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## WHAT IF I WANT MY KIDS TO WATCH PORNOGRAPHY?: PROTECTING CHILDREN FROM “INDECENT” SPEECH

Ashutosh Bhagwat\*

*Under current First Amendment doctrine, a law directed at indecent speech is treated as “content-based” regulation of speech, and thus must satisfy the “strict scrutiny” test to survive constitutional challenge—the regulation must be narrowly tailored to advance a compelling state interest. A number of laws regulating indecent speech have been passed in recent years, and when challenged, the government has defended these regulations on the ground that the State has a compelling interest in the protection of children from harmful materials. Underlying this argument, however, is a deep ambiguity regarding the precise nature of the government’s legitimate objectives in this area. While the government may have an interest in facilitating parental supervision over their children’s access to indecent speech, some courts have found the government to have an independent interest in restricting minors’ access to indecent materials. In this Article, Professor Bhagwat explores the nature of the government’s interest in protecting children from indecent speech. He argues that the existence of such an independent interest is relevant to the constitutionality of statutes regulating indecent speech — as opposed to those that merely enhance the effectiveness of parental supervision — and he criticizes the Supreme Court’s failure to develop a coherent theory or approach to evaluating governmental interests.*

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In recent years, Congress has passed a spate of legislation restricting the dissemination of so-called “indecent” speech — generally understood to mean sexually explicit speech<sup>1</sup> — over various modern mass media. Examples include

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<sup>1</sup> Though the precise definition of “indecent” speech varies, the most widely accepted definition is “language that describes, in terms patently offensive as measured by contemporary community standards . . . , sexual or excretory activities and organs . . . .” *FCC v. Pacifica Found.*, 438 U.S. 726, 732 (1978) (quoting *Pacifica Found. Station WBAI (FM)*, 56 F.C.C.2d 94, 98 (1975)); see also *Reno v. ACLU*, 521 U.S. 844, 871 (1997). It should be noted, however, that “indecent” speech is not simply pornography; as discussed further below, even materials that many would consider socially valuable and appropriate for some minors, such as frank discussions of sexuality or AIDS, might qualify as “indecent” in some communities. See *id.* at 878 (explaining that the terms “indecent” and “patently offensive” could cover “discussions about prison rape or safe sexual practices, artistic images

restrictions on “dial-a-porn” telephone services,<sup>2</sup> restrictions on indecent radio and television broadcasts,<sup>3</sup> restrictions on indecent cable television programming,<sup>4</sup> and restrictions on indecent speech on the Internet.<sup>5</sup> Under current First Amendment doctrine, sexually explicit speech is accorded full constitutional protection so long as it is not “obscene” under the very strict *Miller* test, which requires, among other things, that the “the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”<sup>6</sup> Furthermore, regulations specifically directed at indecent speech are treated as “content-based” regulations because they single out particular speech based on its content and therefore are presumptively unconstitutional. To survive First Amendment scrutiny, the regulations must satisfy the “strict scrutiny”

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that include nude subjects, and arguably the card catalogue of the Carnegie Library”).

<sup>2</sup> See *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989) (striking down 47 U.S.C. § 223(b) insofar as it imposed an absolute ban on “indecent” interstate telephone communications); *Info. Providers’ Coalition for Def. of the First Amendment v. FCC*, 928 F.2d 866 (9th Cir. 1991) (upholding the successor version of 47 U.S.C. § 223(b), enacted in response to the Supreme Court’s *Sable* decision).

<sup>3</sup> See *Action for Children’s Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (en banc) (upholding Section 16(a) of the Public Telecommunications Act of 1992, 47 U.S.C. § 303, which limited indecent radio and television broadcasts to nighttime hours).

<sup>4</sup> See *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803 (2000) (striking down Section 505 of the Telecommunications Act of 1996, 47 U.S.C. § 561, which required cable television operators to “fully scramble or otherwise fully block,” during daytime hours, channels “primarily dedicated to sexually-oriented programming”); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) (upholding in part and striking down in part Section 10 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 532(h), 532(j) and 531, which restricted in various ways the transmission of “indecent” programming on leased access and public access channels).

<sup>5</sup> See *Ashcroft v. ACLU*, 535 U.S. 564 (2002) (reversing appellate decision striking down the Child Online Protection Act, 47 U.S.C. § 231, which prohibited making indecent communications for commercial purposes on the World Wide Web that will be available to minors); *Reno*, 521 U.S. at 859 (striking down the Communications Decency Act of 1996, 47 U.S.C. §§ 223(a) & (d), which prohibited the transmission of “indecent” and “patently offensive” communications on the Internet).

<sup>6</sup> *Miller v. California*, 413 U.S. 15, 24 (1973). *Miller* stated that obscene speech is entirely unprotected under the First Amendment. The test for obscenity is:

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

*Id.* (citations omitted).

One caveat is necessary here: In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Supreme Court held that the State may prohibit the sale to minors of speech that is obscene *as to minors*, even if the speech would be protected as to adults. The significance and limits of the *Ginsberg* decision are discussed further in Part I *infra*.

test, meaning that the government must prove that the regulation is narrowly tailored to advance a *compelling* government interest.<sup>7</sup> This test is extremely difficult to satisfy and was once famously described as "'strict' in theory and fatal in fact."<sup>8</sup>

Unsurprisingly, each of Congress's new indecency regulations have been subjected to constitutional challenge, and most have been struck down.<sup>9</sup> In at least one important case, however, a regulation of indecent speech was upheld under strict scrutiny,<sup>10</sup> suggesting that strict scrutiny is *not* fatal in fact in the area of indecent speech.<sup>11</sup> In each of these cases, the government sought to defend its indecency regulations on the grounds that they advanced the State's compelling interest in "protecting children from harmful materials,"<sup>12</sup> and courts generally have accepted this interest without comment or argument.<sup>13</sup> Underlying this seeming consensus, however, a deep ambiguity persists regarding the precise nature of the government's legitimate objectives in this area. On the one hand, the government may have an interest in supporting and facilitating parental supervision over their children's access to sexually explicit speech. This interest is quite uncontroversial, but as I discuss below, it ultimately supports only limited regulation of indecent speech. In the leading case involving regulation of children's access to sexual speech, however, the Supreme Court stated that "[t]he State also has an *independent* interest in the well-being of its youth."<sup>14</sup> Thus, at least according to some courts,

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<sup>7</sup> *Action for Children's Television*, 58 F.3d at 659.

<sup>8</sup> Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

<sup>9</sup> See *supra* notes 2–5.

<sup>10</sup> See *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (en banc) (upholding requirement limiting broadcasting of indecent materials to nighttime hours); cf. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) (upholding statutory provision permitting cable operators to bar indecent speech from "leased access" channels).

<sup>11</sup> I have argued elsewhere that the weakening of strict scrutiny in recent years is a more general trend. See Ashutosh Bhagwat, *Hard Cases and the (D)Evolution of Constitutional Doctrine*, 30 CONN. L. REV. 961, 965 & n.13 (1998).

<sup>12</sup> See, e.g., *Reno*, 521 U.S. at 875; *Action for Children's Television*, 58 F.3d at 660–63.

<sup>13</sup> See Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427, 429 (2000) ("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."). Professor Ross continued by arguing that the government had failed to produce sufficient empirical evidence to support its claims that what she called "controversial" speech harms children. As discussed in more detail below, I am dubious that the government has any obligation to make such an empirical showing.

<sup>14</sup> *Ginsberg v. New York*, 390 U.S. 629, 640 (1968) (upholding ban on sale to minors of materials "harmful to minors"); see also *Action for Children's Television*, 58 F.3d at 661 ("[W]e believe the Government's own interest in the well-being of minors provides an

the government's interest in protecting children turns out to have two distinct facets: (1) facilitating parental supervision; and (2) independently restricting minors' access to sexually explicit materials. The second, independent interest is quite important because it would justify far broader regulation of sexually explicit materials than the first,<sup>15</sup> a point that became a center of controversy between the majority and dissent in the Supreme Court's decision in *United States v. Playboy Entertainment Group*.<sup>16</sup>

In this Article, I explore the nature of the government's interest in regulating indecent materials to protect children. The caselaw on this subject is hopelessly ambiguous and, to a substantial extent, internally inconsistent. Nonetheless, the issue is an important one to resolve, because if properly analyzed, the constitutionality of many modern indecency regulations turns on whether the government has an independent interest in controlling children's access to indecent materials. In particular, the existence of such an independent interest is highly relevant to the constitutionality of statutes that directly censor indecent speech, as opposed to regulatory measures that merely enhance the effectiveness of parent-controlled screening devices. I argue, moreover, that the controversy and uncertainty in this area highlight a greater problem with the Supreme Court's constitutional jurisprudence: the lack of any coherent theory or approach towards evaluating governmental interests.<sup>17</sup> Thus, the question of why the government is permitted to regulate indecent speech is interesting both intrinsically and because of the insights it offers into the current state of constitutional law.

## I. PROTECTING CHILDREN FROM INDECENCY: THE JUDICIAL VIEW

### A. Background: Children, Pornography and the Internet

The Supreme Court has struggled with the question of the government's power

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independent justification for the regulation of broadcast indecency.”).

<sup>15</sup> Of course, even if the government establishes a compelling interest, it still must prove that any regulation is narrowly tailored to advance that interest, a requirement which raises its own set of complex problems. See Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141, 148–56 (discussing ambiguities in the Court's current implementation of the narrow tailoring standard in the context of indecent speech, because the Court has seemed to strike down regulations even when no *equally effective*, less restrictive regulatory options are available); see also *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 131–33 (1989) (Scalia, J., concurring).

<sup>16</sup> 529 U.S. 803 (2000). In particular, the majority questioned the existence of an independent interest, whereas the dissent strongly defended it. See *infra* Part I.B for further discussion of the *Playboy* decision.

<sup>17</sup> This aspect of the Article draws upon previous work that I have published on this question. See Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297 (1997).

to protect children from sexually explicit speech for as long as the Court has accorded constitutional protection to such speech.<sup>18</sup> In 1957, the Court held in *Butler v. Michigan* that the State may not absolutely prohibit the sale of "lewd" material that might harm children, because the State may not "reduce the adult population of Michigan to reading only what is fit for children."<sup>19</sup> However, the 1968 decision in *Ginsberg v. New York* is undoubtedly the leading case recognizing the power of the State to protect children.<sup>20</sup> The Court in *Ginsberg* upheld a New York statute barring the sale to minors of materials deemed obscene as to minors, using a variant of the standard definition of obscenity.<sup>21</sup> The Court recognized two distinct interests that the State could advance as justification for such a challenged law:

First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society . . . . The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility.<sup>22</sup>

In contrast to this, however, the Court also noted that the "State also has an independent interest in the well-being of its youth" and therefore may ban the sale to minors of sexually explicit materials which might harm the "ethical and moral development" of children.<sup>23</sup> The Court also rejected the contention that in order to regulate, the State must demonstrate the existence of such harm with "scientific" evidence, concluding instead that so long as "it was not irrational for the legislature to find that exposure to materials condemned by the statute is harmful to minors," the statute would be upheld.<sup>24</sup> *Ginsberg* thus firmly established the power of the State to protect children from the "harms," purported or real, caused by exposure to sexual speech and also endorsed the dual nature of the State's interests in this

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<sup>18</sup> Until the late 1950s, and in particular until the Supreme Court's decision in *Roth v. United States*, 354 U.S. 476 (1957), courts — by adopting a very broad definition of the term "obscene" — placed few restrictions on the State's power to completely ban sexually explicit materials. Thus, the specific question of the State's power to protect children from materials deemed protected as to adults simply did not arise.

<sup>19</sup> 352 U.S. 380, 383 (1957); see also *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250–55 (2002).

<sup>20</sup> 390 U.S. 629 (1968).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 639.

<sup>23</sup> *Id.* at 640–41.

<sup>24</sup> *Id.*

regard.<sup>25</sup> It should be noted, however, that unlike most of the modern indecency cases, *Ginsberg* only involved a prohibition on sales to minors of speech deemed constitutionally unprotected as to them; it did *not* involve any restrictions on adults' access to protected speech and, therefore, did not involve the application of strict scrutiny or any level of heightened scrutiny under the modern doctrinal framework. Instead, because it placed the restricted speech in the "obscenity/unprotected speech" category, the *Ginsberg* Court appears to have applied a form of rational basis review.

Since *Ginsberg*, the Court has decided a large number of cases involving restrictions on indecent speech imposed in the name of protecting minors, and in all of these cases (until the recent *Playboy Entertainment Group* decision discussed below), the Court has continued to recognize the legitimacy of the two government interests identified in *Ginsberg*. For example, in *Federal Communications Commission v. Pacifica Foundation*,<sup>26</sup> the Court relied on *Ginsberg* to uphold a Federal Communications Commission ("FCC") decision that sanctioned a radio station for broadcasting "indecent" language during daytime hours. In *Sable Communications of California v. Federal Communications Commission*,<sup>27</sup> in contrast, the Court struck down a flat congressional ban on the interstate transmission of indecent commercial telephone messages, but it did so on "narrow tailoring" grounds (the second part of the Court's "strict scrutiny" test), accepting without question the government's "compelling interest in protecting the physical and psychological well-being of minors."<sup>28</sup> In *Sable*, the Court for the first time elevated the government interests recognized in *Ginsberg* to the level of *compelling* interests, sufficiently powerful to satisfy strict scrutiny; the highest standard of review. The Court took this important doctrinal step summarily, without carefully detailing the criteria for defining compelling interests and without examining the inapplicability of the precedents upon which it relied.<sup>29</sup>

More recently, the Court has been faced with a number of cases involving restrictions on sexual speech — imposed in the name of protecting children — in the context of more modern communications media, specifically cable television and the Internet. Once again, the Court has generally accepted the government's asserted justifications with little skepticism, focusing instead on whether the challenged regulations were "narrowly tailored." In *Denver Area Educational Telecommunications Consortium v. Federal Communications Commission*,<sup>30</sup> the Court was faced with a challenge to a congressional statute imposing various

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<sup>25</sup> See *id.*

<sup>26</sup> 438 U.S. 726, 749–50 (1978).

<sup>27</sup> 492 U.S. 115 (1989).

<sup>28</sup> *Id.* at 126.

<sup>29</sup> See Ross, *supra* note 13, at 465.

<sup>30</sup> 518 U.S. 727 (1996).

restrictions on the transmission of indecent materials on leased access and public access cable television channels.<sup>31</sup> In a highly splintered opinion, the Court struck down two of the three restrictions. The divisions within the Court centered on issues of tailoring and defining the proper standard of review, and establishing the nature of the constitutional rights of cable operators. No member of the Court seriously questioned the strength or legitimacy of the government's interest in protecting children.<sup>32</sup> Similarly, in *Reno v. American Civil Liberties Union*,<sup>33</sup> the Court struck down the Communications Decency Act ("CDA"), a federal statute that effectively prohibited the transmission or posting on the Internet of indecent speech directed at, or available to, minors. Once again, the Court accepted without question "the governmental interest in protecting children from harmful materials,"<sup>34</sup> but also found that the CDA was not narrowly tailored.<sup>35</sup>

Thus, in the thirty years following the *Ginsberg* decision, the Court paid no serious attention to the precise basis or nature of the government's asserted interests in protecting children from sexual materials described and endorsed in *Ginsberg*. In particular, the Court never questioned whether the *Ginsberg* decision was correct in identifying a purported *independent* government interest in controlling minors' access to sexual materials, regardless of the wishes of their parents. The lower federal courts have largely followed the Court's lead in this regard, relying on an undifferentiated State interest in "protecting minors from the harms concededly generated by indecent [speech]."<sup>36</sup>

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<sup>31</sup> Leased access channels are channels which, under federal law, the cable operator must reserve for commercial leasing by third parties. Public access channels are channels which local franchising authorities have required cable operators to set aside for use by the public (or by the government itself).

<sup>32</sup> See *Denver Area*, 518 U.S. at 743, 755 (plurality opinion); *id.* at 779 (O'Connor, J., concurring in part and dissenting in part); *id.* at 806 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

<sup>33</sup> 521 U.S. 844 (1997).

<sup>34</sup> *Id.* at 875; *cf. id.* at 878:

[T]he strength of the Government's interest in protecting minors is not equally strong throughout the coverage of this broad statute. Under the CDA, a parent allowing her 17-year-old to use the family computer to obtain information on the Internet that she, in her parental judgment, deems appropriate could face a lengthy prison term. . . . Similarly, a parent who sent his 17-year-old college freshman information on birth control via e-mail could be incarcerated.

<sup>35</sup> In the wake of the Court's *ACLU* decision, Congress adopted a new statute attempting to protect children from indecency on the Internet: the Child Online Protection Act ("COPA"). In *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564 (2002), the Supreme Court reversed a Third Circuit decision striking down COPA on overbreadth grounds, but the enforcement of the statute remains enjoined as of this writing, and litigation over its constitutionality continues.

<sup>36</sup> *Dial Info. Servs. Corp. v. Thornburgh*, 938 F.2d 1535, 1541 (2d Cir. 1991); see also *ACLU v. Reno*, 217 F.3d 162, 173 (3d Cir. 2000), *rev'd sub nom. Ashcroft v. ACLU*, 535



*B. ACT III and Playboy Entertainment Group: The End of Consensus*

For almost thirty years, in cases involving challenges to regulations designed to protect minors from sexually explicit or “indecent” speech, a broad judicial consensus regarding the strength and legal sufficiency of the government’s asserted interests in protecting children thus appears to have existed. The only debate has focused on whether particular regulatory measures are sufficiently tailored to meet that goal. Underlying that consensus, a deep-seated ambiguity has remained regarding the *precise* nature of the governmental interest. In particular, courts have been uncertain whether the government’s goal is — and should be — to aid parental control over children’s moral upbringing or, instead, to assert its *own* interests in controlling the moral development of children. By and large, courts have tended to ignore that ambiguity, apparently considering it irrelevant. In recent years, however, that consensus has weakened, and more sustained attention has been given to the ambiguities surrounding the *Ginsberg* formulation of the government’s interests in this area. Particularly, in two relatively recent decisions, judges have recognized that the nature of the government’s interest does matter to constitutional analysis and have explicitly grappled with these problems.

