Cyberia: The Chilling of Online Free Speech by the Communications Decency Act

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I. INTRODUCTION

In response to the growing fear that technology will corrupt our children, the United States Congress has acted to protect the next generation from harmful messages which come into the home from cyberspace. Originally constructed by Senators Exon (D-Nebraska) and Coats (R-Indiana), Title V of the 1996 telecommunications law, which contains the Communications Decency Act, would reshape the Internet into a forum of public discussion that is far more limited in its possible scope than it is today. The question raised by this Comment is whether the scope of the statute overreaches its constitutional limits by prohibiting speech that is protected by the First Amendment. The political goals motivating the legislation are *not* in dispute. Congress has clearly stated that the goal of the legislation is to protect minors from sexually-explicit material which is easily accessible in cyberspace; the author of this Comment has no intention to advocate against this legitimate, perhaps compelling, government interest.

The statute in question is Public Law 104-104. Title V, Section 502(a)(1)(A) states that no person may use a telecommunications device to knowingly make, create, or solicit and initiate the transmission of any communication which is "obscene, lewd, lascivious, filthy, or indecent, with intent to annoy, abuse,

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threaten, or harass another person."[1] However, the purpose of this Comment is to analyze the applicability of the Communications Decency Act to a medium in which freedom of speech should be analyzed in a manner recognizing that a person theoretically could have absolute control over what flashes upon the screen before him. As a result, the sections which have particular relevance to this Comment are Section 502(a)(1)(B) & (a)(2) which state:

> (a) Whoever:
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> (1) in interstate or foreign communications-
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> (B) by means of a telecommunications device knowingly:
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> (i) makes, creates, or solicits, and
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> (ii) initiates the transmission of any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication;[2]
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> (2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.[3]

Section 502(d) additionally stipulates the following for users of interactive computer services:

> (d) Whoever-
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> (1) in interstate or foreign communications knowingly-
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> (A) uses an interactive computer service to send to a specific person or persons under 18 years of

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[1] Communications Decency Act of 1996, Pub. L. No. 104-104, § 502(a)(1)(A) [hereinafter *Communications Decency Act*].

[2] *Id.*, § 502(a)(1)(B).

[3] *Id.*, § 502(a)(2).

> age, or
> (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such services placed the call or initiated the communication; or
> (2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.[4]

As a defense to the above sections, Section (e) provides defenses for facility, network, or system providers who offer services that are incidental to providing access and that are not responsible for the creative content of the messages.[5] In addition, the Act offers a defense from prosecution if the following protective measures in Section 502(e)(5) are utilized:

> (5) It is a defense to a prosecution under subsection (a)(1)(B) or (d), or under subsection (a)(2) with respect to the use of a facility for an activity under subsection (a)(1)(B) that a person -
> (A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology; or
> (B) has restricted access to such communication by requiring use of a verified credit card, debit account,

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4 *Id.*, § 502 (d).
5 *Id.*, § 502(e)(1).

adult access code, or adult identification number.[6]

The subject matter that this law is meant to address can be found via access to any online service and a bit of searching in the right locations on the Internet. Pornography is certainly present in cyberspace. Some of the material could be classified as obscene with no constitutional protection, while some of it, such as pictures taken from *Playboy* magazine, would only be considered indecent and would thereby still receive constitutional protection.

A recent *USA Today* article describes the situation online.[7] First of all, "[t]he proportion of raunchy material is small, but it exists. If you want to avoid sex on-line, that's fairly easy. But if you know where it is, you can get it."[8] Sexually-explicit material does not suddenly appear without a request, but an Internet search using the words "sex," "nude," and "adult" brought up 9413 documents.[9] Web "pages" feature such diverse fare as the following: 1) sex shops which advertise adult communications services and "marital aids" for order by credit card; 2) personal pages where individuals can post pictures or text; and 3) newsgroups consisting of postings which contain images, text or sounds.[10] According to Billy Wildhack, the majority of the images are soft-core erotic photos of women, with very little actual hard-core obscenity or child-porn representing the general content of online materials.[11] Explicit content can also be found in the live chat rooms of the online services where a person can engage in conversation with a large number of users or access a private room for more intimate associations.[12]

Considering that much of this material is being accessed by children, it is difficult to argue that the government does not have a worthwhile goal in preventing undesired access to this material by

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6 *Id.*, § 502(e)(5).

7 Leslie Miller, *The Internet's Seamy Side: On-line Sex, Once Found, Can Be Raunchy*, USA TODAY, June 19, 1995, at A1.

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

minors. However, implementation of the legislation could serve such noble goals at the expense of free speech among adults who would otherwise be able to communicate in such a manner. To designate the legality of a communication based on whether an individual knowingly "makes, creates, or solicits" any "indecent" or "patently offensive" communication to a person under the age of 18 will effectively eliminate the legality of virtually all "indecent" communication over the Internet.[13] Because of the nature of the Internet, any posting or any e-mail message could represent such a communication. A court could reasonably find a user to be quite aware that a minor could access any message board on the Internet or on an interactive computer service, and on that basis the knowledge requirement could be fulfilled, even though the communication would not have been directed at the minor.[14] Similarly, e-mail can be relayed by the receiver to a third party, and a minor could then come into contact with the message even though the minor was not the intended recipient of the original sender. "To post anything, anywhere, here or abroad, 'makes it available' to millions of unidentified users who may get it by a variety of technical routes and then make a copy for their own use. Material can thus be 'received' without anybody's sending [of it] . . . ."[15] In essence, many forms of online communications can knowingly end up in the wrong hands simply because an individual who sends a message over the network knows that the message could be viewed by any number of people online whether or not she intends that result.

Because of the substantial over-inclusiveness of the Communications Decency Act (CDA), the regulation of online speech that effectively would constitute an outright ban does not pass constitutional scrutiny despite a compelling interest to prevent access to this material by minors. The indecency provision (and perhaps even the patently offensive standard) is too broad in what it determines to be an appropriate communication over the Internet. Despite the

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[13] *Communications Decency Act*, § 502(a)(1)(A).

[14] Nat Hentoff, *When Privacy Doesn't Compute*, SAN DIEGO UNION-TRIBUNE, Sept. 3, 1995, at G4.

[15] *Id.* (quoting a *Washington Post* editorial) (citation omitted).

fact that several defenses have been included in the CDA, they only serve to protect service and network providers offering access to particular types of materials. To the average user who simply wants to post a message which happens to include an expletive, the CDA could serve to criminalize this person's speech and thereby eliminate that individual's voice from being heard. The legal structure that was intended to clean up the darker corners of the online world has not yet considered the technology that enables individuals to communicate as equals in cyberspace. As a result, certain indecent communications will continue under the new law despite how explicit the material may be, as long as it is not obscene. On the other hand, the majority of individuals who engage in potentially mild forms of indecent communications may be at risk to suffer the same consequences as purveyors of sexually-explicit communications because of their inability to screen the recipients of their messages. The resulting chilling of speech will likely be regarded as unconstitutional by the Court based on this principle alone, let alone that the indecency provision does not describe with any clarity what material will be considered "indecent" under the law. Therefore, the law would be void for vagueness.

Part II of this Comment will analyze the history of the Supreme Court's efforts to determine the constitutionality of regulations that restrict indecent communications disseminated over new forms of media. Some of the relevant issues that will be discussed include the policies of scarcity, intrusiveness, and protecting children from harmful communications. Part III will briefly address the issue of public forum analysis. Finally, Part IV will examine the characteristics of the Internet to determine how the medium should be categorized under the First Amendment to determine which restrictive measures may be used to regulate speech on the Internet.

