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Casenote

WIPE OUT IN ACLU v. JOHNSON: CAN ANY REGULATION OF SURFING THE 'NET WITHSTAND CONSTITUTIONAL SCRUTINY?

I. INTRODUCTION

The Internet ("Net") is an increasingly powerful medium in twenty-first century society, interconnecting people and ideas on a global scale. Never before has the dissemination of information, images and messages been so effortless and unrestricted as it has been in cyberspace. However, this freedom does not come without potential liabilities. Inevitably, the limits of free speech circumscribed by governmental regulation must weigh in to protect citizens from damaging messages that flow through this medium. One example of this regulation, created to protect minors from harmful materials exhibited on the Internet, was a New Mexico statute criminalizing such intentional communications. The New Mexico legislature, similar to other governmental bodies in recent years, attempted to stop minors from viewing sexually explicit materials on the Internet by enacting a statute prohibiting adults from disseminating such materials. Speech restrictions like New Mexico's inevitably trigger the need for judicial review within the constitutional confines of the First Amendment. Furthermore, because the statute restricts the Internet, the courts must review it under the Commerce Clause as well.

This Note examines the constitutionality of these cyberspace speech regulations as set forth specifically in ACLU v. Johnson. First, Section II paints the factual setting for the enactment of the legislation and its constitutional challenge. Next, Section III describes the complex legal background behind Internet regulation.

4. See id. at 1160 (implicating First Amendment and Commerce Clause challenges).
5. 194 F.3d 1149 (10th Cir. 1999).
including both First Amendment analysis and Commerce Clause analysis. Section IV then delineates the United States Court of Appeals for the Tenth Circuit's reasoning in holding the New Mexico statute violated the Constitution. Finally, Section V critically analyzes the reasoning of the court, while Section VI discusses the implications of the decision on Internet use and the potential for any governmental regulation of the medium to withstand constitutional scrutiny.

II. FACTS

In its 1998 session, the New Mexico legislature responded to the public outcry for Internet regulation with regard to minors by enacting a statute criminalizing the "dissemination of material that is harmful to a minor by computer."\(^7\) Such a regulation was designed in part to eliminate the conduct of adults who engage intentionally in these injurious communications with children.\(^8\) In a medium as anonymous and expansive as the Internet, however, there is significant anonymous potential for these regulations to be unconstit-

6. See id. at 1152 (holding that New Mexico statute prohibiting harmful materials to minors over Internet violated Constitution).

7. N.M. STAT. ANN. § 30-37-3.2(A) (Michie 1998) (setting forth criteria for criminal liability in dissemination of harmful materials). The statute explicitly states:

Dissemination of material that is harmful to a minor by computer consists of the use of a computer communications system that allows the input, output, examination, or transfer of computer data or computer programs from one computer to another, to knowingly and intentionally initiate or engage in communication with a person under eighteen years of age when such communication in whole or in part depicts actual or simulated nudity, sexual intercourse or any other sexual conduct. Whoever commits dissemination of material that is harmful to a minor by computer is guilty of a misdemeanor.

Id. The statute itself provides the following defenses:

(1) In good faith taken reasonable, effective and appropriate actions under the circumstances to restrict or prevent access by minors to indecent materials on computer, including any method that is feasible with available technology;

(2) Restricted access to indecent materials by requiring the use of a verified credit card, debit account, adult access code or adult personal identification number; or

(3) In good faith established a mechanism such as labeling, segregation or other means that enables indecent material to be automatically blocked or screened by software or other capability reasonably available to persons who wish to effect such blocking or screening and the defendant has not otherwise solicited a minor not subject to such screening or blocking capabilities to access the indecent material or to circumvent screening or blocking.

Id.

8. See Johnson, 194 F.3d at 1152 (stating that dissemination of materials harmful to minors is valid compelling state interest).
tionally overbroad. Thus, "various organizations and individuals who maintain or use computer systems to provide access to a range of information" accessible to New Mexicans via the Internet banded together to petition the court for an injunction barring enforcement of this statute. Although the intended (harmful) speech is arguably covered by the statute, the statute also includes women's health issues, rape, literary and artistic works, and gay and lesbian materials. The plaintiffs in this action argued these are legitimate materials that unduly fall within the scope of the statute, rendering it an over-expansive regulation. Thus, the plaintiffs challenged the New Mexico statute as facially invalid under the First Amendment, the Fourteenth Amendment and the Commerce Clause. In *ACLU v. Johnson*, the Tenth Circuit affirmed the grant of the preliminary injunction against the statute, finding that the plaintiffs had demonstrated a likelihood of success on the merits of their First Amendment and Commerce Clause claims.

## III. Background

Although state regulation of indecent materials on the Internet is a fairly recent development, Congress has consistently attempted to regulate such speech within the context of various media of protected expression. These attempts have resulted in a

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9. See id. at 1155.


11. See *Johnson*, 194 F.3d at 1153 (finding New Mexico statute constitutionally violative).

12. See id. at 1155 (asserting facial First Amendment challenges to statute).

13. See id. at 1153. Plaintiffs filed suit two months before the statute was to become effective. See id.

14. See id. at 1152. Defendants filed a motion to dismiss at the district court level. Their claims included: (1) ripeness; (2) that the Eleventh Amendment barred the suit; and (3) that the court should abstain from judgment until the New Mexico Supreme Court had time to interpret the statutory language. See id. at 1153. The district court, however, granted the injunction, and the defendants appealed the court's legal conclusions. See id. at 1154. The district court held that the statute violated First and Fourteenth Amendments because it "effectively ban[ned] speech that is constitutionally protected for adults;" it did not "directly and materially advance a compelling government interest;" it was not "the least restrictive means of serving its stated interest;" it "interfere[d] with rights of minors to access and view material that to them is protected by the First Amendment;" it was "substantially over-broad [sic];" and it prevented "people from communication and accessing information anonymously." ACLU v. Johnson, 4 F. Supp. 2d 1024, 1033 (D.N.M. 1998). The Tenth Circuit upheld these findings. See *Johnson*, 194 F.3d at 1152.

sizable arsenal of caselaw applicable in analyzing Johnson under a First Amendment review and, more recently, in the Commerce Clause arena.\textsuperscript{16}

To discuss effectively the court's reasoning in Johnson, this section first articulates the traditional, First Amendment review of speech regulations. Next, this section shows how the Internet is unlike other speech contexts and requires a more novel approach within this constitutional framework. Finally, this section delineates the foundations of traditional Commerce Clause analysis and its particular application to the Internet via the New Mexico statute.

