PROTECTING CHILDREN FROM SPEECH

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I. INTRODUCTION

The notion that children need to be sheltered from inappropriate speech long predates Janet Jackson's "wardrobe malfunction" or Bono's expletive-enhanced acceptance of a Golden Globe.[1] Plato expressed concern about youths' impressionable minds 2300 years ago, stressing that the tales the "young first hear should be models of virtuous thoughts."[2]

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1. *See* Editorial, *An Indecent Crackdown*, N.Y. TIMES, Apr. 22, 2004, at A26.

2. PLATO, THE REPUBLIC bk. II , at 281 (Benjamin Jowett trans., Walter J. Black, Inc. 1942) (circa 360 B.C.). Aristotle similarly believed that children should be protected from harmful speech. ARISTOTLE, THE POLITICS bk. 7, ch. 17, at 223-26 (C.D.C. Reeve trans., Hackett Publ'g Co. 1998) (circa 350 B.C.). He thought that minors should be sheltered from "shameful talk" and forbidden

John Stuart Mill, writing 2000 years after Plato, similarly endorsed limits on children's speech rights. The rights he described applied only "to human beings in the maturity of their faculties" because young people were not "capable of being improved by free and equal discussion."[3] All of this, of course, long preceded Federal Communications Commission (FCC) Chairman Michael Powell's clampdown on broadcast indecency and Howard Stern's characterization of the clampdown as a "McCarthy-type witch hunt."[4]

Notwithstanding its ancient lineage, the concept of sheltering children from speech is largely a modern conceit. The concept, after all, presupposes a "childhood"—a prolonged period of innocence—that was rare in premodern times and continues to be rare in many parts of the world.[5] Put bluntly, children in the Middle Ages, who slept in their parents' beds and were married off "as close to puberty as possible,"[6] did not need sheltering from sexually-explicit speech. Similarly, contemporary children living in war-torn countries like Congo—where war has "shuttered their schools, left them lame and hungry, [and] killed their parents before their eyes"[7]—need more than limited access to violent video games to learn peaceful conflict resolution.

Of course, the fact that so many children are robbed of their childhoods does not mean that societies that can afford to let their youth ease into adulthood should not try to regulate their access to speech. Many countries do in fact regulate children's access to speech, even if they differ over

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"to witness iambus or comedy." *Id*.

3. J. S. MILL, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 9 (R. B. McCallum ed., Basil Blackwell 1948) (1869). John Locke noted that children "are not born in [a] state of *equality*" and that "parents have a sort of rule and jurisdiction over them, when they come into the world." JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 54-55, at 31 (C. B. Macpherson ed., Hackett Publ'g Co. 1980) (1690).

4. Jacques Steinberg, *F.C.C. to Fine Clear Channel $495,000 for Sex Talk*, N.Y. TIMES, Apr. 9, 2004, at C3.

5. In his influential book, *Centuries of Childhood*, the French historian Philippe Ariès argued that the concept of childhood as a period of innocence did not begin until the seventeenth century. *See generally* PHILIPPE ARIÈS, CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE (Robert Baldick trans., Vintage Books 1962) (1960) (explaining that the concept of childhood innocence did not exist at the beginning of the seventeenth century).

6. MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: "INDECENCY," CENSORSHIP, AND THE INNOCENCE OF YOUTH 16-17 (2001) (quoting Peter Brown, *Late Antiquity*, *in* 1 A HISTORY OF PRIVATE LIFE 265 (Arthur Goldhammer trans., P. Arie's & G. Duby eds., 1987)).

7. Somini Sengupta, *Innocence of Youth Is Victim of Congo War*, N.Y. TIMES, June 23, 2003, at A1. As the author notes, the warlords in Congo "have killed even childhood." *Id.* Columnist Nicholas Kristof has similarly noted that "[t]here is no childhood" in Darfur, Sudan, where he observed a four-year-old refugee who was responsible for carrying her thirteen-month-old brother because the rest of her family was missing and presumed dead. Nicholas D. Kristof, *Magboula's Brush with Genocide*, N.Y. TIMES, June 23, 2004, at A23.

which speech they consider harmful or over the proper methods for regulating the speech.[8] Even the United Nations Convention on the Rights of the Child, which requires signatories to "ensure that the child has access to information and material," qualifies this obligation by allowing nations to establish "appropriate guidelines for the protection of the child from information and material injurious to his or her well-being."[9]

This desire to protect children, though well-intentioned, has always been on a collision course with freedom of speech. The collision between these two values has occurred gradually. It not only had to await the development of societies where "childhood" could flourish, but it also had to await the rise of media outlets accessible to children, governments inclined to regulate those outlets, and robust free speech values that called this regulation into question.[10] The tension between free speech and protecting children may have simmered for centuries, but only in recent years, with the advent of pervasive media technologies, has it risen to a boil.

In the United States, the conflict between free speech and protecting children manifests itself in First Amendment jurisprudence. The Supreme Court first wrestled with the issue in the 1950s and 60s.[11] *Ginsberg v. New York*, the Court's seminal 1968 decision, upheld the conviction of a New York bookseller who sold "girlie magazines" to minors; these magazines were fully protected speech as to adults but, the Court said, could be denied

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8. France, for instance, is more relaxed about children's exposure to sexual materials than the United States. Elaine Sciolino, *The French Spar over Sex: There's a Limit, No?*, N.Y. TIMES, Oct. 13, 2002, § 1, at 3 (noting that France is a place where "corner kiosks display blown-up magazine covers of bare-breasted women" and "tabloids run advertisements featuring simulations of sex acts," but also noting a new movement by French parents to limit hard-core pornography on television); *see also* Michael D. Birnhack & Jacob H. Rowbottom, *Shielding Children: The European Way*, 79 CHI.-KENT L. REV. 175 (2004) (discussing European responses to Internet material that is harmful to children).

9. Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, art. 17, 28 I.L.M. 1448, 1462-63, *available at* http://www.un.org/documents/ga/res/44/a44r025.htm.

10. Sissela Bok acknowledges that there is "nothing new" about violence as entertainment and that people have long "watched hangings and other public executions with awe and relish." SISSELA BOK, MAYHEM: VIOLENCE AS PUBLIC ENTERTAINMENT 4 (1998). Still, she notes that "it is only in the last five decades that . . . people [have been able] to tune in to violent programming with graphic immediacy on home screens at all hours of the day and night." *Id*.

First Amendment limitations on child-protection censorship became relevant only after the expansion of adults' free speech rights. Prior to that time, there were few obstacles to denying both adults and children access to speech. At one point, for instance, courts used the English *Hicklin* test in obscenity cases, which allowed the government to ban speech based on its effect on the most impressionable members of society. *See, e.g.*, Roth v. United States, 354 U.S. 476, 486, 488-89 (1957) (citing Regina v. Hicklin, L.R. 3 Q.B. 360 (1868)) (noting that courts had used the *Hicklin* test but finding it "unconstitutionally restrictive").

11. *See, e.g.*, Ginsberg v. New York, 390 U.S. 629, 631 (1968); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 678 (1968); Butler v. Michigan, 352 U.S. 380, 381 (1957).

to minors.[12] In recent years, as lawmakers have aggressively regulated new media technologies, the Court has produced a steady stream of decisions. During the last ten years alone, the Court has issued seven decisions on the constitutionality of child-protection censorship.[13]

The Court's precedent establishes three overarching principles that reoccur throughout its jurisprudence. First, the Supreme Court acknowledges the government's power to enact child-protection censorship; in other words, the government may deny minors access to speech that it cannot deny to adults.[14] Second, the Court acknowledges that minors have free speech rights that can occasionally trump the government's interest in censorship.[15] Third, the Court recognizes that child-protection censorship

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12. *Ginsberg*, 390 U.S. at 634.

13. Ashcroft v. ACLU, 124 S. Ct. 2783, 2788, 2795 (2004) (enjoining enforcement of the Child Online Protection Act); United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 203 (2003) (finding Children's Internet Protection Act constitutional); Ashcroft v. ACLU, 535 U.S. 564, 566 (2002) (holding that the use of contemporary "community standards" in the Child Online Protection Act did not render the act facially unconstitutional); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 566-67 (2001) (finding Massachusetts regulation of cigar and smokeless tobacco advertising unconstitutional); United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 807 (2000) (finding section 505 of the Telecommunications Act unconstitutional); Reno v. ACLU, 521 U.S. 844, 849 (1997) (finding the Communications Decency Act of 1996 unconstitutional); Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 732-33 (1996) (finding aspects of the Cable Television Consumer Protection and Competition Act of 1992 unconstitutional). During this period, the Court also decided a related case concerning the regulation of "virtual" child-pornography. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 239-40 (2002).

14. This principle from *Ginsberg* is firmly established in the jurisprudence. *See generally* Dawn C. Nunziato, *Toward a Constitutional Regulation of Minors' Access to Harmful Internet Speech*, 79 CHI.-KENT L. REV. 121, 128 (2004) (noting that *Ginsberg* and related cases "make clear that legislators may constitutionally restrict minors' access to speech that they cannot constitutionally restrict adults' access to"). The Court makes this point by stating that the government's interest in protecting children from harmful speech is "compelling." *See, e.g.*, *Am. Library Ass'n, Inc.*, 539 U.S. at 215 (Kennedy, J., concurring in the judgment) (stating that "[t]he interest in protecting young library users from material inappropriate for minors is legitimate, and even compelling, as all Members of the Court appear to agree"); *Denver Area Educ. Telecomms. Consortium, Inc.*, 518 U.S. at 743 (stating that "the provision before us comes accompanied with an extremely important justification, one that this Court has often found compelling—the need to protect children from exposure to patently offensive sex-related material"); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (recognizing a "compelling interest in protecting the physical and psychological well-being of minors" and stating that this "interest extends to shielding minors from the influence of literature that is not obscene by adult standards").

15. Perhaps the most famous case standing for this proposition is *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). *Tinker* held that students could not be prohibited from wearing armbands to protest the Vietnam War without a showing that the armbands would cause a substantial disruption of school activities. *Id.* at 504, 512-13. In affirming that minor students had First Amendment rights, the Court said that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506; *see also* Bd. of Educ. v. Pico, 457 U.S. 853, 866 (1982) (plurality opinion) (quoting *Tinker*, 393 U.S. at 506, for the proposition that "First Amendment rights, applied

raises serious constitutional concerns when it incidentally denies adults access to speech.[16]

Beyond these central propositions, however, the constitutionality of child-protection censorship remains largely a muddle. Legislators know they have the power to censor speech but are unsure of the power's limits. Courts know that this censorship can violate the First Amendment but are unsure of when this occurs. The result is a time-consuming and elaborate dance between legislators and judges as each searches for the undeclared border between constitutional and unconstitutional child-protection censorship.[17]

This confusion is exacerbated by the fact that public pressure for child-protection censorship is on the rise. This growing concern is fueled by

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in light of the special characteristics of the school environment, are available to . . . students") (alteration in original); Erznoznik v. City of Jacksonville, 422 U.S. 205, 214 (1975) ("In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors.") (footnote call number omitted); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that a public school student could not be compelled to salute or pledge allegiance to the flag).

16. The first case to clearly establish this principle was *Butler v. Michigan*, 352 U.S. 380, 383-84 (1957). *Butler* invalidated a Michigan statute that made it a crime to sell to the general public literature that was inappropriate for minors. *Id.* at 383-84. Justice Frankfurter noted that the "incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children." *Id.* at 383. "Surely," he famously said, "this is to burn the house to roast the pig." *Id.* Relying on Justice Frankfurter's language in *Butler*, the Court has subsequently invalidated many child-protection censorship laws on the ground that the laws unduly burden adult's access to speech. *See, e.g.*, *Denver Area Educ. Telecomms. Consortium, Inc.*, 518 U.S. at 759-60; *Sable Communications of Cal., Inc.*, 492 U.S. at 128, 131; Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 73, 75 (1983).

17. This confusion is reflected in the mixed results that child-protection censorship laws have received in the courts. *Compare Am. Library Ass'n, Inc.*, 539 U.S. at 214 (upholding Children's Internet Protection Act), *with* Am. Library Ass'n, Inc. v. United States, 201 F. Supp. 2d 401, 495 (E.D. Pa. 2002) (finding Children's Internet Protection Act unconstitutional), *rev'd*, 539 U.S. 194 (2003); *Ashcroft*, 535 U.S. at 585 (finding the Child Online Protection Act's reference to contemporary "community standards" did not render the act unconstitutional), *with* ACLU v. Reno, 217 F.3d 162, 173-74 (3d Cir. 2000) (finding the Child Online Protection Act's reference to "contemporary community standards" did render it unconstitutional), *rev'd sub nom. Ashcroft*, 535 U.S. 564 (2002); *Lorillard Tobacco Co.*, 533 U.S. at 561-66 (finding regulation banning outdoor advertising of certain tobacco products within one thousand feet of a school or playground unconstitutional), *with* Consol. Cigar Corp. v. Reilly, 218 F.3d 30, 53 (1st Cir. 2000) (finding same regulation constitutional), *rev'd in part sub nom. Lorillard Tobacco Co.*, 533 U.S. 525 (2001); Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954, 959 (8th Cir. 2003) (finding ordinance limiting minors' access to violent video games unconstitutional), *with* Interactive Digital Software Ass'n v. St. Louis County, Mo., 200 F. Supp. 2d 1126, 1141 (E.D. Mo. 2002) (finding ordinance constitutional), *rev'd*, 329 F.3d 954 (8th Cir. 2003); Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 573, 580 (7th Cir. 2001) (enjoining law that denied minors' access to violent video-arcade games unless accompanied by a parent), *with* Am. Amusement Mach. Ass'n v. Kendrick, 115 F. Supp. 2d 943, 981 (S.D. Ind. 2000) (refusing to enjoin law), *rev'd*, 244 F.3d 572 (7th Cir. 2001).

advances in technology that have enhanced the graphic quality of sexual and violent images while expanding the means by which these images can be disseminated.[18] These technological advances, combined with the capitalist incentive to exploit the public's thirst for all things prurient and violent (recall P. T. Barnum's observation that "No one ever went broke underestimating the taste of the American public"[19]), have produced an explosion of sexual and violent materials that potentially are available to minors. Consider just a few examples as well as some regulatory responses:

> *Violent Video Games:* Concern over violent video games swelled after the massacres at Columbine High School in Littleton, Colorado and Heath High School in West Paducah, Kentucky.[20] News reports revealed that the teen-age assailants in both instances were avid fans of violent video games such as Doom, Quake, and Mortal Kombat.[21] One of the

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18. *See, e.g.*, YOUTH, PORNOGRAPHY, AND THE INTERNET 21 (Dick Thornburgh & Hebert S. Lin eds., 2002) (attributing the "[p]ublic concern and controversy" about sexual materials on the Internet to the fact that "graphically depicted" sexual materials are easy to find, that these materials are sometimes "more extreme than that which is easily available through non-Internet media," and that "even the most graphic of these images can find their way onto children's computer screens without being actively sought").

19. Michael Anthony, *2002 in Review: Classical Music*, STAR TRIB. (Minneapolis), Dec. 29, 2002, at 10F. Although this quote is frequently attributed to Barnum, it apparently derives from a slightly different quote by H. L. Mencken: "'No one in this world, so far as I know . . . has ever lost money by underestimating the intelligence of the great masses of the plain people.'" Glenwood Gibbs, Editorial, *Free for All*, *Rough Estimate, Part II*, WASH. POST, Dec. 4, 1993, at A17 (alteration in original) (quoting BARTLETT'S FAMILIAR QUOTATIONS (16th ed. Little, Brown & Co. 1992)). Similarly, it also has been claimed that Barnum did not say "there's a sucker born every minute." Matthew Hoffman, *Errors & Omissions: Next Time You Remember an Old Adage, Forget It*, INDEPENDENT (London), July 31, 2004, at 38. Instead, a rival said this when referring to one of Barnum's exhibits. *Id.*

20. Clay Calvert, *Violence, Video Games, and a Voice of Reason: Judge Posner to the Defense of Kids' Culture and the First Amendment*, 39 SAN DIEGO L. REV. 1, 21-23 (2002) (discussing media coverage of the perpetrators' fondness for violent video games); *see also* Frank Bruni, *Senate Looks for Clues on Youth Violence*, N.Y. TIMES, May 5, 1999, at A18 (discussing post-Columbine Senate hearings about "the entertainment industry's marketing of violent fantasies to children"). The article suggested that legislative responses to Columbine, in the form of gun control or regulation of the media, seemed unlikely even shortly after the massacre. The article noted that both Democrats and Republicans, each for their own reasons, might have a limited appetite for new legislation. ("[J]ust as money from the National Rifle Association lines the pockets of Republicans, money from the entertainment industry lines the pockets of Democrats.").

21. Calvert, *supra* note 20, at 21. For a more recent example of violent video games being tied to youth violence, see Joseph A. Gambardello et al., *Teens Accused of Planning Columbine-Style Attack*, PHILA. INQUIRER, July 7, 2003, which describes how three youths suspected of planning a Columbine-style killing rampage called themselves "Warriors of Freedom," the name of an Internet-based combat game.

Columbine assailants even customized his "Doom" game to simulate the crime he eventually committed.[22] Subsequent efforts to limit minors' access to violent video games have been notably unsuccessful. The Seventh Circuit enjoined an Indianapolis ordinance, noting that children would be ill-prepared for adulthood if raised in an "intellectual bubble" and comparing violent video games to "[c]lassic literature and art."[23] The Eighth Circuit invalidated a St. Louis ordinance, finding it inconsequential that modern technology "increased viewer control" and commenting that "literature is most successful when it 'draws the reader into the story . . . [and] makes him identify with the characters.'"[24]

Indecent and Violent Television Programming: Concerns about indecency and violence on television are longstanding and unlikely to disappear.[25] A recent study by the Henry J. Kaiser Family Foundation, for instance, found that one out of seven television shows (excluding newscasts, sports, and children's shows) "has at least one scene in which intercourse is depicted or strongly implied."[26] Concern over violent and indecent television programming has generated a wealth of federal legislation. The FCC has long had authority to

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22. Corinne E. Frantz & Rosemarie Scolaro Moser, *Youth Violence and Victimization: An Introduction*, *in* SHOCKING VIOLENCE: YOUTH PERPETRATORS AND VICTIMS—A MULTIDISCIPLINARY PERSPECTIVE 3, 6 (Rosemarie Scolaro Moser & Corinne E. Frantz eds., 2000).

23. Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 573, 575, 577, 580 (7th Cir. 2001).

24. Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954, 957 (8th Cir. 2003) (quoting *Kendrick*, 244 F.3d at 577); *see also* Video Software Dealers Ass'n v. Webster, 968 F.2d 684, 687, 691 (8th Cir. 1992) (invalidating a Missouri statute restricting rental or sale of violent videos to minors); Video Software Dealers Ass'n v. Maleng, 325 F. Supp. 2d 1180, 1183, 1190 (W.D. Wash. 2004) (finding a Washington law penalizing the distribution of violent video games to minors unconstitutional). Private parties seeking to impose tort liability on the distributors of violent video games have similarly found their actions barred by the First Amendment. *See, e.g.*, James v. Meow Media, Inc., 300 F.3d 683, 695-99 (6th Cir. 2002); Wilson v. Midway Games, Inc., 198 F. Supp. 2d 167, 178-82 (D. Conn. 2002); Sanders v. Acclaim Entm't, Inc., 188 F. Supp. 2d 1264, 1279-82 (D. Colo. 2002).

25. *See, e.g.*, Notice of Inquiry, Violent Television Programming and Its Impact on Children, 69 Fed. Reg. 49,899, 49,899 (July 28, 2004) (noting that violence on television "has been a matter of private and governmental concern and discussion from at least the early 1950s" and citing to numerous reports produced on the topic); Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Televsion*, 89 NW. U. L. REV. 1487, 1565 (1995); Joel Timmer, *Incrementalism and Policymaking on Television Violence*, 9 COMM. L. & POL'Y 351, 352-54 (2004) (reviewing history of Congressional hearings on television violence from the 1950s through the present).

26. THE HENRY J. KAISER FAMILY FOUND., SEX ON TV 3: EXECUTIVE SUMMARY 7 (2003), *available at* http://www.kff.org/entmedia/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=14278; *see also* Alessandra Stanley, *It's a Fact of Life: Prime-Time Shows Are Getting Sexier*, N.Y. TIMES, Feb. 5, 2003, at E1.

regulate indecency on broadcast television.[27] Prompted by the revealing Super Bowl half-time show in 2004, Congress recently considered bills to dramatically increase the agency's sanctioning power under its authority.[28] Congress also has enacted more limited indecency regulations for cable television, including a law designed to protect children from signal "bleeding"—those fleeting moments when inappropriate images on scrambled cable stations escape unscrambled.[29] Federal law also requires television manufacturers to install "V-chips" on newly built televisions so that parents can block inappropriate programming[30] (even though reports suggest that few parents are aware of the technology[31]). These regulations have spawned protracted litigation and several Supreme Court opinions.[32]

Indecency on the Internet: Public concern over unsuitable materials on the Internet has helped to generate a series of federal laws, which have themselves been the subject of numerous legal challenges. Congress's first major foray into the field was the Communications Decency Act of 1996, which regulated the display and distribution of "indecent"

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27. *See* 18 U.S.C. § 1464 (2000); *see also* MARC A. FRANKLIN ET AL., MASS MEDIA LAW: CASES AND MATERIALS 233 (6th ed. 2000) (noting that federal authority to regulate the content over radio and television broadcasts has existed since the enactment of the Communications Act of 1934). A landmark Supreme Court decision on the regulation of broadcast indecency is *FCC v. Pacifica Foundation*, 438 U.S. 726, 729-30, 750-51 (1978), which upheld a FCC sanction against Pacifica Foundation for broadcasting George Carlin's "Filthy Words" monologue. The District of Columbia Circuit Court of Appeals issued an important decision on the constitutionality of FCC rules limiting the times when indecent materials could be broadcast. Action for Children's Television v. FCC, 58 F.3d 654, 667 (D.C. Cir. 1995). *See generally* Policy Statement, Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 66 Fed. Reg. 21, 984 (Apr. 6, 2001) [hereinafter FCC Policy Statement on Broadcast Indecency] (describing the Commission's enforcement policies regarding broadcast indecency).

28. Jacques Steinberg, *Move to Stiffen Decency Rules Is Losing Steam in Washington*, N.Y. TIMES, June 7, 2004, at C1 (stating that "the prospects for such a measure reaching President Bush's desk before the November election appear far less assured than they did a few months ago"). The newly-elected House of Representatives passed a similar bill in February 2005. *House Votes to Raise Fines for Indecency*, N.Y. TIMES, Feb. 17, 2005, at C5.

29. 47 U.S.C. § 561 (2000). This law was found unconstitutional in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 827 (2000).

30. 47 U.S.C. § 303(x) (2000).

31. *See, e.g.*, THE HENRY J. KAISER FAMILY FOUND., PARENTS AND THE V-CHIP 2001: A KAISER FAMILY FOUNDATION SURVEY 1 (2001), *available at* http://www.kff.org/entmedia/upload/13848_1.pdf ("Of all parents who have a V-Chip, half (53%) don't know it . . . .") (emphasis omitted).

32. *See, e.g.*, *Playboy Entm't Group, Inc.*, 529 U.S. at 806; Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727, 732-33 (1996); *Pacifica Found.*, 438 U.S. at 729, 731 nn.3-4.

> materials to minors.[33] The Supreme Court invalidated this Act because of its vague terms and failure to use the least restrictive means to accomplish the government's purpose.[34] Congress responded two years later with a more carefully drawn law, the Child Online Protection Act (COPA).[35] Despite this effort, a lower court enjoined the Act's enforcement,[36] and the Supreme Court affirmed this holding in June 2004.[37] The Supreme Court remanded the case for trial but left a strong impression that the government's prospects for success were bleak.[38] Congress had slightly more success with the Children's Internet Protection Act (CIPA),[39] which denies federal funds to public libraries that fail to place filters on their publicly-accessible computers.[40] The Supreme Court upheld this Act against a facial challenge at the end of its 2002 term;[41] however, two Justices in the five-Justice majority invited the law's opponents to bring a subsequent challenge to the law "as-applied."[42]

As the above discussion suggests, public concern about minors' access to inappropriate materials has led to an onslaught of regulatory responses and a multitude of judicial decisions evaluating those responses. This wealth of precedent has added considerable bulk to free speech/child-protection jurisprudence but very little in terms of clarity; a scholar poring

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33. Communications Decency Act of 1996 (CDA), Pub. L. No. 104-104, 110 Stat. 133 (codified at 47 U.S.C. §§ 230, 560-61 (2000)).

34. Reno v. ACLU, 521 U.S. 844, 870-72, 879 (1997).

35. Child Online Protection Act (COPA), Pub. L. No. 105-277, 112 Stat. 2681 (1998) (codified at 47 U.S.C. § 231 (2000)).

36. ACLU v. Reno, 31 F. Supp. 2d 473, 476, 498 (E.D. Pa. 1999), *aff'd*, 217 F.3d 162 (3d Cir. 2000), *aff'd sub nom.* Ashcroft v. ACLU, 124 S. Ct. 2783 (2004).

37. *Ashcroft*, 124 S. Ct. at 2795.

38. *See id.* at 2794-95; Linda Greenhouse, *Court, 5-4, Blocks a Law Regulating Internet Access*, N.Y. TIMES, June 30, 2004, at A1 (stating that the Court's opinion "suggested strongly" that the government would be unsuccessful at trial).

39. Children's Internet Protection Act (CIPA), Pub. L. No. 106-554, 114 Stat. 2763 (2000) (codified as amended in scattered titles and sections of the United States Code).

40. 20 U.S.C. § 9134(f) (2001).

41. United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 214 (2003).

42. *Id*. at 215 (Kennedy, J., concurring in the judgment); *see id.* at 218-19 (Breyer, J., concurring in the judgment).

Congress has taken other actions to help protect children from inappropriate materials on the Internet. It passed an act prohibiting the use of misleading domain names, Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT ACT), Pub. L. No. 108-21, § 521, 117 Stat. 650, 686 codified at 18 U.S.C. § 2252B (Supp. 2004)), and it created a "Dot Kids" second-level Internet domain for content that was appropriate for minors under the age of thirteen, Dot Kids Implementation and Efficiency Act of 2002, Pub. L. No. 197-317, § 2, 116 Stat. 2766, 2766 (codified at 47 U.S.C § 941 (Supp. 2004)).

over the jurisprudence still could have a hard time articulating what legislators may or may not do to protect minors from speech.

