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Meaningful Mortgage Reform

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Aligning Cyber-World Censorship with the Real-World Censorship

I. INTRODUCTION:

Should six-year-old children be able to access “the largest pornography store in history?” They can. Should eleven be the average age that a child first views pornography? It is. Should children between the ages of twelve and seventeen represent the largest group of pornography consumers? They do. It is puzzling how 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. But, I doubt it.

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, but can enter the same bookstore and

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3 Id.
5 Family Safe Media Website Statistics available at http://familysafemedia.com/pornography_statistics.html#anchor10 (reporting that in 2006 there were over 300 billion web searches for terms like “XXX,” “Playboy,” “Free Porn,” “Adult Sex,” “Porn,” and “Adult DVD”); supra note 4, and accompanying text (reporting that teenagers are the largest group of pornography users online).
6 Ginsberg v. New York, 390 U.S. 629, 635 (1968) (upholding a law prohibiting the sale of adult material to minors). "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
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—curbing constitutionally protected speech. Admittedly, the Internet is a special medium of communication; and the First Amendment safeguards for speech and press is 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 . . . [a medium] as diverse as human thought."7

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* the Court upheld the constitutionality of a New York statute that prohibited selling “obscene material” to children, including pornographic magazines.8 Similarly, in *Renton*, the Court upheld a zoning ordinance that prohibited adult movie theatres "within 1,000 feet of any residential zone, church, park or school," holding that the statute was justified in light of substantial evidence showing the adverse effects on neighborhood children and community improvement efforts.9 In *Pacifica*, the court found that the FCC had authority to prohibit certain speech that was "patently indecent" from being broadcast on the radio.10 These cases illustrate that the

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8 *Ginsberg*, 390 U.S. at 201 (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 864.
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.\textsuperscript{11} In 1996, Congress added the CDA as a “second thought” amendment to a larger proposal.\textsuperscript{12} The CDA prohibited knowingly transmitting obscene or indecent messages to children under the age of eighteen via the internet.\textsuperscript{13} This statute was struck down by the Supreme Court as an undue burden on First Amendment protected speech. Indeed, 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 CDA a “law of extraordinary stupidity; it practically impaled itself on the First Amendment.”\textsuperscript{14} And Professor Preston elaborated that it was, “thrown together without much thought, the CDA had techies nearly strangling their mouses in the vehemence of submitting their criticisms \textit{en blog}.”\textsuperscript{15} The Child Online Protection Act (COPA) was the second major attempt by Congress to protect children through cyber-regulation.\textsuperscript{16} In 2004, Congress created COPA in

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\textsuperscript{11} 47 U.S.C. §223(a) (1997).
\textsuperscript{13} 47 U.S.C. §223(a) (Supp. 1997).
\textsuperscript{14} \textit{Reno}, 521 U.S. at 892.
\textsuperscript{15} Preston, \textit{supra} note 12. (“Despite what might have been noble congressional intentions, the CDA was awful.”).
\end{flushleft}
response to the overturned CDA, but failed to heed several direct warnings by the Supreme Court, that such a law would be unconstitutional.\textsuperscript{17}

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 speech—strict scrutiny.\textsuperscript{18} 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 and Ashcroft. 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.\textsuperscript{19} On the other hand, the internet is used in 1.5 billion homes,\textsuperscript{20} 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.\textsuperscript{21}

\textsuperscript{17} Ashcroft, 542 U.S. at 660 (affirming the lower court's injunction). 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.

\textsuperscript{18} 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." \textit{Id.}

\textsuperscript{19} \textit{Id.} at 885.

\textsuperscript{20} Advanced Micro Devices Website available at http://www.50x15.com/en-us/internet_usage.aspx (projecting that 50\% of the world's population will be online by 2030).

\textsuperscript{21} Reno, 521 U.S. at 892 (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). \textit{Cf.} Preston, \textit{supra} note 12 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).
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. As a result this section simultaneously 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. This section relies on past precedent and facts about the internet to piece together a coherent regulatory scheme that would provide nearly one hundred percent protection for those cyber-users who want to avoid the indecent and obscene. Finally, in Part V the article concludes by providing a starting point for dealing with an issue that is far from finished.

