THE FIRST AMENDMENT AND PROBLEMS OF POLITICAL VIABILITY: THE CASE OF INTERNET PORNOGRAPHY

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I. INTRODUCTION

Political hot-button issues historically have clashed with the First Amendment as political expediency has bumped up against free expression. In the 1940s and 50s, for example, the House Un-American Activities Committee and Senator Joseph McCarthy trampled the First Amendment in scouring the country for alleged Communists. In the 1970s, the prospect of neo-Nazis marching through Skokie, Illinois engendered public outcry and unconstitutional responses. In the late 1980s and early 90s, flag burning ignited public passion. Today, Internet pornography shocks the public and demands attention from politicians, yet it also enjoys a clear measure of constitutional protection. Like other incendiary issues from generations past, Internet pornography poses a political riddle: where is the intersection of political viability and constitutional legitimacy? These issues are at the forefront of American political debate because they are about ideas that shock and stir emotion. But the First Amendment protects unpopular ideas, words, and images from government censorship.

In recent years, as Internet pornography has come to epitomize societal ills, Congress has failed the American people by attempting to federalize regulation of sexually explicit material on the Internet. While pornography has permeated every virtual corner of the Internet, causing great concern to many, Congress has responded by grandstanding, passing

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legislation that is, unsurprisingly, invalidated by the courts for failing constitutional standards. In seeking politically expedient symbolism without regard for the Constitution, Congress has failed.

This Article provides a new look at the problem of regulating pornography on the Internet. Instead of simply offering (or critiquing) a "solution," this Article examines this problem as a lesson in how Congress makes politically expedient decisions at the expense (or in spite) of the constitutional implications of their actions. In Part II, we will see the nature of the problem and review Congress's first two unconstitutional reactions. Further, we will see Internet pornography in the context of another political failure, with a particular comparison to the flag burning issue. Part III will look at a more recent legislative attempt that, while reflecting a new awareness of constitutional parameters, still is constitutionally suspect. In Part IV, the Article recommends a better approach toward the problem, positing that Congress needs to work from the bottom, up, instead of trying to regulate Internet pornography from the top, down. Such an approach, while not as politically appealing as prior efforts, is both constitutionally sound and politically viable.

II. PERCEIVING A PROBLEM, CONGRESS ACTS

The United States Congress has attempted several times to craft federal laws to combat what it perceives to be the problem of Internet pornography, but with each try, elected officials in Washington seem to get it wrong. This failure stems from a combination of factors: first, there is no constitutional federal "solution" or silver bullet available at this time; and second, politicians are unable to vote against unconstitutional legislation for fear that they will be tagged as "supporting" Internet pornography in their next re-election. No soundbite answer passes constitutional muster, but politics and politicians demand soundbite answers. As a result, there is high political theater, but no law on the books. This can change, however. We start with a quick review of the nature of the problem of Internet pornography.

A. The Internet: Development, Current State, and Sexually Explicit Material

The Internet as we know it today has traveled a long path since its first iteration as a Department of Defense project in 1969. It has grown to a world-wide network of ever-changing dimensions with an ever-growing population. It is not a tangible entity, but rather a complex international network of interconnected computers.[1] The "ARPANET" was originally designed to allow communication between the military, defense contractors, and Universities, via overlapping channels.[2] Thus, even if a part of the computer network was damaged in a war or natural disaster, communication would still be possible.[3] From the very beginning, ARPANET was designed to be a "decentralized, self-maintaining series of redundant links between computers and computer networks"[4] that worked without human intervention and with the ability to automatically re-route communications if certain links were unavailable.[5] To achieve this result, ARPANET used multiple links between each computer on the network. As a result, neither the sender nor the receiver of the communication would necessarily know the location of the other, and nobody would know the route the information had traveled.[6]

Similar non-military networks began to emerge in the private sector,[7] to link businesses, universities, and individuals all over the globe. These individual, private networks eventually merged into one main system, ultimately replacing ARPANET

1. *See* Reno v. ACLU, 521 U.S. 844, 849 (1997) (*Reno II*); *infra* Part II.B (discussing *Reno II*); *see also* Dan L. Burk, *Patents in Cyberspace: Territoriality & Infringement on Global Computer Networks*, 68 TUL. L. REV. 6, 6-24 (1993) (describing the structure, uses, and growth of this network).

2. *See Reno II*, 521 U.S. at 850; *see also* Winston P. Lloyd, *What's the Frequency Uncle Sam?: Will the Government Hold up the Information Superhighway in the Name of Competition?* 30 WAKE FOREST L. REV. 233, 235 (1995) (describing the original intention of the ARPANET).

3. *See Reno II*, 521 U.S. at 850; *see also* ED KROL, THE WHOLE INTERNET: USER'S GUIDE & CATALOG 13 (2d ed. 1994) (explaining the design of the network).

4. ACLU v. Reno, 929 F. Supp. 824, 831 (E.D. Pa. 1996) (*Reno I*). *See infra* Part II.B (discussing *Reno I*).

5. *See id.*

6. *See id.*

7. *See id.* at 832; *see also* William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197, 197 (1995) (discussing the rapid growth in private sector Internet users).

with today's Internet.[8] As a result, users of computers on one network could communicate with computers on other networks. Although they are linked, computer operators and computer networks work independently by using common data transfer protocols to communicate with each other.[9] There is "no centralized storage location, control point, or communications channel for the Internet, and it would not be technically feasible for a single entity to control all of the information conveyed on the Internet."[10] By design, then, the Internet is a series of independent networks, and one cannot know where everything is, or where it is going. With unknown routes of transmission and as a series of independent, interconnected networks, the Internet defies description as a fixed community. It is spaceless, timeless, virtual.

The modern day Internet now describes more than 50,000 individual networks linking at least nine million host computers in ninety countries.[11] It is impossible to define the number of users on the Internet at any given time, because users join every second. However, it is clear that the Internet has gone through enormous growth in the past few years. In 1981, fewer than 300 computers were linked to the Internet, but by 1993 that number had risen to over 1,000,000. In 1996, only three short years later, that number had grown to 9,400,000; the number had skyrocketed to sixty million in December 1999.[12]

The online community continues to grow at a remarkable pace, particularly among Internet users under the age of eighteen. One study has projected that the number of Internet users under age sixteen will exceed seventy-seven million by 2005.[13] Further, an estimated seventeen million, or seventy-

8. *See Reno II*, 521 U.S. at 850; *see also* JOHN LEVINE & CAROL BAROUDI, THE INTERNET FOR DUMMIES 7 (2d ed. 1994) (providing an introduction to the structure of the Internet).

9. *See Reno I*, 929 F. Supp. at 832; *see generally* KROL, *supra* note 3, at 29 (describing the communications between independent operators and networks).

10. *Reno I*, 929 F. Supp. at 832; *see also* Amy Harmon, *We the People of the Internet: Cybercitizens Debate How to Form On-Line Union, Perfect or Otherwise*, N.Y. TIMES, June 29, 1998, at D1 (discussing the difficulties involved in setting up a representative political structure for Internet users).

11. *See* Shea v. Reno, 930 F. Supp. 916, 925 (S.D.N.Y. 1996).

12. *See* Robert E. Kahn and Vinton G. Cerf, *What is the Internet and What Makes it Work*, Internet Policy Institute, *at* http://www.internetpolicy.org/briefing/12_99_story.html (Dec. 1999).

13. *See* Michael Pastore, *Number of Kids Online Growing*, CyberAtlas, *at* http://cyberatlas.internet.com/big_picture/demographics/article/0,,5901_15901

three percent, of twelve- to seventeen-year-olds use the Internet,[14] plus an increasing number of very young children are connected as well.[15]

There is an almost infinite array of material—particularly sexually explicit material—available within a few keystrokes. The result is concern over the easy accessibility to and the sheer volume of sexually explicit material on the Internet, especially in light of the increasing number of children online. The concern over children's access to sexually explicit Internet content is further warranted given the incredible growth of the Internet pornography industry, largely enabled by the borderless and anonymous world of cyberspace. Sex sells: the (estimated) number of pornographic websites jumped from 28,000 to 60,000 between 1998 and 2000.[16] Pornographic websites are among the most popular sites.[17] A recent study found that the number of individual visitors to Internet porn sites jumped thirty percent from December 1999 to February 2001, from twenty-two million to twenty-eight million.[18] It is no surprise that Internet pornography is big business, comprising eleven percent of the entire $9 billion e-commerce pie in 1998.[19] Industry followers project that e-porn alone will generate over $3 billion by 2003.[20]

_150561,00.html (Apr. 22, 1999).

14. *See* Pew Internet & American Life Project, *Internet Part of Daily Life for Teens, at* http://www.nua.com/surveys/index.cgi?f=VS&art_id=905356905 (June 25, 2001).

15. According to a Greenfield Online study, fourteen percent of the children online are five years old or younger. *See* Michael Pastore, *Children Surfing Unattended,* CyberAtlas, *at* http://cyberatlas.internet.com/big_picture/ traffic_ patterns/print/0,,5931_152 011,00.html (Apr. 27, 1999).

16. *See* H.R. REP. NO. 105-775, at 7 (1998); Timothy Egan, *Technology Sent Wall Street into Market for Pornography,* N.Y. TIMES, Oct. 23, 2000, at A1. In 1997, there were an estimated nearly 10,000 websites that offered pornographic materials. *See* Seth Schiesel, *A Father, A Friend, a Seller of Cyberporn,* N.Y. TIMES, June 30, 1997, at D1 (discussing the best estimates of the number of online pornographic websites).

17. "The number of people visiting sex sites on the Web doubled over the last year, outpacing the number of new Internet users." Egan, *supra* note 16.

18. *See* Juleka Dash, *Former Dot Com Workers Find Home at Porn Sites,* COMPUTER WORLD (June 11, 2001), http://www.computerworld.com/softwaretopics/ software/appdev/story/0,10801,61275,00.html (citing Jupiter Media Matrix study).

19. *See* Matt Rosoff, *Sex on the Web: An Inside Look at the Net Porn Industry,* CNET (Sept. 1999), *at* http://www.cnet.com/techtrends/0-3805-7-280110.html?tag=st.sr. 1544318-7-19 56441.more.3805-7-280110. Similarly, in 1997 some estimated that $1 billion of a national $8 billion pornography industry is attributable to on-line transactions. *See* Schiesel, *supra* note 16, at D11.

20. *See* Kim Wimpsett, *Net Vices: Sex, Violence and Gambling,* CNET (May 31, 2000), *at* http://www.cnet.com/techtrends/0-1544318-7-1956441.html?tag=st.sr.

The great majority of pornographic websites are actually free and serve as "bait" or "teasers" meant to lure people into the commercial websites.[21] Therefore, children online may have free and unhindered access to almost all of the available adult content on the Internet. This is true regardless of whether the child is curious and Internet savvy or merely surfing the Web for a school assignment or to learn more about his or her favorite hobbies or sports.[22] Inadvertent exposure to online pornography happens most often when children surf the Web or open e-mails with attachments.[23] Such inadvertent exposures are common,[24] particularly since they most often result from misspelling of a website's address or searching and surfing the Web.[25] The problem of inadvertent exposure is heightened by the very architecture of the Internet because:

> sex on the Internet is not segregated and signposted like in a bookstore, and it is not easy to avoid. Some heavy-duty imagery is incredibly easy to stumble upon. . . . [Y]outh do not have to be all that active in exploring the Internet to run across sexual material inadvertently.[26]

Sexually explicit material available on the Internet is nothing short of astounding, ranging from commonplace pornographic magazine still-frames to interactive sexual encounters.[27] Other well-known sites on the Internet include one that boasted a live broadcast of a young couple losing their virginity together as

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1544318-7-1956444.subdir.1544318-7-1956442 (citing Data Monitor study).

21. *See* Rosoff, *supra* note 19 (stating that free pornographic websites make up seventy to eighty percent of Internet pornography).

22. A recent study about online child victimization presented different testimonials including one incident where an eleven-year-old boy was looking for game websites and typed in "fun.com" which resulted in a pornographic website. Another incident occurred when a fifteen-year-old boy came across a bestiality site while researching for a school paper about wolves. *See* DAVID FINKELHOR, KIMBERLY MITCHELL & JANICE WOLAK, ONLINE VICTIMIZATION: A REPORT ON THE NATION'S YOUTH 15 (Crimes Against Children Research Center, 2001), *available at* http://www.unh.edu/ccrc/Youth_Internet_info_page.html.

23. *See id.* at 13.

24. *See id.* at 21 (finding that twenty-five percent of minors had at least one inadvertent exposure to online pornography within the last year).

25. For example, searches for popular children's toys like Beanie Babies, Water Baby, and Barbie all resulted in pornographic websites. *See* S. REP. NO. 105-225, at 4 (1998); H.R. REP. NO. 105-775, at 10 (1998). As another example, the Hasbro toy company successfully sought an injunction against the Internet Entertainment Group, which had used the name candyland.com for a sexually explicit website, playing on the popular children's game manufactured by Hasbro. *See* Hasbro v. Internet Entm't Group, Ltd., 40 U.S.P.Q.2d (BNA) 1479 (W.D. Wash. 1996).

26. FINKELHOR, MITCHELL & WOLAK, *supra* note 22, at 34.

27. *See* Schiesel, *supra* note 16.

well as one with images of a college student's bedroom, twenty-four hours a day, 365 days a year.[28] Many sites have obvious names, based on body parts, sexual positions, fetishes, etc.[29] In addition to these adult sites, and perhaps more potentially dangerous, are those which are innocuously-named but contain adult content. For example, if one enters "whitehouse.com"[30] or "sleepingbeauty.com" into a web browser, instead of seeing the home of the President or a fairy tale princess, one would view still photos of naked women inviting the user to buy pornographic material.[31] Thus, sexually explicit websites get traffic through obvious and non-obvious ways, enhancing their vast reach.

B. Perceptions and Reality—(Failed) Attempts at Federal Regulation

In response to public concern, the United States Congress has tried to regulate sexually explicit material on the Internet several times. Congress has found politically expedient solutions, none of which is constitutionally sound. Congress's top, down attempts to regulate have been rebuked by the federal courts, which have held that these federal solutions violate constitutional guarantees.