This Comment will primarily address the issue whether the government, not online services themselves, will be limited in its capacity to restrict speech. Though the issue of whether online services can be considered state actors will be addressed, little analysis of the extent by which the online service can be prevented from restricting speech will be discussed. In addition, the issues of obscenity and child-pornography are irrelevant to the subject except

to the degree that the distinction between obscenity and indecency may rely on a finding that a work lacks "serious literary, artistic, political, or scientific value."[16] The issue of community standards also falls outside the realm of this Comment because it is currently amorphous whether geographical community standards or cyberspace community standards of decency will be found to be more significant when determining whether a communication is obscene or indecent under the Supreme Court's current obscenity test. Finally, because obscenity and child pornography have been effectively prosecuted under current law, the value of the Communications Decency Act is only relevant to its practical utility in aiding the continued enforcement of such restrictions, not the constitutionality of those restrictions.

II. THE SUPREME COURT'S FIRST AMENDMENT STANDARD FOR REGULATING DISSEMINATION OF INDECENT COMMUNICATIONS OVER NEW FORMS OF MEDIA TECHNOLOGIES

A. *Obscenity versus Indecency*

To clarify what kind of speech is restricted by the Communications Decency Act, first it must be made clear what is meant by the term "indecent." "Indecency" is not as high a standard as "obscenity."[17] Obscenity is clearly defined within the language of *Miller v. California* as "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have a serious literary, artistic, political, or scientific value."[18] The state law involved must also specifically define which conduct fits within these criteria.[19] The court applies a subjective "community standards" test to determine whether the work appeals to the prurient interest, but limits that test by using an objective standard for determining whether

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16 Miller v. California, 413 U.S. 15, 24 (1973).

17 FCC v. Pacifica Found., 438 U.S. 726, 740-41 (1978).

18 *Miller*, 413 U.S. at 24.

19 *Id.*

the work has serious literary, artistic, political, or scientific value.[20] It is thereby possible that material can have a high amount of sexual content yet still not be obscene. However, this does not mean that this sexually-explicit material cannot be restricted from being widely accessible to the population. The Court held in *Butler v. Michigan* that the state could not "reduce the adult population of Michigan to reading only what is fit for children,"[21] but also later held that a state could restrict the availability of adult books to children.[22]

On the other end of the spectrum, indecent speech can be recognized in language which is not sexually-explicit but may be vulgar or profane. The "offensive conduct" found in *Cohen v. California*[23] was not the use of a profane word with the purpose of expressing the sexual nature of the word. The defendant's decision to wear a jacket bearing the message "Fuck the Draft" could not be considered under an obscenity paradigm because an obscene expression "must be, in some significant way, erotic."[24] In holding that this speech was protected, the Court stated the following:

> While this court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, we have at the same time consistently stressed that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech."[25]

The policy of the Court in regard to this middle-ground of offensive communications can thus be viewed as being somewhere between totally protected and totally unprotected. The circumstances determine whether the communication is permissible or not within those circumstances. The cases concerning government regulation of the media clearly demonstrate the use of such standards to determine how

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20 *Id.* at 26-34.

21 Butler v. Michigan, 352 U.S. 380, 383 (1957).

22 Ginsberg v. New York, 390 U.S. 629 (1968).

23 403 U.S. 15 (1971).

24 *Id.* at 20.

25 *Id.* at 21.

to apply the First Amendment to the different characteristics of the various forms of communication.

B. *Indecency and the Media—A New Justification for the Regulation of Indecency*

The Federal Communications Commission (FCC), the government agency that oversees the regulation of modern forms of media, has been granted considerable powers to intervene and impose restrictions on media. In particular, the broadcast media has considerable controls imposed upon it by the federal government. In *Red Lion Broadcasting Co. v. FCC*, the Court allowed the FCC to impose the "fairness doctrine" on broadcasters so that the stations would attempt to provide balanced coverage for opposing sides of an issue.[26] The primary justification for permitting such restrictions, according to the Court, was that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."[27] The primary differences which the Court recognized for the new media in this case were the "scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those without government assistance to gain access to those frequencies for expression of their views."[28]

With the advent of the 500-channel future of cable television, the view of the Supreme Court as it pertains to regulation of the media has been changing with the times. In *Turner Broadcasting System, Inc. v. FCC*,[29] the Court permitted the FCC to require cable operators to transmit the programming of local public television broadcast stations. The Court viewed the cable market as having substantial "barriers to entry for new programmers and a reduction in the number of media voices available to consumers" as a result of

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[26] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 369-75 (1969).

[27] *Id.* at 386.

[28] *Id.* at 400.

[29] Turner Broadcasting System, Inc. v. FCC, — U.S. —, 114 S. Ct. 2445 (1994).

"horizontal concentration, with many cable operators sharing common ownership."[30] However, the government maintained, and the Court rejected, that the must-carry provisions were "industry-specific antitrust legislation, and thus warrant[ed] rational basis scrutiny" even though the market commodity in this case was speech.[31] The Court chose not to follow the same rationale as in *Red Lion* because of the technology differences in the medium; "there may be no practical limitation on the number of speakers who may use the cable medium."[32] The scarcity argument would no longer justify a relaxed standard of scrutiny where the medium of communication is open to many non-interfering communicators.[33] As a result, scarcity will not serve as a proper basis to justify any regulation of cyberspace.

In addition to scarcity, broadcasts have another feature which the Court finds to be significant when dealing with speech over the airwaves: intrusiveness. In *FCC v. Pacifica Foundation*,[34] the Court stated that "[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be let alone plainly outweighs the First Amendment rights of an intruder;" this ruling would justify the FCC's authority to restrict speech under 18 U.S.C. § 1464.[35] This idea of the offensive broadcast is imperceptible when the television or radio is not first turned on. However, the Supreme Court makes a reference to the fact that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans."[36] The intruder enters because the Court apparently assumes that the door is wide open on a general basis: in our society, the television or the radio is perpetually on.

A second feature of broadcast media that the Supreme Court recognizes as relevant is that "broadcasting is uniquely accessible to

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30 *Id.* at 2454-455.

31 *Id.* at 2458.

32 *Id.* at 2457.

33 *Id.*

34 FCC v. Pacifica Found., 438 U.S. 726, 748-49 (1978).

35 *Id.* at 748.

36 *Id.*

children, even those too young to read."[37] In the case at hand, a radio station played a 12-minute monologue by George Carlin in which the comedian lists off the seven "Filthy Words" which never can be spoken over the airwaves; the broadcast was heard by a man who was driving in his car with his young son when the broadcast was aired.[38] The Court found significant the fact that "[a]lthough Cohen's written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant."[39]

The Court's prior determination in *Ginsberg v. New York* that the state had the right to restrict children's access to indecent materials to protect the "well being of its youth" and in supporting "parents' claim to authority in their own household" was then weighed in with "[t]he ease with which children may obtain access to broadcast material" to "justify the special treatment of indecent broadcasting."[40] It is also important to note that the Court sought "to emphasize the narrowness of [the] holding."[41] The restriction of the First Amendment right of free speech in the broadcast media was seen to be a very specific ruling in the *Pacifica* decision and in subsequent decisions. In the actual language of *Pacifica*, the Court pinpointed certain examples of permissible broadcasts, which included "a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy;" or perhaps even the "time of day" of the broadcast was the determining factor for permissibility.[42]

In a recent decision, *Action for Children's Television v. FCC (ACT III)*,[43] the District of Columbia Circuit held that indecency standards imposed by the FCC that restricted indecent broadcasts to the hours between midnight and 6:00 a.m. were constitutional. The court upheld the restrictions even though cable has been increasing the

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37 *Id.* at 749.

38 *Id.* at 726-30.

39 *Id.* at 749 (referring to Cohen v. California, 403 U.S. 15 (1971)).