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 develop exactly what speech is protected by the First Amendment and how different mediums receive different treatment under the Constitution.
Early Development of the Definition of Obscenity

During much of the twentieth century courts have been grappling with how much protection to afford different categories of speech that lie on the fringes of public sensibilities. Drawing the line between the subjective “immorality” and more objective standard of “explicit sexual depictions,” was an important step that began to surface in the mid-century. The courts have since determined that some forms of speech should receive little or no constitutional protection, including: child pornography, obscenity, hate speech, and defamation. But, particularly problematic is defining what speech is in or out. Speaking of obscenity, Justice Stewart stated that while it was difficult to define, “I know it when I see it.” In 1973, the Supreme Court decided Miller v. California, which became the landmark case articulating the definition used today:

“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.”

Thus, distribution of speech that meets the Miller definition may be lawfully banned. Today, courts have continued to uphold this constitutional carve-out

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23 Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 1 Med. L. Rptr. 1357 (1952); id.
24 First Amendment Center Website available at http://www.firstamendmentcenter.org/analysis.aspx?id=21505 (discussing the several categories of speech that receive little or no constitutional protection and the possibility of the Supreme Court adding to the list).
26 Miller v. California, 413 U.S. 15 1 Med. L. Rptr. 1441 (1973); Franklin, supra note ___ at 146.
27 Franklin supra note at 146.
for obscene speech on the internet. But, most sexually explicit material—including most pornography—is 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 general statues to shield society from indecency have failed. In Ginsburg the Supreme Court upheld the constitutionality of a New York statute that prohibited selling indecent material to minors, that is “obscene to children even if not obscene to adults.” The appellant admitted to selling pornographic magazines to a sixteen year old minor. The court found that the magazines at issue contained pictures which 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.”

The court also rejected the defendant’s argument that constitutional 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. The court emphasized that the state had an important and independent interest in securing the well

29 FRANKLIN ET AL., supra note 22, at 148.
30 Ginsberg at 631 (discussing the New York statute that prohibits the sale of obscene material to minors seventeen or younger).
32 Ginsberg, 390 U.S. at 631.
33 Id. at 631. (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.”).
34 Id. at 636.
being of its youth.\textsuperscript{35} And, 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 with respect to what is suitable for minors.”\textsuperscript{36}

c. Prohibiting Indecent Speech on the Radio

In \textit{Pacifica} the Supreme Court considered whether the FCC has any 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.\textsuperscript{37} The Supreme Court held that the FCC had authority to prohibit certain indecent speech broadcasted on the radio.\textsuperscript{38} 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) non-consenting 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.\textsuperscript{39}

d. Prohibiting Adult Movie Theatres in Certain Neighborhoods

In \textit{Renton}, the Supreme Court upheld a zoning ordinance that prohibited adult movie theatres in certain residential neighborhoods.\textsuperscript{40} In the majority opinion, Chief Justice Rhenquist reasoned that the ordinance was content neutral because it focused on

\textsuperscript{36} \textit{Ginsberg}, 390 U.S. at 638 (“Moreover, the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children.”).
\textsuperscript{38} \textit{Id.}
\textsuperscript{39} \textit{Id.} at 731.
\textsuperscript{40} \textit{Renton v. Playtime Theatres}, 475 U.S. 41, 49 (1986).
"secondary effects" of the speech, and not the speech itself.\textsuperscript{41} While the ordinance singled out a specific kind of speech, the "aim" and "predominant concerns" of the ordinance was not at content, but rather the secondary effects of the speech without regard to the actual speech.\textsuperscript{42} The court supported this assertion by pointing out that if the city had been focusing on restricting the content of the speech it would have created burdensome legislation aimed at closing the adult theatres, or restricting their numbers.\textsuperscript{43} The court also found that the government had a substantial interest.\textsuperscript{44}

e. United States v. Playboy

In \textit{United States v. Playboy}, the court considered federal statute §505 which required cable companies to separate indecent speech from other speech and effectively block it from those who had not specifically ordered it by (1) blocking it from those who had not ordered it, or (2) limit transmission to hours when children were likely asleep.\textsuperscript{45} 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.\textsuperscript{46} Also, the court noted, that while some of the material broadcast by Playboy could have been considered obscene, that fact would not be weighed because the appellant had not alleged that it was obscene.\textsuperscript{47} The Court elaborated, stating that filtering technology is important because it expands the capacity to choose and