First, in 1995, the United States Court of Appeals for the District of Columbia Circuit decided *Action for Children’s Television v. Federal Communications Commission* (hereinafter *ACT III*),<sup>37</sup> in which the en banc court was faced with a challenge to a statute, along with the implementing FCC regulations, that required radio and television broadcasters to “channel” indecent materials to the hours between midnight and 6 a.m. A majority of the court, in an opinion by Judge

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U.S. 564 (2002) (holding that the “government has a compelling interest in protecting children from material that is harmful to them”); *Info. Providers’ Coalition for Def. of the First Amendment v. FCC*, 928 F.2d 866, 872–74 (9th Cir. 1991) (failing to examine nature of governmental interest at all); *Fabulous Assocs. v. Pennsylvania Pub. Util. Comm.*, 896 F.2d 780, 787 (3d Cir. 1990) (noting that the “interest of the state in shielding its youth from exposure to indecent materials is a compelling state interest”); *Carlin Comms., Inc. v. FCC*, 837 F.2d 546, 555 (2d Cir. 1988) (finding that the governmental interest was to “protect minors from obscene speech”); *Jones v. Wilkinson*, 800 F.2d 989, 996 (10th Cir. 1986) (Baldock, J., specially concurring) (“protection of minors”); *PSINet v. Chapman*, 167 F. Supp. 2d 878, 884 (W.D. Va. 2001) (stating that “the state’s asserted interest in protecting, and helping parents to protect, minors from sexually explicit materials is compelling”). In *Fabulous Associates*, the court considered the possibility of a clash between governmental and parental desires, and concluded with little analysis that the parental interest should trump in that circumstance. *Fabulous Associates*, 896 F.2d at 788; see also *PSINet*, 167 F. Supp. 2d at 885–86 (recognizing an independent state interest in protecting children and the possibility of conflict with parental desires, but dismissing its significance by analogy to non-speech related areas where the governmental policies sometimes trump parental values).

<sup>37</sup> 58 F.3d 654 (D.C. Cir. 1995) (en banc). That decision was the last in a series of cases involving challenges to regulations limiting the broadcast of indecent materials.

Buckley, upheld the policy in large part, holding that even though the challenged rules were content-based regulations of speech, and thus subject to strict scrutiny, they survived such scrutiny because the rules were narrowly tailored to advance the government's dual goals of facilitating parental supervision and protecting the "ethical and moral development" of children.<sup>38</sup> The majority, however, clearly relied more heavily on the latter *independent* governmental interest, emphasizing that: (1) the government had no obligation to provide empirical evidence that exposure to sexual materials harmed children; and (2) the government's role in producing moral citizens was an important aspect of democratic self-government (quoting Irving Kristol no less).<sup>39</sup> The majority also noted that, in its view, the two goals were "complementary" rather than in tension with each other.<sup>40</sup>

The dissenters in *ACT III*, Judges Edwards and Wald (the latter joined by Judges Rogers and Tatel) parted company with the majority on both of these crucial assumptions, thereby bringing to the forefront the tensions and ambiguities in the *Ginsberg* formulation of the government's interests in this area. In particular, Judge Edwards argued in a lengthy dissent that, in the context of this case, the two interests upon which the majority relied were inevitably in conflict with each other because a flat ban on daytime broadcast of indecent materials, while undoubtedly advancing the government's own purported interest in shielding children, could not advance *parental* supervision unless parents happened to precisely share the FCC's views on how best to raise children.<sup>41</sup> And as for the government's independent interest, Judge Edwards argued that the government had failed to meet its burden of *empirically* demonstrating that exposure to sexually explicit materials causes children any harm.<sup>42</sup> Similarly, Judge Wald in dissent argued that "the primary government interest here must be in facilitating parental supervision of children" because the government failed to demonstrate any real harm caused by exposure to sexual materials.<sup>43</sup> Furthermore, because the government failed to demonstrate that parents could not adequately supervise children during daytime hours, it also failed to establish that a flat ban on daytime broadcasts was necessary or narrowly tailored.<sup>44</sup> In short, the dispute between the majority and dissenting judges in *ACT III* clearly exposed the potential conflict between the two governmental interests relied upon by the Supreme Court in *Ginsberg* and subsequent cases. It also demonstrated that the question of which of those interests the government may properly rely upon has important consequences for regulatory authority.

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<sup>38</sup> *Id.* at 660–63 (quoting *Ginsberg v. New York*, 390 U.S. 629, 641 (1968)).

<sup>39</sup> *Action for Children's Television*, 58 F.3d at 662–63.

<sup>40</sup> *Id.* at 663.

<sup>41</sup> *Id.* at 678–79 & n.29 (Edwards, C.J., dissenting).

<sup>42</sup> *Id.* at 680–82.

<sup>43</sup> *Id.* at 686–88 (Wald, J., dissenting).

<sup>44</sup> *Id.* at 687–88; see also *id.* at 682–83 (Edwards, C.J., dissenting).

Five years after *ACT III*, this simmering dispute over the meaning of *Ginsberg* and its progeny finally came to the Supreme Court in *United States v. Playboy Entertainment Group*.<sup>45</sup> The *Playboy* case involved a challenge to a congressional statute — Section 505 of the Telecommunications Act of 1996 — which required cable television operators who carried channels “primarily dedicated to sexually oriented programming” to take one of two steps: either (1) to “fully scramble or otherwise fully block” such channels, so that no “signal bleed” occurred permitting viewers to see fleeting images of sexual programming; or (2) to limit transmission of such channels to nighttime hours (set by the FCC to between 10 p.m. and 6 a.m.).<sup>46</sup> Because complete blocking was not economically feasible, the vast majority of operators were forced to select the second option — time-channeling the targeted programming.<sup>47</sup> The Supreme Court, in a five to four decision authored by Justice Kennedy, struck down Section 505, holding that it was not narrowly tailored to advance its admittedly compelling goal of facilitating parental control over their children’s access to sexual images or sounds via signal bleed, because Section 504 of the Telecommunications Act provided a less restrictive means for achieving the same end.<sup>48</sup> Section 504 requires cable operators, upon request by a customer, to individually, fully block any channels designated by the customer.<sup>49</sup> As such, according to the majority, this provision fully protected a parent’s interest in shielding his or her children from any type of programming, regardless of sexual content.<sup>50</sup> Crucially, in reaching this conclusion, the Court explicitly considered and rejected the government’s argument that Section 505 was necessary to advance the government’s *independent* interest in protecting children from signal bleed.<sup>51</sup> The majority first expressed doubt about whether such an interest even existed, and held that in any event, such an interest could be implicated *only* if parents were unable themselves to act on behalf of their children.<sup>52</sup> In short, the majority seemed to altogether reject the notion that the government might have a completely independent interest in fostering the “ethical and moral development” of children,

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<sup>45</sup> 529 U.S. 803 (2000).

<sup>46</sup> Telecommunications Act of 1996 § 505, 47 U.S.C. § 560 (1996).

<sup>47</sup> *Playboy*, 529 U.S. at 809.

<sup>48</sup> *Id.* at 825–26.

<sup>49</sup> 47 U.S.C. § 560 (1996).

<sup>50</sup> *Playboy*, 529 U.S. at 809.

<sup>51</sup> *Id.* at 824–26.

<sup>52</sup> *Id.* at 825 (arguing that the independent governmental interest alone could not justify intervention by the State, “[e]ven [given] the assumption that the Government has an interest in substituting itself for informed and empowered parents . . .”).

which could supersede or substitute for the desires of parents.<sup>53</sup>

In contrast to the majority, the primary dissent — authored by Justice Breyer — fully accepted the legitimacy of the government's independent interest in shielding children. Justice Breyer relied heavily upon that interest in arguing to uphold Section 505,<sup>54</sup> pointing out, in particular, that the voluntary blocking mechanism of Section 504 "does *nothing at all* to further" the Government's independent compelling interest in shielding children.<sup>55</sup> It seems clear that this disagreement was extremely significant to the case's final outcome. Its importance is highlighted by the fact that the existence of an independent government interest became a point of contention during the government's oral argument. Faced with a question suggesting that Section 504 might provide a less restrictive means to achieve the government's goals, the attorney for the government emphasized the State's independent interest in protecting children, which in turn elicited a dubious comment that "the Government is a kind of super parent."<sup>56</sup> In both its opening and reply briefs, the government relied heavily upon the existence of an independent interest in protecting children by refuting the argument that Section 504 provided a more narrowly tailored means to achieve its ends. In particular, the government argued that because of parental "inertia, indifference or distraction," parents will fail to act to protect their children and, therefore, the government must step in.<sup>57</sup>

Although the briefs for Playboy did not explicitly address this issue (arguing

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<sup>53</sup> *Id.* at 825–26. The majority opinion is slightly ambiguous on the last point because it seems to leave open the possibility that if the government could *demonstrate* that parents who were aware of their children's exposure to sexual materials still did not act, then perhaps the Government could step in on its own behalf. *See id.*

<sup>54</sup> *Id.* at 842 (Breyer, J., dissenting) ("I could not disagree more when the majority implies that the Government's independent interest in offering such protection — preventing, say, an 8-year-old child from watching virulent pornography without parental consent — might not be 'compelling.'").

<sup>55</sup> *Id.* at 843. Admittedly, however, even the dissent hedged somewhat about the existence and strength of an independent governmental interest by describing it as an interest in shielding children from watching sexual materials "in the absence of parental consent" or parental supervision. By doing so, Justice Breyer managed to sidestep the obvious and difficult question of what power the government has to act contrary to a parent's values, and perhaps even to trump a parent's desire to expose a minor to controversial speech (though in reality, given the range of speech options available to parents, such a scenario is unlikely to arise). As I discuss further below, the dissent's inability to face this problem head-on is indicative of the general jurisprudential confusion in this area, a product of the fact that the Court has failed to develop *any* methodology or jurisprudence regarding the identification of compelling governmental interests.

<sup>56</sup> *See* Transcript of Oral Argument, *Playboy* (No. 98-1682), 1999 U.S. TRANS LEXIS 60, at \*18–\*20.

<sup>57</sup> *See* Brief for the Appellants at \*16–\*18, \*32–\*35, *Playboy* (No. 98-1682), 1999 WL 700620; Reply Brief for the Appellants at \*12–\*13, *Playboy* (No. 98-1682), 1999 WL 1021220.

instead that Section 505 was not narrowly tailored), several amici directly challenged the government's analysis in this regard.<sup>58</sup> In particular, one amicus — the Media Institute — explicitly challenged the government's assertion that it had an independent interest in protecting children, arguing that any such interest "is inconsistent with the Government's asserted interest in supporting parents' authority and ability in inculcating morals and beliefs in their children as they see fit."<sup>59</sup> In addition, another amicus — a group of "sexuality" scholars and therapists — challenged the empirical basis of the government's argument, devoting much of their brief to demonstrating that there is essentially no scientific evidence that exposure to sexually explicit images causes psychological harm to children.<sup>60</sup> The issue of the existence of an independent governmental interest in protecting children from sexually explicit materials was thus fully joined before the Court, and it is not surprising that the Court's division on its resolution proved crucial to the outcome of the case.

What is peculiar about the ultimate resolution of the *Playboy* case is that despite the seemingly clear legal dispute before the Court, and the apparent division within the Court on its resolution, neither the majority nor the dissent address or resolve the problem in a straightforward manner. First of all, as noted above, both the majority and dissenting opinions are in fact somewhat ambiguous in the positions they adopt. Justice Kennedy's majority opinion, for example, seems to reject an independent interest, but nowhere explicitly states that no such interest exists.<sup>61</sup> It appears to leave the door open to the possibility that if the government could demonstrate that well-informed parents were failing to "protect" their children, then the government could act.<sup>62</sup> Justice Breyer's dissent, on the other hand, while loudly trumpeting such an interest, hedges itself by describing the interest as existing (only?) when a child is exposed to sexual materials without parental consent or supervision.<sup>63</sup> More fundamentally, despite the apparently clear dispute between the majority and dissent, neither opinion offers any suggestion or analytical framework for how, and on what basis, this dispute should be resolved. The disagreement thus comes down to nothing more than sheer assertion and citations

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<sup>58</sup> See Brief of Appellee, *Playboy* (No. 98-1682), 1999 WL 756117.

<sup>59</sup> Brief of Amicus Curiae The Media Inst. in Support of Appellee at \*24–\*26, *Playboy* (No. 98-1682), 1999 WL 766039; see also Amicus Curiae Brief for Nat'l Cable Television Ass'n in Support of Appellee at \*14, *Playboy* (No. 98-1682), 1999 WL 766083 ("Whether the Government's paternalistic interest in substituting its judgment for the judgment of a child's fully informed parents provides a legitimate and compelling basis for content-based regulation is dubious at best.").

<sup>60</sup> Brief of Amici Curiae Sexuality Scholars, Researchers, Educators, and Therapists in Support of Appellee, *Playboy* (No. 98-1682), 1999 WL 766040.

<sup>61</sup> See *Playboy*, 529 U.S. at 825–26; *supra* note 53 and accompanying text.

<sup>62</sup> See *Playboy*, 529 U.S. at 825–26; *supra* note 53 and accompanying text.

<sup>63</sup> *Playboy*, 529 U.S. at 842–43; *supra* note 55 and accompanying text.

to precedent which are not truly on point and are themselves entirely lacking in analysis.

This ellipsis is moreover indicative of a greater gap in the Court's jurisprudence: its failure to give any sustained attention to the problem of how to determine whether particular asserted governmental interests qualify as "compelling" (or for that matter as "important" or "legitimate," as required by the other levels of the Court's three-tiered doctrinal framework). I have discussed this phenomenon elsewhere in greater detail and will not repeat it here, but suffice it to say that despite the fact that the Court has recognized the concept of "strict scrutiny" since the 1944 *Korematsu* decision,<sup>64</sup> and has used the term "compelling interest" for almost as long, the Court has never provided a sustained explanation of how such interests are to be identified or evaluated.<sup>65</sup> Without such an analytical framework, however, the disagreement dividing the Court in *Playboy*, and casting its shadow across many other First Amendment cases, is necessarily unresolvable.

## II. PROTECTING CHILDREN FROM WHAT?: A THEORETICAL PERSPECTIVE

In cases involving regulations of indecent speech, the government has asserted, and the courts have recognized, two primary governmental interests justifying such regulation: (1) facilitating parental supervision of children; and (2) shielding children from indecent materials. The first interest — facilitating parental control — unsurprisingly has proven entirely uncontroversial. The reason for this consensus seems to be a fairly universal agreement that parents can and should control their children's upbringing, including controlling their moral and cultural development, and that under modern circumstances the government can and should assist parents in this regard. Indeed, the Supreme Court has long accorded independent constitutional significance to the parental "right" to control their children's upbringing, holding as far back as 1923 that parents have a liberty interest in controlling their children's education free of arbitrary state intervention.<sup>66</sup> If a parent's right to control her children's upbringing has constitutional status, it seems only natural that the government should have a compelling interest in facilitating exercise of that right, or so most courts seem to believe.<sup>67</sup>

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<sup>64</sup> *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

<sup>65</sup> See Bhagwat, *supra* note 17, at 307–08 & n.33; see also Ashutosh Bhagwat, *Affirmative Action and Compelling Interests: Equal Protection Jurisprudence at the Crossroads*, 4 U. PA. J. CONST. L. 260, 270–72 (2002).

<sup>66</sup> *Meyer v. Nebraska*, 262 U.S. 390 (1923); see also *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (holding that a statute granting unlimited visitation rights to children violated a parent's constitutional right related to the "care, custody, and control of [her] children"); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (holding that parents may not be required to send their children to public school).

<sup>67</sup> Of course, the validity of this "compelling interest" is not universally accepted. For

Given the almost universal acceptance of a compelling interest in facilitating parental control, the debate in this area has focused on the existence of an independent governmental right to control and participate in the “ethical and moral development” of children. And as noted above, in recent years that debate has been joined in earnest. Unfortunately, however, the debate has consisted largely of undefended assertions and unexamined assumptions rather than any sustained analysis. The underlying problem here is that although the Supreme Court has provided isolated answers to isolated questions regarding the strength and legitimacy of particular governmental interests,<sup>68</sup> it has not offered any systematic method or analytical framework for resolving those questions. Instead, it has treated each separate asserted interest as raising an ad hoc question, to be resolved on an ad hoc basis. The consequence of this absence of a *legal* analytical framework is that debate over the validity of asserted governmental interests primarily has focused on *empirical* questions, because — perhaps reasonably — courts and litigants have tended to treat the issues raised as ones of fact.<sup>69</sup>

In the specific context of indecency regulation, this tendency has manifested itself in a debate over whether the government should be required to demonstrate empirically that exposure to indecent materials “harms” children. The State’s failure to do so was the primary basis for Chief Judge Edwards’ dissent in *ACT III*,<sup>70</sup> and it was also an important component of the arguments made by amici to the Supreme Court in the *Playboy* case.<sup>71</sup> In the academic arena, Professor Catherine Ross has extensively argued this point in an article which broadly examined the

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example, Professor Catherine Ross has argued that such an interest cannot generally justify regulation of speech because of heterogeneity among families. *See* Ross, *supra* note 13, at 472–93. Judge Posner has also argued that there must be some limits on the parental right to seek government assistance in controlling children’s access to controversial materials. *See* *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001). As discussed below, I question the validity of the syllogism upon which courts seem to rely, but for somewhat different reasons than Professor Ross or Judge Posner. *See infra* notes 122–41 and accompanying text.