In this Article, I try to guide legislators and judges through the thicket of child-protection censorship. I cut through the masses of precedent, empirical studies, and scholarship to distill the child-protection/free speech conflict into a set of comprehensible questions.[43] I hope that by identifying the questions underlying the conflict, I can draw attention to the key constitutional and policy choices at stake whenever speech is suppressed to protect children. This will help policymakers focus on the real questions behind child-protection censorship: namely, who should decide whether child-protection censorship is constitutional and how should they make this decision? I hope that this conceptual roadmap also will help change the tenor of the child-protection censorship debate, which too often is phrased in extreme terms—either that government censorship to protect children should never be trusted because it is always ill-founded and heavy-handed, or that government censorship to protect children must be given great deference lest our society plunge into moral decay.[44]

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43. There has been a burst of scholarship on child-protection censorship in the last few years. Two of the most important works are books by Kevin Saunders and Marjorie Heins. Saunders contends that the First Amendment should permit greater regulation of children's access to speech. KEVIN W. SAUNDERS, SAVING OUR CHILDREN FROM THE FIRST AMENDMENT 2-3 (2003). Heins takes the opposite stance. HEINS, *supra* note 6, at 11 (stating that censorship should extend only to information that results in "real, not just symbolic, harm" to children). There also has been a recent symposium on child-protection censorship organized by Amitai Etzioni. Symposium, *Do Children Have the Same First Amendment Rights as Adults?*, 79 CHI.-KENT L. REV. 3 (2004). Some important earlier works on child-protection censorship include Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427 (2000), which examines the validity of the compelling interests most frequently cited by government actors, and Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141, which analyzes the Supreme Court's logic in *Reno v. ACLU*, 521 U.S. 844 (1997). Many other helpful articles on the constitutionality of specific child-protection censorship laws are cited throughout this Article.

The scholarship mentioned above discusses much of the relevant empirical evidence on the impact of violent and sexual speech. *See, e.g.*, HEINS, *supra* note 6, at 228-53; SAUNDERS, *supra*, at 43-66. There are also recent governmental and privately sponsored reports surveying this evidence. *See, e.g.*, YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 18, at 143-60 (surveying research on the impact of exposure to sexually-explicit material); COMM'N ON CHILD PROT. (COPA), REPORT TO CONGRESS (2000) (evaluating the accessibility, cost, and effectiveness of child-protective technologies and methods), *available at* http://www.copacommission.org/report/COPAreport.pdf; THOMAS BLILEY, CHILD ONLINE PROTECTION ACT, H.R. REP. NO. 105-775, at 10-11 (1998), *reprinted in* 1998 U.S.C.C.A.N. 736 (discussing evidence indicating that exposure to sexually-explicit material harms children).

44. *Compare* HEINS, *supra* note 6, at 257 ("Censorship is an avoidance technique that addresses adult anxieties and satisfies symbolic concerns, but ultimately does nothing to resolve social problems or affirmatively help adolescents and children cope with their environments and impulses or navigate the dense and insistent media barrage that surrounds them."), *with* SAUNDERS, *supra* note 43, at 1-2. Saunders states:

The Article addresses a series of questions that together comprise a methodology for analyzing child-protection censorship. Part II begins the analysis by establishing a procedural framework for evaluating child-protection censorship. It asks the fundamental questions of *who* should decide whether child-protection censorship is constitutional and *how* the decision on the law's constitutionality should be made. These questions concern the propriety of judicial review in the context of child-protection censorship and wrestle with the elusive question of how judicial power can be exercised in a restrained and consistent fashion.

Part III explores the substantive question of whether child-protection censorship should ever be constitutional. It begins by showing how child-protection censorship is at odds with the First Amendment's general prohibition on censorship. It then considers the arguments for exempting child-protection censorship from this prohibition. As will be seen, the primary argument for permitting child-protection censorship is the perception that children are different from adults and that these differences justify governmental intervention to protect children from speech. Part III works through each step in this argument. It also addresses the practical problems of converting a theoretical justification for child-protection censorship into a functional standard for determining when child-protection censorship is constitutional.

Part IV assumes that courts will tolerate at least some forms of child-protection censorship. It wrestles with the sensitive question of how courts can keep child-protection censorship within tolerable limits. Such censorship triggers traditional First Amendment concerns about overbreadth and vagueness, and Part IV considers how courts can address these issues to provide legislators with guidance when they enact new legislation.

II. THE ANALYTICAL FRAMEWORK: WHO SHOULD DECIDE WHETHER CHILD-PROTECTION CENSORSHIP IS CONSTITUTIONAL AND HOW SHOULD THIS DECISION BE MADE?

This Part lays out the procedural groundwork for later substantive discussions about the legitimacy of child-protection censorship. It considers the related questions of who should decide whether child-

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> [H]ow better for a society to commit suicide than to fail in its duty to raise its youth in a safe and psychologically healthy manner. . . . We are failing in our duty to society and its coming generations, and the First Amendment's limitations on our ability to restrict the influences children face are among the roots of that failure.

Id.

protection censorship is constitutional and how this decisionmaker can exercise its discretion in a restrained and disciplined manner.

Of course, the answers to these questions may seem obvious. The Supreme Court, after all, is the arbiter of First Amendment meaning and therefore the logical candidate to rule on child-protection censorship's constitutionality. The Court also has a predictable means for making this determination: Because child-protection censorship regulates speech based on content, the Court should apply a "strict scrutiny" analysis that invalidates a law unless it serves a "compelling" governmental interest and uses the "least speech-restrictive means" to further that interest.[45]

While these choices may seem self-evident, they are not the only ones available. Just because the Supreme Court has the final say on the Constitution's meaning does not mean it must always exercise that power. Indeed, there are many areas of constitutional law in which the Court defers to the other political branches by giving their actions little or no review.[46] Similarly, even if the Court chooses to apply strict scrutiny to child-protection censorship, it still would need to develop a process for deciding when a governmental interest is compelling and how much censorship that interest would justify. These issues are considered below.

A. *Who Should Decide Whether Child-Protection Censorship Is Constitutional?*

The Supreme Court reigns supreme in the area of constitutional interpretation. As Justice Marshall announced in *Marbury v. Madison*, the Court has the power "to say what the law is."[47] But the fact that the Court has this power does not mean it must use it. Indeed, there are many areas of constitutional jurisprudence in which the Court forgoes its power to review laws and instead defers to the political branches. Economic regulations, for example, receive virtually no scrutiny under the Equal Protection or Due Process Clauses.[48] The Court instead applies a "rational

45. Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (stating that the government may "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest"). The Supreme Court also sometimes includes a requirement that a law be "narrowly tailored" to serve the government's interest. RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 4:2 (2004). The narrowly tailored requirement, like the least restrictive means requirement, ensures that content-based regulations do not burden more speech than is necessary to accomplish the government's purpose. *See, e.g.*, *id.* § 4:21 (equating the narrowly tailored and least restrictive means requirements).

46. *See infra* notes 48-50 and accompanying text.

47. 5 U.S. (1 Cranch) 137, 177 (1803).

48. *See, e.g.*, United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 175 (1980) (noting that the Court, "in cases involving social and economic benefits has consistently refused to invalidate on equal protection grounds legislation which it simply deemed unwise or unartfully drawn");

relationship" test that is really no test at all but rather a statement of judicial restraint.[49] Similarly, for almost sixty years, the Court used a deferential approach when reviewing "federalism" issues such as limits on Congress's powers.[50]

Whether the Court aggressively scrutinizes legislation or gives it a "free pass" depends upon how the Court chooses to exercise its power of judicial review. When the Court uses its power aggressively, it allocates to itself the right to decide which laws will pass constitutional muster. When the Court applies no scrutiny, it effectively allows legislators to decide what the Constitution permits. Of course, the Court is always free to re-assert its power, as it has recently done with federalism issues, but until it chooses to do so, its deference leaves legislators the authority to decide on the limits of their own power.

What, then, should the Court do with regard to child-protection censorship? Should it aggressively scrutinize laws limiting child access to speech, or should it defer to legislative judgments by applying little or no scrutiny? At first blush, one would expect the Court to subject these laws to close scrutiny because child-protection censorship regulates speech based on content and such regulations typically face strict scrutiny.[51] This rigorous scrutiny reflects the Court's leeriness of content-based laws, which the Court sees as a potential tool for government censorship. As Justice Scalia noted in *Hill v. Colorado*, "[t]he vice of content-based legislation—what renders it deserving of the high standard of strict

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Fitzgerald v. Racing Ass'n, 539 U.S. 103, 106-07 (2003).

49. *See* JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW 10 (5th ed. 2002) (noting that the "rational relationship test . . . still limits all legislation, but since 1937 its application has been tantamount to finding legislation constitutional; the court has found virtually any proposed reason sufficient to sustain a statute"); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 8.2.3, at 604 (2d ed. 2002) (noting that "since 1937, not one law has been declared unconstitutional by the Supreme Court as violating economic substantive due process"). A classic example of this deferential approach is *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488 (1955) (stating that "[t]he day is gone when this Court uses the Due Process Clause . . . to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought").

50. The Court did not invalidate a single federal law from 1936 until 1994 on grounds that the law exceeded Congress's commerce power. CHEMERINSKY, *supra* note 49, § 3.3.5, at 260. The legal community was surprised by the Court's recent interest in federalism issues only because the Court had applied so little scrutiny to these issues for so long. *See* Russell L. Weaver, Lopez *and the Federalization of Criminal Law*, 98 W. VA. L. REV. 815, 819 (1996) (noting how the Supreme Court's 1995 decision in *United States v. Lopez*, 514 U.S. 549 (1995), "set off a storm of controversy").

51. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) (stating that the Supreme Court's "precedents . . . apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content").

scrutiny—is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes."[52]

Yet arguments can be made for the Court to use a more deferential approach when reviewing child-protection censorship. One could argue, for instance, that child-protection censorship is different from other content-based regulations because only minors are denied access to speech.[53] Because adults still have access to the censored ideas, the threat to First Amendment interests is arguably reduced and the need for active judicial review largely mitigated. The Court could similarly conclude that democratic self-governance includes the right of the adult population to control the speech environment in which its children are reared. Judicial deference would signal the Court's recognition that this type of speech regulation is appropriately left to the discretion of the people's elected representatives.

Proponents of child-protection censorship use such logic to argue for more relaxed judicial review. Kevin Saunders, who passionately argues for more child-protection censorship in his book, *Saving Our Children from the First Amendment*, methodically explains how child-protection censorship is compatible with free speech values.[54] He argues, for example, that child-protection censorship does not undermine the First Amendment's role in facilitating self-governance because children are not participants in self-government:

> The importance of free speech to self-government is that those who are to make the decisions have all the information and will be able to convince each other of the wisest course. Children are not among those who make the decisions, so it is at least questionable how strongly the First Amendment, at least on this justification, applies to children.[55]

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52. Hill v. Colorado, 530 U.S. 703, 743 (2000) (Scalia, J., dissenting) (quoting Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 794 (1994) (Scalia, J., concurring in the judgment in part and dissenting in part) (emphasis omitted)).

53. This argument would be inapplicable if a child-protection censorship law also denied adults access to speech. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 564-65 (2001) (stating that a ban on outdoor advertising of tobacco products also affects adults' access to speech); Reno v. ACLU, 521 U.S. 844, 874 (1997) (stating that a regulation of indecency on the Internet also affects adults' access to speech); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 127 (1989) (stating that a ban on indecent commercial telephone communications limits both adults' and minors' access to speech). Indeed, a common reason for invalidating child-protection censorship laws is because they "burn the house to roast the pig" by "reduc[ing] the adult population" to hearing "only what is fit for children." Butler v. Michigan, 352 U.S. 380, 383 (1957); *see supra* note 16. This issue will be discussed in more detail in Part IV. *See infra* Part IV.C.

54. *See generally* SAUNDERS, *supra* note 43.

55. *Id.* at 21.

Similarly, he argues that children play a less important role than adults in the truth-seeking process of the marketplace of ideas[56] and that limiting children's access to speech is unlikely to lead to civil unrest.[57] In making these arguments, Saunders hopes to allay concerns that child-protection censorship will undermine First Amendment values. If he can convince judges that the censorship is not a threat to the First Amendment, they will be more likely to uphold the legislation.

These arguments certainly have merit. Surely it is more important for self-governance that those who vote have information than those who do not. But even if these arguments establish that adults have a greater claim to First Amendment rights than children, they do not establish that minors lack free speech rights altogether. Indeed, logic leads to the opposite conclusion. The fact that children do not vote, for example, could hardly imply that the government is free to deny them access to current political discourse. As Judge Posner rightly observed, "[n]ow that eighteen-year-olds have the right to vote, it is obvious that they must be allowed the freedom to form their political views . . . *before* they turn eighteen, so that their minds are not a blank when they first exercise the franchise."[58] Likewise, even if minors play a lesser role in the process of truth-seeking (putting aside the story of *The Emperor's New Clothes*[59]), it controverts basic First Amendment principles to suggest that their ideas are not welcome in a marketplace where "there is no such thing as a false idea."[60] This point is perhaps made most clearly, however, when one realizes that if children lacked free speech rights, the government could deny them access to virtually anything, including information about socialism, atheism, homosexuality, or abortion. Critics of child-protection censorship are quick to highlight this "not insignificant question of minors' First Amendment rights":[61]

> This is not some fuzzy, ivory-tower abstraction. Youngsters need access to information and ideas, not indoctrination and ignorance of controversy, precisely because they are in the process of identity formation. They are also in the process of becoming functioning adults in a democratic society and, as

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56. *Id.* at 31 (stating that, on "issues of politics and public policy . . . minors are unlikely to serve as the test of, or make the contribution to, the truth that [John Stuart] Mill envision[ed]" in his marketplace-of-ideas metaphor).

57. *Id.* at 35 (noting that "[t]he likelihood of a rebellion by youths deprived of the ability to attend 'R'-rated films seems remote").

58. Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001).

59. *See generally* HANS CHRISTIAN ANDERSEN, THE EMPEROR'S NEW CLOTHES (Houghton Mifflin 2002) (1837).

60. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

61. HEINS, *supra* note 6, at 258.

> the Supreme Court has pointed out, this is not so easy to do if they are shielded from dangerous or disturbing ideas until they are 18.[62]

These arguments for children's First Amendment rights are sufficiently compelling that even proponents of child-protection censorship concede this point. They do not argue that children lack First Amendment rights but only that they have "weaker" rights than adults.[63] Saunders readily admits that mature minors must hear and participate in current political discourse if they are going to be prepared for their adult civic obligations.[64] He borrows John Garvey's metaphor of minors as adults in "spring training" and Franklin Zimring's description of them as operating with a rights "learner's permit."[65] The communitarian scholar Amitai Etzioni, who also supports censorship to protect children, similarly concedes that "[p]ractically no one would argue that minors have no free speech rights."[66]

The difference between proponents and critics of child-protection censorship, then, is one of degree rather than of kind. All accept that children have judicially enforceable free speech rights (surely the government cannot deny them access to information about evolution or the Republican party platform). Proponents merely think that children have weaker First Amendment rights than adults and that this difference justifies more governmental control of their access to information.

Supreme Court jurisprudence accords with this position. The Court acknowledges that minors have First Amendment rights and has not shied away from enforcing those rights. While the early decision, *Ginsberg v. New York*, suggested that child-protection censorship would receive only rational basis review,[67] more recent decisions establish that such censorship will receive close judicial scrutiny.[68]

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62. *Id.*

63. SAUNDERS, *supra* note 43, at 38 (stating that "the [First Amendment] interests of children are not as great" as adults and that, consequently, "society should be able to impose limitations that would be unacceptable interferences with adult communication").

64. *Id.* at 23 (noting that "[i]t would be for the good of society for these soon-to-be participants to learn how to participate" in self-government).

65. *Id.* (citing JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 106-11 (1996); FRANKLIN E. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE 89-98 (1982)).

66. Amitai Etzioni, *On Protecting Children from Speech*, 79 CHI.-KENT L. REV. 3, 42 (2004).

67. *See* Ginsberg v. New York, 390 U.S. 629, 631, 643 (1968) (upholding a New York law designed to protect minors by stating that the Court "cannot say that [the law] . . . has no rational relation to the objective of safeguarding such minors from harm").

68. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000) (finding that a federal regulation that protected children from inadequately scrambled indecent programs was a "content-based speech restriction" that could "stand only if it satisfie[d] strict scrutiny"); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989); *see also* Steven D. Hinckley, *Your Money or Your Speech: The Children's Internet Protection Act and the Congressional Assault on*

The Court's willingness to scrutinize child-protection censorship does not imply its rejection of the more deferential scrutiny advanced by censorship proponents. The Court, in fact, appears to have adopted this approach. While it uses strict scrutiny to evaluate child-protection censorship, it also acknowledges that the censorship serves a compelling governmental interest.[69] The Court has thus signaled, in the parlance of strict scrutiny analysis, that it is more likely to uphold child-protection censorship than censorship aimed at adults.

B. *How Should the Decision to Permit Child-Protection Censorship Be Made?*

Because all sides agree that judges should have the final say on the constitutionality of child-protection censorship, the analysis can shift from who should make this decision to how this decision should be made. Precedent again suggests an obvious answer. Because child-protection censorship regulates speech based on content, courts should evaluate the law using strict scrutiny. Regulations should be upheld only if they serve a compelling governmental interest and use the least restrictive means to further that governmental interest.[70]

Here too, however, the black letter principle may only obfuscate the analysis rather than clarify it. This would not be the case if strict scrutiny were always "fatal in fact," as it typically is with adult censorship.[71] But the Supreme Court has indicated that child-protection censorship serves a

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the First Amendment in Public Libraries, 80 WASH. U. L.Q. 1025, 1045 (2002).

69. *See, e.g.*, United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 215 (2003) (stating that "[t]he interest in protecting young library users from material inappropriate for minors is legitimate, and even compelling, as all Members of the Court appear to agree"); Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 743 (1996) (stating that "the provision before us comes accompanied with an extremely important justification, one that this Court has often found compelling—the need to protect children from exposure to patently offensive sex-related material"); *Sable Communications of Cal., Inc.*, 492 U.S. at 126 (recognizing "a compelling interest in protecting the physical and psychological well-being of minors" and that this "extends to shielding minors from the influence of literature that is not obscene by adult standards").

70. *Sable Communications of Cal., Inc.*, 492 U.S. at 126 (stating that the government may "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest").

71. Censorship intended to protect adults from "bad" or "harmful" ideas is virtually never sustained unless it concerns an area of unprotected speech like obscenity. *See, e.g.*, Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) (stating that, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"). Content-based restrictions are occasionally sustained when they serve a purpose beyond just protecting adults from "bad" ideas. *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 211 (1992) (upholding a prohibition on solicitation within one hundred feet of a polling place to ensure that elections are "free from the taint of intimidation and fraud").

compelling interest and can survive strict scrutiny.[72] Courts, therefore, cannot rely on this requirement to provide a simple mechanism for weeding out the chaff of unlawful child-protection censorship from the wheat of permissible constitutional regulation.[73]

If the requirement of a compelling interest does not solve the problem of determining when child-protection censorship is constitutional, then perhaps the least restrictive means requirement can. This principle focuses on the means the government uses to regulate. Assuming the end (censoring speech to protect children) is legitimate, it ensures that the government does not suppress more speech than is necessary to accomplish its end.[74] The principle, which is also expressed as the requirement that a law be narrowly tailored to serve the government's interest,[75] embodies a zero-tolerance policy for gratuitous suppression of speech.

In practice, this requirement has proven to be an effective tool for resolving child-protection censorship cases. Many invalidated censorship laws have been poorly drafted and clearly suppressed more speech than was necessary for the government's purpose. A recurring problem has been laws that deny adults access to speech when it was possible to deny access only to minors.[76] Such gratuitous interferences with adults' rights have virtually guaranteed a law's unconstitutionality.[77] As Justice Frankfurter

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72. *See supra* note 14.

73. Similar challenges have arisen in other areas of constitutional law where strict scrutiny does not ensure a particular outcome. Analysis of race-based classifications in the equal protection context, for instance, was simple as long as the strict scrutiny applied to these "suspect" classifications guaranteed their unconstitutionality. But once the Court recognized that the strict scrutiny was not necessarily fatal, *see, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (intending to specifically "dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact'") (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment)), and that race-based classifications could be used to remedy past discrimination, *id.*, or to promote diversity, *see, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311-12 (1978) (plurality opinion); Grutter v. Bollinger, 539 U.S. 306, 327-34 (2003), the Court's jurisprudence became muddled as the Court struggled to explain when these exceptional uses were permissible.

74. As the Court said in its recent decision concerning the Child Online Protection Act, "[t]he purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to assure that legitimate speech is not chilled or punished." Ashcroft v. ACLU, 124 S. Ct. 2783, 2791 (2004).

75. *Id.* at 2790.

76. *See, e.g.*, Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 131 (1989) (finding a law banning indecent commercial telephone calls unconstitutional because it was possible, using technological means, to prevent minors from accessing the calls while still permitting adults access).

77. *Ashcroft*, 124 S. Ct. at 2791. The Court stated that a "statute that 'effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another . . . is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.'" *Id.* (alteration in original) (quoting Reno v. ACLU, 521 U.S. 844, 874 (1997)); *see* Denver Area Educ. Telecomms Consortium, Inc. v. FCC, 518 U.S. 727, 759-60 (1996); *Sable Communications of Cal., Inc.*, 492 U.S. at 128-29;

famously observed, these laws "burn the house to roast the pig."[78]

Laws also have been problematic because they used vague or overbroad language to define the speech being regulated.[79] Although these doctrines are conceptually distinct from the least resrictive means requirement, they too concern regulatory means that unnecessarily suppress or chill speech. Litigants challenging child-protection censorship laws often invoke the doctrines of vagueness or overbreadth. Their common refrain is that the laws ban not only pornographic speech but also speech about AIDS, breast cancer, and famous works of art.[80] Majorie Heins's recent book, *Not in Front of the Children: "Indecency," Censorship, and the Innocence of Youth*, visually captures this argument by placing a Renaissance painting on its cover with "parental advisory" labels over the purportedly indecent parts.[81]

When laws so gratuitously suppress speech, they invite judicial invalidation. Legislators are placing fish in a barrel for judges to shoot. But these criteria—least restrictive means, overbreadth, and vagueness—easily resolve cases only when legislators clearly overreach. As legislators become more adept at crafting legislation with precision, these doctrines will no longer provide a simple means of identifying unconstitutional child-protection censorship.

Once legislators eliminate these obvious grounds for invalidation, judges will face the purer question of when child-protection censorship should be allowed. Because the requirements of a compelling interest or the least restrictive means will not provide judges with ready-made

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Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 73 (1983).

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

79. *Reno*, 521 U.S. at 874 (finding that the "vague contours" of the speech being regulated by the Communications Decency Act was a basis for finding the Act unconstitutional); Erznoznik v. City of Jacksonville, 422 U.S. 205, 214 (1975) (stating that a city ordinance "intended to regulate expression accessible to minors . . . is overbroad in its proscription").

80. The plaintiffs challenging the Communications Decency Act, for instance, claimed that the Act would suppress a wide range of communications about sexual subjects. HEINS, *supra* note 6, at 159. Marjorie Heins describes some of the groups involved in the litigation and the speech they were trying to protect:

> Among them were the ACLU, which hosted a discussion of masturbation after Joycelyn Elders was fired as Surgeon General for mentioning the subject; Human Rights Watch, which offered sometimes graphic descriptions of sexual torture and rape; Planned Parenthood, the Safer Sex Web Page . . . and the Critical Path AIDS Project, all of which provided explicit descriptions of contraception and safer sex; and Wildcat Press, which published an online magazine for gay and lesbian teens.

Id.

81. HEINS, *supra* note 6. The cover painting is *Danae* by Correggio. *Id.*

answers,[82] courts will have little choice but to wade into the broader debate about child-protection censorship's legitimacy. As they enter these waters, they will soon discover that there are no clear answers but only shades of opinion that vary with how the legislation's costs and benefits are assessed.

Critics of child-protection censorship will tell judges that the laws impose severe costs on free speech rights. Their arguments will be strongest when the laws also deny adults access to speech,[83] but they will argue that the laws are problematic even when only minors are affected. They may say that the laws are vague or overbroad and consequently deny minors access to important protected speech (Renaissance paintings or AIDS awareness websites).[84] But even if the laws target only crass, violent, or sexual images, they still will say the laws are unconstitutional. Their arguments may vary, but certain themes will tend to predominate: (1) government censorship is always worse than any harm from speech;[85] (2) minors will not be prepared for the adult marketplace of ideas if they are sheltered from "bad" ideas in their youth;[86] (3) suppressing speech only increases minors' determination to access it (which they will inevitably succeed in doing);[87] (4) even offensive speech includes important ideas (for example, sexual speech can help minors explore their sexuality, and violent images can have the "cathartic" effect of making people less likely to commit actual violence);[88] (5) it is impossible to draft censorship laws without vagueness and overbreadth problems and thus the laws will always chill protected speech;[89] and (6) history teaches that government efforts to

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82. *See supra* notes 72-78 and accompanying text.

83. *See supra* notes 76-77 and accompanying text.

84. *See* HEINS, *supra* note 6, at 159; *supra* notes 79-81 and accompanying text.

85. *See, e.g.*, HEINS, *supra* note 6, at 257 (stating that censorship "frustrates rather than enhances young people's mental agility and capacity to deal with the world . . . . [and] inhibits straightforward discussion about sex" and through modeling can teach minors "authoritarianism, intolerance for unpopular opinions, erotophobia, and sexual guilt").

86. *See, e.g.*, *id*. at 12 (stating that minors "*need* access to information and ideas precisely because they are in the process [sic] becoming functioning members of society and cannot really do so if they are kept in ideological blinders until they are 18").

87. *See, e.g.*, *id.* (referring to the "titillation" caused by "forbidden speech zones").

88. *See, e.g.*, *id*. at 10 (stating that there was "too much real aesthetic experience over centuries" to dismiss the notion that exposure to sexual or violent materials "can sometimes reduce rather than heighten human anxieties or aggression").

89. *See, e.g.*, *id*. at 257-58. Heins states:

> The recurring efforts to purge masterworks like *Huckleberry Finn* or *I Know Why the Caged Bird Sings* from American classrooms suggest that bad ideas are not so easy to identify in the arts and entertainment, and that neither pressure groups nor government officials are well qualified to make these literary and pedagogical distinctions.