\begin{footnotesize}
\begin{enumerate}
\item Id. at 46
\item Id. at 46, 53. ("Renton has not used the power to zone as a pretext for suppressing expression.")
\item Id. at 48.
\item Id. at 53.
\item \textit{Playboy}, 529 U.S. at 816 (discussing the less restrictive requirement to block as requested).
\item Id. at 811 (stating that all parties have brought the case on the premise that the material is not obscene).
\item Cf. id. at 896 (dissent J., Stevens) (discussing that the material may have met the standard for obscenity had it been alleged).
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encouraged Congress to create legislation that empowers and facilitates user-ended voluntary blocking system (filtering). 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.

The most important principle from Playboy that can be transferred to an analysis of internet is that the court favors 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 sued to safeguard the individuals ability to make judgements about content aside from Government decree—even if the majority of citizens wish to mandate certain speech.

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 was relatively rare. Additionally, Playboy is distinguishable because the commercial entities had made a good faith effort to scramble the indecent speech.

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48 Id. ("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.").
49 Id.
50 Id. at 818.
51 Id. at 818.
52 Id. at 807 (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).
f. The First Effort to Protect Children Online

In 1996 Congress enacted the Communications Indecency Act (“CIA”).\(^\text{53}\) This legislative enactment was created to reduce regulation and encourage the “rapid deployment of new telecommunications technologies.”\(^\text{54}\) The major thrust of the statute focused on telephone service, multi-channel video service, and over-the-air broadcasting.\(^\text{55}\) Only one of the seven titles in the act dealt with indecency on the internet: Title V, The Communications Decency Act (“CDA”). This legislation criminalized use of the 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.”\(^\text{56}\)

Congress’ effort to make the internet safe for children was found unconstitutional in *Reno v. ACLU*.\(^\text{57}\) 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.\(^\text{58}\) 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

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\(^{54}\) *Reno*, 521 U.S. at 888.

\(^{55}\) *Id.* at 888.


\(^{57}\) *Reno*, 521 U.S. at 844 (1997).

\(^{58}\) *Id.*
other. Second, the statute was overly broad—affecting the speech of adults—and not narrowly tailored to protect children. Third, the statute failed to focus on commercial speakers, a subset of our community that receives less stringent first amendment protection. In light of the many obvious 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.”

g. The Second Effort to Protect Children Online

In Ashcroft v. ACLU, the Supreme Court upheld an injunction of the Child Online Protection Act (“COPA”) 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. The COPA statute imposed criminal penalties of $50,000 and up to six months in prison for anyone who posted material “harmful to minors . . . for commercial purpose.”

The statute defined material that is “harmful to minors” as:

59 Id. at 889, 871 (“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 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 [indecent or patently offensive], this difference in language will provoke uncertainty among speakers about how the two standards relate to each other.”).
60 Id. at 893 (reasoning that the proposed provisions were too broad and easily distinguishable from cases where the Court had previously held restraints on indecent speech constitutional—Ginsberg, Pacifica, Renton, and Southeastern Promotions).
61 Id. at 865.
62 Preston, supra note 12, at 64.
64 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).
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 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.

Because the statute was a content-based prohibition the court applied the heightened strict scrutiny standard and presumption that the statute was invalid pending the Government’s showing of constitutionality. 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. Specifically, the court found that blocking and filtering software would be less restrictive than COPA: (1) filtering restricts speech on the receiving end, not a universal restriction; (2) filtering allows adults to gain access to speech they have a right to see while simultaneously restricting children; (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

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65 Id. at 660.
66 Id. at 660, 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.”). This high standard is part of the requirement under the strict scrutiny doctrine.
companies from simply creating oversees subsidiaries. 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 defined in this opinion, that COPA is the least restrictive alternative available to accomplish Congress’ goal.” 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 seeks out to draft future legislation it must keep in mind the specific advice of the two decisions where the Supreme Court critiqued CDA and COPA. Courts have been cognizant of the substantial governmental interest and have repeatedly conceded the concept 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,” Unfortunately, legislation that was created to protect that "basic structure in our society” has been half-hearted.