1. CDA

In its first attempt, Congress responded to the perceived need to regulate sexually explicit material on the Internet by enacting the Communications Decency Act ("CDA").[32] The law covered a wide range of activity, including the dissemination of sexually explicit material on the Internet. Section 502(a) of the

28. *See* Dennis Stillwell, *Be One of the 50 Million: Here's How to Spice Up Your Web Work With Video*, J. COM. (New York), Aug. 5, 1998, at 5C.

29. Some explain this phenomenon as such: "If you think of all the dirty words and all the acronyms and all the colloquialisms for sex or for adult content, so to speak, those words all essentially get locked in by a particular advertiser . . . ." *See Morning Edition: Internet Pornography is Big Business* (NPR radio broadcast, Aug. 10, 1998).

30. The correct site for the President's mansion at 1600 Pennsylvania Avenue is "http://www.whitehouse.gov."

31. Some contend that Internet pornographers intentionally choose these innocuous words as their site names, hoping that the inner voyeur of the "accidental surfer" will become a customer; in other words, by driving traffic to their adult sites, these uploaders aim to expand their client base. *See Morning Edition: Internet Pornography is Big Business, supra* note 29.

32. Pub. L. No. 104-104, tit. V, 110 Stat. 56, 133.

CDA,[33] commonly known as the "indecent transmission" provision, criminalized "the knowing transmission of obscene or indecent messages to any recipient under 18 years of age."[34] Section 502(d),[35] commonly known as the "patently offensive display" provision, criminalized "the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age."[36]

It was clear from the moment of conception that the bill would not withstand constitutional scrutiny. But it was a politically appealing attack on a hot-button issue, and no elected official could stop its trajectory. Members of Congress knew the bill was constitutionally unsound[37] but did not stop themselves. Perhaps sensing their legislation's ultimate destiny and demise, Congress included special judicial review provisions, including expedited Supreme Court review,[38] instead of not passing the flawed bill in the first place. Moving off Capitol Hill and down Pennsylvania Avenue, the political response remained the same. Bill Clinton, a former constitutional law professor, knew the problem. However, President Bill Clinton, master of political expediency, signed the bill into law. As one columnist observed:

> When President Clinton signed it, reports the New York Times, "he and his top advisers knew that the legislation . . . was on shaky constitutional ground." They began looking for another means to shield kids from on-line pornography "even as administration lawyers were writing their brief defending the act."[39]

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33. 47 U.S.C. § 223(a) (Supp. 1997).

34. Reno v. ACLU, 521 U.S. 844, 859 (1997) (*Reno II*).

35. 47 U.S.C. § 223(d) (Supp. 1997).

36. *Id.*

37. *See generally infra* notes 39-40 and accompanying text.

38. *See* Communications Decency Act of 1996, Pub. L. No. 104-104, tit. V, § 561, 110 Stat. 133, 142 [hereinafter CDA].

39. Stephen Chapman, *Clinton is No Friend of Free Speech*, CHI. TRIB., July 3, 1997, at 23. Another columnist wrote:

> In May 1995, then-acting Assistant Attorney General Kent Markus wrote to Sen. Patrick Leahy that among other problems, the proposal was an attempt to "impose criminal sanctions on the transmission of constitutionally protected speech." Inside the White House, according to Clinton sources, Vice President Al Gore and members of his staff, who have general responsibility for Internet-related issues, tried to steer the administration away from supporting the act.
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> As the bill headed toward overwhelming passage in the Senate, however, political reality began to assert itself. With an election coming

The President, in short, knew the law was problematic, but he went along anyway.

"Even when House Speaker Newt Gingrich denounced the law . . ., the President stood mute, and his Administration made no effort to join Gingrich in opposing the legislation. (Gingrich himself ultimately voted for the bill.)"[40] Political expediency won out in the end over constitutional concerns, or as one columnist put it, "part of the explanation is cowardice in the face of potential demagoguery."[41] Congress and the President left the ultimate task of sorting out the harder constitutional issues to the courts.[42]

The CDA was immediately challenged in federal court in Philadelphia by a variety of organizations seeking an order enjoining the enforcement of the indecent transmission[43] and patently offensive display[44] provisions. After making extensive factual findings[45] regarding the Internet, available age-verification technology, and the CDA itself, the three-judge panel[46] decided unanimously in *ACLU v. Reno* (*"Reno I"*) to enjoin enforcement of these provisions of the CDA.[47] The

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up, the last thing the Clintonites wanted was to get on the wrong side of a potentially explosive issue dealing with children and pornography. "No way are you going to get yourself in a position where the president isn't willing to go as far as a Democratic senator in restricting child pornography on the Internet," one senior administration official explained. Child pornography and obscenity are illegal anyway, but that was a fine point the administration wasn't willing to risk elucidating on the verge of a campaign.

Jacob Weisberg, *Strange Webfellows*, SLATE (Dec. 13, 1996), *at* http://slate.msn.com/StrangeBedfellow/96-12-13/StrangeBedfellow.asp.

40. Floyd Abrams, *Clinton vs. the First Amendment*, N.Y. TIMES, Mar. 30, 1997, at F42.

41. Weisberg, *supra* note 39.

42. "Those inside the administration who were troubled by the constitutional implications of the CDA rationalized their cop out by saying that the law was sure to be overturned anyway." *Id.*

43. 47 U.S.C. § 223(a)(1)(B) (2000).

44. 47 U.S.C. § 223(d)(1-2) (2000).

45. *See* Reno v. ACLU, 521 U.S. 844, 849-57 (1997) (*Reno II*). These factual findings were frequently cited in Justice Stevens's subsequent Supreme Court opinion on this matter.

46. As noted earlier, special judicial review provisions were included in the CDA. *See supra* note 38 and accompanying text. Pursuant to §561(a) of the Act itself, a three-judge panel was assembled to conduct an evidentiary hearing on the matter and issue a ruling. Communications Decency Act of 1996, Pub. L. No. 104-104, § 561, 110 Stat. 56, 142.

47. 929 F. Supp. 824 (E.D. Pa. 1996). Each of the three judges, however, wrote a separate opinion. For a brief but detailed synopsis of the reasoning of each judge as to the enjoinment, see *Reno II*, 521 U.S. at 862-63.

government immediately filed an appeal which, pursuant to the Act itself, called for a review by the Supreme Court.[48]

In *ACLU v. Reno* ("*Reno II*"), the Supreme Court upheld the decision of the three-judge panel, finding that the provisions at issue were impermissible content-based restrictions on speech and not salvageable as valid time, place, and manner restrictions.[49] The Court also found that the provisions were facially overbroad and would create an unacceptable chilling effect upon the speech of adults using the Internet.[50]

Writing for the Court, Justice Stevens first distinguished the facts from prior Supreme Court decisions, rejecting analogies that the Government had advanced as controlling.[51] While there were analogous cases, none was exactly on point or controlling. First, the Court distinguished *Ginsberg v. New York*,[52] which upheld a New York statute criminalizing the sale of materials deemed obscene for minors, even if the materials were not obscene by adult standards.[53] Justice Stevens first noted that while the *Ginsberg* statute allowed for parents to override the statute's effect by purchasing "outlawed" materials for their children, the CDA was, to the contrary, an absolute ban that even foreclosed the possibility of parental consent or participation in the proscribed communication.[54] The Court also highlighted definitional problems: the New York statute in *Ginsberg* included a properly narrow definition of unprotected material, but the CDA vaguely defined its proscribed material as "indecent" and eliminated the requirement that "patently offensive" material must lack serious literary, artistic, political, or scientific value.[55] The majority also distinguished *Renton v. Playtime Theatres*,[56] observing that the CDA sought to protect minors from the primary effects of indecent or patently offensive content of

48. Communications Decency Act § 561; *see Reno II*, 521 U.S. at 862-64.

49. *See Reno II*, 521 U.S. at 868.

50. *See id.* at 874.

51. *See id.* at 864-68. The Government argued that the Supreme Court's decisions in Ginsberg v. New York, 390 U.S. 629 (1968), FCC v. Pacifica Foundation, 438 U.S. 726 (1978), and Renton v. Playtime Theatres, 475 U.S. 41 (1986), all mandated that the two challenged provisions of the CDA must stand.

52. 390 U.S. at 629.

53. *See Reno II*, 521 U.S. at 864-65.

54. *See id.* at 865.

55. *See id.*

56. 475 U.S. at 41.

speech,[57] whereas the *Renton* zoning ordinance was constitutional because its purpose was to protect against the secondary effects of adult movie theaters and not against the content of the movies.[58] The *Reno II* majority also distinguished *FCC v. Pacifica Foundation*.[59] In *Pacifica*, the Supreme Court upheld a declaratory order of the FCC that had held that a specific broadcast of a specific monologue was susceptible to administrative sanctioning.[60] The majority pointed to *Sable Communications v. FCC*,[61] the dial-a-porn case, as the most analogous case. The majority reasoned that while the affirmative acts in downloading and transmitting on the Internet were similar to those required in dialing a telephone in order to hear a pre-recorded message,[62] Internet transmissions were sufficiently non-invasive that the proposed government ban of the protected speech, as advocated by the CDA, was unwarranted. While the law develops slowly, the Internet has exploded rapidly, and comparisons to prior legal precedent thus proved unhelpful to the government.

Moving beyond prior case law, the Court detailed the constitutional infirmities of the CDA. First, the Court noted that the CDA was not narrowly tailored:

> Could a speaker confidently assume that a serious discussion about birth control practices, homosexuality, the First Amendment issues raised by the Appendix to our *Pacifica* opinion, or the consequences of prison rape would not violate the CDA? This uncertainty undermines the likelihood that the CDA has been carefully tailored to the

57. *Reno II*, 521 U.S. at 868.

58. *Id.* at 867.

59. 438 U.S. 726 (1978).

60. The Court noted that, unlike *Pacifica*, the CDA was to be used to categorically proscribe communication and did not depend upon the particular time at which transmission occurred. *See Reno II*, 521 U.S. at 866-67. Further, with respect to the CDA and the Internet, the majority found that, unlike radio (the *Pacifica* context), the government enjoyed no history of regulation of the medium and the chance of a minor's accidental encounter with indecent material was slim given the series of affirmative acts required to access specific material on the Internet. *See id.* at 867.

61. 492 U.S. 115 (1989). In *Sable* the Supreme Court invalidated an amendment to the Communications Act that had instituted an absolute ban on indecent commercial telephone messages, but it allowed the ban on obscene messages to stand. *See Reno II*, 521 U.S. at 869.

62. *See Reno II*, 521 U.S. at 869-70. "Placing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message." *Sable*, 492 U.S. at 128.

> congressional goal of protecting minors from potentially harmful materials.[63]

Enforcement of the CDA would have a chilling effect upon speech rights of adults on the Internet. Because adults would lack confidence as to what speech would be immune to prosecution, they would have to adapt their speech to that which would always be suitable for minors. The Court rejected such a scenario. "'[T]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.'"[64]

The Court also made clear, based upon the findings of the three-judge panel, that any attempts to verify a completely adult audience on the Internet would not be feasible.[65] Because the Internet is spaceless and anonymous, there is no way to be sure who accesses material once it is placed into cyberspace. The Court noted that the institution of either an adult-verification-number system or a credit-card-verification system would impose a great burden upon many of the non-commercial publishers of information on the Internet, likely driving "cyber-space towncriers" out of the public debate.[66] In addition, even if such systems were financially feasible, there would be little assurance that they would insure that information would never reach minors.[67] Finally, the majority reasoned that relevant communications would be available to a national audience; if the CDA were to stand in its current format, defendants might summarily be judged by the standards of the least tolerant of the nation's communities, in direct defiance of the doctrine of *Miller v. California*.[68]

The Court essentially held that, while there may be a compelling interest in keeping certain materials from minors,

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63. *Reno II*, 521 U.S. at 871.

64. *Id.* at 875 (quoting Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 74-75 (1983)).

65. *See id.* at 876-77.

66. *See id.* at 877.

67. *See id.* at 855-56 (referring to District Court finding that no evidence existed to show the alleged effectiveness of such systems of verification anyway).

68. *See id.* at 877-78. As a result of its adverse constitutional implications upon speech rights of adults, the CDA was invalidated by the Supreme Court inasmuch as it referred to "indecent" or "patently offensive" materials. *See id.* at 874. Due to a built-in severability clause, however, the provision of the act regarding "obscene" material was salvaged. *See id.* at 882-83. *Miller v. California*, 413 U.S. 15 (1973), will be discussed in detail in Part II.D, *infra*.

such an interest may be outweighed by other concerns; the government's interest in protecting minors must defer to the constitutional rights of the speaker and the non-minor receivers of information. In addition, the Court acknowledged the real problem with Internet obscenity prosecutions employing community standards of recipient communities. The politically expedient CDA was thus found unconstitutional.

2. COPA

With the CDA declared dead, Congress went back to work. Senator Dan Coats introduced the Child Online Protection Act ("COPA").[69] COPA modeled the spirit of the CDA[70] by criminalizing commercial Web publishers who "knowingly and with knowledge of the character of the material . . . [use] the World Wide Web [to make] available to any minor . . . any material that is harmful to minors."[71] In response to the constitutional defects of the CDA, Congress defined COPA's key terms and narrowed its regulatory scope in three ways:[72] 1) COPA limited the range of the Internet affected to the World Wide Web;[73] 2) COPA limited the range of affected speakers to commercial website providers;[74] and 3) COPA limited and defined the breadth of the speech regulated to speech that is "harmful to minors."[75] Furthermore, COPA provided broader

69. Pub. L. No. 105-277, 112 Stat. 2681-736 (1998). The official title as introduced was: "A bill to amend section 223 of the Communications Act of 1934 to establish a prohibition on commercial distribution on the World Wide Web of material that is harmful to minors, and for other purposes." S. 1482, 105th Cong. (1997).

70. Lawrence Lessig & Paul Resnick, *Zoning Speech on the Internet: A Legal and Technical Model*, 98 MICH. L. REV. 395, 417 (1999).

71. 47 U.S.C. § 231 (a)(1) (2000).

72. *See* ACLU v. Ashcroft, No. 00-1293, slip op. at 5 (U.S. May 13, 2002).

