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Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech

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Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech

*Catherine J. Ross**

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“In olden days, a glimpse of stocking
Was looked on as something shocking.
But now, God knows,
Anything goes.”

—Cole Porter, *Anything Goes* (1934)

I. INTRODUCTION

Protecting children from contamination by speech has become the focus of national attention. The content of the protected speech that the state seeks to regulate is as varied as the form of communications targeted, including the allegedly indecent, sacrilegious, and violent in media ranging from books to the Internet. Echoing similar crusades to protect children from virtually every new form of entertainment over the last century, contemporary regulatory efforts to protect children reflect the unique legal status of children and the fragility of constitutional liberties where their vulnerabilities are invoked. But content-based restrictions on speech—even in the name

of protecting young people—presumptively violate the First Amendment,¹ which mandates “above all else . . . that government has no power to restrict expression because of its message, its ideas, its subject matter or its content.”²

Strict scrutiny under the Speech Clause requires the government to demonstrate a compelling interest in regulating speech based on its content and to show that a real harm exists which the restriction on speech will redress. Confronted with the incantation that the state aims to safeguard children, courts at every level, including the Supreme Court, have regularly failed to scrutinize the interest alleged by the government. This lack of analysis is all the more striking because the speech at issue in this Article is protected under the Constitution. It is neither legally obscene nor used in the service of criminal acts against children. Both of these categories of speech are unprotected, and are subject to criminal prosecution under pertinent statutes.

Although many parents and other adults might wish it were otherwise, the Supreme Court has recognized that as long as controversial speech is available, some “enterprising youngsters” will find it.³ The Supreme Court has conceded that no “fail-safe” methods can block the most determined teen, especially since government regulations based on content must be narrowly tailored.⁴ The Supreme Court has long held as inviolable the principle that even the desire to protect youth will not allow the state to “reduce the adult population . . . to

1. The First Amendment provides, in pertinent part, “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The First Amendment applies to the states through the Fourteenth Amendment. See *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

2. *Police Dep’t v. Mosley*, 408 U.S. 92, 95 (1972); see *id.* at 95-102 (explaining that government may impose content neutral “time, place and manner” restrictions on speech but may not single out one subject or viewpoint for regulation); see also *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) (reiterating that government cannot stifle speech on account of its content, “subject only to narrow and well-understood exceptions”); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-383 (1992) (confining unprotected speech to limited categories such as fighting words, direct incitement of lawless action, and obscenity); *Texas v. Johnson*, 491 U.S. 397, 414-20 (1989) (holding that flag-burning is protected speech). Cases recognize exceptions to protected speech, for example, statements about private citizens are given less protection than statements about public officials in libel cases, see *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-46 (1974), incitement to “imminent lawless action” is not protected, see *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), and “fighting words” are not protected, see *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

3. See *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 128-30 (1989) (rejecting the government claim that a total ban is necessary to protect minors). The term was first used in *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials*, 50 Fed. Reg. 42,699, 42,706 n.54 (1985), *rev’d*, *Carlin Communications, Inc. v. FCC*, 787 F.2d 846 (2d Cir. 1986).

4. See *Sable*, 492 U.S. at 130-31.

reading only what is fit for children."⁵ Regardless of the strength of the government's interest in protecting children, the Court has insisted that "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox."⁶

One case stemming from efforts to shield children from controversial speech was recently argued before the Supreme Court and a second is likely to reach the Court during the next term: *Playboy Entertainment Group v. United States* ("Playboy II"), involving control of transmissions from subscription adult cable channels so that they do not inadvertently reach non-subscribers,⁷ and *ACLU v. Reno* ("ACLU II"), involving the Child Online Protection Act ("COPA"),⁸ which limits commercial computer communications deemed "harmful to minors."⁹ Over the last decade, the Supreme Court has ruled on three other cases involving the constitutionality of federal efforts to regulate speech in order to shelter children from content: *Sable Communications, Inc. v. FCC*,¹⁰ *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*,¹¹ and *Reno v. ACLU* ("ACLU I").¹² In each instance, the Court rejected the state's argument that the goal of shielding children justified significant intrusions on constitutionally protected speech; in each instance, the Supreme Court overturned all

5. *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (overturning a state statute barring production and circulation of any book "tending to the corruption of the morals of youth"); see also *Reno v. ACLU* ("ACLU I"), 521 U.S. 844, 875 (1997).

6. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74-75 (1983) (overturning ban on mailing unsolicited material regarding contraceptives), quoted with approval in *ACLU I*, 521 U.S. at 875).

7. *Playboy Entertainment Group, Inc. v. United States*, 30 F. Supp. 2d 702 (D. Del. 1998), *prob. juris. noted*, 119 S. Ct. 2365 (1999) ("Playboy II"); see *Playboy Entertainment Group, Inc. v. United States*, 945 F. Supp. 772 (D. Del. 1996), *aff'd mem.*, 520 U.S. 1141 (1997) ("Playboy I").

8. Child Online Protection Act, 47 U.S.C.A. § 231 (West Supp. 1999).

9. *ACLU v. Reno* ("ACLU II"), 31 F. Supp. 2d 473 (E.D. Pa. 1999) (preliminarily enjoining enforcement of the Child Online Protection Act), *appeal docketed*, No. 99-1324 (3d Cir. Apr. 1999). The preliminary injunction in *ACLU v. Reno* "likely will be appealed all the way to the Supreme Court." Christopher Wolf, *Courts, Not Congress, Should Set Limits on Internet Content*, LEGAL TIMES, Feb. 15, 1999, at 25.

10. *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989) (overturning a total ban on commercial telephone sex messages known as "dial-a-porn").

11. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) (overturning key sections of a federal statute which required cable television operators to prevent transmission of indecent programming over leased access channels, and permitting cable operators to prevent transmission of such materials on public, educational, and government access channels (known as "PEGs").

12. *Reno v. ACLU* ("ACLU I"), 521 U.S. 844, 864 (1997) (overturning the Communications Decency Act of 1997 ("CDA") which criminalized the use of "indecent" or "patently offensive" speech on the Internet). Congress subsequently enacted legislation to "remedy the constitutional defects of the CDA," which was also enjoined prior to enforcement for violating the First Amendment. *ACLU II*, 31 F. Supp. 2d at 477.

or part of the statute at issue. The holding in each of the cases in the trilogy reiterated the Supreme Court's express statement in *Interstate Circuit v. City of Dallas* that the "salutary purpose of protecting children" does not insulate government action from constitutional scrutiny.¹³ But remarkably, in each of these three cases, the Supreme Court ignored its own dictates by failing to analyze the state's asserted compelling interest. Instead, the Court readily accepted the asserted interest in passing, but found that Congress had exceeded the boundaries of the Speech Clause in promulgating the specific regulation.¹⁴ Legal questions about the regulation of speech to shield children are likely to recur with increasing frequency, judging from the docket of pending legislation and statutes not yet tested in the courts.¹⁵

As a threshold matter, courts assessing a challenge to a government regulation under the Speech Clause are required to ask whether the interest asserted by the government is strong enough to

13. *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 689 (1968) (overturning a local ordinance that established a film classification scheme barring persons under age sixteen from films "not suitable for young persons" as void for vagueness). The decision in *Interstate Circuit* was handed down the same day as *Ginsberg v. New York*, in which the Court upheld a state statute barring the sale of "girlie" magazines to minors. *Ginsberg v. New York*, 390 U.S. 629, 637 (1968); see discussion *infra* Part III.

14. Because speech on the Internet, comparable to that of the soapbox orator, is entitled to the highest degree of First Amendment protection, a ban on such speech is unconstitutional. See *ACLU I*, 521 U.S. at 870. The requirement that cable operators segregate and block indecent speech on leased access channels is neither narrowly nor reasonably tailored; provisions allowing cable operators the discretion to ban indecent speech on leased access channels withstand constitutional scrutiny, but provisions allowing cable operators to ban such speech on PEGs is not narrowly tailored to protect children, since there is virtually no offensive speech on such channels. See *Denver Area*, 518 U.S. at 733, 760. A total ban on dial-a-porn services violates the rights of adults who wish to receive such messages. See *Sable*, 492 U.S. at 128-31.

15. See, e.g., *ACLU v. Reno* ("ACLU II"), 31 F. Supp. 2d 473 (E.D. Pa. 1999) (granting preliminary injunction), *appeal docketed*, No. 99-1324 (3d Cir. Apr. 1999); *ACLU v. Reno*, 27 Media L. Rep. (BNA) 1026 (E.D. Pa. Nov. 20, 1998) (temporarily enjoining enforcement of the Child Online Protection Act).

Pending federal legislation and bills recently introduced in Congress include the Children's Internet Protection Act, S. 97, 106th Cong. (1999), and H.R. 543, 106th Cong. (1999), which requires schools and libraries to install filtering or blocking programs on all computers with Internet access, see 145 CONG. REC. H4536 (daily ed. June 17, 1999), the Children's Defense Act of 1999, H.R. 2035, 106th Cong. (1999), introduced by Senator Hyde, an Amendment to the Juvenile Offenders Act of 1999, though defeated, see 145 CONG. REC. H4399-4401 (daily ed. June 16, 1999) and the Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, 112 Stat. 2974, providing, among other things, enhanced penalties for use of computers in the sexual exploitation of a child and requiring a National Academy of Sciences study of the availability of "pornographic" material to children on the Internet. Senator Patsy Murray proposed legislation to impose civil and criminal liability on those who fail to properly rate their own Internet sites to allow blocking by Internet filtering programs and the manufacturers of an Internet filtering program ("Safe Surf") proposed similar legislation called the Online Cooperative Publishing Act.

move forward with the applicable test under the First Amendment (normally "strict scrutiny" in the case of content restrictions) as opposed to the mere "legitimacy" or "rational basis" required in most legislative review.¹⁶ Since the restrictions on speech discussed here are indisputably content-based, the government would need to demonstrate a compelling interest to support the regulations. Then, and only then, are courts permitted to analyze whether the regulation at issue is indeed "narrowly tailored" to achieve the government's compelling aims without unduly imposing on protected speech.¹⁷

In case after case, courts at all levels have taken, at most, a cursory glance at the government's asserted interest before accepting the government's position that the interest is "compelling" or "signifi-

16. Where government regulates speech based on its content, the regulations will not survive judicial review unless they pass muster under "strict scrutiny" analysis. Strict scrutiny requires that the regulation serve a "compelling" state interest and be narrowly tailored to achieve that end. See *Sable*, 492 U.S. at 126. On the other hand, where the government regulates commercial speech, it must only show a "substantial interest," and satisfy the lesser, intermediate scrutiny standard of judicial review. See *Greater New Orleans Broad. Ass'n v. United States*, 119 S. Ct. 1923, 1930 (1999) (reiterating the continued vitality of the test for commercial speech set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980)). Advertisements for the underlying controversial speech discussed here, such as movie previews or ads for video games, would constitute commercial speech, and the government would only need to demonstrate a substantial interest in regulating such speech. Since the promotional materials are ancillary to the underlying communications at issue here, I focus on the compelling interest requirement that governs the effort to regulate the content of the core speech.

Occasionally the Court may subject regulations on non-commercial speech based on content to intermediate rather than strict scrutiny. If, for example, the government seeks to ameliorate undesirable "secondary effects" of such speech, the regulation may be regarded as "content-neutral" and will be subjected to the more deferential "intermediate scrutiny," which requires only a "substantial" government interest rather than a compelling interest. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49-50 (1986) (applying intermediate scrutiny to a zoning ordinance intended to prevent crime and maintain property values against the secondary effects of adult entertainment). Although Justice O'Connor has attempted to extend the reach of the *Renton* intermediate scrutiny test in a number of contexts, she has been unable to persuade a majority of the Court to join her. See *ACLU I*, 521 U.S. at 888-91 (O'Connor, J., joined by Rehnquist, C. J., concurring in part, dissenting in part) (stating that the CDA should be construed as an effort to create "adult zones" on the Internet); *Boos v. Barry*, 485 U.S. 312, 318-21 (1988) (O'Connor, J., for a plurality of three) (concluding that the regulation at issue is content based, but implying that *Renton* secondary effects analysis could apply to political speech if the "justification had nothing to do with that speech"). But see *Boos*, 485 U.S. at 334-38 (Brennan, J., concurring). A content-based restriction on speech cannot be recast as "content-neutral" if justified by attempt to reach "secondary effects" which require judicial inquiry into legislative motive, and in any event cannot be applied to political speech. See *id.*

17. See *Sable*, 492 U.S. at 126 ("It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends."); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980) ("Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest.").

cant.”¹⁸ Legal scholars have also largely failed to analyze the “compelling interests” asserted by the government.¹⁹ In a half dozen cases, however, lower courts have scrutinized, and some have rejected outright, the government’s proffered rationale for regulations that impinge on First Amendment freedoms, holding that the government interest asserted was insufficient as presented.²⁰

Serious consequences flow from this lack of attention to the nature of the interest served by regulating speech in the name of children. First, it leads to the tacit assumption that the government’s proclaimed interests are virtually immune from scrutiny once the state invokes the protection of children. Second, it suggests that the boundaries of the speech from which children must be protected are virtually limitless. As a result of an apparent lack of boundaries,

18. See, e.g., *ACLU I*, 521 U.S. at 875; *Sable*, 492 U.S. at 126; *id.* at 134 (Brennan, J., dissenting in part, joined by Marshall, J., and Stevens, J.) (“To be sure, the Government has a strong interest in protecting children against exposure to pornographic material that might be harmful to them.”); *Pope v. Illinois*, 481 U.S. 497, 513, 517 (1987) (Stevens, J., dissenting, joined by Brennan, J., and Marshall, J.) (The “government may not constitutionally criminalize mere possession or sale of obscene literature, absent some connection to minors.”); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 113 (1973) (Brennan, J., dissenting, joined by Stewart, J., and Marshall, J.) (arguing that obscenity is constitutionally protected “at least in the absence of distribution to juveniles”); *Ginsberg*, 390 U.S. at 649-50 (Stewart, J., concurring) (distinguishing children’s rights to access speech from adults’ rights). *But see Ginsberg*, 390 U.S. at 654-55 (Douglas, J., dissenting) (arguing against any special restrictions on speech for minors).

19. To my knowledge, only two articles by legal scholars have raised the issue with respect to the interest of shielding children. See Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141, 147-48, 175-79, 178 n.130 (criticizing the utility of the strict scrutiny test as applied in *ACLU I*, and noting that the Supreme Court “did not squarely confront” the question of whether the government has an independent interest in shielding children, separate from supporting parental decisions).

Harry Edwards and Mitchell Berman raise the question of whether “a court could conclude that elimination of televised violence would serve—let alone *accomplish*—a compelling state interest in promoting the health and well-being of children” based on the difficulty of identifying the harm to child viewers done by television violence, but concede “the state’s admittedly compelling interest in protecting the emotional and psychological well-being of children viewers.” Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Television*, 89 NW. U. L. REV. 1487, 1551-52 & n.288, 1562-63 (1995). Edwards and Berman do not, however, analyze the state’s asserted compelling interest, and limit their discussion to television violence. See also Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917 (1988) (discussing the lack of judicial attention to the government interest generally); Robert C. Post, *Racist Speech, Democracy and the First Amendment*, 32 WM. & MARY L. REV. 267, 278-79 (1991); discussion *infra* Part V (compelling interest in empowering parents). First Amendment interests such as “democracy” or “individual self-fulfillment” are too often reduced to conclusory labels which substitute for “serious engagement” about core issues.

20. See *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 755-56 (1996); *AIDS Action Comm., Inc. v. Massachusetts Bay Transp. Auth.*, 849 F. Supp. 79, 84 (D. Mass. 1993) (holding that the goal of shielding children from advertisements, which used witty sexual innuendoes in promoting use of condoms to prevent spread of AIDS, was not sufficiently compelling to justify authority’s limitation of speech in rejecting advertisements).

government at every level has relied on mere generalized assertions in promulgating broad regulations impinging on protected speech.²¹ Third, when courts beg the question of the nature of the state's interest in regulating speech to shield the young, they inhibit the development of First Amendment jurisprudence and lead emerging doctrine astray. Because courts have not asked the threshold questions required under First Amendment doctrine, they have opened the door to using children as an excuse for the state to intrude upon protected speech, suggesting that regulations on speech will survive scrutiny if they are narrowly crafted. The cumulative effect of this analytic sloppiness is that courts have glossed over the foundation question of whether a compelling state interest in regulating protected speech to shield the young exists at all.

In this Article, I seek to reframe the discussion by calling on courts to force government actors to meet their constitutional obligation to articulate clear, compelling interests to justify each regulation of speech imposed under the guise of protecting children. It is imperative that courts examine the nature of the government's alleged compelling interest in protecting children when considering regulations on speech because if the government's interest is insufficient to satisfy the applicable constitutional standard, an abridgement of protected speech cannot survive scrutiny, no matter how narrowly it is crafted.²²

My discussion focuses on the two compelling interests that the government generally offers for regulating speech that might reach children. First, proponents of government regulation of speech point to a compelling interest in helping parents to control their children's exposure to certain kinds of communication. Second, the state claims an independent interest in the development of children, regardless of the decisions made by their parents.²³

Unfortunately, the entire subject of these compelling interests has been isolated from the growing literature on the relationship between the state and families.²⁴ The first proposed interest—rein-

21. See, e.g., Richard P. Salgado, *Regulating a Video Revolution*, 7 YALE L. & POL'Y REV. 516, 516 (1989) (increased awareness of children's access to ultra violent or sexually indecent movies at local video rental stores has led to "pressures on legislatures to regulate which videotapes may be distributed and to whom"); Library Journal Digital, *Intellectual Freedom Legislation: The State of the States* (visited Jan. 27, 1999) <<http://www.bookwire.com/ljdigital/legislation.article>> (collecting pending and recently passed state legislation regulating speech on the Internet that is indecent or "harmful to minors").

22. See *Turner Broad. Sys., Inc., v. FCC*, 512 U.S. 622, 664-66 (1994).

23. See *infra* Parts V & VI.

24. See Akhil Reed Amar & Daniel Widawsky, *Commentary, Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359, 1385 n.106 (1992)

forcing parental authority—relies on a simplistic view that presumes a harmony between the interests of individual parents and the interests of the state. If the United States were a theocracy, such an assumption might be warranted: parents who did not share the nation's views could be forced to do so. But it is a foundational principle of governance in the United States that an on-going tension exists and must be tolerated between the constitutional guarantees of individual autonomy and the desire for a collective vision of the social good.

Applied to the relationship between the variety of families and the state, this tension translates into perpetual stresses along three sides of a triangle with endpoints labeled PCS: Parent, Child, and State. In some instances, the rights and preferences of parent and child will align perfectly, and will conflict with those of the state. This configuration is the principle focus of this discussion. In other instances, the state may intervene on behalf of the child in opposition to the parents, as in child abuse cases. In yet another configuration, a child may seek to exercise rights outside the home in opposition to parental wishes, and turn to the state for support, as when a teenager seeks to obtain an abortion without parental consent. This Article focuses on situations in which parents either wish the child to have access to communications that the state regards as inappropriate or take a more restrictive view than the state of what speech is appropriate for their child.

Proponents of regulation often claim a second compelling interest—an independent interest—rooted in the government's generalized commitment to nurture and educate the next generation of citizens. Upon examination, this second interest turns out to be no less problematic than the first. Constitutionally recognized principles of autonomy and family privacy limit the State's authority to make moral or developmental choices for minors in areas traditionally reserved for their parents or guardians.²⁵ To justify intrusions on parental rights and family privacy, proponents of abridging speech would need to demonstrate specific harm flowing from the speech.

Part II of this Article provides a brief historical perspective on long-standing concerns about the pernicious effect of new forms of communication on children. Part III defines the universe of protected, non-obscene but controversial speech that is at issue. Part IV sets out

("Because constitutional law and family law fall on different sides of the 'public' law/private' law divide, they are studied by different sets of scholars.")

25. See *Pierce v. Society of Sisters*, 268 U.S. 510, 534-36 (1925) (upholding injunctions against enforcement of a state law requiring parents to send their children to in-state primary schools); *Meyer v. Nebraska*, 262 U.S. 390, 401-03 (1923) (reversing conviction of teacher under state law forbidding teaching in languages other than English).

the test which courts are required to use in assessing the existence and strength of the compelling interest the state asserts for regulating speech and reveals the failure of the Supreme Court to apply its own standards for analyzing the government interest when the government invokes the need to protect children from speech. Part V examines the State's asserted compelling interest in empowering parents to enforce their speech choices on minors, including consideration of the varieties of families, family autonomy rights, the strength of competing private interests of certain parents and minors, and the potential conflicts between parental choices and governmental assumptions about social norms. Part VI analyzes the government's proclaimed compelling interest in regulating material available to minors based on the State's independent interest in the well being of its future citizens. Part VII analyzes the six evenly divided lower court opinions that have scrutinized the compelling interest put forward by proponents of regulations on speech to shield children, as well as the cases which the Supreme Court is expected to decide in the near future. Finally, the conclusion sets forth how scrutinizing the government's compelling interest will restore analytical rigor to an area of law too often susceptible to untested intuition supporting the imposition of majoritarian norms at the cost of constitutional liberties.

II. THE TRADITION OF PROTECTING INNOCENT CHILDREN FROM NEW FORMS OF EXPRESSION²⁶

The public is concerned about what children are hearing and seeing, and to some extent for good reason. Popular concern about the volume of exposure to various forms of media and about its content has spilled over into political discourse.²⁷ Even before the shootings at

26. Portions of this section and other ideas in this essay were originally presented in a panel in 1997. See 1997 Annual Conference Panel, Section on Mass Communications Law, Association of American Law Schools, *Sex, Violence, Children and the Media: Legal, Historical and Empirical Perspectives*, 5 COMM. L. CONCEPTUS 341, 352 (1997) (comments of Catherine J. Ross).

27. See, e.g., Telecommunications Act of 1996, 47 U.S.C. § 303 (1994 & Supp. III 1997) (finding that parents express "grave concern" over their children's exposure to "harmful video programming" and that children in the United States see an average of 8,000 murders and 100,000 acts of violence on television before finishing elementary school). See generally SISSELA BOK, *MAYHEM: VIOLENCE AS PUBLIC ENTERTAINMENT* (1998); NEWTON N. MINOW & CRAIG L. LAMAY, *ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION, AND THE FIRST AMENDMENT* (1995). In 1993, a survey noted by Congress reported that 80% of Americans believe that violence on television is harmful to children and to society. See *Alliance for Community Media v. FCC*, 56 F.3d 105, 149 (D.C. Cir. 1995) (Edwards, C.J., dissenting) (citing 139 CONG. REC. S5050-52 (daily ed. Apr. 28, 1993) (summarizing social science studies supporting this popular view)),

Columbine High,²⁸ Senator Robert Byrd proclaimed on the Senate floor:

The political and social environment in which parents must today raise their children is, unfortunately, an environment in which *anything goes* . . . Profanity, vulgarity, sex and violence are pervasive in television programming, in the movies, and in much of today's books that pretend to pass for literature. The [n]ation is inexorably sinking toward the lowest common denominator in its standards and values. Haven't we had enough?²⁹

In response to such anxieties, both federal and state governments have sought to reduce the exposure of children to arguably unsuitable material.

Regulations aim at communications that emanate from peers,³⁰ as well as those that appear in books,³¹ newspapers and magazines,³²

rev'd in part sub nom. Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727 (1996); *see also* BARRY GLASSNER, *THE CULTURE OF FEAR, WHY AMERICANS ARE AFRAID OF THE WRONG THINGS* 58-60 (1999) (stating that unfounded and/or misleading data feeds public paranoia about influence on America's children including "cybersmut").

28. *See* Marilyn Manson, *Columbine: Whose Fault Is It?*, ROLLING STONE, June 24, 1999, at 23 (arguing that in the search for a simple explanation, people forget that Cain did not need "books, movies, games or music to inspire cold-blooded murder"); *Video Battlers Stick by Their Games*, N.Y. TIMES, June 20, 1999, at A26 (noting that video games and other violent entertainment have come under increased scrutiny since shootings at Columbine High School in May of 1999 left 15 people dead).

29. 144 CONG. REC. S10,110 (daily ed. Sept. 9, 1998) (statement of Sen. Byrd) (emphasis added); *see also* 144 CONG. REC. S9923-25 (daily ed. Sept. 3, 1998) (statement of Sen. Lieberman). America's families must struggle to raise children in "today's 'anything goes' culture" where values appear "fungible." 144 CONG. REC. S9923 (daily ed. Sept. 3, 1998) (statement of Senator Lieberman) (emphasis added).

30. *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (student articles in the school newspaper); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (campaign speech for a student election); *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998) (speech on the student's website).

31. Controversies over books in school curricula and libraries are widespread, and originate from a variety of religious, ethnic and political views. *See, e.g.*, Board of Educ. v. Pico, 457 U.S. 853, 875 (1982) (remanding for inquiry into the motive for removing books from a school library); *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1024-25 (9th Cir. 1998) (involving controversy over Huckleberry Finn); *Scheck v. Baileyville Sch. Comm.*, 530 F. Supp. 679, 693 (D. Me. 1982) (granting an injunction against banning a politically controversial book from the school library, which also served as the town library); *Rosenberg v. Board of Educ.*, 92 N.Y.S.2d 344, 345-46 (Sup. Ct. 1949) (involving controversy over Shakespeare's "The Merchant of Venice"); *Today Show: Carolivia Herron Discusses the Controversy Over Her Book, "Nappy Hair," and the White Teacher Who Read It to Her Black and Hispanic Third Graders* (NBC television broadcast, Dec. 2, 1998). *See generally* STEPHEN BATES, *BATTLEGROUND: ONE MOTHER'S CRUSADE, THE RELIGIOUS RIGHT AND THE STRUGGLE FOR CONTROL OF OUR CLASSROOMS* (1993); HERBERT N. FOERSTEL, *BANNED IN THE U.S.A.: A REFERENCE GUIDE TO BOOK CENSORSHIP IN SCHOOLS AND PUBLIC LIBRARIES* (1994); PEOPLE FOR THE AMERICAN WAY, 1996 REPORT: ATTACKS ON THE FREEDOM TO LEARN (1997) [hereinafter P.A.W., 1996 REPORT]; PEOPLE FOR THE AMERICAN WAY, A RIGHT WING AND A PRAYER: THE RELIGIOUS RIGHT AND YOUR PUBLIC SCHOOLS (1997) [hereinafter P.A.W., RIGHT WING].

32. *See Gimsberg v. New York*, 390 U.S. 629 (1968) ("girlie" magazines); *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269 (D.N.H. 1979) (MS. magazine); *Desilets v. Clearview Reg'l Bd. of*

radio broadcasts,³³ rock music,³⁴ movies,³⁵ broadcast and cable television,³⁶ card games,³⁷ video games,³⁸ telecommunications,³⁹ and computer materials—including the Internet.⁴⁰ The regulations generally fall into

Educ., 647 A.2d 150 (N.J. 1994) (reviews of R-rated movies in school newspaper); Kevin McDermott, *Illinois House Overrides Veto on Student Press*, ST. LOUIS POST-DISPATCH, Oct. 30, 1997, at 1A (reporting that the state legislature promoted liberty guarantees for student newspapers after Napierville, Illinois, blocked publications of an investigative report on school officials' tax-funded travel); Dan Rosek, *Outlet for Controversy: Web Site Gives Student Journalists an Option*, CHI. SUN-TIMES, Nov. 22, 1998, at 12 (revealing a website devoted to publishing stories censored from school publications).

33. See *FCC v. Pacifica Found.*, 438 U.S. 726, 744-51 (1978) (upholding an FCC order regulating indecent language during radio broadcasts); *In re Infinity Broad. Corp.*, 3 F.C.C.R. 930, 930-31 (1987).

34. See, e.g., *Luke Records, Inc. v. Navarro*, 960 F.2d 134, 138-39 (11th Cir. 1992) (finding rap music to be protected speech); *Soundgarden v. Eikenberry*, 871 P.2d 1050, 1065 (Wash. 1994) (enjoining enforcement of erotic sound recordings statute).

35. See *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 684 (1968) (overturning film licensing standards which might leave "only the totally inane" available to viewers based on unsuitability for young viewers); *Gilmer v. Walt Disney Co.*, 915 F. Supp. 1001 (W.D. Ark. 1996) (alleging sexual images and messages embedded in videotapes of "The Lion King" and "The Little Mermaid").

36. See *Action for Children's Television v. FCC* ("ACT III"), 58 F.3d 654, 669-70 (D.C. Cir. 1995) (en banc) (expanding "safe harbor" period in which indecent broadcasts may be made); *Action for Children's Television v. FCC* ("ACT II"), 932 F.2d 1504, 1509-10 (D.C. Cir. 1991) (overturning ban on all indecent radio broadcasts); *Action for Children's Television v. FCC* ("ACT I"), 852 F.2d 1332, 1344 (D.C. Cir. 1988) (holding FCC may prohibit indecent radio broadcasts); see also *Children's Television Act of 1990*, 47 U.S.C. § 303(a)-(b) (1994); *Becker v. FCC*, 95 F.3d 75, 84-85 (D.C. Cir. 1996) (overturning FCC order allowing regulation of an anti-abortion television campaign showing aborted fetuses deemed harmful to children); *Writers Guild of Am., Inc. v. FCC*, 423 F. Supp. 1064, 1071-72 (C.D. Cal. 1976) (challenging family viewing hour policy); *Report & Order, In re Policies and Rules Concerning Children's Television Programming*, 11 F.C.C.R. 10660, 10750-52 (1996) (imposing minimal affirmative obligations on broadcasters to serve the educational needs of children). See generally Reed E. Hundt, *The Public's Airwaves: What Does the Public Interest Require of Television Broadcasters?*, 45 DUKE L.J. 1089 (1996); Julia W. Schlegel, Note, *The Television Violence Act of 1990: A New Program for Government Censorship?*, 46 FED. COMM. L.J. 187 (1993).

37. See *Eclipse Enters., Inc. v. Gulotta*, 134 F.3d 63, 66-68 (2d Cir. 1997) (overturning county ordinance regulating trading cards depicting crimes); *Altman v. Bedford Cent. Sch. Dist.*, 45 F. Supp. 2d 368, 380-82 (S.D.N.Y. 1999) (discussing regulation of "Magic: The Gathering," a card game played on school grounds).

38. See, e.g., *America's Best Family Showcase Corp. v. City of New York*, 536 F. Supp. 170, 174-75 (E.D.N.Y. 1982) (upholding law regulating installation of more than four coin-operated video games as a legitimate exercise of the state's police power and holding that video games do not constitute speech). See generally David B. Goroff, Note, *The First Amendment Side Effects of Curing Pac-Man Fever*, 84 COLUM. L. REV. 744 (1984) (summarizing municipal ordinances and arguing that videogames should be recognized as protected speech).

39. See *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 124-31 (1989); *Dial Info. Servs. v. Thornburgh*, 938 F.2d 1535, 1540-44 (2d Cir. 1991) (upholding statute regulating indecent telephone message service).

40. For a discussion of the evolution of the Internet and its salient characteristics, see *Reno v. ACLU* ("ACLU I"), 521 U.S. 844, 875 (1997). The Internet, which is included in but not the primary focus of the following analysis, is widely perceived as posing unique and uncontrollable hazards for the young. As this Article demonstrates, such arguments have been made about

four dominant modes: (i) an outright ban on the speech;⁴¹ (ii) channeling the speech so that it may only be available at times when children are assumed to be least likely to have access to it;⁴² (iii) using identification requirements to ensure that only adults receive the speech;⁴³ and (iv) filtering mechanisms reliant on technology designed to help parents and other adults screen speech according to pre-assigned categories and labels attached by others.⁴⁴

Many parents and grandparents, including legislators and judges in their individual capacities, “would like to see the efforts of Congress to protect children from harmful materials . . . ultimately succeed and the will of the majority of citizens in this country to be realized.”⁴⁵ But they will never succeed in completely shielding the young from exposure to controversial topics because there is virtually no information that an enterprising youngster could not pick up from news coverage. The highest elected official admits marital infidelity

virtually every new form of communication as it developed. For example, see the Communications Decency Act of 1996, 47 U.S.C. § 223(a)(1), (d) (1994 & Supp. III 1997) (subsequently overturned by *Reno v. ACLU*) and the Child Online Protection Act (“COPA”), 47 U.S.C.A. § 231 (West Supp. 1999) (subsequently enjoined by *ACLU v. Reno*, 31 F. Supp. 2d 473 (E.D. Pa. 1999), appeal docketed, No. 99-1324 (3d Cir. Apr. 1999) (“ACLU II”). See also *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999) (upholding injunction against enforcement of a New Mexico statute criminalizing dissemination of computer material that is “harmful to minors”); *Cyberspace Communications v. Engler*, 55 F. Supp. 2d 737 (E.D. Mich. 1999) (enjoining enforcement of a state law prohibiting the communication of sexually explicit material harmful to minors over the Internet); *ACLU v. Miller*, 977 F. Supp. 1228, 1231-35 (N.D. Ga. 1997) (granting a preliminary injunction barring enforcement of GA. CODE ANN. § 16-9-93.1, which outlawed communication anonymously or by using a pseudonym on computer networks including the Internet).