A. Traditional Review of Speech Regulations

The First Amendment dictates that "Congress shall make no law . . . abridging the freedom of speech . . . ."\textsuperscript{17} Unarguably, this Amendment has been "the cornerstone of our ability to communicate ideas freely, although not absolutely, to others without governmental interference."\textsuperscript{18} The focus of that statement within traditional jurisprudence has been on the states' attempts to regulate this fundamental liberty.\textsuperscript{19} The constitutional limitations of governmental regulation are historically drawn according to the type of restricted speech at issue.\textsuperscript{20} As stated earlier, not all forms of speech garner First Amendment protection; courts will only protect speech which is deemed as having "de minimus" social value.\textsuperscript{21}

Thus, there is a constitutional distinction between the protection of what has been termed "indecent" speech and "obscene" speech

\begin{itemize}
\item \textsuperscript{16} See id. (discussing applicable caselaw in area of Internet regulation).
\item \textsuperscript{17} U.S. Const. amend. I. The First Amendment thereby applies to the states through incorporation of the Fourteenth Amendment. See U.S. Const. amend. XIV.
\item \textsuperscript{18} Brian M. Werst, A Survey of the First Amendment "Indecency" Legal Doctrine and its Inapplicability to Internet Regulation: A Guide for Protecting Children from Internet Indecency After Reno v. ACLU, 33 GONZ. L. REV. 207, 219 (1998) (citing C. Richard Martin, Censorship in Cyberspace, 34 HOUS. L. REV. 45 (1996)). In line with the construction of most of the Constitution, the First Amendment was "intentionally drafted in broad terms to protect the ideas of the ever-changing societal minority from censorship and account for technological and societal transformations." Id.
\item \textsuperscript{19} See id. (discussing free speech ideals underlying First Amendment).
\item \textsuperscript{20} See id. at 225 (distinguishing between indecent and obscene materials).
\item \textsuperscript{21} Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (holding that "utterances . . . of such slight social value [were] clearly outweighed by the social interest in order and morality"); see also Roth v. California, 354 U.S. 476, 484 (1957). Despite falling within the protection of the First Amendment, "indecent material is subject to regulation due to its 'slight social value.'" See Werst, supra note 18, at 225 (1998).
\end{itemize}
under the First Amendment. The United States Supreme Court’s rationale for this differentiation is that obscenity has no social importance and was not intended to receive protection. Thus, if materials are found to be “indecent,” and not rising to the level of “obscene,” then they typically will be guarded by the First Amendment.

The Court, recognizing it is imperative to clarify the distinction between indecent and obscene speech, fashioned a benchmark to compare offensive speech in Roth v. California. Justice Brennan set forth the first test for finding obscenity as, “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest.” The finding of obscenity has from this point on been contingent on some variation of these original standards.

In the same year that the obscenity standard was set forth in Roth, the Supreme Court in Butler v. Michigan reviewed a Michigan statute restricting the accessibility of such harmful materials to

22. See Roth, 354 U.S. at 484-85 (holding that obscene speech is not constitutionally protected).
23. See id. at 484 (setting forth original standard for finding obscenity).
24. See id. It is important to note that in Stanley v. Georgia, the Court held that the First Amendment does not permit the “mere private possession” of obscene materials to be a crime. See Stanley v. Georgia, 394 U.S. 557, 559 (1969).
25. 354 U.S. at 489. The statute in question in Roth was a federal obscenity statute making the mailing of material that was “obscene, lewd, lascivious, or filthy . . . or [any] other publication of an indecent character” criminal. Id. at 479 n.1.
26. Id. at 489. For a discussion of how the Roth test has been subsequently reformulated by the Miller court, see infra note 42 and accompanying text.
28. See Butler v. Michigan, 352 U.S. 380, 381 (1957) (holding that First Amendment does not require all materials to be fit for children). The Michigan Penal Code provided:

Any person who shall import, print, publish, sell, possess with the intent to sell, design, prepare, loan, give away, distribute or offer for sale, any book, magazine, newspaper, writing, pamphlet, ballad, printed paper, print, picture, drawing, photograph, publication or other thing, including any recordings, containing obscene, immoral, lewd or lascivious language, or obscene, immoral, lewd or lascivious prints, pictures, figures or descriptions, tending to incite minors to violent or depraved immoral acts, manifestly tending to the corruption of the morals of youth, or shall introduce into any family, school or place of education or shall buy, procure, receive or have in his possession, any such book, pamphlet, magazine, newspaper, writing, ballad, printed paper, print, picture, drawing, photograph, publication or other thing, either for the purpose of sale, exhibition, loan or circulation, or with intent to introduce the same into any family, school or place of education, shall be guilty of a misdemeanor.

MICH. COMP. LAWS § 750.343 (repealed 1957).
minors. In *Butler*, the Court focused on the potential over-expansive reach of the statute. The Court determined that the statute unduly restricted the access of adults to these materials and was not tailored to effectuate its intended purpose. As Justice Frankfurter warned, a state could not reduce its adult population to "reading only [material] that was fit for children." As a result, the Court struck down the statute on First Amendment grounds.

