TOP LEVEL DOMAIN REORGANIZATION: A CONSTITUTIONAL SOLUTION TO LEGISLATIVE ATTEMPTS AT INTERNET REGULATION

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INTRODUCTION

The human mind seeks order. It craves categorization and structure in anticipation of productivity and efficiency. When questioned, most would characterize themselves as logical in nature, because the trait implies an organized approach to life. When there is some semblance of order, we can anticipate and plan for events, and we enjoy some sense of control. The way in which we coordinate the placement of buildings, homes, and factories reflects this desire for order. In nearly every urban area in America, zoning ordinances have been developed to arrange the landscape of towns and cities in an effort to avert chaotic scenarios of intermixed industrial, commercial, residential, and governmental areas.[1] Originally, the theory for zoning was developed to combat the harmful effects of disorganized urban growth during and after the Industrial Revolution, which were previously assuaged only by nuisance law.[2] The random placement of homes, factories, banks, post offices, bars, clubs, and billboards would hardly be tolerated by modern American society in the physical realm, yet it appears to be the accepted *modus operadi* of the Internet.

As the result of a complacent attitude toward organizing the astounding growth of the Internet, the online community has created many difficult questions regarding the freedom of speech and explicit material. Assuming the government has a legitimate interest in keeping pornographic material out of the hands of children,[3] how can this be accomplished without impinging on the rights of adults seeking this material on the Internet? Is it possible to prevent unwanted pornography from disrupting the navigation of the Internet by adults? What solutions can be developed that would uphold current First Amendment principles of free speech? Is it possible to embrace a solution that is dependant on geographic community standards? How can the Internet be organized to yield greater efficiency for all users, more protection for types of property rights, and still promote its overall growth?

While the answers to all these questions clearly lie beyond the scope of any single work, this Note will focus on the conflict between the state interest in

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1. *See* JESSIE DUKEMINIER & JAMES E. KRIER, PROPERTY 942 (4th ed. 1998).

2. *Id.*

3. *See* Reno v. ACLU, 521 U.S. 844, 875 (1997) (Reno II); FCC v. Pacifica Found., 438 U.S. 726, 749 (1978) (citing Ginsberg v. New York, 390 U.S. 629, 639-40 (1968)).

regulating types of sexually-oriented material[4] and the individual's purported right to freely engage in and receive such speech.[5] Congress has made two attempts to address these oft-opposing interests, primarily in response to public concern over the proliferation of sexually-oriented material on the Internet and children's free access to this material.[6] The first of these attempts, the Communications Decency Act of 1996 (CDA),[7] was found to be unconstitutionally vague by the U.S. Supreme Court in *Reno v. ACLU*.[8] The second attempted regulation, the Child Online Protection Act (COPA),[9] was also found to be unconstitutional by the U.S. District Court for the Eastern District of Pennsylvania, which granted a preliminary injunction against the enforcement of the statute.[10]

While the federal courts have ruled in favor of those entities opposing government regulation of the Internet's content thus far, purveyors of speech on the Internet should take some form of action to self-regulate. The motivation to self-regulate should be based in part on the notion that those entrenched in the Internet will be far more adept at developing workable standards for their own technology. More importantly, self-regulation is likely to curtail any future attempts of governmental intervention.[11]

Opponents of Internet regulation should note that if they do not take action to self-regulate, it appears as if Congress will make further attempts to regulate Internet content. With each federal court decision providing further insight into

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4. As developed throughout this Note, this type of material has been referred to by courts and legislatures, depending on the nature of the material and the question at hand, in legal terms of art including: "obscene," "indecent," "harmful to minors," and "patently offensive."

5. *See* Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85, 85 (1991) (pointing out the Court's interest in the rights of both the speaker and potential listeners in the free speech analytical context).

6. Symposium, *Policing Obscenity and Pornography in an Online World*, 8 WM. & MARY BILL OF RTS. J. 693, 710 (2000) [hereinafter *Policing Obscenity*] (panel comments by Jonathan Zittrain).

7. Pub. L. No. 104-104, 110 Stat. 56, 133-43 (codified as amended in scattered sections of 47 U.S.C.).

8. 521 U.S. 844 (1997).

9. Pub. L. No. 105-277, 112 Stat. 2681 (codified at 47 U.S.C. §§ 230-31 (1994 & Supp. V 1999)).

10. ACLU v. Reno, 31 F. Supp. 2d 473 (E.D. Pa. 1999), *aff'd*, 217 F.3d 162 (3rd Cir. 2000), *cert. granted sub nom.*, Ashcroft v. ACLU, 532 U.S. 1037 (2001). The petitioner has changed from "Reno" to "Ashcroft" because of the appointment of John Ashcroft as Attorney General by President George W. Bush. The Supreme Court heard oral arguments for *Ashcroft* on November 28, 2001. E-mail from Bruce Taylor, President and Chief Counsel, National Law Center for Children and Families, to David E. Roberts (Oct. 3, 2001, 13:14:31 EST) [hereinafter Taylor E-mail] (on file with author).

11. Andy Patrizio, *XXX Domains May Be Hard Sell*, WIRED NEWS (Mar. 6, 2000), *at* http://www.wired.com/news/business/0,1367,42217,00.html.

how this can be done,[12] it seems that it is merely a question of semantics and timing before Congress formulates a constitutionally valid statute regulating Internet content. Generally, Congress can regulate speech if it is obscene, because this type of speech does not fall within the ambit of the First Amendment right to free speech. When determining whether speech is obscene, courts are roughly governed by the Supreme Court's ruling in *Miller v. California.*[13] The three-prong obscenity test from *Miller*[14] is vital to an analysis of speech on the Internet because it represents the product of the Supreme Court's attempt to balance freedom of speech against speech that is wholly unworthy of First Amendment protection.[15] Using this test, and the refining influence of federal court opinions, Congress is likely to continue its pursuit of a constitutional regulation for the Internet.

Generally, there are many serious concerns over the way the Internet's content is currently structured. Whether the solutions come in the form of governmental or private regulation, there should be an urgency to act, as the Internet becomes more unwieldy with each passing day. Regulation of the content of the Internet is a reality that needs to be addressed quickly.[16] Society cannot effectively concede that the Internet is beyond control and retreat from this apparently arduous task.[17] With the adequate technology and political support available, the Internet is ripe for reform, as the potential benefits of a more streamlined, organized Internet outweigh the usefulness of a meaningless pool of data and random thoughts.

The reigning disorder of the Internet is largely a result of the misguided attempt to develop a wholly new legal discipline specific to this developing technology, cyberlaw, instead of applying established principles drawn from mature case law.[18] Part I of this Note discusses the history and current state of the Supreme Court's First Amendment free speech doctrine regarding sexually explicit material. Part II of this Note presents the history and functionality of the Internet, as well as the governmental interests associated with the Internet's organization. Part III of this Note examines the Supreme Court's response to the two congressional attempts to regulate the content of the Internet within this free

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12. *See, e.g., Reno II*, 521 U.S. at 872-81.

13. 413 U.S. 15 (1973).

14. *Id.* at 24.

15. *See* Jason Kipness, *Revisiting* Miller *After the Striking of the Communications Decency Act: A Proposed Set of Internet Specific Regulations for Pornography on the Information Superhighway*, 14 SANTA CLARA COMPUTER & HIGH TECH. L.J. 391, 405 (1998).

16. *Regulating the Internet: Should Pornography Get a Free Ride on the Information Superhighway?*, A Panel Discussion (Nov. 8, 1995), *in* 14 CARDOZO ARTS & ENT. L.J. 343, 360 (1996) [hereinafter *Regulating the Internet*] (panel comments of Barbara Bennett Woodhouse).

17. *Id.*

18. Joseph H. Sommer, *Against Cyberlaw*, 15 BERKELEY TECH. L.J. 1145 (2000). *But cf. Regulating the Internet*, *supra* note 16, at 360 (arguing that it is impractical to expect existing laws to be taken from one context and expect them to function in a new context).

speech framework: the CDA and COPA.[19]

Part IV proposes a different perspective for dealing with the massive amount of Internet content, which will center on the distinction between regulation and organization of speech. Also, Part IV proposes the solution of creating new top level domains (TLDs) as a method of categorizing the Internet's content. Furthermore, Part IV explores not only why a privately-created commission with administrative power to oversee the Internet's organization is preferred, but also why Congress would not be acting unconstitutionally by reclaiming its organizational power from the Internet Corporation for Assigned Names and Numbers (ICANN) and reordering the Internet itself.[20] Finally, Part V of this Note analyzes the strengths, weaknesses, and logistical difficulties of implementing such a system.

