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The Endless Bummer: California's Latest Attempt to Protect Children Online Is Far Out(Side) Effective

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Cover Page Footnote

* Candidate for Juris Doctor, Notre Dame Law School, 2015; B.A., Saint Joseph's University, 2008. The author would like to thank the editorial staff of the Notre Dame Journal of Law, Ethics & Public Policy.

THE ENDLESS BUMMER: CALIFORNIA’S LATEST ATTEMPT TO PROTECT CHILDREN ONLINE IS FAR OUT(SIDE) EFFECTIVE

STEPHEN J. ASTRINGER*

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INTRODUCTION

“Children are the world’s most valuable resource and its best hope for the future.”

-John F. Kennedy

More so than any preceding medium, the Internet has provided users the ability to communicate quickly and without significant restric-

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tions. Today's children face the challenge of seemingly mundane activities, part of everyday life, that have the potential to ruin futures. A single status update on Facebook, post on Twitter, or video on YouTube can have lasting ramifications. Minors are not the only population to later experience post regret, but unlike politicians, athletes, or any other adults, youthful indiscretion will often lead to less prudent and thoughtful decision-making. Before nearly every person had an Internet-capable camera in their pocket at all times, teenagers could make mistakes, but would not have to wear a scarlet letter into adulthood. The rise of these devices and mobile applications create this risk, which is further exacerbated by the rise of countless outlets, many of whom fall victim to short shelf-lives of popularity, making potential laws more difficult to properly tailor.

California recently enacted legislation to restrict advertising to minors and provide them an "eraser button" to eliminate their online presence. By regulating the Internet in this manner, SB 568 faces both practical and legal difficulties that will not allow it to operate as intended. Youthful indiscretion in the Internet era can have long-lasting ramifications, but it is not clear that there is yet a viable solution. What is much more clear is that allowing the survival of laws like that of California and its progeny will harm the free expression that has allowed the Internet to flourish.

The purpose of this Note is to use SB 568 as an example of legislation aimed towards protecting children online, but which has the potential to harm the proper functioning of the Internet. The first type of shortcoming is discussed in Part I.B, which addresses its practical limitations, namely that it is not clear to whom it applies to and how large the available safe harbor is. Part II frames the legal standards of Internet regulation. Part III addresses the second type of deficiency that SB 568 cannot survive, its legal flaws, primarily its possible invalidity under the dormant Commerce Clause and First Amendment, and its inability to exist within the current federal statutory framework.

The final part of this Note analyzes potential solutions to protect children online. Though federal or even global legislation seems the most attractive, it is not clear that a viable solution for shielding children from certain harmful advertising or erasing online content exists. Viewing SB 568 from any perspective but a purposivist one must ultimately lead to the conclusion that Internet regulations in this manner are fundamentally flawed.

I. "PRIVACY RIGHTS FOR CALIFORNIA MINORS IN THE DIGITAL WORLD"

A. *Enactment and Purpose*

California's recent attempt to protect minors on the Internet was through the passage of SB 568, entitled "Privacy Rights for California Minors in the Digital World."¹ The bill contains two sections that become operative on January 1, 2015. The first is an advertising law,

1. 2013 Cal. Legis. Serv. Ch. 336 (S.B. 568) (West).

which prohibits marketing of certain types of products to teenagers.² The second section of the law has become colloquially known as the “eraser law” and is aimed towards helping minors delete their online presence.³

California’s purpose in enacting SB 568 was to fill what the legislature perceived to be a gap in protection for minors online.⁴ Federal laws, namely the Children’s Online Privacy Protection Act (“COPPA”), give children protection online, but only until the age of thirteen,⁵ while SB 568 expands its reach to all children under the age of eighteen.⁶ As the spread of the latest technology continues to increase, it is often difficult for Congress to react quickly, and even more difficult to determine what course of action to take.⁷ It was with a similar reaction—the recognized need to protect, but lack of clarity as to the best manner—that Governor Jerry Brown signed SB 568 into law.⁸

The advertising law prohibits “[a]n operator of an Internet Web site, online service, online application, or mobile application directed to minors [from] market[ing] or advertis[ing]” a designated list of products.⁹ It also applies to operators who have actual knowledge of

2. CAL. BUS. & PROF. CODE § 22580 (West 2014).

3. BUS. & PROF. § 22581. See Eric Goldman, *California’s New ‘Online Eraser’ Law Should Be Erased*, FORBES (Sept. 24, 2013, 1:35 PM), <http://www.forbes.com/sites/ericgoldman/2013/09/24/californias-new-online-eraser-law-should-be-erased>.

4. S. JUDICIARY COMM., ANALYSIS OF S.B. NO. 568, 2013–14 Reg. Sess., at 4. (Cal. 2013).

5. Children’s Online Privacy Protection Act of 1998, 15 U.S.C. § 6501 (2012). See *infra* Part III.D.1.

6. BUS. & PROF. § 22580(d).

7. Privacy continues to be a right worthy of the utmost for many Americans, but with regard to children and young adults, numerous issues have begun to coincide, such as sexting, cyberbullying, online harassment, revenge porn. See Mary Ann Allison & Eric Allison, *Brains and Behavior: Addressing Amplified Adolescent Visibility in the Global Village*, in REGULATING SOCIAL MEDIA: LEGAL AND ETHICAL CONSIDERATIONS 89, 89–90 (Susan J. Drucker & Gary Gumpert eds., 2013). Unintended consequences stemming from legislation will produce results that are nearly universally criticized, but the statute will remain in effect and unchanged. See, e.g., *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009) (woman was unable to initially compel Yahoo! to remove indecent pictures posted of her until she brought litigation, but had no further recourse against Yahoo! because of its immunity under the Communications Decency Act—discussed in greater detail *infra* Part III.C). Other laws, such as COPPA, are recognized by many to be helpful, but may not do enough, or be too easy to circumvent. See *infra* Part III.D.1; Lauren A. Matecki, Note, *Update: COPPA is Ineffective Legislation! Next Steps for Protecting Youth Privacy Rights in the Social Networking Era*, 5 NW. J.L. & SOC. POL’Y 369 (2010).

8. Though the bill passed through the California legislative process without much difficulty, scholars and other commenters immediately expressed their thoughts. See Goldman, *supra* note 3; Katy Waldman, *California’s Internet Eraser Law: Nice Idea, But It Won’t Work*, SLATE (Sept. 25, 2013, 3:07 PM), http://www.slate.com/blogs/xx_factor/2013/09/25/sb_568_california_digital_eraser_law_for_minors_is_unlikely_to_work.html. Not surprisingly, children’s advocacy groups have hailed SB 568 as an “important milestone” because “[k]ids and teenagers often self-reveal before they self-reflect.” Somini Sengupta, *Sharing With a Safety Net*, N.Y. TIMES (Sept. 19, 2013), http://www.nytimes.com/2013/09/20/technology/bill-provides-reset-button-for-youngsters-online-posts.html?_r=1&.