Id.

protect children from speech are misguided and inevitably suppress valuable speech (citing a long list of horror stories about efforts to suppress the works of D.H. Lawrence, Henry Miller, and James Joyce).[90]

Critics similarly will tell judges that the benefits of child-protection censorship are illusory. They will dismiss empirical claims that violent or sexual speech "causes" inappropriate behavior[91] and will claim that, even if any detrimental effect exists, it is minimal compared to other factors such as parental neglect, poor schools, poverty, crime, and drug and alcohol abuse.[92] They will argue that government censorship usurps the role of parents who should decide what their children may hear and see.[93] They will claim that any problems associated with speech should be addressed either by media literacy programs that make children better consumers of speech or by programs that facilitate parental control.[94]

Proponents of child-protection censorship will offer judges a starkly different picture. They will point to a litany of social ills attributable to inappropriate speech: increases in underage sex, teenage pregnancy, violent crime, smoking, drug and alcohol abuse, and a general corrosion of the societal fabric.[95] They will acknowledge that other factors influence these trends but will claim that critics underestimate speech's deleterious influence.[96] Proponents will concede that past efforts to regulate speech have been misguided but will claim that the solution is not to forbid all

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90. *See, e.g.*, *id.* at 14-59 (discussing more than a century of overreaching government censorship done in the name of protecting youth); Ross, *supra* note 43, at 442-46 (discussing abusive censorship to protect children).

91. *See, e.g.*, Ross, *supra* note 43, at 504 (stating that "it is nearly impossible to find an iota of evidence that controversial speech about sex harms children").

92. *See, e.g.*, HEINS, *supra* note 6, at 10-11 (stating that belief in a causal connection between speech and antisocial behavior ignores "much more significant factors, from genetic predisposition to family and community environment, that influence child and adolescent development"); Am. Civil Liberties Union, *Reply Comments in the Matter of Industry Proposal for Rating Video Programming* (May 8, 1997) (on file with author) (stating that "the effects of art and entertainment on human beings are more various, complex, and idiosyncratic than some political leaders or social scientists would suggest").

93. *See, e.g.*, Ross, *supra* note 43, at 521 (arguing that child-protection censorship in the name of supporting "parental authority often clashes with principles of family autonomy and cultural pluralism that are central to the Constitution").

94. *See, e.g.*, HEINS, *supra* note 6, at 260-61 (describing specific media literacy programs that the author believes are a constructive alternative to censorship).

95. Kevin Saunders's book begins with just such a litany of social ills. SAUNDERS, *supra* note 43, at 1 (stating that "[h]omicide is the second leading cause of death for fifteen- to twenty-four-year-olds," that teenage pregnancy rates in 1998 were "too high" at "41.5 births per thousand" unwed mothers between fifteen- and nineteen-years-old, that "5 million children are current smokers," and that "10 million American teenagers drink monthly").

96. Etzioni, *supra* note 66, at 34 (rebutting the civil libertarian argument that "exposure to cultural materials causes no discernable harm" by pointing to the "considerable . . . consensus among those who have studied the matter that significant harm is caused").

censorship but to insist that it be narrowly tailored.[97] They will tell judges that failing to permit child-protection censorship will undermine the First Amendment because it will erode the public's commitment to free speech rights.[98]

Like the critics, proponents will acknowledge that parents must play a critical role in monitoring their children's access to speech, but they will claim that parents cannot fulfill this role without government support.[99] They will claim that it is impossible for parents to monitor their children's access to speech when violent and sexual images pervade the media.[100] They will claim that censorship facilitates parental choice by limiting children's access to inappropriate materials while allowing parents to obtain the materials and share them with their children.[101]

What are judges to do with these claims? They do not have the luxury of being spectators to the debate. Instead, they must choose sides so that they can resolve concrete disputes about actual censorship regimes. Cynics, of course, might say that there is no principled way to make this choice and that judges will choose based on their personal preference—whether it be their political persuasion or their attitude toward free speech—or on more discrete criteria such as whether they believe the media have corrupted their children or grandchildren. Judges might respond that their choices will be based upon "reasoned judgment" applied to the principles embodied in the Constitution.[102]

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97. *See* SAUNDERS, *supra* note 43, at 135-39 (discussing the "[h]istory of [a]buse" in obscenity prosecutions and ultimately arguing in favor of eliminating the obscenity exception for adults while continuing to allow censorship designed to protect children).

98. *See, e.g.*, *id.* at 73 (arguing that the public's respect for core First Amendment values will be eroded if the Amendment is "seen as protecting the exposure of children to . . . objectionable material").

99. *See, e.g.*, *id.* at 91-95 (acknowledging that parents have the "[p]rimary responsibility" for inculcating children with values, but that the state also has an interest in supporting parents).

100. *See, e.g.*, *id.* at 93-94 (acknowledging that supervision of children "'may best be left to their parents,'" but also that "'parental control or guidance cannot always be provided'") (quoting Ginsberg v. New York, 390 U.S. 629, 640 (1968) (quoting People v. Kahan, 206 N.E.2d 333, 334 (N.Y. 1965) (Fuld, J., concurring))).

101. *See, e.g.*, *id.* at 40-41, 94 (suggesting that parents should have broad authority to decide what materials their children may see, "even when the government believes that this material may be inappropriate for consumption by children," but that the government should be allowed to prevent third parties from subverting parental control by exposing children to inappropriate materials without parents' consent).

102. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 849 (1992) (describing judicial discretion as controlled through the exercise of "reasoned judgment"). Justice Stevens recently acknowledged the tension between his obligations as a judge and his personal preferences as a parent and grandparent:

> To be sure, our cases have recognized a compelling interest in protecting minors from exposure to sexually explicit materials. As a parent, grandparent, and great-

Perhaps the most attractive way out of this dilemma is for judges to make their decisions based upon empirical evidence. The child-protection censorship debate, after all, is rife with empirical assumptions. Whether violent or sexual speech is harmful to children is an empirical question. Whether parents can protect their children from speech is an empirical question. Whether children can easily access speech is an empirical question, and whether educational programs can counteract speech is an empirical question. Social scientists have produced reams of literature on these topics.[103] The question is whether courts should rely on this data as the basis for their decisionmaking.[104]

On the surface, this use of empirical data seems like an attractive way to avoid the appearance of judicial arbitrariness. Decisions will be based not on a judge's personal preferences, but rather on "neutral" or "scientific" data. The Supreme Court also has used empirical evidence to resolve a variety of constitutional disputes.[105] Professors John Monahan and Laurens Walker collect examples of such uses in their textbook, *Social*

> grandparent, I endorse that goal without reservation. As a judge, however, I must confess to a growing sense of unease when the interest in protecting children from prurient materials is invoked as a justification for using criminal regulation of speech as a substitute for, or a simple backup to, adult oversight of children's viewing habits.

Ashcroft v. ACLU, 124 S. Ct. 2783, 2796-97 (2004) (Stevens, J., concurring) (citation omitted).

103. See *supra* note 43 for sources of recent empirical studies.

104. Judicial use of social science evidence traces back to the early part of the twentieth century when judges and scholars began to reject the "classical" model of jurisprudence that was "dominated by the belief that a single, correct legal solution could be reached in every case by the application of rules of logic to a set of natural and self-evident principles." MONAHAN & WALKER, *supra* note 49, at 1. Led by Holmes, Brandeis, and Pound, scholars began arguing that lawmaking involved public policy choices and not just deductive logic (as Holmes said in *The Common Law*: "The life of the law has not been logic: it has been experience."). *Id.* at 2 (quoting OLIVER WENDELL HOLMES, Jr., THE COMMON LAW 1 (Belknap Press 1963) (1881)). These scholars also believed that social science evidence could help inform public policy decisions, which Brandeis illustrated with his successful social-science-laden briefs. *Id.*

This "sociological jurisprudence" laid the groundwork for the subsequent legal realist movement. *Id.* at 14. Monahan and Walker, in describing this evolution, note that the sociological jurisprudes "maintained a core belief in traditional principles and moral values," whereas the realists "discounted the worth of many traditional values and expressed a preference for pragmatic experimentation." *Id.* at 15. The realists, influenced by John Dewey's belief that social sciences could be applied to social problems, became interested in the connection between social science and the law. *Id.* at 19. Yale Law School became a center for the study of law and the social sciences during the deanship of Robert Hutchins, whose tenure as dean began in 1927. *Id.*

105. *Id.* at 185-320. When courts are making factual determinations for purposes of creating law or policy, they are creating "legislative facts." *Id.* at 181. This is in contrast to "adjudicative facts," which are factual determinations that are relevant only to the litigants in a particular dispute. *Id.* at 93. These terms were coined by Kenneth Culp Davis but are now widely recognized. *Id.* at 93, 181.

Science in Law.[106] These examples run the gamut from equal protection cases about school desegregation to criminal procedure cases about the constitutionality of smaller juries or the bias of death-qualified jurors.[107] The Court also frequently considers empirical evidence in its First Amendment jurisprudence. In *44 Liquormart, Inc. v. Rhode Island*,[108] for instance, the Court invalidated a ban on liquor price advertising because the State had failed to provide empirical evidence that "the price advertising ban will significantly advance the State's interest in promoting temperance."[109] More recently, in *Bartnicki v. Vopper*,[110] the Court barred application of a wiretap law to defendants who had disclosed, but not intercepted, a cell phone conversation because there was "no empirical evidence to support" the claim that holding a disclosing party liable would reduce the number of illegal interceptions.[111]

At the same time, the Supreme Court's use of empirical evidence in constitutional adjudications has generated considerable controversy. Commentators, for instance, have long argued that the Court's insistence

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106. *Id*. at 185-320.

107. *Id.* at 186-230, 249-90.

108. 517 U.S. 484 (1996).

109. *Id*. at 505.

110. 532 U.S. 514 (2001).

111. *Id.* at 530-31. *See generally* Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. CAL. L. REV. 1281, 1315-19 (2002) (discussing Supreme Court review of Congressional factfinding in First Amendment cases).

The Supreme Court's review of empirical evidence in First Amendment cases has varied considerably. In some instances, the Court defers to the factual findings of legislators, without any independent review. The clearest example of this is in the obscenity area where the Court willingly deferred to the "unprovable assumptions" of legislators, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61 (1973), and refused to demand "'scientifically certain criteria of legislation,'" *id*. at 60-61 (quoting Ginsberg v. New York, 390 U.S. 629, 642-43 (1968) (quoting Noble State Bank v. Haskell, 219 U.S. 104, 110 (1911))). In other contexts, the Court has refused to give deference to legislative factfinding when First Amendment rights were at stake. In *Landmark Communications, Inc. v. Virginia*, for instance, the Court stated that "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." 435 U.S. 829, 843 (1978). The Supreme Court's two decisions on the constitutionality of the federal "must-carry" rules—*Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997)—only added to the confusion by emphasizing both the importance of independent judicial review of legislative factfinding in First Amendment cases as well as the need for deference toward this factfinding. *Turner Broad. System, Inc.*, 512 U.S. at 665-66 (stating that "courts must accord substantial deference to the predictive judgments of Congress" but also that this "substantial deference does not mean" that Congressional judgments "are insulated from meaningful judicial review altogether"); *Turner Broad. System, Inc.*, 520 U.S. at 195-96. *See generally* Note, *Deference to Legislative Fact Determinations in First Amendment Cases After* Turner Broadcasting, 111 HARV. L. REV. 2312 (1998) (discussing the confusion created by the two *Turner* decisions); William E. Lee, *Manipulating Legislative Facts: The Supreme Court and the First Amendment*, 72 TUL. L. REV. 1261, 1261 (1998) (reviewing the Supreme Court's "widely inconsistent evaluations of legislative facts" in First Amendment cases).

upon empirical support for progressive legislation during the *Lochner* era was misguided.[112] In *Lochner v. New York*, the Court struck down a New York law setting maximum work hours for bakers because the Court was unconvinced by the government's empirical claim that baking was a hazardous profession.[113] Lawyers responded by filing "Brandeis Briefs," voluminous court papers brimming with empirical evidence,[114] until the Court relieved them of this burden in 1937 when it stopped carefully scrutinizing economic regulations.[115]

The Court's most controversial use of empirical evidence occurred in footnote 11 of *Brown v. Board of Education*.[116] In that footnote, the Court cited social science studies to support its claim that African-American children were psychologically harmed by segregated education.[117] Commentators subsequently questioned whether the children's constitutional rights had depended upon the results of these studies. Edmond Cahn, for instance, questioned whether fundamental rights should "rise, fall, or change along with the latest fashions of psychological literature."[118] Commentators also pointed out the weaknesses of these studies[119] and openly criticized the Court for its reliance on them.[120]

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112. *See, e.g.*, William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 100-01 (2001).

113. 198 U.S. 45, 59 (1905); *see also* Buzbee & Schapiro, *supra* note 112, at 101 (stating that the "Court refused to defer to the legislative judgment and instead insisted on an independent review of the available evidence"); Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 980 (1999) (stating that the constitutionality of the New York statute "depended upon the underlying empirical question of the extent of a material danger to the health of the workers," and that the majority "dismissed the existence of any danger to the workers' health without much mention of the evidence that led the New York legislature to conclude that such dangers required the protection of a law").

114. *See, e.g.*, Buzbee & Schapiro, *supra* note 112, at 102 (noting how Brandeis employed a "1000-page, fact-filled brief" in *Bunting v. Oregon*, 243 U.S. 426 (1917), in which he successfully argued for the Court to uphold an Oregon maximum-hour law); Solove, *supra* note 113, at 983 (describing Brandeis's successful use of a 113-page, empirically-filled brief in *Muller v. Oregon*, 208 U.S. 412 (1908), just three years after *Lochner*); *see also* MONAHAN & WALKER, *supra* note 49, at 8 (noting that the famous Brandeis Brief in *Muller v. Oregon* was actually a "collection of broad, value-laden statements supported largely by casual observation and opinion"; evidence that was "typical of social science scholarship at that time" but which would not be accepted as "social science evidence" today).

115. Buzbee & Schapiro, *supra* note 112, at 103.

116. 347 U.S. 483, 494 n.11 (1954).

117. *Id*.

118. Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 167 (1955).

119. *See, e.g.*, Ernest van den Haag, *Social Science Testimony in the Desegregation Cases—A Reply to Professor Kenneth Clark*, 6 VILL. L. REV. 69, 77 (1960) (critiquing the conclusions of one of the empirical studies cited by the Supreme Court).

120. *See, e.g.*, Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, L. & CONTEMP. PROBS., Autumn 1978, at 57,

Scholars also have assailed the Court's demands for empirical evidence in its recent federalism jurisprudence.[121] The Court has required empirical evidence that activities regulated by Congress "substantially affect" interstate commerce and that Congressional enactments under Congress's Fourteenth Amendment enforcement power are necessary to remedy Equal Protection violations.[122] These critics point to the illogic of requiring legislators to produce a coherent empirical record. They note that the legislative process does not lend itself to producing a neat, self-defined record, comparable to one produced by a trial court.[123] Unlike a trial court, there is no single decisionmaker to decide which evidence is admissible.[124] The assembled record is instead often a hodgepodge of committee reports, submitted statements, studies, and speeches, none of which reflects the full range of debate, horse trading, and grandstanding that might underlie the

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70 (stating that "[v]irtually everyone" who has examined the *Brown* Court's reliance on social science evidence "now agrees that the Court erred").

121. *See* A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 329-31 (2001); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 80-87 (2001); Buzbee & Schapiro, *supra* note 112, at 89-91; Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and* United States v. Lopez, 46 CASE W. RES. L. REV. 695, 697-98 (1995).

122. In *United States v. Lopez*, 514 U.S. 549, 551 & n.1, 567-68 (1995), the Supreme Court found a federal law criminalizing possession of a handgun within one thousand feet of a school unconstitutional. The Court sent an ambiguous message about Congress's responsibilities to provide the Court with factual support for its claim that the regulated activity substantially affected interstate commerce. On the one hand, the Court said that "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce." *Id.* at 562. At the same time, the Court was critical of the fact that "[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone." *Id.* (quoting Brief for United States at 5-6, *Lopez* (No. 93-1260)); *cf.* United States v. Morrison, 529 U.S. 598, 601-02, 617 (2000) (finding the federal Violence Against Women Act unconstitutional, notwithstanding numerous legislative findings about the impact of gender violence on commerce, because the Court was unwilling to permit Congress to regulate noneconomic conduct based solely upon the conduct's aggregate effect on interstate commerce).

In *Board of Trustees v. Garrett*, 531 U.S. 356, 368, 374 (2001), the Court held that Congress lacked power under the Fourteenth Amendment to abrogate state immunity under Title I of the Americans with Disabilities Act because there was an inadequate factual record of unlawful discrimination by the states. In *Tennessee v. Lane*, 541 U.S. 509, 529-35 (2004), the Court held that there was an adequate factual record to justify Congressional abrogation of state immunity for monetary damages under Title II of the Americans with Disabilities Act, at least in the context of cases involving access to state courts. *See generally* Coenen, *supra* note 111, at 1319-28 (discussing the Supreme Court's review of Congressional factfinding in its federalism jurisprudence).

123. *See, e.g.*, Buzbee & Schapiro, *supra* note 112, at 94-95.

124. *Id.* at 95 (noting that "[i]n the legislative setting, no . . . unitary decisionmaker accepting evidence and explaining policy choices is likely to exist").

enactment of a law.[125]

Does this history suggest that courts should disregard empirical evidence in child-protection censorship cases? On the one hand, much of the criticism lodged against judicial use of empirical evidence is legitimate. Judges are not trained as social scientists and therefore venture beyond their expertise when they evaluate empirical data. Justice Powell was only being honest when he confessed that "[m]y understanding of statistical analysis . . . ranges from limited to zero."[126] It is also true that the legislative process is not ideally suited for developing a coherent evidentiary record in support of legislation.[127]

While these arguments have merit, it still might be desirable for courts to insist upon empirical evidence when evaluating child-protection censorship. As mentioned above, empirical evidence can help judges decide which arguments in the child-protection censorship debate are more compelling.[128] This does not mean that judges should whitewash the problems associated with empirical evidence. Indeed, judicial review of empirical evidence is likely to be palatable only if the weaknesses in the process are acknowledged from the outset. Thus, judges should readily concede that empirical evidence varies widely in its credibility, is often limited or flawed, and can produce mixed results. They should admit their own limited training for evaluating the evidence and acknowledge that the data is often produced by "hired guns" commissioned to provide support for one party's argument. All of this confirms that the judges do not view the empirical evidence as a panacea for the problem of judicial review.

But judges still may believe that reliance on empirical evidence will marginally improve the process by which laws are enacted and the courts review these laws. A requirement that legislators provide empirical support for their legislation can slow down the legislative process and help

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125. As Professors Buzbee and Schapiro note, "legislation may reflect . . . the impact of parallel or competing bills on a subject, constituent communications, lobbying pressure, electoral considerations, and comments by other governmental bodies." *Id.* at 96.

126. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. (1994), *reprinted in* MONAHAN & WALKER, *supra* note 49, at 315. Justice Breyer similarly acknowledged in a recent case concerning the standards for admitting expert testimony that "judges are not scientists and do not have the scientific training that can facilitate the making" of the decision as to whether the expert testimony is reliable. Gen. Elec. Co. v. Joiner, 522 U.S. 136, 147-48 (1997) (Breyer, J., concurring). Nevertheless, he expressed confidence that judges, with the help of the scientific and legal community, as well with appropriate rules for making their determinations, could successfully perform this function. *Id.* at 150 (Breyer, J., concurring). Justice Breyer, in fact, has been a leader in helping bridge the gap between science and the law. As he has noted, "[i]n this age of science, science should expect to find a warm welcome, perhaps a permanent home, in our courtrooms." Stephen Breyer, *Introduction*, to FED. JUDICIAL CTR. 2000, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 2 (2d ed. 2000).

127. *See supra* notes 123-25 and accompanying text.

128. *See supra* notes 105-11 and accompanying text.

legislators focus on whether there truly is a nexus between the end pursued and the means employed.[129] Likewise, judicial review of empirical evidence can provide an effective means of weeding out some of the more egregious forms of censorship. It would probably be difficult, for instance, to find empirical support for the proposition that *Harry Potter* books are harmful to children. A court could therefore easily dismiss a law banning these books. Likewise, legislators might think twice before enacting child-protection censorship laws when there is no empirical evidence to support their actions.

The fact that empirical evidence might be helpful in child-protection censorship cases does not imply that it is necessary in all constitutional adjudications. Much of the criticism aimed at the Supreme Court's *Lochner* era and contemporary federalism jurisprudence, for instance, is tied to larger concerns about the propriety of any judicial review in these contexts. Commentators believe these areas are unsuited for judicial review because they do not lend themselves to judicially manageable standards and are better left to the political process.[130]

By contrast, the propriety of aggressive judicial review in the First Amendment context is universally accepted. The concern, if any, is that courts will be too deferential to legislators and therefore inadequately protective of speech interests. In this context, a court's insistence that legislators provide empirical support has a different significance. Rather than being an inappropriate meddling with a legislative prerogative—as might be the case with the Supreme Court's federalism jurisprudence—a court's insistence on empirical support for censorship can provide a way to curb legislative encroachments on speech. Legislators could not merely allege that censorship is necessary; they would have to provide empirical support for their allegation. Unlike in *Brown*, the empirical evidence would be required in order to take away rights rather than to grant them.

Finally, even if empirical evidence could help facilitate more effective judicial review of child-protection censorship, it need not be required for every factual predicate underlying the legislation. Some factual predicates are so widely accepted that it would be unnecessary for legislators to provide empirical support. For instance, a law that limited the access of

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129. *See* Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1655-65 (2001) (describing how judicial insistence on empirical support can improve the legislative process).

130. *See, e.g.*, Buzbee & Schapiro, *supra* note 112, at 160-61 (arguing that the Rehnquist Court's aggressive review of Congressional factfinding in the Commerce Clause and Fourteenth Amendment enforcement power cases reflects "an illegitimate judicial distrust of Congress" and is not bound by "judicially manageable standards"); Colker & Brudney, *supra* note 121, at 144 (criticizing the Court for "convey[ing] the message that Congress is suspect in the powers it exercises and the manner in which it exercises them").

very young minors to violent movies would be based on a factual assumption that five-year-olds are not as mature as adults. Should the government have to provide empirical support for this claim, or can a court give the government a "free pass" on this issue? As will be discussed subsequently, it might be appropriate for a court to take judicial notice of such a widely-held assumption.[131] The challenge, of course, is in drawing the line between those factual predicates that need empirical support and those that do not.

This Article now turns to the substantive arguments for permitting child-protection censorship. If courts are going to uphold this censorship, they need to understand why they are doing so. Understanding the reasons behind the censorship also will help courts determine the censorship's limits.

III. SHOULD THE FIRST AMENDMENT PERMIT CENSORSHIP TO PROTECT CHILDREN?

The Supreme Court has always accepted the notion that the First Amendment permits censorship to protect children. Even the Court's staunchest defenders of First Amendment rights have often adopted this position.[132] This eagerness to accept child-protection censorship has allowed the Court to avoid serious consideration of *why* the First Amendment permits such censorship. Even *Ginsberg v. New York*, the Court's seminal decision upholding child-protection censorship, offers only a superficial explanation for why the censorship is allowed.[133] The decision is routinely cited for the proposition that child-protection censorship is constitutional, but its reasoning remains largely unexamined.[134]

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131. There are no clear rules as to how judicial notice operates in the context of finding "legislative facts." The Federal Rules of Evidence explicitly failed to address this issue in its one provision on judicial notice. FED. R. EVID. 201 advisory committee's note to subdivision (a) (stating that "[i]t deals only with judicial notice of 'adjudicative' facts" and that "[n]o rule deals with judicial notice of 'legislative' facts"). For a description of "adjudicative" and "legislative" facts, see *supra* note 105.

132. *See, e.g.*, Pope v. Illinois, 481 U.S. 497, 513 (1987) (Stevens, J., dissenting) (stating that the "government may not constitutionally criminalize mere possession or sale of obscene literature, absent some connection to minors"); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 107 (1973) (Brennan, J., dissenting) (stating that the "State may have a substantial interest in precluding the flow of obscene materials even to consenting juveniles"). *But see* Ginsberg v. New York, 390 U.S. 629, 650-56 (1968) (Douglas, J., dissenting) (arguing that child-protection censorship is unconstitutional).

133. *See* 390 U.S. 629, 635-37 (1968).

134. *E.g.*, Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 743 (1996) (citing *Ginsberg* for the proposition that the state has a compelling interest in shielding minors from offensive sex-related materials); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126

This Part tries to fill that gap by fleshing out each step in the argument for permitting child-protection censorship. It begins by reviewing the First Amendment's general prohibition on government censorship. It then explores the arguments for exempting child-protection censorship from this rule. Obviously, if a reason exists, it is because the audience for the censored speech consists of minors. This Part therefore considers what it is about minors that justifies greater government censorship. Of course, the gist of this argument, too, is obvious: children are less mature than adults and thus less capable of handling an unregulated marketplace of ideas. But the simplicity of this explanation masks the complexities underlying a more detailed argument.

A. *Why Child-Protection Censorship Is Problematic: The First Amendment's General Prohibition of Government Censorship*

While few would argue that First Amendment jurisprudence is a model of clarity, most would agree that the jurisprudence reflects some widely accepted principles. Perhaps the most fundamental of these principles is that the government may not censor speech because of its message.[135] This "anticensorship rule," a logical extension of the Supreme Court's commitment to an open "marketplace of ideas," prohibits the government from deciding which ideas are suitable for public discourse.[136] As Judge Frank Easterbrook has noted, any other approach would leave the government as "the great censor and director of which thoughts are good for us."[137]

In practice, this anticensorship rule means that the government may not suppress speech simply because it disapproves of a message or finds it offensive. As Justice Brennan explained in *Texas v. Johnson*, it is a "bedrock principle" of the First Amendment that "the government may not prohibit the expression of an idea simply because society finds the idea . . . offensive or disagreeable."[138] Accordingly, the Supreme Court has held that the government may not prevent a person from burning an American flag,[139] wearing a jacket bearing the words "Fuck the Draft,"[140]

(1989) (same).

135. SMOLLA, *supra* note 45, § 4:8 (stating that "[m]odern First Amendment cases establish a *per se* rule making the punishment of speech flatly unconstitutional if the penalty is based on the offensiveness or the undesirability of the viewpoint expressed").

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

137. Am. Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

138. *Johnson*, 491 U.S. at 414.