40 *Id.* at 749-50 (citing *Ginsberg*, 390 U.S. at 639-40).

41 *Pacifica*, 438 U.S. at 750.

42 *Id.*

43 58 F.3d 654 (D.C. Cir. 1995), *cert. denied*, 116 S.Ct. 701 (1996).

availability of alternative television transmissions because "broadcast audiences have no choice but to 'subscribe' to the entire output of traditional broadcasts."[44] When it comes to broadcasting, the court grants the FCC a great deal of regulatory power. However, as *Turner* indicated, the specificity of this regulatory power seems to be restricted to broadcast television only.

The difficulties of extending the ruling held in *Pacifica* and *ACT III* to other cases proved to be quite tedious as the government sought to use the same rationale—exposure of indecent communications to children—in the "dial-a-porn" cases.[45] In *Sable Communications v. FCC*, the Court declared a total ban on indecent interstate commercial telephone communications to be unconstitutional.[46] The reasoning of *Sable* distinguished *Pacifica* on the basis that a telephone message does not "intrude" into a person's home; the caller creates the communication by making the call, and there was no basis for a determination that a total ban was the least restrictive means to prevent access to minors.[47] It was not until *Dial Information Services Corp. of New York v. Thornburgh* that a Court of Appeals found a compelling governmental interest served through regulation of speech by the "least restrictive means," as the Supreme Court determined to be the standard under *Sable*.[48]

The system used in *Dial Information Services* that passed constitutional muster forsook voluntary blocking by the caller in favor of more restrictive measures because there was strong evidence indicating that the voluntary blocking system already in place did not adequately prevent access to dial-a-porn by minors.[49] The statute involved provided a safe harbor defense against indecency

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[44] *Id.* at 660.

[45] Sable Communications of California v. FCC, 492 U.S. 115 (1989); Dial Info. Servs. Corp. of New York v. Thornburgh, 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 502 U.S. 1072 (1992).

[46] *Id.*

[47] *Id.* at 127-29.

[48] *Dial Info. Servs.*, 938 F.2d at 1541 (citing *Sable*, 492 U.S. at 126).

[49] *Id.* at 1542 (stating that only 4 percent of homes had been blocked, and an awareness study showed that only half of the homes in the New York area served by blocking in the case were aware of blocking or of dial-a-porn).

prosecutions for those companies that initiated the procedures of presubscription with the phone company to access the dial-a-porn companies, required payment by credit card, and used access or identification codes or descrambling devices.[50] The Court determined these measures to be more effective than the voluntary blocking measures imposed after the damage was already done by the minor accessing the service; "[i]t always is more effective to lock the barn before the horse is stolen."[51]

In addition, prior restraint issues were potentially relevant in the case. The Court cited *New York Times Co. v. United States* in stating that "[o]nly where the government imposes a requirement of advance approval or seeks to enjoin speech can there be a prior restraint."[52] Because the statute imposed an obligation on the dial-a-porn company to notify the telephone company, which is a common carrier and *not* a state actor, this could not be considered a prior restraint by the government.[53] The Supreme Court cases invalidating governmental prior restraint all concern *government* officials denying access prior to the desired expression.[54] Additionally, because the telephone company is not compelled by the government to offer billing services for the purposes of dial-a-porn providers and also makes no efforts to review the content of any of the messages, it is not serving as a state actor.[55] The issue whether a common carrier or other service provider, such as broadcast television, is to be considered a state actor involves the application of the public forum doctrine to these service providers to determine whether they should be treated as a part of the government or should be treated as mere private actors.

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50 *Id.* at 1539.

51 *Id.* at 1542.

52 *Id.* at 1543 (citing New York Times Co. v. United States, 403 U.S. 713 (1971)).

53 *Id.* at 1543.

54 *Id.* (citing Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975); Ward v. Rock Against Racism, 491 U.S. 781, 795 n.5 (1989)).

55 *Id.* at 1543-544 (citing Carlin Communications, Inc. v. Mountain States Tel. & Tel. Co., 827 F.2d 1291, 1297 (9th Cir. 1987), *cert. denied*, 485 U.S. 1029 (1988); Carlin Communications, Inc. v. Southern Bell Tel. & Tel. Co., 802 F.2d 1352, 1357-61 (11th Cir. 1986)).

III. SERVICE PROVIDERS ARE NOT CONSIDERED STATE ACTORS UNDER THE PUBLIC FORUM DOCTRINE

The Court has held that although the government has the right at times to restrict speech on its own property, there are limits to that freedom. In *Hague v. CIO*, the Court held the following:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.[56]

These areas, referred to as public fora, are thereby considered to be protected from government restraint of public discussion. However, the government may legislate to maintain the "primary purpose" of the streets and sidewalks, transportation of people and property, "[s]o long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature . . . ."[57] In *Ward v. Rock Against Racism*, the Court added:

> [E]ven in a public forum the government may impose reasonable restrictions on the time, place, and manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.[58]

If the government opens up a new forum to the public for expressive activity, then the government must follow the same standards as would apply to a traditional public forum except that the government may close the forum to public communication if it so

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56 Hague v. CIO, 307 U.S. 496, 515 (1939).

57 Schneider v. State, 308 U.S. 147, 160 (1939).

58 *Ward*, 491 U.S. at 790.

chooses.[59] In these new fora, only reasonable time, place, and manner restrictions and narrowly drawn content-based restrictions serving a compelling governmental interest are allowed, though a "public forum may be *created* for a limited purpose . . . or for the discussion of certain subjects."[60] However, in new fora that are not designated for public communication, the government can regulate the communication within a forum at any point in the forum's existence as long as the suppression of speech is not based on regulation of the speaker's viewpoint.[61] This leads to analysis of the public forum doctrine as it applies to private property.

While viewed somewhat as a public-private partnership to the extent that the government regulates and subsidizes the communications industries, service providers are not owned or directly controlled by the government. They are not state actors through any ownership rationalization. The question remains under what circumstances those providers can be considered state actors through the roles that they play. In *Marsh v. Alabama*, the Court held that a corporation served in the same capacity as a municipality by owning all the property in the entire town.[62] Because "[o]wnership does not always mean absolute dominion," the fact that the company town was privately owned did not "justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties."[63] The fact that the company town had taken on a public function was evidently relevant to the decision because succeeding cases seemed to limit *Marsh* to such extreme cases as the one described in the opinion. In *Hudgens v. NLRB*, the Court ruled that to the degree that a shopping mall resembled a municipality, it did not attain the status of a state actor that could be barred from restricting speech on its own property.[64]

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59 Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983).

60 *Id.* at 46 n.7.

61 *Id.* at 46

62 326 U.S. 501 (1946).

63 *Id.* at 506-09.

64 424 U.S. 507 (1976).

In another line of cases, the degree which the private actor has become "entangled" with the state can confuse the issue whether they should be treated as separate entities. In *Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee*, the Court determined that even in the case of broadcasters, the government does not have a relationship with the broadcaster that is so intertwined that the broadcaster would be treated as a public actor.[65] The broadcast licensee was viewed as "a 'public trustee' charged with the duty of fairly and impartially informing the public audience," over which the FCC oversees that this function is adequately performed.[66] However, the licensee has the "initial and primary responsibility for fairness, balance and objectivity," a function referred to as serving as a journalistic "free agent."[67] Though these two functions must be balanced, to the degree that the discretion of the broadcaster as an independent entity is existent, the government cannot be implicated as being responsible for the decisions made by the broadcaster.[68] In addition, "the Commission must oversee without censoring."[69] As a result, even in a situation where there is a high amount of regulation, as in the case of broadcasting, the intertwining between the government and the private actor must be substantial before state actor status can be found. The government, therefore, cannot regulate the actor's speech to the degree that the actor does not fall under the government's regulatory capacity, and the private actor is not restrained by the First Amendment in its own decisions to restrict speech. This inability of the government to intrude upon the rights of these private companies was also stated clearly with regard to the telephone companies as common carriers in *Dial Information Services*; "[t]he carriers themselves are not state actors but private companies."[70]

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[65] Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) [hereinafter *CBS*].

