several recent attempts to channel speech online. This section also discusses the past failures, successes, and potential of current legislative considerations. Part IV provides several possible strategies for protecting children without burdening online speakers or spectators; the section relies on past precedent and facts about the Internet to piece together a coherent regulatory scheme that would provide nearly 100% protection for those cyber-users who want to avoid the indecent and the obscene. Finally, in Part V this article concludes by providing a starting point for dealing with Internet censorship.

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[20] For example, consider the Government's argument that "the unregulated availability of 'indecent' and 'patently offensive' material on the Internet is driving countless citizens away from the medium because of the risk of exposing themselves or their children to harmful material." *Reno*, 521 U.S. at 885. It is not surprising that the Court responded by finding the argument—that the Internet would lose popularity—"singularly unpersuasive." *Id.*

[21] *Id.*

[22] *See* Internet World Stats: Usage and Population Statistics, Internet Usage and Population Growth Statistics, http://www.Internetworldstats.com/am/us.htm (last visited Feb. 23, 2010). [hereinafter Internet World Stats].

[23] Reno v. ACLU, 521 U.S. 844, 869 (1997) (stating that the Internet is one of the most participatory forms of mass speech yet developed, but also noting that the Internet was not as invasive as radio or television). *Cf.* Preston, *supra* note 13, at 66, 68 (finding that the Internet has grown to be "the fourth basic literacy—after reading, writing, and arithmetic" and that the early Court statements illustrated widespread ignorance about how pervasive the Internet would become during the coming decades).

II. LEGAL PRECEDENT: CREATING A FRAMEWORK FOR INTERNET SPEECH LAW

This section provides a handful of cases to help catalyze a discussion about strategies for creating a successful Internet censorship statute. Each case provides examples of federal law that has helped define exactly what speech is protected by the First Amendment and how different media receive varying treatment under the Constitution.

A. Early Development of the Definition of Obscenity

During much of the twentieth century, courts grappled with how much protection to afford different categories of speech that lie on the fringes of public sensibilities.[24] Drawing bright lines around the subjective standard of "immoral" and more objective standard of "explicit sexual depictions" was an important step that began to surface in the middle of the twentieth century.[25] Courts have since determined that some forms of speech should receive little or no constitutional protection, including: child pornography, obscenity, hate speech, and defamation.[26] Particularly problematic is defining what speech is in or out. Speaking of obscenity, Justice Stewart famously stated that while it was difficult to define, "I know it when I see it."[27] In 1973, the Supreme Court decided *Miller v. California*, which became the landmark case articulating the definition used today:

> (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.[28]

Thus, distribution of speech that meets the *Miller* definition may be

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[24] MARC A. FRANKLIN ET AL., MASS MEDIA LAW, 145 (2005).

[25] *Id. See also* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 504-05 (1952) (holding that a movie could not be banned on the grounds that it was sacriligious).

[26] Tony Mauro, *Supreme Court to Consider Ban on Depictions of Animal Cruelty*, FIRST AMENDMENT CENTER, Apr. 21, 2009, http://www.firstamendmentcenter.org/analysis.aspx?id=21505 (last visited Apr. 18, 2010) (discussing the several categories of speech that receive little or no constitutional protection and the possibility of the Supreme Court adding to the list).

[27] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).

[28] Miller v. California, 413 U.S. 15, 24 (1973) (internal citation omitted); FRANKLIN ET AL, *supra* note 24, at 146.

lawfully banned.[29] Today, courts have continued to uphold this constitutional carve-out for obscene speech on the Internet.[30] But, most sexually explicit material—including most pornography—is considered indecent, not obscene.

B. Prohibiting the Sale of Indecent Material to Children

Generally, statutes created to protect children from indecency have been upheld as Constitutional, but broad statutes created to shield society from indecency have failed.[31] In *Ginsberg*, the Supreme Court upheld the constitutionality of a New York statute that prohibited selling indecent material to minors,[32] that is to say, material that is obscene to children even if not obscene to adults.[33] The appellant admitted to selling pornographic magazines to a sixteen-year-old minor.[34] The Court found that the magazines at issue contained pictures that depicted female nudity which "predominantly appeals to the prurient, shameful or morbid interest of minors . . . and is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors."[35]

The Court also rejected the defendant's argument that the constitutional protection of freedom of expression provided every citizen the right to purchase and view material containing nudity and sex independent of whether the citizen is an adult or minor.[36] The Court emphasized that the state had an important and independent interest in securing the well-being of its youth.[37] The Court also emphasized that the legislature could properly conclude that parents and teachers of youth are entitled to the support of laws designed to support efforts to raise children according to the "prevailing standards in the adult community as a whole

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[29] FRANKLIN ET AL, *supra* note 24, at 146.

[30] United States v. Thomas, 74 F.3d 701, 705 (6th Cir. 1996) (upholding a conviction for distributing obscene materials on a website entitled "The Nastiest Place on Earth," including "depict[ed] images of bestiality, oral sex, incest, sado-masochistic abuse, and sex scenes involving urination").

[31] FRANKLIN ET AL., *supra* note 24, at 148.

[32] Ginsberg v. New York, 390 U.S. 629, 631 (1968).

[33] *Id.* at 631.

[34] *Id.*

[35] *Id.* at 633; *see also id.* at 632 (noting that the material included the "'showing of . . . female . . . buttocks with less than a full opaque covering or the showing of the female breast with less than a fully opaque covering, of any portion thereof below the top of the nipple . . .' and that the pictures were 'harmful to minors' in that they had . . . 'that quality of representation . . . of nudity . . . which . . . predominantly appeals to the prurient, shameful or morbid interest of minors.'").

[36] *Id.* at 636.

[37] Reno v. ACLU, 521 U.S. 844, 875 (1997).

with respect to what is suitable for minors."[38]

C. Prohibiting Indecent Speech on the Radio

In *Pacifica*, the Supreme Court considered whether the FCC had power to regulate indecent speech broadcasted on the radio. The material at issue was a twelve minute radio monologue by George Carlin entitled "Filthy Words," which discussed various words that were inappropriate to speak on the public airwaves.[39] The Supreme Court held that the FCC had authority to prohibit certain indecent speech broadcasted on the radio.[40] Important to the reasoning of the Court was the justification of the regulation of indecent speech due to four unique characteristics of radio broadcasting:

> (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference...; (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest.[41]

D. Prohibiting Adult Movie Theatres in Certain Neighborhoods

In *Renton*, the Supreme Court upheld a zoning ordinance that prohibited adult movie theatres in certain residential neighborhoods.[42] In the majority opinion, Chief Justice Rehnquist reasoned that the ordinance was content neutral because it focused on "secondary effects" of the speech, and not on the speech itself.[43] While the ordinance singled out a specific kind of speech, the "aim" and "predominant concern[]" of the ordinance were not content, but rather the secondary effects of the speech without regard to the actual speech.[44] The Court supported this assertion by pointing out that if the city had been focusing on restricting the content

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[38] Ginsberg v. New York, 390 U.S. 629, 633 (1968). *See also id.* at 639 ("Moreover, the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children.").

[39] FCC v. Pacifica Found., 438 U.S. 729 (1978).

[40] *Id.*

[41] *Id.* at 731 n.2 (internal citation omitted).

[42] Renton v. Playtime Theatres Inc., 475 U.S. 41, 48 (1986).