Although *Roth* outlined the definitive standard for obscenity, the Court elaborated on the application of the doctrine in *Ginsberg v. New York*. The particular issue confronting the Court was the constitutionality of a state statute designed to "assure minors a more restrictive right than the similar right provided to adults in determining what sexual material they were permitted to read or see." The Court held that the state has an interest in protecting the well-being of its children and "safeguard[ing]" them from abuses that might prevent their growth as citizens. Thus, state infringement of potentially protected freedoms may be justified by a state interest in shielding minors from harm—in this case obscene materials. The key relevance of *Ginsberg* is Justice Brennan's declaration that a law effectuating protection of minors from obscene materials need only pass a rational basis test to be constitutional. Thus, a compelling state interest is not necessary to uphold a stat-
ute suppressing obscenity whereas it is traditionally necessary for indecent materials.\(^{38}\)

The Supreme Court in *Miller v. California* finally set forth a test specifically designed to evaluate regulations of sexually explicit materials available to minors.\(^{39}\) The central emphasis of the Court's opinion was on the requisite narrow construction of the statute, which criminalized the conduct of an individual who knowingly sent into the state, with an intent to "distribute or to exhibit or offer to distribute any obscene matter."\(^{40}\) Although the Court recognized that the state has a compelling interest in regulating obscene materials, the scope of the regulation must be narrow so as to avoid the suppression of materials that are constitutionally protected.\(^{41}\) The three factor test, which redefined the *Roth* test, is as follows: (1) whether the average person, applying contemporary community standards would find that the regulation, when considered in its totality, appeals to the prurient interest; (2) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) the trier of fact must determine whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.\(^{42}\) This standard determines the ultimate validity of the challenged regulation restricting obscenity.\(^{43}\)


\(^{40}\). *Id.* at 16 (citing Cal. Amended Stats. 1969, c. 249, § 1, at 598). The statute provides, in relevant part:

Section 311.2: Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within the state:

(a) Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor . . .

*Id.* at 16-17 n.1.

\(^{41}\). See *Miller*, 413 U.S. at 24.

\(^{42}\). *Id.* (holding that prongs of obscenity standard must be strictly construed). This standard was designed to give notice to potential defendants that the distribution of obscene materials may be criminal conduct, subject to prosecution. See *id*.

\(^{43}\). See *id*. 

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As emphasized in the caselaw, the Court not only creates standards to determine the nature of the speech and validity of the regulation but typically must determine what level of scrutiny the First Amendment mandates for the regulation. Historically in First Amendment jurisprudence, the Court designated the appropriate tier of scrutiny by defining the regulation as either content-based or content-neutral. Content-based restrictions trigger strict scrutiny whereas content-neutral regulations garner only an intermediate scrutiny. Strict scrutiny requires that the governmental regulation serve a “compelling state interest” and be “narrowly tailored to achieve that end.” Content-neutral regulations, however, will withstand constitutional scrutiny if they regulate the time, place, and manner of speech, are narrowly tailored to serve a significant or important governmental interest and “leave open ample channels of communication.”

Despite falling within the ambit of the First Amendment’s protection, sexually explicit materials have been classified as having “slight social value” in their content. Thus, indecent materials may be regulated to promote a compelling governmental interest, but only through “narrowly drawn regulations designed to serve those interests without unnecessarily burdening First Amendment freedoms.” Even though the regulation of indecent materials may exist, it must withstand a strict scrutiny review.

The discussion thus far has focused on the classification of state regulated speech and the level of scrutiny warranted by the state action. It is also crucial to review the Court’s treatment of First Amendment doctrine with respect to the medium of the speech.

44. See Merchant, supra note 34, at 439 (discussing various media and differing levels of review each receives).
45. See Va. Pharmacy Bd. v. Va. Consumer Council, 425 U.S. 748 (1976). Content-based regulations are defined as regulations directed at the “communicative impact” of the speech. Conversely, content-neutral restrictions are those that do not target specifically the intended message of the speech, even though they may have that effect. See generally Schneider v. State, 308 U.S. 147 (1939).
46. See id.
47. See id.
48. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984). Essentially, the narrow tailoring requirement provides that the regulation’s interest cannot be as equally served by a means that is substantially less intrusive to the First Amendment. See id. Furthermore, the alternative channels requirement provides that a free exchange of ideas still will be protected despite the regulation. See Metromedia, Inc. v. San Diego, 453 U.S. 490, 516 (1981).
50. See Sable, 492 U.S. at 126 (determining that content-based regulations must meet strict scrutiny test).
and the state's constricted ability to regulate speech within these contexts.

B. Review of Indecent Speech Regulations in the Various Contexts

Despite falling within an established framework of constitutional doctrine, regulations of indecent and obscene materials on the Internet require a more particularized analysis. The Court has treated speech with differing constitutional protections depending on the medium of the speech.

The first questioned medium was radio broadcasting, which has become the least protected medium in the free speech spectrum. In FCC v. Pacifica Foundation, the Court recognized a compelling interest in protecting children from indecent materials over the radio because radio broadcasts have an "uniquely pervasive presence in the lives of all Americans" and confront citizens "in the privacy of their own homes." Additionally, the Court determined that the broadcasting medium is particularly accessible to children and contains no forewarning of the indecent materials. The specific issue in Pacifica was whether the Federal Communications Commission ("FCC") could limit indecent, but not obscene, speech. The Court held that the context of speech is determinative of the constitutional protection that will be afforded to the communication. The Court then upheld the FCC regulation, withholding constitutional protection of the materials themselves because they were communicated over the broadcast medium. As

52. See generally Reno v. ACLU, 521 U.S. 844 (1997) (holding that Internet speech garners First Amendment review).
53. See id.
54. See Werst, supra note 18, at 220 (detailing differences between media and levels of review).
56. Id. at 748 (discussing reasons for limited First Amendment protection of broadcasting).
57. See id. at 748-49 (holding that broadcasting medium is particularly accessible to children).
58. See id. at 749. This issue was brought forth when a radio station broadcasted offensive words during the afternoon - hours in which children would be exposed to the material. See id. at 729-30. The FCC restricted the broadcasting to certain times of the day to ensure children would not be listening. Id. The FCC found the authority to implement this regulation via 47 U.S.C. § 303(g) (1934) and 18 U.S.C. § 1464 (1976). See id. at 731.
59. See id. at 747-48.
60. See Pacifica, 438 U.S. at 750.
exemplified by *Pacifica*, the Court will be less protective of broadcasted speech than speech in other contexts.61

Cable television is another medium that the Court has treated with leniency in analyzing speech regulations.62 The relevant case is *Denver Area Educational Telecommunications Consortium v. FCC*,63 which involved three indecency provisions of the Cable Television Consumer Protection and Competition Act of 1992.64 In this case, the Court struck down two out of the three indecency provisions.65 More important than the decision itself, however, was the Court's analysis of the regulation. The Court declined to articulate a traditional standard to review the regulation or even analogize it to broadcast or telephonic media.66 Thus, the Court's only guidance for cable operators was that it would strike down cable operators' prohibitions on public channels from displaying indecent materials.67 This seems to suggest the cable television context is, like radio, highly susceptible to constitutional regulation.68