I. THE FREE SPEECH DOCTRINE AND LEVELS OF PROTECTED SPEECH

The text of the U.S. Constitution itself is the appropriate beginning to a discussion of First Amendment rights reserved to the citizenry. In relevant part, the Constitution states, "Congress shall make no law . . . abridging the freedom of speech, or of the press."[21] This statement has been the subject of much interpretation throughout the history of American jurisprudence and politics, with a few notable exceptions to this seemingly categorical proclamation developing since 1789.[22] By carving out narrow exceptions to this legal maxim, the Supreme Court has asserted that legislation regulating the content of speech does not necessarily violate the citizens' First Amendment rights.[23] Justice Holmes initially presented this notion in *Shenk v. United States*,[24] by promoting an analysis of speech regulations in consideration of the content and the context of the speech.[25]

In its analysis of the content of speech, the Supreme Court has recognized Congress' authority to regulate adult access to material that is considered obscene.[26] However, the accepted proposition that obscene material does not

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19. Pub. L. No. 104-104, 110 Stat. 56, 133-43 (codified as amended in scattered sections of 47 U.S.C.); Pub. L. No. 105-277, 112 Stat. 2681 (codified at 47 U.S.C. §§ 230-31 (1994 & Supp. V 1999)).

20. Declan McCullagh & Ryan Sager, *Getting to Domain Argument*, WIRED NEWS (Feb. 8, 2001), *at* http://www.wired.com/news/politics/0,1283,41683,00.html.

21. U.S. CONST. amend. I.

22. *See* Ashcroft v. ACLU, 535 U.S. 564, 573-74 (2002); *infra* notes 25-37 and accompanying text.

23. *See* FCC v. Pacifica Found., 438 U.S. 726, 744 (1978).

24. 249 U.S. 47 (1919).

25. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Id.* at 52.

26. *See* Miller v. California, 413 U.S. 15, 23 (1973); Roth v. United States, 354 U.S. 476 (1957).

enjoy First Amendment protection has not yet produced an agreeable standard by which to judge what defines obscenity.[27] Publicly, perhaps the most familiar and meaningful statement regarding obscenity was Justice Stewart's declaration: "I know it when I see it."[28] This assertion leaves much to be developed, as this rule of law is the antithesis of an objective standard for unprotected speech, and it leaves the citizenry without a meaningful guide as to the limits of its First Amendment protection.

There is a rebuttable presumption that pornography is a form of expression protected by the First Amendment, and that only pornography properly classified as obscene can be regulated.[29] As a matter of law child pornography is unprotected speech per se.[30] As such, there is no Supreme Court-developed standard for obscenity that needs to be applied to regulate this material.[31] However, the Supreme Court has distinguished obscenity and child pornography from First Amendment-protected indecent speech.[32] Since obscene speech has partly been defined as that which lacks "serious literary, artistic, political, or scientific expression,"[33] indecent speech presumably includes sexually-oriented material possessing one or more of these traits,[34] thereby invoking the protection of the First Amendment.

However, despite this protection, the Supreme Court has determined that in justifiable circumstances, indecent speech can be regulated. Such circumstances require that the government promote a compelling state interest[35] and do so by using the least restrictive means available.[36] These indicia of constitutionality conform to the strict scrutiny standard of review that the Supreme Court has used in its review of speech regulations, in light of the critical importance of the First Amendment.[37] In sum, the government can freely regulate obscene speech and child pornography. Further, the government may regulate indecent speech, so long as a compelling state interest is being furthered via the least restrictive

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27. *See* Carlin Meyer, *Reclaiming Sex from the Pornographers: Cybersexual Possibilities*, 83 GEO. L.J. 1969, 1980 (1995) (pointing to the Court's debates concerning the "standards for judging" obscenity, not the existence of obscene speech, as evidence that an obscenity niche within the broad category of speech is judicially recognized).

28. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

29. *See Roth*, 354 U.S. at 484-88.

30. *See* New York v. Ferber, 458 U.S. 747 (1982) (stating that child pornography, like obscene speech, is outside the protection of the First Amendment).

31. *See id.* at 760-61.

32. *See* Butler v. Michigan, 352 U.S. 380 (1957).

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

34. *See* ACLU v. Reno, 929 F. Supp. 824, 863 (E.D. Pa. 1996) (Reno I), *aff'd*, 521 U.S. 844 (1997). "*Obscenity* is that which is offensive to chastity. *Indecency* is often used with the same meaning, but may also include anything which is outrageously disgusting." ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 471 (3d ed. 1982).

35. *See* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).

36. *See* Reno II, 521 U.S. 844, 876 (1997).

37. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

means. These standards have been developed in the brick and mortar realm, and now must be applied to any regulation of the Internet.[38]

A. Content-based Limitations on Free Speech

A more developed history of limitations on free speech is prudent as a precursor to delving into issues concerning the Internet and Congressional attempts to regulate its content. Legislative attempts to regulate speech fall within one of two broad categories: content-based and content-neutral regulations. Content-based regulations are subject to greater scrutiny than those that are content-neutral because of their focus on the speech itself.[39] However, consistent with the previously cited case law, legislative regulation of obscenity does not violate the First Amendment since it is a form of speech unworthy of such lofty protection.[40]

The Supreme Court first developed a general rule for its First Amendment doctrine regarding obscenity in 1957 in *Roth v. United States*.[41] The Court ruled that the statute in that case was not violative of any rights to free speech[42] because the purpose of the First Amendment was to preserve discourse over political and social ideas.[43] Obscenity was found to be "of such slight social value . . . that any benefit that may be derived from [obscene expressions] is clearly outweighed by the social interest in order and morality."[44] The Court sought to provide a standard by which to evaluate potentially obscene material.[45] The Court proceeded to define obscenity subjectively, stating that material is obscene when in the opinion of "the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[46]

In *Miller v. California*,[47] the Supreme Court further developed *Roth's* seminal articulation of the obscenity doctrine. A majority opinion was reached

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38. Even opponents of Congressional regulatory attempts express their desire to be held to the application of existing First Amendment doctrine. *Regulating the Internet, supra* note 16, at 385 (Panel comments of Nadine Strossen, President, ACLU).

39. *See* Burson v. Freeman, 504 U.S. 191, 198 (1992); Ward v. Rock Against Racism, 491 U.S. 781, 800 n.6 (1989).

40. *See* Bruce A. Taylor, *Hard-Core Pornography: A Proposal for a Per Se Rule*, 21 U. MICH. J.L. REFORM 255, 255 (citing Arcara v. Cloud Books, Inc., 478 U.S. 697, 705 (1986); Miller v. California, 413 U.S. 15, 23 (1973); Roth v. United States, 354 U.S. 476, 484-86 (1957); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)).

41. 354 U.S. 476 (1957).

42. *See id.* at 485.

43. *Id.* at 484.

44. *Id.* at 485.

45. *Id.* at 487.

46. *Id.* at 489. The Court defined its use of "prurient" as "lascivious desire or thought." *Id.* at 487 n.20.

47. 413 U.S. 15 (1973).

in the case, with agreement on a three-prong standard to aid courts in determining the constitutionality of a government regulation on purportedly obscene speech.[48] Specifically, the reviewing court must consider:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest;
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[49]

Further, the Supreme Court later reasoned that the three prongs of the *Miller* test act cohesively to define the boundaries of the "uncertain sweep of the obscenity definition."[50] In 1977, the Court addressed the second prong of the test, stating that the determination therein was to be made by the average person applying community standards.[51] Additionally, the Court later determined that the third prong's determination was to be made using the familiar legal standard of the "reasonable person,"[52] doing away with the community standards consideration for this prong.[53] Therefore, the modern doctrine of obscenity, as articulated in *Miller* and its progeny, provides that the government can prohibit such speech from distribution without violating the First Amendment.[54]

B. Content-Neutral Regulation of Speech

Apart from the state's interest in subjective notions of morality and decency, the state can regulate speech if it does so in furtherance or protection of other vital state interests. Specifically, the Court has found that commercial sexually-oriented speech endangers government interests in crime prevention, property valuation, and quality of urban life.[55] When focusing on the preservation of these interests the appropriate question is no longer whether the speech is constitutionally protected, which renders the standard of strict scrutiny inapplicable. Since this type of regulation is not concerned with the constitutionality of the speech's content, these legislative acts have been referred to as content-neutral regulations.[56]

One notable application of a content-neutral regulation to a sexually-oriented

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48. *Id.* at 24.
49. *Id.* (citations omitted).
50. Reno II, 521 U.S. 844, 873 (1997).
51. Smith v. United States, 431 U.S. 291, 300-01 (1977).
52. Pope v. Illinois, 481 U.S. 497, 500-01 (1987).
53. *Id.* at 501 n.3.
54. *Miller*, 413 U.S. at 20.
55. Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986).
56. *Id.*

business is the case of *Renton v. Playtime Theatres, Inc.*[57] In that case, the city of Renton, Washington enacted legislation regulating the time, place, and manner of operation for sexually-oriented businesses in its town based on studies conducted in numerous cities, including near-by Seattle.[58] These studies showed decreasing property values and increasing crime rates in areas neighboring such businesses.[59] Citing these deleterious secondary effects that the businesses had on the community, the city was able to regulate speech without questioning the content of the movies shown in the adult theater. The issue did not center on whether the movies were obscene, and therefore unprotected from regulation under the free speech doctrine; rather, the inquiry concerned the effects of such businesses on the peace and welfare of the community.[60] The Supreme Court later reasoned that there was no need for studies to be conducted within the city in question, since the secondary effects had been established by convincing evidence elsewhere.[61] To require such a practice would effectively harm the community by prohibiting preemptive measures from being taken against proven sources of harmful effects.