[43] *Id.* at 47.

[44] *Id. See also id.* at 54 ("Renton has not used the power to zone as a pretext for suppressing expression.") (internal quotations omitted).

of the speech, it would have created burdensome legislation aimed at closing the adult theatres, or restricting their numbers.[45] The Court also found that the government had an important interest in city planning and thus gave deference to the zoning ordinance.[46]

E. United States v. Playboy

In *United States v. Playboy*, the Court considered federal statute United States Code section 561, which required cable companies to separate indecent speech from other speech and to (1) block it from those who had not ordered it, or (2) limit transmission of indecent speech to hours when children were likely asleep.[47] The Court held that the statute was an unconstitutional restriction on free speech and that a statute could have been more narrowly tailored to serve the same government interest—specifically by filtering.[48] The Court noted that while some of the material broadcast by Playboy could have been considered obscene, that fact should not be weighed because the appellant had not alleged that it was obscene.[49] The Court elaborated, stating that filtering technology was important because it expanded the capacity to choose whether or not to view certain material and encouraged Congress to create legislation that empowers and facilitates user-ended voluntary blocking (filtering).[50] The Court found that requests for household-by-household requested blocking would be the least restrictive way for the government to accomplish its important interest to protect those who want protection.[51]

The most important principle from *Playboy* that can be applied to an analysis of speech on the Internet is that the Court favored end user filtering—as a minimal restriction on speech—in cases where it is effective enough to meet the government's interest. Boiled down, the Court asserted that the Constitution should be used to safeguard individuals' ability to make judgments about content aside from Government decree—even if the majority of citizens wish to mandate certain speech.[52]

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[45] *Id.* at 48.

[46] *Id.* at 50.

[47] 47 U.S.C. § 561 (1996); United States v. Playboy Entm't. Group Inc. 529 U.S. 803, 806 (2000).

[48] *Playboy*, 529 U.S. at 816 (discussing the less restrictive requirement to block as requested).

[49] *Id.* at 811 (stating that all parties have brought the case on the premise that the material is not obscene). *Cf. id.* at 831 (Scalia, J., dissenting) (discussing that the material may have met the standard for obscenity had it been alleged).

[50] *Id.* at 826 ("The Government has not shown that this alternative, a regime of added communication and support, would be insufficient to secure its objective, or that any overriding harm justifies its intervention.").

[51] *Id.* at 815.

[52] *Id.* at 818.

The actual holding of *Playboy* is not destructive to future legislative attempts to restrict indecent speech on the Internet because unlike the Internet, the instances of "signal bleed" of indecent pornographic material on cable television was relatively rare.[53] Additionally, the *Playboy* cable matter is distinguishable from the Internet context because, in *Playboy*, the commercial defendants had made a good faith effort to "scramble" the indecent speech.[54]

F. The First Effort to Protect Children Online

In 1996, Congress enacted the CDA.[55] This legislation was created to reduce regulation and encourage the "rapid deployment of new telecommunications technologies."[56] The thrust of the statute was on telephone service, multi-channel video service, and over-the-air broadcasting.[57] Only one of the seven titles in the Act dealt with indecency on the Internet. This legislation criminalized use of a computer, and transmissions between computers, for the purpose of knowingly sending, communicating, or making available to children, "any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."[58]

Congress' effort to make the Internet safe for children was found unconstitutional in *Reno*.[59] The Court found that the statute was not sufficiently narrow to serve the compelling governmental interest and that ultimately there were less restrictive alternatives available.[60] There were several obvious problems with the statute. First, the two Internet provisions at issue—the indecent transmission and patently offensive display provision—were poorly constructed and ambiguous when used in conjunction with each other.[61] Second, the statute was overly broad—

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[53] *Id.*

[54] United States v. Playboy Entm't. Group Inc., 529 U.S. 803, 807 (2000) (discussing that these cable television systems use either "RF" or "Baseband" scrambling systems that sometimes have "signal bleed" which periodically allows discernible pictures or some audio to be accessible).

[55] The Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996); Reno v. ACLU, 521 U.S. 844, 857-59 (1997) (discussing the passage of the Telecommunications Act of 1996 and its subpart—Title V—the Communications Decency Act of 1996).

[56] *Reno*, 521 U.S. at 857.

[57] *Id.* at 857-58.

[58] FRANKLIN ET AL., *supra* note 24, at 166.

[59] *Reno*, 521 U.S. at 882.

[60] *Id.*

[61] *Id.* at 870-71 ("Regardless of whether the CDA is so vague that it violates the Fifth Amendment, the many ambiguities concerning the scope of its coverage render it problematic for

affecting the speech of adults—and not narrowly tailored to protect children.[62] Third, the statute failed to focus on commercial speakers, a subset of the community that receives less stringent first amendment protection.[63] In light of the many oversights by Congress in constructing the statute, many have criticized the CDA as a half-hearted attempt that did more to hurt the progress of Internet censorship than help it: "The CDA has been hailed as the nadir of congressional regulation of communications technology. Badly drafted, inconsistently worded, and palpably unconstitutional, it appeared to most of the Internet community to be a case of technological ignorance run rampant."[64]

G. The Second Effort to Protect Children Online

In *Ashcroft*, the Supreme Court upheld an injunction on COPA ordered by the United States District Court for the Eastern District of Pennsylvania. COPA was Congress' second attempt to regulate indecent speech—including communication, pictures, images, and writing—on the Internet.[65] The COPA statute imposed criminal penalties of $50,000 and up to six months in prison for anyone who posted material "for commercial purpose . . .that is harmful to minors."[66]

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purposes of the First Amendment. For instance, each of the two parts of the CDA uses different linguistic form. . . . Given the absence of a definition of either [indecent or patently offensive], this difference in language will provoke uncertainty among speakers about how the two standards relate to each other . . . .").

[62] *Id.* at 864-68 (reasoning that the proposed provisions were too broad and easily distinguishable from cases where the Court had previously held restraints on indecent speech constitutional).

[63] *Id.* at 865.

[64] Preston, *supra* note 13, at 65 (quoting James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CIN. L. REV. 177, 189 (1997)).

[65] Ashcroft v. ACLU, 542 U.S. 656, 661 (2004).

[66] *Id.* The statute defined commercial business as engaging, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income). 47 U.S.C. § 231 (2000). The statute defined material that is "harmful to minors" as:

> Any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that:
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> (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 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.

Because the statute was a content-based prohibition, the Court applied the heightened strict scrutiny standard and a presumption that the statute was invalid pending the Government's showing of constitutionality.[67] The petitioner claimed that the statute was overbroad, overly burdensome, and, in upholding the injunction, the Court reasoned that the government failed to sufficiently show that there was not a plausible less restrictive alternative to the statute.[68] Specifically, the Court found that blocking and filtering software would be less restrictive than COPA in that (1) filtering restricts speech on the receiving end and is not a universal restriction; (2) filtering allows adults to gain access to speech they have a right to see while simultaneously restricting access by children; and (3) filters do not criminalize a category of speech and facilitate the free flow of constitutionally protected speech. Additionally, the Court reasoned that filters were more effective because COPA failed to block 40% of the indecent material from overseas and from keeping US companies from simply creating oversees subsidiaries.[69] Interestingly, the Supreme Court's 5-4 majority in *Ashcroft* abstained from directly holding whether the statute was unconstitutional or not on its merits, and did not preclude the district court from finding the statute constitutional. "[Our decision] does not foreclose the District Court from concluding, upon a proper showing by the Government that meets the Government's constitutional burden as defined in this opinion, that COPA is the least restrictive alternative available to accomplish Congress' goal."[70] From this statement, it appears that the Supreme Court may have purposefully left a window open for Congress to create future legislation on the matter. However, it is apparent from the *Reno* and *Ashcroft* decisions that if Congress sets out to draft future legislation, it must keep in mind the specific advice of the two decisions in which the Supreme Court critiqued CDA and COPA.