Unlike the preceding contexts, the telephonic industry has proven to be subject to far less regulation than any other medium.69 The predominant case in this area is *Sable Communications of California, Inc. v. FCC*,70 in which the Court struck down a federal statute criminalizing the making of any "obscene or indecent communication for commercial purposes," even if the defendant did not initiate the communication.71 The Court's reasoning was that preventing access by minors to these indecent materials was an im-

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61. See Werst, *supra* note 18, at 221 (differentiating broadcasting medium from other conduits of speech).
62. See id. (noting similarity to broadcast medium because of cable television's presence has in privacy at home).
64. See id. at 732. The first provision, 10(a), applied to "leased channels," such as channels leased from the operator by unaffiliated programmers. See id. at 734. It allowed operators to ban programming describing or depicting "sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." Id. The second provision, 10(b), required the operators to segregate indecent programming onto one channel and to block that channel if they did not ban entirely the programming. See id. at 735. The third provision, 10(c), applied to public channels and allowed the operator to prohibit indecent programming on these channels. See id.
65. See id. at 733 (leaving unresolved which level of First Amendment review regulations of cable medium warrant).
66. See id.
67. See id. at 734.
68. See Werst, *supra* note 18, at 222.
69. See id. at 222 (analogizing telephonic medium to Internet context).
71. See id. at 131.
important interest, but a total ban on these materials could not justify its application; the means were not narrowly tailored to achieve this interest.\footnote{See id. at 126. The Court found this regulation especially overbroad in that new technological advances would allow for a more tailored restriction. See id.} More generally, telephone services provide users with the "greatest control over receipt of content than other media."\footnote{Werst, supra note 18, at 222.} Thus, the speech that occurs within the telephonic medium is most protected because the audience has a particular ability to tune out the message.\footnote{See id. (asserting that control of listener to "tune out" is crucial to accorded First Amendment review).}

Not surprisingly, the Court's varying treatment of these different contexts has played a key role in the analysis of Internet speech regulations. The controlling case is \textit{Reno v. ACLU},\footnote{See \textit{Reno v. ACLU}, 521 U.S. 844, 858 (1997).} in which Congress attempted to criminalize the exposure of indecent materials to minors by enacting the Communications Decency Act of 1996 ("CDA"). There were two provisions in question: first, the CDA criminalized the use of a "telecommunications device" to transmit any communication that is obscene or indecent while "knowing that the recipient of the communication is under 18 [sic] years of age;" second, the CDA criminalized the use of any "interactive computer service" to display in a manner available to a person under eighteen any communication that uses "patently offensive" language or images.\footnote{Id. at 859-60.} The Court found that both provisions violated the First Amendment.\footnote{See id. at 879 (finding CDA facially overbroad).} Justice Stevens, writing the majority opinion, began his analysis with a comparison to the \textit{Pacifica} case, which outlined the importance of the speech's context in allocating constitutional protection.\footnote{See \textit{Pacifica}, 438 U.S. at 733-49.} Stevens first noted that the Internet had no prior history of weak First Amendment protection like radio; therefore, no analogous, binding precedent existed to guide a decision in the Internet medium.\footnote{See \textit{Reno}, 521 U.S. at 866-67; see also \textit{Pacifica}, 438 U.S. at 733-49.} Furthermore, Stevens distinguished radio from cyberspace by highlighting a computer user's enhanced ability to control the flow of unsolicited speech by necessitating "affirmative steps" to reach the materials.\footnote{See \textit{Reno}, 521 U.S. at 866-67.} Justice Stevens concluded
the analysis by holding the CDA was both unconstitutionally vague and overbroad.  

The *Reno* Court, in subjecting the CDA to strict scrutiny review, settled the question of what type of First Amendment protection the Court would afford the Internet.  

The Court also articulated an emphasis on the narrow tailoring of cyberspace regulations, signaling that the state may not restrict the free speech rights of adults in the name of minor protection. This decision is essential in determining the constitutionality of any subsequent Internet regulations attacked under the First Amendment.

C. Commerce Clause Analysis of Internet Regulations

In addition to the traditional First Amendment arguments directed against speech regulations, the Internet provides a unique opportunity for speech restrictions to be challenged on dormant Commerce Clause grounds. As succinctly stated by the Court, the "dormant implication of the Commerce Clause prohibits state . . . regulation that discriminates against or unduly burdens interstate commerce and thereby 'imped[es] free private trade in the national marketplace.'" The Court's modern approach employs a complex test, requiring that a state regulation pursue a legitimate end, be rationally related to that end, and not impose a burden on interstate commerce that outweighs the state interest. Furthermore, in certain commerce contexts, the need for national uniformity is particularly strong, creating a presumption against any state regulation. Thus, the constitutionality of the state regula-

81. *See id.* at 885. Stevens concluded the CDA was vague because it used differing terminology in its provisions, creating confusion as to what "indecent" material would fall within its scope. *See id.* at 870-74. It was overbroad because it restricted the constitutionally protected rights of adults to converse on "indecent" topics. *See id.* at 875.

82. *See Johnson*, 194 F.3d at 1156 (stating that *Reno* is "central" to resolution of later Internet cases).

83. *See Reno*, 521 U.S. at 875.

84. *See Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 173 (S.D.N.Y. 1997). The Supreme Court has found the Internet to represent an "instrument of interstate commerce," and it is therefore subject to analysis under the Commerce Clause. *Id.*


tion often depends on this balancing of local concern versus national interest in uniformity and free commerce. 88

American Libraries Ass’n v. Pataki 89 applied this general dormant Commerce Clause analysis specifically to the Internet. 90 The regulation in question was a New York statute criminalizing the dissemination of obscene materials to minors over the ’Net. 91 The district court noted that the “menace” of varying state regulations in the Internet context inevitably implicates a Commerce Clause analysis because the Clause represents “the framers’ [sic] reaction to over-reaching by the individual states that might jeopardize the growth of the nation [and] the national infrastructure of communications and trade . . . .” 92 Acting consistently with this intent, the district court struck down the statute. 93 The court then went even further by stating that the Commerce Clause “ordains that only Congress can legislate” in the area of the Internet. 94 Thus, the Pataki court suggested that any state regulation of the Internet will be subject to the strictest of standards for fear of inconsistent and injurious restrictions on commerce. 95

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88. See Cooley v. Bd. of Wardens of the Port of Pa., 53 U.S. 299 (1851) (focusing on distinction between national matter or local concern being regulated); see also Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) (striking down local regulations preventing importing of milk). The Court also may consider whether the means are necessary in achieving the legitimate state objective to determine undue burden. See Tribe, supra note 38, § 6-5; see also Dean Milk, 340 U.S. at 355.