41. See, e.g., *ACLU I*, 521 U.S. 844; *Sable*, 492 U.S. 115; *ACT II*, 932 F.2d 1504 (overturning a 24-hour ban on indecent broadcasts enacted by Congress); *ACT I*, 852 F.2d 1332 (overturning a 24-hour ban on indecent broadcasts imposed by the FCC).

42. For example, an FCC ban on indecent radio broadcasts except during the “safe harbor” hours of midnight to 6 a.m. See Public Telecommunications Act of 1992, 47 U.S.C. § 303 (1994) (subsequently modified by *Action for Children’s Television v. FCC* (“ACT III”), 58 F.3d 654, 669-70 (D.C. Cir. 1995) (en banc) (expanding the safe harbor to the hours of 10 p.m. to 6 a.m.)); *Writers Guild of Am. Inc. v. FCC*, 423 F. Supp. 1064, 1071-72 (C.D. Cal. 1976) (discussing FCC television family viewing hour); *Playboy Entertainment Group, Inc. v. United States* (“Playboy II”), 30 F. Supp. 2d 702, 711 (D. Del. 1998) (overturning a statute that “reduce[s] the broadcast day for sexually explicit programming” to a safe harbor running from 10 p.m. to 6 a.m.), *prob. juris. noted*, 119 S. Ct. 2365 (1999); *In re Infinity Broad. Corp.*, 3 F.C.C.R. 930, 930-31 (1987) (suggesting that explicit radio broadcasts should not be aired “when there is a reasonable risk that children may be in the audience,” which may be until midnight).

43. See e.g., *Sable*, 492 U.S. at 115; *Ginsberg v. New York*, 390 U.S. 629, 631 (1968); *ACLU v. Reno* (“ACLU I”), 929 F. Supp. 824, 828-29 (E.D. Pa. 1996) (discussing challenge to the Communications Decency Act of 1996), *aff’d*, 521 U.S. 844 (1997).

44. See *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 688 (1968) (Marshall, J.) (stating that regulation of speech is no less objectionable because it takes the form of “classification rather than direct suppression”). The modes of regulation will be discussed *infra* in Parts V and VI.

45. *ACLU II*, 31 F. Supp. 2d at 498 (Reed, J.) (including “[t]his Court” among that group).

involving fellatio;⁴⁶ high school students use guns to murder their teachers and/or classmates;⁴⁷ a prominent musician, accused of child molestation, reportedly pays millions of dollars to avoid legal penalties;⁴⁸ international news includes coverage of so-called "ethnic cleansing" in the Balkans⁴⁹ and ethnic slaughter in Africa.⁵⁰ None of these news stories could be barred consistent with the First Amendment.⁵¹

The prevalence of such speech in news coverage underscores the flaws in the dominant mode of analyzing speech rights in light of the medium in which the speech occurs. The fragmented analysis grows in large part from the Supreme Court's doctrine that different levels of scrutiny apply to different forms of media⁵²—with the highest

46. See Mike Rosen, *It's About Justice, Not Sex*, DENVER POST, Aug. 21, 1998, at B7.

47. See Tom Kenworthy, *Up to 25 Die in Colorado School Shooting: Two Student Gunmen Are Found Dead*, WASH. POST, Apr. 21, 1999, at A1; Sue Anne Pressley, *6 Wounded at Georgia High School: Student Was Apparently Upset Over Breakup*, WASH. POST, May 21, 1999, at A1; *Suspect in School Shooting Formally Charged*, CHI. TRIB., June 17, 1998, at 16.

48. See *Vandal Sentenced for Painting Jackson Star*, THE ARIZ. REPUBLIC, Feb. 5, 1994, at A14.

49. See John Pomfret, *Misery for Muslims and Croats in Bosnia*, WASH. POST, Mar. 27, 1994, at A22.

50. See Norimitsu Onishi, *The Guns of Africa, Disarming Deadly Rwandan Rebels Is a Key to Congo's Cease-Fire Plan*, N.Y. TIMES, July 9, 1999, at A8 (reporting that the Hutu militia killed an estimated a half million Tutsi in 1994).

51. See *Miami Herald Pub'g Co. v. Tornillo*, 418 U.S. 241, 254-58 (1974) (holding unconstitutional a state law granting politicians "equal space" to answer critics in newspapers). Despite case law, the FCC has not always been scrupulous in distinguishing controversial speech that constitutes news from other controversial speech. See *Joint Brief of Petitioners at 5 & n.3, Action for Children's Television v. FCC ("ACT III")*, 58 F.3d 654, 669-70 (D.C. Cir. 1995) (en banc) (No. 93-1092) (quoting FCC statement that newsworthy nature of a broadcast would not be "dispositive"); *KSD-FM, Notice of Apparent Liability*, 6 F.C.C.R. 3689 (1990); *Report & Order, In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, 8 F.C.C.R. 704, 709* (1993).

52. The Supreme Court has long taken the view that each form of communication requires its own First Amendment analysis. See *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 637 (1994) (rejecting the argument that cable television and broadcast television should be analyzed under the same First Amendment standard); *FCC v. League of Women Voters*, 468 U.S. 364, 377 (1984) (noting characteristics that distinguish "the new medium of broadcasting" and that justify application of different First Amendment standards); *Tornillo*, 418 U.S. at 247-54 (discussing First Amendment standards applying to print media); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386-87 (1969) (supporting different First Amendment standards for different types of media); *National Broad. Co. v. United States*, 319 U.S. 190 (1943) (holding that radio is a unique mode of expression and subject to government regulation).

Judge Harry T. Edwards laments that:

[T]he law is in a state of disarray . . . [A]s often as not there is little coherence in the case law. For example, I have yet to comprehend the distinction that is drawn between *broadcast* and *cable* television . . . This is but a tip of the iceberg, so I will not dwell on my incredulity.

Action for Children's Television v. FCC, 59 F.3d 1249, 1263 (D.C. Cir. 1995) (Edwards, J., concurring with reservations).

deference traditionally paid to verbal expression and print media and the lowest to broadcast media.⁵³ I agree with the many scholars and jurists who question the continued vitality of the Supreme Court's distinction among forms of expression, which reached its apex in *FCC v. Pacifica Foundation*.⁵⁴ Except where it would be unrealistic to do so, the analysis here emphasizes the similarities rather than the distinctions among forms of communication.⁵⁵ For purposes of protecting children, the source of the speech makes little difference, except for the distinction between forms of speech that require literacy and those that do not.

The argument that the government has an independent interest in regulating protected speech on behalf of children rests on the relatively recent social construction of the child as innocent. It is also class based. Few observers who sought to protect children from contaminated speech in the nineteenth century argued that innocence characterized child laborers in mines and factories, chimney sweeps, gutter snipes, or residents of the poorhouses depicted by Charles

The compartmentalization of the law governing the First Amendment by media type has been the subject of scholarly criticism. See generally THOMAS G. KRATTENMAKER & L.A. POWE, *REGULATING BROADCAST PROGRAMMING* (1994); Eric M. Freedman, *A Lot More Comes into Focus When You Remove the Lens Cap: Why Proliferating New Communications Technologies Make it Particularly Urgent for the Supreme Court To Abandon Its Inside-Out Approach to Freedom of Speech and Bring Obscenity, Fighting Words, and Group Libel Within the First Amendment*, 81 IOWA L. REV. 883, 956-62 (1996); Thomas G. Krattenmaker & L.A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719 (1995).

53. In *Turner*, the Supreme Court expressly refused to reconsider the "continuing validity" of a special jurisprudence for broadcast television based on the scarcity rationale, despite the widespread criticism that doctrine has received from "courts and commentators." *Turner*, 512 U.S. at 638 & n.5 (citing *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *Telecommunications Research and Action Ctr. v. FCC*, 801 F.2d 501, 508-509 (D.C. Cir. 1986), L. BOLLINGER, *IMAGES OF A FREE PRESS* 87-90 (1991), L. POWE, *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 197-209 (1987), M. SPITZER, *SEVEN DIRTY WORDS AND SIX OTHER STORIES* 7-18 (1986), Renald H. Coase, *The Federal Communications Commission*, 2 J. LAW & ECON. 1, 12-27 (1959), Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1072-1074 (1994), and Laurence H. Winer, *The Signal Cable Sends—Part I: Why Can't Cable Be More Like Broadcasting?*, 46 MD. L. REV. 212, 218-240 (1987)); see also *In re Complaint of Syracuse Peace Council*, 2 F.C.C.R. 5043, 5048-5057 (1987) (analyzing the rationale for according broadcast media lesser First Amendment protection developed in *Red Lion* and concluding that the rationale no longer has validity). See generally KRATTENMAKER & POWE, *supra* note 52.

54. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

55. Rock songs, for example, are available in a variety of media: compact discs and audiotapes (sometimes accompanied by written lyrics), music videos available on cable television, videocassette recordings of those videos, and on websites, pointing to the need to engage in a legal analysis that transcends the mode of communication.

Dickens. The expansion of the notion of child as innocent made such conditions intolerable to social reformers.⁵⁶

Regulatory efforts to shield children from controversial speech to preserve their innocence have a long lineage. Legal precedent dates back to at least 1868, in the British case of *The Queen v. Hicklin* which, although unconstrained by the First Amendment, proved influential in the United States.⁵⁷ *Hicklin* enunciated an "obscenity" test designed to protect the lowest common denominator among minors and the most vulnerable adults.⁵⁸ According to *Hicklin*, the work could be banned entirely if it would tend to "deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall . . . [and if] it would suggest to the minds of the young of either sex . . . thoughts of a most impure and libidinous character."⁵⁹ American courts adopted the *Hicklin* standard, which provided a roadmap for nearly a century of jurisprudence on obscene and what would now be deemed controversial speech.⁶⁰

Moral crusaders persistently justified regulation of every new form of entertainment as necessary to protect the young. Building on social anxieties that associate young people with disorder, violence, and uncontrolled libido, they have targeted new forms of speech as a cause of youthful immorality, even as they lamented the inability of parents to live up to the trust society has placed in them as the primary custodians of their children. The gatekeepers of Anglo-American culture have long enlisted the state's help in limiting the controversial speech available to the young. In England, G.K. Chesterton commented on the absurdity of the influence on young reprobates attributed to evil reading: "It is firmly fixed in the minds of most people that

56. See generally VIVIANA ZELIZER, *PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN* (1985); Janet L. Dolgin, *The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship*, 61 ALB. L. REV. 345 (1997).

57. *The Queen v. Hicklin*, 3 L.R.-Q.B. 360, 369-73 (1868) (Cockburn, C.J.) (holding obscene and barring distribution of a book that criticized Roman Catholicism).

58. The case actually concerned blasphemy, not sex.

59. *Id.* at 371.

60. See *Smith v. United States*, 431 U.S. 291, 300 n.6 (1977) (explaining that in *Roth v. United States*, 354 U.S. 476, 488-89 (1957), the Supreme Court expressly rejected the *Hicklin* test); *United States v. Bennett*, 24 F. Cas. 1093, 1104 (C.C.S.D.N.Y. 1879) (No. 14,571) (adopting the *Hicklin* test); *State v. Cercone*, 196 A.2d 439, 440 (Conn. Cir. Ct. 1963) (stating that *Hicklin* began the era of "[m]odern confusion" about the definition of obscenity). Judge Edelstein suggests that the *Hicklin* test was actually modified in the lower courts even earlier. See *Klaw v. Schaffer*, 151 F. Supp. 534, 538 (S.D.N.Y. 1957) (citing *United States v. Kennerley*, 209 F. 119, 121 (S.D.N.Y. 1913) (Hand, J.), and *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182, 184 (S.D.N.Y. 1933) (Woolsey, J.), *aff'd* 72 F.2d 705 (2d Cir. 1934)).

gutter-boys, unlike everybody else in the community, find their principle motives for conduct in printed books."⁶¹

In the United States, Anthony Comstock personified the movement for state regulation of reading matter and entertainment on the grounds that it was necessary to protect children.⁶² Satan created titillating traps, he proclaimed, "for boys and girls especially."⁶³ Comstock demanded that the state protect children from a seemingly endless variety of new cultural dangers, including: dime novels and serialized tales; story papers;⁶⁴ books, theatrical performances and pictures (including the classics) that might "arouse in young and inexperienced minds lewd and libidinous thoughts;"⁶⁵ illustrated newspapers depicting crimes;⁶⁶ information about contraception;⁶⁷ stage plays of "beastly character;"⁶⁸ chewing gum containing prizes;⁶⁹ and candy lotteries available in confectionery stores.⁷⁰ Comstock did not trust parents to be aware of the pernicious effects of such entertainment, or even to realize its proximity to their children.

Motion pictures especially raised a tumult of efforts at censorship from their inception.⁷¹ Some major cities even shut down all

61. Robert Bremner, *Editor's Introduction* in ANTHONY COMSTOCK, *TRAPS FOR THE YOUNG*, at xxiii (Robert Bremner ed., Belknap Press 1967) (1883).

62. See generally NICOLA BEISEL, *IMPERILED INNOCENTS: ANTHONY COMSTOCK AND FAMILY REPRODUCTION IN VICTORIAN AMERICA* (1997). Beisel argues that the moral crusades of the nineteenth century designed to protect children from various vices reflected the concern of middle and upper class parents that exposure to vices would render their children unable to maintain the socio-economic status of their family in a rapidly changing society and economy, rather than an attempt to socialize immigrants and lower class children to conform to American mores. To be sure, Comstock frequently drew examples of lives ruined by exposure to cheap novels and magazines from elite groups including children enrolled in private preparatory schools.

63. See *Ginsberg v. New York*, 390 U.S. 629, 651 & n.1, 656-59 (Douglas, J., dissenting) (quoting and reprinting excerpts from Comstock's 1883 book entitled *Traps for the Young*, and comparing Comstock to his English forebear, Thomas Bowdler, who expurgated, or "Bowdlerized" a wide range of literature including Shakespeare's plays and Gibbon's *History of the Decline and Fall of the Roman Empire* in the early nineteenth century).

64. See COMSTOCK, *supra* note 61, at ch.3.

65. Bremner, *Introduction*, *supra* note 61, at xviii.

66. See COMSTOCK, *supra* note 61, at 16-19 (calling the daily press "a thing so foul that no child can look upon it and be as pure afterward").

67. See *id.* at ch. 10.

68. *Id.* at 46-50 (observing that the "youth in our large cities and towns can scarcely go from home to school without being forced to look upon invitations to witness representations of crime, lust, and bloodshed").

69. See *id.* at 96-97.

70. See *id.*

71. See Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society -- From Anthony Comstock to 2 Live Crew*, 33 WM. & MARY L. REV. 741, 760-66 (1992). The early films that caused so much uproar over their potential impact on the young were the very films now regarded as the "Golden Age" before the film industry prostituted itself to the contemporary market for sex and violence.

movie theaters, prompted at least in part by the notion that movies were "schools of crime."⁷² The Supreme Court initially declined to extend the protection of the First Amendment to moving pictures.⁷³ In its 1915 decision in *Mutual Film Corp. v. Industrial Commission*, a unanimous Supreme Court rejected an industry claim that movies were "useful, interesting, amusing, educational and moral."⁷⁴ The Court condemned movies as "capable of evil . . . the greater because of their attractiveness and manner of exhibition."⁷⁵ Following that ruling, nearly one hundred bills intended to censor motion pictures were introduced in the various state legislatures in 1921 alone. In the next year similar bills came before Congress, until the industry agreed to police itself.⁷⁶

The Supreme Court did not reverse *Mutual Film* until 1952.⁷⁷ In *Joseph Burstyn, Inc. v. Wilson*, the Supreme Court held for the first time that "expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments."⁷⁸ The majority opinion flatly rejected the state's justification of censorship on the grounds that "motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression."⁷⁹

72. *Id.* at 761-62 (quoting a 1907 *Chicago Tribune* editorial reprinted in MOVING PICTURE WORLD, Apr. 20, 1907, at 101, and later quoted in CHARLES FELDMAN, THE NATIONAL BOARD OF CENSORSHIP (REVIEW) OF MOTION PICTURES 1909-1922, at 3 (1977)).

73. See *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230, 243-44 (1915), *overruled in part* by *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

74. *Id.* at 240-41 (upholding a state board authorized to review all films and to engage in prior restraint of films that were not of a "moral, educational or amusing and harmless character").

75. *Id.* at 244.

76. See Blanchard, *supra* note 71, at 779-781. This flurry of activity led the industry to a devil's bargain in which it undertook self-censorship, with a list of "Don'ts and Be Carefuls." *Id.* at 780. These codes are the precursors of the contemporary movie rating system, which blends adult identification with what can be viewed as an "honor system" filtering mechanism rather than an automatic filter.

77. See *Joseph Burstyn, Inc.*, 343 U.S. at 504-06 (overturning a ban on Roberto Fellini's "The Miracle" based on accusations that the film was "sacrilegious"). For a description of "The Miracle," see *id.* at 507-08 (Frankfurter, J., concurring). A few years earlier in *United States v. Paramount Pictures*, 334 U.S. 131, 166 (1948), the Court noted that motion pictures are a form of speech.

78. *Joseph Burstyn, Inc.*, 343 U.S. at 502 (expressly reversing *Mutual Film*). This holding did not relieve the courts of considering challenges to restrictions on the speech of movies, especially where obscenity was alleged. See, e.g., *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 49-50 (1961) (Clark, J.) (5-4 decision) (upholding a film licensing ordinance); *Zenith Int'l Film Corp. v. City of Chicago*, 183 F. Supp. 623, 634-36 (N.D. Ill. 1960) (upholding prior restraint of director Louis Malle's "The Lovers").

79. *Joseph Burstyn, Inc.*, 343 U.S. at 502 (Clark, J.).

In *Burstyn*, the Supreme Court enunciated the frequently cited principle that “[e]ach method [of speech] tends to present its own peculiar problems.”⁸⁰ In subsequent references to the “peculiar” properties of each medium, the Supreme Court has inexplicably neglected the rest of that passage,⁸¹ which underscores that the principles of the Speech Clause transcend any distinctions based on mode of expression: “the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary. Those principles . . . make freedom of expression the rule.”⁸²

But that did not stop public outcries about the emergence of new modes of speech.⁸³ In 1954-55, the United States Senate Committee on the Judiciary concluded that the “crime and horror” genre of comic books which “offer short courses in murder, mayhem, robbery, rape, cannibalism, carnage, necrophilia, sex, sadism, masochism, and virtually every other form of crime” read daily by thousands of children was “contributing to the country’s alarming rise in juvenile delinquency.”⁸⁴ At about the same time, courts noted that “the broadening of freedom of expression and of the frankness with which sex and sex relations are dealt with . . . appear in all media of public expression.”⁸⁵

The controversies continued in response to the evolution of television, computers, video games, and music.⁸⁶ Cole Porter’s “Love

80. *Id.* at 503.

81. *See, e.g.*, *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58 (1975); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386-87 (1969); *Freedman v. Maryland*, 380 U.S. 51, 57 (1965).

82. *Joseph Burstyn, Inc.*, 343 U.S. at 503.

83. *See Winters v. New York*, 333 U.S. 507, 510 (1948) (finding comic books entitled to First Amendment protection).

84. S. REP. NO. 84-62, at 2, 7 (1955); *see also* Blanchard, *supra* note 71, at 788. The Congressional investigation built on psychiatrist Fredric Wertham’s *SEDUCTION OF THE INNOCENT* (1954). In response, the comic book industry refined its rating system, guidelines and seal of approval which resemble the movie rating codes that followed a decade later. *See* Comic Book Legal Defense Fund, *A Short History of Censorship in Comics* (visited Jan. 20, 1999) <<http://www.cbldf.org/history.shtml>> (reprinting versions of the Comics Code, including the original and the current Code); *see also* Sarah Boxer, *When Fun Isn’t Funny: Evolution of Pop Gore*, N.Y. TIMES, May 1, 1999, at B11 (explaining that comic strip authors use loopholes in the Comics Code to produce comics rife with violence, sexism, and racism).

85. *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488, 502 (S.D.N.Y. 1959) (holding D.H. Lawrence’s *Lady Chatterley’s Lover* not obscene under the then-applicable *Roth* test, and allowing it to be distributed in the United States for the first time).

86. *See* Boxer, *supra* note 84, at B11; Frank Rich, *Washington’s Post-Littleton Looney Tunes*, N.Y. TIMES, June 19, 1999, at A15 (arguing that politicians used the killings at Columbine High School in Littleton, Colorado for partisan ends in debating cultural issues). Music is protected speech under the First Amendment. *See Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) (“Entertainment, as well as political and ideological speech is protected.”). The distinction between music and politics may be

for Sale" may have pushed the envelope in 1930. In the mid-1960s "Let's Spend the Night Together" seemed pretty risqué.⁸⁷ More recently, Grammy Award winner Alanis Morissette lamented the loss of her lover to another woman, asking "will she go down on you in a theater?"⁸⁸ and Nine Inch Nails offered the romantic medley "you let me violate you, you let me desecrate you, you let me penetrate you . . . I want to fuck you like an animal . . ."⁸⁹

The pace of social change and the emergence of new modes and styles of communication have long inspired calls for censorship designed to shield children from contamination, and they continue to prompt parental concern. But whether or not such adult concerns are justified, or look reasonable in hindsight, the Speech Clause restricts the ability of the body politic to regulate speech that is protected for adults. Government efforts to make protected speech unavailable to children must overcome a number of constitutional barriers, beginning with the problem of definition, as explored in the following Part.

III. DEFINITIONS AND PARAMETERS

In this Article, I refer to "offensive and disagreeable" speech that is nonetheless protected under the Speech Clause as "controversial."⁹⁰ Controversial speech comprises the combined category of "indecent" speech which does not meet the legal definition of obscenity yet may be offensive to some recipients, and speech that contains "violent" material, which are the two kinds of content that seem most likely to

blurred, as in the case of rap music, where some performers view their music as political expression. See *Luke Records, Inc. v. Navarro*, 960 F.2d 134, 137 (11th Cir. 1992).

87. THE ROLLING STONES, *Let's Spend the Night Together*, on FLOWERS (Decca Records 1967).

88. ALANIS MORRISETTE, *You Oughta Know*, on JAGGED LITTLE PILL (Maverick/Reprise Records 1995) (1996 Grammy Award Winner for Best Rock Song of the Year).

89. NINE INCH NAILS, *Closer*, on THE DOWNWARD SPIRAL (Interscope Records 1994). Numerous other, more graphic examples exist. Marilyn Manson, who appears in a black leather thong and calls himself a satanist, has been barred from performing in a number of localities and draws protesters in others. See Neil Strauss, *A Bogey Band to Scare Parents With*, N.Y. TIMES, May 17, 1997, at A13.

90. See, e.g., *Planned Parenthood Ass'n v. Chicago Transit Auth.*, 767 F.2d 1225, 1230 (7th Cir. 1985) (affirming the district court's finding that mass transit authority ban on "immoral, vulgar, or disreputable" public interest advertisements violated the Speech Clause, and concluding that the government's policy reduces to nothing more than a subjective belief by officials that a subject is "controversial"); *Coalition for Abortion Rights v. Niagara Frontier Transp. Agency*, 584 F. Supp. 985, 986-87 (W.D.N.Y. 1984) (holding that labeling content "offensive" reduced to an agency concern that it was "controversial").

alarm popular sentiment when they reach children.⁹¹ Material that may offend in other ways, such as speech that might be perceived as blasphemous or racist also falls within the rubric of “controversial” speech. Admittedly, the term “controversial” is as vague as the terms “indecent,” “patently offensive,” or “violent.” Different observers, in different communities, perhaps depending on context, will draw the line at different subjects and at different ways of presenting those subjects.⁹² The lines between unprotected speech and controversial speech are often murky, especially since the definition of obscenity⁹³ (which is not protected speech) is far from a model of legal precision. As difficult as it has been for courts to define obscenity, protected controversial speech is even more amorphous. This Part examines the parameters of controversial speech by clarifying the sources of concern, the underlying difficulty of establishing meaningful categories of speech, and the range of controversial speech that has been targeted for regulation.⁹⁴

Judge Patricia Wald of the District of Columbia Circuit, commenting on the cable indecency statute ultimately overturned by the Supreme Court in *Denver Area*,⁹⁵ captured the confusion surrounding the legal status of controversial speech:

Lurid descriptions of programming that may well cross over the line into obscenity and merit no First Amendment protection at all should not obscure what this case really is about. This case is not about obscenity; it concerns significant restrictions on a class of speech that is unquestionably entitled to constitutional protection, although possibly offensive to some audiences. Under the broad definition of ‘indecent’ used in this regulation, affected speech could include programs on the AIDS epidemic, abortion,

91. See Transcript of Oral Argument, 1999 WL 1134595, at *8, *Playboy Entertainment Group, Inc. v. United States* (“Playboy II”), No. 98-1682 (Nov. 30, 1999).

92. See *Planned Parenthood*, 767 F.2d at 1230 (noting that there is little agreement about “what subjects would be banned by the [transit authority’s] controversiality policy, or indeed, what subjects are controversial,” since banned ads concerned topics such as abortion, the Vietnam war, and certain political messages, while ads were accepted concerning employment discrimination, arms control, and gun control); *American Libraries Ass’n v. Pataki*, 969 F. Supp. 160, 183 n.10 (S.D.N.Y. 1997) (noting various in the different communities of New York); see also Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 581-82 (1991) (arguing that speech about “important social issues” has a higher legal status fails because of the difficulty of defining such speech and because regulation of “low-value” speech may reduce the availability of more “valuable” speech).

93. See *Miller v. California*, 413 U.S. 15, 24 (1973); *infra* note 105 and accompanying text.

94. Consideration of the nature of the fora in which the various forms of regulated speech take place is beyond the scope of this Article, although it may have influenced particular holdings cited herein. For purposes of this analysis, I assume that the speech at issue takes place in an otherwise accessible forum, and is regulated solely based on its content. For a discussion of public, private, and limited public forum analysis, see Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249 (1995).

95. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996).

childbirth, or practically any aspect of human sexuality, as well as much literature and art from all over the world.⁹⁶

No communications are beyond challenge, even the Bible. The Song of Solomon is obscene to some people.⁹⁷ The Bible is replete with stories of adultery, family betrayal, and actions motivated by physical passion.⁹⁸ Some who do not find the Bible obscene may find the stories it contains controversial.

A. Government Regulation of Constitutionally Unprotected Speech

By definition, the protected speech that is my concern here is not legally obscene and is not used to facilitate crimes against children. Both obscenity⁹⁹ and criminal speech¹⁰⁰ are outside the protection

96. *Alliance for Community Media v. FCC*, 56 F.3d 105, 129 (D.C. Cir. 1995) (Wald, J., dissenting) (citations omitted), *rev'd in part sub nom.*, *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996).

97. See *Miller*, 413 U.S. at 46 (Douglas, J., dissenting). Courts should not be defining obscenity because the evaluation is primarily emotional; "[t]o many the Song of Solomon is obscene." *Id.*; see also *Ginsburg v. United States*, 383 U.S. 463, 482-83 (Douglas, J., dissenting).

98. See, for example, *Genesis* 19:32-38, in which Lot's daughters get their father drunk and sleep with him; *Genesis* 38:15-16, in which Judah sleeps with his daughter-in-law thinking she is a prostitute; *Genesis* 4:8, in which Cain murders his brother Abel; *Genesis* 12:11-17, in which Abraham tells Pharaoh that Sarah, Abraham's wife, is his sister, then Sarah prostitutes herself with Pharaoh. See also BURTON L. VISOTZKY, *READING THE BOOK, MAKING THE BIBLE A TIMELESS TEXT* 110-12 (1996) ("All of this rampant sexuality is, mind you, confined to but one family.").

99. See *Reno v. ACLU* ("ACLU I"), 521 U.S. 844, 878 n.44 (1997) (observing that transmitting obscenity and child pornography is already illegal regardless of the means of transmission for both minors and adults). The government expressed its view to Congress that the CDA was "unnecessary because existing laws already authorized its ongoing efforts to prosecute obscenity, child pornography and child solicitation." *Id.* (citing 141 CONG. REC. S8342 (daily ed. June 14, 1995) (letter from Kent Markus, Acting Assistant Att'y Gen., U.S. Department of Justice, to Senator Leahy)). The government conceded that obscene cable broadcasts are illegal and if material is obscene, additional regulation would not be necessary. See Transcript of Oral Argument, 1999 WL 1134595, at *2-*4, *Playboy Entertainment Group, Inc. v. United States* ("Playboy II"), No. 98-1682 (Nov. 30, 1999). See generally RICHARD A. POSNER & KATHERINE B. SILBAUGH, *A GUIDE TO AMERICA'S SEX LAWS* (1996) (summarizing state criminal law although not specifically focused on sex with children). For state criminal law regarding sex and children, see Chapter Three, entitled "Age of Consent," in POSNER & SILBAUGH, *supra*, at 44-64.

100. Speech used for criminal activity against children, or in the service of other crimes, such as fraud, or for illegal civil purposes, such as defamation, is not protected by the First Amendment. See, e.g., *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 66 (1994). *X-Citement Video* upheld the Protection of Children Against Sexual Exploitation Act of 1977 as amended, 18 U.S.C. § 2252. See, e.g., Child Protection Restoration and Penalties Enhancement Act of 1990, 18 U.S.C. § 2257 (amending earlier statute to include transportation of child pornography "by any means including by computer"); *id.* § 2252 (b)(1)-(2) (imposing enhanced sentencing guidelines on criminal offenders who intentionally mistreat children by, among other things, life-threatening maltreatment or sexual exploitation, whether through abuse or use for pornographic purposes); Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, 112 Stat. 2974 (codified in scattered sections of 18 U.S.C.); *Preventing Child Exploitation on the Internet: Special Hearing Before the Subcomm. on Antitrust, Business Rights, and Competition of*

of the First Amendment, and are illegal under a variety of statutes. None of the arguments offered here challenge the Supreme Court's holding in *New York v. Ferber* that "prevention of sexual exploitation and abuse" of minors is "a government objective of surpassing importance."¹⁰¹ In contrast to the speech under consideration here, *Ferber* upheld a law intended to stop the use and exploitation of actual children in the production of child pornography.¹⁰²

Obscenity (or what is generally called hard-core pornography) lies outside the protection of the First Amendment regardless of the medium of communication.¹⁰³ Obscene speech can be, and is, regulated for adults and children alike.¹⁰⁴ Under the test enunciated in *Miller v. California*, three elements must coalesce to render a communication legally obscene:

(a) . . . 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) . . . the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by

the Senate Comm. on Appropriations, 105th Cong. 23 (1998) (testimony of Ernest Allen, CEO and President of the National Center for Missing and Exploited Children) ("[C]hild pornography is illegal whether it's in an adult bookstore or sent through the mails or on the Internet . . . if it meets the test of obscenity under existing case law, it's illegal wherever."). Plaintiffs in *ACLU I*, 521 U.S. at 864-65, 872, and *ACLU v. Reno* ("*ACLU II*"), 31 F. Supp. 2d 473, 478 n.1 (E.D. Pa. 1999), *appeal docketed*, No. 99-1324 (3d Cir. Apr. 1999), did not challenge the portions of the statutes directed at obscenity.

The Federal Bureau of Investigation ("FBI") has created several programs to respond to possible Internet abuse by adult predators. These include the Cyber Tipline, where parents and others can report suspicious computer activity related to children and the Innocent Images squad, an online undercover operation in which specially trained FBI agents pose as children. Between its establishment in 1995 and March of 1998, Innocent Images investigations resulted in 184 convictions of adults attempting to victimize children over the Internet and the number of warrants and arrests is increasing rapidly. See *Hearings on Preventing Child Exploitation*, *supra* (testimony of FBI Director Louis J. Freeh).

101. *New York v. Ferber*, 458 U.S. 747, 757 (1982) (upholding a state statute barring production and dissemination of child pornography in order to protect children from the underlying act involved in producing such material).

102. *Id.*; see also *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1092 (9th Cir. 1999) ("Nothing in *Ferber* can be said to justify the regulation of [child pornography] other than the protection of the actual children used in [its] production . . ."). Despite the clear distinction between the behavior at issue in *Ferber* and the pure speech at issue in cases discussed here, the government regularly cites *Ferber* in support of its claim that protection of children comprises a compelling interest. See, e.g., Respondent's Brief, 1996 WL 34132, at *26, *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727 (1996) (Nos. 95-124 & 95-227) (citing *Ferber* for the proposition that the government has a "compelling interest" in "shielding children" from expression "that is not obscene by adult standards"); Respondent's Brief at *17, *Action for Children's Television v. FCC* ("Act III"), 58 F.3d 654, 660 (D.C. Cir. 1995) (en banc) (No. 93-1092) (citing *Ferber* to support the government's compelling interest in safeguarding children in the context of regulating indecent speech on television).