Additionally, the Supreme Court has not accepted the argument that targeting sexually-oriented businesses is a violation of the Equal Protection Clause.[62] Sexually-oriented merchants have argued that municipalities violate this doctrine by focusing on the content of the films that are shown in their theaters, but this argument was soundly rejected.[63] Further, potential Equal Protection claims by sexually-oriented businesses based on the assertion that other entities also contribute to the deleterious secondary effects previously enumerated are likewise without merit. It is generally accepted that the Equal Protection doctrine permits legislative bodies to take a piecemeal approach to problems, recognizing the inherent difficulty in identifying all sources of a given mischief and respecting the desire to avoid overbreadth.[64]

Therefore, the Supreme Court has held content-based regulations to the highest standard of scrutiny, demanding the furtherance of a compelling state interest via the least restrictive means available in order to pass constitutional muster. Alternatively, if the statute is aimed at curbing the deleterious secondary effects of sexually-oriented speech, the Court is likely to rule in favor of its constitutionality based on the compelling state interest in reducing levels of crime and preserving property values. Finally, the Court has not recognized an

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57. 475 U.S. 41 (1986).

58. *Id.* at 43-44.

59. *Id.* at 50.

60. *Id.*

61. *Id.* at 50-52.

62. U.S. CONST. amend. XIV, § 1.

63. *See Renton*, 475 U.S. at 55 n.4 (citing Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 63-73 (1976)).

64. WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW 671-72 (10th ed. 1997) (citing Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949)).

Equal Protection argument in cases where only sexually-oriented businesses have been the subject of zoning ordinances.

II. HISTORY AND FUNCTIONALITY OF THE INTERNET

A. History and Growth

To truly grasp the difficulty in applying the developed notions of obscenity and free speech to the Internet, a brief account of the Internet's history and its pervasiveness is appropriate. Today's Internet can find its genesis in a military program began in 1969, which was designed to enable communication between computers operated by the military, defense contractors, and certain universities.[65] This seminal concept for a network of computers was then applied to create civilian networks for business and private use. Eventually, these individual networks were linked together to create a worldwide method of communication.[66] It is this "international network of interconnected computers" that is known as the Internet.[67]

Over the past two decades, the Internet has undergone "extraordinary growth," increasing in size from 300 linked host computers in 1981 to approximately 9.4 million in 1996.[68] Data taken in July 2001 show that this number has ballooned to over 125 million host computers worldwide,[69] with over 165 million actual users with home access to the Internet in the United States *alone*.[70] These statistics confirm the perceived ubiquity of the Internet, implying that it is a medium of communication and a component of life entrenched in the global society.

B. Accessing the Internet

The millions of Internet users access the Internet utilizing one of two major methods: by using a computer directly linked to the Internet, or by using their personal computer to contact a remote computer that is directly linked to the Internet.[71] Typically, computers directly linked to the Internet can be found at institutions such as universities, corporations, libraries, or government facilities.[72] Remote contact can be accomplished via various methods, including a telephone

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65. Reno II, 521 U.S. 844, 849-50 (1997).

66. *Id.* at 850.

67. *Id.* at 849.

68. *Id.* at 850.

69. Internet Software Consortium, *Internet Domain Survey, July 2001*, *at* http://www.isc.org/ds/WWW-200107/index.html (n.d.) (copy on file with author) (noting that there has been a change in how host computers are counted, and that an adjusted estimate of the number of host computers in 1996 is actually closer to 14.3 million).

70. Nielsen//NetRatings, *July Internet Universe*, *at* http://www.nielsennetratings.com/hot_of_the_net_i.htm (n.d.) (copy on file with author).

71. Reno I, 929 F. Supp. 824, 832 (E.D. Pa. 1996), *aff'd*, Reno II, 521 U.S. 844 (1997).

72. *Id.* at 832-33.

modem, a cable modem, or digital subscriber line (DSL).[73] There are also a small, but growing number of users that access the Internet by satellite connection.[74] When using one of these indirect methods of accessing the Internet, the user must utilize an Internet Service Provider (ISP).[75] ISPs are third-party entities with direct contact to the Internet who provide access to their computers, and often charge a usage fee.

Once connected to the Internet, there are various retrieval methods that allow the user to access information located on a remote computer, such as file transfer protocol, gopher, and the World Wide Web (Web).[76] Of these, the most widely used method of information retrieval and general communication over the Internet is the Web.[77] The popularity of the Web is largely attributable to the user's ability to access material and navigate between various information resources quickly. Most information on the Web is arranged such that text, images, sound, and video may be accessed without input of even the most basic computer commands.[78]

Regardless of the manner in which one chooses to connect to the Internet, the preferred method of retrieving information, or the information and services utilized, the primary point of discussing Internet access—with regard to the future of Internet organization—is that a user must go through an intermediate entity to access the Internet. Although this may appear to be straightforward, it holds the key to potential organization or regulation of the Internet, as this intermediary essentially controls the information accessible to the end user.[79]

C. Government Interest at Stake: Children's Access to Sexually-Oriented Material

With the allure of such a powerful communication, research, and commercial device, many have overlooked or minimized the distinct governmental and societal interests placed in jeopardy by an unchecked Internet. The articulation of such interests is vital, since in the absence of true concerns, "there is no point in agonizing over [their] solution."[80] Apart from concerns common to all users, such as decreased research efficiency and unsolicited contact by sexually-oriented websites, the government has an undeniable interest in protecting

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73. Joe Froehlich, *Internet Bandwidth Technologies*, WINDOWS NT PROFESSIONAL (Sept. 2000), *available at* http://msdn.microsoft.com/library/en-us/dnntpro00/html/wnp0095.asp (copy on file with author).

74. *Id.*

75. ACLU v. Reno, 31 F. Supp. 2d 473, 482 (E.D. Pa. 1999) (Reno III), *aff'd*, 217 F.3d 162 (3rd Cir. 2000) (Reno IV), *cert. granted*, Ashcroft v. ACLU, 532 U.S. 1037 (2001).

76. *Reno I*, 929 F. Supp. at 835.

77. Reno II, 521 U.S. 844, 885 (1997).

78. *See Reno I*, 929 F. Supp. at 836.

79. Charles C. Mann, *Taming the Web*, TECH. REV. (Sept. 2001), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/porn/special/taming.html (copy on file with author).

80. *Policing Obscenity*, *supra* note 6, at 699 (panel comments by Bruce Watson).

children from exposure to pornographic material.[81] In large part this is based on a societal recognition of a healthy level of curiosity in children. As this curiosity naturally turns to sexual matters, society does not want pornography setting the ideals for sexual role models or interpersonal relationships.[82] However, this interest must be counterbalanced with the right of adults to access speech protected by the First Amendment.[83] To limit adult access to material suitable only for children has been colorfully described as "burn[ing] the house to roast the pig."[84]

The Internet poses a difficult challenge to governmental bodies trying to balance these interests constitutionally. The Internet has been regarded as a great speech-enhancing medium that has produced more of every kind of speech, including pornography.[85] Further, the private nature of the Internet allows access to this pornography at much lower transactional cost.[86] However, in the course of lowering the barriers to accessing pornography, the Internet has not prohibited children from exercising this same level of freedom. Therefore, the government is faced with the challenge of promoting the free exchange of ideas via a medium that gives each user a virtual press, while simultaneously developing an effective barrier to material that is harmful to minors.

Children's exposure to pornography on the Internet is further enhanced by the current method of information retrieval: search engines. Several search engines have been developed as an Internet service for seeking out Web pages that pertain to certain topics or contain key phrases.[87] After performing its search, a list of hyperlinks[88] is displayed that match the topic or phrase sought by the user.[89] However, search engines are not exact, and may accidentally return links to sexually explicit websites, despite an otherwise benign search.[90] If the problem were confined to the acceptable explanation of irrelevant search results,

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81. *See Reno II*, 521 U.S. at 875; FCC v. Pacifica Found., 438 U.S. 726, 749 (1978) (citing Ginsberg v. New York, 390 U.S. 629, 639-40 (1968)).

82. *See Policing Obscenity*, *supra* note 6, at 700 (panel comments by Bruce Watson).

83. *E.g.*, *Reno II*, 521 U.S. at 875.

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

85. *See Reno II*, 521 U.S. at 853-54.

86. *See Policing Obscenity*, *supra* note 6, at 709 (providing panel comments by Jonathan Zittrain).

87. *See* Reno I, 929 F. Supp. 824, 837 (E.D. Pa. 1996), *aff'd*, Reno II, 521 U.S. 844 (1997).

88. Hyperlinks enable a user to navigate throughout the Internet simply by moving a mouse pointer over the link and clicking on it, which then transfers the user to a new Internet address.

89. *See Reno I*, 929 F. Supp at 837.

90. *See id.* at 844. Despite a demonstration showing the inaccuracy of search engines at the hearing, the court still concluded that exposure to sexually-oriented material rarely occurs in an accidental manner analogous to broadcasts. *Id.* at 844-45. By one account, the benign search for "Pokemon pictures" at one time returned a pornographic site as the first hyperlink. *Policing Obscenity*, *supra* note 6, at 699-700 (providing panel comments by Bruce Watson). Further, pornographic websites misuse brand names such as Disney, Nintendo, and Barbie to increase the occurrence of their hyperlink in Internet searches. *Id.*

the government and concerned citizens would have little reason to find fault with Internet pornographers. However, a study by an online research company showed that an estimated twenty-five percent of pornography sites embed popular name brands into the coding of their websites.[91] This tactic yields search results to common search terms that are infiltrated by hyperlinks to their sites. Further, should an individual click on one of these hyperlinks, some pornographic sites have ingeniously programmed a loop that forces the user to another related site should they attempt to leave the site using the "back" button.[92] It is precisely this type of deceptive luring and unprincipled entrapment that has raised the concern of many in society and government.