Courts have been cognizant of the substantial governmental interest in protecting children from indecency and obscenity and have repeatedly conceded that, "the parent's claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."[71]

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[67] *Ashcroft*, 542 U.S. at 660.

[68] *Id.* at 660. This high standard is part of the requirement under the strict scrutiny doctrine. *Id.* at 666. ("In considering this question, a court assumes that certain protected speech may be regulated, and then asks what is the least restrictive alternative that can be used to achieve that goal.").

[69] *Id.* at 667.

[70] *Id.* at 673.

[71] Reno v. ACLU, 521 U.S. 844, 865 (1997); Ginsberg v. New York, 390 U.S. 629, 639 (1967). Additionally, while the *Ashcroft* majority did not explicitly reemphasize the importance of the government interest, it did not question it. Also, the four justice dissent noted: "No one denies that such an interest is compelling....Rather, the question here is whether the Act, given its restrictions on adult access, significantly advances that interest. In other words, is the game worth the candle?" Ashcroft v. ACLU, 542 U.S. 656, 683 (2004) (Breyer, J., dissenting) (internal citations omitted).

Unfortunately, legislation that has been created to protect that "basic structure in our society"[72] has been half-hearted.[73]

H. Protection for Children Surfing the Net in Public Libraries

Of the millions of Internet users in the United States, approximately 10% rely solely on public libraries to access the Web.[74] The government provides funding to libraries in order to subsidize Internet costs. These funds are largely provided under two programs referred to as (1) E-rate, and (2) the Library Services and Technology Act (LSTA).[75] Some members of Congress felt that if the government was providing financial support, it could require—through Congress' spending power—that a library receive E-rate or LSTA assistance only if it complied by installing a filtering device.[76] In 2002, Congress appropriated approximately $150 million in grants to libraries across the country.[77] The principal purpose of the statute was to block obscene images from children at schools and libraries across the country.[78]

The Supreme Court considered the constitutionality of CIPA in *United States v. American Library Association, Inc.* in 2003.[79] The Court refused to consider the statute as affecting public forum, reasoning that "public forum principles ... are out of place in the context of this case. Internet access in public libraries is neither a 'traditional' nor a 'designated' public forum."[80] Furthermore, the Court found that public libraries use of "Internet filtering software does not violate their patrons' First Amendment rights, CIPA does not violate the Constitution, and is a valid exercise of Congress' spending power."[81]

In sum, by enacting CIPA, Congress was successful in utilizing its power under the Spending Clause to deny funds to libraries that refused to

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[72] *Reno*, 521 U.S. at 865.

[73] If not half-hearted, then at least improperly constructed with little weight given to precedent, Supreme Court instruction, and notice for judicial standards.

[74] Barbara A. Sanchez, United States v. American Library Association*: The Choice Between Cash and Constitutional Rights*, 38 AKRON L. REV. 463, 463 (2005).

[75] *Id.* at 470.

[76] United States v. Am. Library Ass'n Inc., 539 U.S. 194, 199 (2003) ("First, the E-rate program established by the Telecommunications Act of 1996 entitles qualifying libraries to buy Internet access at a discount . . . Second, pursuant to the Library Services and Technology Act (LSAT), the Institute of Museum and Library Services... [helps] pa[y] costs for libraries to acquire or share computer systems and telecommunications technologies.") (internal citations omitted).

[77] *Id.*

[78] *Id.*

[79] 539 U.S. 194 (2003).

[80] *Id.* at 205.

[81] *Id.* at 214.

install filtering software to protect children from indecent and obscene material. Important to the Court's holding was the fact that the software could be turned off by the librarian at any given site. In this way, the statute was an "opt-out" rule, which allowed patrons to opt out of filtering and access indecent material by simple request.

III. PROS AND CONS OF THE MOST RECENT EFFORTS TO PROTECT CHILDREN ONLINE

A. The Internet Community Ports Act

In a recent Law Review Symposium entitled "Pornography, Free Speech, and Technology", Professor Cheryl Preston introduced a technological and administrative concept for channeling Internet speech with limited restriction on speech.[82] In her article, Professor Preston described the logistics for implementing the Ports Act. The Ports Act is a statute that, if enacted, would require indecent and obscene material to operate on a different Internet port (or channel) than other material. To understand the concept of the Ports Act, it is helpful to first be able to conceptualize the technical workings of the Internet.

The Internet is not owned by any one person, but rather is a series of data cables stretched all over the world.[83] Each of these data cables connects millions of computers with millions of servers.[84] Servers work to hold information, receive information, and send information in the form of data.[85] Internet Service Providers (ISPs) act as a hub where customers can link their computers and, through the Internet Service Provider, access the Internet. Upon registering with an ISP, a customer is assigned an Internet Protocol address (IP address), which acts like a license plate number, home address, or telephone number and provides a location and identification for the computer so that it can participate in data transfer on the web of networks we call the Internet.[86]

When a data package is sent over the Internet, it passes through one of several "ports" or channels.[87] There are over 65,000 ports available for

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[82] Symposium, *Warning! Kids Online: Pornography, Free Speech, and Technology*, 2007 BYU L. REV. 1413, 1414 (2007) (introducing the symposium by providing an overview of each participant and their respective topics and baseline arguments). *Cf.* Dawn Nunziato, *Technology and Pornography*, 2007 BYU L. REV. 1535, 1583-84 (2007) (providing critique for Preston's proposal for an Internet Community Port Act).

[83] Cheryl B. Preston, *Zoning the Internet: A New Approach to Protecting Children Online*, 2007 BYU L. REV. 1417, 1428–31 (2007).

[84] *Id.* at 1428-29.

[85] *Id.*

[86] *Id.* at 1429-30.

[87] *Id.* at 1427.

transmission, but most Internet users only access two or three.[88] "The default, or primary, range includes port 80, over which the vast majority of current Web traffic passes, port 25, over which most e-mail traffic currently passes, and the secured socket layer, over which encrypted information, such as credit card numbers and person information, passes."[89]

The large number of ports of the Internet can be likened to cable television channels.[90] The major difference between "Internet ports" and "television channels" is that almost everything is being broadcasted on the same channel—channel 80. This system works in the network world because computers request specific packets of information from specific servers. In essence, the Internet Ports Act, as suggested by Preston, would force certain Internet material to be broadcasted on different ports—like television.[91] Computers could still just as easily access this material—just as a television can just as easily access channel one as channel two—and parents would more easily be able to block unwanted channel information. This is a system of "separation [or zoning] rather than blocking."[92] Thus, Preston asserts, "[t]he Ports Concept permits the freedom of those who want to speak and hear constitutionally protected adult speech while it recognizes the equally legitimate interests of those who do not want pornographic material in their homes and businesses."[93]

The Ports Act has not yet been presented to Congress, but it provides a legitimate alternative to user-end filtering, and perhaps it is just the type of answer the Courts have been saying Congress should consider.[94] The Act fulfills several of the concerns that have been levied by the Supreme Court. It is presumably not a heavy burden on distributors of explicit material. It does not require extra financial commitment by distributors of explicit material. And, it presumably would not "chill" speech.