<sup>68</sup> Two recent examples of such analysis are *Romer v. Evans*, 517 U.S. 620 (1996) (holding that a state has no legitimate interest in seeking to harm an unpopular group), and *California Democratic Party v. Jones*, 530 U.S. 567, 582–85 (2000) (rejecting various governmental interests asserted in support of California’s “blanket primary” system as either illegitimate or not compelling).

<sup>69</sup> For a discussion of this phenomenon in the context of the modern affirmative action debate, see Bhagwat, *supra* note 65, at 265–70.

<sup>70</sup> *Action for Children’s Television v. FCC*, 58 F.3d 654, 680–82 (D.C. Cir. 1995) (Edwards, C.J., dissenting).

<sup>71</sup> *See* Brief Amici Curiae of Sexuality Scholars, Researchers, Educators, and Therapists in Support of Appellee, *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803 (2000) (No. 98-1682), 1999 WL 766040.

State's interest in "protecting children."<sup>72</sup>

The canonical response to this empirical argument is the one offered by the majority in *ACT III*: Under Supreme Court precedent, notably the *Ginsberg* decision, the State is not required to provide "empirical" evidence that exposure to sexually explicit materials may harm children, because legislators are permitted to assume such harm based on common cultural understandings.<sup>73</sup> There is, of course, a problem with this reliance on *Ginsberg* as a strictly legal matter, since as noted earlier, *Ginsberg* did not involve strict scrutiny or a compelling governmental interest.<sup>74</sup> But beyond the doctrinal difficulty, there is a deeper ambiguity here. The empirical arguments described above tend to focus on proof, or lack thereof, regarding *psychological* harm to children caused by exposure to sexually explicit materials, of which there is quite clearly none.<sup>75</sup> In *Ginsberg*, however, the Court based the independent governmental interest in protecting children on concerns about "ethical and moral development." It also seems quite apparent that legislative regulation of indecency usually is rooted in ethical and moral concerns, not concerns about diagnosable, "psychological" harm. Ethical and moral questions, however, are by their nature not susceptible to empirical or scientific proof; rather, their answers exist in the eyes of the beholder. This is undoubtedly what the Court meant in *Ginsberg* when it said that "[i]t is very doubtful" if the legislative finding in that case regarding the effect of sexually explicit materials on children "expresses an accepted scientific fact."<sup>76</sup> Thus, the empirical attacks on the government's purported independent interest in protecting children miss the point. They challenge an assertion which is not being made, and fail to address the true question: whether the State has a legitimate or compelling interest in inculcating moral and ethical values in children by controlling their access to indecent materials as a step towards creating a morally virtuous citizenry.<sup>77</sup>

Posed in those stark terms, it becomes clear that the issues raised by the indecency cases are exceedingly complex and controversial. Whereas it is widely accepted that the State may protect children against "harm" in the sense of physical abuse or neglect,<sup>78</sup> the notion of a government that is responsible for the ethics and

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<sup>72</sup> Ross, *supra* note 13, at 501-07.

<sup>73</sup> *Action for Children's Television*, 58 F.3d at 661-62.

<sup>74</sup> See *Ginsberg v. New York*, 390 U.S. 629 (1968).

<sup>75</sup> I am not aware of anyone who seriously disputes the lack of empirical evidence of harm to children from exposure to sexual materials.

<sup>76</sup> *Ginsberg*, 390 U.S. at 641.

<sup>77</sup> See *Action for Children's Television*, 58 F.3d at 663 (advocating the proposition that, in a democracy, the Government has a compelling interest in producing a virtuous citizenry) (citing *Prince v. Massachusetts*, 321 U.S. 158 (1944), and IRVING KRISTOL, ON THE DEMOCRATIC IDEA IN AMERICA 41-42 (1972)).

<sup>78</sup> This was the holding of *Prince v. Massachusetts*, 321 U.S. 158 (1944), in which the Court rejected a claim by a Jehovah's Witness for a religious exemption from state laws



morality of its citizens — though perhaps consistent with Civic Republican assumptions — is far more controversial. Even here, however, most people would accept that in *some* contexts, the State undoubtedly does have a strong and legitimate interest in inculcating moral and ethical values — for example, in its provision of public education<sup>79</sup> or in setting conditions for the receipt of public funds. The question, then, is whether such an interest is properly deployed to justify censorship of private speech. In other words, does an otherwise powerful and unexceptionable governmental interest cease to be “compelling,” or even “legitimate,” when offered as a justification for a restriction on speech, and if so, why? The broader question raised here is whether, in evaluating an asserted governmental interest, it matters what constitutional provision is at issue. I would argue (and have argued elsewhere<sup>80</sup>) that the answer is an unequivocal “yes.” Governmental interests that might be sufficient to justify restrictions on free speech will not necessarily be sufficient to justify restrictions on abortion, for example, and vice-versa. Indeed, the constitutional provision at issue should not only be relevant in assessing governmental interests, it should be determinative.

The above is a controversial proposition, and although a complete defense is not possible here, some explanation is necessary. There are two basic — and interrelated — arguments for a Constitution-centered approach to governmental interests. One reason is rooted in concerns about judicial legitimacy and competence. It is widely accepted that in light of the countermajoritarian difficulty, courts exercise power most legitimately when their decisions are rooted in clearly identifiable positive law, which in the context of constitutional decisions means the Constitution. In contrast, judicial legitimacy is at its weakest when courts are seen as simply second-guessing legislative policy determinations. Furthermore, in terms of institutional *competence*, courts are best at interpreting and applying specific legal provisions, as opposed to making ad hoc policy judgments about the strength of proposed governmental policies. This is because policy decisions require making empirical and predictive judgments of a sort for which courts have no particular talent or expertise. Moreover, because of their lack of democratic pedigree, courts — unlike legislatures — cannot compensate for a lack of expertise by turning to explicitly political considerations. For these reasons, if a jurisprudence of governmental interests is to be developed, it *must* be rooted in the Constitution, because the alternative, which is an entirely open-ended analysis of whether a particular asserted interest or policy is sufficiently “compelling” (*i.e.*, is a sufficiently good idea), takes courts well beyond their competence and their

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prohibiting underage employment.

<sup>79</sup> Cf. Stanley Ingber, *Socialization, Indoctrination, or the “Pall of Orthodoxy”: Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15.

<sup>80</sup> See Bhagwat, *supra* note 17, at 330–41; Bhagwat, *supra* note 65, at 274.

legitimate place in a democratic society.<sup>81</sup>

The above argument provides an institutional and pragmatic justification for rooting evaluation of governmental interests in constitutional text, but it does not really provide a theoretical one. It also fails to explain why governmental interests must be tested against the specific constitutional provision which the State has allegedly violated. Further justification is necessary, therefore, and it can be found in the nature of constitutional "rights."

Under the Court's current constitutional doctrine, disputes between the State and individuals tend to be described as clashes between an individual's constitutional "right," and a societal interest in limiting that right for the broader good.<sup>82</sup> The greater the intrusion on constitutionally favored rights, the greater the State's burden to justify such an intrusion. The doctrine captures this idea by requiring progressively stronger governmental reasons to justify an action ("legitimate" to "important" to "compelling"), as the burdened rights become more fundamental. In reality, however, this entire structure is deeply deceptive. The Constitution does not grant "rights" to individuals in such terms at all; rather, it establishes specified limits on governmental power. Furthermore, those limits generally are stated in absolute terms, not with caveats for great need. Thus, the speech clause of the First Amendment states that "Congress shall make no law . . . abridging the freedom of speech."<sup>83</sup> It does not state that "Citizens shall have a right to free speech," nor does it state that "Congress shall make no law . . . abridging the freedom of speech unless it has a good reason to do so." Of course, the language of the First Amendment requires interpretation. I am not making an "absolutist" argument regarding free speech. Rather, my argument is that in determining whether a particular statute or other governmental action violates the free speech clause, the relevant question should *not* be whether the government has a good policy reason for limiting speech, it should be whether the challenged action constitutes an "abridgment of speech" in the relevant, constitutional sense. In other words, the question should be whether the action violates some principle derivable from the First Amendment. This kind of analysis is not necessarily easier than the policy analysis required by an ad hoc approach to governmental interests (and seemingly by the Court's current doctrine), but it is a different kind of analysis because it is a constitutional and legal one.<sup>84</sup>

What are the implications of this analytical framework for a purported independent governmental interest in shielding children from sexually explicit materials in order to direct their ethical and moral development? At first cut, the

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<sup>81</sup> For further development of these arguments, see Bhagwat, *supra* note 17, at 321–25.

<sup>82</sup> See generally David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. U. L. REV. 641, 641–44 (1994).

<sup>83</sup> U.S. CONST. amend. I.

<sup>84</sup> See also Bhagwat, *supra* note 65, at 272–74.

answer seems clear — such an interest cannot be the basis for regulation which substantially burdens speech. There seems to be a clear and fatal conflict between an alleged state interest in inculcating moral values by suppressing disfavored speech and what is widely accepted to be one of the defining principles of the First Amendment: The government may not prescribe an “orthodoxy” of belief through coercive means. This is one of the basic purposes of the free speech clause and has been accepted by the Court since Justice Jackson made this point most famously in the *Barnette* case.<sup>85</sup> The principle was restated in the flag burning cases<sup>86</sup> and has been widely endorsed in academic literature.<sup>87</sup> If there is indeed a direct conflict between an asserted governmental interest and the constitutional provision at issue, surely the government interest cannot provide a justification for limiting the scope of that provision; or put differently, surely a governmental interest that runs directly contrary to the underlying purposes of a constitutional provision is “illegitimate”<sup>88</sup> and, thus, *a fortiori* not “compelling.” Under this line of reasoning, therefore, the government simply cannot justify the censorship of speech based on an independent governmental interest in shielding children from sexually explicit speech, because the underlying governmental objective in this situation — to control the ethical and moral development of children by suppressing speech — runs contrary to basic First Amendment principles and therefore is illegitimate.<sup>89</sup>

The difficulty with the above line of reasoning is that it does not consider the fact that in the indecency cases, the target of the State’s attempts to “enforce an orthodoxy” (*i.e.*, inculcate values) is *children*, not adults. Even if *Barnette* and the

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<sup>85</sup> West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

<sup>86</sup> United States v. Eichman, 496 U.S. 310, 315–19 (1990); Texas v. Johnson, 491 U.S. 397, 410–19 (1989); *see also* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245 (2002) (“As a general principal, the First Amendment bars the government from dictating what we see or read or speak or hear.”).

<sup>87</sup> *See, e.g.*, Steven G. Gey, *Is Moral Relativism a Constitutional Command?*, 70 IND. L. J. 331, 353 (1995) (recognizing the “bedrock principle” of free speech upheld in *Barnette* and *Johnson*); Ingber, *supra* note 79, at 22 (hailing *Barnette*, but questioning “the judiciary’s . . . insistence that schools serve a socializing function by inculcating societal beliefs and values”); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 428–37 (1996) (discussing the dangers of restricting speech based on governmental hostility towards its content); Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767, 818–22 (2001) (attacking the governmental prescription of expressive “orthodoxy”). *But see* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 945–47 (1995) (“[I]t has never been the case that ‘officials,’ whether high or petty, have been forbidden from prescribing ‘what shall be orthodox’ in politics, nationalism, and other matters of opinion . . . .”) (footnotes omitted).

<sup>88</sup> *See* Bhagwat, *supra* note 17, at 330–37.

<sup>89</sup> Note that this interest is illegitimate *only* as a basis for restricting the free speech clause of the First Amendment; it might be a perfectly acceptable justification for other government policies, including ones which restrict other constitutional provisions.

flag-burning cases are correct that the State may not suppress speech in order to impose upon adults a particular set of values or beliefs favored by the government,<sup>90</sup> the application of that principle to children is less clear. Of course, *Barnette* itself involved children in the public school setting.<sup>91</sup> But the facts of *Barnette* were far more extreme than the indecency cases.<sup>92</sup> The government in *Barnette* attempted to *require* children to subscribe to an orthodoxy (by saluting the flag) that was contrary to their religious beliefs, without any claim that it was seeking to protect the children from harm.<sup>93</sup> The indecency cases, however, squarely raise the question of whether the State may properly "protect" children from values and ideas that, in the view of the State, will cause them "ethical and moral" harm.<sup>94</sup>

The problem, of course, is that children are different. We widely accept that children do not enjoy the same level of autonomy or the same range of "rights" as adults, and in particular, we accept that others — including parents, legal guardians, and in some circumstances, the State — possess the power to coerce children in ways unimaginable for adults (mandatory schooling laws being only the most obvious example).<sup>95</sup> The State also has a well-recognized interest in protecting children from harm, in some instances from harm by the children's own parents.<sup>96</sup> Does the anti-orthodoxy principle, then, have any application to children? In fact, the Supreme Court has made it quite clear that the principle *does* have some application — i.e., that the State does not possess unlimited power to shield children from ideas of which it disapproves. In *Erznoznik v. City of Jacksonville*, the Court explicitly made this point by striking down an ordinance prohibiting drive-in movie theaters from showing any movies containing nudity if visible from the street.<sup>97</sup> Judge Posner recently reached essentially the same conclusion in even

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<sup>90</sup> *Barnette*, 319 U.S. at 642.

<sup>91</sup> *Id.* at 624.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 630–31.

<sup>94</sup> One point should be clarified here. The various indecency regulations discussed thus far have been challenged not because of their effect on children, but because of their effect on *adult* speech (the exception being *Ginsberg*, where there was no impact on adult speech). In this Article, however, I am not concerned with the legal implications of such incidental effects — that is an issue of narrow tailoring which Eugene Volokh has analyzed thoroughly and, in my view, convincingly. See Volokh, *supra* note 15. My focus here is on the validity of the government's stated *purpose* in adopting these laws, which is to protect children — not adults — from speech.

<sup>95</sup> See, e.g., *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) (permitting drug testing); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990) (restricting abortion rights); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (restricting speech).

<sup>96</sup> See *supra* note 78 and accompanying text (citing *Prince v. Massachusetts*, 321 U.S. 158 (1944)).

<sup>97</sup> 422 U.S. 205, 213–14 (1975):

Speech that is neither obscene as to youths nor subject to some other legitimate

more pointed terms, arguing that children *must* be provided some access to information — even controversial information — because “[p]eople are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.”<sup>98</sup> Given the underpinnings of the First Amendment, these statements must be correct. If one of the core purposes of the First Amendment is to prevent the government from using censorship to impose its own political and moral values on the population, then entirely exempting children from that protection would create a gaping hole in that purpose, since after all, most people’s values, beliefs, and world views are formed during childhood. Permitting the State to completely control “the ethical and moral development” of minors threatens to produce the worst kind of tyranny — a point made by Judge Posner using the example of the Hitler Jugend during World War II.<sup>99</sup> In other words, whatever the State’s general power to protect children from harm, the kind of ideological injury at issue in the indecency cases simply cannot qualify as a relevant kind of “harm” when the issue is the nature of First Amendment limits on the State’s power to suppress speech.<sup>100</sup>

The indecency problem, however, is not fully resolved by these principles because, for better or for worse, the Court has quite clearly treated sexually explicit

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proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors.

<sup>98</sup> *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001) (enjoining enforcement of municipal ordinance limiting minors’ access to violent video games); *see also* *Video Software Dealers Ass’n v. Webster*, 968 F.2d 684, 689 (8th Cir. 1992) (rejecting a law aimed at protecting minors from “slasher” films); *Cyberspace Communications, Inc. v. Engler*, 55 F. Supp. 2d 737, 749 (E.D. Mich. 1999), *aff’d*, 238 F.3d 420 (6th Cir. 2000) (recognizing the need for teens to discuss sexual issues — such as birth control, abstinence, and rape — in an online forum).

<sup>99</sup> *Kendrick*, 244 F.3d at 576–77.