90. See id. at 173.

91. See id. at 163 (discussing New York statute that criminalized dissemination of harmful materials to minors). The court noted that this “New York Act,” New York Penal Law § 235.21(3), was “only one of many efforts by state legislators to control the chaotic environment of the Internet.” Id. at 168.

92. Id. at 169 (citing Quill Corp. v. North Dakota, 504 U.S. 298, 312 (1992)); see also The Federalist Nos. 7, 11 (Alexander Hamilton).

93. See Pataki, 969 F. Supp. at 169 (holding Internet regulation violative under dormant Commerce Clause grounds). The court struck down the statute under three Commerce Clause arguments. See id. First, the Act regulated conduct occurring wholly outside the state of New York. Second, the burden on interstate commerce exceeded the local benefit of protecting children from indecent materials. Third, the Internet context itself is an area necessitating national, uniform regulation to “protect users from inconsistent legislation . . . .” Id.

94. Id.

95. See id.
IV. NARRATIVE ANALYSIS

The Tenth Circuit affirmed the legal conclusions of the district court in ACLU v. Johnson, finding that the New Mexico statute violated both the First Amendment and the Commerce Clause.96 The court first held that the statute could not be upheld under First Amendment strict scrutiny review, as applied in the most recent analogous case, Reno v. ACLU.97 Second, the court held that even if the statute could withstand the First Amendment challenge, it would fail under a Commerce Clause analysis because it regulated conduct outside New Mexico, unduly burdened interstate commerce, and imposed inconsistent regulation on Internet users.98

A. The Tenth Circuit's First Amendment Analysis

The Tenth Circuit first outlined the rationale of the district court's finding that the statute violated the First and Fourteenth Amendments.99 The government, in the area of Internet regulation, is required to advance a "compelling governmental interest" and to show evidence that the state employed the "least restrictive means of serving its stated interest" for the court to uphold a protected speech regulation.100 Furthermore, the court found the materials covered under the statute in question to be protected speech; it noted that the Supreme Court has held that "sexual expression which is indecent but is not obscene is protected by the First Amendment."101 In fact, the Court specifically has held that this "content-based regulation of Internet speech" is subject to the strictest scrutiny.102 Thus, in Johnson, the defendants asserted that section 30-37-3.2(A) of the New Mexico statute must be read nar...
rowly in order to fulfill its constitutional requirements.\textsuperscript{103} The defendants relied heavily on \textit{Ginsberg v. New York},\textsuperscript{104} wherein a conviction for selling harmful materials in the print medium to a minor was upheld.\textsuperscript{105} The plaintiffs and the Tenth Circuit, however, focused almost entirely on \textit{Reno v. ACLU} in their arguments and analysis.\textsuperscript{106} The court concluded that \textit{Reno} was not distinguishable from the present case, and the statutory similarities did “compel the same result.”\textsuperscript{107}

As stated earlier, the argument put forth to defend the statute’s constitutionality was that section 30-37-3.2(A) could be read narrowly so as to “not apply to group communications which include both adults and minors in the group, or where a fact situation presents a mere probability that minors may be part of the receiving group.”\textsuperscript{108} The defendants highlighted that the same definition of “harmful to minors” in \textit{Ginsberg} was employed in this statute, thereby making this merely an “electronic \textit{Ginsberg} case.”\textsuperscript{109} The court rejected this characterization of the case at hand, finding that there are stark differences between the media of magazines in print and cyberspace.\textsuperscript{110} Because of these differences, a narrow reading of the statute, as applied in \textit{Ginsberg}, was not immediately appar-

\textsuperscript{103} See \textit{Johnson}, 194 F.3d at 1156 (asserting that narrow reading of statute would fulfill constitutional requirements).

\textsuperscript{104} 390 U.S. 629 (1968).

\textsuperscript{105} See id. at 644.

\textsuperscript{106} See \textit{Johnson}, 194 F.3d at 1155 (citing \textit{Reno v. ACLU}, 521 U.S. 844 (1997)).

\textsuperscript{107} Id. at 1158.

\textsuperscript{108} Id. (quoting Appellants’ Br. at 19). The defendants argued that the statute only applies in specific situations: “(1) communications using a computer communications system in which (2) the sender deliberately (‘knowingly and intentionally’) (3) sends a message which is ‘harmful to minors’ as defined in section 30-37-3.2(A) . . . (4) to a specific individual recipient who the sender know to be a minor.” \textit{Id.} (quotations in original).

\textsuperscript{109} Id. at 1158 n.7; see generally \textit{Ginsberg v. New York}, 390 U.S. 629 (1968).

\textsuperscript{110} See \textit{Johnson}, 194 F.3d at 158. One difference was that the prohibition against magazine sales to minors allowed parents to purchase these materials for their children; the statute in question here and the CDA in \textit{Reno} did not. See id. In addition, the statute in \textit{Ginsberg} applied only to commercial transactions and the applicable minor age was seventeen years old. Section 30-37-3.2(A) defines a minor as being under age eighteen and applies to non-commercial transactions as well. See id. Finally, the very essence of the material, a magazine, varied greatly from cyberspace communications. Magazines can be “hidden in the backroom” and regulated on a face-to-face basis. The Internet, however, does not “distinguish between minors and adults in their audience.” \textit{Johnson}, 194 F.3d at 1158; “see also \textit{Reno}, 521 U.S. at 889 (O’Connor, J., concurring in the judgment in part and dissenting in part).
ent. The court then analyzed whether a narrow reading was otherwise appropriate in that the statute is "readily susceptible to the limitation" imposed by its construction. The court held that the proposed narrow reading of the statute would be plausible only if the Court itself essentially rewrote the statute, which it declined to do. First, the statute criminalized "knowingly and intentionally initi[ating] or engag[ing] in communication with a [minor]." It was not limited to, as the defendants argued, one-on-one communications with a minor. Thus, the court could not constrict artificially the scope of the statute by interpreting it as narrowly, in this respect, as the defendants argued. Second, defendants argued that the intent clause of the statute, by definition, finely tailored its scope. The court, determined that under the broad definition of intent included in the statute, "virtually all" communications on the Internet would meet this threshold of potential liability. Thus, the court held the intent clause served no narrowing function in interpreting the statute. Finally, the court stated that the defenses contained in the statute would be inconsistent with the defendants' own asserted interpretation. Certain defenses presuppose the speaker's ignorance that he or she is communicating with a minor; these include a good faith defense or asking for a credit card number or age verification. Accepting this fact, the statute could not then be said to impose liability only on those who