On the other hand, there are arguments against implementing the Ports Act. According to Professor Nunziato—who addressed Preston's article directly—the Ports Act has three potential shortfalls: "[f]irst, courts have indicated a clear preference for regulation empowering end users to screen out harmful content on the receiving end over regulation punishing content

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[88] *Id.*

[89] Preston, *supra* note 83, at 1427-28.

[90] *Id.* at 1426-27.

[91] *Id.*

[92] *Id.* at 1433.

[93] *Id.* at 1427.

[94] Ashcroft v. ACLU, 542 U.S. 656, 670 (2004) ("By enacting programs to promote the use of filtering software, Congress could give parents that ability without subjecting protected speech to severe penalties.").

providers."[95] Professor Nunziato asserted that because the Ports Act is ultimately a regulation on the "source" as opposed to a regulation facilitating the empowerment of end-users, it will act to chill speech and discourage free speech. Second, the courts may be leery of the fact that the Ports Act is difficult to turn on and off, and so individual users in a household or company would likely all be restricted to the same amount of information.[96] Third, Nunziato finds that software filters "overblock substantially less constitutionally-protected speech" than the Ports Act scheme, and thus a court would likely find the Act unconstitutional.[97]

There are other potential problems with the Ports Act on which Professor Nunziato did not focus. For example, a potentially problematic characteristic of the Ports Act is the fact that it could have the effect of ostracizing certain speech. The mere fact that certain speech—based on content—will be "banned to a different port" may in and of itself have a chilling effect on the speech in question. Second, the Ports Act uses the "community standard" language. This standard was criticized by the court of appeals that reviewed the COPA statute, and later by Justice Stevens and Ginsburg.[98] Finally, the Ports Act—as it was proposed in Preston's article—seeks to categorize and channel a defined set of information. Instead of empowering the end user to pick and choose—as is the case with modern cable channels and Internet filtering—the Ports Act provides only two channels. It is likely that a negative stereotype might follow: in other words, the legal and illegal posting could lead to a perception of "good" and "bad" channels. Thus, deleterious labeling of certain speech may inevitably follow.

Criticism aside, the Ports Act has great potential. Accordingly, it solves many of the concerns expressed by the Supreme Court over the years about efforts to make the Internet safe for children. For example, the concept is broad enough to allow a multi-level channeling system that has the potential to be as fair as the modern cable channeling, wherein those wishing to broadcast indecent material can do so, while those wishing to "tune out" can avoid subscription without chilling constitutionally protected indecent speech. Additionally, if—over time—it were adopted by the worldwide online community, the Act could potentially be as effective as filtering. Finally, if the "community standard" language could

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[95] Nunziato, *supra* note 82, at 1583.

[96] *Id.*

[97] *Id.*

[98] *Ashcroft*, 542 U.S. at 673 (Stevens, J. dissenting) ("When it first reviewed the constitutionality of the Child Online Protection Act (COPA), the Court of Appeals held that the statute's use of 'contemporary community standards' to identify materials that are 'harmful to minors' was a serious, and likely fatal, defect. I have already explained at some length why I agree with that holding.") (internal citation omitted).

be altered without damaging the main thrust of the Act, it would increase possibilities of success under judicial scrutiny.

B. .KIDS

In 2002, Congress created the Dot Kids Implementation and Efficiency Act of 2002 (Dot Kids Act).[99] The Dot Kids Act created a second level Internet domain named ".kids" which would provide a safe haven for minors. The creation of a new and exclusive domain for children gave Congress the ability to limit speech to material "suitable for minors," and "not harmful to minors."[100] Describing the intentions of the creators of the legislation, Congressman Fred Upton (R-Michigan) claimed that the statute "sets up a children's library section of the Internet."[101]

Unfortunately, the legislation has been unsuccessful and enjoys only a few hundred website participants. There are several possible reasons why .kids has flopped. First, domain registration is approximately twenty times more expensive than registration with traditional domains—for instance, .com.[102] Second, sites that are registered within .kids domain cannot link to sites in .com, .org, or other high traffic domains.[103] Finally, those sites within the .kids domain are required to pay for content reviews which bill at about 250 dollars a year.[104] This requirement creates a deterrent for both commercial and noncommercial speakers. An inherent problem with .kids is the fact that children rarely purchase products. Thus, there is less incentive for the mainstream commercial retailers to create extra web sites within the new domain when the parents who do the shopping usually access the much broader "adult library" section of the Internet.

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[99] Dot Kids Implementation and Efficiency Act of 2002, Pub. L. No. 107-317, §157, 116 Stat. 2766 (2002).

[100] Maureen E. Browne, *Play it Again Uncle Sam: Another Attempt by Congress to Regulate Internet Content. How Will They FareTthis Time?*, 12 COMMLAW CONSPECTUS 79, 91 (2004).

[101] *Id.* (quoting *Mark-up on the .Kids Domain Before the House Comm. On Energy and Commerce*, 107th Cong. 8 (2002) (statement of Rep. Fred Upton, Chairman, Telecommunications Subcomm.)).

[102] Eric J. Sinrod, *The Implications of new Top Level Domains '.xxx' and '.kids.us'*, USA TODAY, Jun. 15, 2005, *available at* http://www.usatoday.com/tech/columnist/ericjsinrod/2005-06-15-new-tlds_x.htm.

[103] *Id.*

[104] *Id.*

C. . XXX

In 2005, the Internet Corporation for Assigned Names and Numbers[105] (ICANN) announced that it was planning to create—or at least strongly considering—a new Top-Level Domain (TLD) under .XXX.[106] This concept, no doubt, derived from the reasoning which led to the creation of the formerly introduced domain ".kids."[107] Both domains were created in order to provide a safe harbor for children from pornography and other offensive material.[108] Unlike the creation of the .kids domain, the .XXX domain was strongly contested by both liberals and conservatives.

A conservative ground swell was headed by the Family Research Council.[109] Supporters of the opposition argued that a .XXX domain would catalyze an insurgence among pornographers and allow them to "expand their evil empires on the Internet."[110] Those in opposition to the domain mass-mailed the Department of Commerce, which received approximately 6,000 letters of concern.[111] The canned email provided by the Family Research Council read:

> I oppose the establishment of the .XXX domain. I do not want to give pornographers more opportunities to distribute smut on the Internet. By establishing this new .XXX domain, you would be giving false hope to parents who want to protect their families from pornography. You would also be lending legitimacy to the hardcore pornography industry. Please stop this effort now.[112]

As a result, the Department of Commerce directed ICANN to further consider the implications of implementing the .XXX domain.[113] ICANN acquiesced.

Interestingly, the other side of the political aisle simultaneously

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[105] ICANN is a nonprofit organization that oversees several important Internet related tasks for the federal government, including the allocation of IP addresses and overseeing web domain management. See ICANN, About, http://www.icann.org/en/about/ (last visited Feb. 27, 2010).

[106] Sinrod, *supra* note 102.