<sup>100</sup> My analysis here clearly draws a sharp distinction between the State’s power to protect children generally from harm even against the wishes of their parents — which is widely acknowledged and which I do not question — and the State’s power to protect children from *ideas*, which I reject as violating the First Amendment. I acknowledge, however, that this distinction may not always be an easy one to draw in situations where conduct becomes intertwined with speech. Consider the example of a parent who supports his or her child’s desire to pose for sexually explicit pictures (suggested to me by Eugene Volokh in a conversation). In these situations, as a realistic matter, the government’s legitimate interest in protecting a child from non-ideological harm should — and presumably will — trump any First Amendment concerns. But in most cases, where the *only* state concern is minors’ exposure to inappropriate speech, the distinction remains a crucial one. *Cf.* *PSINet v. Chapman*, 167 F. Supp. 2d 878, 887 (W.D. Va. 2001) (failing to recognize the distinction between government regulation of parental conduct, where the government may legislate values even if contrary to parents’ values, and government regulation of *speech*).

speech differently from other speech in its First Amendment jurisprudence.<sup>101</sup> Thus even though, in general, the First Amendment almost certainly would be a bar to efforts by the State to shield minors from "inappropriate" speech (e.g., communist writings), it might not be a bar to such efforts directed at sexual speech. Indeed, in the sexual speech context, even with respect to adults, there are limits to the anti-orthodoxy rule, as demonstrated by the law of obscenity which permits the State to suppress speech *purely* because of its disapproval.<sup>102</sup> Given this differential treatment of sexual materials, it may be that the State possesses greater power to shield children from *sexually* oriented ideas and images than other ideas and images. Indeed, that seems to be the clear implication of recent cases striking down state efforts to shield minors from violence while continuing to recognize the State's power with respect to sexual materials.<sup>103</sup>

One way to resolve this conundrum might be to argue that the Supreme Court is simply wrong to treat sexuality differently from all other subjects of speech. After all, why should this one topic be subject to vastly greater state regulation than any other speech? One might argue, for example, that targeting sexual speech alone, as the Court and much legislation has done, is underinclusive and violates equality principles,<sup>104</sup> especially given the lack of empirical evidence that sexual speech harms minors. The Court has never given a clear answer to this criticism, relying instead on precedent and a rather shaky reading of history to justify its singling out of sexual speech, most notably in its decisions holding "obscenity" to be unprotected speech.<sup>105</sup> Regardless, the disfavored treatment of sexual speech is

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<sup>101</sup> See, e.g., *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (nude dancing); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) (cable television programming); *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986) (zoning of adult theaters); *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity).

<sup>102</sup> See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973) (permitting legislatures to ban obscene materials because they may conclude that "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex"). It should be noted that some have argued that the main reason to regulate obscenity is offensiveness. See, e.g., *Kendrick*, 244 F.3d at 574. That justification is clearly inadequate because current law permits punishing the purely private viewing or sale of obscene materials. See *Paris Adult Theater I*, 413 U.S. at 57; *United States v. Reidel*, 402 U.S. 351 (1971) (permitting prosecution for mailing of obscene materials); cf. *Stanley v. Georgia*, 394 U.S. 557 (1969) (holding that purely private possession of obscene materials within one's own home may not be prosecuted under the First Amendment).

<sup>103</sup> See *Kendrick*, 244 F.3d 572; *Webster*, 968 F.2d at 689.

<sup>104</sup> Cf. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992) (discussing "underinclusiveness" but ultimately rejecting a law based on "content discrimination"); *Carey v. Brown*, 447 U.S. 455, 461-62 (1980) (rejecting a law that prohibited all "nonlabor" picketing).

<sup>105</sup> See *Roth*, 354 U.S. at 482 & n.12 (concluding that obscenity may be barred because,

probably too well established, both culturally and within the precedent, to be challenged at this late date.

A better resolution of these issues might be found by examining the relative roles of parents and the State in this area. In particular, it should be borne in mind that when the State exercises control over the upbringing of a minor, particularly by limiting her access to disfavored speech, two different sets of constitutional principles, or rights, are implicated. First, of course, the State is directly interfering with the child's access to speech. But in addition, the State also may be interfering with the child's *parents'* power to have primary control over the child's moral and intellectual development and upbringing. As noted earlier, this power, or right, has been recognized by the Court to have constitutional dimensions.<sup>106</sup> The two leading cases from the 1920s establishing this right each involved conflicts between parents and the State over *education*. In *Meyer*, the Court struck down a statute forbidding the teaching of foreign languages in schools,<sup>107</sup> and in *Pierce*, the Court invalidated a law requiring parents to send their children to public schools.<sup>108</sup> Thus, both cases involved *speech*, in a very real sense, and should be understood to rest on modern First Amendment principles, as the Court has since recognized.<sup>109</sup> *Meyer* and *Pierce* limit the State's power to suppress speech in the context of *education*, an area where the State enjoys broad authority.<sup>110</sup> Given the Court's limitation of governmental power in those cases, it follows that the State may not censor purely private speech in an effort to control children's upbringing. These cases suggest a

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in 1792, all fourteen states "made either blasphemy or profanity, or both, statutory crimes"). Ignoring the problem of incorporation (*i.e.*, that the First Amendment did not apply to the states in 1792), one wonders if the Court would interpret this history to treat "blasphemy" also as a disfavored form of speech.

<sup>106</sup> See *supra* note 67 and accompanying text.

<sup>107</sup> *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>108</sup> *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

<sup>109</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (tracing holdings of *Meyer* and *Pierce* to the First Amendment): Because these cases were decided during the *Lochner* era, their doctrinal result was based on the Due Process Clause of the Fourteenth Amendment and the 1920s Court's understanding of the concept of "ordered liberty," rather than the First Amendment. Given the demise of the libertarian judicial ideology of that time, however, the continued vitality of those cases (which no one seriously questions) must be defended by reference to some narrower constitutional principle, and the First Amendment seems the obvious candidate. Of course, since the 1920s, the right recognized in those cases has evolved well beyond the confines of speech and education, and has become an aspect of the unenumerated "privacy" right recognized in *Griswold* and *Roe v. Wade*, 410 U.S. 113 (1973). See *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (plurality opinion) (recognizing as fundamental the liberty interests of parents in the care, custody, and control of their children). But the relationship between the First Amendment and the holdings in *Meyer* and *Pierce* remains recognized, even by members of the Court who generally support an unenumerated privacy right. See *id.* at 95 (Kennedy, J., dissenting).

<sup>110</sup> See *Pierce*, 268 U.S. at 534; *Meyer*, 262 U.S. at 398.

reconciliation of the anti-orthodoxy principle with the special status of children. The anti-orthodoxy principle is based on the presumption that adult citizens are competent and able to make their own judgments about political and moral issues, and therefore the State simply may not suppress speech in an effort to influence those judgments.<sup>111</sup> Obviously, the same assumptions about competence and ability cannot be made about children, and so *some* control over children's access to information and speech is inevitable. However, the power to control minors' access to "unsuitable" speech, whether sexual or otherwise,<sup>112</sup> is given to parents, and it remains true that the First Amendment prohibits the State from suppressing speech in an effort to control children's "ethical and moral" development. In so far as the Court has suggested otherwise in *Ginsberg* and subsequent cases, it is simply wrong.<sup>113</sup>

The implications of these conclusions for the indecency cases seem fairly clear. First, sexuality is an important component of education and human development, and as such, state control over value development in that area raises serious First Amendment concerns. Indeed, perhaps strangely, it is the very centrality of sexuality to human values and experience that has led the Court to grant the State greater regulatory leeway with respect to sexual speech.<sup>114</sup> For this same reason, parental control over the development of children's attitudes and values in this area is particularly important. Parental control is essential both to protect the parental role *and* as an important restriction on the State's power to create and enforce an orthodoxy on its future citizens — an objective which lies at the core of the First Amendment's purposes. It should be noted in this regard that the existence of an independent governmental interest in shielding children from indecency has significance *only* when deployed to justify a regulation which acts contrary to, or in the absence of, the expressed desires of parents. In other words, the real issues

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<sup>111</sup> See *Pierce*, 268 U.S. at 534–35; *Meyer*, 262 U.S. at 400.

<sup>112</sup> See *infra* note 124 and accompanying text.

<sup>113</sup> One qualification is necessary here. It is obvious that the Court has treated "obscene" speech, as narrowly defined in a sui generis fashion, *see supra* note 6 and accompanying text, denying it all constitutional protection without any particular explanation. Insofar as *Ginsberg's* holding is limited to *obscene* speech, even "obscene as to children," the holding is not inconsistent with the broader body of the Court's jurisprudence, despite its internal inconsistencies. *Ginsberg v. New York*, 390 U.S. 629, 634–36 (1968). However, later cases, with little thought or discussion, have extended the reasoning in *Ginsberg* to merely "indecent," nonobscene speech. That last move is inconsistent with broader principles, and should be reconsidered.

<sup>114</sup> See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973) (describing sexual materials as implicating "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality"); *Roth v. United States*, 354 U.S. 476, 487 (1957) ("Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.").



here are whether the government has the right to *trump* parental desires regarding their children's access to sexually oriented speech, and whether the government has a right to restrict speech in the face of parental inaction, which in turn might reflect parental inertia or indifference.

On the first question — whether the government may trump parental preferences — the above analysis clearly indicates that when there is a direct clash between the government's views on what are "appropriate" materials for a minor and the parent's own views, the parents views must prevail. In fact, the debate on this issue has been remarkably muted because the government generally has shied away from claiming such a power. Even the most vocal supporters (including the government) of an independent state interest in protecting children from indecent materials did not seriously dispute this point in *Playboy*, albeit no explanation was given concerning how this concession is reconcilable with such an independent state interest.<sup>115</sup> The Court has also studiously avoided addressing any potential conflict between the two compelling interests it identified in *Ginsberg*.<sup>116</sup> Insofar as the issue has arisen (mainly in the lower courts), the almost-universal conclusion seems to be that the governmental interest must yield to the parents' wishes.<sup>117</sup> The reasons behind this consensus, however, seem to be instinctual rather than analytical. And logically, under the Court's current analytical structure, the possibility remains that under some circumstances the government might have the power to deny minors access to speech, even if contrary to their parents' desires.

More broadly, however, the above discussion of the anti-orthodoxy principle

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<sup>115</sup> See *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 842 (2000) (Breyer, J., dissenting) (describing independent governmental interest as in preventing young children from "watching virulent pornography *without parental consent*") (emphasis added); Appellants' Brief, *Playboy* (No. 98-1682), available at 1999 WL 700620, at \*34-\*35 (arguing that Section 505 does not prevent parents from exposing their children to indecent materials, should they choose to do so); Transcript of Oral Argument, *Playboy* (No. 98-1682), available at 1999 U.S. TRANS LEXIS 60, \*1-\*20 (arguing, as an attorney for the United States, that Congress did not seek to trump parental desires, but only to limit children's access to indecent materials without parental consent); see also *Action for Children's Television v. FCC*, 58 F.3d 654, 663 (D.C. Cir. 1995) (concluding that the government's independent interest is in "shielding minors from being exposed to indecent speech by persons other than a parent," and permitting parents to expose their children to sexual materials if the parents so desire).

<sup>116</sup> *Ginsberg v. New York*, 390 U.S. 629, 639-41 (1968) (recognizing the parental interest in rearing their children and the State's interest protecting in the "well-being" of its minors).

<sup>117</sup> See *Fabulous Assocs., Inc. v. Pennsylvania Pub. Util. Comm'n*, 896 F.2d 780, 788 (3d Cir. 1990) (arguing that "[n]o constitutional principle is implicated" when parents choose to provide their minors with access to dial-a-porn services); *Action for Children's Television*, 58 F.3d at 678 (Edwards, C.J., dissenting); *id.* at 686 (Wald, J., dissenting) (describing the government's interest as "complementary" to parental interests); cf. *Reno v. ACLU*, 521 U.S. 844, 878 (1997) (suggesting that the governmental interest in protecting minors from indecency must yield to parental wishes under some circumstances).

strongly suggests that there is simply *no* independent governmental interest in shielding children from indecent materials, even in the face of parental inaction. The *only* basis for such an interest would have to be the government's purported desire to control the "ethical and moral" development of the child, a point conceded by proponents of such an interest.<sup>118</sup> But any such moral or ethical interest on the part of the State directly contradicts the notion that the First Amendment prohibits the State from promoting any sort of a political or ideological agenda through the suppression of speech and that, with respect to children, any necessary control over access to speech is vested in parents, *not* the State.

This is not to say, however, that the State has *no* valid regulatory interests in this area. As suggested above, the State's interest in facilitating parental control over their children's exposure to speech actively advances the First Amendment principles identified in *Meyer* and *Pierce*.<sup>119</sup> The State therefore remains free to act in this area, but *how* it may act depends crucially on what interests it may pursue. Given the lack of an independent governmental interest in advancing a moral orthodoxy, it is crucial that when the State acts, it does so only to assist parents in controlling their children's access to speech, and that the parents retain the decision-making power as to *which* speech might be inappropriate.

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<sup>118</sup> See Appellants' Brief, *Playboy* (No. 98-1682), available at 1999 WL 700620, at \*31 n.22 ("Concerns about minors' exposure to [indecent] material are based on commonly held moral views about the upbringing of children . . .").

<sup>119</sup> See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (asserting the parental right to direct their children's education and exposure to instruction); *Meyer v. Nebraska*, 262 U.S. 390, 399-403 (1923) (declaring unconstitutional a law prohibiting the teaching of any language other than English in school). It should be noted, moreover, that the parental interest in controlling children's access to speech, and the State's interest in facilitating that control, is in no way limited to sexual or indecent speech. As the *Meyer* and *Pierce* cases indicate, parents have a constitutionally cognizable interest in exposing their children to speech of which the State disapproves. *Id.* Additionally, as *Wisconsin v. Yoder*, 406 U.S. 205 (1972), indicated, parents also have a cognizable interest in shielding their children from speech of which they disapprove. There seems no reason to doubt that the State may facilitate parental decisions in this regard. Of course, if state facilitation efforts burden access to such speech for those who do not disapprove of it, such efforts might nonetheless be unconstitutional. Furthermore, one suspects that outside of the context of sexual speech, very little burden on others would be permitted in the name of facilitation, because the constitutional protection accorded such speech is likely to be extremely high since the speech at issue is likely to be controversial for political reasons. Thus, in practice, the State is likely to have little regulatory leeway, since almost all attempts at facilitation impose *some* burden on the regulated speech.

### III. A MODEL FOR ANALYZING THE GOVERNMENT INTEREST IN PROTECTING CHILDREN

The above discussion indicates that there are two distinct policies driving governmental regulation of sexually explicit speech. First, there is a relatively uncontroversial governmental interest in facilitating the parental role in raising and controlling their children, and in helping parents to inculcate their children with the parents' values. Second, there may be an independent governmental interest in creating a morally virtuous citizenry, which would potentially justify governmental control over children's access to "immoral" materials, regardless of their parents' wishes. There are strong arguments to be made that the latter interest, though unquestionably driving much of the recent legislative activity against indecency, is not legitimate, much less compelling, because it is inconsistent with the policies underlying the First Amendment.<sup>120</sup> Ultimately, however, one's conclusions regarding the validity of the independent governmental interest turn on one's views of the State's proper role in a democratic society and on the fundamental purposes of the First Amendment. Wide disagreement continues to exist on these issues, and the courts themselves have not definitively rejected an independent governmental interest (however far the *Playboy* majority may have moved in this direction).<sup>121</sup> The analysis below, therefore, will proceed by explaining both possibilities — that an independent governmental interest does exist, and that such an interest does not exist.

Whether there exists two distinct and compelling governmental interests in regulating children's access to indecent materials has important implications for governmental authority. The two interests interact with each other and with other factors relevant to indecency regulation in complex ways. The balance of this Article will explore the nature of those interactions and the implications this has for various regulatory schemes, both actual and proposed.

#### A. A Matrix

The starting point for analysis must be to ask why it *matters* if the government has an independent interest in regulating indecency. After all, it is universally agreed that the State has a compelling interest in facilitating parental control over children's access to sexual materials,<sup>122</sup> so why is that interest not sufficient to

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<sup>120</sup> See *supra* notes 106–18 and accompanying text.

<sup>121</sup> See *supra* note 61 and accompanying text; see also *ACLU v. Reno*, 217 F.3d 162, 173 (3d Cir. 2000), *rev'd on other grounds sub nom. Ashcroft v. ACLU*, 535 U.S. 564 (2002) (stating "[i]t is undisputed that the government has a compelling interest in protecting children from material that is harmful to them, even if not obscene by adult standards").

<sup>122</sup> See *supra* notes 66–67 and accompanying text.

justify government regulation? The answer lies in the potential tensions between governmental and parental values regarding sexuality. The following matrix sets forth one useful way to envision this point. It draws upon Justice Jackson's famous analysis of executive authority in *Youngstown Steel*<sup>123</sup> and analyzes governmental power as a function of both the nature of the governmental interest in regulation and of parental approval or disapproval of governmental policies:

**Strength of Governmental Interest in Regulating Indecent Speech**

	Parents Share Governmental Values	Parents Are Neutral/Distracted	Parents Oppose Governmental Values
Independent State Interest	Very strong governmental interest in regulating indecency	Strong governmental interest in regulating indecency	Weak or no governmental interest in regulating indecency
No Independent State Interest	Strong governmental interest in regulating indecency	Governmental interest in facilitating parental supervision <i>only</i>	No legitimate governmental interest

As the first column of this matrix indicates, if all parents shared the government's preferences and values regarding the ethics and morality of sexuality, the existence of an independent governmental interest would be irrelevant because *a fortiori* any governmental censorship advancing such an independent interest would also directly advance the interest in facilitating parental control. Perhaps unsurprisingly, the strongest judicial supporters of an independent governmental interest have tended to sidestep the most problematic aspects of that interest by *assuming* that all or the vast majority of (or all good?) parents share the State's values in this area, and so the two interests work perfectly in tandem.<sup>124</sup>

What if, however, the assumption of perfect congruence of values was not justified? What if there was some divergence between parental and governmental values in this area? In that situation, the distinction between the two governmental interests has important implications. Before exploring those implications, however, it is worth examining *how* and *why* such a divergence between parents and the State

<sup>123</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring) (analyzing the independent executive authority as being strongest when Congress authorizes the action, at its weakest when Congress disapproves of the action, and in a "zone of twilight" when Congress is silent).

<sup>124</sup> See *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 843–45 (2000) (Breyer, J., dissenting) (describing as a "remote" possibility that fully informed parents would not choose to block materials being censored by the challenged statute); *Action for Children's Television v. FCC*, 58 F.3d 654, 663 (D.C. Cir. 1995) (describing the two governmental interests as "complementary," not in conflict).

might occur.