9. BUS. & PROF. § 22580(a), (i).

use by minors and third parties.¹⁰ Among the list of products included are items such as alcoholic beverages, firearms, tobacco products, “dangerous fireworks,” tattoos, tanning products, and catchalls for “obscene matter” and “less lethal weapon[s].”¹¹ Further, operators and third parties are prohibited from “knowingly” using, disclosing, or compiling minors’ personal information for the marketing of the aforementioned products.¹² Knowledge appears to be the critical component of the law because of the safe harbor for “reasonable actions [taken] in good faith.”¹³

The eraser component applies to the same operators, and requires online services to: (1) permit minors to remove or request removal of content or other information posted on the operator’s site;¹⁴ (2) provide notice to the minor that he or she is able to remove or request removal of content or other information;¹⁵ (3) provide “clear instructions” for removal procedures;¹⁶ and (4) provide notice that the content removed will not be “complete or comprehensive” removal of all of the minor’s content.¹⁷ There are several available exceptions to the requirement by operators to allow removal including: if the minor receives “compensation,”¹⁸ the content is anonymized,¹⁹ or if a third party user “republished or reposted” the content.²⁰ Even if an operator is required to “erase” the content from visibility, it is not required to remove the content from its servers.²¹

In conjunction, SB 568 hopes that the affirmative duties placed on website and application operators and their advertisers will protect California minors’ privacy.²²

10. BUS. & PROF. § 22580(c).

11. BUS. & PROF. § 22580(i).

12. BUS. & PROF. § 22580(c).

13. BUS. & PROF. § 22580(b)(2).

14. BUS. & PROF. § 22581(a)(1).

15. BUS. & PROF. § 22581(a)(2).

16. BUS. & PROF. § 22581(a)(3).

17. BUS. & PROF. § 22581(a)(4).

18. BUS. & PROF. § 22581(b)(5).

19. BUS. & PROF. § 22581(b)(3).

20. BUS. & PROF. § 22581(b)(2).

21. BUS. & PROF. § 22581(d)(1).

22. This is not the only legislation California has recently proposed to protect its resident minors online. Senator Corbett introduced SB 501, entitled the “Social Networking Privacy Act.” 2013 Cal. Legis. Serv. Ch. 336 (S.B. 501) (West). If passed, it would be similar to the eraser law in that users under the age of 18 would be able to request removal of personal information from a web site. However, unlike the eraser law, parents would also be able to utilize SB 501 to request removal of their children’s posts. Another key difference is that SB 501 applies to only certain specified types of personal information such as telephone number, home address, or credit card number. Once the minor or a parent submits a request, the social networking site must commence removal within a “timely manner” (defined as 96 hours). Willful or knowing non-compliance would impose liability of \$10,000 per violation, and was amended to explicitly exclude unintentional violations. Though SB 501 was passed by the California Senate, it has yet to be voted upon by the Assembly or signed into law by Governor Brown. Expectedly, social networking sites like Google and Facebook have opposed its passage because “timely manner” is unworkable and unfeasible. Patrick McGreevy, *California Lawmaker Wants to Regulate Social Network Sites*, L.A. TIMES (Apr. 10, 2013), <http://articles.latimes.com/2013/apr/>

B. Practical Defects

On its face, SB 568 appears inconsistent at best. It stresses repeatedly that it should not be “construed to require an operator of an Internet Web site, online service, online application, or mobile application to collect or retain age information about users” and a website operator is deemed to be in compliance for good faith efforts to avoid marketing the specified products to minors.²³ Taken together, it is not clear how wide this safe harbor is meant to be, and many questions remain such as: would a website operator be deemed to have acted in good faith if it asks for no information about its user and pleads ignorance? This obviously cannot be what the California legislature intended, and the inherent conflict of the statute becomes apparent: if a website operator attempts compliance, they necessarily will have to collect more information about its user, namely whether they reside in California and whether they are adults or minors.

The eraser law similarly has several practical defects. Since many websites already afford their users the ability to delete posts, it is not clear why this law was deemed to be a deserving recipient of the precious time and resources of the California legislature.²⁴ However, even if a website were to comply, it may nevertheless be ineffective because minors may lie about their age in order to gain access.²⁵ Also, if an operator responded to the eraser law by deciding to ban minors from its site entirely because it did not wish to comply, the problem would likely be exacerbated.²⁶

10/local/la-me-pc-social-networks-20130409. The larger issue that these sites and other activists like the Center for Democracy & Technology (“CDT”) point to is that SB 501 infringes upon minors’ First Amendment rights through its use of third party requests for removal. Emma J. Llansó, Policy Counsel, Center for Democracy and Technology, Statement before the California State Assembly Committee on Arts, Entertainment, Sports, Tourism, and Internet Media, Comments on SB 501: The Social Networking Privacy Act and SB 568, Regarding Privacy Rights for California Minors in the Digital World (June 25, 2013), available at <https://www.cdt.org/files/pdfs/CDT-Testimony-SB501-SB568.pdf> [hereinafter Statement of Llansó]. Part of the problem is that this information is unverifiable, but even if it could be verified, it would most likely fall within a public record designation. A final issue with SB 501 is age verification, a problem discussed throughout this Note. See *infra* Parts II.C and III.C. Though introduced the day before SB 568, the Social Networking Privacy Act remains in committee, and given its potential weaknesses, its status remains in question.

23. BUS. & PROF. § 22580(g).

24. See, e.g., Statement of Rights and Responsibilities, FACEBOOK, <https://www.facebook.com/legal/terms> (last visited May 21, 2014) (“You own all of the content and information you post on Facebook, and you can control how it is shared through your privacy and application settings. . . . When you delete IP content, it is deleted in a manner similar to emptying the recycle bin on a computer. However, you understand that removed content may persist in backup copies for a reasonable period of time (but will not be available to others.)”); Deleting a Tweet, TWITTER, <https://support.twitter.com/articles/18906> (last visited May 21, 2014) (article providing instructions for deleting Tweets).