[107] *Id.*

[108] *Id.*

[109] Ryan Paul, *ICANN Rejects .xxx Top Level Domain, Approves .Tel*, ARS TECHNICA, May 11, 2006, http://arstechnica.com/old/content/2006/05/6805.ars (last visited Feb. 27, 2010).

[110] *Id.*

[111] Charles Jade, *U.S. Wants ICANN to Delay .XXX*, ARS TECHNICA, Aug. 16, 2005, http://arstechnica.com/old/content/2005/08/5212.ars (last visted Feb. 27, 2010).

[112] *Id.*.

[113] Paul, *supra* note 109.

objected to the creation of a .XXX domain. Establishing a domain exclusively for pornography could lead to banishing porn only to that domain. Additionally, supporters of pornography worried that the approval of a segregating .XXX domain could lead to legislation increasing censorship for that material that had been separated.[114]

IV. A STRATEGY FOR MOVING FORWARD

In light of the several failed attempts to create legislation that will pass judicial scrutiny, this section suggests future Congressional attempts to create a safe-harbor for children online by following the past advice of the courts—in every aspect. This section provides a series of solutions that are in accordance with the directive of past Supreme Court decisions concerning Internet censorship. Additionally, this section provides concepts that adhere to—and capitalize on—past censorship statutes in other media.

A. Congress Should Create Legislation Based on Filtering Content

I propose that Congress should comply with the Court's continued call for filtering legislation as the most likely candidate for being the least restrictive burden on free speech which will protect children online.[115] Internet filtering was suggested as a viable solution in both the *Ashcroft* and *Reno* decisions.[116] In *Ashcroft*, the Court argued, "[b]y enacting programs to promote use of filtering software, Congress could give parents the ability [to protect children] without subjecting protected speech to severe penalties."[117] Congress has consistently disregarded filtering as the least restrictive way to protect children online. While it is true that past attempts at filtering have proved ineffective, narrowly tailored legislation could fix the shortcomings of filtering without burdening and chilling

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[114] BBC News, Delay for .xxx 'Net Sex' Domain, Aug. 16. 2005 http://news.bbc.co.uk/2/hi/technology/4155568.stm (last visited Apr. 23, 2010).

[115] Ashcroft v. ACLU, 542 U.S. 656, 669 (2004) (noting that while filtering was not a perfect solution, it was a much less burdensome solution and stated that the government must meet "its burden [which] is to show that it is less effective"). The Supreme Court also noted that in *Playboy* the court had previously found a blanket speech restriction unconstitutional and favored "a more specific technological solution that was available to parents who chose to implement it."). *Id.* at 670.

[116] Christopher Hunter, *Social Impacts: Internet Filter Effectiveness – Testing Over and Under Inclusive Blocking Decisions of Four Popular Filters*, 18 SOC. SCI. COMP. REV. 214, 214 (2000) ("In overturning these legislative solutions [CDA and COPA] the courts pointed to the supposedly equally effective but less restrictive alternative of Internet filtering software as the best way to keep the Internet a safe place for children. As a result, filter technologies have been championed as *the* solution for keeping inappropriate content at the edge of cyberspace, and away from children. These self-regulatory, market driven technologies are seen as First Amendment friendly and far preferable to direct government regulation.") (internal citation omitted).

[117] *Ashcroft*, 542 U.S. at 670.

Internet speech.

Congress has not pursued filtering as the most viable option for protecting children for several reasons. First, many filters installed by home-users *under-block* the explicit speech they are designed to catch. While the statistics vary according to the web sites analyzed, search terms used, filter products studied, and "criteria for success" applied, most studies agree that filters installed on a home network are far from perfect. A recent study for the European Union found that the most effective filtering tool scored at 75% effective,[118] while the U.S. Department of Justice showed that the most restrictive filter blocks about 94%.[119] David Burt reported similar statistics when he reviewed thousands of websites he reported approximately a 92% effective rate.[120]

Second, many filters *over-block.* Most studies agree that the filters which most effectively block sexually explicit websites also incorrectly block the highest number of clean websites. Clean websites are accidentally screened because filters are programmed to block sites with words like "sex," "breasts," and other parts of the human anatomy that are often used in both sexually explicit and educational contexts. The DOJ report estimated that among the best filters for blocking sexually explicit material, the percentage of incorrect over-blocking soared at 22%.[121] Thus, a parent seeking the best protection for their children would buy a filter that allowed them to view 10% of explicit material and 22% of non-explicit material would potentially not be available.

The third pitfall of home filters is that many children can easily circumvent them. "The high level of computer literacy of children allows them to bypass filters through tricks that go undetected by their less computer savvy parents."[122] Among the many ways to circumvent filters, youth can uninstall the filter, disable the filter, access Internet indirectly through proxy, manipulate reload and refresh keys, change the settings, access the cache from parent surfing, and access websites by IP address

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[118] Hunter, *supra* note 116, at 220.

[119] Expert Report of Philip B. Stark at 13, ACLU v. Gonzales, No. 98-5591 (E.D. Pa. May 8, 2006) [hereinafter Stark].

[120] David Burt, *Table of Filtering Software Effectiveness Tests*, FILTERINGFACTS.ORG, http://filteringfacts.org/filter-reviews/filter-tests/ (last visited Feb. 27, 2010).

[121] Stark, *supra* note 119, at 7 (Stark reported that the trend was industry wide stating that, "[g]enerally, if a filter blocks more of the sexually explicit websites, it will block more of the clean websites. . . . The filter that blocked all but 8.8% of the sexually explicit websites in the Google and MSN indexes also blocked over 22% of the clean websites.").

[122] Ashcroft v. ACLU, 542 U.S. 656 (2004); Steven E. Merlis, *Preserving Internet Expression While Protecting our Children*, NW. J. OF TECH. & INTELL. PROP. 177, www.law.northwestern.edu/journals/njtip.

instead of accessing the sites URL.[123]

Thus, if filtering is the least restrictive way to protect children—as the case law suggests—we must find an efficient and effective way to filter. Presently, the alternative is that a parent is left to use ineffective filtering or simply "block all sexually explicit websites by turning off the computer."[124] This section explains how to overcome these filtering deficiencies without unconstitutionally burdening speech.

B. Tagging Internet Pages to Facilitate Filtering

In light of the above-stated inefficiencies of filtering, an important element of a successful filtering regime in the United States would require Internet hosters to "tag" questionable website pages. Tagging an Internet page would be easy for commercial Internet speakers. To tag a site, all an Internet page author must do is consult a government-developed "Speech Chart"[125] and self-rate the material on that Internet page by writing the corresponding code into the page title of the web page. Each website page must be titled when created, regardless of content, so adding a two digit code to that title would not be burdensome. Additionally, individual website pages do not readily display their "codes," and so banishment of certain material would not be likely. Providing a code for each commercial web page that generates income would effectively "channel" all speech so that children—and adults—could choose the information they want to access.

There are several "content rating systems" currently available which could provide a foundation for a tagging system. For example, one of the most popular systems for rating Internet content is the Recreational Software Advisory Council's Internet rating system (RSACi), which is already used by more than 100,000 websites that choose to rate their own material as a service to consumers.[126] This chart outlines varying levels of

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[123] Preston, *supra* note 83, at 1453; Deloitte Enterprise Risk Services, Product Report: Safer Internet: Protecting Our Children on the Net Using Content Filtering and Parental Control Techniques, 39 (2008), *available at* http://www.cyberethics.info/cyethics2/UserFiles/SIP_BenchmarkFilteringTools_Report_2008.pdf.