At first glance, such a divergence seems odd — after all, what parent would want her young children to view pornography?<sup>125</sup> The difficulty is that “indecent” materials are not limited to pornography. Under most definitions, any sexual speech that is considered “patently offensive” under local community standards (as understood by a jury) qualifies,<sup>126</sup> and unlike the definition of “obscenity,” the indecency standard *does not* require that the regulated speech “taken as a whole, lacks serious literary, artistic, political, or scientific value.”<sup>127</sup> Most indecency regulations prohibit communication of such materials to all minors, which covers everything from two-year-olds to seventeen-year-olds.<sup>128</sup> Under such a standard, especially in conservative communities, many materials that are far from pornography by any reasonable definition would be prohibited, even to teenagers. As the Court noted in *Reno v. ACLU*, the indecency standard could cover “discussions about prison rape or safe sexual practices, artistic images that include nude subjects, and arguably the card catalogue of the Carnegie Library.”<sup>129</sup> The broad statute at issue in *Reno* might have condemned “a parent who sent his 17-year-old college freshman information on birth control via e-mail . . . even though neither he, his child, nor anyone in their home community, found the material ‘indecent’ or ‘patently offensive,’ if the college town’s community thought otherwise.”<sup>130</sup> Indeed, in the *Pacifica* case, the Court upheld application of the “indecency” standard as applied to the radio broadcast of a political satire because it used “patently offensive” words.<sup>131</sup> Even in the *Playboy* case, which primarily involved visual programming which fairly clearly qualified as pornography, there were issues raised about the precise scope of the indecency standard.<sup>132</sup>

The effect of the indecency standard, then, is to impose upon parents the views and values of the local majority regarding what is appropriate fare for minors and regarding the appropriate treatment of sexuality in the upbringing of children through to adulthood. When these facts are taken into account, the possibility of

<sup>125</sup> See *Playboy*, 529 U.S. at 842 (Breyer, J., dissenting) (describing “an 8-year-old child . . . watching virulent pornography”).

<sup>126</sup> See *supra* note 1.

<sup>127</sup> *Miller v. California*, 413 U.S. 15, 24 (1973).

<sup>128</sup> See *Reno v. ACLU*, 521 U.S. 844, 870–71 (1997); *FCC v. Pacifica Found.*, 438 U.S. 726, 732 (1978); *Action for Children’s Television*, 58 F.3d at 657.

<sup>129</sup> *Reno v. ACLU*, 521 U.S. 844, 878 (1997).

<sup>130</sup> *Id.*

<sup>131</sup> *Pacifica Found.*, 438 U.S. at 745. Ironically enough, the satire — a monologue by George Carlin — was targeted at, among other things, rules forbidding the broadcasting of such “filthy words.” *Id.* at 751.

<sup>132</sup> Appellee’s Brief, *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803 (2000) (No. 98-1682), available at 1999 WL 756117, at \*26–\*29 (noting uncertainty about whether challenged statute covered AIDS awareness programs).

conflicts between governmental (or majority) and parental values becomes quite clear. There are broad moral differences both within this country and within local communities regarding the appropriateness of sex education and the exposure of minors to important but sexually tinged issues such as the AIDS epidemic or prostitution, and more broadly regarding the moral implications of nudity and sexuality. There may be few parents who would want their eight-year-old viewing "virulent pornography,"<sup>133</sup> but what about Michelangelo's David? What about a parent wishing to educate a fifteen-year-old about birth control and AIDS?

Moreover, there is another complication here: Parental preferences in this area might not be limited to positive approval or disapproval of particular speech. Instead, some parents might not take — or wish to take — active steps to expose their minor children to sexually oriented materials, but might also not wish to shield them from such materials, viewing casual exposure to sexuality as a natural part of growing up (*i.e.*, that it is normal to learn about sex "on the street"). In other words, it might be that some parents *consciously choose* to be "indifferent" about their children's exposure to sexually explicit materials.<sup>134</sup> In that situation, as with an explicit difference in values between parents and the State, a conflict in preferences is quite possible. A highly successful governmental censorship scheme might substantially limit the possibility of minors being casually exposed to sexual speech (though admittedly, a less successful regulatory program might well be consistent with the desires of consciously indifferent parents).

With this background in mind, it is possible to examine the implications for regulatory authority of a conflict between governmental and parental values. Consider first the possibility that some or many parents might sharply disagree with the State's value choices in this area and positively desire to expose minors to sexually explicit materials (represented by the last column of the matrix).<sup>135</sup> Then, one would face a direct conflict between the two governmental interests in regulating indecency, because any effort to advance the government's independent interest in shielding children would necessarily burden some parents' preferences about their children's upbringing. In principle, there is no inherent reason why the government's independent interest in shielding children might not trump parental choices, and so the possibility of residual government regulatory power exists.<sup>136</sup> In fact, however, few people today seem to argue this position, and thus in practice, the courts probably would not permit an independent governmental interest in shielding children from materials disapproved by the government to trump parental

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<sup>133</sup> See *Playboy*, 529 U.S. at 842 (Breyer, J., dissenting) (utilizing the phrase "virulent pornography" in his analysis).

<sup>134</sup> I am grateful to Eric Spiegelman for this insight.

<sup>135</sup> See *supra* p. 697.

<sup>136</sup> See Appellants' Brief, *Playboy* (No. 98-1682), available at 1999 WL 700620, at \*34–\*35 (suggesting that parental interests might not prevail over the government's interest).

preferences.<sup>137</sup> In this situation, as in the situation of complete convergence between parental and governmental values, the existence of an independent governmental interest would not matter a great deal. Without such an interest, the government obviously has no interest in censoring indecent materials. But even if such an interest existed, under current views it seems insufficient to justify censorship of materials to which parents believe their children should be exposed.

### *B. Parental "Inertia, Indifference or Distraction"*

That leaves the third possibility, the one generally emphasized by proponents of regulation: Most parents neither fully approve of nor actively oppose governmental policies, but rather they suffer from "inertia, indifference, or distraction."<sup>138</sup> In this situation, represented by the middle column of the above matrix,<sup>139</sup> the distinction between the two governmental interests is crucial. If the government does have an independent interest in regulating indecency, then strong regulations — including absolute bans on indecent speech accessible to children — are probably justifiable as the only effective way to advance the government's interest in protecting children, given that parents cannot be counted upon to act on their own. There is no conflict with parental desires, so there are no clashing constitutional policies. If, on the other hand, the government does not have an independent interest in controlling children's access to sexually explicit materials, then governmental power is vastly reduced. The most that the government would be justified in doing is helping parents overcome their inertia by reducing the transactions costs of supervising their children — *i.e.*, imposing regulatory requirements which make it easier and less costly for parents to control their children's access to sexual materials, without making it substantially more difficult for minors whose parents do *not* oppose this to access particular speech.

That last point is critical. A positive bias for or against a particular outcome with respect to minors' access to sexually explicit speech would not be justified absent an independent governmental interest, since by hypothesis the government must be neutral as to the ultimate result unless it can assume a convergence of values between itself and parents. Most modern regulation seems to be based on such an assumption, to wit, that most or all parents fully agree with the State's moral preferences in this area but lack the time and will to implement their choices. As discussed above, however, for many parents indifference might not reflect

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<sup>137</sup> See, *e.g.*, *Fabulous Assocs., Inc. v. Pennsylvania Pub. Util. Comm'n*, 896 F.2d 780, 788 (3d Cir. 1990) (asserting the parental discretion and ultimate authority in prohibiting their children from accessing indecent materials).

<sup>138</sup> This category is particularly important because, as I argue below, it probably includes the vast majority of parents in this country. See *infra* notes 151–53 and accompanying text.

<sup>139</sup> See *supra* p. 697.

inertia, but instead might reflect a laissez-faire choice with no positive desire to expose minors to sexually explicit materials but also with no desire to shield them.<sup>140</sup>

Determining the dominant explanation is empirical in nature and is likely to vary based on geography, parental values, and perhaps most importantly, the ages of the children involved. The burden of proof on such issues normally would lie with the government to justify censorship. It must be acknowledged, however, that the issues at stake here are extremely complex and difficult to measure or prove. For that reason, at times the State must be permitted to make reasonable judgments if its regulatory authority is not to be denuded. On the other hand, there is an obvious and pervasive risk that such judgments will be colored by the regulators' own values and preferences — an impermissible result given the requirement of neutrality. Thus, with respect to parents in the middle column,<sup>141</sup> constitutional limits on the State's regulatory options are quite complex. In general, because of the possibility of conflict with parental values and desires, it seems preferable that the government be limited to regulatory options that facilitate parental preferences rather than directly censor speech. If, however, there are strong, intuitive reasons to believe that most parents are likely to share the State's disapproval of the speech at issue *and* facilitation of parental control is not a real option, the government retains the power to directly censor speech.

### *C. The Problem of Parental Diversity*

One important refinement is necessary to the above analysis. As set forth, the matrix assumes that all parents subject to particular regulation are the same — they either share the government's values, oppose those values, or are neutral.<sup>142</sup> In reality, that is obviously not the case. Ideological diversity is a fact of life in this country and indeed is one of the basic reasons why we have a First Amendment in the first place. Therefore, at any time, and given any particular set of state beliefs as to what speech is suitable for children, some parents will fully share those views, some will be indifferent or neutral towards the issue, and others will oppose the State's views. The result of this ideological diversity is that no governmental policy can perfectly advance the government's valid interests in this area.

The impossibility of perfectly advancing state interests is most obvious with respect to the interest in facilitating parental control. Even flat censorship of speech by the State facilitates parental control with respect to parents who fully share the government's values; but, of course, such regulation directly contravenes the facilitation interest for parents who disagree with the State and might also

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<sup>140</sup> See *supra* text accompanying note 139.

<sup>141</sup> See *supra* p. 697.

<sup>142</sup> See *supra* p. 697.



contravene the interests of “indifferent” parents.<sup>143</sup> Even non-censoring regulations that merely “reduce transactions costs” — *i.e.*, make it easier for parents to control their children’s access to sexual speech — and that thus *seem* to perfectly advance the government’s interest in facilitating parental control will not necessarily do so. Any such regulation is likely to increase the cost of providing the regulated speech and thus is likely to increase its price or reduce its availability. As a result, parents who disagree with the government’s values and *want* their children to be exposed to the regulated speech will find it more difficult to do so. Therefore, such regulation will inhibit and interfere with their ability to parent as they choose.

The difficulty in advancing the government’s aims is less serious with respect to the possible independent governmental interest in shielding children, since by definition a policy of censorship advances the State’s aims, regardless of the views of parents. A problem does arise, however, because of the general agreement that parental desires trump those of the State.<sup>144</sup> With respect to parents who agree with the government or truly suffer from inertia, there is of course no conflict; as such, censorship directly advances the government’s goals. But with respect to parents who disagree with the State, and with those who are “consciously indifferent” to their children’s exposure to sexually explicit speech, such censorship is problematic since it effectively trumps their preferences.

What implications does parental ideological diversity have for state regulatory authority over “indecent” speech? This question is one of tailoring — how closely must a regulatory policy align with the government’s aims to pass constitutional scrutiny? At a minimum, it seems clear that perfect alignment is not necessary even under strict scrutiny — if it were, few regulations of speech would be possible. On one reading of the doctrine in this area, seemingly championed by Justice Breyer dissenting in *Playboy*, so long as there is no equally effective and significantly less restrictive means of advancing the State’s goals, the lack of alignment — or alternatively, the burden placed on those *not* the target of the state policy — is irrelevant.<sup>145</sup> Thus, if a regulatory policy advances the State’s goal of facilitating *some* parents’ control over their children’s upbringing, the effect on others’ preferences or speech is irrelevant. However, as Eugene Volokh has pointed out, this reading of the strict scrutiny test seems too literal, because it places *no* limits on the State’s power to prohibit or limit speech in the name of pursuing a “compelling” interest.<sup>146</sup> Such an application of the test is in clear conflict with cases such as *Bulter v. Michigan*, which held that the State may not “reduce the

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<sup>143</sup> See *supra* text accompanying note 139.

<sup>144</sup> See *supra* notes 116–17 and accompanying text.

<sup>145</sup> *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 840–41 (2000) (Breyer, J., dissenting).

<sup>146</sup> Volokh, *supra* note 15, at 165–67.

adult population . . . to reading only what is fit for children.”<sup>147</sup> Furthermore, since any effort to “facilitate parental control” not only burdens speech but also inevitably *interferes* with some parents’ efforts to raise their children as they see fit, a reasonably accurate understanding of parental views seems necessary for the government to even argue that its regulations really do advance an interest in facilitating parental control. If the State is permitted to advance an independent interest in shielding children, then a less close fit might be permissible. But even under those circumstances, if a regulation interferes with substantial numbers of parents’ preferences, then those preferences *must* trump those of the State; as such, the degree of fit matters.

In practice, then, it matters a great deal how *most people* feel about indecent speech in assessing regulatory power — the more accurately the State has gauged parental views, the better the fit between any regulation and the State’s interests, especially when the interest is facilitation of parental control. If, for example, the vast majority of parents shared the State’s views about indecent speech and minors, then even flat bans on indecent speech might be a permissible means of advancing the State’s interest in facilitating parental control. In that situation, there is no doubt that censorship provides the most effective means of preventing minors from accessing such materials.<sup>148</sup> Indeed, most regulations of indecent speech seem to be based on a legislative assumption that all or most parents do agree with the legislators’ views about indecency and children, and the same assumption can be found in judicial opinions supporting such regulations.<sup>149</sup> Like the question of why some parents seem “indifferent” to their children’s exposure to indecent speech, this is of course an empirical issue, and one on which under strict scrutiny the State bears the burden of proof. The answers to the questions, however, are extremely complex and difficult to measure or prove. They also are susceptible to being influenced by the decision-makers’ preferences and biases. Therefore, caution is in order, especially regarding claims that most parents fully share the government’s values. Indeed, even the government has hesitated to explicitly make such a claim; rather, as typified by the *Playboy* litigation, the government’s argument has tended to be that parents suffer from “inertia, indifference, or distraction.”<sup>150</sup> For this

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<sup>147</sup> 352 U.S. 380, 383 (1957); *see also* *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 252 (2002) (“The Government cannot ban speech fit for adults simply because it may fall into the hands of children.”).

<sup>148</sup> As noted previously, *see supra* note 98, I am ignoring in this Article the burden that such censorship also places on *adult* speech, which might provide an independent reason to strike down such legislation, regardless of whether it is “narrowly tailored” to be the most effective means to advance the State’s goals.

<sup>149</sup> *See Playboy*, 529 U.S. at 842–43 (Breyer, J., dissenting); *Action for Children’s Television v. FCC*, 58 F.3d 654, 663 (D.C. Cir. 1995).

<sup>150</sup> Appellants’ Brief, *Playboy* (No. 98-1682), *available at* 1999 WL 700620, at \*16–\*17, \*32–\*35; Reply Brief, *Playboy* (No. 98-1682), *available at* 1999 WL 1021220, at \*12–\*13;

reason, flat censorship cannot be understood to advance the government's interest in facilitating parental control, and because of the possibility of conflict with consciously indifferent or nonconformist parents, it may not even *permissibly* advance an independent governmental interest.

At the other extreme, if *most* parents actively oppose the government's views on indecent speech, then any governmental regulation of such speech is probably not a permissible means of facilitating parental control, since such regulation will undoubtedly interfere with those parents' preferences regarding their children. In practice, however, this scenario is even less likely to be true than the possibility of the vast majority of parents completely sharing the government's values. Indeed, in a democratic form of government, it seems true almost by definition that a majority of the population (or of parents, which seems to be a reasonably representative subset of the general population) will not completely oppose the views of the legislature regarding an important issue of public policy. As a practical matter, it seems extremely unlikely that a large portion of parents in the United States actively desire their children, even their teenagers, to have access to sexually explicit speech.

In fact, the true state of affairs is likely to be a muddle: Most parents do not zealously share the State's desires to shield minors from *all* indecent speech, but neither do they actively desire exposure across the board. Rather, many — perhaps most — parents are probably largely indifferent to the treatment of indecent speech or, because of inertia, fail to actively supervise their children's access to such speech (though as noted above, some substantial ambiguity remains about whether this inertia or indifference is a product of apathy or of conscious choice<sup>151</sup>). Many other parents agree with the State or the community that *some* children should be shielded from *some* indecent speech (*e.g.*, young children and "virulent pornography") but disagree that all children should be shielded from all indecent speech (*e.g.*, teenagers and information about AIDS or birth control).

In this situation, regulatory efforts to reduce the difficulty and costs of parents exercising control seem permissible, because such efforts tend to maximize parental flexibility. Whereas any such efforts will inevitably interfere to *some* extent with some parents (notably parents whose values are highly opposed to the majority's), the interference is likely to be fairly limited and therefore not sufficiently substantial to raise constitutional concerns.<sup>152</sup> On the other hand, active suppression

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*see also Playboy*, 529 U.S. at 842–43 (Breyer, J., dissenting) (discussing parental indifference); *Action for Children's Television*, 58 F.3d at 661 (stating that most parents are unable to effectively supervise their children's television viewing).

<sup>151</sup> See *supra* note 134 and accompanying text.