73. The Internet, as we have seen, is comprised of many networks, and there are also many different uses, including, but not limited to the World Wide Web. For the COPA definition of "World Wide Web," see 47 U.S.C § 231(e)(1) (2000). *See also infra* note 80.

74. For the COPA definition of the clause "commercial purposes," see 47 U.S.C. § 231(e)(2) (2000).

75. Material deemed harmful to minors is defined as material that: A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest; B) depicts, describes, or represents, in a manner with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and C) taken as a whole, lacks serious, literary, artistic, political, or scientific value for minors. 47 U.S.C. § 231(e)(6).

affirmative defenses if a Web publisher had restricted access by minors by the use of a credit card, age-verifying digital certificate, or any other reasonable measures that are feasible under available technology.[76]

While COPA represents a technical improvement over the previous failed statute, it still missed central lessons about the fundamental flaws of federal regulation of pornography on the Internet with vague terms and without defined community standards. Daniel Weitzner, deputy director of the Center for Democracy and Technology, said: "Obviously this is an effort to do what some people are calling CDA2. . . . As written, this bill is every bit as unconstitutional as the CDA."[77] Senator Coats disagreed, arguing that his bill responded to the Court's concerns in *Reno II*.[78] First, Senator Coats pointed out that with his bill, parents would have the right to give their minor children access to pornographic material if they so desired.[79] Second, his legislation only dealt with commercial transactions.[80] Third, the CDA omitted any requirement that the material covered lacked serious value; S. 1482, on the other hand, directly defined "harmful to minors" as requiring that the material "lacks serious literary, artistic, political, or scientific value."[81] Fourth, the CDA applied to those individuals under the age of eighteen, whereas S. 1482 only affects those under the age of seventeen.[82] Still, Senator Coats missed the major point: Congress cannot regulate the Internet from Washington, D.C., i.e., top, down, because there is no

76. *See* 47 U.S.C. § 231(c)(1).

77. CQ'S WASHINGTON ALERT, *Full Report on S.1482* (July 7, 1998).

78. "[T]he legislation I introduce today is designed to accommodate the concerns of the Supreme Court." 143 CONG. REC. S12,148 (daily ed. Nov. 8, 1997) (statement of Sen. Coats).

79. *Id.* at 149.

80. "It was the Court's opinion that the CDA treated the entire universe of cyberspace rather than specific areas or zones. Further, the Court seemed preoccupied with the primary, not the secondary effects of pornography. The legislation I introduce today deals with a narrow zone of the Internet, commercial activity on the World Wide Web. Though there is tremendous economic activity in pornography on the Web, the cyber geography of this bill is very limited." *Id.*

81. S.1482, 105th Cong. § 1(a) (1997). *See also* Miller v. California, 413 U.S. 15 (1973).

82. S. 1482, 105th Cong. § 1(a) (1997); 143 CONG. REC. S12, 148 (daily ed. Nov. 8, 1997) (statement of Sen. Coates). Senator Coats also tried to draw an analogy to the use of telephones. "In fact, the very treatment of fines in penalties under this legislation, mirrors those under dialaporn, which have been upheld by the Supreme Court." *Id. See also* Sable v. FCC, 492 U.S. 115 (1989).

constitutionally workable community standard to judge whether the material in question is protected by the First Amendment. But the bill had political appeal and became law.

The ACLU and other plaintiffs filed suit in the Eastern District of Pennsylvania challenging the constitutionality of COPA,[83] beginning a second wave of Internet indecency litigation. Both the federal district and appellate courts ultimately concluded that COPA violated the First Amendment rights of adults.[84] Although the district court and the appellate court both applied strict scrutiny to COPA[85] and ultimately reached the same result, they did so on different grounds. On May 13, 2002, the Supreme Court ruled, remanding the case to the Court of Appeals.[86] Each court's approach sheds further light on our subject.

The District Court enjoined enforcement of COPA, finding it likely unconstitutional based on the impermissible burden placed on protected adult speech.[87] It reasoned that the economic costs of implementing COPA's affirmative defenses of a credit-card or age-verification system would "impose significant residual or indirect burdens upon Web publishers."[88] As a direct result of these costs, the Web publisher would be forced either to self-censor its website or completely stop publishing, and the adult user would be deterred from accessing the content when presented with an age verification or credit card screen.[89] The District Court found that COPA was neither narrowly tailored nor the least restrictive means of protecting children from harmful materials for the following reasons: 1) COPA did not apply to foreign websites containing harmful material; 2) credit card authorizations were ineffective because many minors may legitimately possess a credit card; 3) COPA was over-inclusive because it applied to all Web content, as opposed to graphic images files; and 4) filtering and blocking software implemented by parents was just as effective and less

83. ACLU v. Reno, 31 F. Supp. 2d 473, 476 (E.D. Pa. 1999) ("*Reno III*").

84. *See id.* at 473; ACLU v. Reno, 217 F.3d 162, 173 (2000), *cert. granted*, 532 U.S. 1037 (2001) (No. 00-1293) ("*Reno IV*").

85. *Reno III*, 31 F. Supp. 2d at 493; *Reno IV*, 217 F.3d at 173.

86. ACLU v. Ashcroft, No. 00-1293 (U.S. May 13, 2002).

87. *Reno III*, 31 F. Supp. 2d at 495; *Reno IV*, 217 F.3d at 172.

88. *Reno IV*, 217 F.3d at 171.

89. *Reno III*, 31 F. Supp. 2d at 495.

burdensome than COPA.[90]

In contrast to the District Court's analysis, the Third Circuit panel based COPA's likely unconstitutionality exclusively on its overbroad "contemporary community standards" definition of "harmful to minors."[91] The court did not even undertake an analysis of COPA's tailoring because the fundamental constitutional issue at the very core of COPA was its adoption of the contemporary community standards test in the Internet context.[92] The appeals court reiterated the Supreme Court's concern with the constitutional difficulty of applying varying geographical standards to the non-spatial and borderless Web medium.[93] Because the architecture of the Web does not allow a Web publisher to restrict access based on geographic locale of the user, the court reasoned that in order to avoid criminal liability a Web publisher would have to self-censor the content to comply with the most conservative of community standards.[94] Therefore, the appellate court concluded that application of the contemporary community standards test to the Internet resulted in unconstitutional self-censorship and imposed an unconstitutional burden on protected adult speech. Regulating Internet pornography from the top down again proved unconstitutional.[95]

The Supreme Court's very recent ruling did little to clarify this area of law, as the Court ruled most narrowly and remanded. For five different reasons, no Justice was content to allow COPA to be enforced. The Court's limited holding was "only that COPA's reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment."[96] Even with eight Justices voting to remand the case, the Court was deeply split as to the proper reasoning, and the opinion of the Court, penned by Justice Thomas, was

90. *Reno IV*, 217 F.3d at 172.
91. *Id.* at 173-74.
92. *See id.* at 174.
93. *See Reno II*, 521 U.S. 844, 877-78 (1997).
94. *See Reno IV*, 217 F.3d at 176-77.
95. On a related note, another congressional attempt to regulate pornography was recently declared unconstitutional by the Court. *See* Ashcroft v. Free Speech Coalition, 122 S.Ct. 1389 (2002).
96. Ashcroft v. ACLU, No. 00-1923, slip op. at 22 (U.S. May 13, 2002).

joined only in part by a majority.[97] The most significant split of opinion in the case revolved around differing views on the meaning of community standards and overbreadth. Justice Thomas, the Chief Justice, and Justice Scalia were content that the statute, as written, was not fatally flawed, but still they had concerns that required remand.[98] The six other Justices, in one way or another, saw problems with vagueness and overbreadth.[99]

C. The Intersection of Politics and the Constitution

As it was being debated, members of Congress were warned that the CDA was unconstitutional.[100] Still, it passed by an overwhelming majority.[101] After enactment, the CDA was rejected both by the federal three-judge panel and the U.S. Supreme Court. Yet Congress persisted, this time with a law that was found unconstitutional by another U.S. District Court judge and is now pending a second review in the U.S. Court of Appeals, on remand from the Supreme Court. Why was the United States Congress unable to either craft a constitutional bill, or, barring that, why did it enact a constitutionally unsound bill, two times?[102] This could be called the cornfield

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97. Justices O'Connor and Breyer each concurred, but for very different reasons; Justice Kennedy concurred in the judgment; Justice Stevens, author of *Reno II*, dissented. *See infra* Part II.E.5.

98. Justice Thomas stated that other constitutional issues remained unresolved, including whether the statute was overbroad for other reasons or was unconstitutionally vague. *See Ashcroft v. ACLU*, slip op. at 22.

99. This issue is detailed in Part II.E, *infra*.

100. According to one report:

> In May 1995, then-acting Assistant Attorney General Kent Markus wrote to Sen. Patrick Leahy that among other problems, the proposal was an attempt to 'impose criminal sanctions on the transmission of constitutionally protected speech.' Inside the White House, according to Clinton sources, Vice President Al Gore and members of his staff, who have general responsibility for Internet-related issues, tried to steer the administration away from supporting the act.

Weisberg, *supra* note 39. "In the CDA debate, Republican Rep. Christopher Cox of California led the push for an alternative; both Newt Gingrich and Majority Leader Dick Armey supported Cox's position." Jacob Weisberg, *Clinton Turns Yellow*, SLATE (Oct. 25, 1996), *at* http://slate.msn.com/?id=2253.

101. The Telecommunications Act of 1996, S. 652, 104th Cong., was approved by the Senate by a vote of ninety-one yeas and five nays, with three Senators not voting. 142 Cong. Rec. S. 721 (daily ed. Feb. 1, 1996).

102. In his opinion concurring in the judgment in *Ashcroft v. ACLU*, Justice Kennedy observed:

problem: every United States Senator or Representative imagines standing in a cornfield, having to answer the question: "Why did you vote *for* Internet porn?" Redefining the question or arguing the constitutional merits in that situation is untenable. Congress simply cannot help itself. First and foremost, elected officials look to achieve the politically viable or appealing result. Secondarily, constitutional concerns come into play. This inability to do the job right has negative consequences, the most notable in the Internet pornography context being the persistence of a significant problem with no effective surviving regulation.

Viewed against a backdrop of interrelated concepts of politics and constitutional analysis, these ideas highlight the general tension between a politician's duty and instinct; they particularly arise in the context of issues involving expressive activity that challenges the nation's comfort. The fight is partly about the doctrine and meaning of the First Amendment, but it has deeper roots in the basic tension between that which is political and that which is constitutional. The problem is that few politicians are willing to stand up against a politically expedient bill because it is unconstitutional.

Few people actively consider the intersection between political and constitutional solutions. Politicians first support solutions/bills that are politically appealing, then those which are politically viable, but they consider constitutionality most often as an afterthought. Academics talk about that which is constitutionally sound, but do not have to get legislation

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> COPA is a major federal statute, enacted in the wake of our previous determination that its predecessor violated the First Amendment. Congress and the President were aware of our decision, and we should assume that in seeking to comply with it they have given careful consideration to the constitutionality of the new enactment.

Ashcroft v. ACLU, No. 00-1293, slip op. at 1 (U.S. May 13, 2002) (Kennedy, J., concurring) (citation omitted). While surmising that Congress and the President knew of the constitutional problems after *Reno II*, Justice Kennedy (perhaps ironically) only says they gave constitutional issues "careful consideration." Perhaps this comment is meant in a positive context, but given that he still finds the solution to be constitutionally suspect, it seems a bit like a back-handed complement. In a related vein, Justice Stevens, dissenting and arguing that COPA is unconstitutionally overbroad, wrote: "Congress has thoughtfully addressed several of the First Amendment problems that we identified in [*Reno II*]. Nevertheless, COPA preserves the use of contemporary community standards to define which materials are harmful to minors." Ashcroft v. ACLU, No. 00-1293, slip op. at 2 (U.S. May 13, 2002) (Stevens, J., dissenting). In effect, Justice Stevens is suggesting that, despite awareness of *Reno II*, Congress responded with an unconstitutional solution.

passed or defend opposition to a popular law because it is unconstitutional. When courts review laws, their task is to weigh issues of constitutionality, and political appeal should have no role in their decisions.

When the country faces politically charged issues with significant constitutional ramifications, Congress's challenge is to address the problem with legislation that is not merely politically appealing, expedient or viable, but also effective and constitutionally sound. This problem is not unique to the context of regulating Internet pornography; it is, however, likely to arise in the free expression context, where the First Amendment protects speech that is offensive, challenging and harsh. We have seen this in the past; in particular, Congress's prior work on flag burning sheds light on our present problem of regulating Internet pornography.

In its 1989 *Texas v. Johnson*[103] decision, the Supreme Court reversed the conviction of a man who burned the American flag at a protest outside the Republican Party convention in Texas. The five to four opinion made clear that prohibiting flag burning was an unconstitutional content-specific restriction on free speech rights. While a majority of the Court was clearly offended by the specific behavior, Justice Kennedy's concurrence aptly observed: "[s]ometimes we make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution [compel] the result. . . . It is poignant but fundamental that the flag protects those who hold it in contempt."[104] While Chief Justice Rehnquist was moved to quote poetry and song extensively in his passionate dissent,[105] his understandable passion did not overrule the Constitution.

This was a highly-charged political issue. The reaction against the Court's decision was strong and swift.[106] Congress, feeling a need to react, weighed a legislative response and a constitutional amendment. On October 5, the Senate passed the

103. 491 U.S. 397 (1989).

104. *Id.* at 420-21 (Kennedy, J., concurring).

105. *Id.* at 421-35 (Rehnquist, C.J., dissenting).

106. A Gallup poll showed that "nearly 90 percent of Americans disagreed with the Supreme Court decision, and more than 2/3 supported a constitutional amendment." *American Legion Calls on President Bush to Veto Flag Bill*, PR NEWSWIRE, Oct. 12, 1989.

Flag Protection Act of 1989 by a 91-9 vote; the House passed it 371-43 on October 12, and it became law[107] two weeks later, without the president's signature.[108] The Act was immediately challenged and found unconstitutional in two separate actions in federal district courts[109] and then, pursuant to statutory provisions,[110] went up to the Court for expedited review. In *United States v. Eichman*,[111] the Court echoed *Texas v. Johnson*, holding again that the government may not, within constitutional bounds, proscribe flag burning.