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67 Id. at 667.
68 Id.
69 Reno v. ACLU, 521 U.S. 845, 865 (1997); Ginsberg v. New York, 390 U.S. 629, 638. Additionally, while the Ashcroft Court majority did not explicitly reemphasize the importance of the government interest, it did not question it. Also, the four justice dissent noted that, “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?” Id. at 712 (Breyer, J., dissenting).
70 Reno 521 U.S. at 865.
71 If not half-hearted, then at least improperly constructed with little weight given to precedent, Supreme Court instruction, and notice for judicial standards.
h. Protection for Children Surfing the Net in Public Libraries

Of the millions of internet users in the United States, approximately ten percent rely solely on public libraries to access the Web. 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”). Some members of Congress felt that if the government was providing financial support, it could require—through the spending power—that a library receive E-rate or LSTA assistance only if it complied by installing a filtering device. During just a one year period prior to the case, Congress appropriated approximately $150 million in grants to libraries across the country. The principal purpose of the statute was to block obscene images from children at schools and libraries across the country.

The Supreme Court considered the constitutionality of CIPA in United States v. Am. Library Ass’n in 2003. The court refused to consider the statute as affecting public forum: “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.” Furthermore, the court found that public libraries use of “internet filtering software does

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73 Id. at 470.
74 United States v. Am. Library Ass’n, 539 U.S. 194, 198 (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), [helps] pay costs for libraries to acquire or share computer systems and telecommunications technologies.”).
75 Id. at 198.
76 Id.
77 Id. at 194.
78 Id. 205.
not violate their patron’s First Amendment rights, CIPA does not violate the Constitution, and is a valid exercise of Congress’ spending power.”79

In sum, by enacting CIPA, Congress was successful in utilizing its power under the Spending Clause to deny funds to libraries that refused to implement filtering software to protect children from indecent and obscene material. Important to the court’s holding, is 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.

III. Pros and Cons of the Most Recent Efforts To Protect Children Online

1. The Internet Community Ports Act

In a recent Law Review Symposium dedicated to “Pornography, Free Speech, and Technology, Professor Cheryl Preston introduced a technological and administrative concept for channeling internet speech with limited restriction on speech.80 In her article, Preston described the logistics for implementing the Ports Act. 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.81 Each of these data cables connects millions of computers

79 Id. at 237.
with millions of servers. Servers work to hold information, receive information, and send information in the form of data. Internet Service Providers (ISPs) act as a hubs 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). This IP address acts like a VIN number, or a license plate, address, or a phone 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.

When a data package is sent over the internet it passes through one of several “ports” or channels. There are over 65,000 ports available for transmission, but most internet users only access two or three. “The default, or primary, range includes port 80, over which the vast majority of current Web traffic passes, port 25, over which most email traffic currently passes, and the secured socket layer, over which encrypted information, such as credit card numbers and person information passes.”

The large number of ports of the internet can be likened to cable television channels. 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 a different ports—like

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82 Id.
83 Id.
84 Id.
85 Id. at 1427.
86 Id.
87 Id.
88 Id.
television.\textsuperscript{89} 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.”\textsuperscript{90} Thus, Preston asserts, “the 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.”\textsuperscript{91}

The Ports Act has not yet been presented to Congress, but provides a legitimate alternative to user-end filtering, and perhaps it is just the answer the Courts have been saying Congress should consider.\textsuperscript{92} 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. First, courts have indicated a clear preference for regulation empowering end users to screen out harmful content on the receiving end over regulation punishing content providers . . . at the source.”\textsuperscript{93} Professor Nunziato asserts 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

\textsuperscript{89} Id.
\textsuperscript{90} Id. 1433.
\textsuperscript{91} Id. 1427.
\textsuperscript{92} Ashcroft v. ACLU, 542 U.S. 656, 669 (2004) (“By enacting programs to promote the use of filtering software, Congress could give parents that ability without subjecting protected speech to severe penalties.”).
\textsuperscript{93} Nunziato, supra note 80, at 1583.
discourage free speech. Second, the courts may be leery of the fact that the Ports Act is hard to undo, and so individual users in a household or company would likely all be restricted to the same amount of information.\textsuperscript{94} Third, Nunziato holds that software filters “overblock substantially less constitutionally protected speech” than the Ports Act scheme and thus a court would likely find the Act unconstitutional.\textsuperscript{95}

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 Ginsberg.\textsuperscript{96} 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 not hard to imagine the stereotype that 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—but not necessarily all—of the concerns expressed by the Supreme Court over the years

\textsuperscript{94} \textit{Id.}
\textsuperscript{95} \textit{Id.}
\textsuperscript{96} \textit{Ashcroft}, 542 U.S. at 706 (dissent, J., Ginsberg & Stevens) (“When it 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.”).
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 be altered without damaging the main thrust of the Act it would increase possibilities of success under judicial scrutiny.