103. See *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 124 (1989) (ruling that obscene telephone messages lie outside the protection of the First Amendment).

104. See *id.* (observing that the First Amendment protects the right of adults to engage in or receive indecent speech).

the applicable state law; and (c) . . . the work, taken as a whole, lacks serious literary, artistic, political or scientific value.¹⁰⁵

As discussed further below, controversial speech often has "serious literary, artistic, political or scientific value" which prevents the speech from falling within the legal definition of obscenity.¹⁰⁶

The three elements of the *Miller* test may be modified when applied to minors, so that the impact of the speech and its value may differ depending on whether or not the recipient is an adult. In *Ginsberg v. New York*, the Supreme Court upheld a variable definition of obscenity for minors contained in a state statute barring the sale to minors of non-obscene "girlie" magazines that were protected speech for consenting adults.¹⁰⁷ It is frequently assumed that *Ginsberg* pro-

105. *Miller v. California*, 413 U.S. 15, 24 (1973); see *ACLU I*, 521 U.S. at 872-73 (finding that the *Miller* test remains the applicable standard for gauging obscenity). But see *Miller*, 413 U.S. at 41 (Douglas, J., dissenting) (stating that obscenity cases "have no business being in the courts") (citations omitted). Dissenting in the companion case of *Paris Adult Theater*, Justice Brennan argued that obscenity should be brought within the protection of the First Amendment because, among other things, despite numerous attempts the Supreme Court had "failed to formulate a standard that sharply distinguished protected from unprotected speech." *Paris Adult Theatre I v. Slaten*, 413 U.S. 49, 83 (1973) (joined by Stewart, J. and Marshall, J.). Justice Douglas, who consistently maintained that the government could not regulate speech on the basis that it contained sexually oriented matter filed a separate dissent. See *id.* at 70. The lack of consensus among the Justices long predated *Miller*. See, e.g., *Interstate Circuit v. City of Dallas*, 390 U.S. 676, 705 n.1 (1968) (Harlan, J., dissenting). The Supreme Court's efforts to define obscenity leave observers in "utter bewilderment" having resulted in a wide array of views in no less than 55 separate opinions among the Justices in the thirteen cases decided since *Roth*. *Id.*; see also *Sable*, 492 U.S. at 133 (Breunan, J., concurring in part, dissenting in part). "[T]he concept of 'obscenity' cannot be defined with sufficient specificity and clarity to provide fair notice to persons" who might be charged with violating criminal statutes. *Id.* (quoting *Paris Adult Theatre*, 413 U.S. at 103).

Some scholars argue that material that satisfies the *Miller* definition of obscenity should nonetheless be encompassed by First Amendment protections, but that debate is beyond the scope of this Article. See, e.g., NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX AND THE FIGHT FOR WOMEN'S RIGHTS 59-60, 73, 82 (1995) (criticizing the approach of feminist scholars Andrea Dworkin and Catharine MacKinnon); Freedman, *supra* note 52, at 931-43 (arguing that First Amendment exceptions threaten to render free speech protections dramatically weakened). For purposes of the argument here, however, let us assume that we will recognize obscenity "when [we] see it," since it is not the subject of analysis. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

106. *ACLU I*, 521 U.S. at 872 (quoting *Miller v. California*, 413 U.S. 15, 24 (1973)); see *Sable*, 492 U.S. at 124 (ruling that the First Amendment protects indecent speech). Some observers object that the legal test for obscenity does not reach all material that many citizens would regard as hard-core pornography, especially when the test is applied according to the contemporary norms in liberal communities. See *Action for Children's Television v. FCC* ("ACT III"), 58 F.3d 654, 660 (D.C. Cir. 1995) (en banc) (describing Deep Throat as "notorious" and grouping it with "hard-core pornography" not reached by obscenity laws); *United States v. Various Articles of Obscene Merchandise*, Schedule No. 2102, 709 F.2d 132, 134, 137 (2d Cir. 1983) (holding various detailed portrayals of sexual acts—including the movies "Debbie Does Dallas" and "Deep Throat"—not obscene under the community standards of New York City).

107. *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968).

vides a rationale for regulating protected speech, but in fact *Ginsberg* only lowered the bar for obscenity as applied to minors.¹⁰⁸ The statute at issue adapted the then-governing test for obscenity (the *Roth-Memoirs* test)¹⁰⁹ to weigh community standards as to “what is suitable material for minors.”¹¹⁰ The act further “adjust[ed] the definition of obscenity ‘to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests’ of such minors.”¹¹¹

The Supreme Court’s opinion in *Ginsberg* was premised on the assumption that the material which the statute suppressed for those under the age of seventeen was in fact “obscene” as to minors (though not as to adults, under the concept of “variable obscenity”), and therefore that the speech was outside the protection of the First Amendment.¹¹² This is a critical distinction from the protected controversial matter with which this Article is concerned, for it determined the level of scrutiny the Court applied to the “girlie” magazine statute at issue in *Ginsberg*. The majority opinion made explicit that since the magazines were unprotected as to minors under the Speech Clause, the only question for the Court was “whether the New York Legislature might rationally conclude . . . that exposure to the materials proscribed . . . constitutes such an ‘abuse.’”¹¹³ Once the Court accepted the

108. *Id.* at 638 (Brennan, J.) (citing *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) (“[T]he power of the state to control the conduct of children reaches beyond the scope of its authority over adults.”)).

109. See *Roth v. United States*, 354 U.S. 476, 488-89 (1956). The *Roth* test asks whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interests. *Id.*

110. *Ginsberg*, 390 U.S. at 639 (quoting N.Y. PENAL LAW § 484-h (McKinney 1965)); see *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 n.10 (1975). Subsequent to *Ginsberg*, the Court rejected the *Roth-Memoirs* test for obscenity, and substituted the *Miller* test; the Court has “not had occasion to decide what effect *Miller* will have on the *Ginsberg* formulation.” *Erznoznik*, 422 U.S. at 213 n.10.

111. *Ginsberg*, 390 U.S. at 638 (quoting *Mishkin v. New York*, 383 U.S. 502, 509 (1966)). The state has an interest in barring distribution of materials to children that may be suitable for adults. See *Bookcase, Inc. v. Broderick*, 18 N.Y.2d 71, 75 (1966).

112. In considering a facial challenge to a ban on nudity on the screens of drive-in movie theaters, the Supreme Court observed that “[t]he only narrowing construction which occurs to us would be to limit the ordinance to movies that are obscene as to minors.” *Erznoznik*, 422 U.S. at 213 n.10, 216 n.15. The Court did not reach the question, in part because neither party argued for such a limiting construction. See *id.*; see also *Carey v. Population Servs. Int’l*, 431 U.S. 678, 697 n.22 (1977) (finding *Ginsberg* inapposite to non-obscene, protected material); *American Booksellers v. Webb*, 919 F.2d 1493, 1501 (11th Cir. 1990) (interpreting *Ginsberg* to hold that a state may “deny minors all access in any form to materials obscene as to them”); *Bystrom v. Fridley High Sch.*, 822 F.2d 747, 751-52 (8th Cir. 1987) (holding that a school’s definition of “obscene to minors” is sufficiently specific); *Jones v. Wilkinson*, 800 F.2d 989, 997 (10th Cir. 1986) (holding that “[m]inors have more restricted right than adults to sexually oriented material”).

113. *Ginsberg*, 390 U.S. at 641.

legislature's finding that the material was obscene for minors, it logically followed that the law would receive only the rational basis scrutiny that applies to statutes which do not implicate constitutional liberties. Applying that deferential standard, the Court concluded "it is not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors."¹¹⁴

Many of the doctrinal problems surrounding controversial speech and children stem from the failure to confront the significance of the fact that *Ginsberg* does not stand for the principle that the state has a "compelling interest" in regulating protected speech that reaches minors. Nor does any language in the majority opinion suggest that the Supreme Court would have found a higher standard than mere rationality to have been satisfied on the facts. Justice Brennan pointed out that there was no dearth of studies contradicting the legislative finding that reading such magazines was injurious to the development of young people.¹¹⁵ But, he observed, in applying rational basis analysis, "[w]e do not demand of legislatures 'scientifically certain criteria.'"¹¹⁶ To the contrary, in order to support a regulation of speech that does not infringe on constitutional rights, such as the speech at issue in *Ginsberg*, the state must only provide "any reasonably conceivable state of facts that could provide a rational basis" for its action.¹¹⁷

If "scientifically certain criteria" remain unnecessary when the government attempts to demonstrate a compelling interest as opposed to a rational basis for legislation, at least some level of certitude may be required before courts are asked to approve infringement of core

114. *Id.* at 641, 643 (contrasting the legislative finding in *Meyer v. Nebraska*, 262 U.S. 390 (1923), in which there was no rational basis for finding the teaching of the German language harmful).

115. See *Ginsberg*, 390 U.S. at 641. It is worth noting that if *Ginsberg* had come before a Court made up of the identical Justices five years later, the outcome in *Ginsberg* would almost certainly have been different. Justice Brennan would not have authored the opinion, and probably would not have signed it. By 1973, Justice Brennan, who had authored the Court's first express holding on the constitutional status of obscenity in *Roth*, had concluded that there was no way to craft a constitutionally sustainable definition of obscenity, as he indicated in his dissent from *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 73 (1973) (Brennan, J., dissenting), and its companion case, *Miller v. California*, 413 U.S. 15, 47 (1973) (Brennan, J., dissenting). Justice Marshall, who voted with the majority in *Ginsberg*, and Justice Stewart, who concurred in *Ginsberg*, both joined Justice Brennan's dissents in *Miller* and *Paris Adult Theatre*. Presumably, if there is no way to define obscenity for adults, the drafting problems do not disappear just because the standard is a "variable" one for minors. See *Ginsberg*, 390 U.S. at 673 (Fortas, J., dissenting).

116. *Ginsberg*, 390 U.S. at 642-43 (citing *Noble State Bank v. Haskell*, 219 U.S. 104, 110 (1911)).

117. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) (finding a rational basis for distinctions among cable television facilities under the Equal Protection Clause).

liberty interests. The government's burden to demonstrate a "compelling interest" requires something more than a mere showing that the government regulation is not irrational.¹¹⁸ If material does not fall within the definition of variable obscenity applicable to minors, then the state may not prevent minors from receiving the speech. Speech that is not obscene for minors is protected from state regulation for minors as well as for adults.¹¹⁹

B. *Controversial Speech and the Problem of Meaningful Definitions*

While the Supreme Court has never succeeded in defining obscenity with clarity, it has never even attempted to define indecent or violent speech.¹²⁰ The speech subjected to regulation in order to protect children is often characterized as arguably "indecent," a term which has no legal definition.¹²¹ A Congressional attempt to expand the margins of indecency—however defined—lay at the heart of *ACLU I*, in which the Supreme Court held that two statutory provisions enacted "to protect minors from 'indecent' and 'patently offensive' communica-

118. Professor Volokh, among others, accepts the use of *Ginsberg* as a precedent for the government's interest in limiting non-obscene speech to protect children, and fails to note that *Ginsberg* did not implicate either indecency or strict scrutiny. See Volokh, *supra* note 19, at 176-86.

119. See *FCC v. Pacifica Found.*, 438 U.S. 726, 769 (Brennan, J., dissenting) (criticizing the majority for curtailing First Amendment protections when the speech in question is not obscene to youths).

120. See *Action for Children's Television v. FCC*, 59 F.3d 1249, 1261-62 (D.C. Cir. 1995) (upholding FCC forfeiture procedures for violation of a statute prohibiting obscene, indecent, or profane language on the radio).

121. The FCC has relied on the definition of indecency it used in *Pacifica* in developing regulation since then. See Edythe Wise, *A Historical Perspective on the Protection of Children From Broadcast Indecency*, 3 VILL. SPORTS & ENT. L. J. 15, 17, 33-34 (1996) (applauding the FCC's enforcement of the obscenity, indecency, and profanity prohibition in the least restrictive manner, while protecting the right to privacy in the home). The Supreme Court, however, never expressly examined the definition of indecency at issue in *Pacifica*, or in any subsequent case. See *Action for Children's Television v. FCC* ("ACT I"), 852 F.2d 1332, 1338-39 (D.C. Cir. 1988) (noting that the Supreme Court has never examined whether the FCC definition of indecency was unconstitutionally vague, and expressly asking the Supreme Court for guidance as to whether *Pacifica* should be read as an implicit acceptance of the "generic" definition of indecency), cited in *Alliance for Community Media v. FCC*, 56 F.3d 105, 130 n.2 (D.C. Cir. 1995) (Wald, J., dissenting) (finding that the Supreme Court has "never actually passed on the FCC's broad definition of 'indecency'"), *rev'd in part sub nom. Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727 (1996) (failing to define indecency). Indeed, the Supreme Court has expressly criticized the legislative branch for its failure to define indecency in statutes seeking to control such speech. See *National Endowment for the Arts v. Finley*, 524 U.S. 569, 589-90 (1998) (upholding the statutory scheme of NEA review of applications for financial grants); *Reno v. ACLU* ("ACLU I"), 521 U.S. 844, 867, 871 (1997) (criticizing the uncertainty of the Communications Decency Act of 1996 for undermining Congress's objective of protecting minors from potentially harmful materials).

tions on the Internet" violated the First Amendment.¹²² The portions of the statute at issue in *ACLU I*, the Communications Decency Act ("CDA"), effectively barred both indecent and patently offensive speech from the Internet, but did not define either term.¹²³ Significantly, the CDA did not provide any exceptions for content with "serious literary, artistic, political or scientific value" even in an educational context,¹²⁴ including serious communications between parents and their own children. The CDA imposed criminal penalties both on speakers who knew that their communications would reach minors and on those who merely displayed messages on the Internet in a manner that would be accessible to minors. The latter behavior included all materials posted on unrestricted web pages or contributions to chat rooms that a minor might enter in the midst of a dialogue. Because of the lack of a scienter requirement, the breadth of the speech affected and the lack of a defense based on the inherent value of the speech, the CDA effectively squelched virtually all speech about sex and bodily functions on the Internet. It barred adult speakers and recipients as well as minors from engaging in such speech.

Whatever the precise definitions, however elusive they may be, Justice Scaha has correctly noted the irony that as society becomes more tolerant of a variety of speech—removing it from the category of "obscenity" which may be subject to regulation—the result is that a higher proportion of speech that offends many citizens falls into the even amorphous category of "indecent."¹²⁵ The contraction of the scope of unprotected speech related to sex and the resulting expansion of the universe of protected "indecent" speech makes the intractable problem of definitions both more difficult and more important. "[W]here a reasonable person draws the line in this balancing process—that is, how few children render the risk unacceptable—depends in part on what mere 'indecent' (as opposed to 'obscenity') includes," Justice Scalia observed, focusing on speech that falls at the margins.¹²⁶ "The more narrow the understanding of what is 'obscene' and hence the

122. *ACLU I*, 521 U.S. at 849.

123. *Id.* at 871 n.35 (assuming, *arguendo*, that "patently offensive" is synonymous with "indecent" as used in the Act). The Supreme Court's most recent opinion on indecent speech also failed to define the nature of that speech, reserving interpretation of the congressional definition ("general standards of decency") to a federal administrative agency. See *Finley*, 524 U.S. at 589 (holding that Congress may instruct the National Endowment for the Arts to decline to fund art that may offend general standards of decency).

124. *ACLU I*, 521 U.S. at 872 (quoting *Miller v. California*, 413 U.S. 15, 24 (1973)).

125. See *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 132 (1989) (Scalia, J., concurring).

126. *Id.*

more pornographic what is embraced within the residual category of 'indecent,' the more reasonable it becomes to insist upon greater assurance of insulation from minors," he concluded.¹²⁷ To justify restrictions on speech, however, the government—unlike parents—must have an interest that is more than "reasonable."¹²⁸

The Supreme Court has never squarely confronted the question of whether speech that is "indecent" (however defined) is entitled to lesser constitutional protection than other forms of protected speech.¹²⁹ The Supreme Court has repeatedly emphasized, however, that indecent speech falls within the rubric of protected speech, and that the government may not make such speech inaccessible to adults.¹³⁰ According to Justice Stevens' plurality opinion in *Pacifica*:

[T]he concept of 'indecent' is intimately connected with children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs at times of day when there is a reasonable risk that children may be in the audience.¹³¹

Pacifica represents the epitome of the FCC's gradual expansion of the concept of indecency since the 1920s from "an amorphous generalization poorly differentiated from obscenity into a concept 'intimately connected with the exposure of children to' " controversial material.¹³²

127. *Id.*

128. See discussion *infra* Part VI.

129. Justice Stevens' plurality opinions in *FCC v. Pacifica Foundation*, 438 U.S. 726, 745-46 (1978), and *Young v. American Mini-theaters, Inc.*, 427 U.S. 50, 65-66 (1976), suggested that patently offensive or indecent speech might have only "slight social value," but that proposition did not command a majority. See also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 n.6 (1992) (rejecting Justice Stevens' assertion "that selective regulation of speech based on content is not presumptively valid.") Writing for seven Justices in *ACLU I*, Justice Stevens no longer took the position that there is a sliding scale of value assigned to indecent speech. See Volokh, *supra* note 19, at 144-45.

130. See *Reno v. ACLU ("ACLU I")*, 521 U.S. 844, 869 (1997) (discussing *Sable*, 492 U.S. at 128).

131. *Pacifica*, 438 U.S. at 731-32 (emphasis added) (quoting *In re Pacifica Found.*, 56 F.C.C.R.2d 94, 98 (1975)). Justice Stevens never addressed the question of whether the government had alleged a compelling interest in protecting children, but rather appeared to take the government's interest at face value. See *id.* at 749-50 (Stevens, J., plurality opinion) (citing only *Ginsberg*, and failing to note that *Ginsberg* was inapposite because it applied a rational basis test); see also *Dial Info. Servs. v. Thornburgh*, 938 F.2d 1535, 1541 (1991) (noting that both the FCC and Congress have tracked the definition approved in *Pacifica* in post-*Sable* attempts to regulate dial-a-porn). But the Supreme Court emphasized in *Pacifica* itself and in subsequent references to its opinion therein that *Pacifica* is a narrow holding, limited to its facts, including a heavily regulated form of media, an afternoon broadcast, and the unique pervasiveness and accessibility of the medium to young children. See *ACLU I*, 521 U.S. at 868-70 (distinguishing *Pacifica*); *Sable*, 492 U.S. at 128 (observing that when the recipient of speech must take affirmative steps to obtain communications, *Pacifica* doctrine does not apply).

132. Wise, *supra* note 121, at 17 (citing *Pacifica*, 428 U.S. at 732) (tracing legal developments that led the FCC "to narrow the focus of indecency regulation to children"); see also Lili Levi, *The FCC, Indecency, and Anti-Abortion Political Advertising*, 3 VILL. SPORTS & ENT. L.J. 85, 112

The treatment of violent speech is distinguishable from the speech considered in *Pacifica* which involved sexuality and bodily functions. Although there is widespread concern about the amount of violence contained in entertainment that reaches children,¹³³ the Supreme Court has never held that speech containing violent sentiments or imagery lies outside the protection of the First Amendment as applied to either adults or children.¹³⁴ The sole exceptions are speech that fits the definition of "fighting words" or rises to the level of "incitement," neither of which applies for the purposes of the analysis here.¹³⁵ Controversial speech about violence merely portrays violent acts or characters but does not expressly advocate imminent violence. It is no easier to define than speech dealing with sexuality. As early as 1972, the FCC concluded that it could not prohibit broadcast violence because the subject matter would prove impossible to define.¹³⁶ And violence has not become any easier to define with the passage of time. As one Congressman recently wondered, does violence mean "a movie like 'Home Alone,' . . . a movie like 'Ben Hur,' . . . [or] a movie like '[Saving] Private Ryan?'"¹³⁷

(1996) (observing that Justice Stevens' definition of indecency as "nonconformance with accepted standards of morality" in *Pacifica*, 438 U.S. at 740, would give the FCC wide range to expand the notion of indecency in order to protect children).

133. See, e.g., James Gerstonzang, *Clinton Sees Violent Influence in 3 Video Games Media*, L.A. TIMES, Apr. 25, 1999, at A12 (reporting that President Clinton urges parents, Hollywood, and software producers to resist products that glorify violence); Richard Lacayo, *Violent Reaction*, TIME, June 12, 1995, at 24 (discussing the divisive debate over who is responsible for sex and violence in popular culture). See generally BOK, *supra* note 27.

134. See *R.A.V.*, 505 U.S. at 391 (finding hate speech including cross burning to be protected expression); *Winters v. New York*, 333 U.S. 507, 519 (1947) (finding that the First Amendment protects communications depicting deeds of bloodshed, lust and crime); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 688 (8th Cir. 1992) (holding that depictions of violence alone do not fall within the definition of obscenity for either minors or adults); *Sovereign News Co. v. Falke*, 448 F. Supp. 306, 394 (N.D. Ohio 1977) (outlining the *Miller* test for obscenity).

135. Cf. *Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969) (incitement); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (fighting words). A radio or television show, or Internet communication that urged children to find their parents' guns immediately and go shoot someone would be subject to regulation or liability under *Brandenburg*. Cf. *Weirum v. RKO General, Inc.*, 539 P.2d 36, 40 (Cal. 1975) (finding no First Amendment defense for a radio contest causing personal injury).

136. The Commission referred to the dilemma posed by how to treat *Peter Pan*, where the crocodile eats Captain Hook. See Wise, *supra* note 121, at 34-35 (citing Report on the Broadcast of Violent, Indecent, and Obscene Material, 51 F.C.C.R.2d 418, 418-419 (1975) (responding to TELEVISION AND GROWING UP: THE IMPACT OF TELEVISED VIOLENCE, A REPORT TO THE SURGEON GENERAL FROM THE SURGEON GENERAL'S SCIENTIFIC ADVISORY COMMITTEE ON TELEVISION AND SOCIAL BEHAVIOR (1972))). One can easily see the problems in trying to classify other children's classics such as *Bambi*, who sees his mother shot by a hunter, or *Babar*, whose mother is similarly dispatched at the beginning of the first volume.

137. Alison Mitchell & Frank Bruni, *House Undertakes Days-Long Battle on Youth Violence*, N.Y. TIMES, June 17, 1999, at A1, A26 (quoting Representative Mark Foley). The statute being

As difficult as it has been to develop a legal definition of obscenity, and as elusive as the effort to pin down violent speech has proven, protected controversial speech is even more resistant to precise definition.¹³⁸ Controversial speech falls along a spectrum, so that some speech may fall just on the legal side of obscenity, saved by some small measure of “literary, artistic, political, or scientific value,” while other controversial speech is clearly far from obscene but offensive to some sensibilities. Shakespeare’s *Romeo and Juliet*, after all, defied their families, engaged in ardent teenage sex, and committed suicide.

The third prong of the *Miller* test (the “value” prong) saves a substantial portion of speech from being labeled obscene even as to minors. The CDA would have impermissibly barred Internet communications about birth control practices, safe sex, the consequences of prison rape, each of the seven dirty words at issue in *Pacifica*, classic artworks depicting nudes, and arguably the card catalogues of major libraries, each of which has value under *Miller*.¹³⁹

The subjectivity which Justices as different as Justice Scalia and Justice Brennan have correctly attributed to the *Miller* test has become a matter of legal concern because of the “lack of an ascertainable standard” with which to measure value.¹⁴⁰ As one Congressman put it, “[w]here one Member’s aversions end, others with different sensibilities and with different values begin.”¹⁴¹ Justice Scalia, who concurred in a case holding that the third prong of *Miller* contemplates requiring jurors to assess the saving value of speech according to a reasonable person standard,¹⁴² protested that asking jurors to make such a judgment as “reasonable” people was “quite impossible . . . there being many accomplished people who have found litera-

debated, the Children’s Defense Act of 1999, was touted as reaching all violence in the media. But the definition of speech subject to regulation was a variable obscenity definition that expressly included “sadistic or masochistic activity, . . . acts of mutilation of the human body, or rape.” H.R. 206, 106th Cong. § 1471(b)(3) (1999).

138. See Amy Adler, *What’s Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CAL. L. REV. 1499, 1506 (1996) (arguing that it is impossible to define terms such as “pornography,” “art,” or “hate speech” coherently).

139. See *Reno v. ACLU* (“*ACLU I*”), 521 U.S. 844, 871 (1997). Prison rape, for example, may be of particular concern to young people, who are increasingly confined in adult prisons where they are commonly the subjects of sexual assault. See Amy E. Webbink, *Access Denied: Incarcerated Juveniles and Their Right of Access to Courts*, 7 WM. & MARY BILL OF RTS. J. 613, 630 (1999) (finding that children in adult facilities are five times as likely as children in juvenile facilities to be sexually assaulted).

140. *Pope v. Illinois*, 481 U.S. 497, 505 (1987) (Scalia, J., concurring).

141. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 582 (1998) (quoting Rep. Renald Coleman).

142. See *Pope*, 481 U.S. at 504.

ture in Dada, and art in the replication of a soup can."¹⁴³ Such decisionmaking, if not always impossible, he continued, "is at least impossible in the cases that matter."¹⁴⁴

Justice Scalia concluded that "we would be better advised to adopt as a legal maxim what has long been the wisdom of mankind: *De gustibus non est disputandum*. Just as there is no use arguing about taste, there is no use litigating about it."¹⁴⁵ In what may seem to be a tautology, but is a building block of First Amendment jurisprudence, if the speech is not obscene (and does not fall within limited other First Amendment exceptions), it is protected under the Speech Clause.¹⁴⁶

IV. JUDICIAL TREATMENT OF THE GOVERNMENT'S INTEREST

The failure to achieve specificity in articulating the kinds of speech the state seeks to regulate has complicated judicial efforts to scrutinize the government's alleged interests. And yet, that is precisely what the applicable legal standard requires the courts to do.

A. *The Applicable Legal Standard*

The Supreme Court has expressly required judges to ask whether the record supports a finding that the governmental interest asserted reaches the constitutional dimension required by the applicable First Amendment test. Except in the rarest circumstances, the test applied to regulations on controversial speech will be strict scrutiny because the regulations are content-based.¹⁴⁷ Strict scrutiny re-

143. *Id.* (holding it is harmless error to convict under an obscenity statute based on a community standard of value rather than a reasonable person standard).

144. *Id.* at 505.

145. *Id.*

146. Two additional doctrines must be satisfied for a regulation on speech to survive judicial scrutiny. The rule against vagueness requires that the regulation be drawn with sufficient precision so that persons who seek to exercise their First Amendment rights will have notice of the speech being regulated. The rule against overbreadth demands that the regulation cover only that conduct which is subject to control under the Constitution and that it not extend either to protected conduct or to conduct which it is unnecessary to control in order to accomplish the government's goal. See THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 364-65 (1970).

147. See *Georgine v. Amchem Prods., Inc.*, 160 F.R.D. 478, 514-15 (E.D. Pa. 1995) (finding a compelling governmental interest in controlling potentially misleading speech in a class action litigation determined by the nature of the speech and the scope of the interference with speech imposed by the governmental regulation). Since *Pacifica*, the Supreme Court has consistently rejected government arguments that something less than "strict scrutiny" is required when the government seeks to protect minors. The government, however, continues to make, and courts at

quires courts to balance the individual liberty interests affected against the government's proclaimed interest.¹⁴⁸

The Speech Clause occupies a special place in constitutional jurisprudence because it lies at the core of three foundational principles of our system of governance: the marketplace of ideas, self-determination, and personal autonomy.¹⁴⁹ The marketplace of ideas primarily captures the notion that "good" speech will overcome "bad," so that "truth" will prevail. The marketplace is a prerequisite for creating an informed populace capable of governing itself through democratic self-determination.¹⁵⁰ Both of these interrelated utilitarian values are closely linked to the third goal of personal autonomy. As

least to consider, that argument. At oral argument in *Playboy II*, the government urged same deference under what it characterized as "not quite strict scrutiny" requiring a compelling interest because the regulation is content-based. See Transcript of Oral Argument, 1999 WL 1134595, at *2, *Playboy Entertainment Group, Inc. v. United States* ("Playboy II"), No. 98-1682 (Nov. 30, 1999); see also *FCC v. Pacifica Found.*, 438 U.S. 726, 748-49 (1978) (stating that *Pacifica* is a narrow holding); *Fabulous Assoc., Inc. v. Pennsylvania Pub. Util. Comm'n*, 896 F.2d 780, 783-84 (3d Cir. 1990) (rejecting the state's argument that a lesser standard of scrutiny applies). In *ACLU I*, the government conceded that strict scrutiny applied. *Reno v. ACLU* ("ACLU I"), 521 U.S. 844, 863 n.30 (1997). A lesser standard might, however, apply if the speech were both controversial and commercial. See *Consolidated Edison Co. v. Public Servs. Comm'n*, 447 U.S. 530, 541 (1980); *supra* note 16.

Eugene Volokh has criticized the continued use of the strict scrutiny doctrine as leading to unpredictable results. See Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2441-43 (1996). My argument suggests that rather than seeking a new method of analysis, the courts should apply strict scrutiny seriously.

148. See *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101-02 (1981). While not necessarily framed explicitly as a balancing test, "strict scrutiny" analysis requires judges to compare the weight of two important interests—the government's compelling interest and the individual liberty interest—against each other, knowing that one will be compromised. See Volokh, *supra* note 19, at 167-68. Many scholars have argued that the compelling interest will almost always trump the liberty interest under strict scrutiny. See *id.* at 169 & n.86 (discussing the "compelling interest trumps" approach as the "conventional wisdom").

If the compelling interest does generally trump, it becomes even more important to begin the analysis by examining whether the asserted interest holds up to scrutiny. The Supreme Court, however, has repeatedly failed to do so. See, e.g., *Reno v. ACLU* ("ACLU I"), 521 U.S. 844, 875 (1997) (examining whether there are less restrictive alternatives to the regulation of speech at issue); *Sable Communications v. FCC*, 492 U.S. 115, 134 (1989) (Brennan, J., dissenting in part) ("[T]he Government has a strong interest in protecting children against exposure to pornographic material that might be harmful to them."); *Pope*, 481 U.S. at 513 (Stevens, J., dissenting) ("[G]overnment may not constitutionally criminalize mere possession or sale of obscene literature, absent some connection to minors."); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 113 (1973) (Brennan, J., dissenting) (arguing that obscenity is constitutionally protected "at least in the absence of distribution to juveniles"); *Ginsberg v. New York*, 390 U.S. 629, 649-650 (1968) (Stewart, J., concurring) (distinguishing children's rights to access speech from adults' rights).

149. See C. THOMAS DIENES ET AL., *NEWSGATHERING AND THE LAW* 5-11 (2d ed. 1999) (describing the leading rationales for the special status accorded to freedom of expression: the marketplace, democratic, and liberty models.)

150. See *Grosjean v. American Press Co.*, 297 U.S. 233, 245, 249-50 (1936) (discussing the history of American and English constitutional protections of speech).

Justice Brandeis explained, the Founding Fathers believed that "the final end of the state was to make men free to develop their facilities, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means."¹⁵¹ All three values are at stake when the state abridges speech even for the popular goal of shielding children.¹⁵²

Constitutional jurisprudence imposes a heavy burden on the state when regulating expression.¹⁵³ According to First Amendment doctrine, courts may not even evaluate whether a given regulation is narrowly tailored until the state establishes its compelling interest. The state must both articulate and demonstrate a compelling interest based on a real harm in order to justify any government regulation on the content of speech. The government must also show two corollaries to shore up its claim that the interest is compelling, rather than merely legitimate. First, the government must demonstrate a nexus between the harm the government seeks to diminish and the particular speech affected by the regulation. Second, the state must demonstrate a likelihood that the regulation will substantially diminish the harm.

The Supreme Court has long held that government may not regulate otherwise protected speech based on its content without demonstrating a specific nexus between the speech and harm flowing to citizens. For example, a state may have a "legitimate interest" in preserving the integrity of the electoral process, but that interest is not sufficiently "compelling" to sustain statutory limitations on the nature of the promises a candidate may make to the electorate during a campaign.¹⁵⁴ Similarly, the Supreme Court overturned a statutory limitation on political contributions made by corporations, on the

151. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *rev'd in part*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

152. See ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 298 (1995).

153. Free Speech occupies a special status in contemporary legal discourse on civil liberties. See Diane Leenheer Zimmerman, *Information As Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665, 676 (1992) (stating that "free speech ranks high" in discussion of civil liberties).