139. *Id.* at 415.

140. Cohen v. California, 403 U.S. 15, 16, 26 (1971).

or publicly espousing racist views.[141] The Court is aware that such offensive ideas can be emotionally disturbing to people (think of Nazis marching in Skokie),[142] but it counsels those disturbed to "avert their eyes" or to counter the offensive speech with more speech.[143]

The anticensorship rule also means that the government may not censor speech for the paternalistic purpose of protecting the public from "bad" ideas. As Justice Stevens observed in *44 Liquormart, Inc. v. Rhode Island*, "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."[144] Consequently, speakers have been free to advocate law-breaking so long as their speech was unlikely to produce serious and immediate harm.[145] Speakers also have been allowed to advertise liquor and tobacco products.[146]

Of course, to say that people have a right to express noxious and offensive ideas is not the same as saying that people have a right to access those ideas, but the former has generally implied the latter. First Amendment cases usually discuss speakers' rights because laws typically punish speakers. But the Supreme Court has recognized a corollary right of listeners to receive information.[147]

When these principles are put together—the prohibition on censorship

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141. Brandenburg v. Ohio, 395 U.S. 444, 444-45, 449 (1969).

142. Collin v. Smith, 578 F.2d 1197, 1198-99, 1206 (7th Cir. 1978).

143. *See, e.g.*, United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000) (stating that "[w]here the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails," and that "[w]e are expected to protect our own sensibilities 'simply by averting [our] eyes'") (quoting *Cohen*, 403 U.S. at 21 (alteration in original)); *Johnson*, 491 U.S. at 420 (stating that there is "no more appropriate response to burning a flag than waving one's own"); Erznoznik v. City of Jacksonville, 422 U.S. 205, 210-11 (1975) (noting that "the burden normally falls upon the viewer to 'avoid further bombardment of (his) sensibilities simply by averting (his) eyes'") (quoting *Cohen*, 403 U.S. at 21); *Cohen*, 403 U.S. at 21 (stating that those who were offended by the defendant's jacket could "effectively avoid further bombardment of their sensibilities simply by averting their eyes").

144. 517 U.S. 484, 503 (1996).

145. *Brandenburg*, 395 U.S. at 447.

146. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 564 (2001) (stating that "tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products"); *44 Liquormart, Inc.*, 517 U.S. at 508-14 (recognizing consumers' right to hear nonmisleading information about liquor prices).

147. *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 757 (1976) (in upholding the right of a consumers' group to challenge a law regulating advertising by pharmacists, the Court stated that "[if] there is a right to advertise, there is a reciprocal right to receive the advertising"); Stanley v. Georgia, 394 U.S. 557, 564 (1969) (stating that the "right to receive information and ideas . . . is fundamental to our free society"). For an elaboration of this point, see Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 223, 227-33 (1999).

and the right to access ideas—it quickly becomes apparent that child-protection censorship is at odds with the First Amendment's anticensorship rule. After all, the whole purpose of child-protection censorship is to protect minors from speech that might be emotionally disturbing to them or to deny them access to speech that might encourage them to engage in inappropriate behavior. But neither of these is a legitimate reason for denying adults access to speech. Why, then, should the result be different when speech is targeted at children?

Before exploring this question, it is important to acknowledge a significant exception to the anticensorship rule. Despite the Supreme Court's passionate language about the evils of government censorship,[148] the Court has always accepted that "obscene" speech is unprotected by the First Amendment.[149] This blind spot—a holdover from Victorian era sensibilities—creates a gaping hole in the First Amendment's anticensorship rule.[150] The Court officially endorsed the obscenity exception in *Roth v. United States*, but it only provided feeble arguments for doing so.[151] The Court claimed that obscene speech is "utterly without redeeming social importance," but it never explained why other types of low-value speech continue to receive First Amendment protection.[152] The Court provided historical support for its conclusion, but, as Professor Harry Kalven, Jr. noted, its use of sources was "so casual as to be alarming."[153] Perhaps most importantly, the Court declared obscenity unprotected without requiring any empirical proof that the speech was harmful.[154] The Court was inundated by empirical studies but chose not to wade into this "psychological morass."[155]

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148. *See supra* notes 136-37 and accompanying text.

149. *See infra* notes 151-55.

150. *See* SAUNDERS, *supra* note 43, at 151 (describing the obscenity doctrine's focus on sexual materials as opposed to violent materials as "an unwarranted product of Victorian era concerns with sexuality").

151. 354 U.S. 476, 484-85 (1957).

152. *Id.* at 484. In *Chaplinsky v. New Hampshire*, the Supreme Court provided a list of low-value speech that played "no essential part [in the] exposition of ideas." 351 U.S. 568, 571-72 (1942) (listing lewd, obscene, profane, libelous, and fighting words). As Professor Rodney Smolla notes, every category on this list except obscene speech has since been given some First Amendment protection. SMOLLA, *supra* note 45, §§ 2:69, 2:70.

153. Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 9.

154. *See* HEINS, *supra* note 6, at 63.

155. *See id.* (stating that the Court had "avoided the psychological morass" of "trying to assess the actual behavioral effects of sexual speech"). The Court's willingness to declare obscene speech unconstitutional without empirical proof of its harmfulness became more apparent in *Paris Adult Theatre I v. Slaton*, decided a quarter century after *Roth*. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60 (1973) (upholding a Georgia law prohibiting the exhibition of obscene films at adult theaters and stating that "[i]t is not for us to resolve empirical uncertainties underlying state legislation" and that "[w]e do not demand of legislatures 'scientifically certain criteria of legislation'") (quoting

Of course, if the distribution of obscene speech to adults can be prohibited, it certainly can be prohibited to minors. Much child-protection censorship, however, concerns the distribution of "indecent" speech to minors, the term commonly used for sexually-explicit, but not obscene, speech.[156] A question later addressed is whether the Supreme Court should find indecent speech targeted at minors unprotected in the same *ipse dixit* fashion that it found obscene speech unprotected[157] or whether it should require regulators to establish the speech's harmfulness.

Finally, it also should be noted that child pornography is not protected by the First Amendment.[158] The rationale for exempting this speech, however, is unique and of limited importance for evaluating other types of speech regulation. The exception is based on the need to protect the children involved in the *making* of the pornography and not on the *impact* of the pornography on readers.[159] Thus, the exception does not mean that the government may ban the "idea" of children engaging in sex, nor may it prevent the distribution of nonobscene pornography depicting adults pretending to be minors.[160] The Supreme Court recently held, for instance, that a federal law banning "virtual" child pornography was unconstitutional because the targeted speech did not involve the use of "real" children and the speech being regulated was not otherwise obscene.[161]

B. *The Argument for Permitting Child-Protection Censorship*

Child-protection censorship denies minors access to speech to which adults could not be denied. Any explanation for why the First Amendment permits this must have something to do with the fact that the speech's audience is children. It thus is important to understand what it is about children that justifies more governmental control of speech.

1. How Children are Different from Adults

Laws frequently treat children differently from adults. Minors cannot drive, vote, serve in the military, marry, or skip school.[162] Tort, contract,

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Ginsberg v. New York, 390 U.S. 629, 642-43 (1968) (quoting Noble State Bank v. Haskell, 219 U.S. 104, 110 (1911))).

156. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 859 (1997) (federal act regulating obscene and "indecent" Internet transmissions); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 123 n.4 (1989) (federal act regulating obscene and "indecent" telephone messages).

157. This is the notion of "variable obscenity"—that the types of works which are unprotected as obscene can vary with the context, particularly when the audience for the speech is children. *See Ginsberg*, 390 U.S. at 635 n.4 (discussing the concept of "variable obscenity").

158. New York v. Ferber, 458 U.S. 747, 758 (1982).

159. *Id.* at 756-64.

160. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 246-56 (2002).

161. *Id.*

162. *See, e.g.*, U.S. CONST. amend. XXVI, § 1 (creating a constitutional right to vote for

and criminal law all have special rules for minors, and family law assumes that minors will be subject to their parents' supervision until they reach the age of majority.[163]

The fact that children are treated differently does not explain *why* they are treated differently. But understanding why may be critical for understanding whether this differential treatment should be tolerated. Of course, age is not a "suspect classification" under the Equal Protection clause, so the government usually is free to use age classifications without justifying them.[164] Such regulations are subject to a deferential rational basis review which, in its classic form, constitutes essentially no scrutiny at all.[165]

Deferential review is not appropriate, however, when age is being used to deny people a fundamental right.[166] That is the case when minors are denied access to ideas that adults may lawfully receive.[167] The government, in such instances, must have a compelling reason for denying minors their fundamental right.[168] Absent a credible explanation, the denial should be

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citizens "who are eighteen years of age or older"); 10 U.S.C. § 505(a) (2000) (allowing persons seventeen-years-old or older to enlist for military service); LESLIE J. HARRIS & LEE E. TEITELBAUM, CHILDREN, PARENTS, AND THE LAW 494-95 (2002) (discussing laws requiring parental consent before minors can marry); *id.* at 44-46 (discussing compulsory education).

163. *See, e.g.*, MODEL PENAL CODE § 4.10 (1962) (discussing when immaturity excludes criminal conviction). States also have separate juvenile justice systems for trying minor offenders. *See generally* SAMUEL M. DAVIS ET AL., CHILDREN IN THE LEGAL SYSTEM: CASES AND MATERIALS 946-1188 (3d ed. 2004) (discussing differences between juvenile and adult justice systems). Davis notes that "[u]nder American law, the rearing of children generally takes place in families and is principally the responsibility of parents, who are given broad legal authority and discretion to make decisions involved in carrying out this role." *Id.* at 1; RESTATEMENT (SECOND) OF CONTRACTS § 14 (1981) (stating that "infants" can "incur only voidable contractual duties"); RESTATEMENT (SECOND) OF TORTS § 283A (1965) (creating a separate standard of care for children).

164. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 63 (2000); Vance v. Bradley, 440 U.S. 93, 96-97 (1979); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312-13 (1976).

165. *See Kimel*, 528 U.S. at 86 ("Our Constitution permits States to draw lines on the basis of age when they have a rational basis for doing so at a class-based level, even if it 'is probably not true' that those reasons are valid in the majority of cases.").

166. *See* CHEMERINSKY, *supra* note 49, § 10.1.1, at 762 (describing how the Supreme Court uses strict scrutiny when the government discriminates as to who can exercise a fundamental right).

167. *Id.* (stating that freedom of speech has been deemed a "fundamental right"); *see also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, § 14.40 (7th ed. 2004) (discussing analysis of First Amendment guarantees under the Equal Protection Clause). Of course, it is usually unnecessary to perform an equal protection analysis of laws that deny individuals First Amendment rights because the First Amendment already provides the individuals with an independent source of protection. *Id.* at 1079-80. I have decided to refer to equal protection principles in this Article for the primary purpose of drawing attention to the discriminatory nature, and over- and under-inclusiveness, of child-protection censorship laws. *Id.* at 1080 ("Although the analysis of First Amendment classification under the equal protection guarantee is not common, it is important to remember that it is always permissible to review such laws under the guarantee.").

168. NOWAK & ROTUNDA, *supra* note 167, at 1080 (calling for the application of strict

presumptively unconstitutional. Thus, one must wrestle with *why* the government can impose greater speech restrictions on minors than adults. What is it about minors that justifies more speech control? Does the government have to support this claim with empirical evidence or is it enough for legislators merely to assert that minors are different from adults?

The Supreme Court has not seriously wrestled with these questions in the First Amendment context.[169] In *Ginsberg*, the Court simply presumed that children are different from adults and that these differences justify greater speech regulation.[170] One can infer the Court's underlying thoughts only by reasoning backward from its explanation for upholding the New York censorship law. The Court, for instance, said that New York had a legitimate interest in protecting minors "'from abuses' which might prevent their 'growth into . . . well-developed men and citizens.'"[171] Thus, the Court apparently thought that minors are less "developed" than adults and consequently more vulnerable to "abuses." The Court also stated that New York had an interest in aiding parents in the discharge of their child-rearing responsibilities.[172] The Court therefore reasoned that parental control over minors makes minors' First Amendment rights less robust than those of adults.

The Supreme Court has been more forthcoming about the differences between adults and children in other areas of constitutional law. Perhaps the most elaborate of these discussions is in Justice Powell's plurality

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scrutiny, which requires a governmental compelling interest); *see also* Police Dep't v. Mosley, 408 U.S. 92, 101 (1972) (stating that the "[f]reedom of expression, and its intersection with the guarantee of equal protection, would rest on such a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis").

169. While the Court's First Amendment jurisprudence has not gone into depth about *how* children are different than adults, it has on many occasions decided cases based on the general recognition that minors are less mature and more vulnerable than adults. The Court's Establishment Clause jurisprudence, for instance, repeatedly acknowledges that government involvement with religion "can have a magnified impact on impressionable young minds." Sch. Dist. v. Ball, 473 U.S. 373, 383 (1985); *see also* Lee v. Weisman, 505 U.S. 577, 593 (1992) (finding that students will feel pressured to participate in a prayer ceremony at a middle school graduation because "adolescents are often susceptible to pressure from their peers towards conformity, and . . . the influence is strongest in matters of social convention"). The Court also appears to be more willing to allow state interests to override a minor's Free Excercise rights. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 159, 168 (1944) (upholding the conviction of an aunt for allowing her niece to sell religious publications even though the aunt asserted her niece's belief that this fulfilled a religious obligation). The Court noted in *Prince* that "[t]he state's authority over children's activities is broader than over like actions of adults." *Id.* at 168. Kevin Saunders discusses these points in detail in his book. SAUNDERS, *supra* note 43, at 107-17.

170. *See* Ginsberg v. New York, 390 U.S. 629, 640-41 (1968).

171. *Id.* (quoting *Prince*, 321 U.S. at 165).

172. *Id.* at 639.

opinion in *Bellotti v. Baird*,[173] a case concerning a minor's right to have an abortion without parental consent.[174] Powell began by noting that minors are "not beyond the protection of the Constitution" but that their constitutional rights "cannot be equated with those of adults."[175] To explain this disparate treatment, he focused on three characteristics that distinguish children from adults: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child-rearing."[176] Powell elaborated on each of these characteristics. The "peculiar vulnerabilit[ies]," he said, refer to minors' special "needs for 'concern, . . . sympathy, and . . . paternal attention.'"[177] Children's inability to make critical decisions in an informed, mature manner reflects minors' lack of "experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."[178] The importance of the parental role justifies limits on minors' freedoms because parental guidance "is essential to the growth of young people into mature, socially responsible citizens."[179]

When placed in the First Amendment context, these distinctions help shed light on why child-protection censorship might be permitted. The "peculiar vulnerabilities" of minors suggest that minors need government protection from speech because their lack of emotional and intellectual maturity makes them vulnerable to harm. The inability of minors "to make critical decisions in an informed, mature manner" suggests that the government should limit minors' access to dangerous ideas because

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173. 443 U.S. 622 (1979) (plurality opinion).

174. *Id*. at 624-25 (plurality opinion). There is a considerable volume of jurisprudence on this issue. *See, e.g.*, Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 506-07 (1990); Hodgson v. Minnesota, 497 U.S. 417, 422-23 (1990); H. L. v. Matheson, 450 U.S. 398, 399-400 (1981); Planned Parenthood v. Danforth, 428 U.S. 52, 72-75 (1976). See generally Martin Guggenheim, *Minor Rights: The Adolescent Abortion Cases*, 30 HOFSTRA L. REV. 589 (2002) (discussing how *Danforth* and *Bellotti* have restricted the rights of minors); Helena Silverstein & Leanne Speitel, *"Honey, I Have No Idea": Court Readiness to Handle Petitions to Waive Parental Consent for Abortion*, 88 IOWA L. REV. 75 (2002) (analyzing how minors' constitutional rights when seeking an abortion may be undermined by ill-prepared courts or courts opposed to granting waiver petitions).

175. *Bellotti*, 443 U.S. at 633-34 (plurality opinion).

176. *Id.* at 634 (plurality opinion).

177. *Id.* at 635 (plurality opinion) (alteration in original) (quoting McKeiver v. Pennslyvania, 403 U.S. 528, 550 (1971) (plurality opinion)); *see also* Roper v. Simmons, 125 S. Ct. 1183, 1195 (2005) (noting that "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure").

178. *Bellotti*, 443 U.S. at 635 (plurality opinion); *see also Roper*, 125 S. Ct. at 1195 (noting that a "lack of maturity and an underdeveloped sense of responsibility" often cause minors to take "impetuous and ill-considered actions and decisions") (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

179. *Bellotti*, 443 U.S. at 638 (plurality opinion); *see also Roper*, 125 S. Ct. at 1195 (noting that "the character of a juvenile is not as well formed as that of an adult").

minors cannot responsibly evaluate them. Finally, the "importance of the parental role in child rearing" suggests that government censorship is needed to assist parents with their child-rearing responsibilities.

These arguments combine to create two more generalized theories for why child-protection censorship should be permitted. First, the government has an independent interest in protecting minors from speech that could harm them, either by causing psychological harm because of minors' "peculiar vulnerabilities" or by leading minors astray because of their "inability to make informed, mature decisions." This is a "harm theory" for justifying child-protection censorship. Second, the government has a vicariously derived interest in supporting parents with their child-rearing responsibilities, which the government furthers by denying children access to materials that their parents do not want them to see. This is a "parental support theory" for child-protection censorship. *Ginsberg* never clearly discussed how children are different from adults,[180] but the two interests it identified for justifying child-protection censorship parallel these two theories.[181] *Ginsberg*'s reference to the state's "independent interest in [protecting] the well-being of its youth" parallels the harm theory.[182] The Court's reference to the right of parents "to the support of laws designed to aid discharge of [their child-rearing] responsibility" parallels the parental support theory.[183]

a. The Legitimacy of the Child/Adult Distinction

Judge Musmano observed in a torts case that certain characteristics of children are beyond dispute: "The spontaneity of children in responding to invitation to play, without calculating the risk, is as well known as the sequence of the seasons or the regularity with which night follows day. It is not an imponderable, or a matter of speculation. It is simply fact."[184]

Should judges in the First Amendment context be equally willing to assume that there are differences between adults and children that justify limiting children's free speech rights? Can they assume, for instance, that the distinctions mentioned in *Belotti* are "simply facts" to be accepted as true, or should they insist that legislators establish their veracity?

Logic suggests that the answers to these questions might depend upon how these assumptions are used. On the one hand, neither commentators nor judges likely would challenge the basic assumption that children as a

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180. *See supra* notes 170-72 and accompanying text.

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

182. *Id.* at 640.

183. *Id.* at 639.

184. Jennings v. Glen Alden Coal Co., 87 A.2d 206, 212 (Pa. 1952) (Musmanno, J., dissenting).

group are less mature than adults. Indeed, as long as the terms "children" and "minors" refer to the age range from birth to eighteen, it is difficult to dispute that the group as a whole is less mature than adults. It is probably appropriate for judges to take judicial notice of this difference because it is a matter of "common knowledge," or, as some commentators put it, a fact "so commonly known in the community as to make it unprofitable to require proof."[185] Even critics of child-protection censorship likely would concede this point.[186] Few would stake their argument on a claim that four-year-olds are as mature as adults.

Nevertheless, critics might argue that judges need to take into account the vast differences between younger and older children.[187] They also might argue that reliance on generalizations is not appropriate when it results in specific individuals being denied a fundamental right, such as the right to access information. The problem, in short, is less with the overall generalization about minors and more with the use of the generalization as a basis for regulation.

b. The Problem with Relying on Generalizations

The notion of children as being less mature than adults is based upon crude generalizations. To say that children make fewer "mature" decisions than adults ignores the multitude of adults who routinely make immature decisions, whether about drug or alcohol consumption, gambling, or the assumption of debt. Similarly, to lump all minors together ignores the vast differences in emotional and intellectual maturity within the group of minors.

Commentators have noted, for instance, the substantial developmental differences between young minors and minors approaching maturity.[188] A federally commissioned report, *Youth, Pornography, and the Internet*, charts these changing characteristics through six different stages: Infancy (0-2); Early Childhood (3-5); Childhood (6-9); Preadolescence (10-12); Early Adolescence (13-15); and Late Adolescence (16-18).[189] Notwithstanding these variations, legislators often regulate minors as a group. Professor Etzioni notes that both proponents and critics of child-

185. MCCORMICK ON EVIDENCE 493 (John W. Strong ed., 5th ed. 1999).

186. HEINS, *supra* note 6, at 258-59 (acknowledging that toddlers, grade schoolers, and teenagers do not have equal levels of maturity).

187. *See, e.g.*, *id.* at 259 (noting that child-protection censorship often "merges toddlers, grade schoolers, and teenagers into one vast pool of vulnerable youth" and that "there ought at least to be more thoughtful and finely calibrated judgments about" the differences among these groups).

188. Etzioni, *supra* note 66, at 42-47 (suggesting that regulators should have to take into account the differences between young children, those below the age of twelve, and teenagers, those from age thirteen to eighteen).

189. YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 18, at 116-17 tbl. 5.1.

protection censorship take advantage of this fact by focusing their arguments on the subgroups whose interests most strongly advance their case:

> Those who favor full First Amendment rights for children of all ages tend to use the term "young people," "youngsters," or "students" and point to examples of the harm done when teenagers' access to information about, say, HIV or abortion is limited. Those who favor controls tend to call all minors "children" and point to the harm done to toddlers when they are exposed to pornographic or violent material on television.[190]

Etzioni suggests that legislators must be cognizant of the differences between younger and older minors and should tailor their legislation to the needs and vulnerabilities of each group.[191] He suggests that minors be divided into two groups: "children," those twelve and under, and "teenagers," those thirteen to eighteen.[192] One might wonder whether reliance on these two categories is sufficient to pass constitutional muster or whether lawmakers must consider the full range of developmental possibilities when they regulate.

These concerns point to a larger question about the legitimacy of using generalizations to regulate. Can the government, for simplicity's sake, lump all minors together, even if it is aware of their developmental differences, or must it fine tune its legislation to account for these differences? Admittedly, grouping minors together will be both overinclusive and underinclusive, but the alternative—either tailoring legislation to each subgroup, or, at the extreme, providing individualized determinations for each group member—can be a legislative and administrative nightmare.

The legitimacy of regulation based on generalizations presents an equal protection question.[193] When viewed in this light, the constitutionality of age classifications can be argued both ways. On the one hand, age is not a suspect class so that laws discriminating based on age are subject to a deferential rational basis review.[194] On the other hand, a line of equal protection jurisprudence holds that fundamental rights may not be allocated

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190. Etzioni, *supra* note 66, at 43 (footnote call number omitted).

191. *See id.*

192. *Id.*

193. CHEMERINSKY, *supra* note 49, § 9.1.2, at 643 (noting that "[a]ll equal protection cases pose the same basic question: Is the government's classification justified by a sufficient purpose?").

194. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 86 (2000); Vance v. Bradley, 440 U.S. 93, 96-97 (1979); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312 (1976).

in a discriminatory fashion.[195] If this latter authority is controlling, the use of crude age classifications to deny minors' First Amendment rights would be subject to strict scrutiny.

Case law supports both the proposition that age may be used to deny minors a fundamental right and the proposition that it may not be so used. The former is reflected in cases such as *Moe v. Dinkins*,[196] in which a federal district court held that New York could forbid minors from marrying without their parents' consent. By contrast, in *Planned Parenthood v. Danforth*, the Supreme Court held that minors could not be prevented from having an abortion, even without their parents' consent, if the minors could prove that they were mature enough to make the decision.[197] In *Bellotti v. Baird*, Powell explained these differing approaches by noting that a minor could always wait to marry, but that delaying an abortion has irreversible consequences:

> The pregnant minor's options are much different from those facing a minor in other situations, such as deciding whether to marry. A minor not permitted to marry before the age of majority is required simply to postpone her decision. She and her intended spouse may preserve the opportunity for later marriage should they continue to desire it. A pregnant adolescent, however, cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy.[198]

What does *Bellotti*'s distinction suggest about the legitimacy of denying minors access to speech? For most of the information that states try to deny minors—pornography, violent video games, or liquor advertisements—it would hardly seem to matter if a minor was forced to wait until majority to get access. At the same time, this balance between administrative convenience and a minor's First Amendment rights would tip the other way if a state sought to prevent a mature minor from accessing information of immediate importance. One can easily imagine, for instance, a court concluding that the government may not deny a mature minor access to information about abortion, contraceptives, or AIDS. This suggests that

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195. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 447 (1972) (protecting the right of unmarried individuals to contraceptives under the Equal Protection Clause); Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (protecting the right to travel under the Equal Protection Clause); CHEMERINSKY, *supra* note 49, § 10.1.1, at 763 (stating that if a fundamental right "is protected under equal protection, the issue is whether the government's discrimination as to who can exercise the right is justified by a sufficient purpose").

196. 533 F. Supp. 623, 626 (S.D.N.Y. 1981), *aff'd*, 669 F.2d 67 (2d Cir. 1982).

197. 428 U.S. 52, 75 (1976).

198. 443 U.S. 622, 642 (1979) (plurality opinion).

courts scrutinizing child-protection censorship should consider whether a law affects all minors or only young minors, and the importance and immediacy of the suppressed speech to the affected minors.

Finally, in drawing lines between older and younger minors for First Amendment purposes, courts should be attentive to the rules developed in other areas of constitutional law. The Supreme Court, for instance, held until recently that sixteen-year-olds may be tried as adults and sentenced to death.[199] It would be difficult to reconcile this holding with a separate decision holding that sixteen-year-olds may be denied access to violent video games because of their lack of maturity. Similarly, the Court has held that minors cannot be denied access to contraceptives and must be given an opportunity to obtain an abortion without their parents' consent.[200] These holdings suggest that mature minors cannot be denied access to information about reproduction, contraceptives, and abortion. Otherwise, minors would be in the odd position of having a right to engage in activities about which they would have no comparable right to access information.

2. How the Differences Between Children and Adults Justify Child-Protection Censorship

The prior Part suggested that the differences between children and adults might justify child-protection censorship to protect minors from harmful speech (the harm theory) and to support parents in their child-rearing responsibilities (the parental support theory).[201] While these theories might seem acceptable in the abstract, their implementation raises a multitude of questions.