[66] *Id.* at 117.

[67] *Id.*

[68] *Id.* at 118-19.

[69] *Id.* at 118.

[70] *Dial Info. Servs.*, 938 F.2d at 1543.

IV. WHY ONLINE INDECENT COMMUNICATIONS SHOULD NOT BE REGULATED UNDER THE *PACIFICA* STANDARD FOR BROADCAST MEDIA

Before determining what level of scrutiny should be used to ascertain whether the indecency provision within Public Law 104-104 is constitutional, the Court will have to analyze the characteristics of the new online technologies and the relationship of the government to these technologies.

A. *The Public Forum Doctrine and the Internet*

The first question that is relevant to making such a determination asks whether the online services are providing a public or nonpublic forum for communication. For the online services themselves, it seems quite clear that these companies own the technology for processing the information that goes through their systems. Unless these companies can be considered state actors on some other basis, they offer private fora for the communications between the individuals who use their services. The only other parties involved are the common carrier,[71] which is not a state actor, and the user, who is presumed to privately own the computer used to access the online network. The entire analysis obviously shifts if the network offering access is a university or other public actor. The public forum doctrine would have to be applied to the circumstances in that instance, but that is a subject for an entire other commentary.[72]

When focusing on the Internet, its history becomes important for determining whether public forum analysis is relevant at all. The original Internet, named ARPAnet, was devised in 1969 by the

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[71] David J. Goldstone, *The Public Forum Doctrine in the Age of the Information Superhighway*, 46 HASTINGS L.J. 335, 350 n.58 (1995) (citing *Information Infrastructure Task Force, The National Information Infrastructure: Agenda for Action* 5, 6, 58 Fed. Reg. 49,025 (1993)).

[72] *See, e.g.*, Samantha Hardaway, *Up For Sale: Commercial Speech and the University Internet Account*, 3 UCLA ENT. L. REV. 333 (1996); Goldstone, *supra* note 71.

Pentagon to create a computer network connecting university researchers, military research contractors, and the defense department. This network was, in effect, replaced by the construction of NSFnet by the National Science Foundation. The federally-subsidized NSFnet serves as the foundation for the national computer network. Most universities and corporations are linked to NSFnet via regional networks.[73] As a result, these organizations often impose "acceptable use policies" in order to comply with the NSF's limitation of the NSFnet to educational and research purposes.[74] However, the NSF has reduced its role in the development of the Information Superhighway to open the door for commercial providers to take control over expanding development of the network.[75]

Despite all the government involvement in the development of the Information Superhighway, it would appear that in the future much of the further expansion of the network will be undertaken by the private sector.[76] As a result, it would seem to be increasingly difficult to consider even the Internet itself as government property subject to the restrictions under the First Amendment or to regulation of the government under the public forum doctrine. Especially when access to the Internet occurs through the use of an individual's own computer and a private network service provider, it would be difficult to find that government restrictions should be allowed to intrude upon the freedom to use private services simply because the government owns the pathways through which those communications pass on their way to another private interface. Again, the analysis for government-owned computers and networks will most likely differ from the reasoning applied to private network operators (for instance, would the government system operator be allowed to simply deny access to "alt." groups on the Internet with the alleged purpose of "reducing

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73 Hardaway, *supra* note 72, at 338.

74 *Id.* (citing *The NSFNET Backbone Services Acceptable Use Policy*, June 1992 (available via anonymous ftp to NIC.MERIT.EDU/nsfnet/acceptable.use.policies/nsfnet.txt).

75 *Id.* at 339.

76 Goldstone, *supra* note 71, at 350 n.58 (citing *Information Infrastructure Task Force*, *supra* note 71, at 6).

computer message transmission traffic," thereby eliminating all concern regarding viewpoint or content discrimination?). This foretells a possible discrepancy between the levels of scrutiny that would be applied to the Internet when considering whether the source is of a public or private nature, should the government be granted the lower standard of a nonpublic forum instead of a limited public forum for their own computer networks. However, it would be better to analyze the forum on this basis rather than trying to determine whether the public or private nature of the connectors themselves is relevant to such a determination. Using this method of analysis, government-owned systems and privately-owned systems can make their own regulatory decisions based on their potentially different levels of scrutiny without the government also being able to restrict more speech on a private network than would otherwise be permitted.

If the Information Superhighway is found not to be a public forum, then the only other way which the private online services can be restricted under a lower level of scrutiny is if the online services are found to be state actors. In light of the Court's decisions in *Marsh*, *Hudgens*, *CBS*, and *Dial Information Services*, it seems quite unlikely that a court will find a state actor in the form of an online service unless the network is actually part of the state.[77] To the degree that the government has been involved with developing the National Information Infrastructure (NII), it seems more likely that the Information Superhighway will be viewed as entangled with the government.[78] However, as the Court demonstrated in *Dial Information Services* and *CBS*, the intent of the government not to run the networks, though it would have "an essential role to play" in the development of the Information Superhighway, could be relevant in finding that the network providers are private actors.[79] As a result, the government will not have the capacity to regulate private online systems under a lower level of scrutiny by applying the forum doctrine rationale.

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[77] *Id.* at 353.

[78] *Id.* at 356.

[79] *Id.* at 356 n.97 (citing Cf. Exec. Order No. 12,864, 58 Fed. Reg. 48,773 (1993)).

B. *Analysis of Technological Characteristics*

Following a conclusion that the NII is not applicable to government forum analysis, the next step is to determine how to apply the new technology of the NII to the Court's First Amendment doctrine for other forms of media. The NII has characteristics which resemble both broadcasting, cable, and telephone technologies; however, each of the characteristics must be examined separately in order to gain a clear picture of what factors are relevant to making a determination of what standard should be used to evaluate the constitutionality of regulations regarding cyberspace.

1. Scarcity

First, the issue of scarcity is irrelevant to the online discussion. The issue of government allocation of a limited number of possible frequencies to a certain number of broadcasters has no counterpart on the Internet. "Scarcity" indicates a likelihood that there will be a danger that some viewpoints will not be heard.[80] The Internet has virtually limitless capabilities for all viewpoints to be heard because its architecture resembles that of a decentralized open-access model. The low cost and open accessibility for communication on such a medium insures that diversity of viewpoints will result.[81] The open access system can accommodate a high number of communications because "the network makes no distinction between users who are information providers and those who are information users."[82] Users can alternate in their roles as either information provider or user and can promote debate on any issue that they bring to the forum, add further to existing topics, or merely observe the debate presented before them. Also relevant is that with such a wide number of

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[80] Jerry Berman & Daniel J. Weitzner, *Symposium: Emerging Media and the First Amendment: Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 YALE L.J. 1619, 1622 (May 1995).

[81] *Id.* at 1623.

[82] *Id.* at 1624.

sources and no need for a centralized distribution point, no gatekeeper exists to block transmission of any message by any information provider.[83] The advantages of this freedom to send messages to as many places as desired frees the user from restraints of the network architecture as well.