154. See *Brown v. Hartlage*, 456 U.S. 45, 60 (1982) (Brennan, J.) (overturning a statute that barred candidates from promising to reduce their own salaries if elected, on the grounds that the "State's fear that the voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech"); see also *id.* at 62 (Rehnquist, C.J., concurring) ("[On different facts] I would give more weight to the State's interest.").

grounds that the regulation was “unjustified by a compelling state interest.”¹⁵⁵

In *Erznoznik v. City of Jacksonville*, the Supreme Court invalidated a regulation designed to protect children, because it lacked the “clarity of purpose” essential under the Speech Clause.¹⁵⁶ To justify differential treatment of speech based on content, the State must first show that the regulation “is necessary to serve a compelling state interest.”¹⁵⁷ The burden is on the government to demonstrate that it has a compelling interest in regulating speech; the government interest cannot be taken for granted.¹⁵⁸ As Justice Brandeis warned, “[f]ear of serious injury cannot alone justify suppression of free speech Men feared witches and burnt women To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced.”¹⁵⁹

In *Turner Broadcasting System, Inc. v. FCC*, the case that accorded cable television greater protection than that available to the broadcast media, the Supreme Court clarified its earlier hints about the judicial duty to inquire into the government’s compelling interest. Despite fractured opinions on the merits in *Turner*, and the application of intermediate rather than strict scrutiny, the Justices unanimously agreed that:

155. *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 795 (1978) (quoting *Shelton v. Tucker*, 364 U.S. 479, 485 (1960)) (holding that the asserted interest in protecting the electoral power of the citizens is not compelling absent a showing of imminent threat posed by corporate contributions, and that there was no “substantially relevant correlation between the governmental interest asserted” and the regulation on speech); see *Boos v. Barry*, 485 U.S. 312, 322-24, 329 (1988) (O’Connor, J.) (analyzing but not resolving the question of whether a regulation barring offensive signs near foreign embassies serves a compelling government interest, since the statute was, in any event not narrowly tailored); *Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (Powell, J.) (holding that the state does not have a sufficiently compelling interest in maintaining separation of church and state to justify content-based limitations on the access of student groups to a generally open forum).

156. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217-18 (1975).

157. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118-120 (1991) (citing *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987)) (holding that the state Board’s assertion that the state has a compelling interest in classifying criminal assets to ensure “that criminals do not profit from storytelling about their crimes before their victims have a meaningful opportunity to be compensated” is “hardly compelling,” but finding a compelling interest in depriving criminals of the profits of their crimes and in using such profits to compensate victims but holding that the statute was not narrowly tailored to advance the latter interest.)

158. See *First Nat’l Bank*, 435 U.S. at 786, 788-89. The burden is on the government to show a compelling interest, which the Court held was not “supported by the record or legislative findings” in this matter. *Id.* (citing *Elrod v. Burns*, 427 U.S. 347, 362 (1976)); see also *ACLU v. Reno*, 929 F. Supp. 824, 851 (E.D. Pa. 1996), *aff’d*, 521 U.S. 844 (1997) (“ACLU I”). The government conceded at oral argument that it has the burden of proof to show a compelling interest. See *id.*

159. *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

When the [g]overnment defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured' It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.¹⁶⁰

One year later, in *United States v. National Treasury Employees Union*, a case that did not require strict scrutiny because the regulation was content-neutral, the Supreme Court reiterated the burden on the government.¹⁶¹ The Supreme Court made explicit that in order to regulate protected speech at all, the government must demonstrate a compelling interest, including a nexus between the interest it asserts and the actual harm that the regulation can prevent.¹⁶² *National Treasury Employees* involved a statute banning federal employees from accepting compensation for speeches and articles, regardless of subject matter. Because the statute did not discriminate among forms of speech based on content, the Court only subjected it to a rational basis review, but one that can be understood as a "heightened reasonableness" test.¹⁶³ Even in this context, the majority imposed the burden on the state to establish a compelling interest which it had spelled out in *Turner*.¹⁶⁴

Under the *Turner* test, it is not sufficient for the government to assert an abstract or generalized interest in children's development to sustain a regulation on speech. In order to meet its burden to show a compelling interest in regulating speech to shield the young, the state would have to demonstrate: (i) that children's social, moral or emotional development is at stake; (ii) that the speech is the direct cause of the risk; and (iii) that restricting the speech will in fact reduce the risk of harm. This means that after the government establishes that

160. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994) (Kennedy, J., joined by Rehnquist, C.J., Blackmun, J., and Souter, J.) (citing *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985)) (overturning the "must-carry" provisions, which required cable broadcasters to provide channels for all local broadcast networks, which the Court considered as a content-neutral limitation on speech). Regarding the unanimity of the Justices on this point in *Turner*, see *id.* at 670 n.1 (Stevens, J., concurring), *id.* at 680-81 (O'Connor, J., concurring in part, dissenting in part, joined by Scalia, J., Ginsburg, J., and Thomas, J.) ("It is not enough that the goals of the law be legitimate, or reasonable, or even praiseworthy. There must be some pressing public necessity, some essential value that has to be preserved, . . ." i.e., a compelling interest), and *id.* at 685 (Ginsburg, J., concurring in part, dissenting in part). See also *Eclipse Enters., Inc. v. Gulotta*, 134 F.3d 63, 67 (2d Cir. 1997) (interpreting *Turner* to hold that the government must present "substantial supporting evidence" to justify a law regulating speech).

161. *United States v. National Treasury Employees Union*, 513 U.S. 454, 466-67 (1995).

162. See *id.* at 467-68.

163. See *id.* at 475-76. The burden is not a "reasonable response to the posited harms," when the regulation of speech "heightens the government's burden of justification." *Id.*

164. See *id.* at 475 (quoting *Turner*, 512 U.S. at 664).

controversial speech jeopardizes children, it must also show that the regulation will effectively minimize the risks.

Balancing involves more than a declaration that one set of interests is more important than another. It requires the court to identify the interests on both sides, value them, and compare them.¹⁶⁵ In order for a court to assess value, the government may need to provide empirical data about such issues as the extent and seriousness of the problem which the government seeks to resolve by impinging on a constitutional right, on the one hand, and whether the regulation is likely to resolve the problem efficiently enough that the trade-offs are justifiable, on the other.

Despite the clear instructions set forth in *Turner*, courts at all levels regularly fail to explore whether the government has demonstrated the components of a compelling interest. The formal judicial inquiry under the Speech Clause normally skips the required threshold inquiry into the compelling interest alleged by the government and focuses instead on just two of the three critical questions that courts must weigh in analyzing abridgements of speech: (i) the nature of the constitutional liberty interests at stake;¹⁶⁶ and (ii) whether the regulation is narrowly tailored to achieve the government interest without undue burden on speech.¹⁶⁷

B. *The Supreme Court Cases*

Although the government regularly cites *Pacifica* for the proposition that a compelling interest in shielding children from indecency justifies at least some forms of regulation,¹⁶⁸ the facts in *Pacifica* would not satisfy the standards subsequently spelled out in *Turner*.¹⁶⁹ In *Pacifica*, the Supreme Court upheld FCC enforcement proceedings

165. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 972 (1987) (arguing that constitutional balancing by the Court has recently been guided by liberal policies, instead of more rigorous investigations of rights, principles, and structures).

166. See *Georgiue v. Amchem Prods., Inc.*, 160 F.R.D. 478, 510 (E.D. Pa. 1995). Speech implicating rights of political expression, civil rights or political association can only be impinged upon to serve a "compelling interest." See *In re Primus*, 436 U.S. 412, 431, 438 n.2 (1978); cf. *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940) (observing that speech derived from "racial or religious conceit," which incites violence or breaches of the peace may be appropriately punished by the states). In contrast, commercial speech, while protected, may be assessed under a lesser standard. See *Consolidated Edison Co. v. Public Servs. Comm'n*, 447 U.S. 530, 541 (1980).

167. See *Simon & Schuster, Inc. v. Members of the N.Y. Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

168. See Brief for the Appellants, 1997 WL 32931, at *19-22, *Reno v. ACLU*, 521 U.S. 844 (1997) (No. 96-511) ("ACLU I"); Brief for the Cross-Appellants/Appellees, 1988 LEXIS U.S. Briefs 515, at *14, *18-21, *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989) (Nos. 88-515 & 88-525).

169. *FCC v. Pacifica Found.*, 438 U.S. 726, 729-31 (1978).

that followed from an afternoon radio broadcast of satirist George Carlin's monologue about seven dirty words that must never be said on broadcast media. Justice Stevens' opinion for the plurality took the government's interest for granted in that context.¹⁷⁰ None of the four opinions issued offered any explicit discussion of whether an independent government interest in protecting children exists, much less whether the government had established a convincing nexus between the regulated speech and the anticipated harm.¹⁷¹

Even in the most recent Supreme Court cases involving regulation of speech to protect children, the government has not seriously attempted to establish that the controversial speech it sought to regulate is a cause of real harm. Nor has the Supreme Court raised *Turner* as a hurdle that the government must clear, despite the test it had set forth. This judicial deficit is emphatically present in the trilogy of cases involving speech deemed harmful to children with which this Article began: *ACLU I*, *Sable*, and *Denver Area*.

In *ACLU I*, the Supreme Court entirely failed to analyze the governmental interest in protecting children from indecency on the Internet. Instead, it summarily noted the "legitimacy and importance of the congressional goal."¹⁷² Under First Amendment analysis, a merely "legitimate" or "important" interest normally would not withstand even intermediate scrutiny, much less the strict scrutiny imposed where the government interferes with protected speech based on its content.¹⁷³

170. See *id.* at 749-50 (Stevens, J., plurality opinion) (relying entirely on *Ginsberg* and failing to note that *Ginsberg* was inapposite because it involved only a rational basis analysis, as discussed *supra* Part III.A).

171. See *Pacifica*, 438 U.S. at 770 (Brennan, J., dissenting). Justice Brennan implicitly challenged the glib assumption of a compelling government interest when he raised serious questions in his dissent about the potential conflict between such government choices and the preferences of individual parents. See discussion *infra* Part V.

172. *ACLU I*, 521 U.S. at 849 (Stevens, J.) (emphasis added) (recognizing the interest in the second sentence of the Court's opinion overturning the core provisions of the statute enacted to protect minors from indecent and patently offensive speech on the Internet). In *ACLU I*, the coalition of plaintiffs that challenged the CDA below did "not dispute that the Government generally has a compelling interest in protecting minors from 'indecent' and 'patently offensive' speech." *Id.* at 863 n.30. All of the Justices agreed on this point, and none scrutinized the assumption. See *id.* at 886, 897 (O'Connor, J., concurring in part, dissenting in part) (agreeing that to the extent that the statute bars knowing transmission of indecent material to minors, it should be upheld because the state may restrict access by minors to such materials). In dicta, however, the majority analyzed the possible competing interests of parents. See discussion *infra* Part V.

173. In its next attempt to regulate controversial speech on the Internet, Congress tried to circumvent the issue by defining the proscribed speech circularly as "harmful to minors." *ACLU v. Reno* ("ACLU II"), 31 F. Supp. 2d 473, 478 (E.D. Pa. 1999) (preliminarily enjoining enforcement of the new statute because it would unnecessarily chill speech that is protected as to

In *Sable*, despite the Supreme Court's earlier pronouncements on the importance of scrutinizing the interests set forth by the government, the majority summarily concluded that the Court has "recognized that there is a compelling interest in protecting the physical and psychological well-being of minors."¹⁷⁴ To reach this sweeping conclusion, the Supreme Court accepted the government's reliance on *Ginsberg* and *Ferber*.¹⁷⁵ Neither *Ginsberg* nor *Ferber*, however, were decided under a strict scrutiny analysis, and therefore neither establishes a "compelling interest" for purposes of regulating protected speech in any context.¹⁷⁶

In *Denver Area*, the Justices paid slightly more attention to the government's asserted interest, but were inconsistent in labeling the nature of that interest. Justice Breyer's plurality opinion notes at the outset that the government has a "basic, legitimate objective of protecting children from exposure to 'patently offensive' materials."¹⁷⁷ Subsequently, in a portion of the plurality opinion joined by only three Justices, Justice Breyer changed the label applied to the government interest from "legitimate" to "compelling," in the context of analyzing why a total ban on protected speech violates the First Amendment, regardless of the strength of the government's interest.¹⁷⁸ In *Denver Area*, the Supreme Court held that while Congress could permit a cable operator to decide whether to allow broadcast of indecent material on leased access channels, it could not require cable operators to segregate and block such programming. Nor could Congress allow cable operators to prevent rare or nonexistent 'patently offensive' programming on public, educational, and government channels

adults), *appeal docketed*, No. 99-1324 (3d Cir. Apr. 1999). The District Court did not analyze the government's asserted interest. *See id.* at 495.

174. *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (citing *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968)); *New York v. Ferber*, 458 U.S. 747, 756-57 (1982); *see also Sable*, 492 U.S. at 134 (Brennan J., concurring) ("[T]he government has a strong interest in protecting children against exposure to pornographic material that might be harmful to them.").

175. *See discussion supra* Part III.

176. As discussed in Part III, *supra*, *Ginsberg* was analyzed under a rational basis test because it involved speech that the Court held was not constitutionally protected for minors; *Ferber* did not regulate speech, but instead involved the underlying activities that gave rise to the production of child pornography.

177. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 728 (1996) (emphasis added).

178. *See id.* at 755, 759 (Breyer, J., joined by Stevens, J., O'Connor, J., and Souter, J.) ("[W]e agree with the government that protection of children is a compelling interest."). Protection of even the most determined child from controversial speech cannot justify "reduc[ing] the adult population . . . te . . . only what is fit for children." *Sable*, 492 U.S. at 128; *see also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73 (1983); *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

("PEGs") since it had not proven that a social problem even existed on channels reserved for use by public and nonprofit organizations.¹⁷⁹

The incoherent discussion of the government's interest in *Denver Area* was extraordinary because it violated every requirement the Supreme Court itself had imposed under *Turner*. The Justices jumped from labeling the state interest "basic" or "legitimate" to calling it "compelling" and, in the next breath, concluded that at least one part of the legislation was not even "necessary." Not a single opinion asked how a statute that is not "necessary" could serve a compelling state interest. If it had applied *Turner*, the Supreme Court should have concluded that to the extent the government failed to demonstrate that the harms it alleged were real, it had no compelling interest in regulating controversial material.¹⁸⁰

Where protection of children is invoked as an interest, cogent legal analysis too often is deemed gratuitous. Many factors contribute to this analytic looseness. These factors include an emotional response to children's vulnerability, an irrational sense that if a law is designed to protect children, then it must be good, and the often unquestioned legal principle that while children may have rights, the rights accorded to them are not co-extensive with the rights of adults.¹⁸¹ The operative presumption of the latter principle, which is too often inverted, is that children do indeed possess some version of constitutional rights. Those rights include the right to receive speech and the right to speak. The Supreme Court has never defined the precise parameters of children's constitutional rights, whether under the Speech Clause or more broadly,¹⁸² but the Supreme Court has sometimes minimized those rights by indicating that the state may regulate the conduct of minors beyond what would be constitutional if applied to adults.¹⁸³ It is not necessary to resolve the debate sur-

179. See *Denver Area*, 518 U.S. at 764-65.

180. See *id.* at 773-74 (Stevens, J., concurring) (citing *Sable*, 492 U.S. at 129-31) ("[T]he government may have a compelling interest in protecting children from indecent speech on such a pervasive medium When the government acts to suppress directly the dissemination of such speech, however, it may not rely solely on speculation and conjecture.").

181. See generally Katherine Hunt Federle, *On the Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle*, 42 DEPAUL L. REV. 983 (1993); Wendy Anton Fitzgerald, *Maturity, Difference and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11 (1994); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parent's Rights*, 14 CARDOZO L. REV. 1747 (1993).

182. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 692 (1976) (Brennan, J., plurality opinion).

183. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664 (1995) (limiting Fourth Amendment rights while in the custodial care of schools); *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971) (finding no constitutional right to a jury); Catherine J. Ross, *Disposition in a Discretionary*

rounding the scope of children's speech rights with regard to limitations imposed by the state in this context, because constitutional liberties are not operative between children and their parents.¹⁸⁴ The central issue here is whether the state has a compelling interest in limiting speech that some parents may wish their own children to receive.

Whatever the respective merits and defects of presumptions about rights that flow directly to minors, the frequent diminution of rights exercised by young citizens should raise warning flags when used to justify regulations on speech that affect adults as well as children, which was the case with the statutes at issue in *ACLU I*, *Sable*, and *Denver Area*. It may well be that the statutes under review in *ACLU I* and *Sable*—and, more indirectly, in *Denver Area*—were so transparently unconstitutional in the scope of their ban on speech that the Justices realized at first glance that the regulations before them would not survive scrutiny. Under such circumstances, not confronted with a close case, perhaps the Supreme Court deemed it less pressing to analyze the state's compelling interest. This approach carries grave consequences. First, it promotes undisciplined thinking about the nature of the government's interest, which may affect the future actions of legislators and regulators. Second, it suggests to judges sitting on the lower courts that they too can skip the required inquiry into the state's compelling interest. Finally, the implicit promise of judicial deference invites legislators and advocates of censorship to abridge speech with relative abandon.

It may seem that assessment of the weightiness of the state's interest is largely subjective.¹⁸⁵ The standard is not, however, entirely subjective because it places a burden on the government to demonstrate the existence of a specified harm that can be successfully addressed by regulation—a minimal requirement that the government has frequently failed to meet when it relies on “the salutary purpose of

Regime: Punishment and Rehabilitation in the Juvenile Justice System, 36 B.C. L. REV. 1037, 1040 (1995).

184. See *Wisconsin v. Yoder*, 406 U.S. 205, 241-42 (1972) (Douglas, J., dissenting in part) (arguing that parents may impose their views on their children to the extent that they can do so without the assistance of the state); John E. Coons et al., *Puzzling Over Children's Rights*, 1991 B.Y.U. L. REV. 307, 347.

185. See Edwards & Berman, *supra* note 19, at 1529-30, 1530 n.201 (citing *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 680 (1994) (O'Connor, J., dissenting in part), as an example of “untethered subjectivism”); see also Erwin Chemerinsky, *The Supreme Court, 1998 Term: Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989) (arguing that personal and majoritarian values dominate the Rehnquist Court's constitutional jurisprudence).

protecting children."¹⁸⁶ A finding that the state's interest in regulating speech to protect children does not constitute a sufficiently "compelling interest" to justify the regulation of protected speech does "not belittle the state's interest in the well-being of minors."¹⁸⁷ The interest might still be sufficient to satisfy a rational basis test, as in *Ginsberg*.¹⁸⁸ It would also justify numerous government programs designed to help children and families that do not impinge on speech rights or other foundational constitutional liberties.

C. *The Specter of Censorship*

The incoherence of the judiciary invites efforts to constrain freedom of expression. As Justice Kennedy has argued, raw censorship based on content renders any government regulation of speech unconstitutional unless it reaches only the narrowly defined types of speech that fall outside the protection of the First Amendment.¹⁸⁹ He fears that the Court's willingness even to examine the proposed compelling interest behind a regulation "might be read as a concession that States may censor speech whenever they believe there is a compelling justification for doing so."¹⁹⁰ To be sure, the passivity of most courts—including the Supreme Court—in accepting the interest the government alleges in protecting children suggests that this concern may be well-founded.

If Justice Kennedy's view prevailed, it would be unnecessary to explore the depth, precision or legitimacy of the state's alleged compelling interests in regulating speech to protect children. But as long as strict scrutiny, beginning with analysis of the compelling interest asserted, remains the mode of analyzing infringements on protected speech, courts should perform the serious inquiry urged here where the government claims to be motivated by a desire to protect children.

186. *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 689 (1968) (holding the regulation void for vagueness).

187. *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 691 (8th Cir. 1992).

188. *See id.* (finding that a statute limiting sale or rental of undefined "violent" videos must serve a compelling government interest, which the state failed to articulate precisely).

189. *See Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring); *cf. Board of Educ. v. Pico*, 457 U.S. 853, 880 (1982) (Blackmun, J., concurring) (arguing that state action calculated to suppress certain content is fundamentally antithetical to the First Amendment).

190. *Simon & Schuster*, 505 U.S. at 124-25 (Kennedy, J., concurring) (arguing that the Court's "recent" adaptation of the compelling state interest analysis from its Equal Protection jurisprudence undermines the First Amendment's ban on content regulation, and voicing similar concerns about the Court's willingness to examine whether regulations on speech are narrowly tailored).

1. Looking at Motives

Strict scrutiny does not permit courts to wear blinders regarding the intent of those who would curtail speech.¹⁹¹ In the major cases involving restrictions on controversial speech to protect children, intent to chill the speech more generally has not been a close question, as courts have noted repeatedly. The Supreme Court has been unequivocal in stating that to withstand scrutiny, the compelling interest alleged by the government must be the “actual purpose,” not just one that seems convincing.¹⁹²

In *ACLU I*, the majority of the Justices expressly labeled the CDA a transparent attempt at “censorship,”¹⁹³ and with good cause. Senator James Exon, one of the drafters of the CDA, presented the Senate with a compendium of lurid materials available on the Internet that, in his view, threatened to turn every computer into a “red light district.”¹⁹⁴ He lamented the littering of “this information superhighway with obscene [and] indecent . . . pornography Virtual but virtueless reality is projected in the most twisted, sick use of sexuality.”¹⁹⁵

So too, Senator Joseph Lieberman, praising a separate title in the statute that contained the CDA which required that television manufacturers install a “V-chip” allowing parents to block receipt of certain categories of programs, proclaimed that the problem is not “rating the garbage” but how to “get rid of the garbage.”¹⁹⁶ Supporters

191. “Motives and purposes for legislation are notoriously elusive, ambiguous and multifarious.” Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 392 (1963).

192. See *United States v. Virginia*, 518 U.S. 515, 533 (1996); *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996); see also Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 634 (1991) (criticizing the Court’s recent focus on permissible legislative motive as failing to take unintended restriction of communication into account).

193. *Reno v. ACLU (“ACLU I”)*, 521 U.S. 844, 885 (1997) (“The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.”).

194. 141 CONG. REC. S8087, S8089 (daily ed. June 9, 1995) (describing the “blue book”); see 140 CONG. REC. S9746 (daily ed. July 26, 1994); see also *ACLU I*, 521 U.S. at 885 (discussing the Exon Amendment as the source of the statutory provisions at issue before the Court—the so-called “indecent transmission” provision and the “patently offensive display” provision). The amendment, as revised, became Section 502 of the Communications Act of 1996.

195. 141 CONG. REC. S8293 (daily ed. June 9, 1995) (statement of Senate Chaplain Lloyd Ogilvie). This kind of statement on the Senate floor underscores the frequent linkage between organized religious groups and efforts to restrict speech, raising further concerns under the Establishment Clause. See Henkin, *supra* note 191, at 407-11.

196. GAY AND LESBIAN ALLIANCE AGAINST DEFAMATION (“GLAAD”), ACCESS DENIED: THE IMPACT OF INTERNET FILTERING SOFTWARE ON THE LESBIAN AND GAY COMMUNITY 2 (1997) (on file with author) (statement of Sen. Joseph Lieberman on The Television Improvement Act of 1997) (It only became clear at the end of the battle for the v-chip that the agenda was “the

of the statute overturned in *Denver Area* stated on the floor of Congress that controversial cable programming "should be stopped, must be stopped."¹⁹⁷ The purpose of the legislation, they continued, was "to put an end to the kind of things going on" on cable channels.¹⁹⁸

While neither a considered nor a cavalier attitude toward enactment by the legislators is dispositive,¹⁹⁹ federal courts have noted with dismay the cavalier process commonly accorded government regulations on speech once the goal of protecting children is invoked. The frequent lack of serious consideration to restrictions on speech adopted in the name of protecting children flies in the face of the Supreme Court's proclamation that the "essence" of the Speech Clause is "that Congress may not regulate speech except in cases of extraordinary need and with the exercise of a degree of care that we have not elsewhere required."²⁰⁰

In *ACLU I*, for example, the Supreme Court detailed the lack of legislative attention paid to the CDA's key provisions by legislators. In contrast to the other six Titles of the statute in which the CDA was embedded, each of which, Justice Stevens noted, was "the product of extensive committee hearings and the subject of discussion in Reports prepared by the Committees of the Senate and the House of Representatives," in enacting the CDA, he underscored, "[t]he Senate went in willy-nilly, passed legislation, and never once had a hearing, never once had a discussion other than an hour or so on the floor."²⁰¹ Further,

imposition of conservative political ideologies to change the content of television programming to suit their views.").

197. 138 CONG. REC. S649 (daily ed. Jan. 30, 1992) (statement of Sen. Wyche Fowler).

198. 138 CONG. REC. S652 (daily ed. Jan. 30, 1992) (statement of Sen. Jesse Helms).

199. Compare *Clinton v. City of New York*, 118 S. Ct. 2091, 2107 (1998) (Stevens, J.) (overturning the line item veto even though the text of the Act "was itself the product of much debate and deliberation in both Houses of Congress"), and *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 171 (1803), with *National Endowment for the Arts v. Finley*, 524 U.S. 569, 594 (1998) (Scaha, J., concurring) (stating that although thorough, "all this legislative history has no valid claim upon our attention at all"), and *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 133 (1989) (Scalia, J., concurring) (stating that the First Amendment does not require legislation to be supported by careful consideration, "but only by a vote").

200. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 740 (1996).

201. *Reno v. ACLU* ("ACLU I"), 521 U.S. 844, 858 n.24 (1997) (quoting *Cyberporn and Children: The Scope of the Problem, the State of the Technology, and the Need for Congressional Action: Hearing on S. 892 Before the Senate Comm. on the Judiciary*, 104th Cong. 7-8 (1995) (statement of CDA opponent, Sen. Leahy)); see also, e.g., *Playboy v. United States*, 918 F. Supp. 813, 822 (D. Del. 1996). The court in *Playboy* issued a temporary restraining order because, among other things:

there is an absolute void of legislative findings that Section 505 [of the Telecommunications Act of 1996] is necessary to protect minors from exposure to sexually oriented material shown on adult cable channels which their parents have chosen not to subscribe to. . . . [T]he legislative record contains no findings as to how of-

Justice Stevens drew an express and disapproving parallel between the legislative process that resulted in the CDA and the haphazard process that resulted in the statute regarding telephone indecency at issue in *Sable*.²⁰² *Sable* was perhaps even more troubling, because the legislation at issue in the case emerged following a decade in which Congress and the Federal Communications Commission ("FCC") attempted end-runs around decisions by the lower courts invalidating their efforts to eliminate commercial telephone sex.²⁰³

The government has repeatedly failed to exercise even a modest degree of care in enacting measures that limit protected speech with the asserted purpose of protecting children, much less to demonstrate the special sensitivity required under the Speech Clause. The

ten this bleeding occurs, how many minors are exposed to the adult programming . . . or what effect such exposure has on minors.

Id.; see also *Playboy Entertainment Group, Inc. v. United States* ("Playboy I"), 945 F. Supp. 772, 779 (D. Del. 1996), *aff'd mem.*, 520 U.S. 1141 (1997) (finding that except for the statements of the two sponsors on the floor of the Senate, there "was no debate on the amendment and no hearings were held on it").

To be sure, legislative enactments on a variety of topics are attached as amendments to bills on other subjects, such as appropriations or so-called "omnibus" bills. See, e.g., *Clinton*, 118 S. Ct. at 2119 (Breyer, J., dissenting) (disagreeing with the overturning of the "line item veto" statute because a typical budget appropriations bill may have "a dozen titles, hundreds of sections, and spread across more than 500 pages of the Statutes at Large"). Most of these bills—such as appropriations—do not have constitutional implications.

202. See *ACLU I*, 521 U.S. at 876 n.41 (citing *Sable*, 492 U.S. at 129-30) (noting that the bill on which hearings were conducted never reached the floor, nor did a committee report emerge; the legislation was introduced on the floor, received no hearings and has no meaningful legislative history); see also *Alliance For Community Media v. FCC*, 56 F.3d 105, 141 (Wald, J., dissenting) (observing that the 1992 Cable Act indecency provisions were enacted as the result of a series of amendments from the floor, "without benefit of committee hearings or even substantial floor debate"), *rev'd in part*, *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996).

203. *Sable*, 492 U.S. at 119-23 (observing that the dial-a-porn business has been the subject of efforts at regulation and litigation since its inception). For examples of these efforts, see *Carlin Communications, Inc. v. FCC* ("Carlin III"), 837 F.2d 545, 546 (2d Cir. 1988) (holding inclusion of "indecent" messages in federal statute regulating commercial phone sex services overbroad); *Carlin Communications, Inc. v. FCC* ("Carlin II"), 787 F.2d 846, 855 (2d Cir. 1986) (overturning FCC limitation of access to dial-a-porn messages to those with credit cards or access codes); *Carlin Communications, Inc. v. FCC* ("Carlin I"), 749 F.2d 113, 121 (2d Cir. 1984) (overturning FCC limitations on the times of day when dial-a-porn phone messages could be made available). Congressional revision of the statute underlying the FCC regulations in the *Carlin* trilogy led to the *Sable* litigation. Nor did the dialogue among the branches of government on the subject end after the Supreme Court's decision in *Sable*. See, e.g., *Dial Info. Servs. v. Thornburgh*, 938 F.2d 1535, 1537 (2d Cir. 1991) (upholding post-*Sable* congressional revisions to the Communications Act barring, *inter alia*, "indecent communication for commercial purposes" to any person under age eighteen and subsequent FCC regulation).

The tortuous history of FCC efforts to design a "safe harbor" banning indecent material from broadcast television and radio at times when children were likely to be in the audience is very similar. See *Action for Children's Television v. FCC* ("ACT III"), 58 F.3d 654, 657-59 (D.C. Cir. 1995) (en banc).

record indicates that legislators have used children as a transparent excuse for broad censorship on more than one occasion. The lapses in sensitivity to speech rights when children are involved, noted by the Supreme Court, make it even more imperative to analyze the interests asserted by the government as *Turner* requires. To sustain its purported interest, the state must demonstrate that a compelling state interest exists sufficient to justify regulation of protected speech by showing that the targeted speech places children's development at risk, that the speech causes the identified harm, and that restrictions on speech will reduce the risk of harm to children. Parts V and VI turn to this analysis.

V. EMPOWERING PARENTS AS A GOVERNMENTAL INTEREST

Although the courts have not demanded that the proponents of regulation articulate the compelling interests they seek to promote, the government has offered two plausible compelling interests which merit serious consideration. First, the state asserts an interest in reinforcing parental authority, which is the focus of this Part. Second, the state posits an independent interest in shielding children from speech that could harm them, examined in Part VI.²⁰⁴

The government's strongest argument in support of a compelling interest in regulating speech to shield minors is the claim that the state acts to reinforce parental decisionmaking and to help parents enforce their personal choices about what their children are ready to read, see, or hear.²⁰⁵ It comports with longstanding obiter dicta that parents and guardians are entrusted with the care and upbringing of children.²⁰⁶ When regulations on protected speech impinge on the zone of family privacy, two foundational rights collide, creating an even more urgent demand that the government interest be clearly articu-

204. In *Playboy Entertainment Group, Inc v. United States* ("Playboy II"), 30 F. Supp. 2d 702, 715 (D. Del. 1998), *prob. juris. noted*, 119 S. Ct. 2365 (1999), the government asserted an additional interest in protecting the home from unwanted communications, echoing *Pacifica*. To the extent that such an interest overlaps with the parental interest in protecting children within the home, the two interests are treated as one in this discussion.

205. See, e.g., *ACT III*, 58 F.3d at 680 (Edwards, C.J., dissenting); *id.* at 686 (Wald, J., dissenting).

206. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in parents . . ."); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that the liberty guaranteed by the Fourteenth Amendment includes the liberty to "marry, establish a home and bring up children"); see also *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) (interpreting *Meyer* to stand for the "liberty of parents and guardians to direct the upbringing and education of children under their control").

lated and pursued with the greatest sensitivity. Government discrimination among types of speech based on its assessment of whether the speech is suitable for minors, assumes a harmony of value preferences among parents within a pluralistic society. Because of the range of views among parents, it may ultimately prove impossible for the government to regulate speech with the goal of reinforcing the exercise of every parent's autonomous authority.

A. *The Principle of Family Autonomy*

Personal autonomy is part of the essence of the First Amendment.²⁰⁷ Applied to families and children considered as one unit, the general principle of autonomy is reinforced by the Supreme Court's longstanding obiter dicta that "it is cardinal with us that the custody, care and nurture of the child reside first in the parents."²⁰⁸ In its 1923 decision in *Meyer v. Nebraska*, upholding the right of parents to seek instruction in the German language for their children, the Supreme Court expressly rejected communal models of child rearing where "no parent is to know his own child, nor any child his parent," as well as the model of ancient Sparta where the state trained children over age seven in barracks in "order to submerge the individual and develop ideal citizens."²⁰⁹ No matter how many men of genius might support such modes of child rearing, the Court stated, "their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest."²¹⁰ Any effort to impose such restrictions on parental choice would do "violence to both letter and spirit of the Constitution."²¹¹

The state's claim of an interest in reinforcing family authority flounders in the face of the diversity of values among families in a pluralist society.²¹² The interests of the state and of individual parents often conflict in the sensitive areas protected by the First Amendment. The notion that families may differ about the values they wish to

207. See EMERSON, *supra* note 146, at 6-7; MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 11-12 (1984); STEVEN SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 113-20 (1990). Not all scholars agree on this point. See, e.g., Daniel A. Farber, *supra* note 92, at 556.