III. FEDERAL COURTS HAVE RULED CONGRESS' ATTEMPTS TO REGULATE INFORMATION ON THE INTERNET UNCONSTITUTIONAL

A. The Communications Decency Act of 1996

The first congressional attempt to regulate information on the Internet was the Communications Decency Act of 1996 (CDA).[93] The purpose of the CDA was to address growing concerns over children's access to sexually explicit material on the Internet.[94] To accomplish this goal, the CDA imposed criminal sanctions against any entity "knowingly" providing "obscene" or "indecent" communications to any person under the age of eighteen.[95] Further, the CDA prohibited communication of "patently offensive" material to any person under eighteen.[96] The reach of these two subsections was limited by two affirmative defense provisions,[97] which protected entities who had taken "good faith, reasonable, effective, and appropriate actions" to prevent accessibility by minors.[98]

Two separate actions were quickly initiated to challenge the CDA's constitutionality, alleging that the terms "indecent" and "patently offensive" were

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91. *Policing Obscenity*, *supra* note 6, at 699-700 (providing panel comments by Bruce Watson).

92. *Id.* at 700 (stating that without some sophisticated knowledge of Internet navigation, the average user is forced to turn off the computer to exit the website).

93. 47 U.S.C. § 223 (Supp. 1997). For an exhaustive review of the federal courts' analysis of the CDA, see, for example, J.V. Hale, *C. Reno v. American Civil Liberties Union: Supreme Court Strikes Down Portions of the Communications Decency Act of 1996 as Facially Overbroad in Violation of the First Amendment*, 24 J. CONTEMP. L. 111 (1998).

94. *See* 141 CONG. REC. S8088 (daily ed. June 9, 1995) (statement of Sen. J. James Exon, Jr. (D-SD)).

95. 47 U.S.C. § 223(a)(1) (Supp. 1997) (stating that providers of such communications "shall be fined under Title 18, or imprisoned not more than two years, or both").

96. *Id.* § 223(d) (subjecting providers to the same penalty as under § 223(a)(1)(B)).

97. *Id.* § 223(e)(5).

98. *Id.* § 223(e)(5)(A).

too broad and would violate the free speech clause of the First Amendment.[99] These cases were joined, and a special three-judge district court issued a preliminary injunction against the challenged provisions.[100]

On appeal, the Supreme Court affirmed the lower court's ruling, stating that the CDA's terminology was without the requisite First Amendment precision for statutes attempting to regulate the content of speech.[101] Writing for a seven-Justice majority, Justice Stevens stated that the statute was vague, that it would undoubtedly produce a chilling effect on Internet speech, and that it was not narrowly tailored to further the government interest in protecting children from sexually explicit speech.[102]

Specifically, the Supreme Court rejected the government's attempt to draw favorable precedent from three cases where regulatory statutes were found constitutional. First, the Court distinguished *Ginsberg v. New York*,[103] stating that the challenged statute in that case employed much narrower language than that found in the CDA.[104] Next, the character of the communication that the CDA sought to regulate—all Internet transmissions—was contrasted with the scope of the Federal Communication Commission's (FCC) order in *FCC v. Pacifica Foundation*.[105] In *Pacifica*, the FCC was attempting to regulate transmissions via radio, which was characterized as the medium that has enjoyed the most limited First Amendment protection because of its accessibility by minors.[106] Finally, the Court refused to analogize the CDA with *City of Renton v. Playtime Theatres*.[107] The Court noted that the ordinance in *Renton* was specifically designed to combat the deleterious secondary effects of sexually explicit speech by regulating the time, place, and manner of operation, whereas "the CDA [was] a content-based blanket restriction on speech."[108]

In the course of searching for appropriate precedent, the Supreme Court

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99. Reno II, 521 U.S. 844, 861-62 (1997). Plaintiffs included the ACLU, National Writers Union, Planned Parenthood Federation of America, American Library Association, America Online, American Booksellers Association, Inc., Apple Computer, Association of American Publishers, CompuServe, Magazine Publishers of America, Microsoft Corp., and Newspaper Association of America. *Id.* at 862 nn.27 & 28.

100. This panel, created pursuant to § 561(a) of the Telecommunications Act of 1996, was comprised of one judge from the Third Circuit Court of Appeals and two judges from the Eastern District of Pennsylvania. Reno I, 929 F. Supp. 824, 825 (E.D. Pa. 1996), *aff'd*, Reno II, 521 U.S. 844 (1997).

101. *Reno I*, 929 F. Supp. at 874.

102. *Id.* at 874-78.

103. 390 U.S. 629 (1968).

104. *Reno II*, 521 U.S. at 865 (stating that the statute's regulation of material that was "utterly without redeeming social importance for minors" holds a narrower scope than the "indecent" and "patently offensive" language in the CDA).

105. 438 U.S. 726 (1978).

106. *Reno II*, 521 U.S. at 867.

107. 475 U.S. 41 (1986).

108. *Reno II*, 521 U.S. at 867-68.

likened the CDA to the statute prohibiting indecent and obscene interstate commercial telephone messages at issue in *Sable Communications of California, Inc. v. FCC*.[109] In that case, the Court determined that a ban on indecent commercial telephone messages was unconstitutional since, unlike a broadcast, the user cannot be "taken by surprise by an indecent message."[110] The Court noted that similar to the affirmative steps required to access sexually-oriented prerecorded messages, Internet users must make affirmative steps to access sexually-oriented material.[111] The Court found this precedent persuasive, and ruled that the content-based nature of the regulation made the CDA an unconstitutional attempt to regulate speech.[112]

In a partial dissent, Justice O'Connor specifically addressed the issue of zoning on the Internet. She characterized the purpose of the CDA to be the creation of "adult zones" that would contain material deemed inappropriate for minors.[113] After noting a history of states creating "adult zones" in numerous circumstances, Justice O'Connor asserted that the Court would uphold an Internet zoning plan "if (i) it does not unduly restrict adult access to the material; and (ii) minors have no First Amendment right to read or view the banned material."[114] By articulating the requisite characteristics of any constitutional zoning ordinance, Justice O'Connor's dicta gave the broad, rigorous criteria for successfully organizing information on the Internet.

B. The Child Online Protection Act

In response to the Supreme Court's opinion on the CDA, Congress again sought to protect children from sexually-explicit material on the Internet by passing the Child Online Protection Act (COPA)[115] in October 1998.[116] As opposed to the vague terms of "indecent" and "patently offensive" utilized in the CDA, Congress prohibited the knowing communication of material that is "harmful to minors" for commercial purposes.[117] Unlike the CDA, COPA proceeds to define the specific terms employed within the act, including the "harmful to minors" standard.[118] That definition, with slight alterations so as to be applicable specifically to minor viewers, was comprised of the three-prong

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109. 492 U.S. 115 (1989).

110. *Id.* at 128.

111. *Reno II*, 521 U.S. at 869.

112. *Id.* at 874-78.

113. *Id.* at 886 (O'Connor, J., concurring in part and dissenting in part).

114. *Id.* at 888 (O'Connor, J., concurring in part and dissenting in part).

115. 47 U.S.C. §§ 230-31 (2000). For an exhaustive review of the federal courts' analysis of COPA, see, for example, Heather L. Miller, *Strike Two: An Analysis of the Child Online Protection Act's Constitutional Failures*, 52 FED. COMM. L.J. 155.

116. Reno III, 31 F. Supp. 2d 473, 476-77 (E.D. Pa. 1999), *aff'd*, Reno IV, 217 F.3d 162 (3d Cir. 2000), *cert. granted*, Ashcroft v. ACLU, 532 U.S. 1037 (2001).

117. 47 U.S.C. § 231(a).

118. *Id.* § 231(e).

Miller test for obscene material.[119] Further, the "harmful to minors" standard is not novel, as it has previously been explicitly approved by the Court[120] and is utilized in forty-three state statutes prohibiting the sale of harmful materials to minors.[121] As with the CDA, violators of COPA are subject to criminal sanctions,[122] though affirmative defenses are available for good faith efforts to restrict access by minors to such material.[123]

Alleging that the "harmful to minors" standard was as vague as the standards from the CDA, COPA was immediately challenged by the original *Reno* plaintiffs the day after it was signed into law.[124] The district court granted a preliminary injunction against the application of COPA,[125] using a strict scrutiny standard to analyze the content-based regulation of speech.[126] The district court found that COPA did not employ the least restrictive means to accomplish the legitimate government interest in the welfare of children.[127]

On appeal to the Third Circuit Court of Appeals,[128] the lower court's preliminary injunction was affirmed.[129] The court of appeals noted that current technology did not allow Internet publishers to restrict access to their material based on the geographic location of each individual user.[130] The appellate court reasoned that this limitation requires publishers to meet the most conservative state's community standards, since the modified *Miller* test that defines "harmful to minors" requires a determination of "contemporary community standards."[131] The court of appeals found that this burden, which was a direct result of the state of technology at the time of the ruling, was an impermissible restriction on Internet publishers' protected First Amendment speech.[132] Effectively, this holding was much narrower than the district court's since the appellate court did not categorically refuse the applicability of a modified *Miller* test to the

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119. *Id.*

120. *See, e.g.*, Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126-28 (1989); Ginsberg v. New York, 390 U.S. 629, 636-43 (1968).