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199. In *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989), the Supreme Court held that there was no historical or "modern societal consensus forbidding the imposition of capital punishment on" individuals who committed murders at the ages of sixteen or seventeen. Consequently, the Court held that executing such individuals did not constitute cruel and unusual punishment under the Eighth Amendment. *Id*. The Court had decided a few days prior that the execution of individuals who were fifteen years or younger at the time they committed an offense *did* constitute cruel and unusual punishment. Thompson v. Oklahoma, 487 U.S. 815, 838 (1988). In March 2005, the Supreme Court overturned *Stanford* and held that capital punishment may not be imposed on defendants who were sixteen or seventeen at the time a crime was committed. Roper v. Simmons, 125 S. Ct. 1183, 1198 (2005).

200. Carey v. Population Servs. Int'l, 431 U.S. 678, 694 (1977) (finding unconstitutional a state law forbidding sale or distribution of contraceptives to minors); *Danforth*, 428 U.S. at 74 (finding unconstitutional a blanket prohibition on minor abortions without parental consent).

201. *See supra* notes 179-83 and accompanying text.

a. The Government's Interest in Protecting Children from Harmful Speech

There are many instances of the government regulating speech to prevent harm. The government regulates speech to prevent economic harms (e.g., copyright, trademark, trade secret laws) and social harms (e.g., defamation, privacy torts).[202] It also regulates speech that incites imminent physical harm.[203]

Yet the harms that the government seeks to prevent with child-protection censorship are the very harms that do not ordinarily justify a First Amendment exception. These are harms that result from a listener's reaction to a message: that the message either will be psychologically disturbing to a listener or will encourage a listener to engage in inappropriate behavior.[204] The First Amendment's prohibition on government censorship has meant that these "reactive" harms are not, at least in the adult context, a legitimate basis for regulating speech.[205] Otherwise, the majority could suppress speech it found offensive, or the government could engage in "thought control" by denying the public access to ideas that the government thought were harmful.

If these reactive harms do not justify censorship aimed at adults, why should they do so for children? The argument previously made was that this censorship is justified because children are different from adults.[206] Because of children's "peculiar vulnerabilities" and their inability to make "informed, mature" decisions, the government should be permitted to intervene and protect them from noxious ideas.[207]

If one accepts this argument, it only begins the constitutional inquiry. Courts still must determine which types of speech are "harmful" to children and thus subject to regulation. This "harmfulness" determination has important free speech implications as legislators could potentially label a wide range of speech harmful to children (e.g., *Huckleberry Finn*, the

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202. *See generally* SMOLLA, *supra* note 45, §§ 4:17, 4:19 (Smolla refers to these as "[r]elational harms" and notes that the government's interest in preventing these harms is "quite strong," although not as strong as its interest in preventing physical harms.).

203. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

204. SMOLLA, *supra* note 45, § 4:18 (referring to these types of harm as "reactive").

205. *Id.* § 4:19 (stating that "[r]eactive harms . . . generally may *not* be used as justifications for the regulation of speech").

206. *See supra* Part III.B.1.a.

207. This would be one of the many ways in which the law, both common law and constitutional, acts paternalistically to protect minors because of their immaturity (*e.g.*, minors may not vote, marry, drive, or serve in the military). *See, e.g.*, Ginsberg v. New York, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring in the result) (noting that, because children lack full capacity, states "may deprive [them] of other rights—the right to marry . . . or the right to vote—deprivations that would be constitutionally intolerable for adults").

theory of evolution).[208] The constitutionality of child-protection censorship, therefore, depends on how courts decide which speech is harmful.

i. Determining Which Speech Is "Harmful"

Courts could use a variety of approaches for determining which speech is harmful to minors. At one extreme, they could defer to the legislators' determinations that speech is harmful. This approach has the benefit of simplicity, but it would abdicate the courts' responsibility to ensure that minors' First Amendment rights are not being violated. One need only imagine unchecked legislators declaring speech about homosexuality, socialism, or abortion harmful to recognize the disadvantages of this approach.

At the other extreme, judges could rely on their own sense of what speech is harmful to minors. This approach has the benefit of giving judges a check on the legislative process, but it subjects them to criticism that they are merely substituting their own judgments for those of the legislators.

Part II suggested that one way out of this dilemma is for courts to base their decisions on empirical data.[209] Courts could insist upon empirical proof before finding any particular type of speech harmful. Such an approach would give judges a check on legislators while insulating them from the charge that they are a "bevy of Platonic Guardians."[210] But this "scientific" solution hardly is a panacea.

To begin with, the same societal concerns that lead legislators to limit children's access to speech also can limit the ability of researchers to study the impact of the speech. Most child-protection censorship, for instance, limits children's access to sexual materials. There is little social scientific evidence examining the impact of this material, however, because it is thought to be unethical, if not illegal, to expose children to it.[211] Critics of this censorship frequently point to the absence of evidence establishing the harmfulness of sexual materials,[212] but this absence may be due to the lack of evidence as much as to the existence of evidence negating the harm.

Even when social science evidence is plentiful, it can be inconclusive. This is not surprising, as proving a causal connection between speech and

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208. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 109 (1968) (finding an Arkansas law forbidding the teaching of evolution in state schools unconstitutional).

209. *See supra* Part II.B.

210. LEARNED HAND, THE BILL OF RIGHTS 73-74 (1960).

211. YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 18, at 144-45 box 6.1 (giving explanations for the "[s]parse [r]esearch [b]ase" on the impact of sexually explicit material on children); Etzioni, *supra* note 66, at 38 (noting that "[e]thical considerations prevent researchers from conducting experiments that directly test the effects of pornography on children").

212. *See, e.g.*, Ross, *supra* note 43, at 504 (stating that "it is nearly impossible to find an iota of evidence that controversial speech about sex harms children").

children's emotions or antisocial behavior is not something that lends itself to empirical analysis.[213] Children are subject to so many influences—their parents, their teachers, their peers, poverty, and crime—that it is difficult to isolate any particular variable as the source of their troubles. While social scientists have tried to establish these connections, their results are often inconclusive.[214] One still can find researchers engaging in the same debate over which Plato and Aristotle fought—whether exposure to unseemly speech has a harmful, corrupting effect or a beneficial, cathartic effect.[215]

The impact of violent speech on minors provides a good example. Because violent speech is protected by the First Amendment, researchers have studied its influence on minors and have produced a considerable volume of literature.[216] Nonetheless, legal scholars interpreting this literature continue to find plenty of room for disagreement. Those who favor child-protection censorship, such as Saunders and Etzioni, describe the evidence as providing definitive proof that violent speech begets violent behavior.[217] Saunders summarizes the recent reports and concludes that "[t]he view of the scientific community seems to be that the debate is over and that it is clear that there is a connection between media violence and aggression in the real world."[218] By contrast, Catherine Ross, who has written critically of child-protection censorship, finds the evidence inconclusive: "Although social scientists point to correlations between violence in the media and violent behavior, they have not found evidence that exposure to depictions of violence causes or even contributes to antisocial behavior."[219]

How should courts deal with the paucity of social science evidence in some contexts (sexual speech) and the inconclusiveness of it in others (violent speech)? The answers depend on how courts view their

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213. HEINS, *supra* note 6, at 253 (noting the "inability of social science to quantify the impact of art or entertainment").

214. *Id*. at 242 ("What must strike any open-minded student of the subject . . . is that despite widely publicized claims that adverse effects have been proven, the studies are ambiguous, disparate, and modest in their results.").

215. *Id.* at 15-16 (discussing debate between Plato and Aristotle over the effects of art and entertainment).

216. YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 18, at 149 (noting that researchers have been able to study the impact of violent materials on minors "because our society has more permissive attitudes about allowing young people to view violent material than about allowing them to see sexually explicit material").

217. SAUNDERS, *supra* note 43, at 44-46 (describing empirical evidence establishing the harmful impact of violent speech on minors); Etzioni, *supra* note 66, at 39 (stating that, "[o]verall, the social science data strongly support the need to protect children from harmful material, especially from exposure to violence in the media and on the Internet").

218. SAUNDERS, *supra* note 43, at 45.

219. Ross, *supra* note 43, at 506.

responsibilities as monitors of child-protection censorship. As noted in Part II, all scholars agree that courts should scrutinize child-protection censorship to ensure that First Amendment rights are not being violated.[220] But some argue that child-protection censorship poses less of a threat to First Amendment values than censorship aimed at adults, and that courts should give legislators more "breathing room" when reviewing the legislation.[221] Judicial review of empirical evidence might be one juncture where such breathing room is appropriate. This would be especially true if, as suggested above, it is impossible to definitively prove that the speech is harmful.[222]

At the same time, the inconclusive nature of the empirical evidence should not dissuade judges from demanding the evidence and considering it in their deliberations. Forcing legislators to provide even ambiguous evidence still can have salutary effects. To begin with, and as noted in Part II, it can give courts a tool for weeding out some of the most ill-founded censorship efforts.[223] Legislators may be hard-pressed, for instance, to provide credible evidence that exposure to the theory of evolution or *Huckleberry Finn* will cause minors serious harm.[224] In addition, forcing legislators to provide empirical support can prompt legislators to deliberate more carefully. Professor Dan Coenen, for instance, has concluded that the Supreme Court's demand for empirical evidence in its federalism and affirmative action jurisprudence has served this purpose.[225] While he acknowledges that the Court's approach, which he calls a "proper-findings-and-study" requirement,[226] may merely produce better paper trails, he nevertheless argues that the requirement can have the beneficial effect of "slowing down the policymaking process and . . . bringing into sharper focus the potential costs of legislative action."[227]

The difficulty of proving a definitive causal connection between speech and harm should give courts pause before invalidating child-protection censorship legislation for lack of empirical proof. But there is a difference between giving legislators breathing room and giving them complete deference. Courts still should feel free to reject empirical evidence that is facially weak or unconvincing. While judges are not trained as social scientists,[228] they do have tools to make these determinations. Indeed, ever

220. *See supra* notes 63-66 and accompanying text.
221. *See, e.g.*, Etzioni, *supra* note 66, at 52-53.
222. *See supra* notes 211-14 and accompanying text.
223. *See supra* notes 126-29 and accompanying text.
224. *See supra* note 208 and accompanying text.
225. Coenen, *supra* note 129, at 1655-65.
226. *Id.* at 1655, 1688.
227. *Id.* at 1688-89.
228. *See supra* note 120 and accompanying text.

since the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[229] courts routinely have had to evaluate a whole range of scientific and technical evidence for its relevance and reliability.[230] In doing this, they often consider a variety of factors, such as whether a study's theory is "testable," whether the study has been submitted for peer review or publication, what the study's error rate is, and whether the study's findings are generally accepted in the relevant scientific community.[231] Courts also can look to see if a consensus is emerging among social scientists.[232] For example, the fact that the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the American Psychological Association, the American Medical Association, the American Academy of Family Physicians, and the American Psychiatric Association issued a joint statement concluding that "well over 1000 studies . . . point overwhelmingly to a causal connection between media violence and aggressive behavior in some children" suggests that the argument that media violence spawns actual violence should not be summarily rejected.[233]

But what about areas where the social science evidence is absent as opposed to ambiguous? Of course, if there are no ethical or legal constraints preventing the collection of data, then courts should insist on evidence being collected before they consent to limitations on First Amendment rights. But when ethical and legal restraints prevent the collection of data, such as for the impact of sexual speech on minors,[234] courts cannot fairly put legislators in the "Catch-22" of having to provide data that is unobtainable.

One option is for courts to excuse legislators from providing empirical proof of harm from sexual materials. Indeed, that is precisely what the Supreme Court did when it initially concluded that obscene speech was not protected by the First Amendment.[235] Although the Court was presented with empirical evidence, it chose to ignore this evidence and instead based

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229. 509 U.S. 579 (1993).

230. *Daubert* is part of a trilogy of cases on the judge's role in screening scientific and technical evidence. *See* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 146-47, 158 (1999); Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146-47 (1997); *Daubert*, 509 U.S. at 597.

231. *Daubert*, 509 U.S. at 593-94.

232. *Id.* at 594 (noting that "[w]idespread acceptance can be an important factor in ruling particular evidence admissible, and 'a known technique which has been able to attract only minimal support within the community' may properly be viewed with skepticism") (citations omitted) (quoting United States v. Downing, 753 F.2d 1224, 1238 (3d Cir. 1985)).

233. Am. Acad. of Pediatrics et al., Joint Statement on the Impact of Entertainment Violence on Children (July 26, 2000), *at* http://www.aap.org/advocacy/releases/jstmtevc.htm (last visited May 4, 2005).

234. *See supra* note 211 and accompanying text.

235. *See* HEINS, *supra* note 6, at 63.

its decision on historical practices and its own determination of the speech's minimal value.[236] Courts could use a similar approach for laws that shield children from sexually-explicit, but not obscene, speech.

The Supreme Court, in fact, used such a deferential approach in *Ginsberg v. New York*.[237] The Court acknowledged that there was empirical evidence about the impact of sexual speech but rejected the need to rely on this evidence by stating that "[w]e do not demand of legislatures 'scientifically certain criteria of legislation.'"[238] Using a deferential rational basis test, the Court upheld the New York law limiting minors' access to sexual materials because the Court could not say that the law had "no rational relation to the objective of safeguarding . . . minors from harm."[239] In subsequent years the Court has applied closer scrutiny to child-protection censorship, but it has continued to adhere to *Ginsberg*'s conclusion that the government may shield children from sexually-explicit, but not obscene, speech.[240] Indeed, the proposition that the government has a compelling interest in protecting minors from sexual speech is so established that it is usually a perfunctory aspect of the Court's analysis.[241] Just as the Court in *Roth* did not demand proof that obscene speech was harmful to adults,[242] so the Court has not demanded evidence that this "variable obscenity" is harmful to minors.

The Court's willingness to forgo any assessment of the impact of sexual speech is misplaced. While it may be true that the Court did not demand such evidence in its landmark obscenity case, it is also true that many scholars have been harshly critical of the Court's obscenity jurisprudence.[243] Extending the logic of these cases to the area of child-protection censorship would only propagate an earlier mistake. The Court would better serve First Amendment interests by insisting upon some empirical evidence of harm from sexual speech, just as it should do with

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236. *Id*. In *Paris Adult Theatre I v. Slaton*, the Court openly acknowledged that the obscenity exception to the First Amendment did not depend upon the existence of empirical evidence establishing the speech's harmfulness. 413 U.S. 48, 60-61 (1973).

237. 390 U.S. 629, 642-43 (1968).

238. *Id.* (quoting Noble State Bank v. Haskell, 219 U.S. 104, 110 (1911)).

239. *Id.* at 643.

240. *See, e.g.*, Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (applying strict scrutiny to a child-protection censorship law but also holding that there is a compelling governmental interest "in protecting the physical and psychological well-being of minors" which "extends to shielding minors from the influence of literature that is not obscene by adult standards").

241. *See, e.g.*, Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 743 (1996); *Sable Communications of Cal., Inc.*, 492 U.S. at 126.

242. *See supra* notes 151-55.

243. Kenneth Culp Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931, 940 (1980) (describing the Court's "inaccurate factfinding" in the *Paris Theatre Salon I* obscenity case as "obviously deplorable").

other areas of speech. Of course, the Court would have to make accommodations to address the fact that specific evidence about the impact of this type of speech on minors is lacking because of ethical and legal considerations. In light of this fact, the Court might have to extrapolate conclusions from studies of adults or rely more on psychological theories than empirical evidence.[244]

The lower courts hearing challenges to child-protection censorship laws have been uncertain as to what the Supreme Court wants them to do with empirical evidence. In cases involving the suppression of sexual speech, lower courts generally assume that no empirical evidence is required.[245] That, after all, is what the Supreme Court did in *Ginsberg*.[246] The courts are less certain, however, about whether empirical proof is required when the government regulates speech other than sexual speech. In *American Amusement Machine Ass'n v. Kendrick*,[247] for instance, which concerned minors' access to violent speech, Judge Richard Posner interpreted *Ginsberg* to mean that empirical proof was required only when "common sense" did not suggest the speech's harmfulness.[248] *Kendrick* concerned the constitutionality of an Indianapolis ordinance that required video arcade owners to deny minors access to violent video games unless they were accompanied by a parent.[249] The district court upheld the ordinance relying on *Ginsberg*'s deferential "reasonable basis" test.[250] In reversing, Judge Posner noted that *Ginsberg* "did not insist on social scientific evidence that quasi-obscene images are harmful to children" because the Court "thought this [was] a matter of common sense."[251] Based on this observation, Posner concluded that the government is exempted from providing empirical proof of harm only when common sense suggests the speech's harmfulness.[252]

Applying this analysis to the facts of the case, Posner found that

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244. YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 18, at 145-49 (describing psychoanalytic, arousal, social learning, information processing, cultivation, and uses and gratification theories and discussing how each might analyze minor exposure to sexually-explicit materials).

245. *See, e.g.*, State v. Evenson, 33 P.3d 780, 782 (Ariz. Ct. App. 2001).

246. Ginsberg v. New York, 390 U.S. 629, 642-43 (1968). By contrast, the Court has been much more willing to police the empirical question of whether allegedly harmful speech is actually accessible to children. In *Playboy Entertainment Group, Inc.*, for instance, the Court required proof that children were likely to be exposed to the allegedly harmful speech, even though it was willing to accept at face value the argument that the speech itself was harmful. 529 U.S. 803, 811, 819 (2000). *See generally* Ross, *supra* note 43, at 502-03 (giving other examples of the Court insisting on evidence that minors would be exposed to the allegedly harmful speech).

247. 244 F.3d 572 (7th Cir. 2001).

248. *Id*. at 573, 579.

249. *Id.* at 573.

250. *Id.* at 574; *see also Ginsberg*, 390 U.S. at 636.

251. *Kendrick*, 244 F.3d at 579.

252. *See id.*

common sense did not support the city's claim that the violent speech was harmful.[253] To the contrary, he thought the city's claim was "implausible" or "at best wildly speculative."[254] Because common sense did not support the speech's harmfulness, the city had to prove its harmfulness with empirical evidence.[255] Posner concluded that the city did not meet this burden and consequently found the law unconstitutional.[256] As he noted in summary, the "common sense reaction to the Indianapolis ordinance could be overcome by social scientific evidence, but has not been."[257]

If one accepts the previous argument—that courts should not uphold child-protection censorship unless there is empirical proof of harm—then Posner's interpretation of *Ginsberg* is problematic because it allows courts to bypass this requirement whenever common sense suggests that speech is harmful. An Arizona state court, for example, used Posner's reasoning to dismiss an argument that empirical proof of harm was required for the suppression of indecent sexual materials.[258] *State v. Evenson* concerned a state law that prohibited the placement of coin-operated vending machines with indecent materials in places accessible to minors.[259] Amicus curiae cited *Kendrick* for the proposition that the State had to provide empirical evidence of harm to children.[260] In rejecting this argument, the court noted that *Kendrick* actually said that empirical evidence was not required when common sense supported the harmfulness of the material.[261] Because the Supreme Court in *Ginsberg* already had held that the harmfulness of sexual materials to minors was "a matter of common sense," the court concluded that *Kendrick*'s empirical requirement was inapplicable.[262]

Of course, part of what distinguished *Evenson* from *Kendrick* was that the speech being regulated in *Evenson* already had been identified by the Supreme Court as harmful to minors. Still, the underlying problem is that the Supreme Court has not adopted the principle that speech can be censored only if it is shown to be harmful to minors. *Ginsberg* suggested that the government need not meet such a burden, at least when sexual speech is being suppressed,[263] and Posner extended this logic to hold that the government need not satisfy this requirement whenever common sense

253. *Id*.
254. *Id.*
255. *Id*.
256. *Id*. at 579-80.
257. *Id.* at 579.
258. *See* State v. Evenson, 33 P.3d 780, 785-86 (Ariz. Ct. App. 2001).
259. *Id*. at 782.
260. *Id.* at 786 n.10.
261. *Id*.
262. *Id.* (quoting *Kendrick*, 244 F.3d at 579 (discussing Ginsberg v. New York, 390 U.S. 629 (1968)).
263. *See supra* notes 245-46 and accompanying text.

suggested that speech was harmful.[264] The Supreme Court should reject these inferences and clarify that child-protection censorship will be upheld only if there is credible evidence of the regulated speech's harmfulness.[265]

Of course, once the Supreme Court has found that empirical evidence supports the conclusion that a certain type of speech is harmful to minors, lawmakers should not be forced to meet this empirical burden whenever they regulate the same type of speech. Opponents still should be permitted to present new evidence to challenge the Court's conclusion. But supporters of the regulation should not be forced to repeat the process of submitting empirical evidence on an issue that already has been adjudicated.

ii. The Limits of the "Harmful Speech" Exception

Empirical proof of "harmfulness to minors" cannot, by itself, justify a First Amendment exception for child-protection censorship. Social scientists, after all, might be able to show that minors would be upset by a wide range of information, including information about AIDS, abortion, the Holocaust, or other controversial or disturbing topics. Empirical proof that harm might exist, thus, cannot give the government *carte blanche* to censor.

Courts wrestling with the "harmful to minors" exception, therefore, must consider not only the empirical evidence of harmfulness but also the value of the speech being regulated. Of course, the notion of courts ranking speech is anathema to the First Amendment. The picture of judges deciding which speech is worthy of protection stands in stark contrast to the "bedrock principle" that the government may not choose which ideas it favors.[266] Nevertheless, courts have never been able to fully escape the process of ranking speech. The Supreme Court's jurisprudence in the obscenity and commercial speech areas offers the most vivid examples of speech ranking,[267] but ranking also appears more subtly in such areas as

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264. *See supra* notes 247-57 and accompanying text.

265. While a judge's common sense belief that speech is harmful should not eliminate the need for empirical proof of harm, it might help lessen the government's burden of proof. *Cf.* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 391 (2000) ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.").

266. *See* Texas v. Johnson, 491 U.S. 397, 414 (1989); *see also* SMOLLA, *supra* note 45, § 4:8 (stating that "[a]ll ideas are created equal in the eyes of the First Amendment—even those ideas that are universally condemned and run counter to constitutional principles").

267. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (creating an intermediate standard of review for regulations of commercial speech); Miller v. California, 413 U.S. 15, 23 (1973) (reaffirming that obscene speech is not protected by the First Amendment).

defamation and government employee speech.[268]

Child-protection censorship may be another area in which courts have little choice but to rank speech. For courts to do this credibly, they must act in a way that limits their discretion as much as possible. How courts can best do this is explored in Part IV, which considers how child-protection censorship can be kept within tolerable limits.[269]

b. The Government's Interest in Supporting Parents

The second theory for justifying child-protection censorship is that it is necessary to help parents control the upbringing of their children. Parents presumably do not want their children to become violent, cigarette-smoking, sex perverts, but they may think it difficult to prevent that result if their children are constantly playing violent video games, admiring chain-smoking camels, and ogling Internet pornography.

State empowerment of parents is in many ways an attractive basis for a First Amendment exception. This is because parents' right to control their children's upbringing is itself of constitutional pedigree. The Supreme Court has referred to the "liberty of parents and guardians to direct the upbringing and education of children under their control"[270] and has said that it is a basic tenet of our society that parents have "authority in their own household to direct the rearing of their children."[271] It would not be surprising, then, for the Court to find a compelling governmental interest in shielding children from speech that their parents think is inappropriate.[272]

Yet the right of parents to control their children's upbringing does not

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268. *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985) (allowing a private defamation plaintiff to recover presumed and punitive damages even in the absence of "actual malice" if the speech does not involve "matters of public concern"); Connick v. Myers, 461 U.S. 138, 142 (1983) (giving greater protection to government employee expression relating to matters of public concern).

269. *See infra* Parts IV.A.1.b, IV.A.2.b, IV.A.3.b.

270. Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534-35 (1925).

271. Ginsberg v. New York, 390 U.S. 629, 639 (1968).

272. One benefit of finding a compelling interest under this rubric is that it comes with a self-limiting principle: that the Court is likely to find a compelling interest to override the First Amendment only when there is a competing constitutional right at stake. Such a principle dovetails nicely with one of the few other exceptions to the First Amendment's general prohibition on content-based regulations: laws intended to protect the fundamental right to vote. This principle was illustrated in *Burson v. Freeman*, in which the Supreme Court upheld a content-based ban on soliciting within one hundred feet of a polling place. 504 U.S. 191, 211 (1992). The Court acknowledged that this was a "rare case" in which a law "survive[d] strict scrutiny" but said that this occurred because "free speech rights conflict[ed] with another fundamental right, the right to cast a ballot in an election free from the taint of intimidation and fraud." *Id*.

necessarily imply a right to state censorship. Parents, after all, already have tremendous power to control their children's upbringing, particularly during pre-adolescent years. The Supreme Court might reasonably conclude that parents' child-rearing abilities will only be slightly impaired if the government does not assist them by censoring speech.

The Court also might conclude that parents should have to compete with the marketplace of ideas for influence on their children. This notion was raised in *Wisconsin v. Yoder*,[273] which concerned the right of Amish parents to remove their children from school after eighth grade.[274] The parents expressed concern that "high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students," all of which the parents said were incompatible with Amish values.[275] The Supreme Court ruled in favor of the parents,[276] but some Justices openly questioned the propriety of helping parents deprive their children of access to ideas.[277] Even the majority suggested that the case might have been decided differently if the parents had sought to prevent their children from having any secular education, or if the children had wanted to attend high school against their parents' wishes.[278]

The state's interest in regulating speech to facilitate parental control, therefore, rests on shaky ground. The fact that parents have a constitutional right to control their children's upbringing does not necessarily imply that they have a right to state censorship. It is also unclear whether helping parents deny their children access to ideas is a legitimate use of the state's power. If the Court believes that the government has a compelling interest in censoring speech to assist parents, it must explain why parents should not be forced to compete with an uncensored marketplace of ideas and when, if ever, children's interest in access to speech should override their parents' interest in denying them access.[279]

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273. 406 U.S. 205 (1972).

274. *Id.* at 207.

275. *Id.* at 211.

276. *Id.* at 234.

277. *Id.* at 242 (Douglas, J., dissenting in part) (stating that "if an Amish child desires to attend high school, and is mature enough to have that desire respected, the State may well be able to override the parents' religiously motivated objections").

278. *Id.* at 212 (indicating that the Amish "do not object to elementary education"); *id.* at 225 (rejecting the state's claim that this "brief additional period" of formal education was necessary to enable the Amish to effectively participate in society); *id.* at 231 (noting that the state did not claim that the parents "were preventing their children from attending school against their expressed desires"); *see also id.* at 238 (Stewart, J., concurring) (stating that "[t]his would be a very different case . . . if respondents' claim were that their religion forbade their children from attending any school at any time").