208. *Prince*, 321 U.S. at 166; see also *Bellotti v. Baird*, 443 U.S. 622, 638 (1979); *Parham v. J.R.*, 442 U.S. 584, 621 (1979) (Stewart, J., concurring); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

209. *Meyer*, 262 U.S. at 401-02.

210. *Id.*

211. *Id.*

212. See generally AVIAM SOIFER, LAW AND THE COMPANY WE KEEP (1995) (emphasizing the importance of the multitude of group identities to constitutional law).

transmit to their children has received longstanding deference from the courts.²¹³ Parents have a recognized liberty interest in raising their children as they see fit, so long as they do not cross the line to jeopardize their children's safety.²¹⁴

For heuristic purposes we can divide families into three categories that reflect the complex relationships among government actors, mainstream mores, and each family's values. First, in an "idealized normative family," the parents share the moral values of the government actors as well as sharing the same understanding of how to best transmit those values to the next generation, and the children are on the low end of the spectrum of enterprise and disobedience. Second, the "imperfect normative family," the parents are assumed to share the general moral preferences of the government actors, but fail, through lack of information, fatigue and over extension, or under performance of the parental role to protect their children, and/or the children fall higher on the bell curve for traits of enterprise and disobedience in seeking out controversial speech. Third, countless varieties of the "nonconformist" family exist, in which the parents do not share the view of the dominant culture and lawmakers regarding the definition of controversial speech. Such families differ from both kinds of normative families in how they wish to handle children's exposure to controversial speech and in how they view the impact of such speech on their children. The children of nonconformist parents may either share family norms or push parental limits through enterprise and disobedience, even when those limits are relatively porous.²¹⁵

213. Such deference may be largely theoretical when the child welfare system or the courts consider the behavior of racial, ethnic and social minorities. See Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 688, 690 (1998); Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 131 (1993).

214. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994); *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972); *Meyer*, 262 U.S. at 401-02.

215. The nonconformist family discussed here should not be confused with the "nontraditional family" that has received so much scholarly and popular attention in the last few years. The "nontraditional family" refers to the form of the family, and the biological or other relationships among its members. See *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (holding that the government may not prevent closely related individuals who function as a family unit from living together); see, e.g., Barbara Bennett Woodhouse, *Toward a Communitarian Theory of the "Nontraditional" Family*, 1996 UTAH L. REV. 569, 570 (1996) ("'[N]ontraditional' is a misnomer. . . . [N]onnuclear families have become the norm for a generation."). Here, in contrast, the focus is on the family's inner values and choices about how to handle sexuality, modernity, and maturation. Family form and child-rearing practices concerning speech do not necessarily overlap, although it is possible that at least some proponents of government regulation of speech believe that they do.

For scholarly debate surrounding "nontraditional" family form, see generally, for example, NANCY E. DOWD, *IN DEFENSE OF SINGLE-PARENT FAMILIES* (1996); WILLIAM N. ESKRIDGE, JR.,

Nonconformist families themselves will fall on both extremes of a bell curve of attitudes toward various issues involving controversial speech.

For the regulatory interest in reinforcing parental authority to survive scrutiny, the regulations would need to accommodate parental preferences in all three types of families, including the nonconformist family. In *Turner*, the Supreme Court underscored that “[o]ur political system and cultural life rest upon th[e] ideal” of individual choice regarding ideas and expression.²¹⁶ “Government action that stifles speech on account of its message,” the Supreme Court explained, “contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.”²¹⁷

Parents in all three types of families presumably do not want the government to substitute its judgment for theirs.²¹⁸ Nonetheless, the nonconformist family in particular consists of exactly the sort of individuals that the Supreme Court had in mind when it observed that, as a society, we cannot achieve “intellectual individualism” and “rich cultural diversities” unless we tolerate the risk of “occasional eccentricity and abnormal attitudes.”²¹⁹ The Court stated that “freedom to differ is not limited to things that do not matter much. That would

THE CASE FOR SAME SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT (1996); MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW AND FAMILY IN THE WESTERN UNITED STATES AND EUROPE* 252-84, 291-98 (1989); Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 944-61 (1984); Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985).

Some scholars criticize trends in family form away from the traditional nuclear family. See generally, e.g., DAVID BLANKENHORN, *FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM* (1995); Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy; Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463 (1983); Lynn Wardle, *The Use and Abuse of Rights Rhetoric: The Constitutional Rights of Children*, 27 LOY. U. CHI. L.J. 321, 327-28 (1996) (arguing that marriage is the best means of providing “committed parents” for children). For the Christian Coalition’s proposal for defeating forces it perceives as threatening the traditional American family, see *CONTRACT WITH THE AMERICAN FAMILY* (Ralph Reed ed., 1995).

216. *Turner*, 512 U.S. at 641 (citing *Leathers v. Medlock*, 499 U.S. 439, 449 (1991)); see *Cohen v. California*, 403 U.S. 15, 24 (1971); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640-42 (1943).

217. *Turner*, 512 U.S. at 641.

218. See J.M. Balkin, *Media Filters, the V-Chip and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131, 1139 (1996).

219. *Barnette*, 319 U.S. at 642

be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."²²⁰

In sum, two sets of constitutional values are at stake. The whole notion of "controversial" speech "require[s] discrimination on the basis of conformity with mainstream mores,"²²¹ an undertaking that is incompatible with the premises of the First Amendment. Despite the popularity of the fig leaf provided by the state's asserted compelling interest in children, whether under the guise of reinforcing parental preferences or not, it remains necessary to "carefully scrutinize[]" the justifications the state offers for content-based distinctions on controversial speech.²²² In addition, parental value choices, including those about what speech their children should be able to hear, have been recognized as having constitutional dimensions.²²³

B. *Empowering Parents Demystified*

The state relies heavily on the image of protecting children within the family unit by empowering parents to enforce the rules they impose on their children.²²⁴ The Supreme Court has deferred to

220. *Id.* at 641-42 (Jackson, J.); see MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 310 (1990) (discussing the importance of rights discourse for protecting subgroups, including families, whose norms conflict with officially countenanced behavior).

221. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 605 (1998) (Souter, J., dissenting). In *Grove Press, Inc. v. Christenberry*, the judge explained, we are not "concerned with whether the community would approve of Constance Chatterley's morals." *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488, 501 (S.D.N.Y. 1959) (holding that D.H. Lawrence's *Lady Chatterley's Lover*—in which the wife of a paralyzed baronet has a passionate and tender affair with the gamekeeper—was not obscene).

222. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 125 (1991) (Kennedy, J., concurring) (tracing the compelling interest test for speech cases to application of Equal Protection jurisprudence as developed in *Carey v. Brown*, 447 U.S. 455, 461 (1980)); see also *Board of Educ. v. Pico*, 457 U.S. 853, 875 (1982) (Blackmun, J., concurring) (arguing that removal of books from a school library based on their content is nothing less than censorship).

223. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); see also Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 *FORDHAM L. REV.* 1571, 1586-87 & nn. 76-87 (1996) (arguing that despite dicta regarding parental autonomy, the cases proceed to constrain parental rights and to ignore the independent rights of children). That discussion is not in conflict with my argument here, which focuses on the autonomy of the family unit rather than on the potential conflicts among minors, their parents, and the state which may end up in the judicial system. On *Meyer* and *Pierce*, see generally Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer and Pierce and the Child As Property*, 33 *WM. & MARY L. REV.* 995 (1992).

224. In an ironic twist, Congress has adapted the language of critical legal theorists and others concerned with the rights of the disempowered, titling the legislation providing for the v-chip

the "importance of the parental role in child rearing."²²⁵ The Constitution also demands "that constitutional principles be applied with sensitivity . . . to the special needs of parents and children."²²⁶ If, in fact, regulations on speech would empower the idealized normative family, the imperfect normative family, and the nonconformist family, then a compelling state interest might exist.²²⁷

But this is not the case. Scrutiny of the various arguments put forth in support of the notion that state regulations on speech actually empower any family reveals that regulations on speech adopted to protect children in fact threaten to undermine parental authority instead of reinforcing it.²²⁸

1. Parental Discretion

When the state makes controversial material entirely unavailable, it preempts crucial parental discretion about what children can see or do.²²⁹ The presumption of family autonomy suggests that such choices should normally be based on the family's preferences, which might well take into account the individual minor's level of maturity and responsibility.²³⁰ As adult citizens, the parents have a First Amendment right to receive speech that is controversial but not obscene. The right to receive information is a corollary of the right to speak.²³¹ All adults have the right to engage in controversial speech,

the "Television Violence Reduction Through Parental Empowerment Act of 1995." See *Action for Children's Television v. FCC* ("ACT III"), 58 F.3d 654, 680 (D.C. Cir. 1995) (en banc) (Edwards, C.J., dissenting); *id.* at 686 (Wald, J., dissenting); Henkin, *supra* note 191, at 394, 413 (arguing that the state's efforts to "assist parents" in preventing the corruption of youth may require different resolution from the imposition of morality on adults).

225. *Bellotti v. Baird*, 443 U.S. 622, 634 (1979).

226. *Id.*

227. The state would still have to craft regulations that met the stringent demands of the First Amendment.

228. A possible exception exists with reference to the idealized normative family which, by definition, shares the dominant values reinforced by the government.

229. See *Alliance for Community Media v. FCC*, 56 F.3d 105, 145 (D.C. Cir. 1995) (Edwards, C.J., dissenting).

230. In this Article, I focus on the division of authority between the family unit as represented by parents and the state. In an article intended as a companion piece, I argue that under certain conditions mature minors may have a right to receive information that is generally available despite their parents' objections. The claim is especially strong where it involves hybrid rights, in other words, where minors seek information in order to exercise constitutional liberties in a meaningful way, and where the minor faces an irreversible decision. See Catherine J. Riss, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 223, 246 (1999).

231. See *Reno v. ACLU* ("ACLU I"), 521 U.S. 844, 874 (1997); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concur-

whether as speakers or as recipients of speech they wish to hear. In addition, parents have a constitutionally protected interest in their ability to digest and pass on information to their children, regardless of community norms.²³² That right is protected for parents in three ways: (i) through the right to receive information under the Speech Clause; (ii) as a speaker communicating information and ideas; and (iii) by the right of family privacy.

In the area of sexuality, for example, the Supreme Court has recognized that parents may need concrete information about sex, birth control, and sexually transmitted diseases to help them communicate with their adolescent offspring.²³³ The fundamental rights of parents protect a parent's decision to provide a teenager with information about sex and related topics, even if the rest of the community were to condemn such openness as violating the community's norms of appropriateness.²³⁴ The *Ginsberg* decision, sustaining regulation of the sale of girlie magazines that were unprotected speech for minors, rested in part on the understanding that parents who "may wish their children to have uninhibited access" to such literature could still legally purchase the material for their children.²³⁵ Purchasing a magazine at a newsstand or convenience store is much less burdensome than circumventing bans and safe harbors by using "subscription and pay-per-view cable channels, delayed-access viewing using VCR equipment, and the rental or purchase of . . . audio and video cassettes."²³⁶ Where the government places obstacles in the way of those who wish to obtain controversial speech, but does not ban the speech, it inhibits both individual adult recipients and adults acting in their parental role who might wish to allow their children to receive such speech or to use that speech to communicate with their children.²³⁷ If the material remains available but hard to obtain,²³⁸ government

ring); *Martin v. Struthers*, 319 U.S. 141, 143 (1943). For a fuller analysis of the right to receive information, see Ross, *supra* note 230, at 227-33.

232. See *ACLU I*, 521 U.S. at 877.

233. See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 76, 79 (Rehnquist, J., concurring).

234. See *ACLU I*, 521 U.S. at 878.

235. *Ginsberg v. New York*, 390 U.S. 629, 674 (1968) (Fortas, J., dissenting); see *id.* at 639 (Brennan, J.).

236. *Action for Children's Television v. FCC* ("ACT III"), 58 F.3d 654, 663 (D.C. Cir. 1995) (en banc) ("Parents who wish to expose their children to the most graphic depictions of sexual acts will have no difficulty doing so" through alternative means of transmission.).

237. See *Bolger*, 463 U.S. at 67. A twelve-year-old girl who gives birth to a child will remain a minor herself until her child starts school. She is a parent as well as a child, and may require information about controversial topics affecting both her own health and development, and those of her baby.

238. That is, the potential recipient must affirmatively request information or the information is only available in the middle of the night.

regulations would burden a parent's ability to share controversial speech with an adolescent child.²³⁹

Although courts may assume that the "vast majority" of parents agree with the choices made by government regulators,²⁴⁰ and that those parents welcome intervention, many parents might wish to allow their children access to controversial material. Not every parent will agree about what material is controversial, much less what material may be harmful to the young. Adults within the same family may not always agree about such matters.²⁴¹ Each set of parents may differ depending on which child is asking to see the controversial material. Issues such as the minor's age, maturity, and judgment will all enter into parental decisions.²⁴²

Some parents may decide to "view or listen to material with their children, either to criticize, endorse, or remain neutral about what they see or hear."²⁴³ For example, a parent may watch a racially insensitive or derogatory movie with an older child in order to help the child learn "to think critically about offensive ideas."²⁴⁴ Such a parent might believe that the shared experience and discussion would help the child to respond more effectively to racially disparaging speech heard outside the home, in keeping with the family's non-racist values.²⁴⁵ The same might hold true of discussions of violence, sex, and other controversial topics. Parents who choose such an approach may be dismissed by legislators and courts as having poor judgment,²⁴⁶ or condemned as those "who wish to expose their children to the most graphic depictions of sexual acts."²⁴⁷

239. See *Southeastern Promotions v. Conrad*, 420 U.S. 546, 556 (1975).

240. *ACT III*, 58 F.3d at 663.

241. See Ira C. Lupu, *The Separation of Powers and the Protection of Children*, 61 U. CHI. L. REV. 1317, 1333 (1994).

242. See J. CANTOR ET AL., *WHAT PARENTS WANT IN A TELEVISION RATING SYSTEM: RESULTS OF A NATIONAL SURVEY* 11 (1997).

243. *ACT III*, 58 F.3d at 678-79 (Edwards, C.J., dissenting).

244. See *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1031 n.14 (9th Cir. 1998) (Reinhardt, J.) (discussing objections of African-American students and parents to school assignment of Mark Twain's *Adventures of Huckleberry Finn*); *Rosenberg v. Board of Educ.*, 92 N.Y.S.2d 344, 346 (Sup. Ct. 1949) ("[I]nstruction in the home will remove religious and racial intolerance more effectively than censorship.").

245. Richard Delgado and David Yun argue that when it comes to hate speech, more speech is not an effective cure. Instead, they suggest that elites use such speech to construct social reality. Richard Delgado & David Yun, *"The Speech We Hate": First Amendment Totalism, the ACLU, and the Principle of Dialogic Politics*, 27 ARIZ. ST. L.J. 1281, 1299 (1995).

246. See *id.* at 679 n.29 (observing that in its briefs the government conceded that the regulations only "trample[d]" on the rights of "those parents who do not agree with the [FCC] about how best to raise their children").

247. *Id.* at 663.

The Speech Clause protects the decisions that each person makes about whether to obtain and what to make of such controversial speech. First Amendment doctrine is clear: individual choice about ideas is the keystone of "[o]ur political system and cultural life."²⁴⁸ It is inconceivable that when a person selects speech in a parental capacity he or she sacrifices the right to choose among ideas. The "heart of the First Amendment" protects the freedom of each person, including each parent, to "decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence"²⁴⁹ or condemnation. To be sure, it is not always easy to live up to these ideals.²⁵⁰ But it is important to do so, even if the vast majority of parents were to demand that they wanted controversial speech blocked.²⁵¹

The heterogeneity among nonconformist families further undermines the notion that the state can reinforce the choices of all parents by regulating speech. The category of nonconformist families includes families that strive to shelter their children from virtually all modern, secular speech.²⁵² Those families pose special regulatory dilemmas.²⁵³ They frequently feel that their essential values are endangered by exposure to subjective belief systems which propose that there may not be one objective source of truth, and by other secularizing influences.²⁵⁴ Such families often attempt to enlist the state as an ally, seeking accommodation in public schools to limit their children's exposure to such topics as sex education and evolution, as well as to many types of literature.²⁵⁵

248. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

249. *Id.*

250. *See Action for Children's Television v. FCC* ("ACT III"), 58 F.3d 654, 683 (D.C. Cir. 1995) (en banc) (Wald, J., dissenting).

251. *See id.* at 682 (Edwards, C.J., dissenting) (observing that the government did not present data on parental preferences). Had the government presented even overwhelming data, the Speech Clause and the principle of family autonomy would still protect the rights of the minority of parents.

252. *See Stark v. Independent Sch. Dist. No. 640*, 123 F.3d 1068, 1072 (8th Cir. 1997); JAMES G. DWYER, *RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS* (1998); P.A.W., 1996 REPORT, *supra* note 31; P.A.W., *RIGHT WING*, *supra* note 31.

253. *See generally* STEPHEN BATES, *BATTLEGROUND: ONE MOTHER'S CRUSADE, THE RELIGIOUS RIGHT, AND THE STRUGGLE FOR CONTROL OF OUR CLASSROOMS* (1993); STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1994); JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA, MAKING SENSE OF THE BATTLES OVER THE FAMILY, ART, EDUCATION, LAW AND POLITICS* (1971).

254. *See* Nomi Maya Stolzenberg, "He Drew a Circle That Shut Me Out." *Assimilation, Indocination, and the Paradox of A Liberal Education*, 106 HARV. L. REV. 581 (1993); *see also* sources cited *supra*, note 253.

255. *See* Barbara Bennett Woodhouse, *A Public Role in the Private Family: The Parental Responsibilities Act and the Politics of Child Protection and Education*, 57 OHIO ST. L.J. 393, 411-13 (1996).

Such particularist families expand the boundaries of robust debate. But the state cannot fully accommodate the preferences of the subgroup of nonconformist parents who want to eliminate speech for the children of their fellow citizens as well as for their own children. The litigation record makes clear that such parents have frequently asked the state to engage in radical censorship in order to help enforce their own views.²⁵⁶ Once again, the notion that regulation of speech reinforces parental authority confronts disparities, not just among three types of families ranging from the idealized normative to the nonconformist, but among nonconformist families themselves. Some want their children to hear everything, others virtually nothing. These disparities make it nearly impossible for the government to establish criteria that will not favor one family to the detriment of others.

Protecting listeners by banning controversial speech altogether is incompatible with the First Amendment.²⁵⁷ The Supreme Court has consistently held that “the fact that society may find speech offensive is not a sufficient reason for suppressing it.”²⁵⁸ To the contrary, protection of unpopular speech is the essence of the First Amendment.²⁵⁹ As the Supreme Court forcefully reminded readers in *Texas v. Johnson*, “[i]f there is a bedrock principle underlying the First Amendment, it is

256. See, e.g., *Kathleen R. v. City of Livermore* (complaint available at <http://www.filtering-facts.org/liv_comp.html>), *dismissed for failure to state a claim* (reported at <<http://www.aclu.org/news/1999/n011499a.html>>), *appeal docketed*, No. A086349 (Cal. Ct. App. filed Oct. 1999) (reported at <<http://www.aclu.org/news/1999/n101999a.html>>) (seeking to enjoin the public library system from maintaining any computer available to any patron with access to the World Wide Web or Internet on which a child could obtain “material harmful to minors”).

257. There is considerable reason for skepticism about whether legislators always make good faith efforts to confine regulations of speech to the scope of the constitutionally permissible. See *Hearing on Cyberporn and Children*, *supra* note 201 (statement of CDA opponent, Sen. Leahy, criticizing members who voted for the CDA); Editorial, *Republican Mischief on Gun Control*, N.Y. TIMES, June 16, 1999, at A28 (opining that Judiciary Committee chairman Sen. Hyde has offered “a plainly unconstitutional crackdown on the dissemination of violent material by the media”); *The Effects of Television Violence on Children: Hearings on S. 876 Before the Senate Comm. on Commerce, Science & Transp.*, 106th Cong. (1999) (available at <<http://www.senate.gov/~commerce/issues/telco.htm#Hearings/0518jsm.pdf>>) (testimony of Sen. John McCain, declining to endorse the “safe harbor” approach to violence on television because of its “constitutional infirmities”).

258. *Reno v. ACLU* (“ACLU I”), 521 U.S. 844, 875 (1997); *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978). The Supreme Court has never considered whether violent speech not rising to the *Brandenburg* level enjoys lesser protection. See Benjamin P. Deutsch, Note, *Wile E. Coyote, Acme Explosives and the First Amendment: The Unconstitutionality of Regulating Violence on Broadcast Television*, 60 BROOK. L. REV. 1101 (1994).

259. See *Pacifica*, 438 U.S. at 745-46 (finding that if the content of speech gives offense, that “is a reason for according it constitutional protection”); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.”).

that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."²⁶⁰

Banning speech with the goal of reinforcing parental preferences is the height of irony. Bans deprive parents of the opportunity to make their own decisions. As Chief Judge Edwards of the District of Columbia Circuit has forcefully written, such a regulation "does nothing to facilitate parents' supervision of their children, unless we assume that all parents' views are not only identical to each other, but also the same as the Government's. This assumption is preposterous"²⁶¹

The assumption in its least benign form is worse than "preposterous." Once the state regulates communications in order to protect children from the "harm" such communications would allegedly inflict, it is but a short step to label parents who disagree with majoritarian views and the government's content choices as inadequate in their role as parents. The potential scope of child neglect laws is broad, and the interpretation is open to subjective judgments. Child neglect statutes frequently have been used in an effort to legitimize government intervention in culturally nonconformist families.²⁶²

Although there does not seem to be any reported case in which exposure to speech, without more, led to a neglect prosecution, the federal government has publicly contemplated this patently absurd result under legislation designed to shield children from speech. At oral argument in *ACLU I*, the Solicitor General conceded that, since the CDA lacked any exception for parents who allowed their children to obtain "indecent" speech over the Internet—including information about birth control or AIDS—there could be "instances in which permitting access actually might constitute child abuse."²⁶³ As one of the Justices correctly noted in response, that would be "interfering with the relationship between parent and child."²⁶⁴ Government labeling of

260. *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

261. *Alliance for Community Media v. FCC*, 56 F.3d 105, 147 (D.C. Cir. 1995) (Edwards, C.J., dissenting).

262. See Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race and Class in the Child Protection System*, 48 S.C. L. REV. 577, 579 (1997).

263. Transcript of Oral Argument, 1997 U.S. TRANS. LEXIS 40, at *20, *Reno v. ACLU* ("ACLU I"), 521 U.S. 844 (1997) (No. 96-511).

264. *Id.* at *21. Solicitor General Seth Waxman urged the Justices to narrow the inclusive language of the statute "to exclude parents." He retreated from his own broad interpretation of the statute by noting that "as a practical matter" prosecution would be unlikely "in the absence of true abuse, which is separately actionable." *Id.* That premise, however, is unsupported by statistics on foster care placements, which show that only about ten percent of children in foster care are removed from their homes because of tangible physical or sexual abuse. See ABA, *AMERICA'S CHILDREN AT RISK* 50 (1993).

“preferred” speech and “harmful” speech for children is not only incompatible with the dictates of the First Amendment, it undermines the very families it claims to reinforce.

2. Aspersions on the Adequacy of Parental Supervision

Efforts to bar controversial speech or to make it hard to obtain in the name of helping parents present yet another irony: they tacitly discount the capacity of parents in all types of families to raise their children without the government’s intervention. Limitations on speech suggest that neither the idealized normative family nor the imperfect normative family is equal to the job of enforcing the values that they share with the regulators. Lower courts have said as much. In the context of a safe harbor requirement for radio broadcasts, the Court of Appeals for the District of Columbia reasoned that it did not suffice to limit controversial broadcasts to the hours when parents are at work and therefore entirely unavailable to “supervise what their children see and hear.”²⁶⁵ Parents apparently could not be counted on to have any idea what their children were up to, even when the entire family was at home.²⁶⁶ As one of the sponsors of the statute at issue stated, “parental supervision is not a cure-all.”²⁶⁷ The court agreed, concluding without elaboration, “[i]t is fanciful to believe that the vast majority of parents who wish to shield their children from indecent material can effectively do so without meaningful restrictions on the airing of broadcast indecency.”²⁶⁸

If the government is correct that parents do not provide adequate supervision for children who watch broadcast and cable television, listen to music and radio, cruise the Internet, and play video games, it may be in part because the parents wittingly choose not to supervise, or do so in a way that is too subtle for regulators to understand. In cases involving the channeling of controversial speech to off-hours,²⁶⁹ such as *ACT III*, the government failed to adduce any evi-

265. *Action for Children’s Television v. FCC (“ACT III”)*, 58 F.3d 654, 663 (D.C. Cir. 1995) (en banc).

266. The view of parents as at best ineffectual that is reflected in government efforts to regulate controversial speech contrasts dramatically with recent efforts to impose financial and even criminal liability on parents for acts their children commit outside the home. See Naomi R. Cahn, *Pragmatic Questions About Parental Liability Statutes*, 1996 WIS. L. REV. 399, 415-16 (1996).

267. 138 CONG. REC. S7304, S7309 (daily ed. June 2, 1992) (statement of Sen. Helms).

268. *ACT III*, 58 F.3d at 663.

269. The creation of “safe harbor” hours or “channeling” may severely limit adult access to controversial speech. For all practical purposes, restrictions limiting broadcast of controversial speech to the middle of the night means that adults who follow normal daylight hours, or hold nine to five jobs, would have little opportunity to hear the protected controversial speech.

dence about whether significant numbers of youngsters were exposed to controversial material or whether parents wished to limit what their children heard.²⁷⁰ The logic of supporting parental authority suggests that, if the government has any legitimate interest at all in making controversial speech hard to obtain, that interest should be limited to the times when the average parent is at work and therefore unable to supervise. But when “the great preponderance of children are subject to parental control,”²⁷¹ whether or not they choose to exercise it, no governmental interest in regulating speech exists that is even legitimate, much less compelling.

The argument that the job of responsible parenting is impossible even for the best intentioned parents at times masks a frontal attack on nonconformist parents, as Justice Brennan recognized when he dissented in *Pacifica*:

As surprising as it may be to individual Members of this Court, some parents may actually find [the broadcast's] unabashed attitude toward the seven 'dirty words' healthy, and deem it desirable to expose their children to the manner in which Mr. Carlin defuses the taboo surrounding the words. Such parents might constitute a minority of the American public, but the absence of great numbers willing to exercise the right to raise their children in this fashion does not alter the right's nature or its existence.²⁷²

Sixteen-year-old Filipina bi-sexual Rheana Parrenas and her parents recognized themselves as targets of the CDA.²⁷³ Rheana contributes to a forum dedicated to people like herself on the Internet. She was concerned that the CDA would criminalize her self-expression, depriving her of an audience and others of the “fundamental idea of not being alone.”²⁷⁴ Her parents fully supported both her expressive activities and her participation in the litigation challenging the CDA.²⁷⁵

The neighbors of nonconformist families and their children's schoolmates will understand the government's message in the CDA and other statutes as well. Nonconformist parenting appears to equal irresponsible parenting, even if it does not rise to the level of abuse that would justify the state's concrete intervention in the family. By

270. *ACT III*, 58 F.3d at 682 (Edwards, C.J., dissenting); see also *Playboy Entertainment Group, Inc v. United States*, 30 F. Supp. 2d 702, 719 (D. Del. 1998) (stating that if signal bleed is not a pervasive problem, “parents may have little concern that the adult [premium] channels be blocked”), *prob. juris. noted*, 119 S. Ct. 2365 (1999) (“Playboy II”).

271. *Pacifica Found. v. FCC*, 556 F.2d 9, 36 (D.C. Cir. 1977) (Leventhal, J., dissenting).

272. *FCC v. Pacifica Found.*, 438 U.S. 726, 770 (1978) (Brennan, J., dissenting).

273. See *ACLU Background Briefing: Teens Speak Out About On-Line Censorship* (visited Jan. 8, 2000) <<http://www.aclu.org/issues/cyber/trial/rheana.html>>.

274. *Affidavit of Rheana Parrenas* (visited Jan. 8, 2000) <<http://www.aclu.org/courts/rheana.html>>.

275. See *ACLU Background Briefing*, *supra* note 273.

means of moral legislation,²⁷⁶ the state intervenes at the heart of the family without the due process that would be necessary in a formal investigation of abuse.²⁷⁷

When the state divides speech into favored and disfavored categories on the premise that disfavored speech harms children, it acts on deeply embedded cultural norms. Law and regulation are suffused with such cultural norms, frequently masquerading as either scientific findings or analytically derived legal certainties. The range of cultural norms is critical to the contemporary legal and political debate about controversial speech and children, which one commentator has referred to as the “problematization of children.”²⁷⁸

Regulations that impose moral norms on civil behavior implicating personal autonomy can have pernicious effects on child rearing. Family autonomy means a right for parents to raise their children as they see fit.²⁷⁹ A mother might reasonably conclude that a daughter who would soon be leaving for college should not be subjected to many rules at home, because she needs “the opportunity to learn to manage her time and make decisions before going away to college.”²⁸⁰ In other contexts, parents have testified that:

[J]ust as part of teaching children about responsible behavior involves setting limits, part of that teaching also involves showing them that rules are not rigid, and that reasonable exceptions should be made when there is reasonable justification It usurps our role as parents for the government to step in and tell us and our children that we cannot make those decisions for ourselves²⁸¹

This view of parenting as fostering the emerging autonomy of the young meshes with the legal view of the maturation process. “Constitutional rights,” like children, the Supreme Court has held, “do not mature and come into being magically only when one attains the state-defined age of majority.”²⁸² As Justice Powell explained, the parenting role promotes responsible maturation by an “affirmative

276. See Henkin, *supra* note 191, at 395.

277. See *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982) (holding that due process is required before a state may terminate the rights of parents in their natural child).

278. 1997 Annual Conference Panel, *supra* note 26, at 352 (comments of Jack Balkin).

279. See, e.g., *Hutchins v. District of Columbia*, 942 F. Supp. 665, 680 (D.D.C. 1996), *aff'd* 144 F.3d 798 (D.C. Cir. 1998), *vacated*, 156 F.3d 1267 (D.C. Cir. 1998), *rev'd on other grounds*, 188 F.3d 531, (D.C. Cir. 1999) (en banc). Only a plurality of the judges contested that a juvenile curfew implicated fundamental parental rights; a majority concluded that the statute implicated parental rights but survived intermediate scrutiny. See also *Hutchins v. District of Columbia*, 188 F.3d 531, 548 (D.C. Cir. 1999) (en banc) (Edwards, J., concurring in part and concurring in the judgment) (stating that the law “implicates significant rights of both parents and minors,” but survives intermediate scrutiny).

280. *QUTB v. Strauss*, 11 F.3d 488, 496 (5th Cir. 1993) (opposing juvenile curfews).

281. *Hutchins*, 188 F.3d at 572 (Tatel, J., dissenting) (quoting Plaintiff’s Affidavit).

282. *Planned Parenthood v. Danforth*, 443 U.S. 52, 74 (1976).

process" through which parents teach, guide and inspire in a way that is "beyond the competence of impersonal political institutions."²⁸³ Such individualized decisionmaking teaches that actions have consequences, and that responsibility is rewarded with freedom.²⁸⁴ These precepts help the "children of this diverse and democratic nation . . . to develop habits of responsibility necessary for self-governance and to observe not only the formal rules established by government but also the informal rules and understandings that undergird civilized society."²⁸⁵

Parental autonomy values are at issue when the state substitutes its own value preferences and judgments for parental discretion regarding otherwise legal activities. In the arguably distinguishable context of a juvenile curfew,²⁸⁶ a plurality of the District of Columbia Circuit sitting en banc in *Hutchins v. District of Columbia* suggested that parents' rights to direct their children's upbringing were limited to life at home and educational activities.²⁸⁷ That plurality's pinched version of parental autonomy would impinge upon daily decisions most parents make without thought of government intervention. Surely it:

would come as a stunning surprise to countless parents throughout our history who have imposed restrictions on their children's dating habits, driving, movie selections, part-time jobs, and places to visit, and who have permitted, paid for, and supported their children's activities, in sports programs, summer camps, tutorial counseling, college education and scores of other such activities, all arising outside of the family residence and school classroom.²⁸⁸

The notion of government as decision-maker for children outside the home would trample minority views. The principle holds even if some parents—or nearly all parents—welcome the government's legal reinforcement of the restrictions that they themselves would impose. The *Hutchins* plurality's loose approach to the scope of state authority over children would violate *Meyer* by making the child a virtual creature of the state.²⁸⁹

283. *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (Powell, J., concurring).