2. .KIDS

In 2002, Congress created the Dot Kids Implementation and Efficiency Act ("Dot Kids Act"). 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." Describing the intentions of the creators of the legislation, Congressman Fred Uptom claimed that the statute, "sets up a children's library section of the Internet." 

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

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98 Maureen E. Browne, Play it Again Uncle Sam: Another Attempt by Congress to Regulate Internet Content. How Will They Fare this Time?, COMMLAW CONSPECTUS 79, 91 (2004).
with traditional domains—for instance, .com. Second, sites that are registered within .kids domain cannot link to sites in .com, .org, or other high traffic domains. Finally, those sites within the .kids domain are required to pay for content reviews which bill at about 250 dollars a year. This requirement creates a deterrent for both commercial and noncommercial speakers. An inherent problem with .kids, is the fact that kids 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.

3. .XXX

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

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101 Id.
102 Id.
103 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.
104 Sinrod, supra note 100.
105 Id.
106 Id.
A conservative ground swell was headed by the Family Research Council.\textsuperscript{107} Supporters of the opposition argued that a .XXX domain would catalyze a insurgence among pornographers and allow them to "expand their evil empires on the Internet."\textsuperscript{108} Those in opposition to the domain mass-mailed the Department of Commerce, which received approximately 6,000 letters of concern.\textsuperscript{109} The canned email provided by the Family Research Council read:

\begin{quote}
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.\textsuperscript{110}
\end{quote}

As a result, the Department of Commerce directed ICANN to further consider the implications of implementing the .XXX domain.\textsuperscript{111} ICANN acquiesced.

Interestingly, the other side of the political isle simultaneously objected to the creation of a .XXX domain. Establishing a domain exclusively for pornography could lead to banishing porn only to that domain.\textsuperscript{112} Additionally, supporters of porn worried that the approval of a segregating .XXX domain could lead to legislation increasing censorship for that material that had been separated.\textsuperscript{113}

\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
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 Part attempts to provide a series of solutions that are in accordance with the directive of past Supreme Court decisions concerning internet censorship. Additionally, this Part 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.114 Internet filtering was suggested as a viable solution in both the Ashcroft and Reno decisions.115 In Ashcroft the court argued, “by enacting programs to promote the use of filtering software, Congress could give parents the ability [to protect children] without subjecting protected speech to severe penalties.”116 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 internet speech.

114 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.
115 Christopher Hunter, 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 have 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.”).
116 Ashcroft, 542 U.S. at 669.
Congress has not pursued filtering as the most viable option for protection 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 websites 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 seventy-five percent effective,\textsuperscript{117} while the U.S. Department of Justice showed that the most restrictive filter blocks about ninety-four percent.\textsuperscript{118} David Burt reported similar statistics when he reviewed thousands of websites he reported approximately a ninety-two percent effective rate.\textsuperscript{119}

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 twenty-two percent.\textsuperscript{120} 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.

\textsuperscript{117} Hunter \textit{supra} note 115.
\textsuperscript{118} Philip B. Stark, Expert Report of Philip B. Stark for the DOJ, 8, 8 May 2006.
\textsuperscript{119} David Burt, Table of Filtering Software Effectiveness Tests (2008), available at filteringfacts.org.
\textsuperscript{120} Stark, \textit{supra} note 118 (Stark reported that the trend was industry wide stating that, “generally, 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 percent of the sexually explicit websites in the Google and MSN indexes also blocked over 22 percent of the clean websites.”).
The third pitfall of home filters is that many children can easily circumvent home filters. “The high level of computer literacy of children allows them to bypass filters through tricks that go undetected by their less computer savvy parents.” 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 instead of accessing the sites URL.  