279. *See generally* Ross, *supra* note 147 (exploring when children's right to access information should override their parents' objections).

i. Determining When Government Support Is Justified

Even if courts accept that parental support justifies some child-protection censorship, they still must consider whether parents actually want and need this state assistance. A rigorous analysis must consider a number of issues.

State censorship would seem legitimate only if parents actually desired the state's assistance. Of course, a court reviewing a child-protection law might reasonably assume that legislators acted at the behest of a majority of their constituents. Nevertheless, there may be occasions when legislators, responding to a strident minority (e.g., Christian fundamentalists), enact laws that go beyond what most parents want. There also may be communities in which the bulk of the electorate no longer rears children (e.g., a retirement community in Florida), but which nevertheless pushes for stricter speech regulations than the minority of child-rearing parents desires.

Government censorship to assist parents also would seem questionable if parents did not genuinely need state help. If parents could themselves protect their children, there would be little reason for overriding the First Amendment's anticensorship principle. Thus, the state should not be permitted to censor speech if parents, without state censorship, could protect their children by monitoring them at video arcades, installing filtering software on their computers, and rejecting subscriptions to magazines with liquor ads.[280]

The usual response to this argument is that parents need help. Because the media are overwhelmingly pervasive, because children are not always under their parents' control, or because parents lack the time to supervise their children adequately, parents require the government's assistance to ensure that their children are not exposed to harmful ideas.[281]

The constitutional significance of these arguments is not entirely clear. If parents cannot protect their children from exposure to harmful ideas, perhaps governmental intervention is justified. If parents are capable of protecting their children, but are simply too busy, too tired, or too self-absorbed, then the constitutional justification for censorship is questionable. Should state censorship be allowed if parents have the time to monitor their children but simply do not want to do so? Or should it be

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280. *See* Reno v. ACLU, 521 U.S. 844, 855 (1997) (noting that "the evidence indicates that 'a reasonably effective [technological] method by which parents can prevent their children from accessing sexually explicit and other material . . . will soon be widely available'") (quoting ACLU v. Reno, 929 F. Supp. 824, 842 (E.D. Pa. 1996)).

281. FCC v. Pacifica Found., 438 U.S. 726, 750 (1978) (explaining that "the ease with which children may obtain access to broadcast material . . . justif[ies] special treatment of indecent broadcasting").

allowed only if parents do not have time to monitor their children because they are industriously working? Moreover, if there are ways in which the state could facilitate better parental control (e.g., by requiring filtering devices like the V-chip, or by providing tax incentives for parents to stay at home), must the state exhaust these nonspeech alternatives before it can censor speech? In the commercial speech context, for instance, the Supreme Court has insisted that the government use nonspeech regulations to accomplish its goals before it resorts to speech regulation.[282] Should the same rule apply to child-protection censorship?

These issues can become numbingly complex as courts wrestle with whether a regulation is the least restrictive means for protecting children from harmful speech. Consider, for example, the Child Online Protection Act (COPA),[283] which made it illegal for websites to contain harmful information that was accessible to children.[284] Litigants challenging this law might argue that a less restrictive means of protecting children is for parents to monitor their children's Internet use. Such a "leave it to mom and pop" approach, a favorite of civil liberty groups, is undeniably less speech-restrictive than any government regulation. But how much credence do courts have to give this approach? Can a court summarily dismiss it as an "unreasonable" alternative because parents are too busy to monitor their children, or must it first be convinced that parents have exhausted all possible self-help remedies (such as installing filtering software) before it will permit the government to resort to censorship? Similarly, if effective filtering software is not available or if it is too expensive, should the court require the government to create incentives for the development of the software and to subsidize its purchase by poorer families before the court allows the government to censor?

Yet this only begins the inquiry. For even if parents could easily install cheap and effective filtering software on their home computers, children still might have access to computers at their friends' homes, Internet cafés, or libraries. Does this mean that the filtering solution is not a "reasonable" alternative to the government regulation? And what if the software blocks only some but not all of the speech that would be implicated by the government's regulation? Is this "some but not all" alternative close enough to be considered a "reasonable" alternative?

These issues provided fodder for debate in the Supreme Court's recent

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282. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 511 (1996) (stating that it is "quite clear that banning speech may sometimes prove far more intrusive than banning conduct"); *id.* at 530 (O'Connor, J., concurring in the judgment) (stating that the "ready availability" of nonspeech measures for advancing the state's interests "demonstrates that the fit between ends and means is not narrowly tailored").

283. 47 U.S.C. § 231 (2000).

284. *Id.* § 231(a)(1).

decision enjoining COPA's enforcement.[285] For the majority, the possibility of parents using filtering software was clearly a less restrictive alternative to COPA's regulatory scheme backed by criminal sanctions.[286] The fact that this approach depended upon parental cooperation did not seem troubling:

> The need for parental cooperation does not automatically disqualify a proposed less restrictive alternative. . . . COPA presumes that parents lack the ability, not the will, to monitor what their children see. By enacting programs to promote use of filtering software, Congress could give parents that ability without subjecting protected speech to severe penalties.[287]

Justice Breyer, by contrast, was less sanguine that filtering software could solve the problem of child access to harmful speech. First, he noted that "filtering software costs money" and that "[n]ot every family has the $40 or so necessary to install it."[288] He then pointed out that:

> [F]iltering software depends upon parents willing to decide where their children will surf the Web and able to enforce that decision. As to millions of American families, that is not a reasonable possibility. More than 28 million school age children have both parents or their sole parent in the work force, at least 5 million children are left alone at home without supervision each week, and many of those children will spend afternoons and evenings with friends who may well have access to computers and more lenient parents.[289]

Breyer also noted that filtering software is notoriously imprecise.[290] It can block websites that do not have objectionable material while failing to block many pornographic sites.[291]

Whether Breyer's skepticism is justified is a factual question to be addressed at trial. But the Pandora's box of issues raised by COPA provides some insight into the potential complexity of the seemingly simple question: "Do parents need state support?"

Finally, even if a court accepts that parents need state assistance to control their children's access to harmful speech, what should courts do

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285. Ashcroft v. ACLU, 124 S. Ct. 2783, 2792, 2795 (2004).
286. *Id.* at 2792-93.
287. *Id.* at 2793.
288. *Id.* at 2802 (Breyer, J., dissenting).
289. *Id.* (Breyer, J., dissenting).
290. *Id*. (Breyer, J., dissenting).
291. *Id.* at 2802-03 (Breyer, J., dissenting).

with those parents who want their children to have access to the speech? Justice Brennan pointed out in *FCC v. Pacifica Foundation*, for example, that "some parents may actually find Mr. Carlin's unabashed attitude towards the seven 'dirty words' healthy, and deem it desirable to expose their children to the manner in which Mr. Carlin defuses the taboo surrounding the words."[292] Does it violate the rights of these "cool" parents if the government, at the behest of "square" parents, prohibits minors' access to the Carlin routine?

If the liberal parents have access to Carlin's routine, and the government does not forbid them from sharing it with their children, then their constitutional complaint is largely undermined. While they have the additional burden of obtaining the speech for their children, this burden must be weighed against the burden of parents who would have to police their children in the absence of state censorship. The liberal parents might complain that the government's ban teaches children that the language in Carlin's routine is taboo, but the conservative parents could respond that the absence of a ban would teach children that the words are socially acceptable. The practical implications of balancing the interests of these two sets of parents is considered in Part IV, which considers how courts can ensure that child-protection censorship does not infringe on the rights of parents.[293]

ii. The Limits of the "Parental Support" Exception

Even if all parents agreed that the government should deny minors access to speech, there still must be limits on which types of speech the government could ban. Otherwise, the government could deny minors access to information about atheism or the Cuban revolution simply because parents supported it. Just as the state's interest in protecting minors from harmful speech must be limited, so must the state's power to regulate speech on behalf of parents.[294]

But if not all varieties of state censorship on behalf of parents are justified, which ones are? As was true with censorship aimed at protecting minors from harmful speech, the answer depends upon the speech being regulated.[295] Thus, bans on political speech, even if with universal parental support, are unlikely to pass constitutional muster, whereas bans on "low-value" speech, such as indecent but not obscene materials, are more likely

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292. 438 U.S. 726, 770 (1978) (Brennan, J., dissenting).

293. *See infra* Part IV.B.

294. Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954, 959-60 (8th Cir. 2003) ("Nowhere in *Ginsberg* (or any other case that we can find, for that matter) does the Supreme Court suggest that the government's role in helping parents to be the guardians of their children's well-being is an unbridled license to governments to regulate what minors read and view.").

295. *See supra* notes 266-68 and accompanying text.

to be upheld. Once again, this suggests that courts may have no choice but to consider the relative value of the speech being regulated. Suggestions for how courts can keep this discretionary process within principled limits are considered in Part IV.[296]

Finally, one might expect that parental efforts to suppress speech that is not harmful to minors will be met with skepticism. Courts might conclude that the First Amendment prevents the government from censoring nonharmful speech merely because parents want it suppressed. If this proves to be true, then the parental support theory will justify the suppression of speech only if the speech is also shown to be harmful. Conversely, courts might be equally unwilling to uphold censorship on the harm theory if the majority of parents wanted their children to have access to the censored speech. If both of these propositions prove true, then the parental support and harm theories for justifying child-protection censorship will be inextricably related. Neither theory by itself would justify the censorship. Instead, courts would uphold the censorship only if it was supported by both theories (i.e., the speech was considered harmful and most parents supported its suppression).

IV. CAN CHILD-PROTECTION CENSORSHIP BE KEPT WITHIN TOLERABLE LIMITS?

Even if child-protection censorship furthers one of the two interests identified in Part III, it still may be unconstitutional. It seems highly unlikely, for example, that minors could be denied access to information about evolution even if most parents thought the information inappropriate or social scientists demonstrated its harmfulness. This censorship would raise serious concerns as to whether minors' First Amendment rights were being violated. Similarly, even when child-protection censorship legitimately denied minors access to speech, it still may be unconstitutional if, in denying minors access to speech, it also denied adults access.[297]

These concerns point to the problem of keeping child-protection censorship within tolerable limits. This Part considers that problem by exploring how child-protection censorship can be structured to ensure that it does not impinge upon the rights of the three constituencies most directly affected by the law: (a) minors; (b) parents; and (c) adults.

A. *Protecting the Rights of Minors*

Minors must have some First Amendment rights. Otherwise, the government could deny them access to virtually anything, including ideas

296. *See infra* Parts IV.A.1.b, IV.A.2.b, IV.A.3.b.

297. *See supra* note 14 and accompanying text.

about homosexuality, atheism, or socialism. If, as the Supreme Court has said, minors possess First Amendment rights but those rights are not co-extensive with those of adults,[298] then judges must identify which ideas are unprotected as to minors even though protected as to adults.

For judges to do this, they must consider the value of the speech being censored.[299] This process is at loggerheads with the First Amendment's "neutrality" principle, which prohibits the government from deciding which ideas are worthy of public discourse, but it is unavoidable once courts conclude that some, but not all, speech aimed at minors may be regulated. The Supreme Court, in fact, has often been forced to rank speech in its First Amendment jurisprudence.[300] The Court, for example, has said that obscene speech is not protected,[301] that commercial speech is given reduced protection,[302] and that speech on matters of public concern is protected more than speech on matters of private concern.[303]

Judges will have to engage in a similar ranking process when they evaluate child-protection censorship. They cannot avoid this process, but they can structure it in a way that limits their discretion. The obvious way to do this is to build child-protection censorship rules upon the structure

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298. *See supra* notes 14-15 and accompanying text.

299. *See supra* notes 266-68 and accompanying text.

300. Justice Stevens has candidly acknowledged the need for ranking speech. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 422 (1992) (Stevens, J., concurring in the judgment) (stating that "[o]ur First Amendment decisions have created a rough hierarchy in the constitutional protection of speech"). Others have indicated that it is inappropriate for the Court to do so. *See generally* DANIEL A. FARBER, THE FIRST AMENDMENT 36-37 (2d ed. 2003) (discussing Justice Stevens's argument that the Court should place less emphasis on the prohibition on content discrimination); KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 135 (1999) (discussing Justice Stevens's campaign for ranking speech and the opposition to it).

Sullivan and Gunther summarize the debate over the desirability of ranking speech:

> Can the "lower value" approach be defended as enabling the Justices to deal sensibly with relatively insignificant speech without risking dilution of the protection for "political" expression at the core of the First Amendment? Or does the "lower value" approach show the weakness of judicial efforts to check majoritarian repression, by defining speech as "less valuable" in exactly those situations where it most sharply attacks majoritarian values?

Id.

301. Miller v. California, 413 U.S. 15, 23 (1973).

302. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (creating an intermediate standard of review for content-based regulations of commercial speech).

303. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985) (providing greater protection for defamatory remarks about matters of public concern than for matters of private concern); Connick v. Myers, 461 U.S. 138, 142-43 (1983) (providing greater protection for government employee speech on matters of public concern than for matters of private concern).

created by existing First Amendment jurisprudence. By developing rules that hew closely to the lessons of earlier jurisprudence, judges minimize the risk that their actions will seem arbitrary.

If judges were to do this, they would base child-protection censorship jurisprudence upon two fundamental lessons. The first is that all content-based regulations are inherently suspect.[304] This lesson derives from the anticensorship principle.[305] When applied to child-protection censorship, it means that all child-protection censorship is presumptively unconstitutional. This does not mean that judges can never find this legislation constitutional. To the contrary, Part III presented arguments for why governmental censorship to protect children may sometimes be permitted notwithstanding the anticensorship principle.[306] But the lesson does instruct judges to scrutinize child-protection censorship with a skeptical eye. Unless they find a law adequately protective of speech interests, they should find it unconstitutional.

The second lesson is that not all speech is alike. The Supreme Court's recognition that some types of speech are more valuable than others suggests that child-protection censorship affecting any category of "higher" valued speech is particularly suspect. Thus, the fact that the Court has repeatedly acknowledged that "political speech" goes to the core of First Amendment values suggests that child-protection censorship denying minors access to political speech clearly would be unconstitutional.[307] This principle ensures that efforts to deny minors access to information about socialism or the Vietnam War, for example, would be promptly invalidated.

The categories of higher valued speech, however, are much broader than mere political speech. Indeed, they cover almost the entire gamut of knowledge, from science to the arts.[308] Child-protection censorship seeking to censor any of these categories of speech (e.g., atheism, AIDS, Renaissance art) would thus have to overcome a strong presumption of unconstitutionality.

The opposite of "high-value" speech is not nonpolitical speech but a

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304. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) (stating that "[o]ur precedents . . . apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content").

305. *See supra* Part III.A.

306. *See supra* Part III.B.2.

307. R.A.V. v. City of St. Paul, 505 U.S. 377, 422 (1992) (Stevens, J., concurring in the judgment) (stating that "[c]ore political speech occupies the highest, most protected position" in First Amendment jurisprudence).

308. SMOLLA, *supra* note 45, § 2:46 (stating that the Supreme Court has "steadfastly refused" to limit First Amendment protection to just political speech, and that instead its protection extends "to the almost infinite range of artistic, scientific, religious, and political issues that vex and cajole the human imagination").

narrow range of speech that, in the famous words of *Chaplinsky v. New Hampshire*, plays "no essential part of any exposition of ideas."[309] This range is extremely narrow—even many of the categories identified in *Chaplinsky* as unprotected are now protected.[310] Yet *Chaplinsky* reflects the principle that certain categories of speech are of such limited First Amendment value that they are subject to greater governmental control.[311] This suggests that child-protection censorship is most likely to be upheld when it regulates speech that borders one of these "low-value" areas of speech.

Fortunately, this borderland is where legislators usually seek to censor speech aimed at minors. Legislators typically have not denied minors access to information about socialism or evolution, and when they have, their efforts have been met with skepticism.[312] Instead, they have regulated along the edges of speech that the Supreme Court has already identified as having limited First Amendment protection.[313] Thus, they have tried to deny minors access to sexual speech that was not quite "obscene"; violent speech that was not quite "incitement"; and commercial speech that was not quite for "illegal" products. These are the logical places for legislators to regulate minors' access to speech. The question is whether their attempts to regulate speech beyond that which is unprotected to adults is constitutional. The constitutionality of child-protection censorship in each of these areas is considered below.

1. Regulation of Indecent Speech

Probably the most active area of child-protection censorship concerns laws attempting to deny minors access to sexual materials.[314] Of course, the Supreme Court has already said that obscene materials are not protected by the First Amendment.[315] Child-protection censorship tests the limits of the

309. 315 U.S. 568, 572 (1942).

310. SMOLLA, *supra* note 45, § 2:70 (noting that many of the classes of speech identified in *Chaplinsky* as unprotected "now receive substantial amounts of First Amendment protection").

311. *Chaplinsky*, 315 U.S. at 571-72.

312. *See, e.g.*, Zeke MacCormack, *Wish They May, Harry Won't Vanish: Few Schools Are Charmed into Banishing Potter Books*, SAN ANTONIO EXPRESS-NEWS, Jan. 11, 2002, at 1B (stating that "[d]espite extensive protests, the American Library Association says few public school districts have kept students from reading" the *Harry Potter* books).

313. *See supra* notes 148-52 and accompanying text.

314. *See, e.g.*, United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 806 (2000) (discussing act regulating sexually-explicit programming on cable television); Reno v. ACLU, 521 U.S. 844, 859-60 (1997) (discussing act regulating sexual speech on the Internet); Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 734-35 (1996) (discussing act regulating sexually-explicit programming on cable television); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 117 (1989) (discussing act regulating sexually-explicit telephone messages).

315. Miller v. California, 413 U.S. 15, 23 (1973).

First Amendment only when it suppresses nonobscene sexual material.[316]

Part III suggested that any censorship of this "indecent"speech should first pass empirical hurdles. More specifically, the government should offer evidence that the speech is harmful to minors and that the regulation is using the least restrictive means available to accomplish its objective.[317] Assuming the government has met these burdens, a court then must determine whether the regulation is sufficiently precise to pass constitutional muster. Each of these issues is discussed below.

a. The Empirical Evidence on Indecent Speech

The requirement of empirical proof of harm is particularly troublesome in the context of sexual speech. To begin with, there is a paucity of empirical evidence. As noted in Part III, it is thought unethical if not illegal to expose minors to explicit sexual materials.[318] Consequently, little research exists examining the impact of such speech.[319] Studies exist on the impact of mainstream materials on minors, such as minor responses to sexual content on television.[320] There are also studies on the impact of sexually-explicit materials on adults.[321] Extrapolations also can be made from studies done with other types of speech, particularly violent speech.[322]

Even if adequate data can be found, other problems emerge. What, for instance, can legitimately be considered a "harm" resulting from sexually-explicit speech? Is it harmful if it leads to minors engaging in protected sex? Is it harmful if children become aware of their sexuality at an earlier age? Is it harmful if children believe it appropriate to have multiple sex partners or for married individuals to have affairs? While the answers to these questions might be a resounding "yes" from a segment of the population, it seems unlikely that there is a societal consensus that these are harmful ideas. Parents differ widely over when and how they want their children to become aware of their own sexuality. The adult world also

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316. Legislation often refers to such materials as merely "indecent." *See, e.g.*, *Reno*, 521 U.S. at 859 (discussing act regulating indecent as well as obscene speech).

317. *See supra* Parts III.B.2.a.i., III.B.2.b.i.

318. *See supra* notes 211-12 and accompanying text.

319. *See* Etzioni, *supra* note 66, at 38 (noting that "[e]thical considerations prevent researchers from conducting experiments that directly test the effects of pornography on children" so that "those who make strong arguments about why it is undesirable to expose children to such materials must do so without evidence supporting their claims").

320. *See* YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 18, § 6.2.3, at 153 (noting that "[m]ost studies of the impact of sexually explicit material in the media on adolescents' sexual attitudes and practices have been limited to the sexual content in mainstream media").

321. *See* ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY, FINAL REPORT OF THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY 31-48 (Rutledge Hill Press 1986).

322. *See* YOUTH, PORNOGRAPHY, AND THE INTERNT, *supra* note 18, § 6.2.1 (describing corpus of empirical work on the impact of violent materials on children).

evinces a wide range of sexual relations and behaviors.[323]

Finding these ideas harmful would be particularly troubling in light of the Supreme Court's acknowledgment that sex is "a great and mysterious motive force in human life" and "a subject of absorbing interest to mankind through the ages."[324] How could a subject of such enduring importance be off-limits to minors? The Supreme Court has further recognized that even unorthodox ideas about sexuality are fully protected in the adult world. For example, in *Kingsley International Pictures Corp. v. Regents of the University*, the Court held that a film could not be banned merely because it portrayed adultery in a favorable light.[325] Similarly, in *Ashcroft v. Free Speech Coalition*, the Court held that the idea of minors engaging in sex was fully protected.[326] If these unconventional ideas are legitimate in the adult world, it might be surprising to find them illegitimate in the world of minors.

Rather than focusing on these more controversial types of harms, courts would be safer defining the harms from sexual speech in more limited terms. Courts, for instance, might safely say that speech that causes children to engage in unprotected sex is harmful. They probably also could conclude that speech that causes minors to engage in sexual violence is harmful. Finally, and most controversially, they might conclude that minors, particularly young minors, are emotionally disturbed by exposure to explicit sexual materials and that such exposure is therefore harmful.

Even if these harms are thought to be legitimate, courts still must confront perplexing issues as to whether speech causes these harms. For instance, if the harm is minors engaging in unprotected sex (e.g., resulting in the spread of disease or unwanted pregnancies), then the problem might be due to a lack of access to sexually-explicit speech rather than the opposite. The harm might best be addressed by providing minors with sexually-explicit materials about birth control and sexually-transmitted diseases.[327] Of course, some might say that the goal of the law should be to encourage abstinence by limiting minors' access to materials that encourage sexual relations. This is not an unreasonable position. Indeed, some studies have found that minors who frequently watch "television with a high degree of sexual content [a]re more likely to engage in sexual

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323. The Supreme Court has powerfully endorsed the right of citizens to engage in consensual sexual relations without interference from the state. *See* Lawrence v. Texas, 539 U.S. 558, 560 (2003) (finding unconstitutional a Texas law criminalizing homosexual sodomy).

324. Roth v. United States, 354 U.S. 476, 487 (1957).

325. 360 U.S. 684, 688-89 (1959).

326. 535 U.S. 234, 246-49 (2002).

327. *See* Mireya Navarro, *Experts in Sex Field Say Conservatives Interfere with Health and Research*, N.Y. TIMES, July 11, 2004, § 1, at 16 (stating that "the American Association of Sex Educators, Counselors and Therapists called the Bush administration's increased financing of abstinence-only programs at the expense of comprehensive sex education a violation of children's human rights").

intercourse than those who" watch television with less sexual content.[328] But there are two problems with this approach. First, it seems clear that the idea that "sex is good" cannot be considered harmful to minors. Sex cannot be both a "great and mysterious motive force in human life"[329] and off-limits to minors. Suppressing the message that "sex is good" could give minors the psychologically destructive signal that their interest in sex is unhealthy. This would be a throwback to the oppressive times when Anthony Comstock warned that sexual literature "'breeds lust'"[330] and when Boy Scout manuals warned that "semen had to be hoarded."[331] Second, the idea that "sex is good" is not exclusively conveyed by sexually-explicit materials. Indeed, it pervades modern American culture and is present in virtually every form of media. Denying minors access to sexually-explicit materials is therefore likely to do little to advance the cause of abstinence.

Discouraging violence in sexual relations is a more credible basis for regulating minors' access to sexual materials. Empirical studies have found a correlation between exposure to violent sexual materials and aggressive behavior toward women.[332] Indeed, even critics of child-protection censorship often acknowledge this connection.[333] The irony courts confront in this context is that Supreme Court obscenity jurisprudence has focused entirely on speech's sexual nature (i.e., its "appeal to the prurient interest") as opposed to its violent nature.[334] The same has generally been true of governmental efforts to regulate nonobscene indecent speech.[335] Nevertheless, discouraging sexual violence might be a legitimate ground for regulating minors' access to speech.

Finally, the potential harm of exposing minors, especially young minors, to explicit sexual materials might be a basis for regulating indecency. Here there likely is little empirical evidence because of ethical

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328. YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 18, at 154 (also noting to the contrary that "it is unclear whether viewing such content contributes to a teen's decision to engage in intercourse, or instead, whether those who are already engaging in sexual activity are more likely to seek out such programs").

329. *Roth*, 354 U.S. at 487.

330. HEINS, *supra* note 6, at 30 (quoting ANTHONY COMSTOCK, FRAUDS EXPOSED 416 (1880)).

331. *Id*. (quoting ERNEST THOMPSON SETON, BOY SCOUTS OF AMERICAN: A HANDBOOK OF WOODCRAFT, SCOUTING, AND LIFE-CRAFT xii (1910)).

332. YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 18, § 6.2.2, at 152 (describing research on the impact of sexually-violent materials).

333. Ross, *supra* note 43, at 505 (stating that, "[i]n contrast to the dearth of support for the notion that sexually explicit speech is harmful, substantial social science research . . . lends support to the allegation that violent speech may lead some children to violent attitudes or actions").

334. Miller v. California, 413 U.S. 15, 24 (1973) (defining obscenity as speech which "appeals to the prurient interest"); Roth v. United States, 354 U.S. 476, 487 & n.20 (1957) (defining "prurient" material as "material having a tendency to excite lustful thoughts").

335. Ashcroft v. ACLU, 124 S. Ct. 2783, 2789 (2004) (stating that the Child Online Protection Act definines speech as "harmful to minors" when it "is designed to appeal to, or is designed to pander to, the prurient interest") (quoting 47 U.S.C. § 231(e) (6) (2000)).

and legal restraints on research.[336] Therefore, courts might have to rely on empirical studies of adults and on psychological theories about the impact of sexually-explicit materials on children.[337] They also might consider by analogy studies on violent materials.[338] This also may be an area where courts will have to give legislators some "breathing room" in their obligation to meet the empirical burden.[339] At the same time, courts should be attentive to the developmental differences among minors. Regulations sheltering younger minors from sexually-explicit speech might be much more compelling than those limiting the access of mature minors.

b. Keeping Regulation of Indecent Speech Within Tolerable Limits

Assuming the government can meet the burden of establishing that indecent speech is harmful to minors, the next question is whether any given regulation is narrowly tailored to achieve the government's objective. A court must determine whether the government has used the least restrictive means available to accomplish its goal and has defined the regulated speech in ways that are neither vague nor overbroad.[340]

Some of these issues have been addressed previously. For instance, whether a regulation is the least restrictive means available may depend upon the ability of parents to monitor their children, including their ability to use screening devices like V-chips or filtering software.[341] Even if government regulation is necessary to assist parents, there still may be less-speech-restrictive ways of regulating. For instance, a regulation that denies

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336. *See supra* notes 211-12 and accompanying text.