121. *See, e.g.*, CAL. PENAL CODE § 313.1 (West 1999); FLA. STAT. ch. 847.012 (2000); 720 ILL. COMP. STAT. 5/11-21 (West 1993); IND. CODE ANN. § 35-49-3-3(1) (West 1998); N.Y. PENAL § 235.21(1) (McKinney 1999); 18 PA. CONST. STAT. § 5903(c) (2001); TEX. PENAL CODE ANN. § 43.24(b) (Vernon 1994).

122. 47 U.S.C. § 231(a) (stating that violators are potentially subject to a series of fines, up to six months imprisonment, or both).

123. *Id.* § 231(c).

124. Reno III, 31 F. Supp. 2d 473, 476 (E.D. Pa. 1999), *aff'd*, Reno IV, 217 F.3d 162 (3rd Cir. 2000), *cert. granted*, Ashcroft v. ACLU, 532 U.S. 1037 (2001).

125. *Id.* at 498-99.

126. *Id.* at 492-93.

127. *Id.* at 496-97.

128. Reno IV, 217 F.3d 162 (3rd Cir. 2000).

129. *Id.* at 180.

130. *Id.* at 166.

131. *Id.*

132. *Id.*

Internet.[133] In fact, the court iterated a "firm conviction that developing technology will soon render the 'community standards' challenge moot," which would allow Congress to constitutionally draft a protective statute against material harmful to children.[134]

The government subsequently appealed the Third Circuit's ruling, to which the Supreme Court granted certiorari.[135] The Court's ruling was announced in five narrowly drafted opinions, in which eight Justices voted to vacate the Third Circuit's ruling and remand for further consideration.[136] Through Justice Thomas' opinion, the Court held "only that COPA's reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment."[137] Justice Thomas noted that omitting a specific geographic reference does not do violence to the contemporary community standards analysis, per the Court's ruling in *Jenkins v. Georgia*.[138] Such a generic reference would negate the Third Circuit's concern that the Internet community would have to "abide by the 'most puritan' community's standards."[139] Even if geographic constraints are used, Justice Thomas also points out that "requiring a speaker disseminating material to a national audience to observe varying community standards does not violate the First Amendment."[140] Although the Court rejected this narrow constitutional assault on COPA, the Court cited the prudence of having the Third Circuit initially review the other potential constitutional maladies,[141] effectively delaying any ultimate ruling on COPA's constitutionality by several years. Regrettably, such a time frame only enhances the difficulty of implementing COPA, should it pass constitutional muster in the final analysis.

C. Erroneous Focus on Analogous Fora in Judicial Review of the CDA and COPA

During the course of their constitutional analysis of the CDA and COPA, one of the primary focal points was the search for an appropriate analogy for Internet communication.[142] The motivation for an analogy is clearly driven by the notion

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133. *Id.* at 180.

134. *Id.* at 181.

135. Ashcroft v. ACLU, 532 U.S. 1037 (2001).

136. Ashcroft v. ACLU, 535 U.S. 564, 586 (2002) (the government remains enjoined from enforcing COPA until after the Third Circuit reviews the remaining "difficult issues"). *Id.*

137. *Id.* at 585 (emphasis in original). Further, the Court withheld any opinion regarding other potential constitutional concerns, including alternative bases for overbreadth, vagueness, or COPA's ability to ultimately withstand a strict scrutiny analysis. *Id.*

138. *Id.* at 576-77 (citing Jenkins v. Georgia, 418 U.S. 153, 157 (1974)).

139. *Id.* at 577.

140. *Id.* at 580 (referring to the Court's holding in *Hamling v. United States*, 418 U.S. 87 (1974)).

141. *Id.* at 585.

142. *See, e.g.*, Reno III, 31 F. Supp. 2d 473 (E.D. Pa. 1999), *aff'd*, Reno IV, 217 F.3d 162 (3d

that once the Internet is appropriately likened to an existing mode of communication, the regulation on speech permitted by the Supreme Court for that forum can then be applied to the Internet.[143] The federal courts have considered analogies to communication via broadcast, print publishers, telephone, cable television, and postal delivery,[144] with none truly capturing the unique combination of functions served by the Internet. One reaction to the inadequacy of an existing analogy—combined with the concern over applying the *Miller* test to the Internet—has been to call for the abolition of the obscenity standard altogether.[145] This extreme stance is but the natural extension of an analysis focused on the trees without a clear vision of the forest.

Contrary to the oft-recited notion that the scope of speech protected by the First Amendment is dependent on the specific technology of the distinct forum in which it exists, some legal commentators have noted that First Amendment protection is uniform across all media, with an exception for broadcast communications.[146] Upon agreement that the Internet does not properly fit into this broadcast exception,[147] it is only proper to apply the traditionally accepted standard for the scope of protected speech: the *Miller* test.[148] Therefore, the challenge lying ahead is to develop a constitutional balance between the existing

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Cir. 2000), *cert. granted*, Ashcroft v. ACLU, 532 U.S. 1037 (2001); Reno II, 521 U.S. 844 (1997). This analysis stems from the notion that proper First Amendment analysis requires a court to examine the content and context in which the speech occurred. *See* Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727, 740-41 (1996); FCC v. Pacifica Found., 438 U.S. 726, 744 (1978).

143. Congress applied existing standards when drafting both the CDA and COPA. The "indecent" speech standard in the CDA was borrowed from the standard for broadcast speech. This standard is appropriate for broadcasts because they enter the private sphere of the user unbidden and are highly accessible to children. *Pacifica Found.*, 438 at 748-50. In reply to the Court's ruling on the CDA, Congress utilized the much lower "harmful to minors" standard applied to print media and telephone communications. *See* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115 (1989); Ginsberg v. New York, 390 U.S. 629 (1968); *see also Policing Obscenity*, *supra* note 6, at 700-01, 706 (providing panel comments by Bruce Watson and Bruce Taylor).

144. *See, e.g.*, *Reno II*, 521 U.S. at 864-68.

145. *See* Kipness, *supra* note 15, at 419-20. This would be based on an expansion of the dicta from Stanley v. Georgia, 394 U.S. 557 (1969).

146. *See Regulating the Internet*, *supra* note 16, at 376-77 (providing a response by Mike Godwin to audience question).

147. *See Reno II*, 521 U.S. at 868-70.

148. "While new technology such as the Internet may complicate analysis and may sometimes require new or modified laws, it does not . . . change the analysis . . . under the First Amendment." United States v. Baker, 890 F. Supp. 1375, 1390 (E.D. Mich. 1995) (footnotes omitted)). Application of the existing free speech doctrine, presumably including its limitations, has even been supported by the ACLU. *Regulating the Internet*, *supra* note 16, at 385 (providing panel comments of Nadine Strossen, President, ACLU). However, ACLU publications suggest their deeper goal is to change the standard of obscenity itself. *See Policing Obscenity*, *supra* note 6, at 700-01 (providing panel comments by Bruce Watson).

Miller test for obscenity, the government's interest in protecting minors from material that is harmful to them, and the right of adults to access material that is constitutionally protected under the free speech doctrine.

IV. LOOKING AHEAD: GOVERNMENT VS. PRIVATE ACTION REGARDING THE INTERNET

A. Organization vs. Regulation

One of the downfalls with Congress' approach to managing the Internet's content is that they have focused primarily on creating constitutional regulations of free speech.[149] To effectively further the state interest in protecting children from sexually-oriented material, authoritative bodies should instead focus on methods of *organization* as opposed to traditional *regulation*. The term "organization" has been purposefully chosen over the traditional term "zoning" because of the notions of zoning articulated by Justice O'Connor.[150] Zoning has been said to have two critical characteristics that allow for restricting access by children, yet permitting adults' access to the same material: geography and identity.[151] These characteristics refer to the ability of merchants to visually examine the potential consumer and request specific information to ensure the viewer is of an appropriate age.[152]

However, applying this narrow notion of zoning to the Internet restricts analysis to the end user. Organization, conversely, refers to compartmentalizing the entirety of the Internet's content, thereby providing general assistance to the user in identifying material. Therefore, by design, organization of information is a way of increasing the usefulness of that which is being ordered. Once properly labeled, an individual or other entity can then choose to privately regulate what type of information will be accessible on their personal computer.