To have total open access, a network would also require open endpoints, called interfaces.[84] The endpoints of the network must be open and enable access to the users or else a bottleneck will form, slowing the free-flow of the information.[85] The Internet interfaces could plug up the flow of information simply because the technological requirements to create a network interface are complex.[86] However, there are plenty of network providers currently in existence to ensure that a bottleneck similar to that in the cable industry, as was recognized in *Turner Broadcasting,* would not develop. In addition, no blockage of new network providers can result as was the case in *Turner Broadcasting* because there is no monopoly controlling access to the Internet.[87] This distinction makes the NII more similar to the print medium than to the cable industry; though a newspaper may have a monopoly over an entire area, there is nothing stopping another person from starting up their own printing press.[88] The open decentralized access system could lead to a return to the regulation model for the print medium as presented in *Miami Herald Publishing Co. v. Tornillo*, in which the Court rejected imposing a "right to reply" requirement reflecting *Red Lion*'s regulation of the broadcast media.[89] Because there is no limit to the number of "channels" in the open-access model, the Internet, like cable, can be easily distinguished from the scarcity issues confronted by the Court in *Red Lion*; it is unlikely that a monopolistic situation as represented by the

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83 *Id.*

84 *Id.*

85 *Id.* at 1625.

86 *Id.* at 1624-25.

87 *Id.* at 1628.

88 *Id.*

89 *Id.* at 1628-29 n.30 (citing Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 254-58 (1974)).

Turner Broadcasting case will ever result either due to the sheer number of networks that can spring up on the national computer network or to a lack of any essential element which can fall under the control of a single entity.[90] Even if such a situation develops, the problem could probably be dealt with under the antitrust laws, despite the presence of First Amendment issues,[91] just as in the *Turner* case. By contrasting the open-access model, which is highly representative of the qualities of the Internet, to characteristics of both the cable industry in *Turner* and the broadcast industry in *Red Lion*, it seems clear that issues of scarcity are irrelevant in justifying any regulation of the Internet as long as the network can maintain open access and sufficiently open endpoints for all information providers and users.[92] As a result, this scarcity rationale which served as a basis for regulating indecency under *Pacifica* cannot be applied to this new form of technology.

2. Intrusiveness

The second major issue that should be addressed is the issue of intrusiveness. The idea of the broadcaster as invader was found to be significant in *Pacifica*[93] and *CBS*.[94] This intrusiveness of the broadcast has three possible interpretations: broadcast signals are "in the air," broadcast signals do not require an affirmative act to perceive, and broadcasting is more powerful than print.[95] The first argument is irrelevant because electromagnetic waves are imperceptible without the aid of an appropriate device; because communication on the Internet is essentially contained within the

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[90] Fred H. Cate, *The First Amendment and the National Information Infrastructure*, 30 WAKE FOREST L. REV. 1, 46 (Spring 1995).

[91] *Id.* at n.283 (citing Associated Press v. United States, 326 U.S. 1, 19-20 (1945)).

[92] Berman & Weitzner, *supra* note 80, at 1628.

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

[94] Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

[95] Cate, *supra* note 90, at 41.

materials which serve to link together the NII, the significance of this interpretation is even less applicable to online systems.[96]

The reasoning behind the second interpretation is also a bit questionable to the extent that it requires an affirmative act to possess or operate the receiving device. However, the argument that a person is passively subjected to broadcast messages can be easily distinguished from interactive media. The Internet requires a person to make a high number of affirmative acts and choices in order to access information.[97] As a result, it would be difficult to label a provider of this information as "an intruder" when the person has in many cases specifically sought the information out. The degree to which a person must "invite" cable into the home was found to be relevant in holding that the intrusiveness justification did not apply to the cable industry.[98] Similarly, the degree to which interactive media grants a high amount of user control, thereby requiring the user to extend a large number of "invitations" before finally accessing the source of his query, also leads to the conclusion that intrusiveness cannot be found on this basis.[99] In addition, interactive media such as the Internet often tells a user what the subject matter is before the person views any image or text, so the intrusiveness argument falters on that basis as well.

In any case, "indecent" material on the Internet would be no more offensive than similar material found in the library or a bookstore. In such instances, it is quite simple to put an offensive book down and read something else. If a person wants to look at the magazines, then they can walk over to the magazine section and glance through those materials. If they want to see the pornographic pictures, then they reach up a bit higher to grab a hold of one of those magazines, *if they so choose*. The Internet is no more intrusive than

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96 *Id.*

97 *Id.* at 42.

98 *Id.* at 42-43 n.267 (citing Cruz v. Ferre, 755 F.2d 1415, 1419-22 (11th Cir. 1985); *id.* at n.268 (citing Community Television of Utah, Inc. v. Wilkinson, 611 F. Supp. 1099, 1113 (D. Utah 1985), *aff'd*, 800 F.2d 989 (10th Cir. 1986), *aff'd*, 480 U.S. 926 (1987)).

99 Berman & Weitzner, *supra* note 80, at 1629.

this example except that the person does not actually have to leave the home and go to the nearest mall to access these materials. The Internet is anything but intrusive; rather, it increases a person's ability to access a variety of forms of information without ever leaving the house.

3. Pervasiveness of the Medium

The third argument, which concerns the power of the broadcast media in communicating its message, should have little relevance to the intrusiveness of the medium argument. As mentioned in *Cohen v. California*, effective communication, even if jarring or shocking, is protected speech.[100] Because of the high amount of user control, this would be even more compelling for interactive media; with complete user control, the ability to "avert one's eyes" is completely in the hands of the user. Therefore, as with broadcasting and dial-a-porn, the degree to which intrusiveness of the interactive media should be significant regarding the "power of the medium" should only be in relation to the differential impact of the medium on children.

The user control aspect of technology when applied to the context of children being able to access cyberspace has more to do with user control enabling children to get a hold of material which is unsuitable for their observation than its intrusion without being sought out. In *Pacifica*, the uniquely pervasive nature of broadcasting could be seen as intruding into the home under the nose of unsuspecting parents who are unable to prevent their children from hearing or seeing an indecent communication.[101] This argument seems a bit problematic when it is brought to light that in the *Pacifica* case, the boy's father was in the car playing the radio when the boy heard the Carlin broadcast; however, the Court also points out that oftentimes in broadcasting, there is not enough time to change the channel before the damage is done.[102] Despite the fact that the radio station had issued warnings to listeners that the station was broadcasting

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100 Cate, *supra* note 90, at 43 (citing Cohen v. California, 403 U.S. 15 (1971).

101 *Pacifica*, 438 U.S. at 749-50.

102 *Id.* at 730, 748-49.

potentially offensive material, there was no chance that someone listening in late to the broadcast could be warned before being "assaulted" by the offensive material.[103] A parent would have no time to cover the child's eyes or ears to prevent the child from hearing or seeing the communication.

This same reasoning applied to the dial-a-porn cases, although the Court evaluated the restrictions under much more stringent standards. In *Sable*, the Court found no "uniquely pervasive medium" issue when the rationale was applied to telephonic services.[104] The Court stated:

> [U]nlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it.[105]

However, the ability of children to access the material under the noses of their ever-watchful parents was still viewed to be significant. In *Dial Information Services*, the Court determined that the least restrictive manner to fulfill the government's compelling interest was to block access until age verification or credit card procedures were followed by the prospective user.[106] Being unfamiliar with the new technology, the parents had to be assisted by the state in preventing children from accessing this material.[107]

C. *New Technologies as Least Restrictive Means*

Again, broadcasting and dial-a-porn are easily distinguishable from interactive media. The high amount of user control demonstrated when obtaining information through the use of interactive media is also significant in eliminating intrusion of

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103 STEVEN H. SHIFFRIN & JESSE H. CHOPER, THE FIRST AMENDMENT: CASES, COMMENTS, QUESTIONS 483 (1991); *Pacifica*, 438 U.S. at 748-49.

104 Sable Communications of California v. FCC, 492 U.S. 115, 127 (1989).

105 *Id.* at 128.

106 *Dial Info. Servs.*, 938 F.2d at 1541-43.