25. This is not an issue unique to SB 568, and is one of the primary reasons COPPA is faulted. See *infra* Part III.C.2.

26. Statement of Llansó, *supra* note 22.

Content eligible for removal is only that which is generated by the minor, and does not include anything “republished” or “reposted.”²⁷ The California Legislature included this provision to combat First Amendment issues, but the exception likely swallows the entire rule and is the most critical facial defect of the law.²⁸ If a post were to go viral, there is nothing SB 568 can do to protect the minor.²⁹ This demonstrates why all eraser laws are doomed to fail. No matter the privacy settings a minor may enable, the adage of “once it is on the Internet, it is there forever” will still hold true, and no legislation will ever be as effective as individuals making proper judgment calls regarding what to post.³⁰ President Barack Obama commented on the appropriateness of this position while speaking to young students.³¹ The President discussed how he made many mistakes during his youth, but the problem faced by teens today is that any post invariably “will be pulled up again later somewhere in your life.”³² Though the California legislature believed that teens will benefit from this law, there is a risk that they may gain a false sense of security.³³ This illusion of control does not encourage the type of prudent behavior that should be exhibited online by young people who will one day apply to colleges, jobs, or perhaps even run for office. Likewise, the statute is facially unclear as to whom it applies, whether it is something meant only for minors, or for adults who wish to erase something posted while they were a minor.³⁴

27. BUS. & PROF. § 22581(b)(2).

28. Reposts and republishing is not limited only to sharing explicitly on the same site. For example, screenshots of a particular post on Facebook could be posted to another site like Twitter, CNN, etc.

29. The viral nature of the Internet acts as a double-edged sword. On one hand, a positive message can quickly become popular and spread the word of a worthy cause. On the other hand, social media blunders by teenagers will circulate just as quickly. Even if SB 568 were upheld, viral stories would be out of the law’s province. *E.g.*, Katy Waldman, *Teen’s Facebook Post Costs Her Dad \$80,000. Oops.*, SLATE (Feb. 28, 2014, 1:41 PM), http://www.slate.com/blogs/xx_factor/2014/02/28/dana_snay_s_facebook_post_cost_80_000_by_violating_confidentiality_agreement.html (teenager boasted about the private details of her father’s lawsuit settlement, costing him \$80,000); Steve Almasy, Kim Segal & John Couwells, *Sheriff: Taunting post leads to arrests in Rebecca Sedwick Bullying Death*, CNN (Oct. 16, 2013, 8:53 AM), <http://www.cnn.com/2013/10/15/justice/rebecca-sedwick-bullying-death-arrests/> (teenager posted on Facebook that she didn’t care that a girl she bullied later killed herself).

30. California’s eraser law illustrates this point perfectly, because compliance requires that posts be removed from the public eye, not from the web site operator’s servers. Consequently, this can have legal implications and can still be used against the minor.

31. Taylor Buley, *When Social Media Bites*, FORBES (Sept. 28, 2009, 6:00 PM), <http://www.forbes.com/2009/09/28/twitter-facebook-myspace-technology-personal-social-media.html>.

32. *Id.*

33. See Goldman, *supra* note 3.

34. If the purpose of the law is to protect minors from harming their futures by allowing them to delete posts that reflect that “[k]ids and teenagers often self-reveal before they self-reflect,” it is not entirely clear whether this self-reflection would occur before a person’s eighteenth birthday. See Sengupta, *supra* note 8.

Another example of a significant lack in clarity is that minors who have “received compensation or other consideration for providing the content” are not eligible for the eraser button.³⁵ Neither “compensation” nor “other consideration” is defined within the statute, and it is not clear how broad the legislature intended this exception to be.³⁶ Some commenters also fault the eraser law because certain online communities depend on users responding to one another, and requiring deletion of this content could render posts nonsensical.³⁷

II. LEGAL STANDARDS OF INTERNET REGULATION

The domain of law-making power over the Internet can be best described as murky and implicates broad separation of powers questions. Regulation of the Internet undoubtedly belongs to Congress, but questions remain as to state legislatures’ ability to enact laws to complement the existing federal framework. Even legislation that seems to combat a significant societal issue will often be struck down by the courts. The recent saga of Backpage.com illustrates challenges three states faced in legislation targeted at the Internet.

The facts of each case are nearly identical, and involve a series of state statutes attempting to criminalize the advertisement of sexual abuse of a minor.³⁸ Backpage.com is the operator of an online classified service, which experienced a rapid increase in growth after Craigslist Inc. ended its adult category of advertisements in 2010.³⁹ Per month, Backpage.com hosts approximately 3.3 million classified advertisements, blocks between 750,000 and one million posts deemed inappropriate under its terms of service, and reports 400 posts to the National Center for Missing and Exploited Children.⁴⁰ The state legislatures of Washington, Tennessee, and New Jersey all wished to combat human sex trafficking, specifically exploitation of minors, and enacted

35. CAL. BUS. & PROF. CODE § 22581(b)(5) (West 2014).

36. A minor who operates a popular YouTube channel and receives advertising revenue would obviously fall outside the exception. A closer question would be a minor who posts to be entered into a contest or receives a free trial to a subscription service. For example, users on the music application Spotify will receive a free premium subscription for a month if they share a link and another person signs up for the service—would this be considered “other compensation?” SPOTIFY, <http://spotify.extole.com/micro/microsite> (last visited May 21, 2014). The mobile application Foursquare allows its users to check in at different mobile venues, some of which may provide a discount for the check in such as a 10% discount from their bill or a free dessert—would this fall within the definition of “other compensation?” Jeff Hidek, *Check In On Foursquare; Check Out the Benefits*, STARNEWSONLINE (Nov. 22, 2012, 12:30 AM), <http://www.starnewsonline.com/article/20121122/ARTICLES/121129935>.

37. See Goldman, *supra* note 3. However, a possible solution to this issue may exist within the statute itself, as it allows the operator to comply through making identifying information anonymous. BUS. & PROF. § 22581(b)(3).

38. Backpage.com, LLC v. McKenna, 881 F. Supp. 2d 1262 (W.D. Wash. 2012); Backpage.com, LLC v. Cooper, 939 F. Supp. 2d 805 (M.D. Tenn. 2013); Backpage.com, LLC v. Hoffman, 13-CV-03952(DMC)(JAD), 2013 WL 4502097 (D.N.J. Aug. 20, 2013).

39. Cooper, 939 F. Supp. 2d at 815; Hoffman, 2013 WL 4502097, at *1.

40. Hoffman, 2013 WL 4502097 at *1; McKenna, 881 F. Supp. 2d at 1266; Cooper, 939 F. Supp. 2d at 813.

similar laws.⁴¹ Each time, Backpage.com filed suit seeking injunctive relief and the statute at issue was struck down, with no appeal sought.⁴² All three courts felt that the challenged statutes violated the dormant Commerce Clause⁴³ and First Amendment,⁴⁴ and were preempted by § 230 of the Communications Decency Act.⁴⁵

The three cases involving Backpage.com are fairly demonstrative of the types of challenges to state regulation of the Internet. The remaining balance of Parts II and III will discuss the relevant law in each of these areas and the implications that they may have on SB 568.