With both flag burning and Internet pornography, Congress has faced a hot-button political question with clear constitutional constraints. Then, and now, elected officials overwhelmingly ignored their duty to uphold the Constitution,[112] instead passing politically appealing

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107. Pub L. No. 101-131, 103 Stat. 777 (1989).

108. President George H. W. Bush did not veto the bill, even though he knew it was unconstitutional. He stated:

> While I commend the intentions of those who voted for this bill, I have serious doubts that it can withstand Supreme Court review. The Supreme Court has held that the Government's interest in preserving the flag as a symbol can never be compelling enough to justify prohibiting flag desecration that is intended to express a message. Since that is precisely the target of this bill's prohibition, I suspect that any subsequent court challenge will reach a similar conclusion. Nevertheless, because this bill is intended to achieve our mutual goal of protecting our Nation's greatest symbol, and its constitutionality must ultimately be decided by the courts, I have decided to allow it to become law without my signature. I remain convinced, however, that a constitutional amendment is the only way to ensure that our flag is protected from desecration.

Statements on the Flag Protection Act of 1989, 25 WEEKLY COMP. PRES. DOCS. 1619 (Oct. 26, 1989). See *supra* note 39 and accompanying text for a presidential parallel,.

109. United States v. Haggerty, 731 F. Supp. 415 (W.D. Wash. 1989); United States. v. Eichman, 731 F. Supp 1123 (D.D.C. 1989).

110. Both decisions were appealed directly to the Supreme Court pursuant to 18 USC § 700(d) (2000). Recall that the CDA also had an expedited review provision. *See supra* note 48.

111. 496 U.S. 310 (1990).

112. The Congressional Record describes the oath of office:

> The oath of office [is] required by the sixth article of the Constitution of the United States, . . . the text . . . is carried in 5 U.S.C. 3331:
>
> > I, [name], do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God."

147 CONG. REC. H389-H391 (daily ed. Feb. 14, 2001), *available at* http://clerkweb.house.gov/mbrcmtee/members/oath.htm. Also, as Prof. Pollitt noted:

legislation. In such a situation, the role of the courts, as explained by Justice Kennedy in *Texas v. Johnson*, is essential.[113]

Why were the Senators and Representatives unwilling or unable to stand up against a flag burning bill that was unconstitutional? The answers to that question help us understand why Congress has such a poor record in regulating Internet pornography.[114] Many legal scholars have explored the First Amendment doctrinal implications of the flag burning cases, but a few have analyzed the underlying political and decision-making contexts of these cases. To Prof. Frank Michelman, for example, the question was not whether there would be a response, but what it would look like.[115] Congress was unable to sit back idly, regardless of the constitutional propriety of such action. He has reflected upon the dilemma many felt: Congress was going to react with either a new federal law or a constitutional amendment. He presciently warned Congress: "Perhaps the People won't succeed very well in using their lawmaking power to attain their objectives unless they take care for the clarity, timeliness, practical and even moral consistency of their legal directives."[116] Prof. Geoffrey

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> [Representative Don] Edwards accused the Republicans of 'taking the low road' in suggesting that he was less patriotic than those who supported the amendment, and said:
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> > I am a veteran. I served in World War II. It was a bloody war. . . . So I share the outrage of Americans at seeing the flag burned. But at the same time . . . I took an oath . . . to support and defend not the flag, but the Constitution. . . . That is what I intend to do today—defend the Constitution.

Daniel H. Pollitt, *Reflection on the Bicentennial of the Bill of Rights: The Flag Burning Controversy: A Chronology*, 70 N.C. L. REV. 553, 594. (1992).

113. The courts serve an essential constitutional function, as the politicians avoid constitutional questions. One columnist observed as follows in the context of President Clinton and the CDA:

> We thus have the spectacle of a conservative Supreme Court, seven of whose nine members were appointed by Republican presidents, blocking efforts by a Democratic president to censor information . . . . It should not be the exclusive responsibility of these justices to protect Americans from out-of-control government. Congress and the president could help. But when Clinton took his oath to uphold the Constitution, he must have had his fingers crossed.

Weisberg, *supra* note 39.

114. Flag burning, as an isolated act, does not compare to the widespread dissemination of pornography on the Internet, but parallels remain. And as with the rush to enact federal flag burning legislation, the clamor over Internet pornography has resulted in untenable laws.

115. Frank Michelman, *Saving Old Glory: On Constitutional Iconography*, 42 STAN. L. REV. 1337 (1990).

116. *Id.* at 1342.

Stone looked at Congress's dilemma and concluded that "[w]e should recognize the flag issue for what it is—a profoundly controversial and inflammatory dispute over what in the grand scheme of constitutional government is ultimately a matter of secondary importance."[117] As Michelman further observed, "[i]f lawmakers are usually and mainly strategic self-servers, and ignorant to boot, then there is no good reason for setting them loose on these daunting issues or according them discretion to work out the issues as best they can."[118] But the question raised remains: is there an appropriate, proportionate response to this problem? While arguing that *Texas v. Johnson* was correctly decided,[119] Stone focused on the reaction by Congress. Congress faced a dilemma in choosing between a constitutional amendment and a legislative response. There was no good option, but politicians in Congress needed to react, and they did.

Members of Congress in 1989 felt compelled to act to express moral indignation over flag burning, but why could they not stop themselves and regulate within constitutional bounds? Prof. Daniel Pollitt saw the flag burning situation as political failure and cowardice: "In Congress, the tide of outraged patriotism swept reason away."[120] Pollitt saw the proposed constitutional amendment as intertwined with the legislative strategy, and all of it tied up in appeasing political interests. "The Democratic strategy was to propose palatable resolutions and statutes, thereby avoiding the necessity of amending the Constitution."[121] Partisan political instincts were engaged and operating at a fever pitch.[122] In Pollitt's opinion, the true heroes

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117. Geoffrey R. Stone, *Flag Burning and the Constitution*, 75 IOWA L. REV. 111, 124 (1989).

118. Frank I. Michelman, *Property and the Politics of Distrust: Liberties, Fair Values, and Constitutional Method*, 59 U. CHI. L. REV. 91, 106 (1992).

119. "In my judgment, the Court's analysis of *O'Brien* and of the Texas flag desecration statute was clearly correct and essentially uncontroversial as a matter of both precedent and principle." Stone, *supra* note 117, at 124 (citing United States v. O'Brien, 319 U.S. 367 (1968)).

120. Pollitt, *supra* note 112, at 569.

121. *Id.* at 570.

122. The political pressure was strong in terms of both passing a bill and a constitutional amendment:

> Senate Minority Leader Robert Dole seemed to relish his role as designated demagogue. . . . When asked if an opponent could defend his stand, Dole replied, "I think he could at a bar association meeting, but not before real people." House Minority Leader [Robert] Michel predicted

of the day were those who showed courage in the face of pressure. "What better way to celebrate [the] 200th birthday [of the Bill of Rights] than to pay homage to those members of Congress who risked the 'soundbite' and the negative 'thirty-second spot' to ensure it passes on to the next generations without change, without blemish, totally intact."[123] Courageous legislators, however, were in short supply.

In the context of analyzing another set of statutes, Professors Mark Tushnet and Larry Yackle aptly discussed the flag burning episode as an example of symbolic statutes:

> Sometimes, perhaps often, legislators enact statutes to make a point, or to be able to tell their constituents that they have done something about a problem. We call these symbolic statutes. Legislators may win politically by enacting symbolic laws, but courts, bureaucrats and others affected by the statutes . . . may lose as they try to work out what the statutes mean.[124]

In addition, symbolic statutes might not even survive court review and therefore everyone loses by the empty legislative gesture. Tushnet and Yackle warned that with symbolic statutes, "prior judicial developments may induce legislators to be inattentive to details of statutory design."[125] While they saw this in terms of further judicial refinement of existing doctrine, it also speaks directly to the question of regulation in general. As Congress has been inattentive to larger lessons from the courts, it has designed fundamentally flawed statutes. And Congress must remember base line constitutional principles if it is going to successfully regulate—that is if it wants to enact constitutional statutes and not settle for show over substance. Prof. Stone also reminded us of the importance of looking at base line principles:

> even if the Court eventually holds that there is no method by which the government can constitutionally protect the physical integrity of the flag[126] through legislation, a

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quick adoption of the proposed amendment, asking, "Who wants to be against the flag, mother and apple pie?"

Id. at 590.

123. *Id.* at 614.

124. Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 3-4 (1997).

125. *Id.* at 3.

126. Note that Stone's comments pre-dated the *Eichman* decision.

> constitutional amendment to overrule *Johnson* would be undesirable because *Johnson* itself was premised upon sound principles of constitutional theory. The "bedrock" principle that government should not "prohibit the expression of the idea simply because society finds the idea itself offensive or disagreeable" is not only a correct interpretation of the First Amendment, it is wise public policy in a free and self-governing society.[127]

To the extent that their actions reflected politically expedient ideas that offend bedrock First Amendment principles elected officials in Washington failed the people.

Likewise, CDA and COPA represent faulty regulatory approaches to incendiary expressive activity.[128] Flag burning and Internet pornography both have generated similar patterns of response, outside the intersection of politics and the Constitution. The tension between that which is politically expedient and that which is constitutionally sound is particularly noteworthy in the area of free expression. The First Amendment protects expressive activity, including, and perhaps most importantly, that which causes controversy, serving as a shield to protect the people from the dangers of government censorship of unpopular ideas. As noted First Amendment lawyer Floyd Abrams wrote:

> First Amendment claims tend to be made by unpopular people or institutions who wish to say unpopular things. Popular speakers rarely need legal protection. To lend meaningful support to First Amendment protections, a President must be prepared to put aside popular political positions and defend the rights of those who say things of which the public thoroughly disapproves.
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> They include a cadre of sometimes disagreeable candidates[, such as] Nazis and pornographers. . . . To protect such people and institutions to the fullest requires a

127. Stone, *supra* note 117, at 124 (citing Texas v. Johnson, 491 U.S. 397 (1989)).

128. In *Ashcroft v. Free Speech Coalition*, 122 S.Ct. 1389 (2002), the Court recently struck down another regulation of sexually explicit material, the Child Pornography Protection Act. Like flag burning and Internet pornography (and perhaps even more so), child pornography is highly charged, and there was clear controlling Court precedent, but Congress failed to write a law that conformed with the Court's prior teachings. "In sum [the statute] covers materials beyond the categories recognized in *Ferber* and *Miller*, and the reasons the Government offers in support of limiting the freedom of speech have no justification in our precedents or in the law of the First Amendment." *Free Speech Coalition*, 122 S.Ct. at 1405 (citing New York v. Ferber, 458 U.S. 747 (1982); Miller v. California, 413 U.S. 15 (1973)).

good dose of political courage.[129]

Political courage is required to attack thorny First Amendment issues without cowardly succumbing to the politically expedient, but constitutionally unsound, solution. But Congress is a political body and the Courts remain the backstop for protecting against legislative cowardice. The problem with such symbolic legislating remains that while symbolism may satisfy surface concerns, the end result is little or no meaningful way of addressing a problem.[130] In the Internet pornography context, the American people want and deserve a better response.

D. Intractable Federal Problems & Understanding Miller

A top, down approach to regulating Internet pornography has not and will not survive constitutional scrutiny. Congress wrote two broad laws regulating Internet pornography. The laws were reviewed by one U.S. District Judge, one three-judge panel of the U.S. District Court, one three-judge panel of the U.S. Court of Appeals, and the U.S. Supreme Court, twice. After all the legal battles, these laws have never been enforced. One consistent theme from all the different opinions is that without a clear standard for determining whether material is obscene and unprotected, no top, down federal Internet pornography regulation can withstand constitutional scrutiny.[131] We now look at First Amendment principles in the pornography area, in order to more fully understand Congress's prior failures and the intractable problem of finding a legislative response that is politically viable *and* constitutional.

1. Developing Standards

While the First Amendment provides that "Congress shall

129. Abrams, *supra* note 40, at F42.

130. Further, the resulting legal challenges to a new law known to be unconstitutional require significant dedication of resources from lawyers and the courts.

131. While the latest Supreme Court decision, the most government-friendly so far in this line, offers various perspectives, a majority of Justices agree on the need for clear standards and appreciate the constitutional dangers inherent in any top, down solution, thus supporting remand and still keeping open the possibility of an outright declaration of unconstitutionality. *See infra* Part II.E.5.

make no law . . . abridging the freedom of speech,"[132] it has never been read as providing an absolute protection of all expressive activity.[133] It has been found to protect the arts and literature,[134] including that which may be sexually explicit, but there are limits. Specifically, the Court has found that which is obscene to be undeserving of first Amendment protection. The *Miller* test provides a formula for determining what is obscene in the physical world, and there have been several suggestions as to a proper standard in the virtual world, but none is appropriate. We now consider how the Court has defined what is obscene, and how others have suggested we define obscenity in cyberspace, with a focus on who makes these determinations.

As the various federal courts have explored this issue, one defining feature has been who determines whether the material in question is obscene, and therefore lacking First Amendment protection. In the nineteenth century, as prosecutions for obscenity offenses began, United States courts adopted the English rule of law enunciated in *Regina v. Hicklin*.[135] For example, in *United States v. Bennett*,[136] the court announced that

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132. U.S. CONST. amend. I.

133. Justice Black consistently carried the absolutist banner, but his view never came close to commanding a majority of the Court. *See, e.g.* N.Y. Times v. Sullivan, 376 U.S. 254, 293 (1964) (Black, J., concurring); Barenblatt v. United States, 360 U.S. 109, 141 (1959) (Black, J., dissenting). *See also* Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 246-51 ("[T]he absolute view has not prevailed within the Court.").

134. The arts and literature are also essential to the fully functioning democracy. Such individual expression is not just important to the First Amendment; it is also protected by it. As the Court stated:

> The First Amendment guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.

Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 689 (1959). *See also* Meiklejohn, *supra* note 133, at 262. ("[L]iterature and the arts are protected because they have a 'social importance' which I have called a 'governing' importance. For example, . . . the novel, like all the other creations of literature and the arts, may be produced wisely or unwisely, sensitively or coarsely, for the building up of a way of life which we treasure or for tearing it down. Shall the government establish a censorship to distinguish between 'good' novels and 'bad' ones? And, more specifically, shall it forbid the publication of novels which portray sexual experiences with a frankness that, to the prevailing conventions of our society, seems 'obscene'?").