107 *Id.* at 1542-43.

unwanted messages.[108] Parents can read the subject line of the material and "cover their children's eyes and ears" before the harmful image ever crosses the screen. In addition, the availability of screening technologies enable the parents to lock out harmful material so that they can be sure that their children are not delving into material in their absence that could be harmful to the social development or values of their children. Currently, technology exists which will give individuals the capacity to screen out information on the basis of particular features.[109] Such screening systems could block messages dealing with particular subject matter, newsgroups, keywords, or vulgarity. Access to chatrooms can be blocked and discussion groups intended only for children can be formed. The screening system can be based on the parents' own selections or by a rating system created by an outside party.[110] Because of the upcoming availability of many forms of this new technology, it is obvious that an outright ban of all indecent material in cyberspace would not be constitutional and would not survive the stringent scrutiny that the Court would use to analyze the new medium. The government has provided no evidence which would support the assumption that these technologies would not serve as a sufficient protective measure, so government regulation would not be the least restrictive means by which to deal with this issue, as in the dial-a-porn cases. As a result, the Court will not have to impose limitations that serve to restrict adults to communicating online in a manner that "is only fit for children"[111] in order to protect those children from indecent materials.

In response to the prevalence of online pornography and the political heat that has resulted, many companies have been working on a solution to the problem through technological means. America Online, Prodigy, CompuServe, Microsoft, and other high-tech companies have organized to find a solution to the problem, and they reached a consensus: allow individuals to select a ratings system that

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108 Cate, *supra* note 90, at 44.

109 Berman, *supra* note 80, at 1633.

110 *Id.*

111 Butler v. Michigan, 352 U.S. 380, 383 (1957).

would be appropriate for their needs in screening unwanted messages.[112] The framework established to fulfill this function will be able to block messages through the use of three techniques: 1) content providers voluntarily placing headers which will repel net-surfers using a particular rating system; 2) online services blocking access at the source; and 3) private organizations periodically sending updated lists of web sites that provide information in which they approve or disapprove of the content.[113]

These private organizations would obviously be guided by the marketplace and the ideologies of the particular organizations when making judgments regarding the proper standards to be used in rating the web sites. The pursuit of profits would additionally serve to motivate these organizations to develop this new technology. The market would also serve to enable parents to select the screening program that most reflects their personal ideology as opposed to having a single general standard applied by the federal government. Finally, all of these differing standards can be created to fulfill the government's compelling interest to protect children from harmful online speech without instituting a ban of all such communications, including those between consenting adults.

The question remains how realistic it is that such a program can be quickly and effectively developed. Some of this technology already exists and is currently in use. For instance, America Online provides parents with the capability to block access to chat rooms, and the service employs individuals to monitor live chat that does not take place in the private chat rooms.[114] The company also plans to extend the blocking system to e-mail, bulletin boards, and data libraries.[115] The coalition of high-tech companies which conferred in September 1995 planned to establish the framework of the ratings

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[112] Stephen Lynch, *Internet Consortium Has Plan On Porn: Technology: The Goal is to Avoid Government Oversight*, ORANGE COUNTY REGISTER, Sept. 12, 1995, at C3.

[113] *Id.*

[114] Jared Sandberg & Glenn R. Simpson, *Porn Arrests Inflame Debate on New Laws*, SAN DIEGO UNION-TRIBUNE, Sept. 19, 1995, at 3.

[115] *Id.*

system in early 1996.[116] Organizations such as the Christian Coalition, SafeSurf, and Surfwatch are setting out to create a system where their staff surfs the net, analyzes the material, and classifies the material within a ratings system that can be used by parents to keep their kids away from cyber-porn.[117]

To serve as an example, the Surfwatch program has already been used in some instances to curb access to the Internet.[118] The program keeps all individuals from being able to access explicit material unless a password is used to open the lock.[119] The company claims that the program can block 90-95 percent of the red light district sites, despite the fact that the purpose of the program can be defeated by the creation of new cyber-porn sites or altering the location of old sites; however, the company can make new, updated lists available to accommodate for these changes and block access to those sites if the parents continue to keep their program list current.[120] If parents should disagree with the decisions made by Surfwatch when compiling the restricted site list, future versions of the program will enable parents to create their own list of areas to which they may wish to prevent their children from gaining access.[121]

Despite the fact that the program is not fool-proof, it could actually serve to be a better measure for attacking on-line smut than government regulation because the program targets all on-line pornography; nearly one-third of Surfwatch-targeted sites are from overseas and potentially out of reach from the enforcement of the federal law.[122]

As long as the bill's constitutionality is in question, it is possible that Congress will not enact legislation embracing

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116 Lynch, *supra* note 112.

117 *Id.*; Jeff Leeds, *The Inter-nyet; With His Surfwatch Program, Software Developer Bill Duvall Has Jumped Into the Fray Over Who Should Police Children's Computer Access to Sexually Explicit Material*, L.A. TIMES, Sept. 14, 1995, at B2.

118 Leeds, *supra* note 117.

119 *Id.*

120 *Id.*

121 *Id.*

122 *Id.*; *Cybercops*, USA TODAY, June 19, 1995, at A10.

development of new technologies that can prevent children from accessing harmful material. The present situation is analogous to the battle over dial-a-porn regulation. Instead of utilizing the identification and credit card measures eventually required by the FCC, Congress repeatedly passed legislation that was held unconstitutional by the courts.[123]

Perhaps with future legislation of this sort, Congress should consider that a cohesive effort to implement these technologies would be more successful than repeatedly experimenting with new legislation until a suitable measure is approved by the Court. The divide and conquer nature of government regulation draws lines in the sand, which in many cases can hinder the efforts of private actors from implementing their own policies. For instance, the fact that an online service can be prosecuted under the law may actually persuade online services to avoid policing their own systems out of fear that they will be criminally liable for having knowledge of potentially indecent communications between the users, despite the presence of good faith defenses in the CDA.[124] Contrast such a result with the hands-on approach of the Motion Picture Association of America which has been quite successful in giving parents the type of information that they require to determine whether a motion picture is suitable for their children to watch—at least it has been successful enough to avoid a call for government censorship of the film industry. Since this approach is being applied to the broadcasting industry as well by the implementation of a ratings system accompanied by a V-chip in all television sets to block children's access to restricted programming (at the discretion of the parent), why should a different approach apply to the online medium when such technologies are available for that medium to a potentially more effective degree?

It is also sometimes difficult to tell who is making the indecent communication in order to prosecute the person. In a recent instance, this problem was clearly demonstrated when Caltech administrators attempted to determine whether a student was using the university's

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123 *Dial Info. Servs.*, 938 F.2d 1535.

124 *Communications Decency Act*, *supra* note 1, §§ 502(a)(2), 502(e).

e-mail services to harass a fellow student, his ex-girlfriend.[125] Given the anonymous nature of some e-mail, and the ease by which e-mail can be forged in order to implicate the wrong person for sending an improper message, it is difficult to determine the actual identity of an individual who makes the indecent communication.[126] Despite the questionable nature of e-mail evidence, the Caltech student was expelled from the university for making the harassive communications.[127] The controversy would be even more serious if the evidence for a criminal case, which could result in a fine of $250,000 and/or two years imprisonment, would be based on something so easily falsified as e-mail. To counter all the criticism of the CDA, supporters of the bill may argue that the Section 502(e) defenses create a standard that is analogous to the standards determined to be constitutional in the *Dial Information Services* case, where particular techniques used to block access to minors from dial-a-porn services were determined to be suitable protections from prosecution under the statute.[128] The two situations are not so easily analogized, however, when it is considered that the indecency targeted in the dial-a-porn cases was not from an individual communicating expletives to a minor, as could result under the CDA, but a telephone service communicating *sexually explicit* messages to a minor. The primary difference between the two laws is that the communication over the telecommunications device need not be sexually explicit at all under the current construction of the CDA in order to constitute a criminal act. If the *Pacifica* standard created by the FCC is the measure for indecency, then the use of vulgarity in itself would constitute a violation of the CDA, even if used in a political context (or comedo-political context as with George Carlin in the *Pacifica* case).