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.”  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 inefficiencies of filtering, an important element of successful filtering regime in the United States would require internet posters 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” 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, so adding a two digit code to that title would presumably not be burdensome. Additionally, individual website pages do not readily display their “codes”

122 Stark, supra note 118, at 8.
123 I propose the government develop a Speech Chart for categorizing all speech online. This would allow
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 ICRA which is already used by more than 100,000 websites that choose to rate their own material as a service to consumers. This chart outlines varying levels of different material that might be of interest to parents raising young children, including violence, nudity, sex, and language.

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

124 Hunter, supra note 115, 288 (2000). Cf. FOSI and ICRA Official Website, available at http://www.fosi.org/icra (“The centerpiece 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 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.”).
I would propose that the legislation would only require commercial websites to tag web pages for approximately two years.\textsuperscript{125} For example, a site with 1A, 1B, 1C, and 1D 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. 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 which would facilitate effective filtering by perfecting over-blocking and eliminating 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 to ensure that any federal statutes are not burdensome for those who wish to access or disseminate indecent material.\textsuperscript{126}

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 speak extremist or adult content on the net would not be restricted in the slightest, but parents could choose filtering options that were 100\% percent effective. Each user would have access to exactly that content which he or she was searching for. Websites with hot-button words that filters often incorrectly read—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

\textsuperscript{125} 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.

\textsuperscript{126} 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).
on speech already imposed by filters that over-block. Finally, required tagging practices would allow filters to block pornographic images and objectionable words that are 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 fees could be charged 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.\(^{127}\) Also, private pornography sites are rare in comparison to commercial sites.\(^{128}\)

Tagging internet sites with a code describing their content in order to ensure that children get the information they want when they “surf” and keep the 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 than actually prohibiting it."\(^{129}\) While it is unconstitutional to ban patently-offensive and indecent speech and pictures

\(^{127}\) *See supra* note 115, and accompanying text (discussing that the most effective filtering programs filter, on average, 92\% effective at blocking and 22\% over-blocking).

\(^{128}\) Family Safe Media Website Statistics available at http://familyesafe.com/pornography_statistics.html#anchor10 (stating that the “The pornography industry revenues exceed the revenues of all the top technology companies combined: Microsoft, Google, Amazon, eBay, Yahoo!, Apple, Netflix, and EarthLink”).

\(^{129}\) FCC v. Pacifica, 438 U.S. 726, 731, 733 (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.’”).
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."\textsuperscript{130}

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, some parents lack the technological ability to monitor what their children see, other parents lack the money to purchase filters, some parents—given full information—simply fail to act.\textsuperscript{131}

Congress should create a statute that requires internet service providers ("ISP") to participate in providing filters for their clients. This requirement would not be without supporting precedent. \textit{Ginsberg}, \textit{Pacifica}, and \textit{Renton} all involved statutes wherein 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.\textsuperscript{132}

Currently, ISPs enjoy almost zero responsibility for filtering content. Although, some ISPs have begun to censor content passing through and hosted on their servers to support copyright laws.\textsuperscript{133} Others—most notably AOL—have begun to implement editorial rights in service agreements in order to allow the ISP to reject hosting material

\textsuperscript{130} Id. at 733.
\textsuperscript{131} Ashcroft v. ACLU, 542 U.S. 657, 669 (2004).
\textsuperscript{132} See \textit{supra} notes 22–45 and accompanying text.
\textsuperscript{133} Brad Stone, \textit{AT&T and Other ISP’s May Be Getting Ready to Filter}, NY TIMES.COM, Jan. 8, 2008.
that is “grossly repugnant to the community standards.” 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 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.’

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. 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 level three or four (for example).

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 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.

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135 Janet Kornblum, ISP Censorship Seen as Trend, CNET, Sept. 18, 1997.
136 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.
137 Ashcroft, 542 U.S. at 669 (noting that many families do not use filtering devices because they do not know about them, or do not technologically understand them. The court suggested that the government could implement educational programs and advertising to overcome this pitfall of user ended filtering).
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 newspaper industries.138

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 seventy three percent.139 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;140 (2) the likelihood of radios in nearly every home

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138 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 Entertainment, 529 U.S. 803 (2000).