135. 3 L.R.-Q.B. 360 (1868).

136. 24 F.Cas. 1093, 1104-05 (S.D.N.Y. 1879) (No. 14,571) (quoting *Hicklin*).

the relevant proxy for judging obscenity would be "whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands a publication of this sort may fall."[137] Explaining this standard, the court also re-emphasized that a jury "may consider whether [depictions or descriptions] are obscene, or lewd, or lascivious to *any considerable portion of the community*, or whether they excite impure desires in *the minds of the boys and girls or other persons who are susceptible to such impure thoughts and desires.*"[138]

While *Hicklin* endured for a number of years, in 1933 in *United States v. One Book Called "Ulysses"*[139] a lower federal court discarded the *Hicklin* obscenity standard, instead proposing a method whereby a depiction or description would "be tested by the court's opinion as to its effect on a *person with average sex instincts.*"[140] Twenty-four years later, the Supreme Court fired its first shot at the *Hicklin* standard in *Butler v. Michigan*,[141] criticizing a Michigan statute derived from *Hicklin* for effectively "reduc[ing] the adult population of Michigan to reading only what [was] fit for children."[142] Only four months later, in *Roth v. United States*[143] the Supreme Court explicitly rejected the *Hicklin* test and announced its own standard for the analysis of materials alleged to be obscene: "whether to the *average person, applying contemporary community standards*, the dominant theme of *the material taken as a whole*

137. *See id.* at 1102.

138. *See id.* at 1105 (emphasis added). The court explained why such a standard was necessary: "If any other standard were adopted, probably no book would be obscene, because there would be some men and women so pure, perhaps, that it would not excite an impure thought; but it is to be governed by its effect upon the community—whether it is obscene and is of dangerous tendency in the community generally or any considerable portion of the community." *Id.*

139. 5 F. Supp. 182 (S.D.N.Y. 1933).

140. *Id.* at 184 (emphasis added).

141. 352 U.S. 380 (1957).

142. *Id.* at 383. The Court rejected the State's assertion that reducing the material available to all was within its power to promote the general welfare, particularly that of minors. The Court noted that such a legislative intent equaled an effort "to burn the house to roast the pig." *Id.* Despite this stride, however, the Supreme Court neither designed a new test for the determination of obscenity nor overruled the use of a *Hicklin* standard.

143. 354 U.S. 476 (1957). *Roth* was actually a pair of cases; one involved the prosecution of Samuel Roth under a federal obscenity statute and the other focused upon the prosecution of David Alberts under a California obscenity statute. *See id.* at 480-81.

appeals to prurient interests."[144] The Court was looking to average community members to define what was obscene. The question still remained as to whether we find that community locally or nationally.

In *Manual Enterprises, Inc. v. Day,* Justice Harlan's plurality opinion advocated the use of a national standard to determine whether material is obscene.[145] The debate heightened in *Jacobellis v. Ohio,*[146] as Justice Brennan's plurality opinion advanced a national standard. He explained that obscenity may have "'a varying meaning from time to time' not from county to county, or town to town."[147] Justice Brennan articulated his rejection of a local community standard by positing that "to sustain the suppression of a particular book or film in one locality would deter its dissemination in other localities where it might be held not obscene, since sellers and exhibitors would be reluctant to risk criminal conviction in testing the variation between the two places."[148]

Chief Justice Warren's dissent included a stinging criticism of Justice Brennan's reasoning: "[W]hen the Court said in *Roth* that obscenity is to be defined by reference to 'community standards,' *it meant community standards*—not a national standard as is sometimes argued. I believe that there is no provable 'national standard' and perhaps there should be none."[149] Chief Justice Warren explained that "this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one."[150] Over time, the courts had struggled to define what community should judge whether sexually explicit material was obscene and therefore unprotected. There remained great uncertainty as to who should determine the appropriate standards and whether such standard should be local or national.

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144. *Id.* at 489.

145. 370 U.S. 478 (1962). "The proper test under this federal statute, reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency." *Id.* at 488.

146. 378 U.S. 184 (1964).

147. *Id.* at 193.

148. *Id.* at 194.

149. *Id.* at 200 (Warren, C.J., dissenting).

150. *Id.* (Warren, C.J., dissenting).

2. *The* Miller *Test and Community Standards*

The debate over the contemporary community standard came to a head in 1973 in *Miller v. California*,[151] as the Court discarded the national standard in favor of a local community standard. In *Miller*, the defendant was convicted of the unsolicited mass mailing of sexually explicit materials in violation of the California Penal Code.[152] In upholding the conviction, Chief Justice Burger re-affirmed the principle that obscenity was unprotected by the First Amendment,[153] and he used the opinion to settle the question of which community standard should apply to determinations of that which constitutes obscenity.[154] The Chief Justice declared:

> Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, *but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive.'* These are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists.[155]

The Chief Justice justified this reasoning by combining notions of both tradition and practicality. First, he reinforced the need for local juries to speak the mind of the community.[156] Next, the opinion reasoned that the nation's variety of communities demanded a variety of community standards: "It is neither realistic nor constitutionally sound to read the First

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151. 413 U.S. 15 (1973).

152. *See id.* at 16.

153. *See id.* at 23.

154. *See id.* at 24. The Chief Justice wrote:

> The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. (citations omitted).

155. *Id.* at 29 (emphasis added).

156. "[T]he adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law." *Id.* at 30.

Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City."[157] Four years later, the Court elaborated in *Smith v. United States*: "obscenity is to be judged according to the average person in the community, rather than the most prudish or the most tolerant."[158] Thus, the *Miller* opinion rejected the national standard, instead endorsing the position that obscenity had to be judged community by community. The Court removed itself from the business of deciding obscenity on a case-by-case basis[159] and for the nearly three decades since then, *Miller* has been well-settled doctrine.

3. Miller *on the Internet*

Because *Miller* was decided in 1973, it lacks any apparent mechanism for dealing with the Internet, which was only initially conceived in 1969 and really expanded in just the last decade or so.[160] *Miller* is built upon a real, physical world paradigm, but how does it apply to our virtual world problem? One reported opinion, *United States v. Thomas*,[161] sheds particular light on our discussion. In *Thomas*, a married couple was convicted for distributing obscene images and videos via their own Amateur Action Computer Bulletin Board System ("AABBS") from their household in California.[162] The couple operated their business by using a scanner to convert sexually explicit photographs taken from magazines into computer files that were made available on a computer bulletin board site. Interested customers[163] would be granted access to extended

157. *See id.* at 32.

158. Smith v. United States, 431 U.S. 291, 304 (1977) (citing Hamling v. United States, 418 U.S. 87 (1974); Miller v. California, 413 U.S. 15 (1972); Roth v. United States, 354 U.S. 476 (1957)).

159. The Court certainly struggled mightily over this task, as reflected on Justice Stewart's memorable line in his concurrence in *Jacobellis*: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . . ." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

160. *See supra* Part II.A.

161. 74 F.3d 701 (6th Cir. 1996).

162. *See id.* at 705.

163. Initial access to the Thomases' AABBS site without an issued password would, in fact, allow for the viewing of brief sexually-explicit descriptions of the available computer files and video clips that could be accessed via the Thomases' business. *See id.*

length video clips and sexually graphic pictures only if they paid a membership fee and filled out an application form.[164]

In July 1993, the Thomases became the target of a sting operation led by a U.S. Postal Inspector because of complaints about the content on their AABBS.[165] Operating out of Tennessee, the inspector accessed the AABBS using an assumed name and a Tennessee address and sent in an application form and fee to the Thomases in California in order to obtain a password.[166] Shortly after, the inspector was contacted by Mr. Thomas, who issued him a password, authorized his access, and received his order for six videotapes.[167] Several months later, the Thomases were arrested and subsequently convicted in Tennessee on multiple counts of federal obscenity violations.[168] On appeal, inter alia, the defendants argued that the nature of the sexually explicit material involved should be determined by using a virtual community standard, not that of the Western District of Tennessee, where they were tried.[169]

The appellate court rejected the defendants' argument that the only appropriate *Miller* community would be one that included only those who accessed computers using the technology that their AABBS employed.[170] But the facts of the case did not implicate the issue as raised by the defendants; the court pointed to the fact that the defendants' knowledge of the accessor's location was sufficient to establish a nexus with the federal district and to implicate that district's specific community standards.[171] While the defendants' specific

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164. *See id.*

165. *See id.*

166. *See Thomas*, 74 F.3d at 705.

167. *See id.*

168. *See id.* at 705-06.

169. First, the court rejected the defendants' venue challenge regarding the Western District of Tennessee, noting that the defendants had an exact knowledge of all of their accessing clientele's locations because of the application form that was part of the defendants' membership procedure. Because of the defendants' knowledge of their members' whereabouts and because of precedent in *United States v. Bagnell*, 679 F.2d 826 (11th Cir. 1982), the court held that the Thomases were properly prosecuted in the Western District of Tennessee; in essence, the court found the requisite nexus between the crime and the district so as to permit the defendants' prosecution. (The *Bagnell* court had found that "there is no constitutional impediment to the government's power to prosecute pornography dealers in any district into which the material is sent." *Id.* at 830).

170. 74 F.3d at 711.

171. *See id.* The court's reasoning was that the defendants' knowledge allowed

"virtual community" standard argument was not accepted, the broader concept was not addressed by the *Thomas* court; many questions remain unanswered.

E. No Proper Federal Jurisdictional Standard

Broadly speaking, the national standard for determining obscenity has been rejected in favor of the local community standard, but that still remains to be fully understood or defined for purposes of Internet pornography. Any federal law regulating Internet pornography must confront the question of what standard should be used to determine whether sexually explicit material found on the Internet is obscene.[172] But a federal law that tries a top, down standard will likely violate constitutional teachings. What community can judge—as necessitated by *Miller*—whether sexually explicit material distributed online is obscene? At least four approaches have been suggested, but none fully satisfies constitutional concerns; the Supreme Court recently shed some light on the subject, albeit an unfocused wash of light. We therefore see more clearly the conundrum: a real problem exists; the people want solutions; yet a federal, top, down politically expedient "solution" is not constitutionally sound.

1. Recipient's Jurisdiction (Where Downloaded)

First, some have suggested that the proper jurisdiction and community standard depend upon the location where sexually explicit material was received or downloaded. This runs contrary to First Amendment obscenity case law and chills speech by creating uncertainty as to applicable standards.[173] Under this approach, the only sexually explicit material that may be distributed across the Internet would be that which is tolerated in the least permissive jurisdiction in the country. Such a result directly contradicts the underlying value that we

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for it to control the jurisdictions in which it could be subjected to criminal prosecution; by allowing access to someone from a less tolerant community (as in this case), the defendants themselves "assumed the risk," especially in light of the fact that they had preventative means in place to preclude liability in "foreign" districts. *See id.*

172. The recent Supreme Court decision in *Ashcroft v. ACLU*, No. 00-1293 (U.S. May 13, 2002), is generally instructive in this matter.

173. Additionally, but not of primary concern in this Article, it flaunts criminal due process and jurisdictional principles, allowing prosecutions where a defendant has had no knowing substantial contact.

cannot allow the least permissive forces in the nation to decide what is the proper level of sexually explicit material for the entire nation to view.[174]

In addition, if the determinative community is where information was received, the individual distributor is subject to the whim of any individual prosecutor in any location in the United States.[175] The U.S. Attorney in any district in the country would have the ability to reach out and prosecute any individual simply by accessing that individual's website. This flawed standard would invite federal prosecutors to find the places where they have the best chance of obtaining a conviction.[176] The individual would be subject to jurisdiction in any of the fifty States, or tens of thousands of local communities across the nation. Without more, mere virtual presence cannot be taken to stand for the proposition that actual presence is established for purposes of venue and jurisdiction[177] and *Miller*.[178] While *Smith* and its progeny have

174. In fact, it is even a point of agreement between the majority and dissent in these cases. *See, e.g.*, Miller v. California, 413 U.S. 15 (1972) (Brennan, J., dissenting).

175. This is precisely what happened in the *Thomas* case. We have no reason not to think that the U.S. Attorney will not crusade to ensure that material that is deemed obscene in Memphis is not posted anywhere in the nation. The fear of a crusading prosecutor squelching First Amendment rights is more reality than theory.

176. *See* Erik G. Swenson, *Redefining Community Standards in Light of Geographic Limitlessness of the Internet: A Critique of* United States v. Thomas, 82 MINN. L. REV. 855, 880 (1998).

177. An assertion of personal jurisdiction via this pervasive legal fiction, according to some courts, would be "wildly beyond the reasonable expectations of computer-information users." Pres-Knap, Inc. v. System One, Direct Access, Inc., 636 So.2d 1351, 1353 (Fla. Dist. Ct. App. 1994).

If "courts do not base jurisdiction upon the action of an individual downloading materials into the forum, but rather on the distributor's direct contact with a particular forum," constitutional norms survive. Patrick T. Egan, *Virtual Community Standards: Should Obscenity Law Recognize the Contemporary Community of Cyberspace?*, 30 SUFFOLK U. L. REV. 117, 148-49 (1996) (citing *Thomas*, 74 F.3d at 711.

Likewise, on the civil side, this would invite a flurry of forum-shopping; it would create "a jurisdictional nightmare in which parties will choose a forum as inconvenient as possible for defendants as a tactic to create favorable pretrial settlements from those who either cannot afford distant forum litigation or simply find that paying off the complaining party is less costly than defending in an unfamiliar state." *See* Leif Swedlow, *Three Paradigms of Presence: A Solution for Personal Jurisdiction on the Internet*, 22 OKLA. CITY U. L. REV. 337 (1997).