The law also goes so far even to dissuade two consenting

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[125] Amy Harmon, *Student's Expulsion over E-mail Use Raises Concerns: Cyberspace: Caltech Harassment Case Illustrates Growing Problem. But Experts Fear Unreliable Records*, L.A. TIMES, Nov. 15, 1995, at A1.

[126] *Id.* at A27.

[127] *Id.*

[128] *Dial Info. Servs.*, 938 F.2d 1535.

minors not involved in the commercialization of pornographic communications from discussing a line of dialogue from a PG-13 film, a form of communication which is not barred in any medium except broadcast media with its heightened standards of scrutiny. Even on television, some communication of a more explicit nature has been appearing in prime time hours—perhaps a trend which will continue to be permitted with increasing prominence of the V-chip in television sets). On this basis, without any further efforts to restrict the indecency provision of Section 502(a)(1)(B) to patently offensive sexual or excretory activities, the provision should be deemed unconstitutional following the reasoning of such cases as *Dial Information Services*, which required that indecency be defined as the "description or depiction of sexual or excretory activities or organs in a patently offensive manner."[129]

D. *Compelling Interests and Narrow Tailoring*

If the Section 502(a)(1)(B) indecency standard is determined to be enforceable only in relation to patently offensive sexual or excretory activities, then it would essentially mirror Section 502(d)(1). Section 502(d)(1) essentially uses the language in the first prong of *Miller v. California* to serve as the standard for indecency.[130] This view of indecency would serve to effectively restrict patently offensive sexual or excretory communications that *do* have scientific, literary, political, or artistic value (and would thereby chill constitutionally protected speech not classified as unprotectable obscenity).[131] Although the potential for a favorable determination of the constitutionality for this provision far exceeds that of Section 502(a)(1)(B), the Court still will have to look at the compelling interest of the state in restricting such communications as well as the narrowness in tailoring the statute before justifying the measures on constitutional grounds.

First of all, the Court will probably recognize that one of the

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129 *Id.*

130 *Miller*, 413 U.S. 15 (1973).

131 *Id.*

primary purposes of the statute was to protect children from the effects of pornography on the Internet. It seems clear from the Congressional Record that this goal was clearly on the minds of many of the senators when voting on the original form of the Exon-Coats Amendment, including those who opposed the provision; in particular, Senator Exon presented to the chamber a scrapbook of obscene material obtained online.[132] On the other hand, it is also clear that several senators were highly concerned about the chilling of free speech that would occur by issuing a blanket ban of all indecent communications, especially for those communications with high literary, artistic, political, scientific, and even expressive merit.[133] As a result of the arguments offered by either side of the discussion, it can be argued that the primary purpose of the legislation was to protect minors from coming into contact with harmful sexual material despite the possibility of chilling free speech between adults. However, it is not clear where that line is to be drawn in determining which material was considered harmful to children in the entire scheme of things. Clearly the senators were concerned about the dangers of obscene material, which the Court has clearly determined receives very little if any protection by the Constitution, but the issue of indecency is another matter. Since there is no clear goal on the record that the law was intended to restrict access to all materials pertaining to any kind of sexual topic, then it would seem that the line is somewhere in between the two extremes. In most cases, however, the courts have shown a limited amount of deference to the legislature concerning the chilling of indecent speech if the legislative goal is not compelling; with the exception of broadcast television, virtually all such restrictions have only passed constitutional analysis if they have been narrowly-tailored.[134]

Clearly the indecency provision is not narrowly-tailored to strike at the primary goal: eliminating children's access to

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132 141 CONG. REC. S8310-03, S8327-8347 (daily ed. June 14, 1995).

133 *Id.*

134 *Cf.* FCC v. Pacifica Found., 438 U.S. 726 (1978); *Dial Info. Servs.*, 938 F.2d 1535; Sable Communications of California v. FCC, 492 U.S. 115 (1989); Cohen v. California, 403 U.S. 15 (1971).

pornography. It would seem that the legislature missed the mark with the patently-offensive standard as well. The history behind *Sable* and *Dial Information Services* would appear to indicate that this is the case. Restriction of dial-a-porn communications was not determined to be constitutional until it was shown that the requirements for identification as an adult, in order to gain access to the service, was virtually essential to prevent access by minors.[135]

Proponents of the CDA may argue that the safe harbor defense provided by Section 502(e)(5) is comparable to the *Dial Information Services* safe harbor for dial-a-porn. In the case of the Internet, however, there has been no showing by the government that the use of similar identification requirements is even necessary, let alone least restrictive. The use of screening technologies at the hands of the user are capable of performing the same function without requiring information providers to screen all information that appears on their services or else develop a system which would prevent minors from gaining access to the site. This would not only make it more difficult for individuals to access the information, it could potentially shut down providers who do not have the resources to monitor the communications on the site or to establish a complicated clearance system allowing access only to adults. The freedom and equality of the Internet for all speakers would cease to exist due to such burdens imposed by the CDA. As a result, the Court should find that the patently-offensive requirement joined with the use of a safe harbor defense under Section 502(e)(5) does not constitute the least restrictive means to prevent access of indecent communications to minors.

One final issue that is problematic for the constitutionality of the CDA is that it not only prevents the dissemination of new ideas, but it also blocks access to ideas which are already freely available in other media. For instance, a child could walk into virtually any bookstore or library and read a novel containing material that would be considered unsuitable for the Internet. A library on the Internet

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[135] *Dial Info. Servs.*, 938 F.2d at 1542 (stating that low awareness of blocking services provided by the telephone company required that drastic measures must be taken to prevent access by minors before their parents were aware of such activities).

would be restrained from having the same freedoms that a print library would have. In *City of Cincinnati v. Discovery Network*, the Court held that a categorical ban of commercial newsracks was unconstitutional because the distinction between commercial and noncommercial speech "bears no relation *whatsoever* to the particular interests that the city has asserted."[136] Likewise, because the CDA could conceivably result in a hindrance to indecent speech that would occur on a similar scale and that has no real relationship with the characteristics of the medium, the distinction between the print medium and the online world is impermissible. In a library or a bookstore, it is conceivable that a child could come across indecent material, but the value of free speech in that case supercedes repressing speech out of fear that a child may come across the wrong type of material. In the print medium, it has been left to the parents and schools to decide what is fit for a child to read. The same viewpoint should apply to cyberspace, especially since parental controls can do the job even when the parent is totally unaware what the child has accessed. The software controlling access can ease a parent's task to determine what knowledge their child discovers. Just because speech is in print does not make it less harmful than when it is stored in an electronic database; the distinction is irrelevant. Thus the two forms of media should be given equal deference by the Court, especially when the goal of Congress was primarily to protect children from the harmful effects of pornography, not from artistic, political, scientific, or literary materials dealing with sexual issues.[137]

For all of the aforementioned reasons, the screening programs provided by online services and independent organizations are less restrictive and more narrowly-tailored than a virtual federal ban of all online indecency with exceptions only for those providers who have the resources to meet the requirements of the safe harbor defense.

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[136] City of Cincinnati v. Discovery Network, 507 U.S. 410 (1993) (stating that discrimination against commercial speech cannot be justified when the city's goal was to increase safety and improve aesthetics, which is a goal not directly related to a distinction between the content of publications from commercial newsracks and noncommercial newsracks).