<sup>152</sup> Some balancing, of course, is inevitable here, since as noted earlier, no regulatory policy can perfectly advance the State's interests in this area while imposing *no* collateral burdens. But it seems fairly clear that the balance cuts in favor of regulations purely facilitating parental control.

of merely indecent speech by the State seems clearly impermissible as a means of facilitating parental control, since such efforts inevitably will conflict with the desires of many parents. Because of the existence of diversity among parents and the availability of regulatory alternatives that reduce the barriers to parental control, actual suppression of speech in the name of facilitating parental control should be permitted only if: (1) almost all parents would agree that the suppressed speech is inappropriate for minors (a condition which might be satisfied with respect to the most graphic pornography but is not likely to hold for much else); *and* (2) the State cannot effectively enhance parental control over their children's access to such materials. This presumably is a rare combination.<sup>153</sup>

Finally, it should be noted that if there really is an independent state interest in shielding children from indecent speech, then the argument in favor of more aggressive regulation that actually suppresses indecent speech becomes much stronger. This is true most obviously because censorship provides the most direct means of advancing such an interest. In addition, it is highly doubtful that such censorship would interfere with a substantial number of parents who actively wish to expose their children to particular "indecent" speech, so long as a regulation does not completely ban particular forms of speech and so retains some avenues for parents to circumvent regulatory limits.<sup>154</sup> Therefore, the problem of "trumping" parental preferences might not bar such regulation. Ultimately, the permissibility of such regulation would turn on a case-by-case analysis of the types of speech suppressed by the regulation and the degree to which parents share or oppose the government's objectives.

In short, in the real world of ideological diversity and parental inertia and indifference, it matters a great deal in analyzing regulations of indecent speech whether the State has an independent interest in shielding children from such speech, in addition to its undoubted interest in facilitating parental desires in this regard. It is of course the premise of this Article that, for all of the reasons

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<sup>153</sup> In addition to these other barriers, a censorship scheme would also need to clearly define the prohibited materials in terms that exclude materials upon which parents disagree. It is not at all clear how such a definition would be stated, suggesting that the need to create a clear definition of "graphic pornography," for example, poses a substantial — and perhaps insurmountable — barrier to such a regulatory scheme.

<sup>154</sup> See *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) ("[T]he prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children."); *Action for Children's Television*, 58 F.3d at 663 ("Today, of course, parents who wish to expose their children to the most graphic depictions of sexual acts will have no difficulty in doing so through the use of subscription and pay-per-view cable channels, delayed-access viewing using VCR equipment, and the rental or purchase of readily available audio and video cassettes."); cf. *Reno v. ACLU*, 521 U.S. 844, 865 (1997) (noting that one problematic aspect of the CDA was that "neither the parents' consent — nor their participation — in the communication would avoid the application of the statute").

discussed earlier,<sup>155</sup> no such independent interest exists. It follows from this conclusion (though not as directly as one might presume) that the best governmental regulations of indecent speech generally are those that facilitate parental control over their children by lowering the barriers to and costs of such control. Direct suppression of indecent speech is permissible *only* if such facilitating measures are not practical and there is strong reason to believe that most parents share the government's views regarding the harmful effects of the censored speech.

#### IV. IMPLICATIONS FOR CURRENT REGULATIONS

This Part of the Article examines the implications of the above analysis and conclusions for a variety of specific regulatory schemes that have been proposed or enacted in recent years. The analysis will proceed by examining various different electronic communications media because the nature of regulatory schemes has tended to depend sharply on the medium being enforced, and the practical impact of particular regulation also has tended to depend significantly on the nature of the communications medium.<sup>156</sup>

##### A. Broadcast Regulation

Broadcast radio and television is the oldest form of electronic mass media. It is also the most heavily regulated, as a result of an extensive and intrusive regulatory scheme set forth in the Communications Act of 1934<sup>157</sup> and a series of Supreme Court decisions holding that broadcasters may constitutionally be subject to extensive, even content-based regulation.<sup>158</sup> On the subject of indecent speech, radio broadcasters are prohibited statutorily from broadcasting any "obscene, indecent, or profane language."<sup>159</sup> In *Pacifica Foundation*, the Court held that the FCC may bar the transmission of indecent or offensive language during daytime hours, when children are likely to be exposed to it.<sup>160</sup> Relying on this holding, the

<sup>155</sup> See *supra* Part II.

<sup>156</sup> I do not discuss the print media simply because there is little continuing debate in this area. In *Ginsberg*, the Court held that the State may ban the sale of sexually explicit materials to minors (though in *Ginsberg*, the actual ban was on materials obscene as to minors, not indecent materials). *Ginsberg*, 390 U.S. at 631 n.1. In *Butler v. Michigan*, 352 U.S. 380 (1957), however, the Court struck down an absolute ban on the sale of indecent materials. This area of the law seems well established and is largely uncontroversial at present.

<sup>157</sup> 47 U.S.C. §§ 1-1110 (2000). The Communications Act amended and expanded upon a regulatory regime first established in 1927.

<sup>158</sup> See, e.g., *CBS v. FCC*, 453 U.S. 367 (1981); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969); *Nat'l Broad. Co. v. United States*, 319 U.S. 190 (1943).

<sup>159</sup> 18 U.S.C. § 1454 (2000).

<sup>160</sup> *Pacifica Found.*, 438 U.S. at 748-51; *id.* at 760-61 (Powell, J., concurring in part and

D.C. Circuit in *ACT III*, decided in 1995, upheld a congressional statute and FCC regulations banning the broadcast of indecent materials over radio or television during daytime hours, finding that such a rule was narrowly tailored to advance the State's dual compelling interests in facilitating parental supervision and shielding children from indecent materials.<sup>161</sup> Thus, under current law, broadcasting of indecent materials is strictly limited to nighttime hours, which are defined as between 10 p.m. and 6 a.m.

Is the use of "time-channeling" rules to restrict indecent speech in broadcasting consistent with the analysis developed here? To begin with, it is obvious that time-channeling rules seem designed more to advance an independent government interest in shielding children rather than an interest in facilitating parental control, because they do not *directly* advance parental control in any way. As such, the rules seem problematic if no such independent interest exists. However, there is a difficulty in relation to broadcasting in that, at least until recently, there was no simple way for the government to directly assist parents in controlling their children's viewing. Certainly in 1978, and probably also in 1995, television and radio broadcasts simply entered the home and were picked up by receivers — no filtering technology was available. As a result, the only way for parents to directly control their children's access was to insist on being present when a radio or television program was being broadcast — an option which, while perhaps desirable, is not terribly practical (and in any event is far beyond the power of the State to impose), especially in an era when many minors are at home alone in the afternoon. In that context, *some* form of time-channeling might well have constituted a narrowly tailored means of facilitating parental control, since it assisted parents in exercising supervision over their children's viewing (and listening) habits, albeit while also imposing burdens on adult access to speech and on parents who disagreed with the State's policies on child rearing.

Arguably, however, a policy restricting indecent speech to late-night hours (after 10 p.m., or after midnight under the original legislation)<sup>162</sup> is not well tailored to the purpose of facilitating parental control. The biggest barriers to parental supervision clearly exist during afternoon work hours, when many minors watch television entirely unsupervised; therefore, a ban on indecent speech during that time seems well targeted to facilitating parental control. During evening hours, parents generally are present, although many may not *choose* to closely supervise their children's viewing habits. Barring indecent speech during those hours thus does not truly facilitate parental supervision; it merely advances the government's purported — but arguably illegitimate — desire to shield children regardless of their parents' desires. Perhaps one might seek to justify an evening ban based on an

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concurring in the judgment).

<sup>161</sup> *Action for Children's Television v. FCC*, 58 F.3d 654, 659–67 (D.C. Cir. 1995).

<sup>162</sup> *See id.* at 656.

assumption that parents *wish* to prohibit all access to controversial materials but, because of inertia or distraction, fail to do so. As noted earlier, however, such an assumption is empirically unjustified, and therefore, absent an independent compelling interest in shielding children, a ban on the evening broadcast of indecent speech seems overly broad. This is not to say that the State can take *no* steps to assist parental supervision during the evening, but such steps must in fact be designed to facilitate parental control, not merely to ban speech that the State dislikes. For example, provisions requiring broadcasters to disclose and publicize when they will transmit indecent programming might well be defensible as a means of facilitating supervision, but the ultimate decision as to whether access to certain programming should be barred must be left to parents. An absolute ban would not allow this.

Since 1995, the debate over indecency in broadcasting has been complicated by the availability of new "V-chip" technology, which permits greater parental filtering of television broadcasts. In 1996, Congress passed legislation requiring essentially all new televisions to contain such technology.<sup>163</sup> The legislation requiring incorporation of V-chip technology seems perfectly suited to the State's goal of facilitating parental control and thus would appear to easily satisfy the constitutional analysis set forth here, so long as the costs of implementing the regulations are not exorbitant (which they do not appear to be). Furthermore, it would seem that the State would also be justified in imposing a mandatory rating system on broadcasters (and other television programmers as well, since the V-chip also filters cable television programming), as a means of facilitating parental control.<sup>164</sup> Both the V-chip requirement and a rating system increase parental control while imposing minimal restrictions on speech, and as such, seem to be extremely well aligned with the State's interest in facilitating parental supervision.

The question that remains is whether the availability of such filtering technology, which would appear to fully and directly advance the State's interest in assisting parents, has the consequence of making time-channeling rules

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<sup>163</sup> See 47 U.S.C. §§ 303(x), 330(c) (2000). See generally J.M. Balkin, *Media Filters, the V-Chip, and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131 (1996) (discussing media filtering in general, and the V-Chip in particular); Steven D. Feldman, *The V-Chip: Protecting Children from Violence or Doing Violence to the Constitution?*, 39 HOW. L.J. 587 (1996) (giving an overview of V-Chip technology and legislation).

<sup>164</sup> In fact, the same legislation which required use of the V-chip also invited the television industry to establish a ratings system (and a system of transmitting ratings with programming), with the threat that if the industry failed to do this, the FCC would step in. The industry did eventually adopt such a ratings system, which was approved by the FCC and has been in place since 1998. See F.C.C., *Implementation of Section 551 of the Telecommunications Act of 1996: Video Programming Ratings*, CS Docket No. 97-55, FCC 98-35 (Mar. 13, 1998), available at <http://www.fcc.gov/Bureaus/Cable/Orders/1998/fcc98035.html>.

unnecessary and therefore unconstitutional. At first glance, that would appear to be the case, because if the V-chip permits full parental control (without even requiring their actual presence), then further measures that block speech would seem unnecessary.

Some objections might, however, be raised to such a conclusion. First, not all parents will use the V-chip technology. Second, not all televisions contain V-chips at this point in time. Finally, not all television viewing by children occurs at home. The first is not a legitimate objection. For the reasons noted above, the State has no basis for presuming that parents who do not employ the V-chip are doing so because of inertia, rather than conscious choice (or disagreement with the State's definition of what is inappropriate for minors). At most, the State would be justified in publicizing the availability of filtering technology — and requiring that it be easy to use — to overcome inertia. But if parents make a conscious choice not to filter, the State is powerless. The second objection is more serious, because it is true that many older televisions, which do not contain the filtering technology, remain in use. This suggests that the current time-channeling rules might remain necessary,<sup>165</sup> but that they should be phased out as new televisions containing filters replace the existing stock. The final objection is the most problematic, because it raises the possibility that even if parents wish to — and do — utilize filtering technology, their children might be exposed to "indecent" speech at the homes of friends, for example, whose parents do not share the same values or zeal. It should be noted, however, that if V-chips were universally available, deployed, and understood, the danger of *casual* access is reduced substantially, making the task of parental supervision somewhat easier. But this is not a complete answer to the problem. If the State were able to demonstrate that exposure to indecent programming outside the home posed a significant problem for parental control, and that there was no solution to this problem beyond time-channeling, then the State might well be able to demonstrate that time-channeling rules were indeed narrowly tailored to advance its legitimate and compelling interests (at least as to programming that most parents would agree was inappropriate for most children). Of course, the question would still remain as to whether such rules impose too great of a burden on adult speech when compared to the magnitude of the problem being addressed, but that is an issue beyond the scope of this Article.<sup>166</sup>

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<sup>165</sup> Though for the reasons noted above, such channeling requirements should probably be limited to work hours.

<sup>166</sup> On this subject, see *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 131–32 (1989) (Scalia, J., concurring); Eugene Volokh, *supra* note 15, at 165–67; *supra* note 98 and accompanying text.



### B. Telephony and "Dial-a-Porn"

Another area in which the regulation of "indecent" speech for the purpose of protecting children has clashed with First Amendment principles in recent years is indecent telephone messages and, in particular, commercial "dial-a-porn" services.<sup>167</sup> The first congressional and administrative attempts to regulate such services began in 1983 and generated an extended series of administrative challenges and remands, the exact details of which are not important here.<sup>168</sup> In 1988, Congress passed a statute flatly banning all interstate commercial telephone messages that were either obscene or indecent,<sup>169</sup> and in 1989, in *Sable Communications*,<sup>170</sup> the Supreme Court struck down this statute (as applied to indecent messages) on the grounds that the statute was not narrowly tailored because it restricted too much adult speech in the name of shielding children.<sup>171</sup> Later that year, in response to *Sable*, Congress quickly passed the "Helms Amendment," which prohibits making "any indecent communication for commercial purposes which is available to any person under 18 years of age or to any other person without that person's consent."<sup>172</sup> The statute also established a safe harbor protecting telephone companies who provide billing for dial-a-porn services from liability if they establish "reverse blocking" procedures, whereby only customers who request access in writing to dial-a-porn services will be able to access such services.<sup>173</sup> The statute also authorized the FCC to establish regulatory safe harbors for dial-a-porn providers themselves.<sup>174</sup> The FCC then passed regulations establishing a safe harbor for such providers so long as they notify telephone companies that they provide sexually oriented messages and either require that: (1) customers pay with credit cards; (2) customers obtain an access code prior to using the service; or (3) customers use a previously obtained descrambler to unscramble their messages.<sup>175</sup> In two separate decisions, the Ninth and Second Circuits upheld the Helms Amendment and its implementing regulations as consistent with the First Amendment, because they were narrowly

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<sup>167</sup> Dial-a-porn services are oral communications of a sexual nature, often prerecorded, provided over telephone lines for a charge.

<sup>168</sup> The regulatory actions and legal challenges are described in detail in *Dial Info. Servs. Corp. v. Thornburgh*, 938 F.2d 1535, 1537 (2d Cir. 1991). See *Fabulous Assocs., Inc. v. Pennsylvania Pub. Util. Comm'n*, 896 F.2d 780 (3d Cir. 1990) (invalidating a state law regulating dial-a-porn services).

<sup>169</sup> 47 U.S.C. § 223(b) (2000) (as amended).

<sup>170</sup> 492 U.S. 115 (1989).

<sup>171</sup> *Id.*

<sup>172</sup> 47 U.S.C. § 223(b)(2)(A) (2000).

<sup>173</sup> *Id.* § 223(c)(1).

<sup>174</sup> *Id.* § 223(c)(3).

<sup>175</sup> 47 C.F.R. § 64.201 (2003).

tailored to advance the government's compelling interest in shielding children from indecent speech.<sup>176</sup> Crucial to both of these rulings was the courts' rejection of the argument that the new rules were not narrowly tailored because another regulatory option called "voluntary blocking" — a system whereby telephone subscribers, free of charge, may request that their telephone be blocked from access to sexually explicit services — would provide a less restrictive means for achieving the government's goal.<sup>177</sup> The courts rejected voluntary blocking because it was less effective in achieving the government's goals for two different reasons.<sup>178</sup> First, there were substantial doubts about the actual effectiveness of such schemes, especially in their ability to block long-distance dial-a-porn calls.<sup>179</sup> But second, both courts also relied on the argument that voluntary blocking is ineffective because, due to ignorance, many parents will not take advantage of it, at least until they discover that their children have accessed dial-a-porn services.<sup>180</sup>

It is no longer seriously disputed that a flat ban on interstate indecent telephone messages of the sort struck down in *Sable* is unconstitutional. The analysis developed here contributes little in that respect, since the problem identified in *Sable* was the burden on adult speech imposed by such a bar (though it should be noted that the burden on adult speech was fatal only because an effective regulatory option which facilitated parental control was available to the government).<sup>181</sup> The successor rules upheld by the Second and Ninth Circuits, however, raise much more interesting questions than a flat ban. In effect, those rules prohibit granting minors access to dial-a-porn unless a parent prearranges such access either by requesting in writing that reverse blocking be lifted (if the telephone company bills for the services) or presubscribing to the services. Unlike a flat ban on dial-a-porn, these rules do *not* entirely displace parents' judgments with the State's regarding children's access to such services. As such, they are clearly defensible as a means of facilitating parental control.

These rules do, however, shift the presumption with respect to inactive parents,

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<sup>176</sup> *Dial Info. Servs. Corp. v. Thornburgh*, 938 F.2d 1535, 1537 (2d Cir. 1991); *Info. Providers' Coalition for Def. of the First Amendment v. FCC*, 928 F.2d 866 (9th Cir. 1991).

<sup>177</sup> *Dial Info. Servs. Corp.*, 938 F.2d at 1541-43; *Info. Providers' Coalition*, 928 F.2d at 872-74.

<sup>178</sup> *Dial Info. Servs. Corp.*, 938 F.2d at 1541-43; *Info. Providers' Coalition*, 928 F.2d at 872-74.

<sup>179</sup> *Info. Providers' Coalition*, 928 F.2d at 873.

<sup>180</sup> *Dial Info. Servs. Corp.*, 938 F.2d at 1542; *Info. Providers' Coalition*, 928 F.2d at 873. The Second Circuit relied heavily on this argument, noting that over the preceding two years, "only four percent of the 4.6 million residential telephone lines in the area having access to [dial-a-porn services] have been blocked" and, according to a study, "half of the residential households in New York are not aware of either the availability of dial-a-porn or of blocking." *Dial Info. Servs. Corp.*, 938 F.2d at 1542.