178. To the contrary, if there is some sort of knowing contact or business relationship with a jurisdiction, then venue will be proper there. But for these purposes, we are assuming, *unlike* the *Thomas* case, that the individual does not know where a recipient lives.

upheld allowing federal prosecutors to argue local community standards, this is a step beyond that. In *Smith* there was knowledge of the communities involved, as the defendant had mailed materials from one Iowa city to another location in Iowa. To the contrary, the recipient's jurisdiction standard would open the door for prosecutions almost *anywhere*, without the sender having knowledge of the fact that material had ever been downloaded there. Such prosecutions would improperly chill First Amendment rights by creating a lowest common denominator approach.[179] Anxious uncertainty about a jury's definition of obscene may result in the censorship of materials that a jury would not have found obscene.[180] In discussing the chilling effect, one commentator has observed:

> If each cyberspace user must govern her speech in accordance with the most restrictive of these communities, then either much will remain unexpressed, or, more likely, the virtual community will restrict access of the members of those restrictive jurisdictions to entire conversational subjects or to membership in the community itself. Either alternative substantially chills the free expression of, and exchange about, topics for which significant controversy exists.[181]

At the very minimum, the application of the community standard of a recipient jurisdiction would improperly chill speech rights.[182]

2. *Internet (Virtual Community) Standard*

Some suggest that the proper standard to use when judging sexually explicit material on-line is that of the "virtual community." Several problems are worth noting. First, the virtual community is without meaningful definition, which is a central concern in the *Reno* series. Who resides in the virtual community? Any person who has ever accessed information on the Internet? Any person who has ever accessed sexually

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179. *See* Swenson, *supra* note 176, at 878.

180. Timothy S. T. Bass, *Obscenity in Cyberspace: Some Reasons for Retaining the Local Community Standard*, 1996 U. CHI. LEGAL F. 471, 484-85 (1996).

181. Byassee, *supra* note 7, at 210.

182. The individual would be brought into court without any necessary proof that he had any knowledge or awareness that his material had been accessed by others in said locale. To pull an individual into court in any of the countless jurisdictions across the country also offends notions of fundamental fairness and due process in the criminal context.

explicit material on the Net? Any person who regularly accesses such material on the Internet? These few questions highlight the myriad definitional problems with the virtual community. With no clearly defined community, *Miller* is inoperable, and First Amendment values are offended.

The virtual community theory is also unacceptable because it would create two-track obscenity prosecutions, with materials transmitted across the Internet being judged by one standard and those via more traditional media being judged by another. Assume, for example, that photographs are taken, downloaded into a computer program, then turned into a magazine. If the magazine is then sent across the Internet to another person, under the virtual community standard, that on-line magazine would be judged differently than the same content when printed and mailed to the same individual. The same material thus would be judged by two different standards, again in violation of First Amendment principles.

The *Thomas* case touched on the idea of a virtual community. At trial, the Thomases argued that there should be a separate community standard for cyberspace, a non-physical place that feels like a community to its users and has the unique attributes of linking global parties.[183] The Thomases relied upon past court approval of communities defined in non-geographic terms.[184] They argued that *Miller* allows for the court to apply a community standard to specifically match the community touched by the obscenity. The *Thomas* court quickly rejected this notion, stating that based upon *Miller*'s enunciation of the law "the community standard we are dealing with is not the community of computer users, the community of those owning

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183. *See* Byassee, *supra* note 7, at 198-99. Another commentator who supports the virtual community standard has remarked:

> Implicit in the community standards approach is the notion that a community relies upon the proximity of its members. Computer technologies allow individuals to create unique communities of people who share similar interests and who wish to communicate with each other about those interests. These communities have no geographical boundaries and should not be judged by communities with geographical boundaries. Internet users . . . are often more connected to each other than they are to their physical neighbors. Consequently, these citizens of the Internet community should determine what is obscene for citizens of the Internet.

Swenson, *supra* note 176, at 881.

184. *See generally* Hamling v. United States, 418 U.S. 87, 104-05 (1974); United States v. Maxwell, 42 M.J. 568, 581 (A.F. Ct. Crim. App. 1995).

VCRs, the community of those who might go into adult bookstores. That's not the definition of community."[185]

3. National Standard

Some also (re-)argue for using a national standard to determine whether sexually explicit material is obscene and therefore unprotected. As discussed earlier, the national standard was rejected by the Supreme Court in *Miller*.[186] In conceding that the First Amendment (with respect to obscenity) would subsequently mean a different level of speech protection in different regions of the nation, the Court responded in practical terms, announcing that "diversity is not to be strangled by the absolutism of imposed uniformity."[187] Imposing a national standard when dealing with on-line obscenity could likewise strangle diversity in material distributed on-line.[188]

Advocates of a national standard in on-line obscenity prosecutions[189] also ignore the interrelated issues of venue and jurisdiction. The question of the location where the prosecution will occur is essential; location will truly determine what standard will be used. That decision may well determine

185. Record at 726, United States v. Thomas (No. CR-94-20019-G). For another interesting insight, see Donald T. Stepka, *Obscenity On-Line: A Transnational Approach to Computer Transfers of Potentially Obscene Material*, 82 CORNELL L. REV. 905 (1997) (stating that the law should not "consider the computer user as no longer a part of his or her geographic community while on-line"). The court also recognized that, in practical terms, the virtual community would be extremely difficult to define; because of the variety of resources available on the Internet a precise definition of a "cyberspace citizen" would be implausible.

186. "[I]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." Miller v. California, 413 U.S. 15, 32 (1973). *See also* Byassee, *supra* note 7, at 210. ("If the nationwide test were required, the effect would be to chill speech in those communities more tolerant than average, for fear that the speech may cross the line into obscenity when viewed from the national mean.") The national standard may result in compromises in both directions—more sexually explicit material than some would want and less for others.

187. *Miller*, 413 U.S. at 33.

188. In addition, a national standard would place—almost return—the United States Supreme Court to a position of being the ultimate arbiter of what sexually explicit material on the Internet is obscene. The Court's days of struggling to define obscenity on a case-by-case basis are over, thankfully. To return these nine individuals to such a task would prove unworkable and unwise.

189. As discussed in Part II.E.5, *infra*, Justice O'Connor (and to a modified extent Justice Breyer) argued for a national standard in her *Ashcroft v. ACLU* concurrence.

whether the material in question is deemed obscene.[190] In other words, the standard that is actually employed depends upon where the prosecution occurs.[191] While the national standard has the seeming attraction of giving every individual notice of what is forbidden and what is permissible, in reality, the individual is without clear guidance and likely is at the whim of the jurisdiction.[192]

4. Provider's Jurisdiction/Location (Where Uploaded)

Finally some argue that we should try the individual where he has posted the allegedly obscene materials. This beneficially allows for communities to control the content of that which is acceptable within the community. It also recognizes that while the information with which we are concerned is transmitted via the Internet, it is created by and typically involves real individuals, in real places. In other words, it acknowledges that while the Internet is a dominant force in our modern lives, we are humans using machines to transmit ideas. Trying the individual where he uploaded information would ensure that the defendant would know the community and would not have to guess the appropriate level of content—there would be no chilling effect. The local community would have the ability to regulate itself and remain within the dictates of *Miller*.[193] This is the best option offered so far, but it is also flawed.

While preventing the least permissive community from dictating the national standard, the most permissive community should not necessarily set the standard for the entire nation. This criticism has been put as follows:

> The community-of-dispatch standard would not solve the

190. *See* United States v. Reed, 354 F.2d 519, 522 (1965).

191. This is the case even if the Court abandons the *Miller* local community standard test.

192. *See* Bass, *supra* note 180, at 492 ("The jury in obscenity litigation would not have an inherent understanding of a national standard as it does with its own local standard, so both the prosecution and defense would need to call expert witnesses. At a minimum, informing the jury about standards that they do not understand necessarily would take time . . . thus increasing litigation costs.").

193. Further, in terms of venue, prosecutions could proceed when an individual had a substantial nexus with a recipient and his jurisdiction, like we saw in *Thomas*, but venue would be improper in the absence of such a substantial nexus. We should not permit an individual to be dragged across the country to defend his actions in any State or county across the country without some previous notion that he is establishing contacts in that jurisdiction.

> diversity-of-standards problem since distributors of obscene material could move to the most permissive jurisdictions. The standards of that community would then dictate the standards for all communities . . . It ignores the long-recognized regulatory interest of the community affected by the distribution. Since distributors of obscene materials could circumvent stricter regulations over other media, the communities would lose effective control over those media as well.[194]

This is the reverse of the local standard problem: instead of dummying down the discussion, there are no controls whatsoever. Just as it is impermissible to let the most restrictive standards govern the entire nation, it is similarly problematic to let the most permissive standards govern. This is precisely the problem that *Miller* prevents, and the local standard, while generally favorable, is still unworkable for federal regulation.

5. *New Perspective:* Ashcroft v. ACLU

While far from conclusive, the recent decision in *Ashcroft v. ACLU* sheds some additional light on the subject. The Justices offer five different answers to the question of what community standard is to be used when judging Internet pornography.[195] The most COPA-friendly perspective was offered by Justice Thomas, writing for himself, the Chief Justice, and Justice Scalia: "It is sufficient to note that community standards need not be defined by reference to a precise geographic area."[196] Thus, Justice Thomas found COPA constitutional. In her concurring opinion, Justice O'Connor urged adoption of a national community standard for judging sexually explicit material on the Internet.[197] Justice Breyer offered a variant on O'Connor's idea, a statutory interpretation to resolve some questions: "I believe that Congress intended the statutory word 'community' to refer to the Nation's adult community taken as a whole . . . ."[198] He further suggested that "variation reflecting application of the same national standard by different local

194. Bass, *supra* note 180, at 493-94.

195. This issue is detailed in Parts II.E.1-4, *supra*.

196. Ashcroft v. ACLU, No. 00-1293, slip op. at 12 (U.S. May 13, 2002).

197. "I write separately to express my views on the constitutionality and desirability of adopting a national standard for obscenity for regulation of the internet." *Ashcroft v. ACLU*, slip op. at 1 (O'Connor, J., concurring).

198. *Id.*, slip op. at 1 (Breyer, J., concurring).

juries does not violate the First Amendment."[199] Yet another perspective came from Justice Kennedy, who was concerned about overbreadth and persuaded by the concerns of the District Court, so he wanted the Appeals Court to address those concerns.[200] "[T]he Court of Appeals was correct to focus on COPA's incorporation of varying community standards; and it may have been correct as well to conclude that in practical effect COPA imposes the most puritanical community standard on the entire country."[201] Finally, Justice Stevens held fast to his *Reno II* opinion: "Because communities differ widely in their attitudes toward sex, . . . applying community standards to the Internet will restrict a substantial amount of protected speech . . . ."[202]

At the end of this examination, we see no apparent solutions that can be imposed from Washington that conform with *Miller* and First Amendment principles. While the politically *expedient* solutions are not constitutionally sound, politically *viable* alternatives may still exist.

III. CIPA: HAS CONGRESS LEARNED?

Regulating Internet pornography presents a challenge to Congress that at least for now may seem impossible to solve. No single top, down solution can be imposed by the federal government that satisfies constitutional, political, and practical concerns. Perhaps after all these rebukes from the federal courts, Congress may learn a lesson and seek out the answers that lie at the intersection of politically viability and

199. *Id.*, slip op. at 3 (Breyer, J., concurring).

200. *Id.*, slip op. at 3 (Kennedy, J., concurring).

201. *Id.*, slip op. at 7 (Kennedy, J., concurring). Above all, Justice Kennedy saw too many unresolved questions and wanted to send the case down for further resolution. "There may be grave doubts that COPA is consistent with the First Amendment; but we should not make that determination with so many questions unanswered." *Id.*, slip op. at 12 (Kennedy, J., concurring).

202. *Id.*, slip op. at 10 (Stevens, J., dissenting). Earlier in the opinion he directly reflected his adherence to his majority opinion in *Reno II*: "[W]e did not adopt the position relied on by Justice Thomas—that applying community standards to the Internet is constitutional . . . ." *Id.*, slip op. at 5 (Stevens, J., concurring) (citation omitted). As a predictive matter, if any new standard is to emerge from the Supreme Court in the next five years, it is likely to be the national adult community standard. Both Justices Breyer and O'Connor are clearly favorably disposed toward such an approach, and the Chief Justice and Justices Scalia and Thomas are likely to agree, even though they would not necessarily be in total agreement. Still, concerns about application will remain, as both Justices O'Connor and Kennedy fear.

constitutionality. Congress appeared to be making progress when it passed the Children's Internet Protection Act ("CIPA"),[203] which requires that all public schools and libraries with Internet access install filtering software, technology designed to block out pornographic material.[204] While Congress seemed to be taking a step in the right direction by changing its focus from federal regulation to empowering local communities, the reality is that Congress has failed the people by passing another politically appealing, yet unconstitutional law.

CIPA is politically appealing because it provides what seems to be a simple solution to a serious problem. However, filtering software does not necessarily do what it is designed to, and it also is imprecise in what it does. While it may block a majority of pornographic sites, it also blocks legitimate, constitutionally protected sites.[205] This is why the American Library Association has been fighting CIPA from its inception.[206] This is also why the federally-created COPA Commission did not recommend that filters be installed in schools and libraries, but rather recommended that the government fund research.[207] This is why filtering software was struck down in the one case that pre-dated CIPA, *Mainstream Loudoun v. Board of Trustees of the*

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203. P.L. No. 106-554, tit. xii, 114 stat. 2763, 2763A-335 (2001).

204. 47 U.S.C. §254(h) (Supp. 2001); 20 U.S.C. §9134 (Supp. 2001).

205. In March, 2001, Consumer Reports rated six of the most widely used software along with AOL's parental controls and found that AOL's Young Teen was the most effective, failing to block only fourteen percent of objectionable sites. However, it also blocked sixty-three percent of legitimate sites, each containing constitutionally protected speech. *Digital Chaperones for Kids, Which Internet Filter Protect the Best, Which Get in the Way?*, CONSUMER REPS. ONLINE (Mar. 2001), *at* http://www.consumerreports. org.

206. As early as 1998, when Senator John McCain introduced the "School Filtering Act," the American Library Association spearheaded the opposition to the bill because it believes that schools and libraries should make their own choices about which web sites are acceptable and whether filtering needs to occur at all. Lynne Bradley, the ALA's deputy executive director, stated: "There are different needs within the same building. The school nurse may need to get information that a kindergartner should not see. To have across-the board blocking on all terminals limits professionals' access." *See* Julia Duin, *Bill Aims to Keep Children Away From Porn Web Sites*, WASH. TIMES, May 11, 1998, at A3.