[137] *See* 141 CONG. REC. S8310-03 (daily ed. June 14, 1995).

When considering how difficult such far-reaching restrictions would be to enforce due to the high amounts of traffic that take place on the Internet as well as the international scope of the network, parental controls could simply be more effective than any legislative ban.

IV. CONCLUSION: WHERE DO WE GO FROM HERE?

On Wednesday, June 14, 1995, the Senate debated on two separate amendments to the telecommunications bill, one (No. 1288) proposed by Senators Leahy (D-Vermont), Feingold (D-Wisconsin), Moseley-Braun (D-Illinois), and Kerrey (D-Nebraska), the other (No. 1362) proposed by Senators Exon and Coats.[138] Amendment 1288 was introduced to offer an alternative to the Exon-Coats Amendment by proposing an alternative strategy of studying the current law and potential new technologies in order to establish a system which would enable users to screen information without intervention from the government.[139] Nevertheless, the Exon-Coats Amendment passed with an incredible supermajority of 84 yeas to 16 nays.[140] Virtually every article researched for this Comment stating an opinion on this approved legislation heavily criticized the decision of the lawmakers.[141]

Speaker of the House Newt Gingrich scorned the bill as "a violation of the rights of adults to communicate with each other."[142] In response to the Senate Bill, the House of Representatives overwhelmingly approved an amendment to their own telecommunications bill which would prohibit government censorship

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138 141 Cong. Rec.. S8310-03, S8327 (daily ed. June 14, 1995).

139 *Id.* at S8327 (statement of Sen. Exon).

140 *Id.* at S8347.

141 It should be noted, however, that some of those articles were written by such individuals as Nat Hentoff of the *Village Voice* and Senator Feingold, co-advocate for the Leahy Amendment. *See* Hentoff, *supra* note 14; Russell D. Feingold, *Parental Responsibility and the First Amendment*, WASH. POST, July 15, 1995, at A20.

142 Leeds, *supra* note 115.

of the Internet, 420 yeas to 4 nays.[143] In addition, President Clinton expressed his support for the House approach to the issue.[144] Because of the conflict between the Exon and Coats Amendment, the House anti-censorship provision, and another House amendment to the telecommunications bill, the final outcome was resolved in the conference committee between the two houses. President Clinton signed the bill into law on February 8, 1996, despite the inclusion of the Indecency Act, which included terms that were even more stringent than the terms in the original construction of the Exon-Coats Amendment. However, on February 16, U.S. District Judge Ronald Buckwalter issued a temporary restraining order against enforcement of the indecency standard for Section 502(a)(1)(B) due to the vagueness of the term "indecent."[145] In addition, the Justice Department one week later decided not to prosecute individuals for the distribution of materials which are "patently offensive."[146] A three judge panel of the U.S. District Court in Philadelphia will decide in Spring 1996 whether to issue a preliminary injunction against enforcement of both the "indecent" and "patently offensive" terms of the law.[147]

It seems that if legal precedent should finally prevail over emotion, lobbying power, and paranoia over public perception, the trend of thought on this controversial issue may lean in favor of freedom of speech finally prevailing. However, the vote is not in yet, and the Supreme Court may have something to say about it. The Court will soon rule on a free-speech challenge to a law which permits cable operators to restrict access of indecent programming to channels

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[143] John Schwartz, *House Vote Bars Internet Censorship; Amendment to Communications Bill Seems in Conflict with Senate*, WASH. POST, Aug. 5, 1995, at A11.

[144] *Id.*

[145] Amy Harmon, *Judge Blocks Government's Enforcement of Internet Ban*, L.A. TIMES, Feb. 16, 1996, at D1.

[146] *Internet Regulations On Hold*, L.A. TIMES, Feb. 24, 1996, at D2.

[147] *Id.*; *Communications Decency Act*, *supra* note 1, § 561 (calling for expedited review of any constitutional challenge to the CDA by a three-judge district court panel).

leased to independent and local programmers.[148] The U.S. Court of Appeals held that the law simply permits, not "commands," private companies to ban indecent programs; however, the law also says that if the company allows indecent leased-access programming, the company must block access to the program until the subscriber issues a written request.[149] A D.C. Circuit three-judge panel ruled that a subsequent ban of indecent material by the private cable company does not constitute state action.[150] The appellate court decision appears to have followed the reasoning of *Dial Information Services* and could represent a trend in the Court's analysis of the regulation of new technologies.

The Court's ruling on this law could have repercussions on the debate concerning regulation of the Internet. Today, online services can initiate their own censorship proceedings of public areas without any fear of violating First Amendment rights.[151] Because they are private in nature, online services are able to edit what they publish in their own public areas. A controversy resulted when Prodigy engaged in such behavior in the recent past, but the organization was well within its legal rights in making such editorial decisions; in contrast, it is legally impermissible to edit e-mail, which involves the services' online capacity as a carrier, not as a publisher.[152] With regard to the online system's capacity as a publisher, however, if the government is permitted to intervene into regulating the cable television medium, it is possible that the Court would thereby invite attempts to impose such restrictions on the online services. Again, the analysis of the Internet would differ from that for the cable industry due to the differences in the two media; however, with constitutional law, all it takes is a 5-4 vote following a particular line of reasoning

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148 Joan Biskupic, *Court to Hear Dispute on Curbing Indecency in Cable Television Programming,* WASH. POST, Nov. 14, 1995, at A11.

149 *Id.*

150 *Id.*

151 Anne Wells Branscomb, *Symposium: Emerging Media Technology and the First Amendment: Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspace*, 104 YALE L.J. 1639, 1651, May 1995.

152 *Id.* at 1651-52.

to validate a law. Even though the Internet offers more user control technologies and involves no scarcity issues, the Court could simply find that the Internet is a uniquely pervasive medium subject to lower level scrutiny and that the power of the medium justifies the restrictions placed on the voices using the medium. Government imposition "permitting" online services to regulate indecent content, which would be similar to what was approved for the dial-a-porn services and which could also be extended to the cable industry by an upcoming Supreme Court case, could escape the heightened scrutiny that would be called for by such drastic measures as the Communications Decency Act. This would still seem unlikely because the Internet is an environment that requires no regulation to provide unlimited access, there are no monopolistic service providers as with the cable and telephone industries, and it seems that the free market should be able to create a variety of possible service options depending upon the needs of the user. Due to the self-imposed actions by online services in the recent past, it does not appear that government intervention will be required in order to make diverse screening options available for the discriminating consumer or parent.

With luck, the online services and other high-tech organizations will be able to give parents the appropriate tools to enable them to retain total control over what materials their children can access so that an effective and *least restrictive* means of meeting this compelling government interest can be found without government interference. Then again, perhaps the Court will nip this problem in the bud and find relevant to the constitutional paradigm that Congress is in the process of placing a v-chip requirement on all television sets, which could someday serve even to eliminate the justification for considering television regulations as the "least restrictive means" for preventing children's access to indecent programming. Since the real issue is about intrusiveness, self-imposed user control technologies should be found to be the least restrictive means.

Because Congress passed such a bill to restrict speech on the Internet, and avoided the promised veto from a reluctant president, the final decision rests in the hands of nine justices who *must* come to a vote. What should continue to motivate libertarians and freedom of speech advocates to increase the organization of their alliance against

the powerful lobbyists who helped to push the law through Congress, however, is the shocking fact of how the recent vote came out on Capitol Hill—a vote that poorly predicts how reason and Supreme Court precedent would indicate the proper outcome. The time for advocates of online freedom of speech to end the fight on this issue is now, in the courts as well as in Congress, before free speech online becomes a thing of the past and cyberspace becomes a false dream of equal, democratic communication.