111. See Johnson, 194 F.3d at 1159.
112. Id. (quoting Virginia v. Am. Booksellers' Ass'n, 484 U.S. 383, 397 (1988)). The Supreme Court has held that the judiciary should not "rewrite a state law to conform it to constitutional requirements." Id.
113. See id. at 1159-60.
114. N.M. STAT. ANN. § 30-37-3.2(A) (Michie 1998).
115. See Johnson, 194 F.3d at 1159 (noting that defendants' interpretation would lead to "absurd" result that no violation would occur if someone sent message to two minors, minor and adult, or chat room of minors).
116. See id. (holding that court will not re-write violate statute).
117. See id. The statutory definition of "knowingly" requires only "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of . . . the age of the minor." N.M. STAT. ANN. § 30-37-3.2(G).
118. Johnson, 194 F.3d at 1159; see also Reno, 521 U.S. at 876 (stating that absent viable age verification process, senders are "charged with knowing" that one or more minors will likely view material at issue). The Supreme Court addressed this exact issue in Reno, stating that the "knowledge" and "specific person" requirements simply could not remedy the overbreadth of the statute itself. Johnson, 194 F.3d at 1159 n.8.
119. See Johnson, 194 F.3d at 1159.
120. See id.
121. See id. at 1159-60 (stating that defendants' arguments contradict in terms of a narrow reading of regulation).
intentionally communicate with minors. The court concluded that the very existence of these statutory defenses undermined the credibility of the defendants' narrow reading of the statute.

Having rejected the defendants' narrow interpretation argument, the court next addressed the assertion that the statutory defenses themselves provided the "sort of 'narrow tailoring' that would save an otherwise patently invalid unconstitutional provision." On this point, the court referred to Reno and rejected the defendants' contentions, holding that the defenses were ineffective, even "illusory" and, therefore, unable to vitiate the statute's overbreadth.

B. Commerce Clause Analysis

Although the Tenth Circuit held that the plaintiffs exhibited a likelihood of success on the merits of their First Amendment claim, the court continued with its analysis of the statute under Commerce Clause review. It affirmed the lower court's finding that section 30-37-3.2(A) violated the dormant Commerce Clause in three ways: "(1) it regulate[d] conduct occurring wholly outside of the state of New Mexico; (2) it constitute[d] an unreasonable and undue burden on interstate and foreign commerce; and (3) it subject[ed] interstate use of the Internet to inconsistent state regulation." Furthermore, the court noted that it must be particularly sensitive to Commerce Clause issues because the nature of the Internet is such that it is not confined by any sort of jurisdictional boundaries, typically related to geography, which would protect against inconsistent regulation.

122. See id. The court suggested that the fact that the defenses were "directed at group communications that have unique dynamics on the Internet" intimated that the general prohibition was intended to include such group communications. Id. at 1160.

123. See id.


125. Johnson, 194 F.3d at 1160; see also Reno, 521 U.S. at 882. The defendants in this case had not demonstrated any reason why these defenses would be effective in actually preventing minors from accessing these harmful materials on the Internet so as to distinguish them from Reno. See id.; see also Cyberspace, Communications, Inc. v. Engler, 55 F. Supp. 2d 737, 751 (E.D. Mich. 1999).

126. See Johnson, 194 F.3d at 1160.

127. Id. at 1160-61.

The defendants' first argument was that section 30-37-3.2(A) only reaches intrastate conduct.\(^{129}\) The court rejected this argument on two grounds. First, the statute contained no express provision restricting its application solely to communication within its borders.\(^{130}\) Additionally, the very essence of the Internet as a medium disables a state from purporting such limited application of a state statute.\(^{131}\) Thus, the court concluded that the statute did attempt to regulate interstate conduct and was a per se violation of the Commerce Clause.\(^{132}\)

The defendants' second argument was that the burden on interstate commerce imposed by the statute did not outweigh the local benefit in protecting minors from harmful, sexually explicit materials.\(^{133}\) The court acknowledged that the asserted local benefit was a compelling state interest, but it stated that the real issue in *Johnson* was whether the means chosen to further the interest "excessively burden interstate commerce compared to the local benefits the statute actually confers."\(^ {134}\) The court held that they did not; the benefits were minimal, especially if the defendants' own narrow interpretation of the statute were adopted.\(^ {135}\) These small potential benefits were almost subsumed by the excessive burden on interstate commerce imposed by section 30-37-3.2(A).\(^ {136}\) Furthermore, the court declared that even the prosecution of parties beyond the borders of New Mexico triggered immense practical dif-

\(^{129}\) See *Johnson*, 194 F.3d at 1161. Defendants also initially argued that recreational use of the Internet is not "commerce," and therefore the statute was not subject to Commerce Clause limitations. See *id*. The court noted that the defendants "wisely" withdrew this assertion. *Id*.

\(^{130}\) See *id*. It rather applied to any communication that fits "within the prohibition and over which [New Mexico] has the capacity to exercise criminal jurisdiction." *Pataki*, 969 F. Supp. at 169.

\(^{131}\) See *Johnson*, 194 F.3d at 1161. Even if the communication in question is an email from one New Mexican resident to another, it cannot be guaranteed that the email "would not travel through other states en route." *Id*. (citing *Pataki*, 969 F. Supp. at 171).

\(^{132}\) See *id*.