207. "The Commission recommends allocation of resources for the independent evaluation of child protection technologies and to provide reports to the public about the capabilities of these technologies. The current lack of information about how well technologies work, and lack of transparency about what they might block, is a major hurdle for their adoption by families or caregivers." COMM'N ON CHILD ONLINE PROT., REPORT TO CONGRESS 41 (2000) [hereinafter COPA COMM'N REPORT].

Loudoun County Library.[208] To the extent that Congress turned to local communities in CIPA, it learned. But still, CIPA is another politically appealing law that will fail constitutional scrutiny.

A. The Effectiveness of Filters

The constitutionality of CIPA depends upon the effectiveness of filtering technology, so we must first develop some background information. Filtering technology was developed in the mid-1990s to block access to pornography and other objectionable material. While most software has the same basic objective, there are significant distinctions between their methods.[209] The technology varies in cost and effectiveness, and no program is perfect. When filtering software was first introduced it identified keywords such as "breast," "sex," or "XXX."[210] Any site containing an objectionable word would then be blocked.[211] While this approach was effective in blocking objectionable sites, it also raised First Amendment concerns when filtering software blocked sites that contained constitutionally protected material, such as sites containing the terms, "chicken breast recipes," "Middlesex," or "Super Bowl XXX."[212] While some keyword filtering still remains indiscriminate, technological advances have made it possible to

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208. 24 F. Supp. 2d 552 (E.D. Va. 1998). In *Mainstream Loudon*, a U.S. District Court ruled that a county library policy requiring the installation of filtering software on every computer with Internet access was unconstitutional because "such a policy offends the guarantee of free speech in the First Amendment." *Id* at 570. While this case is not binding in regard to federal law, Congress still chose to ignore its clear message that this type of policy infringes upon an adult's First Amendment rights and would be invalidated by the courts.

209. Some filtering software must be purchased and installed by the client, while other software is operated by the Internet Service Provider ("ISP"). Some technology is designed to block sites by scanning for certain "keywords," while other technology blocks a list of prohibited web addresses. Some companies use computer software to find objectionable text or sites, while others use the more time-consuming human review process. The best programs often use a combination of methods. Filtering software can also be specifically designed to operate in either the home, or a more public setting, such as schools, libraries, or large corporations. *See Digital Chaperones for Kids*, *supra* note 205.

210. *The Children's Internet Protection Act: Hearing Before the Subcomm. on Telecomm. and the Internet of the House Comm. on Energy and Commerce*, 107th Cong. 2 (2001) (statement of Chris Ophus, President, FamilyConnect, Inc.) [hereinafter Ophus Statement].

211. "Depending on the product and how a user configures it, a child trying to access an off-limits site may receive a warning message, a browser error message, or a partial view of the blocked site. Sometimes, the browser itself will shut down." *See Digital Chaperones for Kids*, *supra* note 205.

212. Ophus Statement, *supra* note 210.

improve some programs so that they can take context into account.[213] Even if technological advances can combat the problem of over-blocking, keyword filtering has another drawback: it only screens for text. To be completely effective it must check for images as well.[214]

Today, the most common form of filtering is based on a website's address, otherwise known as its URL (uniform resource locator).[215] There are both server-side and client-side filtering based on URL lists. Server-side filtering is:

> voluntary use by Internet Service Providers and Online Services of server software that denies access to a particular content source (identified by uniform resource locators) that have been selected for blocking. The selection of the blocked list can rely upon automated processes, human review, and user options. The list of blocked URLs may or may not be disclosed. The list is regularly updated by the server.[216]

The federal COPA Commission found that:

> relative to other technologies, the best of these technologies can be highly effective in directly blocking access to global harmful to minors content on the Web and also on newsgroups, email and chat rooms. Server-side filters may be more easily implemented on a wide scale than client-side filters and may be more difficult for children to defeat.[217]

However, the Commission also noted that "filters using URL lists may not be perfectly effective in blocking," and the technology "raises First Amendment concerns because of its potential to be over-inclusive in blocking content."[218] Client-

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213. *Id.* (referring to IKSSB (Intelligent Keyword Search String Block Out), which "has the ability to decipher the difference between a website containing pornography, and one that has text which contains the word pornography"). However, Peacefire, an organization founded in 1996 "to represent the interests of people under 18 in the debate over freedom of speech on the Internet," provides examples on its website of certain legitimate documents which have been blocked despite this type of technology. For example, Cybersitter's phrase filter, which claimed to "look at how the word or phrase is used in context," blocked a document containing the sentence "Reports of shootings in Irian Jaya bring to at least 21 the number of people in Indonesia and East Timor killed or wounded . . . ." on Amnesty International's homepage because CyberSitter filtered the phrase "least 21." Bennet Haselton, *Amnesty Intercepted,* http://www.peacefire.org/amnesty-intercepted (Dec. 12, 2000).

214. COPA COMM'N REPORT, *supra* note 207, at 22.

215. Ophus Statement, *supra* note 210.

216. COPA COMM'N REPORT, *supra* note 207, at 19.

217. *Id.*

218. "Concerns are increased because extent of blocking is often unclear and not disclosed, and may not be based on parental choices." *Id.* at 19-20. Specifically, the

side filtering using URL lists is the:

> voluntary use by end users of software that causes the browser not to download content from specified content sources. The list of blocked sites may originate from both the software supplier and/or from decisions by the user. The list may be updated periodically by means of download from the site of the software provider. This list may or may not be disclosed. A denial of access may be overridden with the use of a password controlled by a parent (librarian, teacher). PC-based software may also filter out email or instant messaging from unapproved sources.[219]

With this filtering, there is also an increased concern of security loopholes. "Many smart children can disable filtering software faster than a parent or teacher can install it. In addition, there are quick and easy programs written to disable the major companies' software with the click of a mouse."[220]

While filters using URL addresses can be effective, it is difficult for companies to keep up with the constantly changing Internet.[221] Some software has the ability to run twenty-four hours a day, collecting potential web sites to be added to the blocked lists. This technology is not perfect, however, and using computer software alone can result in over-blocking.[222] That is why some companies also use human review.[223] However, human review can create questions about moral and political bias being used in determining which sites should or should not be blocked.[224]

Commission noted that "there are significant concerns about First Amendment values when server-side filters are used in libraries and schools." *Id.* at 20.

219. *Id.* at 21.

220. Ophus Statement, *supra* note 210 (referring to the disabling programs provided on Peacefire's web site).

221. "When a website is reviewed, it may not contain obscene material, but at some later point, the author of the website may change the content that now would be considered inappropriate. Conversely, a site with content that may have at one time been considered pornographic or illegal could change and be perfectly acceptable. So, in addition to keeping up new sites, that come online daily, filtering departments must constantly review those sites that are already categorized." *Id.*

222. *Id.*

223. "Some companies have their staff review sites individually, then place them on a list to be blocked or designated as suitable for children. This time-consuming process limits the number of sites that can be reviewed. Given the web's volatility, chances are that numerous objectionable sites will remain perpetually outside the reviewers' scrutiny." *See Digital Chaperones for Kids, supra* note 205.

224. "In some cases, filters block harmless sites merely because their software does not consider the context in which a word or phrase appears. More troubling

Just as the Internet has changed dramatically, technological advances have significantly improved the effectiveness of filtering software.[225] Technology can only continue to improve the effectiveness of filters, however they currently are not as effective as they need to be, and they still block constitutionally protected speech. As a result, the ALA and the ACLU have each filed lawsuits against the federal government challenging the constitutionality of CIPA.[226]

B. The Lawsuit

The ALA and ACLU have raised a number of claims against CIPA, reflecting again a concern that broad, top, down regulation from Washington DC does not suffice. First, the suit claims the law is overbroad, arguing that "[a]ll available filtering technology blocks access to tremendous amount of Constitutionally protected expression."[227] Further, it claims that "[a]ny attempts to meet the Act's requirements inevitably will lead to the suppression of vast amounts of protected Internet speech that would otherwise be available to public library patrons."[228] As with CDA and COPA, one standard set for the nation cannot withstand constitutional scrutiny. In a related vein, CIPA is further flawed because it requires that software be used on all library Internet terminals, without distinguishing who the user is. As a result, the adult patron must access that which is appropriate for children—the level of speech is dummied down, in direct contradiction to prior case law.

The law also exceeds its proper reach, mandating filters even with limited federal funds. Moreover, CIPA puts discretion in the hands of librarians without proper guidance; its vague

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is when a filter appears to block legitimate sites based on moral or political value judgments." *See id.* At least two of the tested filters blocked each of these sites: Citizens Committee for the Right to Keep and Bear Arms (site lobbying for gun owner's rights); Lesbian.org (guide to lesbian politics, art, and culture); National Institute on Drug Abuse (drug information site run by the National Institutes of Health); Southern Poverty Law Center (a non-profit anti-discrimination law center). *Id.*

225. Ophus Statement, *supra* note 210.

226. The two suits effectively have been consolidated, with the ALA proceeding as the lead plaintiff.

227. Complaint for Declaratory and Injunctive Relief at ¶5, Am. Library Ass'n v. United States (E.D. Pa.) (No. 01-CV-1303), *available at* http://www.ala.org/cipa/cipacomplaint.pdf

228. *Id.* at ¶2.

language and lack of governing standards violates constitutional norms. Further, because of the vague definitions, patrons' rights of access may be chilled, for fear of improper stigmatization. Finally, CIPA will likely fail constitutional scrutiny because technology does not work as it is supposed to.

While in theory filters are a wonderful idea, putting theory into practice is another matter. Congress saw the politically-expedient route in CIPA and filters, but the constitutional nuances escaped Congressional notice. CIPA's primary flaw is the mandate of a solution that comes from the federal government down to the States and localities. Although this law appears to take a bottom, up approach, it still is primarily a top, down approach. While local schools and libraries are involved, a federal one-stop solution is imposed from Washington under the guise of incentives. While making an apparent turn in the right direction, in CIPA Congress again misses the mark.

IV. COMMUNITY EMPOWERMENT

We are seemingly faced with an intractable problem. Internet pornography is ubiquitous. Politicians in Washington have sought large federal solutions, to mollify voter concerns and to respond to sensational headlines. Cowardice and symbolic laws do not help. Politically expedient solutions have been declared constitutionally unsound. The courts have made clear that top, down federal regulation is flawed and maybe impossible. Still the voters cry for protection for their children. Two possibilities present themselves. First, the Constitution may simply not permit a "solution." Second, there may be options available for regulating from the bottom, up, not the top, down. Thus, if members of Congress feel compelled to regulate, they must change their fundamental approach from a stick to a carrot: local communities must be entrusted and empowered to act. While not headline-grabbing, local control may be the only effective option that lies at the intersection of political viability and constitutionality.[229]

The problem may turn out to be like flag burning, in that neither the federal nor the state government may regulate

229. This also assumes that the Court is not going to depart significantly from the *Miller* paradigm any time in the near future.

within constitutional bounds. In that context, flag burning might be seen as "the price we pay" for unparalleled freedom of expression. But by now, it should be clear that if flag burning is to be broadly criminally proscribed, the Constitution must first be amended. We have not reached that point with Internet pornography, but Congress has reached a logjam. Its attempts at regulating from the top, down have been unconstitutional, and courts have rejected them. Now is the time for lawmakers to decide if they want to continue to try to regulate, or if they prefer to chalk their failure up as a victim of an occasionally tragic Constitution.[230]

The ultimate problem that Congress seeks to address might be impervious to legislative response. The current top, down approach offends First Amendment principles. But approaching the problem from the bottom, up merits exploration. In other words, sometimes the Constitution dictates results that we might not like. Congress has to confront the reality that the First Amendment does not permit broad, politically appealing regulation from Washington. Members of Congress should stop acting politically, with grand gestures, and instead act as legislators determined to help constituents with a very serious concern. If they believe that no solution will be bold enough, so be it. But the grandstanding should stop. They must choose: either accept the results and turn to other arenas, or try a new approach. While some localities have tried to regulate, there is room for experimentation at the local level, and Congress can help. This is a key strategic or tactical decision, but given the record, one which has not been well considered in the halls of Congress.

If there is a desire to go forward with regulatory efforts, there must be an entirely new approach. In this context, the

230. Prof. Sandy Levinson has effectively promoted this idea and question. *See, e.g.*, CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES (William N. Eskridge, Jr. & Sanford Levinson eds., 1998) (answering the questions: what is the most stupid and what is the most tragic provision of the Constitution?). Prof. Jack Balkin asks: "How should we understand the notion of constitutional tragedy? . . . [One] approach focuses on constitutional evil: the possibility that the Constitution permits or requires serious and profound injustices . . . ." J.M. Balkin, *The Meaning of Constitutional Tragedy, in* CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES, *supra*, at 121. Levinson himself has written: "Little recognition is given to the possibility that life under even the American Constitution may be a tragedy, presenting irresolvable conflicts between the realms of law and morality." SANFORD LEVINSON, CONSTITUTIONAL FAITH 59 (1988).

blueprint that Congress should follow starts from the bottom, up. Each local community must be empowered to regulate according to its own standards. This approach must start at the home, move to local schools, then to libraries. Local and state officials must be engaged. The industry itself can also help in the creation and encouragement of local markets in filtration and regulation of Internet pornography. In sum, while the Internet is timeless and spaceless, that does not justify massive regulation from on high—local control must be the order of the day. Before the end of this Article, we consider a few basic parameters and examples.

A. Homes, Schools and Libraries

Congress should entrust and empower those who confront these problems on a daily basis. Parents in the home need to be both educated and empowered; school officials must be given support and tools; local libraries must be encouraged to develop successful policies and acquire innovative tools. Any successful strategy for regulating Internet pornography at the local level must have some combination of the following three components: (1) filtration; (2) acceptable use policies; and (3) monitoring. Congress can facilitate and encourage this type of activity, but it cannot mandate it from Washington.

The bottom, up approach can and should start at the most local level—the home—where concerned parents can take responsibility for helping decide what materials they think their children should see. Unfortunately, many parents are unwilling or unable to devote the necessary attention to achieve significant results. In the home context, filtration and monitoring are the two primary components of any successful policy. Congress could work with the computer industry to develop a new standard by which home PCs and market-level software are sold with filters turned on. The norm could effectively be changed so that nobody is required to opt in to filtration. The choice would remain for the consumer to have an unscreened system. The key would be to switch the presumptions.