284. See *Hutchins*, 188 F.3d at 572 (Tatel, J., dissenting).

285. *Id.* at 573.

286. For an argument that juvenile curfews are not distinguishable because they violate children's rights, see Katherine Hunt Federle, *Children, Curfews and the Constitution*, 73 WASH. U. L.Q. 1315, 1364-65 (1995).

287. *Hutchins*, 188 F.3d at 540-41 (en banc) (Silberman, J., plurality opinion).

288. *Id.* at 550 (Edwards, C.J., concurring).

289. *Meyer v. Nebraska*, 262 U.S. 390, 401-02 (1923).

C. Parental Preferences and the Private Market

To the extent that regulating controversial speech facilitates parental decisionmaking, and cannot be accomplished without government action,²⁹⁰ a compelling interest may exist. Such a hypothetical situation would require balancing the state interest against the speech rights of adults and minors as both speakers and recipients. But this possibility raises two additional questions. First, are large numbers of parents eager for help in protecting their children from speech? Second, even if they are clamoring for help, is state action the only way to provide that help?²⁹¹

The measurable actions of parents themselves suggest that the answer to both questions is no. Parents facilitate access to controversial speech by providing electronic equipment for their children: over ninety-six percent of American households have televisions,²⁹² and more than two-thirds of households subscribe to cable service,²⁹³ although parents are acutely aware that children watch a lot of television.²⁹⁴ Even more telling, about eighty percent of all children have their own radios (and among children under age twelve, two-thirds have their own radios), half of them with a headphone that prevents others from hearing what they are listening to.²⁹⁵ Approximately 110 million Americans of all ages have access to the Internet whether at home, or through school or work; that number grows daily.²⁹⁶ This data

290. See generally Matthew Spitzer, *An Introduction to the Law and Economics of the V-Chip*, 15 CARDOZO ARTS & ENT. L.J. 429 (1997) (concluding that V-chip legislation and accompanying developments constitute state action).

291. The question of harm independent of parental preferences is addressed *supra* in Part VI.

292. See 1 BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1998, at 573 (1998). A 1995 poll found that 54% of American children had television sets in their own rooms, slightly more generally watched television without their families, and 66% of children lived in households with three or more television sets. See *Action for Children's Television v. FCC* ("ACT III"), 58 F.3d 654, 661 (D.C. Cir. 1995) (en banc) (citing poll by Fairbank, Maslin, Maullin & Associates on behalf of Children Now).

293. See *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 745 (1996); *Satellite/Cable Competition: An Examination of the EchoStar/MCT Deal: Hearing Before the Subcomm. on Antitrust, Business Rights, and Competition of the Senate Comm. on the Judiciary*, 106th Cong. 6 (1999) (testimony of Charles W. Ergen, CEO EchoStar Communications Corp., that 68.2% of homes reached by cable wires subscribe, and cable reaches over 97% of homes).

294. Television Violence Reduction Through Parental Empowerment Act, S.306, 104th Cong. § 2(3) (1995).

295. See *ACT III*, 58 F.3d at 661. According to the Consumer Electronics Manufacturing Association, most homes in the United States have at least eight radios, not counting car radios, making radios "easily the most ubiquitous" communications medium. Joel Brinkley, *Listening to Sounds of a Wave*, N.Y. TIMES, June 3, 1999, at G1.

296. See *Reno v. ACLU* ("ACLU I"), 521 U.S. 844, 850 (1997) (stating that in 1997, about 40 million Americans used the Internet and the number was expected to reach 200 million by the

suggests that parents as an aggregate have concluded that the benefits of receiving speech outweigh the risks for their own children.

Nor are parents rushing to embrace voluntary forms of monitoring compatible with their own preferences, as represented by technologies such as Internet filters, cable lockboxes²⁹⁷ and television V-chips²⁹⁸ that erect barriers between their children and controversial speech. With the possible exception of the somewhat rarified telephone dial-a-porn services,²⁹⁹ in most forms of communication, as Judge Wald expressed it, "parents would have to be hermits to be unaware through newspapers and even television itself of the debate over sex and violence."³⁰⁰ After years of growth, improved technology and public debate, only about one-third of American parents with online connections in their homes use a commercially available filtering program.³⁰¹ On the other hand, this is a dramatic rise from only two years earlier, when the district court received evidence in *ACLU I*.³⁰² The statistical trend suggests that as the market develops more refined filtering mechanisms that are responsive to the genuine concerns of parents, families may be more inclined to use them. In contrast, a negligible

end of 1999); Cass R. Sunstein, *Code Comfort*, NEW REPUBLIC, Jan. 10, 2000, at 37, 38 (stating that more than 100 million Americans now use the Internet); see also *Shea v. Reno*, 930 F. Supp. 916, 926 (S.D.N.Y. 1996) (Cabranes, J.) (citing Joint Stipulation of Parties), *aff'd*, *Reno v. ACLU*, 521 U.S. 844 (1997). Libraries are the sole source of Internet access for many Americans, and more than three-quarters of the nation's libraries offered Internet access as of March 1998. See Amy Harmon, *Library Suit Becomes Key Test of Freedom to Use the Internet*, N.Y. TIMES, Mar. 2, 1998, at D7.

297. Cable operators are required to provide "lockboxes" which enable the adult subscriber to block viewing of selected cable services at certain times or indefinitely. See 47 U.S.C. § 544(d)(2) (1994). Federal regulators presume that parents will use lockboxes to restrict their children's access to certain cable broadcasts. See *In re Enforcement of Prohibitions Against Broadcast Indecency* in 18 U.S.C. § 1064, 5 F.C.C.R. 5297, 5305 (1990).

298. A so-called "v-chip" (a series of technological devices) allows viewers to identify and block sexually explicit and violent broadcast and cable television programming based on codes embedded by producers of such material and selected by potential recipients. See Telecommunications Act of 1996, 29 U.S.C.A. § 330(c) (West 1991 & Supp. 1999). The constitutionality of the statute requiring manufacturers to install v-chips in new televisions over a certain size and the accompanying industry regulations have not yet been tested in the courts. See *Denver Area*, 518 U.S. at 756 (noting that the v-chip is significantly less restrictive than a ban but reserving the question of whether the statute is "lawful").

299. Many parents are unaware that dial-a-porn even exists, much less that they can install voluntary blocking technology. See *Dial Info. Servs. v. Thornburgh*, 938 F.2d 1535, 1542 (2d Cir. 1991).

300. *Alliance for Community Media v. FCC*, 56 F.3d 105, 142 (D.C. Cir. 1995) (Wald, J., dissenting) (discussing cable television programming).

301. See John Schwartz, *It's a Dirty Job; Web Childproofers Keep Surfing Through Muck*, WASH. POST, June 23, 1999, at A1 (citing a recent poll for the Annenberg Public Policy Center).

302. See *ACLU v. Reno*, 929 F. Supp. 824, 838-42 (E.D. Pa. 1996) (describing how the various filtering systems work and their low cost to consumers), *aff'd*, 521 U.S. 844 (1997) ("ACLU I").

number of cable subscribers have requested the free lockboxes that federal law requires cable operators to provide.³⁰³

The potential legal and logistical problems with the voluntary use of filters are outside the scope of this inquiry.³⁰⁴ But a brief consideration of filters, rating systems, and responses to sexually explicit e-mail in terms of the capacity of technology to enhance parental authority underscores that constitutionally permissible measures exist to help parents in the private market. When filters and ratings provide information that helps parents make decisions, such developments have the potential to enhance parental authority.³⁰⁵ Parents need to understand, however, that existing filtering programs for Internet communications are both over-inclusive and under-inclusive.³⁰⁶ Such programs almost uniformly block valuable controversial speech, such as all messages concerning homosexuality, as well as sites that include linguistic derivatives of the words "gay" or "sex."³⁰⁷ One filtering system used in some public schools blocks all information on the Gulf War, on the grounds that it is too violent, while allowing unfettered access to information about sports teams, including hockey.³⁰⁸ Nonetheless, to the extent that mechanisms can facilitate individual choice about which speech is received without overbroad

303. See *Playboy Entertainment Group, Inc. v. United States* ("Playboy II"), 30 F. Supp. 2d 702, 712 (D. Del. 1998) (citing a nation-wide government survey showing that "less than one-half of one percent (0.5)" of subscribers have lockboxes), *prob. juris. noted*, 119 S. Ct. 2365 (1999).

304. See generally Balkin, *supra* note 218 (discussing the challenges posed by media filters).

305. See In re Implementation of Section 551 of the Telecommunications Act of 1996, Report and Order, F.C.C. 98-35 (Mar. 12 1998), available at <<http://www.fcc.gov/bureaus/cable/orders/1998/fcc98035.pdf>> (statement of Comm. Gloria Tristani that "[t]he v-chip is essentially a remote control device with a longer range . . . [I]t will not be a substitute for parents").

306. See Ira Glasser, *The Struggle for a New Paradigm: Protecting Free Speech and Privacy in the Virtual World of Cyberspace*, 23 NOVA L. REV. 627, 648 (1999); see also Reply Brief for Appellant at 5 (indicating that both the plaintiffs and the government agree that blocking software is flawed because it is both under- and over-inclusive), *ACLU v. Reno*, 31 F. Supp. 2d 473 (E.D. Pa. 1999) *appeal docketed*, No. 99-1324 (3d Cir. Apr. 1999) ("*ACLU II*").

307. See GAY & LESBIAN ALLIANCE AGAINST DEFAMATION, *supra* note 196, at 2. Filtering programs block the maps of the town Gay, West Virginia and reliance on key words in a filtering mechanism may also block access to information on Middlesex, England and Superbowl XXX—based on "XXX" frequently being a shorthand for sexually oriented sites. See *ACLU, FAHRENHEIT 451*, at 9 (1997); see also Glasser, *supra* note 306, at 648 ("Censorship offered by such software is often like poison gas: it seems a good idea when aimed at a target you oppose, but the wind has a way of shifting" and, in any event, blocking software is both over- and under-inclusive.).

308. Government efforts to facilitate or enforce the use of filters have not yet been tested in the courts outside the context of public library Internet service. In a case of first impression, a federal court held that use of filters by the government in public libraries is an unconstitutional abridgement of speech. See *Mainstream Loudon v. Loudon County Library Bd.*, 24 F. Supp. 2d 552, 570 (E.D. Va. 1998) (enjoining use of a commercial Internet filtering program on public library computers).

blocking of speech the recipients might wish to see, filtering appears to be a potentially useful approach for parents.³⁰⁹

Filters may best enhance parental authority when a variety of ratings systems are available for each medium of expression, reflecting a range of tolerance for speech and a diversity of world views. Although the sheer volume of speech on the Internet, and even on cable television, makes it difficult for raters who are not the producers of the material to keep pace, the system that might serve parental autonomy would involve ratings by groups such as religious denominations, and secular or political groups that have an articulated view about cultural norms and values. Parents consulting such ratings on movies, or programming computer filters in order to impose restrictions based on these ratings, would have a context for understanding the basis on which ratings were assigned. Parents could also test different rating systems to find the ones that most closely approximate the decisions they would make themselves. Those issues, however, concern the "means" side of the speech equation, rather than the government interest or "ends" side, which is the focus here.

Finally, many parents worry about the risks they perceive to be associated with unsolicited e-mails from strangers containing controversial sexual material. Yet it is unclear that even this invasive practice creates a compelling independent government interest, because it can be handled through another form of filtering that gives parents a great deal of choice. Unwelcome e-mail messages can be cut off by technology that empowers individual parents. For example, the system offered by America Online allows parents to block all e-mail with illustrations or attachments, to post a list of senders whose mail should be delivered, with all other mail to be returned to sender, or to instruct the Internet provider not to deliver mail from certain senders. Under First Amendment doctrine, listeners may affirmatively decline to receive certain materials.³¹⁰ Consistent with that tradition, parents who choose to do so can give their Internet provider a list of approved correspondents for their children (or themselves), and ask that mail from persons not on the list be returned to sender. Unwanted e-mail can also be deleted unread under parental supervision, just as unwanted postal service mail goes in the trash basket.

309. See Lawrence Lessig, *The Constitution of Code: Limitations on Choice-Based Critiques of Cyberspace Regulation*, 5 COMM. L. CONCEPTUS 181, 187 n.36 (1997).

310. See *Rowan v. Post Office Dep't*, 397 U.S. 728, 737-38 (1970) (upholding a statute that allowed individuals to request that the post office not deliver "sexually provocative" materials to their homes); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 310 (1965) (Brennan, J., concurring).

Filters installed in the home and administered by parents do not raise the same First Amendment problems as those installed in public libraries, where the state becomes the censor.³¹¹ Significant constitutional questions arise where the government installs filters or mandates the use of filters.³¹² To the extent that filters and rating systems impose or are tied to potential state sanctions that limit what speech the young can receive, they risk becoming “a solemn ratification in constitutional terms of the ‘generation gap.’”³¹³

Government activities that neither regulate speech nor infringe on other protected liberties do not require a compelling interest. A range of government programs designed merely to provide information without categorizing or disfavoring any particular speech may enhance parental authority and pass constitutional muster.³¹⁴ These programs include pamphlets containing advice on technology that could help enforce the family’s rules, regulations requiring service providers to inform parents about available blocking technology, and even warnings about unproven risks inherent in various forms of media. The government has a rational interest in establishing a commission to examine existing research on whether controversial speech harms children.³¹⁵ A rational basis is all that is necessary to justify government recommendations and reference materials designed to help all parents make informed decisions about the rules they wish to impose on their own children, as long as the state does not inhibit speech itself.

The economic market has demonstrated an ability to provide alternatives when a sufficient number of parents care strongly about protecting their children from controversial speech. Filters for television, monitored Internet sites,³¹⁶ and tame computer games are

311. See Ross, *supra* note 230, at 234-36, 251.

312. See *Mainstream Loudon v. Loudon County Library Bd.*, 2 F. Supp. 2d 783 (E.D. Va. 1998); *supra* note 15 (describing congressional proposals for requiring Internet filters in public schools and libraries).

313. HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* 59 (1988).

314. See *Cyberspace Communications v. Engler*, 55 F. Supp. 2d 737, 750 (E.D. Mich. 1999) (summarizing expert testimony that parental control through participation with a minor or oversight in a public area of the home is the most effective means of monitoring content, and can be complemented by lockboxes, filtering programs, logs of web sites accessed and even the on/off switch).

315. The Child Online Protection Act (“COPA”) establishes a temporary national commission to review technologies that would help “reduce access by minors to material that is harmful to minors” on the Internet, but not to resolve what material is in fact “harmful.” Child Online Protection Act, Pub. L. No. 105-277, § 1405(c), 112 Stat. 2681, 2681-739 (1998).

316. No screening software currently exists for Internet forums such as chat rooms or email. See *Reno v. ACLU* (“*ACLU I*”), 521 U.S. 844, 881 (1997). Some major Internet providers, such as America Online monitor chat rooms designated for minors at their own volition in order to

achievable through the market if there is adequate consumer demand.³¹⁷ Similarly, labels designed to inform parents but which are not attached to a screening mechanism, such as ratings of movies and musical recordings, do not require state action.³¹⁸

For example, since the rap group 2 Live Crew recorded a companion "clean" version of its sexually explicit album "As Nasty as They Wanna Be," entitled "As Clean as They Wanna Be,"³¹⁹ retailers have made the release of expurgated rock music almost routine. Wal-Mart Stores, the nation's largest retailer, among others, refuses to stock audio or visual material that their managers regard as too sexually explicit or violent.³²⁰ Some record producers regularly provide a second version of both the lyrics and the album cover to large retailers like Wal-Mart visibly labeled "clean," or "sanitized for your protection."³²¹ As in other forms of First Amendment chill, some producers and artists tone down the original release so that major marketers will carry it.³²² While such developments affect the range of speech available, they do not constitute state action so long as the impetus really comes from stores and consumers.³²³

On the other hand, in many rural areas a major chain might be the only retail outlet for music within a reasonable distance. Private

enforce codes of discourse. Such activity does not implicate state action, and parents can instruct their children to limit chat room contact to systems that monitor such sites.

317. Microsoft, the major provider of computer operating systems, recently announced that the next version of its operating system Windows will include a feature that will allow "parents to keep a game with gruesome violence, offensive language or nudity from being played, based on the game's content rating," which major manufacturers will encode. The system will also allow a game to be set at different levels of violence, language and so forth dependent on the identification of each family member. See Sharon R. King, *Game Blocker to Be Installed on Windows*, N.Y. TIMES, June 25, 1999, at C1. This plan does not involve any state action, and leaves material completely accessible to adults and to minors with parental consent. I am not unmindful of the possibility that enterprising and disobedient minors may find ways to override the codes or gain access to an older family member's more explicit version of a game.

318. See, e.g., *Delgado v. American Multi-Cinema*, 85 Cal. Rptr. 2d 838, 840-41 (1999) (holding that the voluntary film-rating system is designed solely to promote parental control; no duty flows to theaters or to society at large).

319. See *Skywalker Records, Inc. v. Navarro*, 739 F. Supp. 578, 592 (S.D. Fla. 1990) (comparing "Clean," which sold less than 250,000 copies, with "Nasty," which sold 1.7 million), *rev'd sub. nom.*, *Luke Records, Inc. v. Navarro*, 960 F.2d 134, 138 (11th Cir. 1992).

320. See Steve Morse, *Is It Live, Or Has It Been Sanitized for Retail Sale?*, NEW ORLEANS TIMES-PICAYUNE, Dec. 13, 1996, at L20.

321. See *id.*; Neil Strauss & Alan Hustak, *Chains Like Wal-Mart Writing the Lines for Music, Movies in the U.S.*, MONTREAL GAZETTE, Nov. 14, 1996, at A1.

322. See Strauss & Hustak, *supra* note 321. Expurgation of music and video to satisfy large retailers is ubiquitous in the United States, but not in Canada.

323. For a discussion of the role of private boycotts and censorship in the framework of the First Amendment, see Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 57-61 (1991).

choices may have an impact on the entertainment industry, because consumer purchases at large chains affect the sales charts.³²⁴ A chain store's marketing decisions may make controversial speech harder to obtain, but for purposes of constitutional analysis the distributor's choice is not necessarily more significant than its choice of what color shirts to stock in any given fashion season. These private actions constrict the marketplace of ideas, even as they enhance the authority of conservative parents. But they do not implicate or require government action, thus further undermining the notion that state action is necessary to reinforce parental efforts to shield children from controversial speech.

Producers and distributors cater to the demand for non-controversial entertainment by providing special fora. These include PAX, a cable network which offers only family-oriented programs,³²⁵ Christian radio and television stations, and the burgeoning industry of Christian rock.³²⁶ Pacifica Radio network and Playboy Enterprises—among other frequent parties to First Amendment litigation—respond to demand from a different group of listeners. When the market responds to particularized tastes by enhancing the possibility of matching speakers to those who want to hear their message, it expands the marketplace of ideas for everyone. The marketplace could thus be responsive to all levels of parental levels of tolerance.

An expanded marketplace that reflects consumer preferences of all three types of parents, including both the most restrictive and the most permissive nonconformist, facilitates parental decisionmaking. As the Court of Appeals for the Third Circuit explained, parental choice is an inherent part of the systems to which we adhere as a society. "[T]he decision a parent must make," about whether to install a filter on a computer is comparable to the decision about whether to block a phone line, to "keep sexually explicit books on the shelf or subscribe to adult magazines. No constitutional principle is implicated. The responsibility for making such choices is where our society has traditionally placed it—on the shoulders of the parent."³²⁷

324. See *id.*; Marie-Josée Kravis, *Nothing Orderly About Industries Transforming Themselves: From Megadealerships in Auto Sector to Virtual Banking, Get Ready for Explosive Change*, FIN. POST, Nov. 20, 1996, at 19 (stating that the power of major retailers like Wal-Mart allows them to "impose countless constraints on manufacturers").

325. See Lisa de Moraes, *On Monday, The Genesis of PAX TV*, WASH. POST, Aug. 29, 1998, at C7 (creating a "haven from the sex, language and violence" on other networks, PAX founder will not air shows that "[God] won't want to watch").

326. See Steve Lohr, *It's Demons vs. Angels in Computer Game with a Religious Theme*, N.Y. TIMES, Oct. 18, 1999, at C1 (describing a new genre of "violent Christian action games").

327. *Fabulous Assocs., Inc. v. Pennsylvania Pub. Util. Comm'n*, 896 F.2d 780, 788 (3d Cir. 1990); see also *Reno v. ACLU* ("ACLU I"), 521 U.S. 844, 887, 893, 901 (1997).

VI. THE STATE'S INDEPENDENT INTEREST IN SHIELDING CHILDREN REGARDLESS OF FAMILY PREFERENCES

Proponents of regulation rely as well on a second potential interest, an independent state interest in shielding children. Under *Turner*, in order to show that such a government interest is compelling, the state must demonstrate the specific harm that flows from the speech it seeks to regulate. It must also show that the regulation is likely to diminish the risk of the identified harm. But in case after case, the proponents of government regulation have failed to articulate any specific harm to children that would establish such an independent compelling interest.

A. *The Government as Inculcator of Values for Citizenship*

The primary argument that government has an independent interest in regulating controversial speech that might reach minors builds on *Prince v. Massachusetts*, in which the Supreme Court upheld the use of child labor and compulsory school laws to bar a child from proselytizing on the street with her family in the evening.³²⁸ The government's interest in assuring the well-being of the next generation of citizens is unquestioned when the actions taken to promote healthy development do not impinge upon fundamental rights, such as freedom of speech or religion. Under *Prince*, government has a unique role to play in a democracy by ensuring "the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."³²⁹ In attempting to regulate speech that children might receive in their homes, proponents of regulation appear to claim that the language "all that implies," lacks any boundaries. The risk arises that the state would present itself as a "superparent."³³⁰

Those who favor state action designed to protect children from controversial speech base their arguments on children's vulnerability and presumed lack of capacity to make critical choices or protect themselves. Anglo-American jurisprudence has frequently accepted, without question, the notion that the average child experiences legal

328. *Prince v. Massachusetts*, 321 U.S. 158, 170-71 (1944) (holding that the government may enforce child labor laws over religious exercise claims by Jehovah's Witnesses whose children wish to participate in proselytizing).

329. *Id.* at 168.

330. Transcript of Oral Argument, 1999 WL 1134595, at *20, *Playboy Entertainment Group, Inc. v. United States* ("Playboy II"), No. 98-1682 (Nov. 30, 1999) (including a question as to whether the government saw itself as "a kind of super-parent" and why the government's interest should not yield to parental decisions, even if these decisions stem from inertia as the government alleges).

“disabilities” compared with the average adult.³³¹ Even legal commentators who are committed to an expansive reading of the Speech Clause have accepted vulnerability as a justification for the state to restrict children’s speech rights.³³² Concurring in *Ginsberg*, Justice Stewart emphasized that “children lack the full capacity for individual choice which is the presupposition of First Amendment guarantees.”³³³ Without a presumption of capacity, Justice Stewart argued, children are not free to participate in the “free trade in ideas” envisioned by Justice Holmes or to decide for themselves “what [they] will read and to what [they] will listen.”³³⁴

Judicial acceptance of paternalism, the dominant doctrine supporting the notion that children need state regulation to shield them from speech, proceeds from an undifferentiated notion of children’s vulnerability.³³⁵ In applying paternalistic presumptions, courts have failed to distinguish between rules made by the state and rules imposed by parents on their own children;³³⁶ between an eight-year-old and a person who will turn seventeen in the next month;³³⁷ and between choices made by the state about what children should read and

331. See Ross, *supra* note 223, at 1571-72 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *452)).

332. See, e.g., Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 938-39 (1963); Henkin, *supra* note 191, at 413 n.68; Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 7. All these authors were cited, among others, in *Ginsberg v. New York*, 390 U.S. 629, 637 n.5 (1968). *Ginsberg* did not, however, reach this question. *Id.* at 636 (“We have no occasion in this case to consider the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the State.”) To date, the Supreme Court has not addressed the scope of minors’ speech rights.

333. *Ginsberg*, 390 U.S. at 650 (Stewart, J., concurring in the result) (making six votes for the holding).

334. *Id.* at 649.

335. Such public concerns are highly selective, outweighed by the prevailing view that the concrete needs of children for care and sustenance are the sole responsibility of parents. For critiques of that view, see, e.g., MINOW, *supra* note 220, at 271 & n.15; Martha Fineman, *Cracking the Foundational Myths: Independence, Autonomy and Self-Sufficiency*, 7 AM. U. J. GENDER, SOC. POL’Y & LAW 101 (forthcoming 2000) (proposing public support for private caretaking); Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children’s Rights*, 9 HARV. WOMEN’S L. J. 1, 1-24 (1986); Catherine J. Ross & Naomi R. Cahn, *Subsidy for Caretaking in Families: Lessons from Foster Care*, 7 AM. U. J. GENDER, SOC. POL’Y & LAW 101 (forthcoming 1999) (response to Professor Fineman).

336. On the distinction between rules imposed and enforced by parents and those enforced by state action, see Ross, *supra* note 230, at 243, 246-50, 262. Justice Stewart shows enormous deference to the parental role, and finds it hard to imagine a situation in which the interests of parents and children would not be aligned perfectly. See *Parham v. J.R.*, 442 U.S. 584, 621 (1979) (Stewart, J., concurring) (“[F]or centuries it has been a canon of the common law that parents speak for their minor children.”); Ross, *supra* note 223, at 1580-81 (discussing Justice Stewart’s views).

337. See *Planned Parenthood v. Danforth*, 443 U.S. 52, 74 (1976) (“Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.”).

hear in school and in the rest the universe they occupy outside of school hours.³³⁸

A decade after *Ginsberg*, the Supreme Court clarified the characteristics of the age of minority, which it saw as threefold: (i) "the peculiar vulnerability of children"; (ii) "their inability to make critical decisions in an informed, mature manner"; and (iii) legal recognition of the importance of the "parental role in childrearing."³³⁹ In the context of constitutional liberties, the Court underscored the legal significance of distinguishing between "mature" and "immature" minors, although it provided no guidelines to the lower courts on how to make that distinction.³⁴⁰

The distinction remains important despite the lack of concrete guidance. In *ACLU I*, for example, Justice Stevens' majority opinion chastised the government for its failure to acknowledge the range of maturity represented during minority. "[T]he strength of the government's interest in protecting minors is not equally strong" for three-year-olds and seventeen-year-olds.³⁴¹ For the fourteen years in between, the level of maturity required may well depend on what kind of decision the child is asking to make, and on the characteristics of the individual child. Parents are best equipped to make such subjective distinctions based on their knowledge about each child's level of maturity.³⁴² The state, in contrast, can only make rules of general applicability.

The government's role in safeguarding children and promoting their development into responsible citizens generally falls into three categories: (i) regulation of juvenile behavior that could not be con-

338. See *Mainstream Loudoun v. Loudoun County Library Bd.*, 2 F. Supp. 2d 783, 795 (E.D. Va. 1998) (overturning the use of a filter on the computers made available to users by the public library, and noting that the lesser First Amendment protection traditionally accorded to children because their "minds and values are still developing" applied particularly in the school context, not the public library).

339. *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (Powell, J.) (holding that a minor must have the opportunity to go directly to court for a judicial determination, without prior parental consent, to obtain an abortion).

340. *Id.* at 640-43; see Ross, *supra* note 230, at 256-57 (discussing how the lower courts apply the *Bellotti* factors).

341. *Reno v. ACLU* ("ACLU I"), 521 U.S. 844, 878 (1997).

342. See *supra* Part V.

strained for adults;³⁴³ (ii) protection from abuse and neglect;³⁴⁴ and (iii) education and inculcation for citizenship.³⁴⁵

The regulation of juvenile behavior generally has no bearing on restrictions on pure speech and requires no further discussion here. While conduct may, under certain circumstances, constitute protected speech,³⁴⁶ receipt of protected communications does not currently constitute conduct amenable to punishment by the state.³⁴⁷ It is not unimaginable that in a regime which labeled selected speech as dangerous for the young, receipt of such speech could join the array of status offenses, i.e., acts such as truancy that are illegal only when committed by minors, and which are punishable by confinement. Parents cannot protect their children from state involvement by consenting to behavior that constitutes a status offense.³⁴⁸

On the other hand, some parents turn to the juvenile justice system to help them discipline "incorrigible" young people. This pattern suggests that, if courts find a compelling interest in isolating children from controversial speech sufficient to turn receipt of speech into an act of delinquency, parents whose children break the family rules about television, movies, and music could turn the state into the enforcer of family discipline. Such an outcome, while extreme, builds logically from the arguments offered in support of regulation. If controversial speech threatens to turn children into criminals, a proposition which is open to question, as discussed below, why not treat adolescents who obtain such speech in the same way that courts treat teenagers who carry guns or sell drugs?

The second category—protection from abuse and neglect at the hands of parents and guardians—might support a compelling governmental interest in regulating controversial speech if the government could establish that such speech leads to serious physical, emotional, or psychological damage which, in turn, could be attributed to negli-

343. Children are subject to penalties including confinement when they commit "status offenses," that is, acts which would not violate the law if performed by an adult. These include truancy, incorrigibility, and failure to obey parents. See Mark H. Moore & Stewart Wakeling, *Juvenile Justice: Shoring up the Foundations*, 22 CRIME & JUST. 253, 261, 264-66 (1997).

344. See *Santosky v. Kramer*, 455 U.S. 745, 771 (1982).

345. See *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

346. See *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).

347. Controversial speech as part of a pattern of child abuse may constitute an element of a criminal offense. See *United States v. French*, 31 M.J. 57, 59 (C.M.A. 1990) (finding liability for two counts of "communicating indecent language" to a minor when combined with sexual contact); *Kansas v. Ramos*, 731 P.2d 837 (Kan. 1987) (showing a pornographic magazine to ten-year-old daughter as part of a sexual approach).

348. See *Prince*, 321 U.S. at 169 ("What may be wholly permissible for adults . . . may not be so for children, either with or without their parents' presence.").

gent parents.³⁴⁹ In *Ginsberg*, the Court correctly relied on *Prince* for the proposition that the state may intervene against parental wishes to "protect the welfare of children" and to safeguard them from abuse.³⁵⁰ This approach seems to suggest that where the "imperfect normative family" or the "nonconformist family" fails to provide adequate supervision, the state could claim an independent role as guardian of last resort.³⁵¹ Although one can imagine a case where parents exposed a child to speech that crossed such a clear line that it constituted child abuse, such as reading sado-masochistic material that qualifies as obscene under *Miller* to a four-year-old, it seems unlikely that such speech-related behavior would be the only questionable acts committed by such parents. Because facts like these do not appear to occur frequently, and courts are unlikely to find such cases difficult to decide if they do arise, this issue does not require prolonged discussion.

The third and most widespread area of state intervention is the state's role in education. Public schools, the Supreme Court has held, are vital "in the preparation of individuals for participation as citizens."³⁵² Schools are the vehicles for "inculcating fundamental values necessary to the maintenance of a democratic political system."³⁵³ Under existing doctrine, the government has great leeway in assessing and regulating the content of speech when it functions as educator.

Its role as educator and "inculcator of values" requires the state to make choices based on content and, at least sometimes, on viewpoint.³⁵⁴ It must, for example, create a curriculum consisting of re-

349. The state overrides parental decisions in limited instances, including denial of potentially life-saving medical care and judicial consent to abortions for adolescents without parental notice or consent. Both of these instances are easily distinguishable from the state second-guessing a parent's decision to allow a child access to controversial material. In the case of medical care, courts will generally impose treatment over parental religious objections only where intervention is likely to save a life. The risk of harm and the benefits of state action are clear. See *In re Green*, 292 A.2d 387, 391-92 (Pa. 1972). In the instance of abortions, the state is responding to a mature minor's invocation of her own constitutional privacy rights. Even then, she must meet certain requirements, including inability to talk to her parents, in order to avoid involving at least one of her parents.

350. This of course is the holding in *Prince*, notwithstanding that it is frequently cited for its dicta that the care of children rests with their parents and guardians. See Ross, *supra* note 223, at 1586.

351. See *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (Brennan, J.) (pointing out that the statute was saved in part because parents who choose to do so can purchase these same materials for their minor children); see also discussion *infra* at Part VII.

352. *Ambach v. Norwick*, 441 U.S. 68, 76 (1979).

353. *Id.* at 77.