The Internet's privacy serves to assuage typical concerns regarding the impact of zoning on the commercial viability of a targeted merchant. Loss of clientele and social stigmatization have been two charges of the deleterious effects zoning may have on merchants that are labeled as "pornographers," but these concerns do not transfer strictly to the Internet. Clientele are not dissuaded from visiting pornography sites on the Internet by notions of shame of recognition or fear of physical harm. Further, the structure of the Internet diminishes the level of stigmatization against the merchant since it is impossible to relegate a pornographer to a seedy, vile neighborhood, which may be the effect of some zoning ordinances. Therefore, the proposed organization of material on the Internet is more analogous to the organization of information in libraries according to the Dewey Decimal system than to physical zoning ordinances. In

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149. *See* Reno III, 31 F. Supp. 2d 473 (E.D. Pa. 1999), *aff'd*, Reno IV, 217 F.3d 162 (3d Cir. 2000), *cert. granted*, Ashcroft v. ACLU, 532 U.S. 1037 (2001); *Reno II*, 521 U.S. at 868.

150. *Reno II*, 521 U.S. at 888-90 (O'Connor, J., concurring in part, dissenting in part).

151. *Id.*

152. *Id.*

an organized structure, speech is not impinged; it is merely placed in a useful, accessible locale.

B. Government-based Organization of the Internet

Two primary questions gird the possibility of government organization of the Internet. Does the government still have the power to organize the Internet, in light of Congress' act granting ICANN authority to make Internet policy decisions?[153] Can the government take action to organize the Internet's content without creating constitutional concerns similar to those arising from their regulation attempts?

1. The Government Still Has the Authority to Organize the Internet.—In lieu of regulation, the government still retains the authority to affect the structure of the Internet. ICANN is a private organization that was empowered via Congressional act to manage TLDs and oversee the Internet's organization.[154] However, Congress' General Accounting Office has reported that it is the Commerce Department, not ICANN, which retains the ultimate authority over TLD management.[155] In response to recent ICANN action, some Internet entities have specifically called for government intervention into the issue of policy-making on the Internet because the interests of ICANN are not representative of the interests of users.[156] Therefore, the government retains the final decision-making authority regarding the organization of the Internet and appears to enjoy some support from the online community.

2. Organization Relieves the Constitutional Concerns for Government Regulatory Actions.—Organization of the Internet can be accomplished constitutionally, so long as the government works within the bounds of First Amendment free speech principles. Above all other rights put at risk by the Internet, this right is of foremost concern because of the unique opportunity for the masses to have their individual voices heard as never before.[157] The impact of the Internet is profound because it enables each person with Internet access to own a press,[158] representing an extremely low barrier to entrance for potential speakers.[159]

One primary challenge for the government is to address the applicability of obscenity standards to the Internet. The main problem associated with the *Miller* test's applicability to the Internet is its reliance on current local community

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153. McCullagh & Sager, *supra* note 20.

154. Declan McCullagh, *Senator Seeks Sex*, WIRED NEWS, June 9, 2000, *at* http://www.wired.com/news/politics/0,1283,36867,00.html.

155. McCullagh & Sager, *supra* note 20.

156. *Id.*

157. *Regulating the Internet*, *supra* note 16, at 344 (providing the introductory comments of Frank J. Macchiarola).

158. United States v. Baker, 890 F. Supp. 1375, 1390 (E.D. Mich. 1995) (analogizing the Internet with a newspaper).

159. Reno II, 521 U.S. 844, 863 n.30 (1997).

standards of decency or morality.[160] By representing a global community, this standard is difficult, if not impossible, to apply to the Internet's content.[161] Should one accept the notion that global standards of decency and morality should govern the definition of obscenity, the legal force of the *Miller* test is obliterated. While this concern for a meaningful obscenity standard lurks for future scholars to address, the principle that the government can organize the Internet according to the accepted free speech doctrine remains foremost.

C. Privately-Initiated Organization of the Internet

In anticipation of a government-based attempt to organize the Internet, the leaders of the Internet should privately take initiative to order its content. In so doing, these entities would avoid governmental bureaucracy and ensure their input is determinative in the new Internet's structure.

1. Motivation for Self-organization.—With federal courts ruling in favor of objectors to both the CDA and COPA, there would not seem to be great incentive for privately-initiated steps to be taken toward the goal of organization. However, there are myriad reasons for the private leaders of the Internet to take the first steps toward structuring the Internet.

First, the alternative of government-based organization is dangerously inefficient. With the dynamic, near-exponential growth of the Internet, any proposed plan for organization must be refined and implemented as quickly as possible. For an example of the government's competency when dealing with technological matters, one need look no further than the case of *Sable Communications of California v. FCC*.[162] In that case, the FCC considered the matter of free speech over the telephone in the "dial-a-porn" context. Including the time for litigation of the FCC standards, it had taken eight years to finalize the industry guidelines for a relatively simple blocking technology.[163] This time lapse would render any organization proposal useless in light of the unprecedented growth and ubiquity of the Internet.

Second, the entities most likely to create fair, manageable, and meaningful solutions are those entrenched in the Internet. The technological, educational, and commercial leaders of the Internet are more knowledgeable about the existing technology and potential development concerns than the government because of their proximity to these issues. It is reasonable to presume that these entities would be best suited to create a logical, functional structure for the Internet.

Finally, those entities at the forefront of supporting such organization would likely be rewarded with a favorable response in public sentiment. The public

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160. Smith v. United States, 431 U.S. 291, 300-01 (1977).

161. Kipness, *supra* note 15, at 419.

162. 492 U.S. 115 (1989).

163. Jerry Berman & Daniel Weitzner, *CDT Analysis of the Communications Decency Act Passed by the Senate*, CENTER FOR DEMOCRACY AND TECHNOLOGY, *at* http://www.cdt.org/speech/cda/950615exon-coats_analysis.html (n.d.) (copy on file with author).

relations of these entities, as well as the Internet generally, might be recognized for their concern over growing problems and their keen consideration of the public's welfare in acting without government intervention. At a time when many have been economically disillusioned by the short-term failure in the Internet's commercial proficiency, such an altruistic act may serve to mitigate public perceptions of self-serving malevolence.

2. Parties That Must Be Involved in the Organization Effort.—A proper discussion of privately-based organization of the Internet begs the question of which entities will be represented in such an authoritative body. Intuitively, those entities serving in such a capacity must be made up of those willingly taking initiative to be involved in an organization effort.[164] At minimum, this body would need to have the support of the top Internet Service Providers (ISPs) and "community" sites[165] so that any determinations could be enforced. Such support would coerce other Internet entities into participation, since ISPs and community sites could threaten to filter uncooperative sites at the point of service.[166] In addition to these entities, it would be prudent to include representatives from academia and government—specifically military intelligence—since these two entities were involved in the creation of the Internet. The cooperative power-sharing nature of such a body would ensure that government officials would not be acting in a purely regulatory manner. The primary function of such a commission would be to develop an organizational structure for the Internet comprised of a fixed number of TLDs and to create a review body that would aid in the classification of websites into appropriate TLDs.

D. Top Level Domains Represent Technologically Feasible Method of Internet Organization

Currently, websites are distinguished according to the identity of the site's owner, who then qualifies for one of a limited number of TLDs. Until recently, private individuals or institutions could only register websites with TLDs of dot-com, dot-net, or dot-org.[167] However, the issue of website addresses on these TLDs has been in a state of disarray since the mid-1990's.[168] There have been

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164. The Clinton Administration recognized that without online industry support, regulation or organization of Internet content will be met with a "nationwide backlash that could stunt the growth" of the Internet. *Gore at Summit Conference Sets Kids Online Policy*, COMM. DAILY, Dec. 3, 1997 (quoting Al Gore), *available at* 1997 WL 13781201.

165. Such as America OnLine, Yahoo, Microsoft Network, or Lycos.

166. *See Policing Obscenity*, *supra* note 6, at 711 (providing panel comments by Jonathan Zittrain, stating that this "vertical portability" is a disadvantage of current filtering technology).

167. David J. Stewart & Robert L. Lee, *Foreign-Character Domain Names and New Top-Level Domains Create More Trademark Issues*, GigaLaw.com, Nov. 2000, *at* http://www.gigalaw.com/articles/stewart-2000-11-p3.html. This is the third web page of a three-page article. The full text of the article is on file with author.

168. McCullagh, *supra* note 154.

several suggestions for creating only a dot-xxx or dot-sex extension,[169] but this action alone may infringe on the rights of established sites based on an Equal Protection argument.[170] While this argument is suspect,[171] the broader goal of organizing the Internet is more effectively accomplished by creating a fixed number of TLDs within which all websites would be required to exist.

1. Current TLDs Are Being Expanded by ICANN.—In response to the saturation of the dot-com TLD,[172] ICANN has recently approved seven new TLDs for registering websites.[173] However, their creation of more TLDs fails to further the organization of the Internet. By simply creating new TLDs without also providing some incentive for websites to realign, ICANN has succeeded in merely contributing to the Internet's chaos and fostering confusing, cumbersome navigation of its content.[174] For any organization proposal to truly be effective, there must either be an overwhelming incentive for existing websites to adopt a new TLD or there must be some tangible penalty for refusing the new structure.