A. *Dormant Commerce Clause Jurisprudence*

The Framers of the Constitution understood that while state competition is important, Congress would retain the power to “regulate Commerce . . . among the several States.”⁴⁶ In *Gibbons v. Ogden*,⁴⁷ Chief Justice Marshall took a broad view of this power, recognizing that while states undoubtedly possess the ability to regulate their internal affairs, commerce is best defined as “intercourse between . . . parts of nations . . . and is regulated by prescribing rules for carrying on that intercourse.”⁴⁸ With this definition, the Commerce Clause serves as an independent limit on state regulation, even absent Congressional action.⁴⁹ This implication of Congress’s power over commerce is referred to as the “dormant” or “negative” Commerce Clause. The Supreme Court has recognized that the “common thread” in cases involving this aspect of the Commerce Clause is that “the State interfered with the natural

41. *McKenna*, 881 F. Supp. 2d at 1268 (Washington’s SB 6521 imposed liability when a person “knowingly sells or offers to sell an advertisement that would appear to a reasonable person to be for the purpose of engaging in what would be commercial sexual abuse of a minor, if occurring in this state.”); *Cooper*, 939 F. Supp. 2d at 817 (Tennessee’s statute imposed liability when a person “knowingly sells or offers to sell an advertisement that would appear to a reasonable person to be for the purpose of engaging in what would be a commercial sex act . . . with a minor.”); *Hoffman*, 2013 WL 4502097, at *3 (New Jersey’s statute imposed liability for “advertising commercial sexual abuse of a minor if: the person knowingly publishes, disseminates, or displays, or causes directly or indirectly, to be published, disseminated, or displayed, any advertisement for a commercial sex act, which is to take place in this State and which includes the depiction of a minor.”).

42. *McKenna*, 881 F. Supp. 2d at 1271; *Cooper*, 939 F. Supp. 2d at 827; *Hoffman*, 2013 WL 4502097, at *11.

43. *McKenna*, 881 F. Supp. 2d at 1286; *Cooper*, 939 F. Supp. 2d at 841; *Hoffman*, 2013 WL 4502097, at *12.

44. *McKenna*, 881 F. Supp. 2d at 1275; *Cooper*, 939 F. Supp. 2d at 840; *Hoffman*, 2013 WL 4502097, at *7.

45. *McKenna*, 881 F. Supp. 2d at 1273; *Cooper*, 939 F. Supp. 2d at 823; *Hoffman*, 2013 WL 4502097, at *6.

46. U.S. CONST. art. I, § 8, cl. 3; *Gonzales v. Raich*, 545 U.S. 1, 16 (2005) (“The Commerce Clause emerged as the Framers’ response to the central problem giving rise to the Constitution itself: the absence of any federal commerce power under the Articles of Confederation.”).

47. 22 U.S. (9 Wheat) 1, 190 (1824).

48. *Id.*

49. *Id.* at 199–200 (“[W]hen a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do.”).

functioning of the interstate market either through prohibition or through burdensome regulation.”⁵⁰

A court reviewing state legislation will utilize a two-step framework for potential violations of the dormant Commerce Clause.⁵¹ First, the court must look to whether out-of-staters are discriminated against.⁵² If the statute discriminates unfairly, it is per se invalid.⁵³ If the state law is found to be nondiscriminatory, the court will next apply the *Pike v. Bruce Church, Inc.* balancing test, looking towards the extraterritorial effect of the legislation:

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.⁵⁴

The Supreme Court further clarified this test in *Healy v. Beer Institute, Inc.*, and instructs the reviewing court to determine “whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.”⁵⁵

Unsurprisingly, the Internet has created unique challenges for state legislatures who attempt to regulate it.⁵⁶ The Second Circuit has

50. *McBurney v. Young*, 133 S. Ct. 1709, 1720 (2013). See *Healy v. Beer Inst.*, 491 U.S. 324, 335 (1989) (the Dormant Commerce Clause demonstrates “the Constitution’s special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres”); see *Am. Booksellers Found. for Free Expression v. Dean*, 202 F. Supp. 2d 300, 320 (D. Vt. 2002) (quoting *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997)) (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’”).

51. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

52. *Id.*; Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 *YALE L.J.* 785, 789 (2001).

53. *Healy*, 491 U.S. at 336.

54. *Pike*, 397 U.S. at 142.

55. 491 U.S. at 336. The Court analyzed its previous jurisprudence in this area and listed several propositions that emerged: (1) the Commerce Clause precludes application of state law to commerce that “takes place wholly outside of the State’s borders, whether or not the commerce has effects within the state;” (2) state statutes that “directly control[] commerce occurring wholly outside the boundaries of a State exceed[] the inherent limits of the enacting State’s authority and [are] invalid regardless of whether the statute’s extraterritorial reach was intended by the legislature;” and (3) considering the effect of the statute in light of “not only . . . the consequences of the statute itself, but also by considering how the challenged statute may interact with legitimate regulatory regimes of other states and what effect would arise if not one, but many or every State, adopted a similar legislation.” *Id.*

56. See *Am. Libraries Ass’n v. Pataki*, 969 F. Supp. 160, 168 (S.D.N.Y. 1997) (citations omitted) (“The borderless world of the Internet raises profound questions concerning the relationship among the several states and the relationship of the federal government to each state, questions that go to the heart of ‘our federalism.’”).

remarked, “[b]ecause the Internet does not recognize geographical boundaries, it is difficult, if not impossible, for a state to regulate Internet activities without ‘project[ing] its legislation into other States.’”⁵⁷ Considered by many scholars as the seminal case interpreting the dormant Commerce Clause’s interaction with state regulation of the Internet, *American Libraries Association v. Pataki* found a New York statute to conflict with Congress’s power under the tests articulated in *Pike* and *Healy*.⁵⁸ The Court’s reasoning focused on three concerns regarding the statute: (1) it “project[ed] its law into other states whose citizens use the Net”;⁵⁹ (2) it imposed burdens on interstate commerce that exceeded local benefit; and (3) “the Internet is one of those areas of commerce that must be marked off as a national preserve to protect users from inconsistent legislation that . . . could paralyze development of the Internet altogether.”⁶⁰ While Judge Preska’s view seems to imply regulation of the Internet belongs solely to the federal government, subsequent cases split between a similar view,⁶¹ and one more restrictive.⁶² An important distinction to draw between these two lines of cases is that as a general matter, statutes are more likely to be upheld if aimed to combat luring a child for a sexual act, fraud, or spam.⁶³

B. First Amendment

The First Amendment to the Constitution states that “Congress shall make no law . . . abridging the freedom of speech, or of the

57. *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 103 (2d Cir. 2003).

58. *Pataki*, 969 F. Supp. at 167.

59. *Id.* at 177.

60. *Id.* at 169.