337. *See* YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 18, at 153-60 (describing research on the impact of nonviolent sexual material).

338. *Id.* §§ 6.2.1.-2.

339. *See supra* notes 220-21 and accompanying text.

340. *See supra* notes 45, 75-80 and accompanying text.

341. *See supra* Part III.B.2.b.i. Whether screening devices can effectively and constitutionally shelter children from "bad" speech while not interfering with their access to "good" speech is a matter of considerable contention. Filtering systems are only as good as the mechanism used for separating the speech, whether it be decisions made by a human or automatically by a computer. Moreover, the constitutionality of the system (at least when the rules for the system are embodied in law) will largely turn on whether the rules identifying the regulated speech are not vague and do not sweep in areas of protected speech. Even if the filtering mechanism is privately designed and administered, it still might serve speech interests poorly, even if it does not implicate the First Amendment. (In other words, are we confident that AOL or Disney will make good choices as to what our children should see?) *See generally* J.M. BALKIN ET AL., YALE LAW SCH.,FILTERING THE INTERNET: A BEST PRACTICES MODEL (1999) (discussing the pros and cons of various filtering systems and proposing best practices for Internet self-regulation), *at* http://islandia.law.yale.edu/isp/papers/Filters0208.pdf. (last visited Mar. 14, 2005); Lawrence Lessig, *What Things Regulate Speech: CDA 2.0 vs. Filtering*, 38 JURIMETRICS J. 629 (1998) (discussing whether filtering is a constitutional solution to the perceived problem of indecency); R. Polk Wagner, *Filters and the First Amendment*, 83 MINN. L. REV. 755 (1999) (discussing the use and effectiveness of filters).

both adults and children access to speech would be unconstitutional if it was possible to deny access to only minors.[342]

This Part will focus on the problems of vagueness and overbreadth in indecency regulation.[343] Overbreadth problems arise when a law regulates both protected and unprotected speech.[344] Imagine, for instance, a law that denied minors access to materials depicting "human nudity." This law is not vague because its scope is clear, but it is overbroad because it affects both protected and unprotected speech. The law would be unconstitutional because it would deny minors access to art history books, sex-education materials, and movies with even the mildest scenes of nudity.[345] By contrast, a law that denied minors access to "indecent" materials, without defining indecency, would be unconstitutionally vague. It would be unconstitutional because it would give people little guidance as to what speech is covered by the prohibition.[346] People might choose not to disseminate even protected speech for fear that it might fall within the law's vague parameters.

Vagueness and overbreadth problems are endemic to any area of unprotected speech. Unless the Supreme Court can define the unprotected area with adequate precision, legislators must regulate without clear guidance as to when their laws will cross the line from unprotected to protected speech. The Court has had a particularly hard time defining which sexual materials are unprotected by the First Amendment. For years the Court could not agree on a workable definition of obscenity.[347] A majority finally agreed to the test developed in *Miller v. California*,[348] but many judges and commentators continue to find this definition unworkable.[349]

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342. *See supra* note 16 and accompanying text.

343. Vagueness and overbreadth problems have frequently been the basis for invalidating child-protection censorship laws. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 874 (1997) (finding the Communications Decency Act unconstitutionally vague); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 678, 690 (1968) (invalidating a municipal licensing scheme that classified motion pictures as "not suitable for young persons" because of its vague standards).

344. CHEMERINSKY, *supra* note 49, § 11.2.2, at 912-13.

345. *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205, 213 (1975) (stating that "[c]learly all nudity cannot be deemed obscene even as to minors").

346. CHEMERINSKY, *supra* note 49, § 11.2.2, at 910 (stating that a law is "unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted").

347. SULLIVAN & GUNTHER, *supra* note 300, at 109 (describing the Court's "Redrup" approach, in which it issued *per curiam* reversals of convictions whenever five or more Justices, "applying their separate tests," found the disseminated material not to be obscene).

348. 413 U.S. 15, 24 (1973).

349. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 84 (1973) (Brennan, J., dissenting) (stating that none of the Court's formulas for defining obscenity, including the *Miller* test, "can reduce the vagueness [of the tests] to a tolerable level"); *see also* CHEMERINSKY, *supra* note 49, § 11.3.4.2, at 985 (noting that "some argue that obscenity should not be a category of unprotected expression because of the impossibility of formulating a definition that is not impermissibly vague or overbroad").

Legislators intending to deny minors access to indecent materials must build upon this shaky foundation. For some critics of indecency regulation, this is an impossible task. They believe that any law that bans indecent speech will inevitably chill protected speech. The line-drawing problem, they contend, is simply insurmountable.

Ira Glass, the host of the public radio program *This American Life*, eloquently made this point in a recent New York Times Magazine article entitled *Howard and Me*.[350] He comments on how the recent FCC crackdown on *The Howard Stern Show* could just as easily have been directed at his own show.[351] He acknowledges that "lots of smart people shrug off" the crackdown on Stern "as if it were nastiness going on in some bad neighborhood of the broadcast dial," but he explains that the FCC's action has made him "Stern's brother as I've never been before."[352] He notes that curse words had previously been broadcast on his show, as had a David Sedaris story about "excretory organs or activities," and that these programs are just as vulnerable to FCC sanctions as anything on Stern's show.[353]

Glass also implicitly suggests that the overbreadth problem cannot be solved by limiting government censorship to "low-value" programming (i.e., *The Howard Stern Show* but not *This American Life*). He alludes to the impossibility of honestly making this distinction by pointing to the important artistic and social value of the Stern show:

> I'm the host of a show on public radio, and when my listeners tell me they don't care for Stern, I always think it reveals a regrettable narrowness of vision. Mostly, they're put off by the naked girls. But Stern has invented a way of being on the air that uses the medium better than nearly anyone. He's more honest, more emotionally present, more interesting, more wide-ranging in his opinions than any host on public radio. Also, he's a fantastic interviewer. He's truly funny. And his staff on the air is cheerfully inclusive of every kind of person: black, white, dwarf, stutterer, drunk and supposed gay. What public radio show has that kind of diversity?[354]

While Glass's points are well taken, what conclusion can be drawn from them? Do they mean that government regulation of broadcast indecency can never be permitted because it is impossible to draw constitutionally tolerable limits? Many civil libertarians, of course, would

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350. Ira Glass, *Howard and Me*, N.Y. TIMES, May 9, 2004, § 6, at 18.
351. *Id.*
352. *Id.*
353. *Id.*
354. *Id.*

subscribe to this position, but it seems unlikely that the courts would, or should, do so. The notion that there can be no limits on explicit violent or sexual content, regardless of the time of day or the likely audience, seems counterintuitive. It assumes either that exposing minors to this material is harmless, or that this harm can be avoided by parental monitoring of children. The latter claim, in light of Justice Breyer's earlier observations about the absentee rate of parents, seems factually unsupportable.[355] The former claim, while perhaps difficult to prove empirically, is contrary to the opinions of many, if not most, in the expert community.[356] Neither can those who oppose indecency regulation because of its vagueness take refuge in the argument that the government always can regulate obscene speech. This may be true as a matter of First Amendment jurisprudence, but it only skirts the issue. Obscenity has the same vagueness and definitional problems as indecency; the doctrines are merely two peas in the same pod.

If courts are unwilling to forbid all indecency regulation, they will have to wrestle with the difficult problem of keeping this regulation within constitutionally tolerable limits. While this may be a nearly impossible task, it is perhaps one worth pursuing. Indeed, even Justice Brennan, who ultimately concluded that obscene speech must be protected because it is impossible to define, nevertheless agreed that this admittedly undefinable speech could be kept from minors.[357]

How, then, can courts police the regulation of indecency to ensure that the Ira Glasses, as well as the Howard Sterns, of the world can sleep at night? There is, of course, no magical rule to pull out of a hat to solve this problem. To the contrary, indecency analysis is likely to remain highly contextual, depending upon when and where the speech was communicated, the likely audience, and the accessibility of the speech to children. To protect First Amendment interests adequately, courts must find ways to compensate for the inherent vagueness in the indecency standard. In this regard, there may be lessons to be learned from the admittedly less-than-perfect *Miller* obscenity test.

Miller's first lesson is that obscenity laws must "specifically define[]" the speech being regulated.[358] Courts similarly should require any indecency regulation to be as specific as possible. This specificity could refer not just to the images or speech involved, but also to the time and

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355. *See supra* note 289 and accompanying text.

356. *See supra* notes 43, 97 and accompanying text.

357. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 79-80, 106-07 (1973) (Brennan, J., dissenting).

358. Miller v. California, 413 U.S. 15, 24 (1973) (stating that an obscene work must depict or describe in "a patently offensive way, sexual conduct *specifically defined* by the applicable state law") (emphasis added).

place in which the speech is communicated. If parties have to speculate about whether they are violating the law, First Amendment principles should dictate that their speech is protected.[359]

Miller also provided that the government could regulate only a work that, "taken as a whole, lacks serious literary, artistic, political, or scientific value."[360] As Justice Brennan rightfully pointed out, this test is itself deficient because it allows works of value to be suppressed as long as their value is not "serious."[361] But the test sends a signal to courts that they must be cautious in ensuring that obscenity regulations do not impinge upon works of value. This should be equally true of any indecency regulation. Of course, Ira Glass might argue that this distinction is impossible to make.[362] But perhaps the way to compensate for this difficulty is not to deprive the government of any power to regulate, but rather to limit its power to "channeling" speech away from those times and places where children are most likely to be exposed. Courts also can compensate for the ambiguous nature of the standard by placing restrictions on the sanctions available to the government. Criminal sanctions or severe fines would be

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359. One of the primary complaints about the FCC's recent clampdown on broadcast indecency is that the agency has failed to specifically define what constitutes "indecency." *See* Scott Robson, *You Can't Do That on Television!*, N.Y. TIMES, July 18, 2004, § 2, at 1 (Jeff Filgo, the executive producer of *That 70's Show*, notes that "[t]he problem is the F.C.C. is trying to enforce a standard that doesn't exist"). FCC Chairman Michael Powell responded to this complaint in an Op-Ed in the New York Times:

> For material to be indecent in the legal sense it must be of a sexual or excretory nature and it must be patently offensive. Mere bad taste is not actionable. Context remains the critical factor in determining if content is legally indecent. Words or actions might be acceptable as part of a news program, or as an indispensable component of a dramatic film, but be nothing more than sexual pandering in another context. That context and the specific facts of each program are reasons the government can't devise a book of rules listing all the bad stuff. In 2001, however, the agency issued policy guidelines summarizing the case law on indecency, and each new ruling since then clarifies what is prohibited.

Michael K. Powell, *Don't Expect the Government to Be a* V-Chip, N.Y. TIMES, Dec. 3, 2004, at A29; *see also* Stephen Labaton, *Indecency on the Air, Evolution at F.C.C.*, N.Y. TIMES, Dec. 23, 2004, at E1 (stating that Chairman Powell had evolved from an "unbridled libertarian" who opposed indecency regulation to an "aggressive enforcer," but suggesting that this evolution might have occurred for political reasons: Powell "concluded that he could not carry on his fight against the indecency rules and also survive politically to carry out the rest of his agenda"). *See generally* FCC Policy Statement on Broadcast Indecency, *supra* note 27 (providing an overview of the Commission's enforcement policies on broadcast indecency).

360. *Miller*, 413 U.S. at 24. *Miller*'s "serious value" prong is based on a national standard and not, like the prurience and patently offensive prongs, on local community standards. Ashcroft v. ACLU, 535 U.S. 564, 579 (2002).

361. *Paris Adult Theatre I*, 413 U.S. at 97 (Brennan, J., dissenting).

362. *See supra* note 354 and accompanying text.

inappropriate in any context in which the speech arguably has redeemable value and the speaker reasonably could have believed that the speech would not have been actionable.

Lawmakers sometimes have drawn on the *Miller* obscenity model in drafting indecency regulations. One of the more common approaches has been to modify the *Miller* test by adding the language "as to minors" to each of *Miller*'s three criteria.[363] Critics might rightfully say that this only adds a vague step to an already vague standard, but it should be acceptable as long as legislators adhere to *Miller*'s second prong, which requires that they "specifically define[]" the type of sexual materials being regulated.[364] If legislators adhere to this requirement, their laws may overcome a vagueness challenge.[365] The question, then, would be whether such laws were overbroad. This would depend on how sensitive the legislators were to free speech interests. If they regulate only speech near the outer edge of the obscenity exception, if they choose to channel speech rather than ban speech, and if they place strict limits on any sanctions so that speakers legitimately testing the regulation's limits will not be cowed into silence, then their regulations will more likely be upheld.

2. Regulation of Speech Depicting or Advocating Violence

Unlike obscene speech, speech depicting or advocating violence or unlawful behavior is generally protected by the First Amendment. Speech advocating violence or lawlessness is protected except when directed to inciting imminent lawless action and when likely to produce such action.[366] Speech depicting violence is similarly protected.[367]

While this speech is largely protected as to adults, the logic underlying its protection suggests that a broader range of speech might be unprotected

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363. *See, e.g.*, State v. Evenson, 33 P.3d 780, 782 (Ariz. Ct. App. 2001) (describing an Arizona statute that defines the unprotected speech by using a modified *Miller* test).

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

365. *See* Nunziato, *supra* note 14, at 127 (noting that *Miller*'s specificity requirement "helps to reduce the potential for unconstitutional vagueness").

366. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). A speaker can lose First Amendment protection by conspiring with another to commit an unlawful act or by directly aiding another's unlawful action. *See, e.g.*, Rice v. Paladin Enters., Inc., 128 F.3d 233, 236, 242-43, 267 (4th Cir. 1997) (finding the First Amendment did not bar an action against the publisher of a "hit man" manual for aiding an abetting three murders).

367. *See, e.g.*, Olivia N. v. Nat'l Broad. Co., 178 Cal. Rptr. 888, 891 (Cal. Ct. App. 1981) (applying *Brandenburg* test to determine liability of television network for broadcasting fictional rape scene that was imitated by teenagers who raped the plaintiff). *See generally* Richard C. Ausness, *The Application of Product Liability Principles to Publishers of Violent or Sexually Explicit Material*, 52 FLA. L. REV. 603, 658-59 (2000) (stating that "[t]hose who claim to have been injured by the portrayal of violent material in movies or video games are . . . unlikely to prevail as long as most courts rely on the *Brandenburg* standard").

as to children. The Supreme Court's leading case, *Brandenburg v. Ohio*,[368] draws a line that focuses on the proximity of speech to a listener's action.[369] If speech is likely to incite "imminent lawless action" by a listener, then the speaker can be punished for inciting the action.[370] But if there is time for the listener to think about his or her response to the speaker's message, then the speaker is protected.[371]

This "imminence" requirement suggests that the causal connection between speaker and actor is severed for purposes of legal responsibility when an actor is capable of deciding for him or herself how to respond to speech. Absent the danger of imminent harm, the speaker may not be punished for voicing an idea no matter how noxious. Responsibility for any improper actions rests with the independent individual who chose to act on the idea and not with the idea's messenger.

This logic suggests that a different standard might be appropriate when speech advocating lawlessness is aimed at minors. The vulnerability of children, particularly their "'inability to make critical decisions in an informed, mature manner,'" suggests that children cannot adequately mediate between what they are told to do and what they should do.[372] Thus, whereas speakers should not be held accountable if adults act on their ideas, they might bear greater responsibility when their words are directed at children.

If one accepts this logic, legislators might be permitted to regulate inciting speech aimed at children even when it does not satisfy the *Brandenburg* test. They also might be permitted to regulate speech that depicts graphic violence on the theory that these depictions might encourage minors to imitate the violence.

Before a court sustains this type of regulation, it should require empirical evidence that the speech being regulated is harmful. If the regulation passes that hurdle, the court should then examine the regulation to make sure that it does not unlawfully impinge upon protected speech.

a. The Empirical Evidence on Violent Speech

The empirical analysis of violent speech is relatively simple compared to that of sexual speech. To begin with, the relevant "harm" is easier to

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368. 395 U.S. 444 (1969).

369. *See id.* at 447-48.

370. *Id.* at 447.

371. For an early statement of this principle, see *Whitney v. California*, 274 U.S. 357, 376-77 (1927) (Brandeis, J., concurring) (stating that a "clear and present danger" will exist only when there is evidence of "immediate serious violence," and noting that "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence").

372. *See supra* notes 175-78 and accompanying text (quoting Bellotti v. Baird, 443 U.S. 622, 634 (1979) (plurality opinion)).

identify. Virtually all members of the child-protection censorship debate probably would agree that speech causing violence is problematic. The debate, instead, is over whether violent speech actually leads to violent behavior.

As noted earlier, scholars continue to debate whether empirical evidence supports the claim that violent speech leads to violent behavior.[373] Nevertheless, even critics of child-protection censorship tend to concede that the empirical support for the harmfulness of violent speech is much stronger than that for sexual speech. Catherine Ross, for instance, notes that "[i]n contrast to the dearth of support for the notion that sexually-explicit speech is harmful, substantial social science research conducted over several decades lends support to the allegation that violent speech may lead some children to violent attitudes or actions."[374]

Proponents of child-protection censorship, such as Saunders and Etzioni, point to the numerous studies finding a correlation between media violence and acts of violence, and to the multitude of professional associations that have called for regulation of violence in the media.[375] The President of the American Academy of Pediatrics, for instance, testified before a Senate Committee in 2000 that, since the 1950s, over "3,500 research studies" have been conducted on "whether there is an association between exposure to media violence and subsequent violent behavior," and "[a]ll but 18 have shown a positive correlation."[376] He also noted that epidemiologists found "exposure to violent media" to be a factor in half the homicides committed in the United States in a single year.[377] If this empirical evidence is sufficient to demonstrate the harmfulness of violent speech, then courts will have to move on to the difficult task of figuring out the limits of permissible government regulation.

b. Keeping Regulation of Violent Speech Within Tolerable Limits

Censorship of violent speech raises many of the same definitional problems that have proven so perplexing in the area of sexual speech. Too broad a definition of the speech being regulated would sweep in Saturday

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373. *See supra* notes 215-19 and accompanying text.

374. Ross, *supra* note 43, at 505.

375. SAUNDERS, *supra* note 43, at 43-46; Etzioni, *supra* note 66, at 35-37.

376. Media industries have described such characterizations of the empirical evidence as being "wildly inaccurate" and have said instead that the evidence linking televsion violence to real violence is "weak and inconsistent." Robert Corn-Revere, *Regulating TV Violence: The FCC's National Rorschach Test*, COMM. LAW., Fall 2004, at 1, 24, 25.

377. *Marketing Violence to Children: Hearing Before the Senate Comm. on Commerce, Sci., and Transp.*, 106th Cong. 119 (2000) (prepared statement of Donald E. Cook, M.D., FAAP, President, American Academy of Pediatrics).

morning cartoons and classic adventure stories.[378] Too narrow a definition would only cover speech that satisfies the *Brandenburg* test.[379] Legislators would be wise to follow the lessons mentioned above for regulation of indecent speech. First, they should define the unprotected speech with as much precision as possible.[380] This parallels the requirement in *Miller* that patently offensive sexual materials be "specifically defined" in the applicable regulation.[381] Second, they should limit the scope of their laws to speech that closely approximates the type of speech that the Supreme Court already has declared unprotected.[382] In the context of speech depicting or advocating violence, this means speech that is especially likely to engender a violent or unlawful response. Regulations that censor speech with only a weak causal connection to action are likely to be unconstitutional.[383]

Violent video games, especially those in which the child stands in the position of the shooter, are perhaps the most likely candidates for regulation under this principle. While the empirical evidence on their impact is still limited, scholars have contended that these games

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378. *See, e.g.*, Winters v. New York, 333 U.S. 507, 518, 520 (1948) (finding unconstitutionally vague a New York law that prohibited the distribution of materials "made up of criminal news or stories of deeds of bloodshed or lust [that are] so massed as to become vehicles for inciting violent and depraved crimes").

Judge Richard Posner has eloquently pointed out the danger of broadly denying children access to violent materials. *See* Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001). In enjoining a city ordinance that forbade children from playing violent video-arcade games without parental supervision, he noted that "[p]eople are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble." *Id*. He continued:

> No doubt the City would concede this point if the question were whether to forbid children to read without the presence of an adult the *Odyssey*, with its graphic descriptions of Odysseus's grinding out the eye of Polyphemus with a heated, sharpened stake, killing the suitors, and hanging the treacherous maidservants; or *The Divine Comedy* with its graphic descriptions of the tortures of the damned; or *War and Peace* with its graphic descriptions of execution by firing squad, death in childbirth, and death from war wounds.

Id.; *see also* Am. Civil Liberties Union, *supra* note 92, at 2 (Burne Neuborne testifying before a Congressional committee that "any effort . . . to decide when speech depicting violence crosses the line from an acceptable exercise in artistic creation, as in Hamlet or Oedipus Rex, or Antigone, or The Crucible, to a forbidden depiction of 'gratuitous' or 'excessive' violence must involve purely subjective notions of taste and aesthetic judgment").

379. *See supra* notes 368-71 and accompanying text.

380. *See supra* notes 45, 75-80 and accompanying text.

381. *See supra* note 358 and accompanying text.

382. *See supra* notes 149-52 and accompanying text.

383. *See supra* notes 368-72 and accompanying text.

desensitize children to the effects of violence and condition them to kill.[384] Dave Grossman, a former military psychologist, has made chilling observations about the impact of violent video games.[385] He notes that the military trains soldiers by using computer simulations that are comparable to the first-person shooter games that children play.[386] These games help soldiers overcome their resistence to killing and develop conditioned responses to shooting at targets.[387] Grossman and a co-author, Gloria DeGaetano, note in their book, *Stop Teaching Our Kids to Kill: A Call to Action Against TV, Movie and Video Game Violence*, that Michael Carneal, the assailant in the Heath High School massacre, committed his crime just as the video games had taught him:

> Michael Carneal . . . never moved his feet during his rampage. He never fired far to the right or left, never far up or down. He simply fired once at everything that popped up on his 'screen.' It is not natural to fire once at each target. The normal, almost universal, response is to fire at a target until it drops and then move on to the next target. . . . But most video games teach you to fire at each target only once, hitting as many targets as you can as fast as you can in order to rack up a high score. And many video games give bonus effects . . . for head shots. It's awful to note that of Michael Carneal's eight shots he had eight hits, all head and upper torso . . . . And this is from a kid who, prior to stealing that gun, had never shot a real handgun in his life![388]

Both the Seventh and Eighth Circuit may have been too cavalier in brushing aside arguments about the harmfulness of violent video games.

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384. *Marketing Violence to Children: Hearing Before the Senate Comm. on Commerce, Sci., and Transp.*, 106th Cong. 119 (2000) (prepared statement of Donald E. Cook, M.D., FAAP, President, American Academy of Pediatrics) (noting that "[r]esearch to date indicates that interactive media have an even more potent and lasting effect on violent behavior than passive media forms like television and movies"). *But see* Calvert, *supra* note 20, at 24-30 (criticizing empirical studies on the impact of violent video games).

385. *See generally* DAVE GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY (1995) (arguing that the unrestrained desensitization, conditioning, and defense mechanisms provided by modern video games and violent media is a potential threat to society); DAVE GROSSMAN & GLORIA DEGAETANO, STOP TEACHING OUR KIDS TO KILL: A CALL TO ACTION AGAINST TV, MOVIE & VIDEO GAME VIOLENCE (1999) (arguing that violent television programming and video games is complicit in conditioning young people to mimic the violence they see on the screen).

386. GROSSMAN & DEGAETANO, *supra* note 385, at 74 (noting that "one of the most effective and widely used simulators developed by the United States Army . . . is nothing more than a modified Super Nintendo game").

387. *Id.* at 71-76.

388. *Id.* at 75-76.

The Seventh Circuit's comparison of the violence in video games to the "graphic descriptions" in the *Odyssey* of "Odysseus's grinding out the eye of Polyphemus with a heated, sharpened stake" or to the "graphic descriptions" in *War and Peace* of "execution by firing squad"[389] suggest that the court may have misunderstood the unique desensitizing and conditioning effects of realistic and graphic video games. The Eighth Circuit's observation that "literature is most successful when it 'draws the reader into the story'"[390] suggests that the court may have underestimated the effects of repeatedly standing in the shoes of a murderer in a graphically-realistic environment.

Yet, both courts left open the possibility that a more narrowly drawn regulation of violent video games might pass constitutional muster. The Seventh Circuit conceded that, if the games "used actors and simulated real death and mutilation convincingly, or if the games lacked any story line and were merely animated shooting galleries," then "a more narrowly drawn ordinance might survive a constitutional challenge."[391] Likewise, the Eighth Circuit implied that an ordinance on video games might be sustained if the government brought forth "'substantial supporting evidence' of harm."[392]

These demands for specificity and empirical support were echoed in a recent Seattle district court decision that enjoined the enforcement of a Washington state law that penalized the distribution of violent video games to minors.[393] After deciding to enjoin the enforcement of the act, the court posed the more philosophical question of "whether a state may ever impose a ban on the dissemination of video games to children under 18."[394] Citing *Ginsberg*, the court said that "[t]he answer is 'probably yes' if the games contain sexually explicit images."[395] The court said that the answer is probably "'maybe' if the games contain violent images, such as torture or bondage, that appeal to the prurient interest of minors."[396] The court then

389. Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001).

390. Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954, 957 (8th Cir. 2003) (quoting *Kendrick*, 244 F.3d at 577).

391. *Kendrick*, 244 F.3d at 579-80.

392. *Interactive Digital Software Ass'n*, 329 F.3d at 959 (quoting Eclipse Enters. v. Gulotta, 134 F.3d 63, 67 (2d Cir. 1997)).

393. Video Software Dealers Ass'n v. Maleng, 325 F. Supp. 2d 1180, 1188 (W.D. Wash. 2004).

394. *Id.* at 1190.

395. *Id.* (citing Ginsberg v. New York, 390 U.S. 629, 634-38 (1968); *Kendrick*, 244 F.3d at 574-76, 579).