2. Suggestion for TLDs That Could be Created.—To begin, Congress must first repeal the act providing ICANN with sole power to manage TLDs, and reassign this power to the aforementioned, privately-organized commission.[175] As a suggested starting point, the commission could create ten different TLDs that permit private registration.[176] This would in no way effect the sites owned by the government or educational facilities. The selected TLDs might include dot-kid, dot-teen, dot-xxx,[177] dot-adult, dot-mature, dot-shop, dot-biz, dot-me, dot-news, or dot-research. Any applicant for a website might be required to select up to three TLDs that they feel best represent the target audience or type of activity that will take place on their site. It would then be the responsibility of a review board to evaluate the application—including a sample of the

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169. *Id.*

170. *See* Glenn E. Simon, *Supreme Court Review: Cyberporn and Censorship: Constitutional Barriers to Preventing Access to Internet Pornography by Minors*, 88 J. CRIM. L. & CRIMINOLOGY 1015, 1046-48 (1998).

171. COHEN & VARAT, *supra* note 64, at 672 (noting that the Court has defended under-inclusive statutes from narrowly tailored arguments by stating that the legislature may attack a general problem in a piecemeal fashion). *See* discussion *supra* Part I.B.

172. Joanna Glasner, *Do We Really Need New Domains?*, WIRED, Nov. 17, 2000, *at* http://www.wired.com/news/print/0,1367,40242,00.html.

173. The approved TLDs were: dot-biz, dot-info, dot-name, dot-pro, dot-museum, dot-aero, and dot-coop. Oscar S. Cisneros, *ICANN: The Winners Are . . .*, WIRED, Nov. 16, 2000, *at* http://www.wired.com/news/politics/0,1283,40228,00.html.

174. The confusion has been multiplied by the presence of "alternative" TLD providers, who have began offering unauthorized TLDs for sale. *See* Andy Patrizio, *Confusion is Domain Problem*, WIRED, Mar. 14, 2001, *at* http://www.wired.com/news/business/0,1367,42373,00.html.

175. *See generally* McCullagh & Sager, *supra* note 20.

176. *See generally* Patrizio, *supra* note 174; Rebecca Vesely, *Word's Out: Time to Change Domain-Name System*, WIRED, Aug. 22, 1997, *at* http://www.wired.com/news/politics/0,1283,6297,00.html.

177. *See generally* McCullagh, *supra* note 146.

website's code—to determine which TLD should be assigned.

The dot-kid TLD could be set aside for content specifically targeted toward or in the interest of children, such as Sesame Street, Nickelodeon, or websites for cartoons.[178] Similarly, the dot-teen TLD would be comprised of pages with content specifically targeted toward teenage interests.[179]

Internet sites containing sexually-oriented material could utilize either a dot-xxx, dot-adult, or dot-mature extension.[180] The distinguishing factors relating to which TLD is appropriate would be contingent on the nature of the sight itself. If the sight engages in commercial pornographic activity, sells membership that grants access to pornographic material, or is otherwise in receipt of consideration from a user in exchange for pornographic material, then the dot-xxx TLD would be appropriate. In contrast, if the website is designed so that pornographic material is accessible without charge, or sexually explicit interchange regularly occurs on a chat portion of the site, then a dot-adult TLD may be appropriate. Finally, if the website contains non-pornographic information or discussion relevant to educating and opining on issues of sexuality, the dot-mature TLD may be appropriate. A recognizable concern with these TLDs is that they may be viewed as a blemish on the commercial viability of the website, similar to an NC-17 rating for films. However, the very nature of the Internet relieves this fear of being branded or punished because of the specific TLD, rendering this concern invalid.[181]

Additionally, the dot-shop TLD could be created to house Internet websites generally engaged in business-to-consumer or consumer-to-consumer transactions, such as Amazon or Ebay, respectively. Should the online entity engage in the sale of pornographic and non-pornographic items, a separate TLD could be assigned depending on the items for sale.[182] The dot-biz TLD would intend to represent a pure version of the dot-com TLD. Specifically, this TLD would house much of the information from existing commercial entities desiring a web presence, but not necessarily engaging in a significant amount of online sales.[183]

Further, the dot-me TLD could be created to house all personal websites. These websites would be characterized by individual or small-group ownership engaging in no commercial activity. The dot-news TLD would house much of the information disseminated by news organizations, including information on global and local news, sporting events and commentary, and weather. Finally,

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178. 178 *See* Oscar S. Cisneros, *No Porn Wanted at .Kids*, WIRED, Oct. 2, 2000, *at* http://www.wired.com/news/business/0,1367,39169,00.html.

179. Such as www.teen.com, www.teenpregnancy.org, and www.teenvoices.com.

180. *See generally* Chris Stamper, *.XXX Marks the Porn Site*, ABCNews.com, July 20, 1998, *at* http://more.abcnews.go.com/sections/tech/dailynews/dotxxx970715.html. (copy on file with author).

181. *See* discussion *infra* Part IV.A.

182. Thus, in the Ebay example, Ebay.sale might have general goods for auction, while Ebay.xxx would have pornographic material for auction.

183. Representative businesses include Coke, Nike, General Motors, and Microsoft.

the dot-research TLD could be an extension dedicated to any information relevant to the various types of academic research.

These TLDs are provided purely as potential examples, and intend to show the type of broad categories it might be appropriate to create. Inevitably, there will be websites that either do not clearly fit into any of the created TLDs or whose material overlaps a number of possible TLDs. The first problem would have to be dealt with using the aforementioned application review board and relying on their combined discretion. While assignments could be potentially appealed,[184] the applicant would suffer no impingement of their free speech rights since the material would still be accessible by any interested party. The latter problem could be dealt with easily by securing the same secondary domain—the "hotmail" portion in hotmail.com—with appropriate TLDs.

3. Persuading Existing Entities to Change TLDs.—The most favorable approach to accomplishing this arduous task of reorganization, while maintaining fairness to existing websites, is to require all websites to re-register under one of the newly created TLDs. To respect the value of the existing websites' name recognition, all current websites would have the opportunity to claim their choice of a new TLD prior to general registration. Further, to prevent websites from capitalizing on users' predilection to default to the dot-com, dot-net, or dot-org TLDs, these old TLDs would not be included in the new series of options.

The actual requirement for existing websites to re-register using a newly created TLD can be enforced through two methods. As noted previously, the commission could threaten supply-side filtering of any site not complying with such a proposal. This means that the ISP would prevent access to the website by displaying an error message when users attempt to access the website.[185] Technologically, this could be easily accomplished by filtering any website carrying an old TLD extension. In the alternative, the commission could simply rely on favorable public sentiment and pressure on Internet sites to comply with a plan for organization. However, this latter method of enforcement is likely to be effective only if there is significant support from Internet and government entities initially.

V. ADVANTAGES AND DISADVANTAGES OF ORGANIZATION VIA NEW TLDS

A. Advantages of Organization Over User-Based Filtering

1. Organization Represents the Least Restrictive Means of Furthering Legitimate State Interests.—Constitutionally, one of the most important advantages to the organization of the Internet using new TLDs is that it represents the least restrictive means of accomplishing one of the government's compelling interests: prohibiting children's access to pornography on the

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184. *See Policing Obscenity*, *supra* note 6, at 714 (panel comments by Deirdre Mulligan).

185. *See id.* at 711 (panel comments by Jonathan Zittrain, stating that such "vertical portability" is a disadvantage of current filtering technology).

Internet.[186] Under a highly organized construction, this interest is furthered by empowering users to make important decisions about what TLDs will be accessible. In this way, the government is not imposing any restriction in the traditional sense; rather, this is left to the individual end user or local community.[187]

2. Organization of Cyberspace Does Not Have the Same Potential Detrimental Effects to Commerce as Zoning.—In the past thirty years, the Supreme Court has heard several cases regarding zoning ordinances for sexually-oriented businesses.[188] These ordinances have been largely upheld because they focused on the furtherance of compelling state interests: the deleterious secondary effects on the community of such businesses.[189] It has been argued that these secondary effects do not exist for the Internet because these concerns are only appropriate for the physical world.[190] While secondary effects such as inefficiency and user displeasure may be too attenuated for an analogous argument, there is a wholly different perspective appropriate for organization versus zoning.

The private nature of accessibility to the Internet may have eliminated concern over decreasing property values and increased crime rates at the dissemination point of sexually-oriented material, but this trait also alleviates the commercial effects of labeling a merchant as a sexually-oriented website.[191] Since speech would be segmented—not stifled or suppressed—the purveyor of pornographic material would be unable to make valid First Amendment arguments.[192]

3. Local Communities Would Again Be Empowered to Utilize the Miller *Obscenity Test.*—The globalization that results from the Internet's ubiquity essentially strips the *Miller* test for obscenity of its legal effect,[193] as it is dependant on a reasonable person's analysis of the material based on local community standards. Another advantage of organizing the Internet by TLDs is that local communities could implement an Internet filter for ISPs located within their jurisdiction. ISPs simply provide a service to the local community, and therefore are subject to the community standards applicable to their point of business.[194] For those ISPs offering land-based access, local communities could

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186. *See, e.g.*, Ginsberg v. New York, 390 U.S. 629 (1968).

187. *See* Stamper, *supra* note 180.

188. *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277 (2000); Renton v. Playtime Theatres, 427 U.S. 41 (1986); Young v. Am. Mini Theatres, Inc., 427 U.S. 50 (1976).

189. *See Renton*, 475 U.S. at 48.

190. Reno II, 521 U.S. 844, 888-90 (1997) (O'Connor, J., concurring in part, dissenting in part).

191. *See* discussion *infra* Part IV.A.