In addition, as simple as it may sound, parents need to watch what their children are doing. However, many feel like this is impossible or impracticable. In reality, there are numerous strategies for doing so, and the government can play an active

role in promoting these policies, as the FBI already has started. The FBI publishes *A Parent's Guide To Internet Safety*, which contains tips on recognizing and correcting problems, law enforcement information, common sense tools for parents, and other resources.[231]

Next, we must look to the schools. While children should not be able to access sexually explicit materials in school, discretion should be put in the hands of those who are on the ground, on the front line in the community. Unattended school computers should have filters, and teachers, librarians and school professionals should have greater access, or keys to unlock filters. In this way, teachers can help students if there are sites that may be otherwise objectionable, but there would be less concern about children stumbling upon inappropriate materials. Further, every school should be encouraged to and should receive assistance in developing acceptable use policies, to spell out parameters for computer use. Congress should work with the schools to develop these policies, with these basic guidelines. Mandating policy changes from Washington will not help, and ultimately will run up against constitutional problems.

Local libraries should be encouraged to filter material, in accordance with local community standards, *as they see fit.* Local librarians should be given the responsibility to meet their community standards, to be reflected in filters, acceptable use policies and monitoring. Computers for children should have filters, but there should be monitored ones that do not. Local communities must draw up guidelines, and community standards must prevail. However, solutions imposed from Washington violate the principle that local communities must decide what is obscene and what is protected. If all libraries are forced to use a filtration system, then that removes that choice from the local community's hands.

B. State Regulation

To the extent that States and localities can ferret out sexually explicit material in their districts, then they should have the power to enforce community norms. For example, to the extent

231. FED. BUREAU OF INVESTIGATION, *A Parent's Guide to Internet Safety, available at* http://www.fbi.gov/publications/pguide/pguidee.htm.

that the Thomases knew they were sending material to Tennessee, their prosecution was correct, and it should be carried out by local prosecutors. But prosecutors should not be able to go on fishing expeditions to find that which will offend the local community, even though produced elsewhere and downloaded without the uploader's knowledge.

Utah provides an instructive example of a sound, bottom, up approach that might pass constitutional muster. The State has a "porn czar" who can oversee prosecutions of those who violate community standards. The role of the porn czar is not to regulate online content, but to "act as an advisor to communities to assist them in maintaining standards . . . ."[232] In fact, the porn czar herself has recognized the government's limited role in this context, but she has also recognized that the power of the local community to create, maintain, and enforce their own standards is very strong.[233] This is no panacea, as the porn czar will still face significant First Amendment limitations, particularly as enunciated in *Miller*.[234] But, to the extent that such a law enforcement figure represents a local community, and to the extent that any online pornographer has minimum contacts with the locality, this represents another politically viable approach to regulating Internet pornography that could meet First Amendment standards.[235]

In addition, the majority of States have proposed their own legislation, another alternative to top, down regulation. While

232. Julie Cart, *As Utah Takes Aim at Smut, the Internet is Job 1*, L.A. TIMES, Mar. 25, 2001, at A15 (quoting Gov. Mike Leavitt).

233. The creation of Utah's "porn czar" has led to concerns regarding the porn czar's possible overzealousness in Internet indecency prosecution, demolition of First Amendment rights in the Internet context, and moral policing of protected online speech. In spite of these concerns, the position offers great potential in enabling a bottom, up approach that is both politically viable and constitutionally sound by enabling the local community to better define and enforce their own community standards in real space and cyberspace. *See* UTAH CODE ANN. § 67-5-18 (2001); Cart, *supra* note 232; Joe Salkowski, *Anti-Porn Effort May Have Free Speech Impact*, L.A. BUS. J., Feb. 26, 2001, at 16.

234. The primary limitations center on the jurisdictional issues, particularly as discussed in Part II.E.1, *supra*.

235. If, for example, a person in Provo, Utah, downloads a site that the community deems obscene, but which might not be obscene in Las Vegas, that nonetheless could lead to prosecution in Provo. But the prosecutor's success would hinge upon the pornographer's knowledge (as seen, for example, in *Thomas*) that the material was being received in Provo. This knowledge can be achieved in various ways and can help define the proper parameters of obscenity prosecutions.

many States have introduced bills that simply mimic CIPA,[236] others promote more of a bottom, up approach requiring local communities to determine their own policies for dealing with children's access to pornography online.[237] To the extent that they vest control in determining what is obscene and unprotected to the local communities, many of these regulations will be constitutionally sound. Some States have developed their own remedies to CIPA's excessive reach by enacting legislation that requires the installation of filtering software in public schools, but not in libraries.[238] This is perhaps a more constitutionally sound approach that is still politically viable and appealing. Other state legislatures have too little confidence in filtering technology to require it anywhere. Instead, States like Hawaii and Washington have adopted resolutions requesting that Congress and the President explore new top domain lines such as ".xxx" for materials for adult audiences and ".kids" for materials appropriate for minor audiences.[239]

There is room for States to get involved, if they empower people from the bottom, up, to define obscenity community by community. This does not entirely remove the constitutional concerns delineated earlier, but it does demonstrate that there are alternatives to top, down regulation that merit exploration. While some state attempts to regulate sexually explicit material

236. *See, e.g.*, H.B. 1376, 63d Leg., 2d Sess. (Colo. 2001).

237. On March 15, 2001, Utah's governor signed UT H.B. 131, which requires all public schools and libraries to adopt Acceptable Use Policies. Each policy is developed under the direction of the local school or library board and adopted in an open meeting. This type of law empowers local communities by allowing them to make decisions on controversial issues (like whether or not to install filters), while at the same time, ensuring they are doing something to address the problem. Utah also enacted UT H.B. 373, a law which modifies the duties of the porn czar to require the creation of a program to combat Internet pornography.

238. On March 15, 2001, Virginia's governor signed VA H.B. 1691, which requires all public schools to adopt Acceptable Use Policies. "At a minimum, the policy shall contain provisions that (i) are designed to prohibit use by division employees and students of the division's computer equipment and communications services for sending, receiving, viewing, or downloading illegal material via the Internet; (ii) seek to prevent access by students to material that the school division deems to be harmful to juveniles; and (iii) select a technology for the division's computers having Internet access to filter or block Internet access through such computers to child pornography . . . and obscenity. . . and (iv) establish appropriate measures to be taken against persons who violate the policy."

239. Hawaii adopted HI S.R. 7 on April 12, 2001. Washington adopted WA S.J.M. 8007 on January 16, 2001.

on the Internet have been defeated,[240] Congress can and should consent to state regulation of the Internet and make clear that it has no intention to occupy the field or preempt local laws. The First Amendment is not necessarily an obstacle to state regulation.

C. Industry

In addition to enabling and empowering local communities, industry solutions can become an integral part of the bottom, up approach. In this context, industry can help concerned individuals as they seek to control the type of information they or their children receive over the Internet. Unlike the ideas we previously explored, this does not depend upon local governmental entities; rather, the idea here is that industry can be instrumental in helping people define their own local communities and what material is found in them, and Congress can provide incentives and funding to develop programs and technology.

Perhaps the greatest opportunity lies in getting the ISPs to develop filtering and acceptable use policies, thereby creating their own virtual communities. Having such options could give individuals the chance to virtually reside in places that will meet with their own standards. Groups bound together by core values (such as religious organizations) should create their own

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240. One of the most celebrated victories for civil libertarians in this area came in *American Libraries Association v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997), which challenged New York Penal Law §235.21 (3), which made it a crime for an individual:

> Knowing the character and content of the communication which in whole or in part depicts actual or simulated nudity, sexual conduct or sadomasochistic abuse, and which is harmful to minors, [to] intentionally use [] any computer communication system allowing the input, output, examination, or transfer, of computer data or computer program from one computer to another, to initiate or engage in such communication with a person who is a minor.

Am. Libraries Ass'n, 969 F. Supp. at 163 (quoting N.Y. PENAL LAW § 235.21(3)). The court found that this statute was unconstitutional, under a Commerce Clause—but not a First Amendment—analysis. The court found that although New York had a legitimate interest, its law addressed conduct occurring outside the State, burdened interstate commerce excessively, and should be dealt with at a national level, so as to avoid inconsistent legislation. In *Urofsky v. Allen*, 995 F. Supp. 634, 636 (E.D. Va. 1998), the court struck down Virginia Code § 2.1-804 and § 2.1-805 as unconstitutional. These provisions restricted state employees from accessing any sexually explicit material on state-owned computers unless they were taking part in a "bona fide, agency-approved research project or other agency-approved undertaking." VA. CODE ANN. § 2.1-805 (Michie Supp. 1998).

ISPs. The faith-based ISP, for example, would be a safe haven for all those of common belief structure who fear stumbling across offensive material. And those who engage in activity within that ISP would have full notice of the terms of agreement. Today, ISPs are much more than the simple dial up Internet access provider, but can serve as the fountainhead of the virtual community given its control over the online membership, content and behavior of its community.[241]

The modern ISP allows for a much more selective and targeted online membership. In fact, there are an ever increasing number of smaller, private label ISPs specially marketed to certain communities seeking to extend their "membership" to cyberspace. Many of the smaller ISPs are able to create and define a quasi virtual community that embraces the values and standards of their community.[242] Alternative ISPs are able to create virtual communities not only based on the values of their members, but they are also able to define and shape their virtual community based primarily on filtered content. In fact, the filtered access and content is the hook of these ISPs.[243] Family-friendly or faith-based ISPs are unique from the major mainstream ISPs because they offer *filtered only access* to the Internet by employing server-side filters.[244] Generally, these ISPs employ server-based filters that the ISP installs, maintains, and updates, as opposed to client-based filters. With these providers, the filtering software is not an

241. *See Development: Communities Virtual and Real: Social and Political Dynamics of Law in Cyberspace*, 112 HARV. L. REV. 1586 (1999). Also, note that this is a different approach from idea discussed in Part II.E.2, *supra*. Here, the suggestion is to encourage people to form and opt in to virtual communities that would be safe harbors where everyone could agree to certain standards of decency.

242. For example, faith-based ISPs define and create their community around religion. For example, 711.Net is one of the largest Christian full service ISPs that offers the same basic services as AOL or Prodigy, but specifically with a Christian perspective, or focus. *See* http://www.711.net (last visited May 15, 2002). Today, Christian ISPs inhabit a niche apart from AOL and are serving a growing demand and growing market. *See* Raymond McCaffrey, *Christian Internet Providers Growing Niche*, VENTURA COUNTY STAR, Nov. 13, 1999, at D3; Eric Ladley, *A Rated G ISP: FindEx.com Promises Good Clean Fun*, ISP BUS. NEWS, July 24, 2000.

243. *See* Julie Hyman, *Internet Provider Filters Out Smut Sites*, WASH. TIMES, July 23, 1999, at B8.

244. Compare AOL, Earthlink, and AT&T Worldnet, none of which use built-in ISP filters. AOL offers a free parental control feature, which allows parents to control the level of their children's access with three access levels. Earthlink subscribers must follow a formal Acceptable Use Policy and does not normally monitor use or edit content. AT&T Worldnet promotes client end software and active parental participation.

additional or ancillary feature of the service, but the very essence of the service. The filtering software serves as the hook and the window into a filtered family-friendly cybercommunity.

Further, virtually all ISPs maintain some sort of enforceable use and behavior policy, whether it is a formal use policy to which subscribers must adhere or informal netiquette guidelines. These guidelines or policies are means by which each ISP can police its own unique cybercommunity standards and the behavior of its members.[245] The ISP can play a crucial role in community redefinition since the ISPs of today have the power to shape the cybercommunity from its members to its online content and even community enforcement.

Finally, Congress should urge and facilitate serious self-regulation, perhaps akin to the Motion Picture Association of America's movie rating system. While the government cannot mandate such a solution, federal intervention and incentives could help create a voluntary rating system. A simple system would add domains like .xxx, .adult, or .kids, which would then allow for easier screening. The hard part is achieving a voluntary agreement. But if there is the will, this politically appealing solution should be pursued. Voluntary agreements would not violate the First Amendment, as there would be no state action, and they would be politically appealing in that they are simple and at the very least superficially effective, because of the way in which they ease filtering.

V. CONCLUSION

At the end of this discussion, we should better understand the puzzle of regulating Internet pornography. There is a large, highly visible problem that stirs excitement inside and among politicians. But the First Amendment protects most of what is online, including much that offends every day Americans. As

245. Many ISPs have policies to control usage, and which result in suspension or termination of service for violators. For example, Earthlink members must adhere to a formal Acceptable Use Policy, which if violated subjects the member's services to suspension or termination. *See* www.earthlink.net for terms of policy. Verizon Online, on the other hand, follows "netiquette guidelines." *See* http://home.bellatlantic.net?root/Help/GUD_netiquet.html. Integrity Online also enforces and polices its own cybercommunity standards by allowing its members to report offensive sites. *See* http://www.integrity.com/report/report.htm.

we saw with flag burning, Congress has been undaunted in attempting to regulate sexually explicit material on the Internet. Political expediency is the superseding value, and constitutionality is more of an afterthought.

Given the politician's instinct to speak out against the obvious politically-offensive expression and the First Amendment's protection of the same, we should not be surprised at the impasse. First Amendment issues engender this kind of response. While so many politicians seek a Washington-based "solution," that has been a losing strategy, and will likely remain so. Properly understood, this is an example of legislative failure.

Political failure and expediency have resulted in a situation where many clamor for action, but Congress has failed to provide a constitutional solution. Members of Congress must understand that the First Amendment protects some speech that is offensive to many; they have a duty to protect and respect that. If they seriously want to regulate Internet pornography, they must stop acting as politicians in search of soundbites and instead must act as lawmakers seeking innovative responses to difficult challenges of the twenty-first century. The challenge before Congress is to avoid the simplistic and symbolic top, down regulation. Instead, Congress should address this problem from the bottom, up, putting primary responsibility in the hands of local communities. While not as politically expedient as the CDA, COPA or CIPA, this approach lies at the intersection of political viability and constitutionality. If Congress truly cares about doing something, they should entrust and empower local communities.