\(^{133}\) See *id*.; see also *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *V-1 Oil Co. v. Utah State Dep't. of Pub. Safety*, 131 F.3d 1415, 1423-24 (10th Cir. 1997).

\(^{134}\) *Johnson*, 194 F.3d at 1161.

\(^{135}\) See *id*. Another district court noted with regard to the CDA that "[n]early half of Internet communications originate outside the United States . . . . Pornography from, say, Amsterdam will be no less appealing to a child on the Internet . . . . and residents of Amsterdam have little incentive to comply with [the statute]." ACLU v. Reno, 929 F. Supp. 824, 882 (E.D.Pa. 1996), aff'd, 521 U.S. 844 (1997). Thus, the benefits when viewed from the standpoint of the statute's efficacy were small at best. *See Johnson*, 194 F.3d at 1162.

\(^{136}\) See *Johnson*, 194 F.3d at 1162 (citing *Pataki*, 969 F. Supp. at 179).
difficulties in implementation.\textsuperscript{137} Therefore, the court held that the high burden on interstate commerce that the statute created was not outweighed by the minimal and dubious benefits asserted.\textsuperscript{138} The court found that section 30-37-3.2(A) violated the Commerce Clause because it "constitute[d] an invalid indirect regulation of interstate commerce."\textsuperscript{139}

The third ground upon which the court found section 30-37-3.2(A) to be a violation of the Commerce Clause was its imposition of inconsistent regulation on Internet users.\textsuperscript{140} The court, having stated that certain types of commerce require national regulation, found the Internet to be the exact kind of medium to necessitate such uniform regulation.\textsuperscript{141} Similar to the transportation context, the Internet is an area of national, even global, concern, which requires uniform regulation so that "users are reasonably able to determine their obligations."\textsuperscript{142} New Mexico, in attempting to regulate Internet activity, overstepped its constitutional bounds by regulating an area that requires uniform resolution under the dormant Commerce Clause.\textsuperscript{143}

V. CRITICAL ANALYSIS

In \textit{Johnson}, the Tenth Circuit consistently followed the precedent of the Supreme Court in handling a state's attempt to regulate sexually explicit materials on the Internet. The reasoning of the court in both the First Amendment and Commerce Clause contexts was congruous with the current trend of striking down regulation in this medium. This section will analyze the internal consistencies of this reasoning and how the court's conclusions will shape future attempts at regulating the Internet.

A. First Amendment Barrier to Regulating the Internet

The Tenth Circuit found that the New Mexico statute criminalizing dissemination of materials harmful to minors was unconstitu-

\begin{itemize}
  \item \textsuperscript{137} See id.
  \item \textsuperscript{138} See id. (stating that benefits of statute did not override burden on interstate commerce).
  \item \textsuperscript{139} Id.
  \item \textsuperscript{140} See id.
  \item \textsuperscript{141} See \textit{Johnson}, 194 F.3d at 1162 (citing \textit{Wabash}, 118 U.S. at 574-75).
  \item \textsuperscript{142} \textit{Pataki}, 969 F. Supp. at 182; see also \textit{Johnson}, 194 F.3d at 1162; Kenneth D. Bassinger, \textit{Dormant Commerce Clause Limits on State Regulation of the Internet: The Transportation Analogy}, 32 Ga. L. Rev. 889, 904 (1998).
  \item \textsuperscript{143} See \textit{Johnson}, 194 F.3d at 1162.
\end{itemize}
tional on overbreadth grounds.\textsuperscript{144} The statute, while potentially effective in regulating its intended speech, also burdened otherwise protected adult communications on the Internet and failed First Amendment scrutiny.\textsuperscript{145} However, this Note thus far has built a foundation for the assertion that under a \textit{Johnson} court analysis, following the Supreme Court's lead in \textit{Reno}, any Internet regulation will fall under First Amendment review.

The \textit{Reno} Court highlighted the fact that the medium itself creates an almost unworkable base from which to fashion regulations.\textsuperscript{146} The court in \textit{Johnson} agreed, stating that the closest analogy to the Internet medium was the telephone medium, which garnered strict scrutiny.\textsuperscript{147} Therefore, Internet regulations, if they are to survive at all, must meet the strictest of constitutional standards.\textsuperscript{148}

Meeting this high threshold in the context of the Internet is virtually impossible because of the very "pervasiveness" and "invasiveness" of the medium.\textsuperscript{149} The only viable way in which to achieve the state's goal of protecting minors is to limit all Internet materials to content that is appropriate for minors.\textsuperscript{150} Although it has traditionally recognized the need for such protection, the Supreme Court has consistently "leaned against measures which limit the speech of adults, even when the motive was to protect children."\textsuperscript{151} Thus, there is an inevitable tension between the two prongs of a strict scrutiny analysis when Internet regulations are reviewed under the First Amendment. In creating lawful regulations that affect indecent speech, legislators must "narrowly tailor the regula-

\begin{itemize}
\item\textsuperscript{144} See \textit{id.} at 1149 (finding that New Mexico statute regulating interstate commerce criminalized otherwise protected speech).
\item\textsuperscript{145} See \textit{id.}
\item\textsuperscript{146} See ACLU v. Reno, 521 U.S. 844, 880 (1997) (asserting that Internet context creates unique dilemma in regulating in accordance with First Amendment principles).
\item\textsuperscript{147} See \textit{Johnson}, 194 F.3d at 1156 n.4 (reviewing \textit{Reno} in its comparison of various speech media).
\item\textsuperscript{148} See \textit{id.}
\item\textsuperscript{149} See \textit{Werst}, supra note 18, at 225.
\item\textsuperscript{150} See \textit{id.} at 226-27 (stating that government may not "limit the adult population to only content that is fit for children").
\item\textsuperscript{151} \textit{Id.} at 226; see also Playboy Entm't Group v. United States, 945 F. Supp. 772, 785-86 (1997). The legislative history of the CDA suggested that the drafting was based on a fear of growing pornography on the Internet. See \textit{Werst}, supra note 18, at 226. This concern was fueled by a study conducted at Carnegie Mellon University that found that "approximately one-third of the most frequently visited Internet sites were pornographic and nearly eight-five percent of all images posted on the Internet were pornographic." \textit{Id.} at 226-27. This study was later discredited because of poor methodology and questionable ethics. See \textit{id.}
\end{itemize}
tion to serve the government's legitimate, content-neutral interest of shielding minors . . .". Thus, an Internet regulation never truly can be effective in achieving its compelling governmental interest by narrowly tailoring its scope to the protection of minors without violating constitutional norms.