396. *Id.* (citing Miller v. California, 413 U.S. 15, 24 (1973)). The court's insistence that the violent images "appeal to the prurient interest" is borrowed from the Supreme Court's obscenity jurisprudence. *See Miller*, 413 U.S. at 24. The child-protection censorship law sustained in *Ginsberg* used a modified obscenity test that asked whether material appealed to minors' prurient

outlined the "[k]ey considerations" that might influence the constitutionality of future regulation of violent video games:[397]

> —does the regulation cover only the type of depraved or extreme acts of violence that violate community norms and prompted the legislature to act?
>
> —does the regulation prohibit depictions of extreme violence against all innocent victims, regardless of their viewpoint or status? and
>
> —do the social scientific studies support the legislative findings at issue?[398]

As can be seen, the decision implies that regulations of violent video games might be sustained if they are narrowly drawn (covering only "depraved or extreme acts") and are supported by "social scientific studies."[399] This suggestion accords with the arguments made above.

3. Regulation of Advertisements for Vice Activities

A third area of child-protection censorship targets advertisements of vice activities. Legislators have expressed concern that these advertisements induce children to engage in vice activities and have enacted laws to limit minors' exposure to the advertisements (e.g., restricting advertising on billboards near schools).[400]

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interests. *Ginsberg*, 390 U.S. at 632-33. Nevertheless, the "appeal to the prurient interest" requirement seems misplaced in the context of violent speech. The Supreme Court has defined material appealing to the prurient interest as "material having a tendency to excite lustful thoughts." Roth v. United States, 354 U.S. 476, 487 & n.20 (1957). Violent materials, while arguably harmful to minors, are not necessarily likely to excite lustful thoughts. In other words, any justification for regulating violent speech should not be based on its appeal to the prurient interests. Indeed, as argued in the section on indecent speech, it is even doubtful whether the appeal to the prurient interest requirement is a legitimate basis for regulating sexual materials. *See supra* notes 326-30 and accompanying text (suggesting that material cannot be suppressed because it suggests to minors that sex is healthy or desirable).

397. *Maleng*, 325 F. Supp. 2d at 1190.

398. *Id*.

399. *Id.* Legislation should not, for example, be broad enough to sweep in graphic depictions of violence in classic literature (e.g., Odysseus grinding out the eyes of Polyphemus). Such overbroad legislation would ignore the requirement that regulations may not suppress works of serious social value. *See supra* notes 358-59 and accompanying text. Thus, the government could not ban all depictions of particularly heinous violent acts such as amputations, decapitations, or dismemberments, but only those that were depicted in graphically-realistic interactive video games in which the user perpetrated the acts.

400. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 534-35 (2001) (discussing a regulation

Once again, if courts are to uphold this type of regulation, they should build upon earlier jurisprudence. Most obviously, the Supreme Court already has indicated that "commercial speech" is entitled to reduced First Amendment protection.[401] The logic underlying this jurisprudence suggests rules for when child-protection censorship of vice-advertising should be constitutional.

This analysis, however, is complicated by the fact that the Supreme Court has been moving away from its original conclusion that commercial speech is entitled to reduced protection. The Court acknowledges that advertising of unlawful products, as well as false and misleading advertising, is unprotected.[402] But recent decisions suggest that truthful advertising of lawful products will be fully protected.[403] This is true even if the speech advertises vice activities such as smoking, drinking, and gambling. While earlier jurisprudence suggested that legislators had more leeway to regulate this type of advertising, the Court has since repudiated it.[404] The Court has instead suggested that the government may not try to control people's behavior by limiting what they hear. The government may regulate the activities themselves (e.g., it can tax cigarette consumption or make it illegal), but it cannot seek to control usage by "keep[ing] people in the dark."[405]

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that prohibited outdoor advertising for tobacco products "within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school"); Anheuser-Busch, Inc. v. Schmoke, 101 F.3d 325, 327 (4th Cir. 1996) (discussing a Baltimore ordinance banning outdoor advertising of alcoholic beverages in places where children are likely to walk or play).

401. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (applying a four-part test to regulations of commercial speech).

402. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 496 (1996).

403. One can reach this conclusion by piecing together the rationales in the multiple decisions in *44 Liquormart, Inc.* Four Justices openly stated that the government may not suppress truthful advertising of lawful products for the sole purpose of trying to influence consumer behavior. *Id.* at 501-05 (Justices Stevens, Kennedy, Souter, and Ginsburg); *id.* at 526 (Thomas, J., concurring). Other Justices applied the *Central Hudson Gas & Electric Corp*. test in a manner that would effectively make it impossible for the government to satisfy the test when it is regulating truthful advertising of lawful products. *Id.* at 530 (O'Connor, J., concurring); *id.* at 524-26 (Thomas, J., concurring) (noting how the other Justices' strict application of the *Central Hudson Gas & Electric Corp*. test always will result in invalidation of regulations of truthful advertising).

404. In *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 341, 346-47 (1986), Justice Rehnquist suggested that legislators had greater leeway to regulate vice activities. The Court rejected this logic in *44 Liquormart, Inc. See* 517 U.S. at 514 (stating that "the scope of any 'vice' exception to the protection afforded by the First Amendment would be difficult, if not impossible, to define").

405. *44 Liquormart, Inc.*, 517 U.S. at 503. This position is most forcefully recongized in Justice Stevens's opinion. *Id*. (stating that "bans against truthful, nonmisleading commercial speech . . . rest solely on the offensive assumption that the public will respond 'irrationally' to the truth").

Despite this recent trend, commercial speech jurisprudence continues to provide powerful arguments for permitting regulation of vice advertising aimed at children. To begin with, the Supreme Court's acknowledgment that advertisements for unlawful products are unprotected would justify regulation of most vice-advertising aimed at children because most of the advertised activities (smoking, drinking, gambling) are unlawful for children.[406] In addition, the acknowledgment that misleading advertising is also unprotected might give regulators greater power to legislate in the context of child-protection censorship because children are arguably more easily misled than adults (recall their inability to make "informed, mature" decisions).[407]

a. The Empirical Evidence on Vice-Advertising

The harm from vice advertising, like the harm from violent speech, is easily identifiable. The harm is that children will be persuaded by the advertising to adopt a vice activity, whether it be smoking, drinking, or gambling.

While the empirical claim that advertising leads to use might seem straightforward—indeed, an entire multibillion dollar industry is premised on this causal connection—the social science evidence is not conclusive.[408]

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406. Anheuser-Busch, Inc. v. Schmoke, 101 F.3d 325, 329 (4th Cir. 1996) (noting that a Baltimore ban on outdoor advertising for alcoholic beverages "expressly targets persons who cannot be legal users of alcoholic beverages").

407. *See supra* note 372 and accompanying text. A more difficult question is whether advertisements for products that minors can lawfully consume can be constitutionally regulated for the paternalistic purpose of dampening minor demand for the products. The Supreme Court has become increasingly hostile to such paternalistic regulation in the adult context, and it has insisted that the government instead rely on non-speech alternatives to influence adults' purchasing behavior (i.e., taxing products or placing limits on how much can be purchased). *See supra* notes 402-05 and accompanying text. The question is whether the Court should be more tolerant of paternalistic regulation when the advertising is targeted at minors. Senator Harkin, for example, recently decried the food industry's heavy marketing of "nutritionally deficient products" to children and said he was going to introduce a bill to broaden the Federal Trade Commission's power to regulate this advertising. Melanie Warner, *Guidelines Are Urged in Food Ads for Children*, N.Y. TIMES, Mar. 17, 2005, at C7. Of course, to the extent that this advertising implies that the food has greater nutritional value than it really has, the government could regulate the advertising as misleading. But even if the statements on the advertising are truthful, the Court still might permit this regulation if the advertising is targeted at children (such as Shrek on boxes of cereal consisting of sweetened corn puffs and marshmallow pieces). *Id*. The logic for tolerating such regulation would be that it is necessary to protect children because of their "peculiar vulnerability" and "inability to make critical decisions in an informed, mature manner." *See supra* note 176 and accompanying text. Nevertheless, the Court still might, as it has done in the adult context, insist that legislators use non-speech alternatives (such as regulating the content of foods) rather than using speech regulation to manipulate children's behavior.

408. Lee, *supra* note 111, at 1283 (noting that the "literature on advertising's effects reveals

Still, there are studies and anecdotal evidence that can lend support to the premise.

Perhaps some of the best evidence comes from studies of cigarette advertising. While tobacco companies have had to curtail this advertising as a result of their recent settlement with the states,[409] their past practices provide plenty of grist for the empirical mill. The Surgeon General found that cigarette advertisements "'play a significant and important contributory role'" in minors' "'decision[s] to use . . . tobacco products'" and noted that minors, unlike adults, were most likely to make their choice of brands based on advertising.[410] Of course, the most notorious tobacco industry advertisement aimed at children was "Joe Camel." A 1991 study published in the *Journal of the American Medical Association* found that "30% of 3-year-olds and 91% of 6-year-olds could identify Joe Camel as a symbol for smoking."[411] After the Joe Camel advertising campaign began, Camel's "share of the youth [cigarette] market rose from 4% to 13%."[412] Tobacco companies also negotiated placement of their products in children-oriented entertainment. Etzioni notes, for instance, that internal company documents revealed that Phillip Morris negotiated the placement of its products in *Who Framed Roger Rabbit?* and *The Muppet Movie*.[413] If the government can establish the harmfulness of the vice-advertising being regulated, a court then would examine the regulation to determine whether it is narrowly drawn.

b. Keeping Regulation of Vice-Advertising Within Tolerable Limits

The definitional problems with vice-advertising are less daunting than with violent or sexual speech. The Supreme Court has well-developed precedent on the definition of commercial speech, including cases that wrestle with advertisements that combine informational and promotional

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that the impact of advertising on sales is uncertain").

409. *See* Etzioni, *supra* note 66, at 22-23 (discussing settlement agreement between states and tobacco companies).

410. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 558 (2001).

411. Nicotine in Cigarettes, 61 Fed. Reg. 44,619, 45,246 (Aug. 28, 1996) (citing Fischer et al., *Brand Logo Recognition by Children Aged 3 to 6 Years, Mickey Mouse and Old Joe the Camel*, 266 J. AM. MED. ASS'N 3145 (1991)).

412. *Lorillard Tobacco Co.*, 533 U.S. at 558; *see also* Etzioni, *supra* note 66, at 22 & n.106 (quoting a CDC report indicating that "[t]he largest increase in adolescent smoking initiation was in 1988, the year that the Joe Camel cartoon character was introduced nationally") (quoting Nat'l Ctr. for Chronic Disease Prevention & Health Promotion, *Trends in Smoking Initiation Among Adolescents and Young Adults*, MORBIDITY & MORTALITY WKLY. REP., July 21, 1995, at 521).

413. Etzioni, *supra* note 66, at 21 & n.98 (citing National Ass'n of Attorneys General, Tobacco Settlement Agreement at a Glance, *available at* http://www.naag.org/issues/tobacco/msa_at_a_glance.php (Nov. 6, 1998)).

material.[414]

The larger problem is that advertising is almost never targeted solely toward children. Whether the advertising is on billboards, in magazines, on television, or on sports cars, both adults and children generally have access to it. This presents the problem that any censorship also will deny adults access to speech. That issue will be explored more fully in the Part concerning the rights of adults.[415] Nevertheless, the commercial speech jurisprudence provides some guidance for that discussion. To begin with, the conclusion that vice-advertising aimed at children should be wholly unprotected suggests that regulators should receive leeway to regulate advertising directed to the public if the nature of the advertising suggests it is particularly aimed at children. Thus, the fact that "Joe Camel" appeared on advertisements available for all to see should not have sheltered it from regulation if regulators could establish that it was aimed at children.[416] More generally, to the extent that the Court still subscribes to the notion that commercial speech is entitled to less protection than other forms of speech, it might justify permitting more regulation of the speech for the sake of protecting children, even if the regulation impacts adults' access to the speech.

4. Protecting the Rights of Mature Minors

Part III identified the concern that child-protection censorship relies on crude generalizations to determine which parties should be denied access to speech.[417] The laws assume that all minors lack adequate maturity to handle an unregulated marketplace of ideas. The truth, however, is that there are many minors who are just as able as adults to process the full range of protected speech.

The discussion suggested that the government may have little choice but to rely on these generalizations in enacting child-protection censorship laws. It considered the propriety of this reliance under equal protection jurisprudence and concluded that censorship rules using age classifications are probably constitutional.[418] The only exception was those situations

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414. *See, e.g.*, Bd. of Trs. v. Fox, 492 U.S. 469, 471-72 (1989); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 61-62 (1983).

415. *See infra* Part IV.C.

416. States have found an alternative route to limit cigarette advertising. Rather than banning such advertising, which would raise First Amendment concerns, they instead succeeded in getting the tobacco industry to limit its advertising as part of a larger settlement of tort actions brought by the states against the industry. *See* Nat'l Ass'n of Attorneys Gen., *Master Settlement Agreement and Amendments*, *at* http://www.naag.org/issues/tobacco/index.php?sdpid=919 (last visited May 3, 2005) (displaying the settlement agreement between states and tobacco companies).

417. *See supra* Part III.B.1.b.

418. *See supra* notes 192-99 and accompanying text.

where information of critical and immediate importance was denied to a mature minor.[419]

Courts are unlikely to conclude that cigarette advertisements, pornography, and graphic violence ever are of critical and immediate importance to a minor. Information is likely to meet this criteria only if it is a type of higher valued speech, such as information about reproductive rights, sexually-transmitted diseases, or drug addiction. Because this type of censorship implicates higher valued speech, it would be inherently suspect and usually unconstitutional when applied to any minors. Nevertheless, there may be instances in which regulators reasonably could conclude that this type of information was inappropriate for very young minors. This is precisely the type of regulation that courts should carefully scrutinize to ensure that the rights of mature minors are protected. Unless the law limits its scope only to young minors or, at a minimum, provides an opportunity for mature minors to be exempted from its reach, it may be unconstitutional. Of course, child-censorship laws do not punish minors who access the censored speech but instead punish those who give the minors the information. Nevertheless, minors who are denied access by a child-protection censorship law should have standing to challenge a law to the extent that it impinges on their First Amendment right to access speech.[420]

B. *Protecting the Rights of Parents*

Part III also identified the concern that child-protection censorship laws might impinge upon the rights of more liberal parents who did not want their children to be denied access to censored material.[421] Legislators should be careful not to infringe on the rights of these parents when they enact child-protection censorship, and courts should be prepared to review censorship laws to ensure that these parents' rights are protected.

Of course, if the majority of parents do not approve of a child-protection censorship law, then the law as a whole would be of questionable constitutionality. It certainly could not be justified under the theory that it assists parents with their child-rearing responsibility. It also is doubtful that the government could declare the speech harmful to minors when most parents disagree.

The issue of protecting parental rights is more likely to arise when a minority of parents object to a child-protection censorship law. These parents may not be troubled that their children have access to the banned

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419. *See supra* notes 197-99 and accompanying text.

420. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 756-57 (1976) (upholding the right of consumers to challenge a restriction on pharmacists' speech).

421. *See supra* note 292 and accompanying text.

speech and may even feel that their children would benefit from exposure to it. The question is whether a law violates the rights of these parents if it prevents their children from gaining access to the speech. This, of course, is a somewhat circuitous argument as it is the children and not the parents who are being denied access. Nevertheless, a child-protection censorship law might be viewed as impinging on the parents' right to control their children's upbringing.[422]

In most instances, this problem can be avoided if legislation makes it clear that parents are not prohibited from obtaining the banned material and giving it to their children.[423] While parents still would be inconvenienced in the sense that they would need to obtain the materials for their children, this inconvenience probably would not be enough to justify a finding that their rights have been infringed.

Legislators, of course, are free to enact a child-protection censorship law that does not have a parental exemption. Such a law presumably would reflect a legislative determination that the speech being censored is sufficiently harmful to children so that even a child's parents should not be permitted to expose the child to it. The problem with such legislation is that it stands in conflict with a parent's competing right to control his or her child's upbringing. Precedents suggest that the government can override this parental right when the government's interest in protecting a child is sufficiently compelling.[424] But this exception typically is limited to instances of more obvious parental neglect, such as when a parent is physically abusive toward a child. It seems unlikely that the government could meet this burden in most cases when the only harm it alleges is that a parent exposed his or her child to speech.

C. *Protecting the Rights of Adults*

Child-protection censorship will impinge on the rights of adults only when, as a means of denying minors access to speech, it also denies adults access. There are many instances in which this spillover problem can be avoided. Pornographic magazines, for instance, can be sold in adult

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422. *See supra* notes 269-71 and accompanying text.

423. Legislators should try to avoid the mistake that Congress made in drafting the Communications Decency Act. As the Supreme Court pointed out in *Reno v. ACLU*, "[u]nder the CDA, a parent allowing her 17-year-old to use the family computer to obtain information on the Internet that she, in her parental judgment, deems appropriate could face a lengthy prison term." 521 U.S. 844, 878 (1997).

424. Edward C. v. Edmond C., 178 Cal. Rptr. 694, 701 (Cal. Ct. App. 1981) (acknowledging that First Amendment protection of freedom of religion limited the government's power to interfere with parental rights in controlling the upbringing of their children, but finding that governmental intervention was justified when parents' religious beliefs ordained excessive discipline that jeopardized children's health and safety).

bookstores that deny entrance to minors. Similarly, adult movie theaters can limit admittance to those eighteen and over. The rights of adults are likely to be implicated only when it is impossible to separate adults from children. It is impossible, for instance, to regulate indecency in radio broadcasts without implicating access for both adults and children.

The ability to effectively separate minors from adults has figured prominently in Supreme Court jurisprudence concerning child-protection censorship. The Court typically has upheld censorship regimes that preserved adults' access to the censored material and invalidated those that did not.[425] The Court has condemned these latter laws as "burn[ing] the house to roast the pig" because they "reduce the adult population . . . to [hearing] only what is fit for children."[426]

Whether a censorship law succeeds in denying minors access while protecting adults' rights often depends upon how the adults' rights are defined. For instance, the Court could hold that a blanket ban on indecency on the Internet would not impinge upon adult rights so long as adults could obtain the material from their local adult bookstore. In other words, banning speech in one medium (i.e., television, radio, the Internet) would be permissible so long as adults retain access to the materials elsewhere. The Court, however, has declined to follow this logic. In *Reno v. ACLU*, the Court specifically rejected this argument, implying that the First Amendment rights of adults are implicated whenever they are denied access in any medium.[427] The availability of other means to obtain similar material does not erase the First Amendment concerns.[428]

While the Court's reasoning in these instances is not entirely clear, its conclusion appears correct. To begin with, the conclusion is consistent with the Court's general approach to content-based regulations. Such regulations are subject to strict scrutiny and usually found unconstitutional even when they affect First Amendment rights only in limited contexts.[429] Thus, a ban on political speech in one city park would be unconstitutional even though citizens were free to give the same speech in the other city parks.[430] The specter of government censorship raised by content-based

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425. *See supra* notes 16, 53 and accompanying text.

426. Butler v. Michigan, 352 U.S. 380, 383 (1957); *see also* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 128 (1989); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 73 (1983).

427. 521 U.S. 844, 879 (1997) (rejecting the government's argument that the Communications Decency Act was "constitutional because it provide[d] a 'reasonable opportunity' for speakers to engage in the restricted speech" on some but not all Internet modalities).

428. *See id.* at 880.

429. *See supra* notes 45, 51, 71 and accompanying text.

430. *See id.* (stating that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place") (quoting Schneider v. New Jersey, 308 U.S. 147, 163 (1939)).

laws is of sufficient concern to render a law presumptively unconstitutional even when alternative avenues for the speech are available.

Perhaps more importantly, the Court's rule shows appreciation for the uniqueness of each medium of expression and the sometimes subtle effect that blocking speech in one medium can have on First Amendment rights. For instance, if the government banned indecent speech on the Internet, adults still might be able to obtain it (e.g., by going to an adult bookstore), but they might not be able to obtain it anonymously, as they could do on the Internet. Consequently, adults who desired indecent speech but were too embarrassed to do so publicly might be denied access to the material. A rule that respects the First Amendment rights of adults for each medium better protects such subtle differences between various means of accessing speech.

Of course, if a censorship regime succeeds in denying minors access to speech without affecting adults, then the Court should reject arguments that the law violates adults' First Amendment rights. In those instances in which such perfect zoning is not possible, the Court has three choices. At one extreme, it could hold that the government's interest in protecting minors trumps the adults' right of access. Such an approach clearly is undesirable. It gives the government *carte blanche* to regulate adults' access whenever it could justify denying minors access. This effectively would reduce adult discourse to "that which would be suitable for a sandbox,"[431] a result that the Court repeatedly has held is unacceptable.[432]

At the other extreme, the Court could say that an adult's right to access speech should always trump the government's interest in protecting children, so that child-protection censorship will be permitted only when a law is able to deny minors access to speech without affecting adults. This approach might permit lawmakers to insist that "girlie" magazines be sold at adult bookstores and that adult movie theaters be restricted to grown-ups, but the government would be powerless to regulate those media, such as television and radio, where separating children from adults is impossible.

A middle ground approach would be for the Court to balance the government's interest in censoring speech to protect children against the competing First Amendment rights of adults to have access to the censored speech. Unless the Court is prepared to deprive the government of all power to regulate media such as television and radio, it may have little choice but to follow this approach. Indeed, the leading case in this area,

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431. *Bolger*, 463 U.S. at 74-75.

432. *See, e.g.*, *Reno*, 521 U.S. at 875; Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 759 (1996); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 128 (1989).

FCC v. Pacifica Foundation,[433] suggests that the Court will follow this course. In that case, the Court upheld a sanction issued against a radio station for broadcasting George Carlin's "Filthy Words" routine during the middle of the day.[434] By upholding the FCC sanction, the Court was acknowledging that indecent speech could be banned from the radio even though the ban also would affect adults' rights to hear the speech. At the same time, the Court emphasized the narrowness of its holding, suggesting that the ban might be unconstitutional if applied at a time when only adults were likely to be listening (e.g., late at night).[435]

If the Court is to engage in such a balancing test, it must develop a means for measuring the strength of the government's interest in censoring speech to protect children as well as the extent of the burden on adults' First Amendment rights.[436] In considering the former, the Court should consider some of the issues raised in Part III of this Article, which considered when the government is justified in censoring speech to protect children.[437] In considering the latter, the Court might consider such factors as whether adults could easily access the banned material through other outlets, even though, as mentioned above, that fact by itself should not warrant a conclusion that adults' rights are not infringed. Other factors might be whether there are technological ways of separating children from adults or whether it would be sufficient merely to "channel" the censored speech to a time of day when children are less likely to be exposed.

V. CONCLUSION

There is no simple solution to the clash of values that occurs when society regulates speech to protect children. Lawmakers have little choice but to walk a tightrope between the interest in protecting children and the interest in protecting speech. Finding the right balance is difficult because each interest has a powerful pull, and each pulls in a different direction. If lawmakers lean too far toward protecting children, they threaten freedom of speech. If they lean too far toward free speech, they threaten the welfare of children. Judge Dalzell thus was correct in stating that the interest in protecting children is "as dangerous as it is compelling."[438] Proponents of child-protection censorship undoubtedly would say the same is true for the interest in protecting speech.

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433. 438 U.S. 726 (1978).

434. *Id.* at 729-30.

435. *Id.* at 750 (emphasizing the "narrowness" of the Court's holding and, in particular, the fact that the FCC's decision emphasized the "time of day" that the show was broadcast).

436. *See generally* Volokh, *supra* note 43, at 169-93 (surveying various tests for deciding whether child-protection censorship laws affecting adults' access should be constitutional).

437. *See supra* Part III.B.

438. ACLU v. Reno, 929 F. Supp. 824, 882 (E.D. Pa. 1996) (Dalzell, J., concurring).

In this Article, I have tried to help lawmakers navigate this tight-rope. By analyzing the legal and policy issues raised by child-protection censorship, I have sought to provide lawmakers with tools for identifying the issues raised by child-protection censorship and for methodically resolving these issues. The process still will never be simple; there are too many underlying factual issues for it to be so. But if this Article helps lawmakers understand the layers of issues underlying child-protection censorship's constitutionality, it will have served its purpose.

Judge Dalzell's quote about the "compelling" but "dangerous" nature of child-protection censorship[439] captures the two themes that permeate this Article. One is the theme that child-protection censorship can sometimes serve a compelling state interest. This assertion is based on the propositions that children are less mature than adults and that their exposure to certain types of speech can be harmful. These propositions are neither absolute nor unassailable. There is a wide range of maturity among minors, and the harmfulness of speech is something that will forever be debated. But the propositions also have considerable expert and empirical support, not to mention a basis in common sense.

The competing theme is that child-protection censorship can be "dangerous" to freedom of speech. This means that judges must methodically police this censorship to ensure that the threat it poses to First Amendment values is kept to an absolute minimum. Censorship should not be allowed unless judges are convinced that the speech is harmful and that parents support its suppression. Direct suppression should not be allowed when a less speech-restrictive means exists to accomplish the government's objective (i.e., Can parents protect their children without government help? Will filtering devices provide adequate protection?). Regulations must be specific, ensure that valuable speech is not suppressed, and provide for penalties that will not chill speakers legitimately testing the regulation's limits. Regulations also must ensure that adults will have access to the speech, and if there must be some limits on adults' access, legislators must ensure that there are easily accessible alternatives that respect adults' rights of anonymity.

After these checks are in place, lawmakers will have only very circumscribed powers to enact child-protection censorship. One might wonder if this whole effort is worth the candle if that is all that the Constitution will allow. The answer is "yes," however, because allowing this minimal speech regulation may be necessary to protect minors from speech that is harmful to them. Proponents of censorship, for example, may be right that children should not play video games that the military uses to teach soldiers how to kill. If empirical evidence supports their claim, it

439. *Id*. (Dalzell, J., concurring).

should not be unreasonable to deny minors access to these games until they reach eighteen.

At the same time, if judges are sensitive to free speech rights and attentive to the numerous constitutional hurdles that any censorship regime must overcome, they can ensure that this limited legislative power to suppress speech on children's behalf will be adequately monitored. Children will then still be able to read about Odysseus's grinding out the eyes of Polyphemus and the bloody executions in *War and Peace*.[440] Assuming, of course, that their parents can get them to read![441]

440. Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001).

441. Charles McGrath, *What Johnny Won't Read*, N.Y. TIMES, July 11, 2004, § 4, at 3 (discussing a National Endowment for the Arts report which found that reading in America, particularly of literature, had declined during the last twenty years).