[124] Stark, *supra* note 119, at 7.

[125] I propose the government develop a Speech Chart for categorizing *all* speech online. This would allow

[126] Hunter, *supra* note 116, at 216. *Cf.* The Family Online Safety Institute, ICRA Tools, http://www.fosi.org/icra, (last visited Feb. 22, 2010) ("The centrepiece of the organization is the descriptive vocabulary, often referred to as 'the ICRA questionnaire.' Content providers check which of the elements in the questionnaire are present or absent from their websites. This then generates a small file containing the labels that is then linked to the content on one or more domains. Users, especially parents of young children, can then use filtering software to allow or disallow access to web sites based on the information declared in the label. A key point is that ICRA does not rate Internet content - the content providers do that, using the ICRA labeling system. ICRA makes no value

different material that might be of concern to parents raising young children, including violence, nudity, sex, and language.

	A: Violence	B: Nudity	C: Sex	D: Language
Level 4	Rape or wanton, gratuitous violence	Provocative frontal nudity	Explicit sexual acts or sex crimes	Crude, vulgar language, or extreme hate speech
Level 3	Aggressive violence or death to humans	Frontal nudity	Non-explicit sexual acts	Strong language or hate speech
Level 2	Destruction of realistic objects	Partial nudity	Clothed sexual touching	Moderate expletives or profanity
Level 1	Injury to human beings	Revealing attire	Passionate kissing	Mild expletives
Level 0	None of the above or sports related	None of the above	None above or innocent kissing	None of the above

I would propose that the legislation would require *commercial* website hosts to tag its web pages within a two year grace period.[127] For example, a website with 0A, 0B, 0C, and 0D content would not be required to tag content; but a site with 4A, 4B, 4C, or 4D material would be required by law to tag the web pages content with the corresponding code. This requirement would be very modest and require easy code modifications within each page of each website. Requiring commercial site holders to tag the content of their websites is a small burden that would facilitate effective filtering by eliminating over-blocking and under-blocking. The requirement to avoid burdensome legislation or legislation that will potentially "chill" speech was core to the majority decisions that found both CDA and COPA unconstitutional. The Court's primary interest was

judgment about sites. The descriptive vocabulary was drawn up by an international panel and designed to be as neutral and objective as possible. It was revised in 2005 to enable easier application to a wide range of digital content, not just websites. Most of the items in the questionnaire allow the content provider to declare simply that a particular type of content is present or absent. The subjective decision about whether to allow access to that content is then made by the parent.").

[127] During an extended period—two years—most active commercial websites would update the pages of their site. During this updating, each could easily refer to the chart and type in the two-digit code that corresponds with the material advertised on the page.

to ensure that any federal statutes are not burdensome for those who wish to access or disseminate indecent material.[128]

This tagging system would be beneficial for sites with material rated at zero, one, or two because their material would be safeguarded against over-blocking. Thus, like cable television, those wishing to express obscene or pornographic content on the Internet would not be restricted in the slightest, but parents could choose filtering options that were 100% effective. Each user would have access to exactly that content for which he or she was searching. Websites with hot-button words that filters often incorrectly ban—like "sex" or "breast"—would safely reach children seeking to learn about chicken breast, safe sex, and breast milk. In this way, tagging could actually help decrease the restriction on speech already imposed by filters that over-block. Finally, requiring tagging would allow filters to block pornographic images and objectionable words uploaded as image files which often are not filtered.

There are at least two issues that web page tagging may create. First, Congress would have to find a way to "regulate and punish" those commercial entities that did not comply with tagging their web pages with the appropriate codes. This would not be an insurmountable issue, as moderate fines could be levied for non-compliance, which could be used to fund the regulation process. Second, requiring only commercial entities to comply with tagging web pages with content codes would leave a fair amount of explicit speech untagged on private web pages. However, those sites would still be filtered according to current filtering efficiencies discussed earlier in this article.[129] Also, private pornography sites are rare in comparison to commercial sites.[130]

Tagging Internet sites with a code describing their content in order to ensure that children get the information they want when they "surf", while simultaneously keeping explicit information from reaching them, is not a new concept. For years courts have accepted this concept of "information channeling" as an acceptable way of protecting those who wish to be protected from certain speech. In *Pacifica*, the Court took particular notice to the fact that the "law generally [spoke] to channeling behavior more

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[128] Reno v. ACLU, 521 U.S. 844, 856 (1997) (stating that credit card possession for proof of age would create a high burden on consumers who did not have credit cards and issuers of indecent material that would incur greater expenses to coordinate with credit card companies).

[129] *See* Hunter, *supra* note 116, at 220 (discussing that filtering programs did not block approximately 92% of non-objectionable material, but these programs also over-blocked 21% of benign content).

[130] *See* Family Safe Media, *supra* note 5 (stating that "[t]he pornography industry revenues exceed the revenues of all the top technology companies combined: Microsoft, Google, Amazon, eBay, Yahoo!, Apple, Netflix, and EarthLink.").

than actually prohibiting it."[131] While it is unconstitutional to ban patently offensive and indecent speech and pictures from the Internet, it is quite another thing to seek to "channel it [to ensure that] children most likely would not be exposed to it."[132]

C. Involving ISPs to Bolster Filtering Efficiency and Effectiveness

1. How to Involve ISPs

In attempting to defend both COPA and CDA, the Government argued that filtering was an imperfect solution because many children could circumvent end-user filters, that some parents lack the technological ability to monitor what their children see, that other parents lack the money to purchase filters, and that still other parents—given full information—simply fail to act.[133]

Congress should create legislation requiring Internet service providers (ISP) to participate in providing filters for their clients. This requirement would not be without supporting precedent. *Ginsberg*, *Pacifica*, and *Renton* all involved statutes in which the Government required the speaker or distributor of indecent speech to adhere to reasonable regulations in order to ensure that the speech was received by audiences who wanted to access the speech.[134]

Currently, ISPs enjoy almost zero responsibility for filtering content. However, some ISPs have begun to censor content passing through and hosted on their servers to support copyright laws.[135] Others—most notably AOL—have begun to implement editorial rights in service agreements in order to allow the ISP to reject hosting material that is "grossly repugnant to the community standards."[136] Many see this as a trend toward ISP censorship.

> What we're seeing now is Internet service providers increasingly taking responsibility for the content that is hosted on their computers. They are now saying 'We

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[131] FCC v. Pacifica, 438 U.S. 726, 732-33 (1978) ("[The FCC] pointed out that it 'never intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it.'").

[132] *Id.* at 733.

[133] Ashcroft v. ACLU, 542 U.S. 656, 669-70 (2004).

[134] *See supra* Part II.A-D.

[135] Brad Stone, *AT&T and Other I.S.P.'s May Be Getting Ready to Filter*, NY TIMES.COM, Jan. 8, 2008, http://bits.blogs.nytimes.com/2008/01/08/att-and-other-isps-may-be-getting-ready-to-filter/.

[136] Stanford University Computer Science Department, ISP Censorship, *available at* http://www-cs-faculty.stanford.edu/~eroberts /cs201/projects/nuremberg-files/censorship.html (last visited Apr. 23, 2010).