354. The discretion of public schools is not unlimited. See *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987); *Board of Educ. v. Pico*, 457 U.S. 853, 861 (1982); *Epperson v. Arkansas*, 393 U.S. 97, 105 (1968).

quired and perhaps elective materials, and select texts that cover the curricular areas.³⁵⁵ The curriculum cannot accommodate every idea afloat in the marketplace of ideas, or even every possible topic. In the unique setting of schools, such choices normally are not held to violate constitutional norms because where the government is speaker, it must make choices by drawing selectively from the marketplace of ideas.³⁵⁶ Courts give school officials great leeway in making such choices.³⁵⁷ Even though parents have some degree of choice about what kind of school their children attend—public or private, religious or secular, licensed or home-based—state governments set minimum standards and curricular requirements that educational institutions must meet in order to satisfy compulsory education laws.³⁵⁸ When children attend public schools, the discretion that courts accord to local officials is vast.³⁵⁹

Although it is possible to argue that the principles of free inquiry should prevail in schools outside of core curricular choices,³⁶⁰ courts have held that schools have “a significant measure of authority”

355. See *Pico*, 457 U.S. at 863-64; 2 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 17:1 (2d ed. 1996); William Buss, *School Newspapers, Public Forum and the First Amendment*, 74 IOWA L. REV. 505, 506 (1989).

356. See *Pico*, 457 U.S. at 863-64; *Epperson*, 393 U.S. at 104 (noting that federal courts should not “ordinarily interfere in the resolution of conflicts which arise in the daily operation of school systems”); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943) (“Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public education officials shall compel youth to unite in embracing.”).

357. See *Board of Educ. v. Mergens*, 496 U.S. 226, 241 (1990) (O’Connor, J.) (“[S]chools and school districts maintain their traditional latitude to determine appropriate subjects of instruction.”).

358. See *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) (“No question is raised concerning the power of the State to reasonably regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school . . . that certain studies plainly essential to good citizenship be taught, and that nothing be taught which is manifestly inimical to the public welfare.”); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) (“[T]he power of the State to compel attendance at some schools and to make reasonable regulations for all schools . . . is not questioned.”); see also *Barnette*, 319 U.S. at 657 (Frankfurter, J., dissenting) (observing that because parents have the right to choose what schools their children attend they cannot always request special accommodation at public schools); Barbara Kentowitz & Pat Wingert, *Learning at Home: Does It Pass the Test?*, NEWSWEEK, Oct. 5, 1998, at 64-66 (estimating 1.5 million children are currently being taught primarily by a parent); Lupu, *supra* note 241, 1357-58 (arguing against the constitutional legitimacy of the premises supporting home schooling).

359. In theory, the government could expand this role by extending the length of time children spend in school. At some point between the school year as we now know it and compulsory year round boarding school, the state would come into conflict with parental autonomy rights.

360. See *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 511 (1969); *Pico*, 457 U.S. at 877 (Blackmun, J., concurring).

over many student activities.³⁶¹ A plurality of the Supreme Court has indicated that officials may even remove books from the school library based on their subjective judgment of "educational suitability."³⁶²

Boards of education are not exempt, however, from the demands of the Bill of Rights. The discretion accorded public schools is bound by the underlying goal of promoting democracy and pluralism. As the Supreme Court emphasized in *Barnette*, the fact that schools are "educating the young for citizenship is [particular] reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."³⁶³

The vast discretion accorded the state during school hours gives it a large bite at the apple.³⁶⁴ The ability to inculcate values during the school day—in the curriculum, in the library, and in extra-curricular activities³⁶⁵—undermines the state's position that its discretion to limit speech available to minors should extend outside of school and even into the home. When the proponents of regulating speech to shield children seek to expand the state's discretion outside the educational context, they must overcome constitutional presumptions about both free expression and the zone of privacy that protects parental decisionmaking.

Even if courts were to conclude that the state could justify expanding its inculcative function beyond the schools, the precedents within schools themselves alert us to the risks that government decisionmaking will threaten the autonomy of some portion of families. All over the country, school choices about material have provided a continuing source of controversy and litigation. School officials have proven vulnerable to political mobilization by small groups of activist parents. Parents with varying strongly-held beliefs relentlessly challenge the inclusion of books in the curriculum, in optional assignments, and in the library.³⁶⁶ They have challenged the exclusion of

361. *Mergens*, 496 U.S. at 240 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) and *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986)).

362. *Pico*, 457 U.S. at 871.

363. *Barnette*, 319 U.S. at 637.

364. See Doni Gewirtzman, Comment, "Make Your Own Kind of Music:" *Queer Student Groups and the First Amendment*, 86 CAL. L. REV. 1131, 1140 (1998) (noting that as the Supreme Court's image of the educational mission shifted from "producing independent thinkers to articulating cultural values" the discretion accorded to schools expanded).

365. See, e.g., *Kuhlmeier*, 484 U.S. 260; *Fraser*, 478 U.S. 675; *Pico*, 457 U.S. 853.

366. Parents challenged such works as "The Adventures of Huckleberry Finn," see *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1024 (9th Cir. 1998), "The Merchant of Venice," and "Oliver Twist," see *Rosenberg v. Board of Educ.*, 92 N.Y.S.2d 344, 345 (Sup. Ct. 1949). See

similar materials.³⁶⁷ Communities are divided over sex education requirements and the content of such programs, as well as over whether schools should provide access to condoms to protect the health and life of students.³⁶⁸ In some school districts, parents with strongly-held religious views have objected to the use of movies, secular music, and even computers in the classroom.³⁶⁹

Such controversies reiterate the divisions among family types, whether based on religion or other core values and beliefs. These differences render categorization of communications directed at children very difficult, even where the state has the greatest flexibility in making choices. Further, school systems have not demonstrated a reliable or uniform ability to withstand pressure from parents or other groups with a clear social or religious agenda.³⁷⁰ Cultural battles in local schools suggest that national efforts to label or to regulate communications in an effort to shield children will be rife with disagreements based on differing world views, creating genuine cause for concern that government regulation of controversial speech will incorporate viewpoint as well as content discrimination.³⁷¹

B. Identifying Harm

As *Turner* made clear, for the government to meet its burden to demonstrate a compelling interest in regulating speech, it must do more than allege that a harm exists. The state must present evidence that the harm is real, not merely conjectural, and show a nexus between the speech and the harm indicating that the regulation will alleviate the harm "in a direct and material way."³⁷² Proponents of regulation have not yet identified the required specific harm and

also *Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184, 195-96 (5th Cir. 1995) (challenging the history of voodoo).

367. See *DeNooyer v. Merinelli*, No. 92-2080, 1993 U.S. App. LEXIS 30084, at *3-*4 (6th Cir. Nov. 18, 1993); *C.H. v. Oliva*, 990 F. Supp. 341, 346-47 (D.N.J. 1997), *aff'd mem.*, 166 F.3d 1204 (3d Cir. 1998).

368. See *Ross*, *supra* note 230, at 259, 263-64.

369. See, e.g., *Stark v. Independent Sch. Dist. No. 640*, 123 F.3d 1068, 1070-71 (8th Cir. 1998) (objecting to use of computers); *Mozert v. Hawkins County Bd. of Educ.*, 827 F. 2d 1058, 1061-61 (6th Cir. 1987) (stories dealing with magic); *Davis v. Page*, 385 F. Supp 395, 397 (D.N.H. 1974) (audio-visual equipment violating religious beliefs).

370. See, e.g., *Pico*, 457 U.S. at 856-58 (removing objectionable books from high school curriculum). See generally *FOERSTEL*, *supra* note 31.

371. Cf. *Cornelius v. NAACP Legal Defense & Educ. Fund* 473 U.S. 788, 811 (1985) (holding that the desire to avoid controversy is a reasonable grounds for limiting access to a nonpublic forum).

372. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994); see *supra* note 160.

nexus in their efforts to defend any of the regulations on speech that purportedly places children at risk.

Although decided under a mere rational basis test, *Ginsberg* contains the Supreme Court's most detailed analysis of the government's independent interest in shielding children from speech.³⁷³ Justice Brennan, writing for a majority of five, agreed that the risks of pornography reaching children required an insurance policy against parental inadequacy:

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 regulate the sale of pornography to children special standards, broader than those [regulating sales to adults].³⁷⁴

But pornography is not protected speech, and was never alleged to be at stake in the controversial speech regulated by the legislation overturned in *ACLU I*, *Denver Area*, or *Sable*.

In order to establish the harm necessary to support a judicial finding of a compelling interest, proponents of regulating speech first must show that the speech they wish to abridge actually reaches children in significant numbers, and then must demonstrate the harm to the children whom the speech reaches. Both of these inquiries bear directly on whether the harm is real or merely conjectural.

The Supreme Court has repeatedly chastised the proponents of regulation for failing to demonstrate that the targeted speech even reaches children with any frequency—let alone harms them. In *ACLU I*, the Supreme Court relied on the government's concession below that children would rarely if ever stumble upon controversial material on the Internet by accident and, if they did, they would be warned to leave the site before viewing it.³⁷⁵ The few examples of controversial or obscene sites discovered by inadvertence turned out to be sites accessed because the government's expert already knew that the key words he was using would pull up material barred under the CDA,

373. *Ginsberg v. New York*, 390 U.S. 629, 640-43 (1968) (analyzing the state's "independent interest in the well-being of its youth" as separate from its interest in helping parents discharge their responsibilities); see *Roth v. United States*, 354 U.S. 476, 486-87 (1957); *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923); *Noble State Bank v. Haskell*, 219 U.S. 104, 110 (1911); *Bookcase, Inc. v. Broderick*, 18 N.Y.2d 71, 75 (1966); *People v. Kahan*, 15 N.Y.2d 311 (1965).

374. *Ginsberg*, 390 U.S. at 640 (quoting *Kahan*, 15 N.Y.2d at 312 (Fuld, J., concurring)) (striking down an earlier version of the statute at issue in *Ginsberg* as void for vagueness).

375. *Reno v. ACLU* ("ACLU I"), 521 U.S. 844, 869 (1997).

rather than sites that real children had found.³⁷⁶ The paucity of evidence offered may be explained in part by the informal reports that adult patrons almost never use Internet access in libraries to find “mildly pornographic” or explicit sites, and librarians informally monitor children who seek pornographic sites.³⁷⁷ Regulations on cable television suffer from the same constitutional infirmity. In *Denver Area*, the Supreme Court criticized the government for presenting only “anecdotal references to what seem isolated instances of potentially indecent programming,”³⁷⁸ “borderline examples as to which people may differ.”³⁷⁹ The government failed to show that controversial speech existed on PEGs, much less that it harmed children.

Lower courts have made similar findings. In regulating controversial speech on public radio, for example, the FCC ignored the fact that teenagers comprised only 0.2% of the audience for public radio, and further insisted that it had no obligation to take data on listening habits into account.³⁸⁰ An undercover officer in New York State who logged over 600 hours on the Internet failed to identify a single case that could not have been prosecuted under existing statutes criminalizing child pornography.³⁸¹

In addition to showing that controversial speech actually reaches children regularly through the targeted means of communication, those who wish to abridge speech to protect children must isolate the specific harm such speech causes to children who receive it. But this requirement has also received short shrift. When Congress passed the CDA, for example, it expressly rejected language that would have limited the Act’s reach to materials deemed “harmful to minors.”³⁸² The legislative history, sparse as it is, specifically indicates a Congressional intent to reach beyond the “harmful to minors” standard upheld for unprotected speech in *Ginsberg*.³⁸³ As Judge Dalzell ob-

376. See *ACLU v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1996), *aff’d*, 521 U.S. 844 (1997) (“*ACLU I*”).

377. See Daniel Le Duc, *At Libraries, Little Worry Over Sex Sites on the Web*, WASH. POST, July 15, 1999, at B1, B5.

378. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 763 (1996) (Breyer, J.).

379. *Id.* at 765.

380. See *Action for Children’s Television v. FCC* (“ACT III”), 58 F.3d 654, 667 (D.C. Cir. 1995) (en banc); see Brief of Petitioners at 9 & n.2, *Action for Children’s Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (en banc) (Nos. 93-1092, 93-1100).

381. See *American Libraries Ass’n v. Pataki*, 969 F. Supp. 160, 179 (S.D.N.Y. 1997) (Preska, J.) (overturning a New York state statute regulating speech on the Internet as violating the Commerce Clause).

382. H.R. CONF. REP. NO. 104-458, at 189 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 202.

383. *Id.*; see Robert Corn-Revere, *New Age Comstockery*, 4 COMM. L. CONSPECTUS 173, 174 (1996).

served in his separate opinion in *ACLU I*, the interest in protecting children "is as dangerous as it is compelling," because it has no limiting principle.³⁸⁴

Even where legislators try to stay within the rubric of the "harmful to minors" standard, the supporters of regulation have failed to show that exposure to controversial (as opposed to obscene or violent) speech in fact harms minors, as it is required to do under *Turner*.³⁸⁵ For example, Chief Judge Edwards of the District of Columbia Circuit, after several hearings on the regulation of indecent cable broadcast that was ultimately overturned by the Supreme Court in *Denver Area*, concluded that the "[g]overnment has not offered one shred of evidence that indecent programming harms children."³⁸⁶

The design and results of empirical studies about the effects of speech make it important to distinguish speech about sexuality from speech about violence. Although it is nearly impossible to find an iota of evidence that controversial speech about sex harms children,³⁸⁷ speech concerned with sexuality is the content most commonly subject to regulation on their behalf, in contrast to speech with violent content.³⁸⁸ For example, during one debate, five of the eight articles cited

384. *ACLU v. Reno*, 929 F. Supp. 824, 882 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997) ("ACLU I").

385. *See id.* at 881 (Dalzell, J., concurring) ("I am hard pressed . . . to identify the disease [the CDA intended to cure.]") (referring to *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (plurality) (stating that government must identify the disease to be cured by regulation of speech)).

In stark contrast, social science studies presented to courts in support of the argument that controversial speech harms minors, are expressly limited to "pornography," which is not at issue here. *See, e.g.*, Brief of Amicus Curiae of Enough is Enough et al. for *Reno* at 10-16, *Reno v. ACLU* ("ACLU I"), 521 U.S. 844 (1997) (No. 96-511) (arguing, by reference to studies of "pornography," i.e., obscenity, that exposure to sexually explicit speech harms minors by, among other things, negatively influencing their image of sexuality, creating chemically encoded harmful images on the brain, unnaturally accelerating development, causing sexual addiction and promoting negative attitudes toward women).

386. *Alliance for Community Media v. FCC*, 56 F.3d 105, 147 (D.C. Cir. 1995) (en banc) (Edwards, C. J., dissenting, in part). Similarly, in the companion case, *Action for Children's Television v. FCC*, 59 F.3d 1249, 1263 (D.C. Cir. 1995) (Edwards, J., concurring with reservations), *cert. denied*, 116 S. Ct. 773 (1996), argued the same day as *Alliance*, Judge Edwards concluded that the harms the government sought to address by limiting the hours during which indecent speech could be broadcast were "merely conjectural," since "[t]here is no showing of harm in this case."

387. *See* Joint Brief of Petitioners at 33-36, *Action for Children's Television v. FCC* ("ACT III"), 58 F.3d 654 (D.C. Cir. 1995) (en banc) (No. 93-1092). Even studies regarding the impact of pornographic speech on adults have been criticized. *See* Freedman, *supra* note 52, at 910-11 nn.127-130.

388. *See* *Playboy Entertainment Group, Inc. v. United States*, 30 F. Supp. 2d 702, 716 (D. Del. 1998), *prob. juris. noted*, 119 S. Ct. 2365 (1999) ("Playboy II"). A recent study of broadcast and cable television, movies, and music videos found that extensive violent content often received an industry rating as acceptable for teenagers. *See* S. Robert Lichter et al., *Merchandizing*

on the Senate floor in support of regulating indecent speech expressly examined the impact of material about violence or suicide rather than the indecency targeted by the legislation.³⁸⁹ The FCC, in turn, relied on the same evidence about violent speech in defending its abridgement of sexually explicit speech that it did not dispute was protected under the First Amendment.³⁹⁰

In contrast to the dearth of support for the notion that sexually explicit speech is harmful, substantial social science research conducted over several decades lends support to the allegation that violent speech may lead some children to violent attitudes or actions.³⁹¹ Even this research, however, is not uncontroverted.³⁹² One unresolved issue is that mere correlations do not equal a nexus, or indicate that

Mayhem: Violence in Popular Culture (visited Sept. 28, 1999) <<http://www.cmpa.com/archive/viol98.htm>>.

389. See 138 CONG. REC. S7309-10 (daily ed. June 2, 1992) (statement of Sen. Helms); Joint Brief of Petitioners at 35 & n.21, *ACT III*, 58 F.3d 654.

390. See Reply Brief of Petitioners at 5, *ACT III*, 58 F.3d 654 (en banc) (No. 93-1092) (arguing that the FCC's claim that "indecent" material harms children is "purely speculative" since it is based primarily on sources discussing "violent" material). Similarly, in *Eclipse*, the witnesses for the government admitted that they knew of no studies linking trading cards or reading material to violence. *Eclipse Enters., Inc. v. Gulotta*, 134 F.3d 63, 65-66 (2d Cir. 1997).

391. See, e.g., *Hearings on the Effects of Television Violence on Children*, *supra* note 257 (testimony of Leonard Eron, Professor of Psychology and Research Scientist, University of Michigan) (summarizing meta analyses); Aletha C. Huston et al., *Public Policy and Children's Television*, 44 AM. PSYCHOLOGIST 424, 430 (1989); Edwards & Berman, *supra* note 19, at 1537-41. (summarizing data); Dale Kunkel & John Murray, *Television, Children, and Social Policy: Issues and Resources for Child Advocates*, 20 J. OF CLINICAL CHILD PSYCHOL. 88, 92 (1991); Patricia M. Wald, *Doing Right By Our Kids: A Case Study in the Perils of Making Policy on Television Violence*, 23 U. BALT. L. REV. 397, 419-21 (1994).

392. See Peter Johnson, *The Irrelevant V-Chip: An Alternate Theory of TV and Violence*, 4 UCLA ENT. L. REV. 185, 187-92 (1997) (critiquing the "hypothesis" that watching violence on television causes violent behavior, and reviewing the data); see also Edwards & Berman, *supra* note 19, at 1565 (concluding that the context so critical to measuring causation cannot be captured in legislative definitions). See generally Guy Cumberhatch, *Legislating Mythology: Video Violence and Children*, 3 J. OF MENTAL HEALTH 485 (1994); Horst Stipp & J. Renald Milavsky, *U.S. Television Programming's Effect on Aggressive Behavior of Children and Adolescents*, 7 CURRENT PSYCHOL. 76 (1988) (the authors are employed by the National Broadcasting Company). It is not necessary to resolve the social science debate to consider the constitutional issues. See *Hearings on the Effects of Television Violence on Children*, *supra* note 257 (testimony of Rebert Corn-Revere).

One of the earliest studies demonstrated substantial common sense in concluding that "[f]or some children, under some conditions, some television is harmful. For other children, under the same conditions, or for the same children under other conditions, television may be beneficial. For most children, under most conditions, most television is probably neither harmful nor particularly beneficial." WILBUR SCHRAMM ET AL., *TELEVISION IN THE LIVES OF OUR CHILDREN* 1 (1961), quoted in Scott Stossel, *The Man Who Counts the Killings*, ATLANTIC MONTHLY, May 1997, at 86, 104. Contemporary studies reach substantially similar conclusions. See, e.g., Michael Furlong et al., *The Effects of Media Violence on Youth*, 19 CHILDREN'S LEGAL RTS. J. 33, 39 (1999) (reviewing the social science literature on the effect of depictions of violence on youth and concluding that the children who are most influenced by media violence are high risk children due to multiple factors, including personal exposure to aggression).

abridging speech will reduce harm.³⁹³ The Court of Appeals for the Second Circuit was persuaded by expert testimony that "TV violence studies do not provide strong evidence that TV violence causes criminal behavior or aggression."³⁹⁴ Another problem is that the results of social science research focused primarily on television and movies³⁹⁵ are frequently attributed to other forms of speech. The Second Circuit criticized the defense of a regulation on trading cards depicting violence based on inconclusive evidence about the very different medium of television, "a far more powerful medium."³⁹⁶

Although social scientists point to correlations between violence in the media and violent behavior, they have not found evidence that exposure to depictions of violence causes or even contributes to antisocial behavior.³⁹⁷ Social scientist James Q. Wilson, a political conservative, recently concluded that there is "virtually no evidence" that violence on television and in the movies "affects the serious crime rate," which has been falling even as entertainment has become "more gruesome."³⁹⁸ Other commentators, starting from the perspective that there is more evidence to justify regulation of media violence than other forms of controversial speech, have concluded that existing social science data do not provide "a basis upon which one may determine with adequate certainty which violent programs cause harmful behavior."³⁹⁹

Similar evidentiary weaknesses help to explain the fact that no court has ever found civil liability for violence based on the influence of controversial speech.⁴⁰⁰ Courts have refused to find causation in tort

393. See Edwards & Berman, *supra* note 19, at 1540; see also Sissela Bok, *1997 Survey of Books Relating to the Law: X. Legal Regulation and Reform: Censorship and Media Violence*, 95 MICH. L. REV. 2160, 2165 (1997).

394. *Eclipse*, 134 F.3d at 65 (Miner, J.) (cautioning that "environmental risk factors" including child abuse, drugs, alcohol, and gang membership must be considered).

395. See, e.g., KEVIN SAUNDERS, *VIOLENCE AS OBSCENITY: LIMITING THE MEDIA'S FIRST AMENDMENT PROTECTION* 29-44 (1996); Kevin Saunders, *Media Violence and the Obscenity Exception to the First Amendment*, 3 WM. & MARY BILL OF RTS. J. 107, 167-73 (1993).

396. *Id.*

397. See Bok, *supra* note 393, at 2162.

398. James Q. Wilson, *Beware the Many Easy Answers for Ending Violence in Schools*, STAR TRIB., Apr. 28, 1999, at 15A.

399. Edwards & Berman, *supra* note 19, at 1492.

400. See, e.g., *Waller v. Osbourne*, 763 F. Supp. 1144, 1152 (M.D. Ga. 1991), *aff'd* 958 F.2d 1084 (11th Cir.1992) (suicide attributed to rock music); *Matarazzo v. Aerosmith Prods., Inc.*, No. 86 Civ. 8815, slip op. at 2 (S.D.N.Y. Nov. 16, 1989); *Zamora v. CBS*, 480 F. Supp. 199, 204 (S.D. Fla. 1979) (television violence); *Delgado v. American Multi-Cinema*, 85 Cal. Rptr. 2d 838, 839 (1999) (shooting immediately after viewing a violent film); *McCullum v. CBS, Inc.*, 202 Cal. App. 3d 989, 1007 (Ct. App.1988) (suicide attributed to rock music); *Bill v. Superior Court*, 137 Cal. App. 3d 1002, 1014 (Cal. Ct. App. 1982); *Olivia N. v. NBC Corp.*, 126 Cal. App. 3d 488, 496 (1981) (alleged replication of violent act in television movie); *Walt Disney Television Prods. v. Shannon*,

actions even where the violent acts were committed contemporaneously with exposure to the speech.⁴⁰¹ This line of cases suggests that the link between speech that depicts violence and violent actions is not sufficient to satisfy the standard of causation under tort law. Presumably, the nexus would have to be even stronger to satisfy the government's burden of proof in establishing a compelling interest in suppressing protected speech.

For all of these reasons, the second compelling interest offered for regulating speech, the government's independent interest, fares no better than its first interest of reinforcing parental authority. In the future, if proponents of regulating speech to protect children succeeded in meeting their burden of proof on each element needed to show a compelling interest, the issue still would not be resolved. Then, and only then, would a court actually confront a close question about whether the regulation would survive constitutional scrutiny, requiring it to balance the weight of competing constitutional interests. At that point, the courts would have before them a question of balancing at the margin, that would permit comparing "the incremental promotion of the interest on which the government relies with the incremental threat to freedom of expression."⁴⁰² That balancing would include consideration of the mode and sweep of the regulation and other values such as parental autonomy.

VII. THE CRITIQUE OF THE GOVERNMENT'S INTEREST APPLIED TO GERMANE LOWER COURT OPINIONS

Notwithstanding the pervasive dicta to the effect that the government has a compelling interest in shielding children from controversial speech, only a handful of lower courts have squarely considered and ruled on the proposition.⁴⁰³ Those courts are divided as to

276 S.E.2d 580, 583 (Ga. 1981) (accidental self-inflicted wound mimicking Mickey Mouse Club); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067, 1071 (Mass. 1989) (fatal assault occurred after viewing violent film).

401. See *Waller*, 763 F. Supp. at 1151.

402. John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1485 n.10 (1975).

403. The most detailed discussion of compelling interest in the context of regulation of speech to protect minors is found in *Action for Children's Television v. FCC ("ACT III")*, 58 F.3d 654, 659-69 (D.C. Cir. 1995) (en banc). The majority held that the government had at least two compelling interests in regulating indecent radio broadcasts, but two dissenters who had served on the original panel hotly contested that conclusion. See *id.* at 670 (Edwards, C. J., dissenting); *id.* at 683 (Wald, J., dissenting); see also *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1091-94 (9th Cir. 1999) (absent studies linking computer-generated child pornography to the subsequent sexual abuse of actual children, there is no nexus establishing a compelling interest in regulating

whether the government's interest met the standard of "compelling," sufficient to justify narrowly tailored limitations on speech. A brief review of these decisions, in light of the previous discussion of the government interests generally asserted, clarifies how analyzing the compelling interest can improve the quality of judicial reasoning with respect to controversial speech and children.

A. Decisions Rejecting the Government's Asserted Interest in Protecting Minors from Speech

In *Video Software Dealers Association v. Webster* and *Eclipse Enterprises v. Gulotta*, the Courts of Appeals for the Eighth and Second Circuits overturned statutes designed to protect children from violent material on videocassettes, and in trading cards depicting crimes.⁴⁰⁴ Both courts agreed on several baseline points. Depictions of violence, they held, fall within the umbrella of the Speech Clause, so efforts to regulate violent speech are subject to strict scrutiny, requiring that the regulation serve a compelling government interest.⁴⁰⁵ In each case, the state relied on its general power to protect children,⁴⁰⁶ but both courts demanded that the government demonstrate a more

all computer-generated child pornography); *Eclipse Enters., Inc. v. Gulotta*, 134 F.3d 63, 67 (2d Cir. 1997); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 688 (8th Cir. 1992); *Cyberspace Communications v. Engler*, 55 F. Supp. 2d 737 (E.D. Mich. 1999) (overturning a state regulation of Internet speech as overbroad and as a violation of the Commerce Clause after finding that the act did not further the state's compelling interest and questions, *sua sponte*, in obiter dictum, whether the regulation interferes parental liberty interest in child rearing); *Playboy Entertainment Group, Inc v. United States ("Playboy II")*, 30 F. Supp. 2d 702, 720 (D. Del. 1998) (enjoining enforcement of the statute), *prob. juris. noted*, 119 S. Ct. 2365 (1999); *Playboy Entertainment Group, Inc v. United States ("Playboy I")*, 945 F. Supp. 772, 785 (D. Del. 1996), *aff'd mem.*, 520 U.S. 1141 (1997) (denying preliminary injunction and removing temporary restraining order preventing enforcement of Section 505 of the Telecommunications Act of 1996, 47 U.S.C. § 561, which required scrambling of sexually explicit video programming); *AIDS Action Comm., Inc. v. Massachusetts Bay Transp. Auth.*, 849 F. Supp. 79, 84 (D. Mass. 1993); *Bering v. SHARE*, 721 P.2d 918, 937 (Wash. 1986) (upholding constitutionality of a statute restricting verbal statements of anti-abortion picketers in the presence of young children).

404. *Eclipse*, 134 F.3d at 68 (Miner, J.) (overturning county ordinance barring dissemination of trading cards depicting "indecent crime material . . . harmful to minors"); *Video Software Dealers*, 968 F.2d at 691 (Fagg, J.) (barring enforcement of a statute that restricts sale or rental of videos depicting violence to persons under age seventeen); *see* Salgado, *supra* note 21, at 520-22 (discussing the widespread efforts to restrict dissemination of violent videos to minors).

405. *See Eclipse*, 134 F.3d at 66 (finding that violence, unlike obscenity, is protected speech); *Video Software Dealers*, 968 F.2d at 688 (rejecting the state's argument that violent videos are "obscene" for children and thus the statute need only have a rational basis); *see also* *Winters v. New York*, 333 U.S. 507, 508 (1948) (finding that the First Amendment protects speech about "deeds of bloodshed, lust or crime"); *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985) (holding that violence is protected speech).

406. In *Eclipse*, the plaintiffs did not contest the state's compelling interest. *Eclipse*, 134 F.3d at 66 n.1.

precise compelling interest tied to a direct harm to children, and held that the government had failed to do so.

In *Video Software*, the Court of Appeals for the Eighth Circuit held that the state's failure to articulate whether it was concerned with "all kinds of violence" or only with "slasher" movies was fatal to its efforts to restrict access to films.⁴⁰⁷ The court rejected out-of-hand the state's assertion that its "power to protect children" allowed it to suppress speech "that is neither obscene as to youths not subject to some other legitimate proscription . . . solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."⁴⁰⁸ The court made clear that the state must identify the precise nature of the harm it is trying to prevent in order for the court to assess whether or not the statute is narrowly drawn.⁴⁰⁹

The Court of Appeals for the Second Circuit went a step further in *Eclipse*, holding that the government had failed to "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms."⁴¹⁰ The government had failed to offer anything more than surmise and conclusory statements to show that crime trading cards either harm minors or cause juvenile delinquency.⁴¹¹ The court expressly held that the statute barring dissemination of crime trading cards was not "necessary" to protect young people.⁴¹²

In *AIDS Action Committee of Massachusetts v. Massachusetts Bay Transportation Authority* the District Court for the District of Massachusetts sent a message to proponents of regulation: where the government fails to demonstrate a compelling interest, it should expect the court to overturn the regulation without discussing narrow

407. *Video Software Dealers*, 968 F.2d at 688-89 (observing that the statute as drawn reaches cartoons, westerns and war dramas, boxing matches, and psychological violence in suspense series).

408. *Id.* at 689 (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975)).

409. *See id.* at 688 ("Because the Missouri legislature failed to articulate the type of violence it deems harmful to minors, the district court found it 'virtually impossible to determine if the statute is narrowly drawn to regulate only that expression.'"), *aff'g and quoting* *Video Software Dealers Ass'n v. Webster*, 773 F. Supp. 1275, 1277, 1279-80 (W.D. Mo. 1991). Judge Bartlett, for the district court, had relied on *Sable, Ginsberg*, and obiter dictum in *Prince* for the general proposition that the state has a compelling interest in the well-being of minors. *Sable Communications, Inc. v. FCC*, 494 U.S. 115, 125 (1989); *Ginsberg v. New York*, 390 U.S. 629, 640 (1968); *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944).

410. *Eclipse*, 134 F.3d at 66 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994)).

411. *See id.* at 67 (rejecting the use of contested studies showing harm done by exposure to television violence, especially since experts testified that even if the television research conclusively linked violent material to violent behavior, television is a "more vibrant medium than trading cards" and the television research cannot be analogized to the impact of trading cards).

412. *See id.* (holding that the law was not narrowly tailored to its stated purpose).

tailoring.⁴¹³ Judge Zobel rejected the agency's argument that the possibility of harm to children could outweigh the rights of speakers to post safe sex ads promoting condom use.⁴¹⁴ Moreover, the court found that the constitutional "interests of minors in receiving information trump the government's interest in insulating them from that same information."⁴¹⁵ *AIDS Action* provides a model of how courts should cut their inquiry short once the government fails to demonstrate a compelling interest.⁴¹⁶

B. Lower Court Cases Finding a Compelling Interest in Protecting Children from Controversial Speech

The three cases in which lower courts expressly sustained the compelling interest offered by the government do not resolve the broader question of the nature of the state's interest in regulating controversial speech that may reach children, because each decision is tied to the factual context of the case in accordance with the principle that Speech Clause analysis must be conducted on a case-by-case

413. *AIDS Action Comm., Inc. v. Massachusetts Bay Transp. Auth.*, 849 F. Supp. 79, 84 (D. Mass. 1993) (Zobel, J.) (overturning an administrative ban on public service ads for the mass transit system on condoms and safe sex). The Court of Appeals for the First Circuit affirmed on other grounds, but did not address the issue of whether the state had demonstrated a compelling interest. See *AIDS Action Comm., Inc. v. Massachusetts Bay Transp. Auth.*, 42 F.3d 1, 6 (1st Cir. 1994). The Court of Appeals found that the agency's "incoherent" policy resulted in an "unrebutted appearance of viewpoint discrimination," especially since the agency had accepted and posted what the court considered an equally offensive paid advertisement for the film "Fatal Instinct." *Id.* at 10-11.