192. *See* discussion *infra* Parts I, III.A.

193. Kipness, *supra* note 15, at 419.

194. *See* Aaron Craig, *Gambling on the Internet*, 1998 COMP. L. REV. & TECH. J. 61, 75 (1998) (discussing authority to enforce gambling laws against ISPs). *See generally* Jeffrey Yeates, *CALEA and the RIPA: The U.S. and the U.K. Responses to Wiretapping in an Increasingly Wireless World*,

require filtering of designated TLDs according to community standards. Further, the Internet's flexibility would also allow for such filtering to occur dependant on the time of day, similar to generally accepted broadcast policies.

Finally, the numerous methods of accessing the Internet ensure that speech would not be stifled. If an end user does want to access material that has been filtered by their community, they could subscribe to a national satellite provider or dial into an ISP located in another community. Children trying to access pornography using similar methods could be prohibited by parental restraints on which ISP will service the household. These alternatives would also assuage concerns over the dicta from *Stanley v. Georgia*,[195] which implied that mere possession of pornography reaching the obscene level in one's home may not be criminal. Once again, local communities would have the opportunity to determine what material is obscene according to current standards for that particular geographic location.

4. Overall Efficiency and Clarity of the Internet Would Be Improved.—Closely related to the issue of a local community's ability to set obscenity standards is the right of commercial, educational, and governmental entities to filter Internet content. Such institutions may want to filter certain content for many reasons, including the desire to promote professionalism, the threat of sexual harassment suits, and overall productivity. If an engineering firm, college, or local library determines that there is no reason for any of its potential users to be able to access commercial pornography, then they could filter the particular TLD(s) providing such access. Productivity may be increased in a two-fold fashion: unrelated material would be inaccessible and relevant material would be more easily identified, with aid from the TLD designation itself.

Additionally, by using TLDs to organize material, as opposed to an encoded rating system,[196] the public would be clearly apprised of material that they may want to filter. Such user-friendliness is vital as an increasing number of Internet users have a limited level of computer literacy.

5. Current Methods of Restricting Access to Internet Content Have Numerous Flaws.—Currently, user-based regulation of Internet content is primarily accomplished by using one of the numerous commercial filtering programs. Preliminarily, it is worth noting that the success of any user-based regulation that is dependent on parental knowledge of computers is suspect, since children are often more technology-literate than their parents.[197] However, filtering programs have many other disadvantages that diminish their effectiveness and precision, including potential over-filtering, unclear standards

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12 ALB. L.J. SCI. & TECH. 125, 2001 (discussing recent communication statutes and their enforceability against communication entities, including ISPs).

195. 394 U.S. 557 (1969).

196. Reno I, 929 F. Supp. 824, 838-39 (E.D. Pa. 1996), *aff'd*, Reno II, 521 U.S. 844 (1997).

197. *Regulating the Internet, supra* note 16, at 355 (Panel comments of Richard A. Kurnit, supported by John Zipperer, *The Naked City: Cyberporn Invades the American Home*, CHRISTIANITY TODAY, Sept. 12, 1994, at 48).

for filtering, and missed websites.[198] The first concern springs from the nature of purchasing prepackaged software: the consumer is purchasing the standards of the software developer,[199] which have been developed with little input from the websites themselves. By creating an application system for the TLDs, users would enjoy the benefit of the websites' self-assessment of their content, yielding more precise filtering. Also, the websites themselves would be cognizant of their status, who is filtering them, and what they might change to be eligible for a different TLD.[200] Finally, since there would be an application process for all registering websites, there would be no opportunity for a new site to have an Internet presence undetected by dated filtering software.

Another proposed technique for restricting access to specific Internet content is the class of age-verification techniques.[201] However, not only has the Court recognized that these techniques threaten the availability of indecent material to consenting adults,[202] they are also not the least restrictive means by which the content can be kept from minors.[203] Reorganization under new TLDs would present the least restrictive means for accomplishing this goal since it effectively places the onus for filtering on the parent or individual user, but enables them to do so easily and efficiently.

6. Little Technological Knowledge Is Required by the End User.—One intuitive requirement of any proposal incorporating new technology is that the end user be able to employ it in a meaningful way. Creating new TLDs permits organization and user-side filtering to take place without requiring detailed knowledge of how the Internet or filtering technology works. Functionally, the user would be able to filter TLDs using a simple drop-down menu and by supplying a password. Further, the browser could be designed to report any changes in the TLD filtering standards so parents could truly monitor what websites are being accessed by their children.

B. Disadvantages

1. Logistical Implementation Would Require Time, Effort, Money, and Unified Support.—Perhaps the most apparent disadvantage or barrier to implementing such a proposal is the large amount of work and support that would be required. The time and effort required to establish a commission alone may be prohibitive. Such a commission would also require funding to staff personnel to carry out its resolutions. Further, for such a commission to function effectively, there would have to be unified support from the majority of the Internet entities. However, the alternative of inaction presents many problems

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198. *See Policing Obscenity*, *supra* note 6, at 711 (panel comments by Jonathan Zittrain).

199. *See id.* at 714 (response comments by Deirdre Mulligan).

200. *See id.* (noting current site owners' inability to know when they are filtered and how to petition for unfiltered status).

201. Reno I, 929 F. Supp. 824, 839-42 (E.D. Pa. 1996), *aff'd*, Reno II, 521 U.S. 844 (1997).

202. *Id.* at 846-47.

203. *Id.* at 855-56.

of its own by promoting the inefficiency and disarray of the Internet. Also, *any* solution that is proposed will require the capital and support mentioned.

2. Existing Internet Entities Will Perceive Loss of Name Recognition.—Another objection that surely will be raised in the face of forcing websites to change TLDs is the perceived loss of name recognition. This is a powerful economic argument, as the first entity to secure name recognition in a particular field enjoys public attention, and perhaps a de facto monopoly. However, by forcing all websites to relocate, no existing website will lose name recognition disproportionately with another website. That is, Toyota need not be concerned that potential consumers will be able to access honda.com, but not toyota.com. To further mitigate this concern, if a user would input an address using an old TLD, a page used to redirect them to the appropriate site could be implemented similar to an out-of-service message used in the telephone industry. Such a page could alert the user of the change in TLDs, and if there are numerous secondary level domains with the same TLD, the page could include a brief description of each site.

3. Creating TLDs May Legitimize Obscenity.—Finally, a legitimate concern surrounding the creation of new TLDs specifically aimed at organizing sexually-oriented material is that such an act furthers the legitimization of obscene pornography in our society's psyche.[204] To the contrary, by enabling local communities and individual users to employ the *Miller* test in a meaningful way, obscenity is restrained to its rightful place: outside the veil of constitutional protection. An Internet constructed with various TLDs allows the local government to enforce its standards for obscenity, without circumvention and infiltration by suspect standards found in other parts of the world.

CONCLUSION

The Internet has been called the greatest experiment in First Amendment principles of free speech and free press.[205] It is the responsibility of modern society and government not to fail.[206] The proposal for creating new TLDs and organizing the Internet into a manageable system is admittedly optimistic, but the alternative of relying on invisible market forces to drive the Internet's organization is simply unrealistic. It is prudent to take action now, while the Internet is still in its relative infancy. Should there be delay, the incentive to take affirmative actions will diminish, as this incentive is inversely proportional to the size of the Internet. Further, should their latest attempt at regulation be declared unconstitutional, it is inevitable that Congress will once again try their hand at crafting legislation that will pass constitutional muster.

The Internet is indeed the greatest speech-enabling technology that man has ever developed.[207] However, this empowerment raises the concern of whether the

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204. Stamper, *supra* note 180.

205. *Regulating the Internet*, *supra* note 16, at 353 (panel comments of Mike Godwin).

206. *Id.*

207. *Policing Obscenity*, *supra* note 6, at 696 (panel comments by Ann Beeson).

global community wants to or should be able to hear everything that is said. Some may charge that this is a blatant cry for censorship. The challenge for these accusers is to resist popular rhetoric, and remember: free speech has limitations. For these constitutional limitations to remain efficacious in the future, local communities must reclaim their ability to determine their own contemporary standards. The creation of new TLDs, coupled with the cancellation of most existing TLDs, would accomplish this goal.

Finally, as a challenge to the judiciary, it may now be appropriate to strengthen the *Miller* test by creating an objective standard for obscenity. While the mere suggestion of such a standard raises federalism concerns, some commentators have alleged that the current subjectivity has rendered the *Miller* test "spongy" and ineffective.[208] If this continues to be the measure for determining what is obscene, then obscenity means nothing. Drawing lines is not an enjoyable or easy task, but it is an integral part of creating good law. Under a malleable definition of obscenity, it is only a matter of time and soft resolve before bedrock principles—such as the prohibition against child pornography—are compromised.[209]

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208. *See* Richard A. Posner, *Law and Literature: A Misunderstood Relation* (1988). "[T]he operative legal tests for obscenity are spongy and leave much to the vagaries of juries asked to evaluate expert testimony on literary merit, offensiveness, and other unmeasureables." *Id.* at 329.

209. For further review of current efforts to erode the child pornography prohibition, see *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). This case concerns the question of constitutional protection of "virtual" child pornography.