> accept responsibility and we will control material that is hosted on our site and we will subject it to our criteria as to whether it's acceptable.'[137]

Legislation requiring ISP participation could be structured in several different ways. This section provides a three-prong statutory outline as a possible option. First, the legislation could require each ISP to provide filtering services for each client that desires it.[138] Filtering at the ISP level—as opposed to the user level—will prevent circumvention by children that are often more tech-savvy than parents. This requirement would not make ISPs liable for content, only liable to provide a service—filtering. The actual content liability would continue with the actual domain owner who has responsibility to tag material that reaches, for example, level three or four.

Second, ISP's could be required to fully disclose to each consumer the several degrees of filtering protection that are available. The *Ashcroft* Court acknowledged, the congressional concern that educating parents about filtering and teaching them what is available is one of the largest hurdles to making user end filtering an effective solution.[139]

Finally, ISPs should be required to provide username and password access to those parents who wish to be able to filter for their children, but continue to access adult material. Allowing protection for children while maintaining protection for adult's First Amendment rights has been a key issue in the court decisions scrutinizing Internet censorship.

2. Similarities Between Internet and Other Mediums Which Regulate Indecent Speech

Placing the burden of providing the option of censorship on the ISP industry follows successful precedent in nearly every other major censored speech medium in the United States, including the radio, television, and

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[137] Janet Kornblum, *ISP Censorship Seen as Trend*, CNET, Sept. 18, 1997, http://news.cnet.com/ISP-censorship-seen-as-trend/2100-1023_3-203398.html (last visited Apr. 18, 2010).

[138] This is a simple process for ISPs. Several already provide the service. It is just a matter of filtering at the server level as opposed to filtering at the house of each client. In some cases, small ISPs may require additional hardware (servers) and software (for those ISPs that do not offer filtering services) that could be subsidized by the government and paid for with the future fees that are charged for commercial web page tagging noncompliance.

[139] Ashcroft v. ACLU, 542 U.S. 656, 669-70 (2004). The Court suggested that the government could implement educational programs and advertising to overcome this pitfall of user ended filtering. *Id.* at 670 ("COPA presumes that parents lack the ability, not the will, to monitor what their children see. By enacting programs to promote use of filtering software, Congress could give parents that ability without subjecting protected speech to severe penalties.").

newspaper industries.[140]

In *Pacifica*, the Court found that broadcasters retained some responsibilities for content delivered via each commercial station because of the "pervasive influence in the home and universal use and access to children, etc." The Internet enjoys similarly pervasive characteristics. For example, the population of the United States was 337 million in 2008 and nearly 247 million Americans were online—approximately 73%.[141] In light of the expansive use of the Internet, it is noteworthy to consider the reasoning the *Pacifica* court gave for allowing Congress to censor radio speech: (1) access by unsupervised children;[142] (2) the likelihood of radios in nearly every home triggered extra deference for privacy interests; (3) the fact that non-consenting adults could tune in without prior knowledge that offensive language would be used; (4) scarcity of spectrum space. With the exception of the last reason, each of these arguments could be levied in support for Internet censorship and for placing the burden of filtering according to end-user desire on the provider of that medium—ISPs.

3. Addressing the Problem of Foreign Influence

In *Ashcroft*, the Court pointed out that one of the reasons that filters were more effective than COPA was that filters worked to protect minors from all pornography, not just pornography from the United States.[143] "The District Court noted in its findings of fact that one witness estimated that 40% of harmful-to-minors content comes from overseas. COPA does not prevent minors from having access to those foreign harmful materials."[144]

The Court also argued that filters appeared to be more effective than COPA because enforcing the COPA statute would simply force pornography websites to move their operations overseas to avoid criminal sanctions.[145] The Court emphasized, "It is not an answer to say that COPA reaches some amount of materials that are harmful to minors; the question is whether it would reach more of them than less restrictive

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[140] Even in *Playboy*, the question was not whether the material should be channeled—indeed the defendant was already scrambling the signal—the question was whether the blocking and scrambling was sufficient enough in light of the occasional "signal bleed." United States v. Playboy Entm't. Group Inc., 529 U.S. 803, 807 (2000).

[141] *See* Internet World Stats, *supra* note 22. This number is even more impressive when one considers how many citizens of the United States live in extreme poverty and cannot afford a computer, or are too young to read, or too old to read.

[142] Wanamaker, *supra* note 3, at 957 ("Studies show that the average child first views pornographic material on the Internet at age eleven, and that approximately 80% of all children have viewed numerous hard core pornography websites by the age of seventeen.").

[143] *Ashcroft*, 542 U.S. at 667.

[144] *Id.*

[145] Ashcroft v. ACLU, 542 U.S. 656, 667 (2004).

alternatives."[146] Thus, Congress must deal with the problem that much of the indecent material available on the World Wide Web is available via other countries that operate outside of the jurisdiction of our statutes and that many U.S. based Internet requirements can be easily circumvented by hosting a site in a foreign jurisdiction.

Studies that have surfaced since *Ashcroft* have largely concurred that roughly half of all sexually explicit Internet sites are hosted overseas.[147] Obviously, foreign-hosted websites would not be subject to requirements to "tag" their web pages, but filtering by each ISP could include an option to "attempt to filter" foreign level three or level four content. The result would be that foreign filtering of level three or level four content would be as effective as it is today without tagging—that is, roughly 10% under-blocking and 25% over-blocking.[148] Thus, many foreign websites may adhere to tagging practices on their web pages in order to avoid being accidentally "over-blocked" by a significant portion the U.S. market by filters.[149]

Assuming foreign companies refuse to tag their sites, the end result of ISP controlled filtering in conjunction with mandatory website tagging practices in the United States would be that U.S. filtering of commercial pornography would be nearly 100% effective,[150] and foreign filtering would continue to be 80% to 90% effective.[151] But, it is hard to imagine foreign web sites owners would resist tagging their web pages knowing that the best filters over-block over 22% of websites in one of the largest consuming sexually explicit material industries in the world.[152]

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[146] *Id.*

[147] Stark, *supra* note 119, at 6 ("I estimate that 1.1 percent of the websites cataloged by Google and 1.1 percent of the websites cataloged by MSN are sexually explicit. The numbers are the same to one decimal place. I estimate that 44.2 percent of the sexually explicit websites in the Google index are domestic and that 56.6 percent of the sexually explicit websites in the MSN index are domestic.").

[148] This is obviously the same result as with noncommercial U.S. websites that post explicit material. *See* Hunter, *supra* note 116, at 220 (explaining current over and under-blocking problems and stats).

[149] Programming filtering devices to block both the tagging code and the traditional phrases and words already programmed into filters would not be difficult. Some home filters that allow the consumer to select specific categories of filtering could accomplish the task with almost no custom changes. It is as simple as telling the filter to pick up one extra "word" only the search word that would be blocked is a ten digit code (issued in connection with the two letter code to ensure specificity) which corresponds with the simple speech chart discussed earlier.

[150] Again, non-compliance by commercial entities and the small number of private sites would still be filtered at a 92% effective rate. *See* Hunter, *supra* note 116, at 220 (discussing that the most effective filtering programs filter, on average, 92% effective at blocking).