414. See *AIDS Action*, 849 F. Supp. at 84 (citing cases that do not involve a state claim that inhibitions on controversial speech were intended to protect children, such as *Community for Creative Non-Violence v. Turncr*, 893 F.2d 1387, 1396 (D.C. Cir. 1990) (invalidating permit requirement for engaging in free speech activities), *Planned Parenthood Ass'n v. Chicago Transit Authority*, 767 F.2d 1225, 1232-33 (7th Cir. 1985) (holding that the transit authority may not bar family planning advertisements from public property that has become a public forum), and *Coalition for Abortion Rights and Against Sterilization Abuse v. Niagara Frontier Transportation Authority*, 584 F. Supp. 985, 989 (W.D.N.Y. 1984) (overturning administrative ban on Planned Parenthood advertisements based on their "controversial content").

415. *AIDS Action*, 849 F. Supp. at 84 (citing *Action for Children's Television v. FCC*, 11 F.3d 170, 178-180 (D.C. Cir. 1993), and quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975)).

416. Other jurists have used this approach in speech cases that did not involve children. See, e.g., *Kirkeby v. Furness*, 92 F.3d 655, 658 (8th Cir. 1996) (citing *Carey v. Brown*, 447 U.S. 455, 465 (1980) (overturning an ordinance barring picketing in front of residences "for the purpose of persuading the public . . . to protest some action, attitude or belief" because while the interest in protecting tranquility may be "substantial," it has never been held to be "compelling"); *id.* at 662 (Gibson, J., dissenting) (observing that the restriction on speech is content-based and not justified by a compelling state interest, and therefore concluding that the court should not indulge in further analysis of the ordinance which can only amount to obiter dictum in light of the holding).

basis.⁴¹⁷ Taken together, these three cases suggest that where a court concludes that the government has met its burden to establish a concrete and clearly articulated compelling interest, then the court is able to consider with greater precision whether the regulation is narrowly tailored to achieve that interest.

In *Bering v. SHARE*, the Supreme Court of the State of Washington, sitting en banc, expressly found that the state had a compelling interest in regulating speech to protect children through an injunction limiting speech by anti-abortion picketers. The lower court had enjoined picketers' oral use of the words "murder," "kill," and "their derivatives" during their demonstration and barred them from marching in front of the single entrance to the Medical Building which housed a number of doctors' offices, including the office where abortions were performed.⁴¹⁸ The court focused initially on the question of "whether the State has a compelling interest in protecting . . . children by limiting the oral expression of the proscribed words at the picket site."⁴¹⁹ After a hearing, the lower court had found that the anti-abortion picketers interfered with parents who were bringing their children to see a pediatric allergist in the Medical Building. Specifically, the picketers referred to the doctors collectively as "killers or murderers in the presence of young children."⁴²⁰ Experts testified that this verbal assault disturbed the children and undermined their trust in their doctors.⁴²¹

In light of these facts, the Supreme Court of the State of Washington found that the state had established a compelling interest in preventing such speech in the presence of children.⁴²² First, the court emphasized that the injunction served the rights of parents by helping them to protect their children from verbal assault and allowing them to "explain the concept of abortion to their children personally, and only when they believe the children are able to understand it."⁴²³ Second, the court found that the government's "independent interest in the well-being of its youth"⁴²⁴ was compelling where the

417. See *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 781 (1996) (Kennedy, J., concurring in part, dissenting in part) (discussing "the essence of the case-by-case approach to ensuring protection of speech under the First Amendment, even in novel settings"); see also *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 503 (1984) (holding that the concept of manner of speech must be evaluated on a case by case basis).

418. See *Bering v. SHARE*, 721 P.2d 918, 921 (Wash. 1986).

419. *Id.* at 933.

420. *Id.* at 923.

421. See *id.* at 933.

422. See *id.* at 923, 933-34.

423. *Id.* at 934.

424. *Id.* (quoting *Ginsberg v. New York*, 390 U.S. 629, 640 (1968)).

trial court expressly found that the specific language, when directed at young children, was abusive and interfered with the ability of doctors to treat young children effectively.⁴²⁵ The court concluded that the state had established "a compelling interest in avoiding subjection of children to the physical and psychological abuse inflicted by the picketers' speech."⁴²⁶

Even though the injunction was relatively narrow because it did not bar use of the same words on placards and was designed solely to protect children who were too young to read, the state Supreme Court held that the articulated interest did not support the terms of the injunction, which the court found would "water down speech to make it suitable for the sandbox."⁴²⁷ The court remanded the case for even more specific findings to pin down the precise scope of the government's compelling interest. It instructed the lower court to determine the ages at which the speech would be most harmful to children. The Supreme Court of the State of Washington further ordered that the injunction be narrowed to proscribe the offensive language only when children within that precisely defined age range are present, and also that the injunction be modified to provide guidance to picketers about how to assess the ages of children.⁴²⁸ *Bering* underscores the importance of both specificity and a nuanced concern for context in speech cases.⁴²⁹ It suggests that courts are better equipped to decide whether a regulation is narrowly tailored when they understand precisely what the regulation aims to accomplish. Where judicial analysis sustains the government's compelling interest, the rigor demanded by sound legal argument is more likely to lead to regulation that is carefully circumscribed to tread lightly on protected speech.

In *ACT v. FCC* ("*ACT III*"), the Court of Appeals for the District of Columbia Circuit sitting en banc held that the government has a compelling interest in "supporting parental supervision of what children see and hear," as well as a compelling governmental interest in the well-being of minors, each of which was deemed sufficient to jus-

425. *See id.* at 934-37 (discussing *FCC v. Pacifica Found.*, 438 U.S. 726, 756-58 (1978) (Powell, J., concurring)).

426. *Id.* at 935.

427. *Id.*

428. *See id.* at 936 (holding that the injunction was not drawn narrowly enough, because it applied whether or not children were present, regardless of whether the child was a teenager, and without guidelines to the picketers that would enable them to gauge the age of listeners, and thus the need to refrain from speech).

429. *Id.* at 935 n.7 (citing *Cohen v. California*, 403 U.S. 15, 19 (1971), for the proposition that context is the key to speech cases and supports distinguishing the printed from the spoken word); *see also* *Rosenfeld v. New Jersey*, 408 U.S. 901, 903 (1972) (Powell, J., dissenting).

tify a ban on indecent radio broadcasts with a brief "safe harbor."⁴³⁰ The en banc opinion resolved a lengthy struggle among the three branches of government about regulation of indecent speech on the radio. The court remanded the matter to the FCC with instructions to revise its regulations to provide a slightly longer safe harbor for the broadcast of indecent speech on radio.⁴³¹ The District of Columbia Circuit Court considered the FCC's regulations on controversial speech within the confines of the much-criticized *Pacifica* decision. The context of radio broadcasts gave the FCC a foot up in arguing that the Supreme Court had already found the interests compelling. Once the court deferred to that position, the only remaining question appeared to be whether the regulation was narrowly crafted—which the court held it was not. *ACT III* illustrates the importance of analyzing the interests asserted by the government, because in the context of those articulated interests, the court was able to conclude that the means did not appropriately serve the proclaimed ends.

Finally, in *Playboy Entertainment Group v. United States* ("*Playboy II*"), a case pending before the Supreme Court,⁴³² the United States District Court for the District of Delaware found a compelling interest in shielding children from "signal bleed," which occurs when portions of the video or audio from a subscription cable channel appear to non-subscribers despite the cable operator's efforts to limit the signals to subscribers. Congress addressed the problem of signal bleed in Section 505 of the Telecommunications Act of 1996, which is the subject of a facial challenge in *Playboy II*.⁴³³ Section 505 requires cable television operators to "scramble" subscription (premium) channels specializing in sexually explicit adult programming in order to "protect children from signal bleed," or to limit their broadcasts of explicit material to "safe harbor" hours in the middle of the night.⁴³⁴ Scrambling eliminates the possibility that non-subscribers could accidentally receive visual or audio signals which they do not seek.

430. *Action for Children's Television v. FCC* ("*ACT III*"), 58 F.3d 654, 661 (D.C. Cir. 1995) (en banc).

431. *See id.* at 658.

432. *Playboy Entertainment Group, Inc v. United States* ("*Playboy II*"), 30 F. Supp. 2d 702, 714 (D. Del. 1998), *prob. juris. noted*, 119 S. Ct. 2365 (1999).

433. *Id.* at 706.

434. *Playboy Entertainment Group, Inc. v. United States* ("*Playboy I*"), 945 F. Supp. 772, 774-77 (D. Del. 1996), *aff'd mem.*, 520 U.S. 1141 (1997) (removing a temporary restraining order and denying a preliminary injunction). The statute, 47 U.S.C. § 561, provided that if a cable operator proved unable to fully block the transmission of non-obscene sexually explicit materials, it must "time channel" such programming, limiting the transmission to "safe harbor" hours when children were deemed unlikely to be in the audience, which the FCC determined would be between 10:00 p.m. and 6:00 a.m. *See Playboy I*, 945 F. Supp. at 774.

A series of opinions by Judge Roth of the Court of Appeals for the Third Circuit expressly considered "whether [the statute] survives strict scrutiny by addressing a compelling interest."⁴³⁵ The court took *Denver Area* as its starting point, noting that content-based strict scrutiny applies to regulations on cable television, and that *Denver Area* had expressly defined the interest asserted before the Court as "the protection of children from exposure to patently offensive depictions of sex"—the "same problems" that led to enactment of Section 505. It then distinguished the statute overturned in *Denver Area* from Section 505 on two grounds. First, Judge Roth explained that the target of Section 505 was not the protected speech itself, but rather "signal bleed, a secondary effect of the transmission of that speech."⁴³⁶ Second, Judge Roth distinguished the speech at issue in Section 505 from most other efforts to regulate speech because the signal bleed intrudes into the homes of persons who have chosen not to subscribe and thus expect not to receive explicit programming.⁴³⁷ The court declined to grant a preliminary injunction. The Supreme Court affirmed the panel's decision in *Playboy I* by memorandum opinion.⁴³⁸

Plaintiff Playboy ultimately obtained an injunction enjoining enforcement of Section 505 following a trial at which Judge Roth presided.⁴³⁹ In granting the injunction, the court once more expressly considered the nature of the interest offered by proponents of Section 505. Because it had admonished the parties during the preliminary hearing not to return without briefing the nature and scope of the government's interest and providing "additional evidence demonstrating the effects of sexually explicit materials on children,"⁴⁴⁰ the court criticized the "paucity" of the government's evidence. In particular, Judge Roth regarded two important questions as unanswered by the government's presentation: "does viewing signal bleed of sexu-

435. *Id.*

436. *Id.* at 785. The secondary effects of speech may be subject to zoning that resembles time channeling. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-49 (1986). At the subsequent hearing, Judge Roth rejected the government's reliance on the secondary effects doctrine, because the regulations directed to scrambling were based on content. "[S]ignal bleed from the Disney Channel, for example, does not come within the purview of the statute." *Playboy II*, 30 F. Supp. 2d at 714 (enjoining enforcement of the statute).

437. See *Playboy I*, 945 F. Supp. at 785; see also *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (holding that in the privacy of one's own home, the individual's right to be left alone outweighs the First Amendment rights of the intruder).

438. See *Playboy Entertainment Group, Inc. v. United States*, 520 U.S. 1141 (1997) (mem.), *aff'g* 945 F. Supp. 2d 772 (D. Del. 1996).

439. See *Playboy II*, 30 F. Supp. 2d at 720. The court required Playboy to use its contractual negotiations with cable operators to ensure use of the least restrictive alternative by informing subscribers that lockboxes which can prevent signal bleed are available. See *id.* at 719-20.

440. See *Playboy I*, 945 F. Supp. at 786 n.25.

ally explicit programming constitute a harm to children?," and does signal bleed even constitute a pervasive problem?⁴⁴¹ Subsequently, at oral argument before the Supreme Court, the Justices noted more than once that the record failed to answer either of these questions.⁴⁴² Instead, at the evidentiary hearing, the government relied on studies of the effect of televised violence on children, which the lower court deemed inapposite to regulations on sexually explicit speech, and offered no evidence at all on the effects of "intermittent signal bleed" as opposed to "explicit pornography."⁴⁴³ Even though it acknowledged that the "mere articulation of a theoretical harm is not enough" to establish a compelling government interest under normal circumstances, the court concluded that the standard of proof was lower where protection of children was at issue.⁴⁴⁴

Applying its own new flexible standard that "[o]nly some minimal amount of evidence is required when sexually explicit programming and children are involved," the court reluctantly held that the government had established a sufficient risk of harm to constitute a compelling interest.⁴⁴⁵ Nonetheless, the court enjoined enforcement of Section 505 because the statute was not narrowly tailored to use the least restrictive means of regulating the controversial speech: a cable lockbox which would allow parents to block signal bleed from entering their homes, combined with a requirement that cable providers notify all subscribers that blocking devices are available without charge.

The district court in *Playboy II* correctly demanded that the government present evidence supporting its claim to a compelling interest, but the court failed to follow its analysis to the requisite conclusion. Even though the government failed to show that signal bleed actually reaches children with any regularity, or that intermittent signal bleed harms children when it reaches them, the court found that the cumulative merits of the government's purported interests sufficed under a relaxed standard, which it erroneously assumed should apply because children were involved. In this respect, the *Playboy II* court fell short of the more rigorous analysis performed by the courts in both *AIDS Action*, which found that the government

441. *Playboy II*, 30 F. Supp. 2d at 709. The government pointed to only a handful of isolated incidents over a sixteen-year period. *See id.*

442. Transcript of Oral Argument, 1999 WL 1134595, at *2, *4, *17 & *20, *Playboy Entertainment Group, Inc. v. United States*, No. 98-1682 (Nov. 30, 1999).

443. *Playboy II*, 30 F. Supp. 2d at 716.

444. *Id.* (noting the "paucity" of evidence of harm presented).

445. *Id.* at 716-17 (ruling that the government's interests in protecting children, reinforcing parental authority and the privacy of the home "in sum can be labelled 'compelling'").

failed to show a compelling interest,⁴⁴⁶ and *Bering v. SHARE*, which held that a very narrowly defined compelling interest existed, justifying an even narrower regulation on speech.⁴⁴⁷

C. *Pending Appellate Litigation: Playboy II and ACLU II*

Two important cases which would allow appellate courts to examine the nature of the government's purported interest in regulating controversial speech to protect children are currently undergoing review: *Playboy II* and *ACLU II*. The Supreme Court heard oral arguments in the government's appeal of the decision below in *Playboy II* on November 30, 1999; the case is pending as this Article goes to press.⁴⁴⁸ *Playboy II* offers an excellent opportunity for the Supreme Court to clarify that it is not sufficient for the government to invoke the needs of children in order to establish a compelling interest that will justify regulations on speech that is protected for adults.⁴⁴⁹

The Supreme Court might well use *Playboy II* to emphasize that the government faces the same burden of establishing a compelling interest where the speech of all members of the community is regulated with the express aim of protecting children as in any other case. The need for such analysis may be even more pressing when the government's purported purpose is to protect children because the cultural temptations to take that interest at face value are so strong. Even if the Supreme Court declines to raise the issue *sua sponte* in *Playboy II* and decides the case entirely on other grounds, the case illustrates how imperative it is not only to scrutinize the government's purported interest in shielding children from controversial speech, but to also insist that the government meet its constitutional burden to establish that interest.

An appeal is also pending before the Court of Appeals for the Third Circuit in *ACLU II*. Revisiting the problem of children and controversial speech on the Internet after the Supreme Court's 1997 decision in *ACLU I*, Congress enacted the Child Online Protection Act, 47 U.S.C. § 231 ("COPA"), which was to go into effect in November of

446. *AIDS Action Comm., Inc. v. Massachusetts Bay Transp. Auth.*, 849 F. Supp. 79 (D. Mass. 1993); *supra* notes 413-15 and accompanying text.

447. *Bering v. SHARE*, 721 P.2d 918 (Wash. 1986); *see supra* notes 418-29 and accompanying text.

448. Transcript of Oral Argument, 1999 WL 1134595, at *4-*5, *Playboy Entertainment Group, Inc. v. United States* ("Playboy II"), No. 98-1682 (Nov. 30, 1999).

449. Although the parties did not brief the issues surrounding the government's assertion of a compelling interest in regulating signal bleed, several of the Justices posed questions at oral argument relating to the nature of the government's interest. *See generally id.*

1998. COPA makes it a criminal offense for a person engaged in the business of communicating on the World Wide Web to knowingly post communications "harmful to minors."⁴⁵⁰ A federal district court preliminarily enjoined enforcement of COPA before it took effect.⁴⁵¹ The Court of Appeals for the Third Circuit heard oral argument in the matter on November 4, 1999, and the court has not yet issued its decision.

The district court in *ACLU II* did not examine the government's asserted interest, except to note that "the government clearly has an interest in the protection of minors, including shielding them from materials that are not obscene by adult standards."⁴⁵² Congressional findings make clear that COPA relies primarily on the government's alleged independent interest in deciding what speech minors should be able to receive. Congress expressly stated that "innovative ways to help parents . . . restrict material that is harmful to minors through parental control protections and self-regulation . . . have not provided a national solution to the problem of minors accessing harmful material on the World Wide Web."⁴⁵³ Parents, the government repeatedly asserts, cannot be trusted to protect their children in ways that meet congressional approval.⁴⁵⁴

At the time it passed the CDA, overturned in *ACLU I*, Congress did not examine which speech, if any, actually harms the young and expressly rejected the modifying phrase "harmful to minors" as too narrow.⁴⁵⁵ In COPA, Congress again made no effort to determine what sort of controversial computer speech, if any, in fact harms minors.⁴⁵⁶ Instead, COPA defines the material "harmful to minors" as including all communications that meet a statutory variable obscenity standard based on the *Miller* test, refined for minors on the assump-

450. 47 U.S.C. § 231(a) (West Supp. 1999).

451. *ACLU v. Reno* ("ACLU II"), 31 F. Supp. 2d 473, 498 (E.D. Pa. 1999) (Read, J.), *appeal docketed*, No. 99-1324 (3d Cir. Apr. 1999).

452. *Id.* at 495 (citing *Ginsberg v. New York*, 390 U.S. 629, 640 (1968)).

453. Child Online Protection Act, Pub. L. No. 105-277, § 1402, 112 Stat. 2681, 2681-736 (1998).

454. See Reply Brief for the Appellants, 1999 WL 1021220, at *10-*11, *Playboy Entertainment Group, Inc. v. United States* ("Playboy II"), No. 98-1682 (filed Nov. 3, 1999) (stating that when parents fail to request blocking devices "out of distraction, inertia, or indifference," scrambling or safe harbor hours "would be the only means to protect society's independent interest," which is "independent of the actions of particular parents"). But the Supreme Court already rejected the substitution of congressional values for parental choices in *Denver Area Educ. Telecom. Consortium, Inc. v. FCC*, 518 U.S. 727, 758-59 (1996) (noting that the existence of "inattentive parents" means that nothing short of a total ban can protect the "determined child").

455. H.R. CONF. REP. No. 104-458, at 189 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 202; see *Corn-Revere*, *supra* note 383, at 174.

456. See *ACLU v. Reno* ("ACLU II"), 31 F. Supp. 2d 473, 489 (E.D. Pa. 1999).

tion that such material is harmful rather than merely distasteful when it reaches minors.⁴⁵⁷ The approach closely mirrors the state statute upheld by the Supreme Court in *Ginsberg*.⁴⁵⁸ But *Ginsberg* indicates that material does not meet the definition of variable obscenity under the statute unless the communications "taken as a whole, lack[] serious literary, artistic, political, or scientific value for minors."⁴⁵⁹ COPA's own language, however, betrays a facial effort to limit its scope to material that fits the *Ginsberg* model. Despite its initial reliance on a definition of material "harmful to minors" that mirrors the test for obscenity, COPA bars commercial Internet communications that "include[] any material" harmful to minors. The phrase "any material" suggests that analysis of the value of the speech would not be confined to the communication "taken as a whole."⁴⁶⁰ Moreover, COPA is both over- and under-inclusive because it would reach some arguably indecent sexual speech which has not been shown to lead to concrete harms, but would fail to reach depictions of violence unless they also fall into the category of variable obscenity, even though the evidence is stronger that depictions of violence harm children more than sexually explicit speech harms children.

In addition, the statute appears to reach a much broader array of sexually explicit speech than the speech which meets a definition of variable obscenity for minors. In granting a preliminary injunction, the district court ruled that COPA could threaten valuable content including "resources on obstetrics, gynecology and sexual health; visual art and poetry . . . information about [non-obscene] books and photographic images offered for sale; and online magazines," even news magazines.⁴⁶¹

COPA provides an affirmative defense to speakers who restrict access to their web sites by requiring proof of age through means such as credit cards or identification numbers. The imposition of adult identification requirements as a mode of regulating speech at first

457. 47 U.S.C. § 231 (e)(2)(B) (West Supp. 1999).

458. On the legislative history of COPA, see Marc Rohr, *Can Congress Regulate "Indecent" Speech on the Internet?*, 23 NOVA L. REV. 709, 731-38 (1999) (arguing that COPA is distinguishable from the statute at issue in *Ginsberg*).

459. 47 U.S.C. § 231 (6)(C).

460. 47 U.S.C. § 231 (a)(1), (e)(6) (using the phrase "includes any material" two times); see also *ACLU v. Johnson*, 194 F.3d 1149, 1152 (10th Cir. 1999) (overturning a New Mexico statute that criminalizes dissemination of "material that is harmful to a minor" defined as containing "in whole or in part . . . nudity, sexual intercourse or any other sexual conduct"); *Cyberspace Communications v. Engler*, 55 F. Supp. 2d 737, 740 (E.D. Mich. 1999) (overturning a Michigan statute that redefines obscenity as "sexually explicit . . . material harmful to minors" knowingly disseminated to them).

461. *ACLU II*, 31 F. Supp. 2d at 483-84, 495.

glance seems constitutionally palatable⁴⁶² compared to bans or channeling, at least to the extent that it resembles proof of age to purchase liquor or tobacco. But it is not legal for minors to purchase or consume alcohol or tobacco and consumption of such products does not enjoy constitutional protection. Controversial speech, in contrast, is constitutionally protected.

Equally important from a doctrinal vantage point, as the district court found in *ACLU II*, a risk exists that adult identification will be transformed into a requirement that consenting adults affirmatively request controversial speech and identify themselves before entering Internet sites.⁴⁶³ While adults may choose to identify themselves by using credit cards in bookstores, or by checking out library books, they can preserve anonymity in acquiring many forms of speech by paying cash or browsing. Forcing adults either to identify themselves to request speech or to forgo the speech altogether violates the holding of the Supreme Court in *Lamont v. Postmaster General* that imposing an affirmative obligation on a person who wishes to receive unpopular speech violates the First Amendment.⁴⁶⁴

Adult identification regimes that allow parents to obtain controversial material for minors or encompass the possibility of verifiable parental consent for those under the age of majority may be conducive to accommodating the range of family types from the idealized normative to the nonconformist, depending on whether the nature of the medium makes such identification schemes feasible. Newsstands, bookstores, libraries, movie theaters, video rental stores and even dial-a-porn businesses can establish effective adult identification at a reasonable cost. For Internet communications, however, the Supreme Court found in *ACLU I* that no reliable technology currently exists "to determine the age of a user who is accessing material through e-mail, mail exploders, newsgroups or chat rooms."⁴⁶⁵ The government did not contest this finding in *ACLU II*.⁴⁶⁶ To the extent that age verification is currently technologically feasible on the Internet, courts have found

462. See *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 533 (Tenn. 1993) (upholding a ban on selling material "harmful to children" in display or coin-operated stands).

463. *ACLU II*, 31 F. Supp. 2d at 473, 495 ("[A]ny barrier that Web site operators and content providers construct to bar access to even some of the content on their sites will be a barrier that adults must cross as well."); see also *Fabulous Assocs., Inc. v. Pennsylvania Pub. Util. Comm'n*, 896 F.2d 780, 785 (3d Cir. 1990).

464. *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965) (requiring addresses to affirmatively request delivery of "communist political propaganda" from abroad violates First Amendment rights).

465. *Reno v. ACLU* ("*ACLU I*"), 521 U.S. 844, 875 (1997) (reporting the findings of the district court); see *ACLU v. Reno*, 929 F. Supp. 824, 845 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).

466. *ACLU II*, 31 F. Supp. 2d at 487-88.

that verification would be "prohibitively expensive" for many speakers with inherently valuable messages.⁴⁶⁷ Because it is not currently feasible to segregate material that is obscene for minors from material that is protected and valuable for minors on websites (as opposed to magazine stands and video stores), *Ginsberg* is inapposite to computer communications.⁴⁶⁸ Limitations designed to protect children from Internet speech will chill speakers and inhibit the speech available to adults.⁴⁶⁹

It may not be sufficient, however, to distinguish *Ginsberg* in the Internet context, or to limit its applicability based on its use of the rational basis standard. COPA confronts us with the underlying flaws in the *Ginsberg* analysis. COPA, like *Ginsberg* and the entire concept of variable obscenity, fails to draw comprehensible lines for speakers and those who distribute speech. By failing to define the specific types of speech that harm children and to articulate the nexus between that speech and the harm, regulators may unleash a regime of unbridled censorship.⁴⁷⁰ The statutory definition of variable obscenity brings us no closer to understanding how to delineate the speech that is protected from being labeled "obscene for minors" because it is valuable for children. COPA would likely prevent children from receiving valuable speech to which their parents may wish them to have free access by limiting the availability of speech with artistic, literary, and educational value.⁴⁷¹ COPA's definition of variable obscenity makes no provision for differentiating speech that has social value for three-year-olds from speech that has value for mature adolescents. But assessment of value will vary depending on the individual youngster's maturity and ability to use information thoughtfully, which parents can interpret in each instance, but the government cannot.

467. See *ACLU I*, 521 U.S. at 877 (1997); *Reno v. ACLU*, 929 F. Supp. at 845-48; see also *ACLU v. Johnson*, 194 F.3d 1149, 1158 (10th Cir. 1999).

468. See *Johnson*, 194 F.3d at 1158 (disagreeing with the government's assertion that its effort to regulate Internet speech reaching minors is "cyber-*Ginsberg*: nothing more, nothing less").

469. Even if it were to become technologically feasible to install affordable age-sensitive screening devices on computers, COPA would not further the government's purported interest in a way that would significantly ameliorate the purported harm. Minors would still be able to receive the controversial material from outside the United States and from speakers who have no commercial intent.

470. See *Ginsberg v. New York*, 390 U.S. 629, 674 (1968) (Fortas, J., dissenting).

471. See *Cyberspace Communications v. Engler*, 55 F. Supp. 2d 737, 749 (E.D. Mich. 1999) ("Discussions would be stifled to the point that a teenager seeking answers to curious questions concerning a subject foremost on their mind, could not find answers via this medium [creating a risk of] greater numbers of teenage pregnancy or sexually transmitted diseases [which would be] contrary to the interests of the State.").

The notion of variable obscenity leaves the question of what speech is harmful unresolved despite the congressional effort to create a definitional tautology that equates variable obscenity with harm to minors. Variable obscenity, directed at speech which would be merely "indecent" for adults, raises all of the issues of subjectivity which plague efforts to define indecent speech directed at adults.⁴⁷² Nor does the construct of variable obscenity answer the threshold question of whether the state is entitled to make value judgments about speech on behalf of the young, or whether such decisions are reserved for parents.

VIII. CONCLUSION

At times, the struggle over controversial speech appears to be a war between "two ancient enemies: Anything Goes and Enough Already," as one federal judge observed in holding a rap recording obscene.⁴⁷³ When sensitive matters of freedom of speech collide with images of children's vulnerability, and are framed in terms of the battle between good and evil, even well intentioned people can lose sight of fundamental constitutional principles. In the process, the requirement that courts apply each element of strict scrutiny to regulations on speech has all but evaporated.

Faced with the justification of shielding children, courts have repeatedly failed to apply the standard enunciated in *Turner*, which requires the government to demonstrate a compelling interest in regulating protected speech. In all of the major cases decided by the Supreme Court, the state has failed to meet its burden with respect to the three elements of a compelling interest: the state has failed to articulate the precise harm it seeks to address; the state has failed to establish a nexus between the regulated speech and the specific harm; and the state has failed to do more than speculate that the restriction of speech will alleviate the articulated harm.

Neither of the interests most commonly alleged by the government to support regulations of controversial speech stands up to strict scrutiny. As Part V makes clear, the government's professed interest in reinforcing parental authority often clashes with principles of family autonomy and cultural pluralism that are central to the Constitu-

472. See *Pope v. Illinois*, 481 U.S. 497, 505 (Scalia, J., concurring); see discussion *supra* notes 140-45 and accompanying text.

473. See *Skywalker Records, Inc. v. Navarro*, 739 F. Supp. 578, 582 (S.D. Fla. 1990) (Gonzalez, J.), *rev'd sub nom.*, *Luke Records, Inc. v. Navarro*, 960 F.2d 134, 138 (11th Cir. 1992).

tion. The state's evaluation of speech undercuts the authority of parents who do not share normative cultural values. In order to empower parents in a constitutionally permissible manner, government regulation on speech would have to support equally the choices made by the idealized normative family, the imperfect normative family and by all manifestations of the nonconformist family. Instead, by replacing parental judgment with its own, the state threatens a new level of intrusion into the family.

The second compelling interest offered by the government—an independent interest in protecting children regardless of their parents' preferences—also threatens state interference in the family. The government's claim of an independent interest often reflects concerns about social anxieties and personal morality rather than any demonstrable harm precisely linked to the speech. The realm of cultural morality is best left to informal gatekeepers of social norms and may not be appropriate for legal remedies within the framework of the Constitution.⁴⁷⁴

Moreover, even if either of the two interests that the government offers as compelling were to withstand scrutiny, they appear to be mutually exclusive. The state cannot simultaneously claim to reinforce the authority of all parents and proclaim its own independent interest in sheltering children from speech that their parents allow them to receive. Under the Speech Clause, only parental authority and discipline stand between minors and protected speech absent clear evidence that the speech causes a specific harm.

The flaws in the government's reasoning suggest that regulations of speech to protect children will more often than not fail to meet the stringent requirements of the Speech Clause. In most instances, the burden on the government to establish a compelling interest will probably prove insurmountable when formulated in broad terms.⁴⁷⁵ Regulations on controversial speech imposed under the guise of protecting children face additional constitutional hurdles even if the government were to satisfy all three elements of the *Turner* test. After satisfying the requirements of *Turner*, the government would still have to convince a court that the regulation should survive balancing

474. See Henkin, *supra* note 191, at 407.

475. The question of what data would prove sufficient to support the government's burden is best reserved for a specific case or controversy, but the facts that the government offers should be more than speculative assumptions. See generally William E. Lee, *Manipulating Legislative Facts: The Supreme Court and the First Amendment*, 72 TUL. L. REV. 1261 (1998) (arguing that in cases involving protected expression, the Supreme Court too often allows legislatures to operate based on unproven assumptions, and that legislative facts have had little bearing on cases subjected to strict scrutiny).

of competing interests at the margin and met requirements such as narrow tailoring.

It is not necessarily impossible for the state to satisfy the strictures of *Turner* in regulating carefully defined controversial speech tied to a specific harm to children. In some circumstances, the state may be able to establish a compelling interest in protecting children that comports with the requirements of both the Speech Clause and the doctrine of family autonomy. To do so, legislatures and administrative agencies would need to demonstrate that the speech actually harms children, that the private market or other means are unable to provide remedies for parents who seek them, and that the regulation would actually facilitate the choices made by parents, including all of the diverse views of nonconformist parents. Any effort to craft regulations that satisfy those conditions will call for a great deal more precision than has generally been exercised in this sensitive area. As analysis of narrow bans on anti-abortion demonstrators in *Bering v. SHARE* made clear, the more precisely the state defines the purported harm, and the narrower the state's purported interests, the more likely it becomes that the state will be able to demonstrate a harm that can be ameliorated by a narrowly crafted regulation.

Serious attention to the doctrinal framework developed in this Article would help all three branches of government to keep the mandates of the Speech Clause clearly before them when dealing with the emotionally charged issues raised by children and controversial speech. To articulate the state's compelling interest in a manner that will withstand constitutional scrutiny, legislators, regulators, and judges must use a fine brush rather than a paint roller when they try to shield children. To the extent that government actors fail to demonstrate the requisite sensitivity when regulating speech to protect children, plaintiffs who seek to overturn restrictions on speech may wish to reconsider the traditional reluctance to challenge the government's alleged interest.

The state has frequently disregarded a range of constitutional principles in the quest to safeguard children.⁴⁷⁶ Widespread tolerance for intrusions on the rights of minors, and of adults in the name of protecting minors, is predicated on the misconception that the resulting compromises are small and that the rights at stake are relatively insignificant. That complacency is unwarranted. The compromises to free speech and family autonomy are great, and the rights affected lie at the heart of constitutional liberties. The Supreme Court warned

476. See, e.g., *In re Gault*, 387 U.S. 1, 16-19 (1967).

against such encroachment over one hundred years ago: "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure."⁴⁷⁷

477. *Boyd v. United States*, 116 U.S. 616, 635 (1886).