<sup>181</sup> *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 128 (1989).

from a presumption of children having access to sexual speech absent supervision, to a presumption of children not having access. Such a shift in presumption, of course, is entirely defensible if the State has an independent interest in shielding children from indecency, which must yield only to actively stated parental preferences. If such an independent interest does not exist, however, the shift in presumption becomes somewhat more problematic, especially in its effect on parents who are “consciously indifferent” to their children’s activities in this regard. On the other hand, the shift might be defended as a reasonable means for the State to assist parents who suffer from ignorance or inertia, but who actually prefer that their children, of any age, be unable to access such services, if the State may assume that the latter group predominates. The predominance of parents who share the State’s hostility to dial-a-porn is, of course, an empirical question, but this may be an area in which the State is permitted to rely on the assumption that parents who share the State’s hostility to dial-a-porn are far more common than “consciously indifferent” parents. This is because as a matter of common sense, the assumption seems reasonable, but the burden of *proving* such predominance seems almost insurmountable.<sup>182</sup> Additionally, the Helms Amendment imposes relatively minor burdens on both adult speech and on parents who positively desire their children to have access to such speech, since credit card payment is one option provided in the regulatory safe harbor reducing the *cost* to those who do *not* share the State’s hostility.<sup>183</sup>

Furthermore, the “voluntary blocking” option advocated by the dial-a-porn providers does not really provide an alternate means for the State to assist parents, for two reasons. First, “voluntary blocking,” as currently implemented, simply seems to be ineffective, since it cannot block all dial-a-porn services.<sup>184</sup> Second, there are enormous information cost barriers to successfully informing all telephone subscribers (*i.e.*, essentially all households) of the existence of dial-a-porn services and the availability of blocking. Of course, the existence of such costs does not necessarily condemn a voluntary blocking scheme (such an argument was, for example, rejected by the Court in *Playboy*).<sup>185</sup> But in light of the minimal burden on speech imposed by the current rules, it seems unnecessary to impose such costs on either the State or the telephone industry (who presumably would bear the costs, not dial-a-porn providers themselves). The regulatory scheme upheld by the Ninth

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<sup>182</sup> It should be remembered in this regard that dial-a-porn services are commercial — and therefore potentially expensive — and that unlike cable programming and the Internet, with dial-a-porn services, the “indecent speech” at issue has little or no social or educative value.

<sup>183</sup> See *supra* text accompanying note 175.

<sup>184</sup> *Info. Providers’ Coalition*, 928 F.2d at 873. It should be noted, though, that if technological advances permitted an effective voluntary blocking system to be developed, an argument might be made that the current rules are overbroad, though the rules still might be defended because of the information-cost problems discussed in the text.

<sup>185</sup> *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 824 (2000).

and Second Circuits therefore appears to constitute a reasonable attempt to accommodate and assist parents who are unable to supervise their children because of ignorance or other barriers, and thus passes constitutional scrutiny, even under the analysis set forth in this Article.

### C. Cable Television Regulation

Whereas the broadcasting and telephone industries undoubtedly have been the target of some important regulatory efforts to suppress indecent speech over the years, there is no doubt that the most prominent and significant such attempts in recent years have focused on the relatively new technologies of cable television and the Internet. Because it is older and (for now) more pervasive, cable television in particular has been the target of a number of regulatory initiatives over the past two decades,<sup>186</sup> which have produced two significant Supreme Court cases since the mid-1990s: *Denver Area Educational Telecommunications Consortium v. FCC*<sup>187</sup> and *United States v. Playboy Entertainment Group*.<sup>188</sup> In *Playboy*, the Court struck down Section 505 of the Telecommunications Act of 1996, which required cable operators to either "fully scramble" or limit to nighttime hours the transmission of channels "primarily dedicated to sexually-oriented programming" because of concerns that partial scrambling of the type normally employed exposed children via "signal bleed" to fleeting images of a sexual nature.<sup>189</sup> In *Denver Area*, the Court (in a highly splintered opinion) upheld in part and struck down in part congressional efforts to regulate indecent programming on leased access and public access channels.<sup>190</sup> The Court upheld one provision, Section 10(a) of the Cable Television and Consumer Protection and Competition Act of 1992,<sup>191</sup> which permitted cable television operators to prohibit the transmission of indecent programming on leased access channels, but it struck down two other portions of

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<sup>186</sup> See, e.g., *Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986) (per curiam) (striking down a Utah statute treating as a nuisance the transmission over cable facilities of "indecent material"), *aff'd*, 480 U.S. 926 (1987); *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985) (striking down a Miami ordinance prohibiting "obscene or indecent" materials from being distributed over cable television facilities); *Altmann v. Television Signal Corp.*, 849 F. Supp. 1335 (N.D. Cal. 1994) (striking down Sections 10(a) and (c) of the Cable Television and Consumer Protection and Competition Act of 1992, later at issue in the Supreme Court's *Denver Area* decision).

<sup>187</sup> 518 U.S. 727 (1996).

<sup>188</sup> 529 U.S. 803 (2000).

<sup>189</sup> 47 U.S.C. § 561 (1994 & Supp. V 1999). The holding of the *Playboy* case is described in detail *supra*, and will not be reiterated here. See *supra* notes 45–60 and accompanying text.

<sup>190</sup> For a description of such channels, see *supra* note 31.

<sup>191</sup> 47 U.S.C. § 532(h) (1994).

the same Act, Sections 10(b) and 10(c).<sup>192</sup> Section 10(b) *required* cable operators to “segregate” all indecent materials on leased access channels onto a separate channel, and then to implement a “reverse blocking” scheme whereby that channel would be available only to subscribers who request access in writing.<sup>193</sup> Section 10(c), on the other hand, paralleled Section 10(a) in giving cable operators discretion to ban indecent programming on public access channels.<sup>194</sup> The Court (or more accurately, a plurality), however, concluded that because of historical differences between leased and public access, this discretion was unconstitutional.<sup>195</sup>

What does a sustained analysis of the nature of the governmental interests in regulating indecency contribute to our understanding of the issues raised in *Playboy* and *Denver*? With respect to *Playboy*, the analysis appears to fully support the result reached by the Court.<sup>196</sup> This is unsurprising since, as discussed earlier, the *Playboy* majority, in striking down Section 505, seems to have relied — albeit ambiguously and with little analysis — on the lack of an independent governmental interest in “protecting” children from indecent speech. In reaching that result, the Court reasoned that the voluntary blocking option offered by Section 504 of the same Act fully protected the governmental interest in assisting parents.<sup>197</sup> A counter-argument might be made here that Section 505’s time-channeling requirement is a justifiable method of facilitating parental control because of the high costs of informing parents about Section 504’s voluntary blocking option, and because most parents share the State’s aversion to “signal bleed.” In fact, however, both of the key underlying assumptions of this argument seem weak. It does not seem especially difficult to inform cable subscribers about a generally available, voluntary blocking option (an insert in cable bills might well suffice). It also seems a stretch to believe that many or most parents are truly concerned about their children’s exposure to the fleeting images resulting from signal bleed. This is undoubtedly why the government and the *Playboy* dissent relied so heavily on the independent interest in defending Section 505.<sup>198</sup> Without that interest, however, the defense of Section 505 becomes weak indeed.

Unlike with *Playboy*, focusing attention on the nature of the governmental interests at stake in the *Denver Area* case yields surprising results. Focusing on Sections 10(a) and 10(c), which granted cable operators discretion to ban indecent speech (but, it should be noted, no other speech) from leased and public access

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<sup>192</sup> *Id.* §§ 532(j), (i).

<sup>193</sup> *Id.* § 532(j).

<sup>194</sup> *Id.* § 531.

<sup>195</sup> *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 760–63 (1996).

<sup>196</sup> *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 825–26 (2000).

<sup>197</sup> *Id.*

<sup>198</sup> *See supra* notes 54–57 and accompanying text.

channels, the argument for constitutionality is extremely weak (contrary to the Court's conclusion upholding Section 10(a)).<sup>199</sup> A law that grants standardless discretion to cable companies — purely private actors — to ban indecent speech does absolutely nothing to advance the government's interest in facilitating parental control over their children's upbringing, because the ultimate decision on whether to limit indecency lies not with individual parents but with a single, unaccountable third party. Thus, absent an independent governmental interest in shielding children, Sections 10(a) and 10(c) do not appear even rationally related, much less narrowly tailored to advance the government's interest, and should have been struck down.<sup>200</sup>

The analysis with respect to Section 10(b) is even more interesting. The Court held that this provision, by requiring cable operators to segregate indecent speech on leased access channels and then to block those channels, imposed an excessive burden on speech.<sup>201</sup> A strong argument can be made, however, that a segregation requirement is in fact an entirely defensible means for the State to facilitate parental control over their children's viewing. One of the great burdens parents face in supervising their children's viewing is the sheer volume of cable programming, which is far greater than broadcast television programming and beyond the capacity of most people to track. This volume makes it difficult or impossible for parents to effectively employ filtering mechanisms, such as lockboxes, or to supervise their children by keeping track of when indecent material might be available (unless, of course, parents were to be present whenever children watched television — an unlikely prospect under modern conditions). Segregation requirements respond to this need by moving indecent programming to a few, identifiable channels which parents can track and, if they wish, block. As such, a segregation requirement seems ideally suited to facilitating parental control by reducing information and other transaction costs *without* imposing direct state censorship. Thus, the *Denver Area* Court seems to have been dead wrong in questioning the utility and permissibility of segregation requirements as a means to advance the governmental interests at stake in indecency cases.

Of course, in addition to the segregation requirement, Section 10(b) also imposed a "reverse blocking" requirement on segregated channels,<sup>202</sup> and the Court was on stronger grounds in invalidating this provision. As the Court discussed in *Denver Area*, reverse blocking schemes put substantial burdens on speech by

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<sup>199</sup> *Denver Area*, 518 U.S. at 737–53.

<sup>200</sup> Indeed, granting cable operators discretion to suppress indecent speech seems a rather indirect way of advancing the government's own purported interest in shielding children, since under that provision the decision on whether such speech continues to be transmitted lies not with the State, but with local cable operators.

<sup>201</sup> *Denver Area*, 518 U.S. at 753–60.

<sup>202</sup> 47 U.S.C. § 532(j) (1994).

making it impossible for viewers to watch particular speech without unblocking well in advance (up to 30 days, in this instance).<sup>203</sup> Furthermore, such a requirement advances the state interest in assisting parents far less directly than alternative regulatory mechanisms, such as voluntary blocking upon customer request (which is also required by federal law under Section 504 of the Telecommunications Act of 1996, cited in the *Playboy* case<sup>204</sup>) and the use of “lockbox” mechanisms, which permit subscribers to block particular channels or programs.<sup>205</sup> The primary rationale for reverse-blocking appears to be the same “parental inertia and ignorance” as advanced in *Playboy* and in the context of dial-a-porn regulation.<sup>206</sup> As the *Playboy* Court noted, however, the obvious response to such ignorance or inertia does not appear to be blocking; it appears to be providing information to parents and requiring cable operators to increase the availability and ease of use of blocking and filtering mechanisms.<sup>207</sup> After all, unlike the situation presented by dial-a-porn, parents who subscribe to cable television are surely aware of the possibility that “indecent” programming might exist on cable. Such rules, combined perhaps with segregation requirements and mandatory ratings (again designed to ease parents’ information costs) seem likely to successfully permit parents to filter programs *they* find inappropriate, without imposing a uniform, state-set standard of indecency, and without trampling on the wishes of parents who disagree with the State or who are consciously indifferent to their children’s access to sexual speech.

Finally, it must be noted that with the advent of V-chip technology,<sup>208</sup> much of the above discussion might become moot. As with broadcast television, the full implementation and widespread availability of V-chips, along with implementation of a rating system permitting use of the technology, might well eliminate the need for any other filtering mechanism, including segregation requirements and lockboxes (though not, of course, ratings requirements). If and when this technology becomes ubiquitous, the scope of permissible governmental regulation in this area will decline dramatically for all of the reasons discussed in the context of broadcast regulation.

In conclusion, in the context of cable television, the availability of filtering mechanisms and the relatively lower information costs faced by parents (especially with governmental assistance in obtaining information) suggest that the State’s regulatory power over indecent speech in this area depends crucially on the nature of the governmental interest at stake. If the government does indeed have an

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<sup>203</sup> *Denver Area*, 518 U.S. at 755–58.

<sup>204</sup> 47 U.S.C. § 560 (1994 & Supp. III 1997).

<sup>205</sup> *Denver Area*, 518 U.S. at 758–59.

<sup>206</sup> *Id.* at 758–59 (quoting the government’s brief, which set forth barriers to parental use of lockboxes).

<sup>207</sup> *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 825–26 (2000).

<sup>208</sup> See *supra* notes 162–66 and accompanying text.

independent interest in shielding children from sexual speech, fairly draconian regulations might well be defensible as the only effective means of preventing children from accessing disfavored speech. If, however, no such interest exists, as argued in this Article, and the government's only legitimate interest is in assisting parents in shielding their children from speech which *the parents* find inappropriate, then the scope of permissible governmental regulation is limited to those steps which enable parents to employ the available filtering technology by reducing information costs and easing access to such technology. Of course, as discussed in the context of broadcasting regulation, no filtering technology can protect perfectly against exposure to indecent materials. Even powerful filters, such as the V-chip, cannot protect against exposure outside the home. Short of an absolute ban on indecent speech, however, no regulatory scheme can provide such absolute protection (and in truth, even an absolute ban will not be completely effective). Filters, especially filters that are widely available and easy to use, promise to achieve much of the goal of facilitating parental supervision of their children without imposing a state-sponsored orthodoxy and, as such, should remain the favored means of regulation in this area.

#### *D. Regulation of the Internet*

As with cable television, the Internet in recent years has provided many examples of regulatory attacks on indecent speech that have run up against the strictures of the First Amendment. The lower federal courts have dealt with a number of state efforts to restrict "indecent" speech on the Internet,<sup>209</sup> and federal regulation in this area already has generated two major Supreme Court decisions.<sup>210</sup> Many of the debates surrounding regulation of indecency on the Internet parallel those regarding cable television, especially regarding the availability and efficacy of filtering as a preferred method of regulation. But there also are important factual

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<sup>209</sup> See *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999) (striking down a New Mexico statute prohibiting the dissemination by computer of materials harmful to minors); *PSINet v. Chapman*, 167 F. Supp. 2d 878 (W.D. Va. 2001) (striking down a Virginia law that prohibited displaying to minors any materials, including electronic files that contain sexually explicit materials); *Cyberspace Communications v. Engler*, 142 F. Supp. 2d 827 (E.D. Mich. 2001) (striking down a Michigan statute prohibiting the transmission of sexually explicit material to minors over the Internet); *Am. Libraries v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997) (striking down a New York statute prohibiting transmission by computer of sexual materials to minors).

<sup>210</sup> *Ashcroft v. ACLU*, 535 U.S. 564 (2002) (holding that the Child Online Protection Act's definition of what was harmful to minors did not render the Act unconstitutionally overbroad); *Reno v. ACLU*, 521 U.S. 844 (1997) (striking down the CDA's "indecent transmission" and "patently offensive display" provisions as violations of the First Amendment).



and technological differences which complicate the issues tremendously.

The most prominent recent example of a regulation aimed at indecency on the Internet was undoubtedly the Communications Decency Act ("CDA"), which was struck down by the Supreme Court in *Reno v. ACLU*.<sup>211</sup> The CDA broadly prohibited the use of the Internet to transmit or make available to minors any indecent speech, while providing narrow safe harbors against prosecution<sup>212</sup> (which the Court found to be unavailable for most noncommercial users for reasons of technical feasibility and cost<sup>213</sup>). That the Court reached the right result in *ACLU* seems clear under the analysis set forth here, though perhaps for the wrong reasons. The CDA simply cannot be defended as a regulatory attempt to assist parents in raising their children, because as the Court pointed out, the CDA gave *no* control to parents in deciding what speech was inappropriate for children and *criminalized* parental use of the Internet to send a message to a child that the State deemed "indecent."<sup>214</sup> For that reason alone, if parental facilitation is the *only* permissible governmental interest in this area, as this Article argues, the CDA obviously cannot stand. The *ACLU* Court, however, did not rely on this reasoning, explicitly leaving unanswered the question of whether the State may trump parental desires regarding sexual speech.<sup>215</sup> Instead, the *ACLU* Court held that the CDA was not narrowly tailored to advance the governmental interest in shielding children because of the availability of less restrictive alternatives, such as parent-controlled filtering software.<sup>216</sup> This result is probably not consistent with the Court's doctrine, at least as currently articulated, because such software is *not* as effective as a ban on indecent speech. However, it certainly can be defended as a reasonable accommodation of the competing interests in this area.<sup>217</sup> If the analysis developed here is accepted, however, the unconstitutionality of the CDA can be demonstrated much more simply — there is no rational relationship between the regulatory scheme and the only permissible state objective.

In the aftermath of the *ACLU* decision, Congress enacted a new statute regulating indecency on the Internet: the Child Online Protection Act, or "COPA."<sup>218</sup> COPA differs from the CDA in that it limits its coverage to *commercial* communications via the World Wide Web, and it prohibits only the distribution of materials that are "harmful to minors"<sup>219</sup> (the latter term being

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<sup>211</sup> *Reno*, 521 U.S. at 874–75.

<sup>212</sup> 47 U.S.C. § 223 (1994 & Supp. II 1996).