[151] Stark, *supra* note 119, at 7 (explaining that the best filters failed to block approximately 10% of sexually explicit websites and over-blocked approximately 20%, meaning that they were 80% to 90% effective depending on whether over-blocking or under-blocking was the issue).

[152] *See* Family Safe Media, *supra* note 5 (reporting that 14% of all porn revenues in the world flow from the United States).

D. What to Censor and How to Censor It

1. Congress Must Create a Statute that Focuses on Commercial Speech

It is important—at least initially—for Congress to tailor censorship legislation to commercial practice.[153] Generally, courts have upheld the notion that commercial speech enjoys less constitutional protection than other speech.[154] In *Lorillard Tobacco Co. v. Reilly,* the Court grappled with determining whether the speech in question was commercial or not and as a result created a three-prong test: (1) whether the expression is protected by the first Amendment as a result of concerning lawful activity; (2) whether the government interest is substantial; and (3) whether the regulation directly advances the governmental interest and if it is more extensive than necessary. Furthermore, the court explicitly declined to reject the Central Hudson analysis and apply strict scrutiny where the speech was commercial per se.[155]

Congress' first censorship legislation—the CDA—was directed broadly and was struck down because it failed to pass strict scrutiny. On its second attempt, Congress limited the requirements of COPA to commercial entities. Supported by three other Justices, Scalia argued to uphold COPA as constitutional and further clarified the standard by which it should be measured.

> We have recognized that commercial entities which engage in the sordid business of pandering by 'deliberately emphasiz[ing] the sexually provocative aspects of [their non-obscene products], in order to catch the salaciously disposed,' engage in constitutionally unprotected behavior. There is no doubt that the commercial pornography covered by COPA fits this description.[156]

Thus, by limiting the statute to regulate commercial speech, the statute will have a much better chance of success under intermediate scrutiny—as

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[153] For purposes of this article, I do not attempt to define the term "commercial" for Internet purposes —though the COPA statute was limited to commercial practice and afforded a definition that could provide a starting point for new legislation. *See* Preston, *supra* note 13, at 63 (describing the importance of successful censorship legislation: "the failure of the CDA cost us dearly in terms of what we value most. . . . [I]naction has its consequences. The irony may be that by leaving the Internet 'wild and free,' the events of these early years might have vastly complicated the work that must now be done.").

[154] FRANKLIN ET AL., *supra* note 24, at 169.

[155] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554 (2001).

[156] Ashcroft v. ACLU, 542 U.S. 656, 676 (2004) (Scalia, J. dissenting) (internal citation omitted).

opposed to strict scrutiny.[157]

2. Congress Must Create a Statute Specific to Children

Future attempts to create online censorship statutes must be very specific and narrowly tailored to protect children. Both the CDA and COPA statutes were not narrowly tailored enough to protect children in that both statutes swept unnecessarily broadly to also regulate adult speech. Congress must work to create narrowly tailored cyberspace statutes that focus strictly on protecting the parent's right to choose which speech is appropriate for their child and "deal with the morals of their children as they see fit."[158] In *Ginsberg*, the Court acknowledged that there are many constitutional arguments against government mandated moral standards—both for children and adults.[159] But, the Court emphasized that statutes that support parent's efforts to mold their children's morals—as opposed to statutes that dictate children's morals for the parents—are an appropriate use of the legislative power.[160]

> While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children, justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulated the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults.[161]

3. Eliminate the Contemporary Community Standards

Congress should consider using a different standard for determining which speech is harmful to minors. In both *Reno* and *Ashcroft*, the statute at issue considered "whether the average person, applying contemporary community standards, would find [the material], taken as a whole, [to]

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[157] *Lorillard*, 533 U.S. at 554 (stating that the *Central Hudson* standard which applies to commercial speech is a lower standard than the strict scrutiny, which the petitioners urged the court to apply).

[158] Ginsberg v. New York, 390 U.S. 629, 639-40 n.7 (1968) (noting that the slight difference between unconstitutional and constitutional is between government *mandating speech* for children according to the majority voice/vote and government *facilitating the opportunity for parents to mandate* what speech is appropriate for their children).

[159] *Id.* at 639.

[160] *Id.*

[161] *Id.* at 640.

appeal to, the prurient interest."[162] Both Justice Stevens and Ginsburg took issue with the "contemporary community standards" language and asserted that it alone was a "serious, and likely fatal, defect" in the statutory language.[163] This point was made several times in conjunction with the CIA statute and subsequently reiterated multiple times in connection with the COPA legislation.[164] Stevens argued that the World Wide Web should not be limited to that speech which "the least tolerant" would consider to be offensive.[165] In light of the concurring and dissenting opinions, the majority of the court agreed that "the practical effects of subjecting online communicators to the potential of prosecution under the most restrictive local standards would impose a burden on Internet speech that might be unconstitutional."[166] Congress should consider implementing a standard that is less subjective, more descriptive, and better balanced to take into consideration the adults that will be affected by the legislation. However, to date, no majority decision by a court has adopted the argument that the community standards concept chills speech in the Internet medium.[167]

V. CONCLUSION

Courts have consistently held that protecting the welfare of children is an important interest of government.[168] However, pushing back against this government interest are the same principles invoked to foster the marketplace of ideas that exist in television and print media: indeed, "[t]he level of discourse reaching the mailbox simply cannot be limited to that which would be suitable for the sandbox."[169] The divide in Internet censorship is not between those who acknowledge the importance of protecting children and those who don't. Rather, the divide is between those whose opinions about how to protect children fall at varying degrees of the "protection continuum." The relevant factors that contribute to the disparity in opinion are: (1) the degree of importance of protecting children

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[162] Reno v. ACLU, 521 U.S. 844, 872 (1997).

[163] Ashcroft v. ACLU, 542 U.S. 656, 673 (2004) (Stevens, J. concurring).

[164] *Id.* at 673-74.

[165] *Id.* at 674 ("I continue to believe that the Government may not penalize speakers for making available to the general World Wide Web audience that which the least tolerant communities in America deem unfit for their children's consumption, and consider that principle a sufficient basis for deciding this case.") (citation omitted).

[166] FRANKLIN ET AL., *supra* note 24, at 147.

[167] While there has been rising concern about the conventional community standard being used to evaluate indecent speech, the same concern has not been voiced as strongly about obscene speech. *Id.* at 146. *See also* United States v. Thomas, 74 F.3d 701 (6th Cir. 1996)

[168] Ginsberg v. New York, 390 U.S. 629, 640 (1968).

[169] Bolger v. Young's Drug Products Corp., 463 U.S. 60, 74 (1957).

from indecent and obscene speech, (2) the ideal degree of government intervention in speech and family rearing, (3) the importance of free speech as an individual right and/or as an important check against government, (4) the uniqueness of the Internet as the ultimate "marketplace of ideas," (5) the business interests of the 100 billion dollar porn industry,[170] and (6) the expectation that members of society must protect their own sensibilities "simply by averting their eyes."[171] Thus, ideal legislation—regulations which utilize some of the suggestions proposed in this essay—must balance all of these interests and provide a narrow safe-harbor for children while upholding the constitutional freedom of speech under the First Amendment.

[170] *See* Family Safe Media, *supra* note 5 (reporting that in 2006 the pornography industry made 97 billion dollars, and that the Internet is second only to video as the means for preview).

[171] Cohen v. California, 403 U.S. 15, 21 (1971).