B. The Commerce Clause Dilemma in Internet Regulation

As the court in Johnson held, state regulations of materials on the Internet will generally fall under a Commerce Clause analysis. The Tenth Circuit strictly followed the reasoning of Pataki, the first and leading case to find a regulation of Internet activity invalid under the dormant Commerce Clause. The Pataki court's reasoning was that the legitimate state interest in protecting minors from harm would not have been achieved significantly by the anti-pornography statute. Thus, the "slight efficacy" of the statute did not "outweigh the strong national interest in keeping the Internet free of inconsistent regulations that produce a chilling effect on its development." In Johnson, the court again highlighted this language that a state attempting to regulate interstate conduct occurring wholly outside of its borders is a "per se violation of the Commerce Clause." Furthermore, the Tenth Circuit agreed with Pataki in that the potential local benefits of this statute, purported as the protection of minors, are actually very small. Already existing laws which are not tailored specifically to Internet speech may already serve these protectionist measures, whereas matters not within their scope are no more resolved by the enactment of a state statute. Thus, the heavy burden on the national economic marketplace needlessly outweighs the tenuous benefits from the statute.

152. Werst, supra note 18, at 227.
153. See id. In addition to the difficulty in meeting a strict scrutiny standard, regulations like the one in Johnson also have an enormous chilling effect on constitutionally protected speech, which hampers their ability to pass First Amendment review. See id. at 231-32. Furthermore, the global nature of the Internet adds another notch to the ineffectiveness of national or state regulations. See id. at 237.
154. See Johnson, 194 F.3d at 1160 (holding that Internet regulation violated dormant Commerce Clause doctrine).
156. See Pataki, 969 F. Supp. at 173 (finding anti-pornography regulation of Internet unconstitutional because it burdened interstate commerce).
157. Bassinger, supra note 142, at 916.
158. Johnson, 194 F.3d at 1161.
159. See id. (employing Pike balancing test).
160. See id. at 1162 (balancing burden on interstate commerce with benefits of regulation).
The central synthesis of Pataki and Johnson is their mutual concentration on the unique nature of the cyberspace medium, declaring that the Internet "like . . . rail and highway traffic . . . requires a cohesive national scheme of regulation so that users are reasonably able to determine their obligations."\(^{161}\) Thus, the only laws that will be effective in withstanding a constitutional challenge will be those that accomplish no more than generally applicable laws and pose no additional burden on interstate Internet commerce.\(^{162}\) These regulations, however, are futile functionally because their prescribed activity would already be illegal under existing laws.\(^{163}\) Not only would such regulations be superfluous and inefficacious in affording any more protection to minors, they would be detrimental to the free marketplace of the Internet by imposing a chilling effect on speech and commerce.\(^{164}\) Coupled with the need for consistent, uniform regulations to "foster the development of online commerce," a worthwhile state statute, regulating the Internet by adding to the protection of minors, never ultimately will pass Commerce Clause muster.\(^{165}\)

VI. IMPACT

Johnson is a benchmark decision that will invariably guide state and federal legislators in drafting regulations of indecent materials on the Internet. In both the First Amendment and Commerce Clause contexts, the Johnson decision offers assistance to legislators in a negative capacity; it will undoubtedly become a primer on how

\(^{161}\) Id. (quoting Pataki, 969 F. Supp. at 182).
\(^{162}\) See Bassinger, supra note 142, at 924-25.
\(^{163}\) See id. (asserting that states should refrain from attempting to regulate Internet materials).
\(^{164}\) See id. The Bassinger article stated that because state Internet regulations "which would not offend the dormant commerce clause are indistinguishable in effect from existing state laws simply proscribing illegal activity, the Internet regulations should not even be enacted in the first place." Id. at 925.
\(^{165}\) Id. Bassinger argued that:
The Internet, as an instrument of interstate commerce, embodies the same national interests and demands the same uniform federal regulation as the more traditional channels of interstate commerce. These national interests justify a uniform base of laws rather than the menace of inconsistent state regulation. Under this Dormant Commerce Clause jurisprudence, state Internet regulation that imposes burdensome requirements on nonresident participation in online commerce should be invalidated. The Internet should be marked off as a national preserve subject only to uniform federal regulation, and states should therefore refrain from enacting laws purporting to regulate activity in the truly global realm of cyberspace.
Bassinger, supra note 142, at 926.
not to draft constitutionally sound, Internet regulations. Although this critical guidance will be invaluable in shaping a new crop of cyberspace statutes, the Tenth Circuit's decision in Johnson inevitably poses a problem to eager legislators.166

Johnson, buttressed by uncontroverted Supreme Court precedent, gives states very little hope of ever validly restricting materials on the Internet.167 Ironically, as we enter an era of burgeoning reliance on Internet communications, the need for such effective legislation will only increase.168 The Johnson decision resolves that this necessary legislation must come from the national government and must be narrowly tailored to effectuate its goal of protecting minors from explicit materials on this singular medium.169 To uphold valued constitutional principles while still exercising an unprecedented ability to regulate cyberspace communications, the burden of shielding our youth from the sometimes deleterious effects of Internet use must lie ultimately on Congress, the Internet industry and our parents.170 With such a wave of constitutional obstacles flowing from Johnson, state legislatures must take a cue from the court and simply wait out this tide of Internet legislation.171

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166. See Werst, supra note 18, at 232.

167. See id.

168. See Bassinger, supra note 142, at 926. Since 1989 the Internet "has been growing at about one hundred percent per year," and it is expected to continue at this rate well into the current decade. Id. at 926 n.1.

169. See Johnson, 194 F.3d at 1162.

170. See Werst, supra note 18, at 240. Some legal theorists argue:
Ultimately, there may not be a proper legislative response to the indecent content on the Internet, and Congress may be forced to look to international solutions, the technological industry itself, or rely on the "police power" of a parent in the home. This may be the true beauty of the Internet, since this could be the first time in American history that a form of communication is ensured a true "freedom of speech" without governmental abridgment.

Id.

171. See id.