61. *See, e.g.*, *PSINet, Inc. v. Chapman*, 362 F.3d 227, 241 (4th Cir. 2004) (accepting adoption of *Pataki*’s rationale); *Dean*, 342 F.3d at 96 (invalidating a Vermont statute that prohibited the transmission of sexually explicit materials to minors on First Amendment and Dormant Commerce Clause grounds); *ACLU v. Johnson*, 194 F.3d 1149, 1162 (10th Cir. 1999) (recognizing that while protecting minors from sexually explicit material on the Internet is an important interest, the statute at hand was an “invalid indirect regulation of interstate commerce”); *TelTech Sys., Inc. v. Barbour*, 866 F. Supp. 2d 571, 577 (S.D. Miss. 2011) (striking down Mississippi law after applying *Healy* because while the law did not attempt to “directly control” commerce “wholly outside” the state, the practical effect did just that).

62. *See Am. Booksellers Found. for Free Expression v. Strickland*, 512 F. Supp. 2d 1082, 1105 (S.D. Ohio 2007) (“this Court will not adopt *Pataki*’s stance that all regulation of the internet is the exclusive province of the federal government”), *rev’d on other grounds*, 601 F.3d 622; *State v. Heckel*, 24 P.3d 404 (Wash. 2001) (Washington Supreme Court upheld state spam law by distinguishing *Pataki* because the statute did not regulate all communications on the Internet; instead, it regulated emails sent from Washington or directly to residents of Washington), *cert. denied*, 534 U.S. 997 (2001); *MaryCLE, LLC v. First Choice Internet, Inc.*, 890 A.2d 818, 842 (Md. Ct. Spec. App. 2006) (upholding Maryland law nearly identical to that of Washington because it “addresses the conduct of spammers in targeting [Maryland] consumers”).

63. *Goldsmith & Sykes, supra* note 52, at 787. *See Simmons v. State*, 944 So. 2d 317, 334 (Fla. 2006) (upholding conviction under Florida statute for luring or enticing a child by means of online services and transmission of materials harmful to a minor; the Court gave an in-depth analysis of previous cases that fall on either the *Pataki* or *Heckel* spectrum). *Cf. State v. Backlund*, 672 N.W.2d 431, 438 (N.D. 2003); *State v. Ebert*, 263 P.3d 918 (N.M. Ct. App. 2011); *People v. Hsu*, 99 Cal. Rptr. 2d 184, 189 (Cal. Ct. App. 2000).

press.”⁶⁴ Through the Fourteenth Amendment, this prohibition extends to the several States.⁶⁵ A court will uphold a statute when reviewing a facial challenge if a “readily susceptible” narrowing construction is available.⁶⁶

If the speech subject to regulation is deemed commercial, the four-part analysis articulated in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*⁶⁷ will apply.⁶⁸ This analysis includes: “(1) whether the expression concerns lawful activity and is not misleading; (2) whether the asserted governmental interest is substantial; (3) whether the regulation directly advances the governmental interest asserted; and (4) whether the regulation is no more extensive than is necessary to serve that interest.”⁶⁹ Unlike strict scrutiny, the *Central Hudson* level of intermediate scrutiny does not require the least restrictive means.⁷⁰ Rather, there must be a proper fit between the legislature’s ends and means chosen.⁷¹ This analysis has done a great amount of work in tobacco cases attempting to limit minors’ exposure to advertisements.⁷²

Similarly, in the Internet context, the Supreme Court has been unfavorable to content-based restrictions, even if aimed towards the protection of children.⁷³ Long-standing precedent recognizes the First Amendment rights of minors, “and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.”⁷⁴ More recently, a California statute prohibiting the sale of violent video games was found to be invalid under the First Amendment.⁷⁵ Writing for the majority, Justice Scalia acknowledged that a State may have “legitimate power to protect children from harm” but it “does not include a free-floating power to restrict the ideas to which children may be exposed.”⁷⁶

64. U.S. CONST. amend. I.

65. U.S. CONST. amend. XIV.

66. *Virginia v. Am. Booksellers Ass’n., Inc.*, 484 U.S. 383, 397 (1988) (further, “[t]he key to application of this principle is that the statute must be ‘readily susceptible’ to the limitation” because a court “will not rewrite a state law to conform it to constitutional requirements”).

67. 447 U.S. 557 (1980).

68. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554–55 (2001).

69. *Rockwood v. City of Burlington*, 21 F. Supp. 2d 411, 421 (D. Vt. 1998); *accord Lorillard*, 533 U.S. at 555.

70. *Minority Television Project, Inc. v. FCC*, 736 F.3d 1192, 1204 (9th Cir. 2013).

71. *Id.*

72. *See, e.g., Lorillard*, 533 U.S. 525 (striking down Massachusetts statute banning outdoor cigarette advertisements).

73. *Reno v. ACLU*, 521 U.S. 844 (1997).

74. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213–14 (1975) (also stating, “[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them”).

75. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011).

76. *Id.* at 2736.

Typically tied to the breadth challenge, a statute may also not pass constitutional muster under the First Amendment for vagueness.⁷⁷ While “perfect clarity and precise guidance” is not required,⁷⁸ prohibitions must be clearly defined.⁷⁹

C. *Supremacy Clause*

1. Communications Decency Act

Congress enacted the Communications Decency Act of 1996 (“CDA”) with two purposes: first, to regulate indecency on the Internet by imposing criminal penalties for the transmission of patently offensive content to minors,⁸⁰ and second, to allow the Internet to continue to evolve “with a minimum of government regulation”⁸¹ by declining to extend liability to interactive computer services for content created and developed by third parties through § 230.⁸² Taken together, the CDA was meant to “encourage interactive computer services and users of such services to self-police the Internet for obscenity and other offensive material, so as to aid parents in limiting their children’s access to such material.”⁸³ Therefore, the goal is to protect minors, but not overly burden the free flow of expression on the Internet.⁸⁴

An early challenge to the CDA struck down provisions located within, when the Supreme Court found them to abridge the freedom of speech protected by the First Amendment.⁸⁵ These provisions were aimed towards the promotion of the first purpose, decency on the Internet.⁸⁶ The Court ruled that as a medium, the Internet was different than radio,⁸⁷ magazines,⁸⁸ or adult theatres.⁸⁹ Justice Stevens faulted the CDA for the lack of precision required by the First Amend-

77. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). *See also* *United States v. Williams*, 553 U.S. 285, 306 (2008) (“What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is.”).

78. *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989).

79. *Grayned*, 408 U.S. at 108.

80. 47 U.S.C.A. § 223(d) (West 1998).

81. *Smith v. Intercosmos Media Group, Inc.*, 2002 WL 31844907, at *2 (E.D. La. Dec. 17, 2002).