139 Internet World Stats: Usage and Population Statistics, Internet Growth Statistics, available at www.internetworldstats.com. 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. *Id.*

triggered extra deference for privacy interests; (3) the fact that nonconsenting adults could tune in without foreknowledge 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 that burden of filtering according to user-end 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.\(^{141}\) “The District Court noted in its fact findings 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.”\(^{142}\)

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.\(^ {143}\) 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 alternatives.”\(^ {144}\) 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

\(^{141}\) *Ashcroft*, 542 U.S. at 669.
\(^{142}\) *Id.* at 667.
\(^{143}\) *Id.*
\(^{144}\) *Id.* at 669.
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. 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 ten percent under-blocking and twenty-five percent over-blocking. 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.

Assuming foreign companies refused 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 one hundred percent effective, and foreign filtering would continue to be eighty to ninety percent effective. But, it is hard to imagine foreign web sites owners would resist...
tagging their web pages knowing that the best filters over-block over twenty-two percent of websites in one of the largest consuming sexually explicit material industries in the world.\footnote{Family Safe Media Website available at http://familysafemedia.com/pornography_statistics.html#anchor10 (reporting that fourteen percent 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.\footnote{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 provided a definition that could provide a starting point for new legislation. Preston, supra note 12, at 63 (describing the importance of successful censorship legislation at some level to build upon: “the failure of the CDA cost us dearly in terms of what we value most. . . . inaction 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.”).} Generally, courts have upheld the notion that commercial speech enjoys less constitutional protection than other speech.\footnote{FRANKLIN ET AL., MASS MEDIA LAW, 169 (2005).} 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; (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.\footnote{Lorillard v. Reilly, 533 U.S. 525 (2001).}

Congress’ first censorship legislation—the CDA—was directed broadly and was struck down because it failed to qualify under 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 emphasizing 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.”

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

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.” In Ginsberg, the court acknowledged that there are many constitutional arguments against government mandated moral standards—both for children and adults. But, the court emphasized that statutes that support parent’s efforts to mold their children’s

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155 Lorillard, 533 U.S. at 528 (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).
156 Ginsberg v. New York, 390 U.S. 629, 639 (1968) (discussing 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).
157 Id.
morals—as opposed to statutes that dictate children’s morals for the parents—are an appropriate use of the legislative power.\(^\text{158}\)

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.\(^\text{159}\)

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 asked whether “the average person applying contemporary community standards, would find [the material] designed to pander to, the prurient interest.”\(^\text{160}\) 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.\(^\text{161}\) This point was made several times in conjunction with the CIA statute and subsequently reiterated multiple times in connection with the COPA legislation.\(^\text{162}\) Steven’s argued that the World Wide Web should not be limited to that speech which "the least tolerant" would consider to be offensive.\(^\text{163}\) 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

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\(^{158}\) *Id.*

\(^{159}\) *Id.* at 640.

\(^{160}\) *Reno*, 521 U.S. at 844.

\(^{161}\) *Ashcroft*, 542 U.S. at 706.

\(^{162}\) *Id.*

\(^{163}\) *Id.* (“I continue to believe that the Government may not penalize speakers for making available to the 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.”).
speech that might be unconstitutional." 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. Although, to date, no majority decision by a court has adopted the argument that the community standards concept chills speech in the Internet medium.

V. CONCLUSION

Courts have consistently held that protecting the welfare of children is an important interest of government. 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, "the level of discourse reaching the mailbox simply cannot be limited to that which would be suitable for the sandbox." 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 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

164 FRANKLIN, supra note 22, at 147.
165 Id. at 146; United States v. Thomas, 74 F.3d 701, 24 Med. L. Rptr. 1321 (6th Cir. 1996). While there has been rising concern about this standard (the conventional community standard) being used to evaluate indecent speech, the same concern has not been voiced as strongly about obscene speech. Id.
billion dollar porn industry, \textsuperscript{168} and (6) the expectation that members of society must protect their own sensibilities by “simply by averting [their] eyes.”\textsuperscript{169} 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 and the press under the First Amendment.

\textsuperscript{168} Family Safe Media Website available at http://familysafemedia.com/pornography_statistics.html#time (reporting that in 2006 the pornography industry made 97 billion dollars with internet second only to video as the means for preview).

\textsuperscript{169} Cohen v. California, 403 U.S. 15, 21 (1971).