<sup>213</sup> *Reno*, 521 U.S. at 881–82.

<sup>214</sup> *Id.* at 878.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> This issue was analyzed thoroughly in Volokh, *supra* note 15.

<sup>218</sup> Child Online Protection Act, 47 U.S.C. § 231 (1994).

<sup>219</sup> *Id.*

defined essentially to mirror the *Ginsberg* obscene-as-to-minors standard<sup>220</sup>). Otherwise, the statute is similar to the CDA, notably in its provision of a safe harbor to web publishers of sexual materials who utilize credit cards or other screening mechanisms to exclude minors.<sup>221</sup> Soon after COPA was enacted, the Third Circuit enjoined its enforcement on the grounds that COPA was unconstitutional due to the statute's reliance on a "contemporary community standards" test for defining material that is harmful to minors.<sup>222</sup> Interestingly, in striking down COPA, the Third Circuit explicitly refused to rely on the trial court's holding (following the Supreme Court's analysis in striking down the CDA) that COPA failed the narrow-tailoring requirement of constitutional scrutiny because less restrictive means, in the form of parent-controlled filtering software, existed to achieve the government's objectives.<sup>223</sup> The court suggested, rather, that parental control is irrelevant because "such actions do not constitute government action" and therefore are not "lesser restrictive means for the government to achieve its compelling interest."<sup>224</sup> On appeal, the Supreme Court reversed the Third Circuit's holding that the "contemporary community standards" test could not be applied constitutionally to the Internet (essentially holding that the chilling effect of that definition did not automatically make COPA overbroad), and it remanded the case to the Third Circuit for application of the strict scrutiny test to COPA.<sup>225</sup>

Insofar as the Third Circuit suggested that parental control is irrelevant to assessing indecency regulations,<sup>226</sup> it seemed to turn proper analysis on its head. This reasoning would make sense if the *only* state interest in this area was an independent interest in shielding children, regardless of parents' desires. As discussed above, however, that is clearly not the case. At a minimum, it is widely accepted that parental desires should trump the State's views regarding material from which minors need to be "protected," but more generally there is a powerful argument that the only legitimate state interest here is in facilitating parental

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<sup>220</sup> *Ginsberg v. New York*, 390 U.S. 629, 633–35 (1968).

<sup>221</sup> *Ashcroft v. ACLU*, 535 U.S. 564, 570–71 (2002).

<sup>222</sup> *ACLU v. Reno*, 217 F.3d 162, 173–74 (3d Cir. 2000), *rev'd sub nom.* *Ashcroft v. ACLU*, 535 U.S. 564 (2002). The Third Circuit reasoned that given the nature of the Internet and the World Wide Web, and particularly the inability of website operators to screen out users based on their geographic location, the consequence of applying COPA's definition of harmful materials would be that every website with sexual material must either adhere to the standards of the most conservative communities in the United States, as applied to the youngest of minors, or else limit access using a screening mechanism such as a credit card. Either "solution" would impose a very substantial burden on speech, and therefore COPA was unconstitutional.

<sup>223</sup> *Reno*, 217 F.3d at 171 n.16; *see also id.* at 181 n.24.

<sup>224</sup> *Id.* at 171 n.16; *see also id.* at 181 n.24 ("[T]he parental hand should not be looked to as a substitute for a congressional mandate.").

<sup>225</sup> *Ashcroft*, 535 U.S. at 584–86.

<sup>226</sup> *See Reno*, 217 F.3d at 171 n.16; *see also id.* at 181 n.24.

control.<sup>227</sup> When viewed through the lens of that analysis, it becomes clear that COPA is highly problematic and should be struck down under strict scrutiny. Like the CDA, COPA does not directly facilitate parental control over their children. Instead, it imposes a flat, state-defined (or community-defined) standard of what materials are inappropriate for minors, and then requires commercial speakers on the World Wide Web to screen such materials, effectively denying access to the general public including both adults and minors whose parents do not share the State's views.<sup>228</sup> Of course COPA, like all government-imposed censorship, will assist parents who share the State's values on child-rearing. Furthermore, COPA — unlike the CDA — does not punish parents who choose to provide their children with materials the State deems inappropriate. Moreover, because COPA restricts only materials which are "obscene as to minors" and thus lack serious value,<sup>229</sup> it seems plausible that many, if not most, parents might share the government's desire to shield children from such materials. There is, however, a grave problem with this argument. As constructed, COPA limits access to all speech which is "obscene" (*i.e.*, offensive and lacking in serious value) as to *any* minors.<sup>230</sup> As a result, speech deemed offensive and lacking in value as to an eight-year-old would be denied to a seventeen-year-old (and to many adults). Given the extraordinarily wide diversity of materials available on the Internet, including political and educational materials dealing with subjects such as birth control, homosexuality, and sexually transmitted diseases, it seems entirely inappropriate for the State to assume that all or most parents would wish their children to be denied access to all such materials simply because *some* parents in some communities would consider those materials "harmful" to very young children. As a consequence, COPA must fail constitutional scrutiny.

Although the CDA and COPA are both clearly unconstitutional, this does not mean that the State is powerless to regulate indecent speech on the Internet. As with cable television, so long as state regulatory efforts are directed at assisting parents in monitoring or screening their children's access to Internet sites, they clearly are permissible under current law.<sup>231</sup> As noted in the *ACLU* opinion, the most obvious technology currently available for parents to exercise control over their children's Internet access is screening software installed on home computers, which prevents users from accessing websites known to contain graphic language or content deemed unacceptable to children by the software provider.<sup>232</sup> Such

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<sup>227</sup> See *supra* Part III.

<sup>228</sup> See 47 U.S.C. § 231(a)(1) (2000).

<sup>229</sup> See *supra* notes 20–24 and accompanying text.

<sup>230</sup> See *supra* note 220 and accompanying text.

<sup>231</sup> I do not fully address here the question of whether such regulations might nonetheless be struck down because they impose an excessive burden on adult speech, though the issue is touched upon in the text.

<sup>232</sup> *Reno v. ACLU*, 521 U.S. 844, 854–55, 877 (1997); *id.* at 890–91 (O'Connor, J.,

software is not fully effective today, however, largely because the size and constantly changing nature of the Internet makes it very difficult for a software provider to maintain a complete list of "inappropriate" websites.<sup>233</sup> This problem points to one potentially promising and seemingly unproblematic regulatory avenue for the State to pursue: a mandatory rating system upon which filtering software could rely. If, for example, a regulatory regime were adopted which established standards for what types of Internet content is appropriate for minors and which required website operators to self-rate their content and post the relevant rating in a manner accessible to filtering software, few constitutional issues would seem to be raised.<sup>234</sup> Furthermore, a ratings system could be keyed to different levels of sexual content, permitting parents to vary access based on their values and the age of their children. It is true that the rating requirement would impose some costs on website operators providing sexually explicit content. Furthermore, those costs would be more burdensome than in the V-chip context, since speakers on the Internet constitute a far broader, more diverse, and less consistently affluent group than commercial television programmers. Nonetheless, the costs seem fairly trivial in light of the potential gain, and most importantly, under a ratings system, no speech would be suppressed by the State.<sup>235</sup> Of course, no rating and filtering system could be fully effective in shielding minors from sexual materials, even sexual materials of which their parents disapprove, because such a system could not be imposed on foreign websites and domestic enforcement would be difficult and burdensome. But the same objection also can be made in relation to censorship schemes such as the CDA and COPA, which are otherwise far more blunt regulatory instruments if the State's objective is to facilitate parents' abilities to monitor and control their children's access to sexually explicit speech.

Filtering software, aided by mandatory ratings schemes, thus seem to be the obvious regulatory means to achieve the State's legitimate goals in this area. There is no doubt that some Internet speakers would object to such a scheme because it would limit their ability to speak to minors whose parents employ filtering software.

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concurring in part and dissenting in part).

<sup>233</sup> For a comprehensive discussion of the current status of Internet filtering software, see *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401, 427-50 (E.D. Pa. 2002), *prob. juris. noted*, 123 S. Ct. 551 (2002).

<sup>234</sup> Cf. Jonathan Weinberg, *Rating the Net*, 19 HASTINGS COMM. & ENT. L.J. 453 (1997) (discussing and criticizing proposals to rate Internet sites); *id.* at 474-76 (arguing that mandatory rating requirements for websites would violate the First Amendment).

<sup>235</sup> A system of voluntary ratings has already begun. See *Reno*, 521 U.S. at 890-91 (O'Connor, J., concurring in part and dissenting in part) (discussing the "Platform for Internet Content Selection," or "PICS"); LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 177-82 (1999) (discussing and critiquing current PICS architecture). Such a voluntary system, however, will necessarily be less effective than a State-imposed system, in which a failure to comply would constitute a punishable offense.

But such objections may be dismissed, since website operators have no legitimate interest in speaking to minors against their parents' wishes, just as speakers generally have no right to speak to those who do not wish to listen.<sup>236</sup>

One difficult issue remains, however, regarding the use of filtering software outside of the home, in places such as the workplace, schools, and most controversially, public libraries.<sup>237</sup> Focusing on the public library context, which has generated the most interest in recent years,<sup>238</sup> the question becomes whether the use of filtering software, which screens out "indecent" websites on Internet-access computers in public libraries, constitutes a permissible means for the State to advance its regulatory goal of assisting parents.<sup>239</sup> The dilemma here is fairly clear. If public libraries fail to use filtering software on computers accessible by minors, some parents' ability to control their children's access to the Internet inevitably will

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<sup>236</sup> I do not here discuss the possibility raised by Lawrence Lessig that entities other than parents, such as Internet Service Providers ("ISPs"), might use ratings and filtering software to filter all speech, even directed at adults. See LESSIG, *supra* note 235, at 178–81. Such misuse of filtering, while troublesome, raises primarily contractual rather than constitutional issues, and is therefore beyond the scope of this Article.

<sup>237</sup> Congress has passed legislation making receipt of certain federal funding by public libraries contingent on the use of such filters, making it likely that the use of filtering software in libraries will become much more prevalent in coming years. See Children's Internet Protection Act, Pub. L. No. 106-554, 114 Stat. 2763 (2000) (codified as amended in scattered sections of U.S.C.). Recently, however, a three-judge district court panel struck down this provision on the grounds that the funding condition forced public libraries to violate their patrons' First Amendment rights. *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2002). The Supreme Court has noted Probable Jurisdiction in this case, see *United States v. Am. Library Ass'n*, 123 S. Ct. 551 (2002), and should resolve the issue shortly.

<sup>238</sup> But see Neil A. Lewis, *Rebels in Black Robes Recoil At Surveillance of Computers*, N.Y. TIMES, Aug. 8, 2001, at A1 (describing the dispute between Judges on the Ninth Circuit and the Administrative Office of the Courts regarding monitoring of employees' Internet usage).

<sup>239</sup> I will presume, for the purposes of this discussion, that the use of such software raises First Amendment issues because it impinges on the free-speech rights of library patrons and website operators who are screened out, despite the fact that the State has no constitutional obligation to provide computers in public libraries, or even public libraries themselves. See *Am. Library Ass'n*, 201 F. Supp. 2d at 454–70 (relying on the public forum doctrine to hold that strict scrutiny applies to public libraries' use of Internet filtering software; *Mainstream Loudon v. Bd. of Trs. of the Loudon County Library*, 24 F. Supp. 2d 552, 561–63 (E.D. Va. 1998) (same). I should note, however, that because the State operates libraries in its proprietary and not its regulatory capacity, the proposition is not an uncontroversial one. See generally Bernard W. Bell, *Filth, Filtering, and the First Amendment: Ruminations on Public Libraries' Use of Internet Filtering Software*, 53 FED. COMM. L.J. 191 (2001). In keeping with the subject of this Article, I also do not address here the use of filtering software for purposes other than shielding minors from sexually explicit materials. For a description of such interests, see *Am. Library Ass'n*, 201 F. Supp. 2d at 471–75.

be compromised (since the only alternative available to those parents, barring their children's access to the public library, seems unacceptable). On the other hand, use of filtering software imposes a burden on parents who *do* wish their children to have unfettered access to the Internet, especially those families who do not have access to the Internet at home (as well as on adults, if all computers in a library were filtered). Absent some means for libraries to calibrate filtering systems to the desires of individual parents (which today would be administratively impossible), some conflict is therefore inevitable. In that situation, the State presumably must be given some discretion to assess how it can best assist parents and to make an empirical judgment about what sorts of screening devices most parents would prefer. So long as that judgment appears reasonable and grounded in a factual inquiry, courts should defer to it, and so long as the burden on adult speech is not too great (as would be true, for example, if the State set aside some unfiltered computers for exclusive adult use),<sup>240</sup> such a judgment should survive constitutional scrutiny.<sup>241</sup>

#### CONCLUSION

For the last half-century, our society has struggled to reconcile the constitutional commitment to free speech with the widely shared desire to shield children from sexual material deemed inappropriate and harmful. Underlying this struggle, there have lurked important questions regarding precisely *why* we believe children need to be shielded from such materials, and more controversially, who should decide whether — and when — such shielding is necessary: parents or the State.

On the first issue, the best and only answer that has emerged thus far is that children are shielded from sexual materials in order to protect their "ethical and moral development." On the second point, it has long been accepted, since at least the 1968 *Ginsberg* decision, that parents and the State *share* the power to make the relevant decisions.<sup>242</sup> Furthermore, social and technological realities during most of this period made it necessary for the State to act in *loco parentis*, because it was

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<sup>240</sup> I do not fully address the question of what sort of burden on adult speech would be too great to satisfy constitutional requirements. Of course, if the State does have an independent interest in shielding minors from "indecent" materials, then the argument in favor of filtering software becomes much more powerful, though the need to balance against the burden on adult speech remains. As noted in the text, however, libraries could minimize that burden fairly easily by reserving some unfiltered computers for adult use.

<sup>241</sup> Cf. *Am. Library Ass'n*, 201 F. Supp. 2d at 477–78, 482–83 (finding that the use of filtering software in public libraries is not "narrowly tailored" to advance governmental interests because it blocks "significant amounts of constitutionally protected speech," including use of such software on computers accessible to minors).

<sup>242</sup> *Ginsberg v. New York*, 390 U.S. 629, 639–41 (1968).

largely impossible for parents to effectively exercise personal control over their children's access to sexual speech, even with the assistance of the State. This situation made it unnecessary to examine closely the underlying assumptions and potential tensions inherent in the *Ginsberg* analysis.

Recently, however, this consensus has been challenged, most notably by a majority of the Supreme Court in the *Playboy* decision, in questioning whether the State has any legitimate interest in censoring speech that *it* considers inappropriate for the "ethical and moral development" of children.<sup>243</sup> This Article argues that the doubts expressed by the *Playboy* Court are justified. Basic First Amendment principles, including the long-accepted view that the State may not suppress speech in order to advance its own orthodoxy of belief, dictate that the State cannot legitimately seek to control speech because it disapproves of the influence that speech might have on the values or beliefs of citizens, including minors. On the other hand, the State does have a legitimate and compelling interest in *assisting* parents who wish to control their children's exposure to speech of which the parents disapprove. Such an interest in no way conflicts with the First Amendment and indeed is supported by constitutional principles. Most of this Article has explored the implications of this insight, arguing in particular that the absence of an independent governmental interest in suppressing indecent speech has many specific and important implications for permissible regulatory strategies in this area.

The issues explored in this Article have gained particular salience and importance in recent years, because technological advances, such as the V-chip and various filtering software, offer the promise of permitting parents themselves — if they receive proper assistance from the State — to exercise control over their children's upbringing and exposure to controversial speech without the need for direct censorship. As such, this new technology offers the possibility of advancing the core purpose of the First Amendment, which is to limit official, coercive control over speech, thoughts, and ideology, while still permitting the State to play an important role in assisting parents with raising their children to share their values and beliefs. Of course, there have been — and undoubtedly will continue to be — many regulatory efforts, such as the Communications Decency Act, which threaten this promise by adopting censorship rather than filtering as the preferred mode of regulation. But the First Amendment, as properly interpreted by the courts, should be (and largely has been) an effective barrier to such efforts.

The truth is, however, that the very technological advances discussed above may also spell the end of any real hope of shielding children from disfavored speech. The open architecture and lack of geographic boundaries of the Internet mean that any regulatory efforts — whether to suppress speech or to assist parents — can have only limited effectiveness, given the inability to enforce such standards outside the United States. Furthermore, if the much-touted technological

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<sup>243</sup> *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000).

"convergence" between the Internet and other media truly proceeds, and other media such as cable television and telephony begin to resemble the Internet in their architecture, the same inherent shortcomings will limit effective regulation of those media. In short, the game may be up, and modern regulatory efforts may become pointless or worse — capable of doing harm but not much good.

The only apparent solution to this dilemma would appear to be some sort of a regime of international cooperation in setting and enforcing standards to control indecent speech. If such a regime were to come into being (a perhaps unlikely prospect, given the range of ideological diversity in the world), it would be especially important to limit its functioning to facilitating parental control over access to speech. This is because, in an international regime, the gap between citizens and decision-makers would be even greater than today. As a result, regulators could not be trusted to reflect either the desires or the values of most parents, making any use of censorship or direct regulatory restrictions on speech deeply problematic as a matter of both democratic theory and constitutional principle. In short, the current bias in the Supreme Court's constitutional decisions in favor of parental, rather than state, control over indecent speech, reflected in cases such as *Reno v. ACLU* and *Playboy*, is likely to remain as appropriate and important as ever, especially as technology and regulatory regimes evolve over the next few decades.