82. 47 U.S.C.A. § 230 (West 2012) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”). Absent this statute, a website operator would be liable for defamatory or other speech, even if the operator was unaware of the statement, *e.g.* *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). Congress enacted section 230 of this statute to specifically overrule *Stratton Oakmont*. *See* S. REP. NO. 104-230, at 194 (1996).

83. *Batzel v. Smith*, 333 F.3d 1018, 1028 (9th Cir. 2003); 141 CONG. REC. H8469-70 (daily ed. Aug. 4, 1995) (statements of Representatives Cox, Wyden, and Barton).

84. *Batzel*, 333 F.3d at 1028.

85. *Reno*, 521 U.S. at 844.

86. *Id.* at 868.

87. *E.g.*, *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

88. *E.g.*, *Ginsberg v. New York*, 390 U.S. 629 (1968).

89. *E.g.*, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

ment because it suppressed “a large amount of speech that adults have a constitutional right to receive and to address to one another.”⁹⁰

Despite much of the CDA having been invalidated, § 230’s express bar against liability in certain contexts⁹¹ was left for another day.⁹² Which ultimately came in *Zeran v. America Online, Inc.*,⁹³ where the bar was upheld when the court deferred to the policy choice by Congress “not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages.”⁹⁴ A website operator is immune under § 230 if the content at issue was generated by a third party user⁹⁵ or if the action was by a third party advertiser.⁹⁶

Though § 230 may preempt certain state laws, it was not Congress’s intent to preempt *all* state law causes of action for interactive computer services.⁹⁷ The Ninth Circuit identified that the critical aspect to determine preemption by § 230 is whether the cause of action inherently requires the court to treat the defendant as the “publisher or speaker” of content provided by another.⁹⁸ Immunity requires establishing three elements: (1) the party “is a provider of an ‘interactive computer service;’ (2) that the asserted claims treat the [operator] as the publisher or speaker of the information; and (3) the information is provided by another” party.⁹⁹

Many recognize the need for facilitation of information on the Internet, but will fault § 230 for the “strip[ping] of some of the legal tools the law might otherwise offer harassment victims.”¹⁰⁰ Professor Bartow points to immunity being explicitly reserved for ISPs, but not obligating them to disclose the third party content creator, often leaving victims with no possible recourse against wrongdoers.¹⁰¹

90. *Reno*, 521 U.S. at 874–75 (recognizing that while there is a governmental interest in shielding children from harmful material, it “does not justify an unnecessarily broad suppression of speech addressed to adults”).

91. 47 U.S.C. § 230 (2012) (“No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”).

92. *Reno*, 521 U.S. at 889 n.24.

93. 129 F.3d 327 (4th Cir. 1997).

94. *Id.* at 330–31.

95. *See e.g.*, *Diemo v. Max*, 433 F. Supp. 2d 523 (E.D. Pa. 2006) (declining to extend liability to website owner for comments posted on message board), *aff’d* 248 F. App’x 280 (3d Cir. 2007).

96. *Rosetta Stone Ltd. v. Google Inc.*, 732 F. Supp. 2d 628, 633 (E.D. Va. 2010) (granting Google immunity from “fraudulent and abusive conduct of third part[y]” advertisers).

97. *Zeran v. Am. Online, Inc.*, 958 F. Supp. 1124 (E.D. Va.1997), *aff’d*, 129 F.3d 327 (4th Cir. 2007), *cert. denied*, 524 U.S. 937 (1998).

98. *Barnes*, 570 F.3d 1096.

99. *Parker v. Google, Inc.*, 242 F. App’x 833, 838 (3d Cir. 2007).

100. Ann Bartow, *Bad Samaritanism: Barnes v. Yahoo! And Section 230 ISP Immunity*, in *CYBERSPACE LAW: CENSORSHIP AND REGULATION OF THE INTERNET* 161, 162 (Hannibal Travis ed., 2013).

101. *Id.* at 175.

2. Federal Children's Privacy Laws

a. COPPA and DNTK

The anonymity of the Internet provides great benefits in certain cases, but Congress has realized the unique danger it can provide to children in its passage of COPPA.¹⁰² "The primary goal of COPPA is to place parents in control over what information is collected from their young children online."¹⁰³ "Children" are defined as an individual under the age of thirteen.¹⁰⁴

COPPA was designed to ensure that website operators who direct content at children or general websites that collect personal information from children had proper guidelines.¹⁰⁵ These guidelines include: notice of what information is collected, how it is used, and the website's disclosure practices.¹⁰⁶ If the user is a child, verifiable parental consent is also required.¹⁰⁷ Examples of information that can trigger COPPA include first or last name, physical or email address, telephone number, and social security number.¹⁰⁸

As the agency that administers the statute, the FTC reviews the enabling rule every five years.¹⁰⁹ In 2012, the FTC amended the rule to include geolocation information, photos or videos containing a child's image or audio files with a child's voice, screen or user names, and persistent identifiers.¹¹⁰ The amended rules also clarified that operators of certain "online services" include "any service available over the Internet, or that connects to the Internet or a wide-area network."¹¹¹ These recent amendments indicate the broad view the FTC has taken in enforcing COPPA.¹¹²

Though the protection of children's information is widely accepted as an important purpose, COPPA is not without its critics. For example, it may be seen as inefficient because children are able to

102. 15 U.S.C. §§ 6501–06 (2006); see AARON SCHWABACH, INTERNET AND THE LAW: TECHNOLOGY, SOCIETY, AND COMPROMISES 40 (2005).

103. *Complying with COPPA: Frequently Asked Questions*, FTC, <http://www.business.ftc.gov/documents/0493-Complying-with-COPPA-Frequently-Asked-Questions> (July 16, 2014) [hereinafter *COPPA FAQ*].

104. § 6501(1). This distinction is important because minors who are above age 13 are only federally protected by general unfair or deceptive practice restrictions of the FTC Act.

105. THOMAS J. SHAW, CHILDREN AND THE INTERNET: A GLOBAL GUIDE FOR LAWYERS AND PARENTS 114 (2012).

106. § 6502(b)(1)(A)(i).

107. § 6502(b)(1)(A)(ii).

108. AARON SCHWABACH, INTERNET AND THE LAW: TECHNOLOGY, SOCIETY, AND COMPROMISES 40 (2005).

109. SHAW, *supra* note 105, at 115.

110. Children's Online Privacy Protection Rule 16 C.F.R. § 312.2 (2012). See Shaw, *supra* note 105, at 115.

111. *COPPA FAQ*, *supra* note 103.

112. See ANDREW B. SERWIN, PETER F. McLAUGHLIN & JOHN P. TOMASZEWSKI, PRIVACY, SECURITY AND INFORMATION MANAGEMENT: AN OVERVIEW 35, 40–43 (2011) (even prior to the recent amendment, the FTC brought enforcement actions against many large and well-known companies including Hershey Food Corporation, Xanga.com, and Sony).

input false information to circumvent parental consent.¹¹³ Others point to the cost of compliance, which, in turn, leads to websites or other online services banning or declining to produce content for users who are children.¹¹⁴ Perhaps the most visible critic of COPPA is Facebook founder and Chief Executive Officer Mark Zuckerberg, who sees the age limit of thirteen as a restriction that will be challenged by Facebook in the future.¹¹⁵

Related to COPPA and the FTC's growing concern for teenagers,¹¹⁶ the Do Not Track Kids Act of 2013 ("DNTK") was introduced in both the House and Senate.¹¹⁷ The Act includes several key provisions such as an eraser button, opt-ins for behavioral marketing, and collection of information, limiting the amount of information that companies can collect and retain, and reinforcing COPPA's 2012 amendments.¹¹⁸ Instead of COPPA's line of protection set at twelve and under, DNTK applies to children fifteen and under.¹¹⁹ Critics of DNTK fault its use of fifteen as too arbitrary and confusing, both for users and operators, because the distinction between sites aimed at teenagers and children is much more clear than aimed at various subsets of teenagers.¹²⁰

b. CIPA & Protecting Children in the 21st Century Act

The Children's Internet Protection Act ("CIPA")¹²¹ reflects Congress's concerns regarding children's ability to access harmful or offensive content on the Internet. Schools or libraries that receive discounts or funding under the E-Rate plan for Internet connections must certify that they have an Internet safety policy that includes technology protection measures.¹²² Schools or libraries subject to CIPA must "monitor the online activities of minors" to remain in compliance.¹²³ To avoid constitutional difficulties, CIPA also requires that adults may disable the content filtering for any lawful purpose.¹²⁴ Further, the Protecting Children in the 21st Century Act provides that these schools and libraries must educate minors on "appropriate online behavior, including

113. IAN BROWN & CHRISTOPHER T. MARSDEN, REGULATING CODE: GOOD GOVERNANCE AND BETTER REGULATION IN THE INFORMATION AGE 121 (2013) ("In reality, children circumvent these restrictions by entering an inaccurate birthdate on the initial subscriber information register.")

114. See Matecki *supra* note 7, at 370–71.

115. Michal Lev-Ram, *Zuckerberg: Kids Under 13 Should be Allowed on Facebook*, CNN (May 20, 2011, 3:02 PM), <http://tech.fortune.cnn.com/2011/05/20/zuckerberg-kids-under-13-should-be-allowed-on-facebook/>.

116. COPPA FAQ, *supra* note 103.

117. H.R. Res. 3481, 113th Cong. (2013); S. Res. 1700, 113th Cong. (2013).

118. See H.R. Res. 3481, *supra* note 117.

119. *Id.*

120. Emma Llansó, *Do Not Track Kids Bill Revives Minors' Online Privacy Debate*, CDT (Nov. 26, 2013), <https://cdt.org/blog/do-not-track-kids-bill-revives-minors%E2%80%99-online-privacy-debate/>.

121. 47 U.S.C. §§ 254(h)(5), 254(I) (2012); 47 C.F.R. § 54.520(c)(1)(i) (2011).

122. § 254(h)(5).

123. § 254(h)(5)(B)(i).

124. 20 U.S.C. § 9134(f)(3) (2010); 47 U.S.C. § 254(h)(7)(I) (2008).

interacting with other individuals on social networking websites . . .”¹²⁵ CIPA was challenged by the American Library Association, and while the District Court found that Congress had acted outside its power granted by the Spending Clause,¹²⁶ the Supreme Court reversed, finding that Congress did not impose unconstitutional conditions on public libraries or violate the First Amendment.¹²⁷

c. *The Failed Dream of COPA*

After the invalidation of several provisions of the CDA,¹²⁸ and as a precursor to COPPA, Congress attempted to pass a more narrowly tailored means by which to protect minors online with the Children’s Online Privacy Act (“COPA”).¹²⁹ COPA utilized both civil and criminal penalties for anyone who knowingly posts “material harmful to minors . . . for commercial purposes.”¹³⁰ A motion requesting relief through permanent injunction was immediately filed, and a decade long challenge commenced, ultimately leading to its invalidation.¹³¹ The court’s analysis proceeded under strict scrutiny, finding COPA to be overbroad, unconstitutionally vague, and not the least restrictive means of protecting transmission of harmful content to minors.¹³²

III. LEGAL DEFECTS OF SB 568

A. *Dormant Commerce Clause*

As the trio of *Backpage.com* cases demonstrated, regulation of the Internet undeniably belongs to Congress, but it is not exclusive.¹³³ The dormant Commerce Clause prevents states from enacting certain types of legislation, and “[t]he Internet is undeniably an incident of interstate commerce.”¹³⁴ A court reviewing SB 568 would first ask whether it discriminates against out-of-staters.¹³⁵ Neither the advertising law nor the eraser law facially seem to discriminate, as they apply to any “operator of an Internet Web site . . . directed to minors,” regardless of the operator’s location.¹³⁶

The second step of the *Pike* analysis would ask the reviewing court to balance the putative local benefits against the effect on interstate commerce.¹³⁷ A party challenging SB 568 would bear the burden of

125. 15 U.S.C. § 6551 (2008).

126. *Am. Library Ass’n, Inc. v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2002).

127. *United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194 (2003).

128. *Reno*, 521 U.S. at 844.

129. 47 U.S.C.A. § 231 (West 1998).

130. *Id.*

131. *ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008), *cert. denied*, 555 U.S. 1137 (2009) (discussing extensive procedural history).

132. *Id.* at 190.

133. *McKenna*, 881 F. Supp. 2d 1262; *Cooper*, 939 F. Supp. 2d 805; *Hoffman*, 2013 WL 4502097.

134. *Hsu*, 99 Cal. Rptr. 2d 184.

135. *Pike*, 397 U.S. at 142.

136. CAL. BUS. & PROF. CODE § 22580(a) (West 2014).

137. *See Pike*, 397 U.S. at 142.

demonstrating that the practical effect burdened interstate commerce.¹³⁸ Though a court applying this *Pike* analysis would defer to the California legislature's judgment,¹³⁹ it would nevertheless have to conclude that SB 568 "further[s] the purpose so marginally, and interfere[s] with commerce so substantially [that it is] to be invalid under the Commerce Clause."¹⁴⁰ The purpose of prohibiting the advertisement of certain products to teenagers, and allowing them to escape social media transgressions is important, but so was restricting minors' access to obscene material¹⁴¹ and criminalizing a sex act with a minor,¹⁴² but both were struck down for their practical effects on interstate commerce.

Of the dormant Commerce Clause propositions that *Healy* noted, two are applicable when evaluating this step of *Pike*: first, state statutes which directly control wholly out-of-state commerce; and second, the state statute's interaction with legitimate regulatory schemes of other states.¹⁴³ This is ultimately where SB 568 fails.

Assuming *arguendo* that SB 568 could achieve its desired effects, the prohibition on advertising and requirement of an eraser fall closer to the *Pataki* line of cases than to *Heckel*.¹⁴⁴ Though SB 568 explicitly limits its application to minors who reside in California, it also states "[t]his section shall not be construed to require an operator of an Internet Web site, online service, online application, or mobile application to collect or retain age information about users."¹⁴⁵ Therefore, operators are faced with three options: comply with SB 568's advertising and eraser provisions universally, ask for geographical and age information,¹⁴⁶ or plead ignorance and hope to fall within the safe harbor provision.¹⁴⁷ If a company chooses the latter, it is not clear whether this

138. See *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

139. See *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 92 (1987).

140. *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 670 (1981).

141. See *Am. Booksellers Found. v. Dean*, 342 F.3d 96 (2d Cir. 2003).

142. See *Cooper*, 939 F. Supp. 2d 805; *Hoffman*, 2013 WL 4502097; *McKenna*, 881 F. Supp. 2d 1262.

143. *Healy*, 491 U.S. at 336.

144. See *supra* notes 61–62. Further, the *Heckel* court's analysis included that: [U]nder the New York statute, a website creator in California could inadvertently violate the law simply because the site could be viewed in New York. . . . In contrast to the New York statute, which could reach all content posted on the Internet and therefore subject individuals to liability based on unintended access, the Act reaches only those deceptive UCE messages directed to a Washington resident or initiated from a computer located in Washington; in other words, the Act does not impose liability for messages that are merely routed through Washington or that are read by a Washington resident who was not the actual addressee.

Heckel, 24 P.3d at 412.

145. CAL. BUS. & PROF. CODE § 22580(g) (West 2014). Compliance is established "if the operator takes reasonable actions in good faith" to achieve the purpose of the statute. BUS. & PROF. § 22580(b)(2).

146. Which, as COPPA has demonstrated, can be easily faked.

147. BUS. & PROF. § 22580(b)(2).

would qualify as “good faith” and fall within the safe harbor provision.¹⁴⁸

The most likely approach is compliance. However, without requesting more information—such as location and age—SB 568 compliance would begin to regulate conduct wholly outside California’s borders. This regulation of interstate commerce will certainly occur even in the application to a minor who is a resident of California—for example, if a user were to travel to another state and utilize a website or mobile application. There is no limiting language in SB 568 to infer it does not apply in this scenario. If the operator then advertised an excluded product to a minor and California attempted to impose punishment, this is conduct wholly outside the state.

The remaining applicable *Healy* convention would be implicated if SB 568 survived because a state patchwork would result.¹⁴⁹ Some believe that regulation of the Internet by states is per se invalid¹⁵⁰ because unlike other areas of the law, a company may not choose to market its site or application in a particular location, but under a state patchwork it would be forced to comply with multiple states’ regulatory schemes.¹⁵¹ The danger of regulations like SB 568 is that they set a national floor, and website operators will comply with the most restric-

148. Factually, SB 568 is most similar to the statute at issue in *Se. Booksellers Ass’n v. McMaster*, 371 F. Supp. 2d 773 (D.S.C. 2005). The limiting language located within the eraser law instructs operators to not construe their obligations as to require collection of more data; however, they would “have no way of ensuring their communications are not accessed in a certain geographic location.” *Id.* at 787.

149. *See Pataki*, 969 F. Supp. at 168 (S.D.N.Y. 1997) (“The unique nature of the Internet highlights the likelihood that a single actor might be subject to haphazard, uncoordinated, and even outright inconsistent regulation by states that the actor never intended to reach and possibly was unaware were being accessed. Typically, states’ jurisdictional limits are related to geography; geography, however, is a virtually meaningless construct on the Internet. The menace of inconsistent state regulation invites analysis under the Commerce Clause . . . because that clause represented the framers’ reaction to overreaching by the individual states that might jeopardize the growth of the nation . . .”).

150. *Id. See, e.g., Goldman, supra* note 3 (“My position is that states categorically lack authority to regulate the Internet because the Internet is a borderless electronic network, and websites/apps typically cannot make their electronic packets honor state borders.”).

151. For example, a company can decide what state to incorporate in, and is subject to its laws under the internal affairs doctrine, which out-of-state courts have no choice but to apply. Regulation of the Internet is different because no choice exists. Theoretically an Internet or application operator could block all the residents of a state from accessing its content, but it is likely to be costly and would not be effective because of the many ways available to circumvent these types of restrictions. *See Eric Goldman, The Implications of Excluding State Crimes from 47 U.S.C. § 230’s Immunity*, SANTA CLARA LAW DIGITAL COMMONS 6–7 (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2287622. (“Most [user-generated content] websites have no easy way to avoid interacting with residents in any specific state, so even small websites typically have users in every state.”). Perhaps the greatest evidence that these types of restrictions are not effective is that Facebook was blocked in China when only 8 million Chinese Internet users used it, but it now has over 60 million Chinese users. Douglas MacMillan, *Facebook Rises as 63.5 Million Users in China Skirt Ban*, BLOOMBERG (Sep. 28, 2012, 4:18 PM), <http://www.bloomberg.com/news/2012-09-27/facebook-tops-63-million-users-in-china-despite-ban-report-says.html>.

tive state in order to avoid liability in any state, disrupting power between the states.¹⁵²

Evidence of this danger was felt immediately. Within three months of SB 568's enactment, Maryland expressed a similar cause for concern for its resident minors on the Internet and created a Workgroup on Children's Privacy to convene with its Office of the Attorney General to produce a report ("Workgroup Report").¹⁵³ The Workgroup summarized its findings on the history and current state of children's online privacy.¹⁵⁴ The report is troubling because it encourages the Maryland legislature to enact legislation similar to SB 568.¹⁵⁵ If Maryland and other states follow suit, inconsistent or even conflicting regulations could occur.¹⁵⁶ In testimony before the California Assembly regarding

152. See Sengupta, *supra* note 8 (quoting Mali Friedman, attorney at Covington & Burling, as saying "[o]ften you need to comply with the most restrictive state as a practical matter because the Internet doesn't really have state boundaries"). Professor Goldman further argues that the two justifications of federalism and letting states manage their own affairs (legislative experimentation and being better situated to respond to state-specific conditions) cannot hold true in regulation of the Internet, and the potential adverse consequences that would occur otherwise are too great. Goldman, *supra* note 151. The former justification of state experimentation led to the regulatory "race to the bottom" where Delaware emerged as dominant force in corporate law, which cannot be the case for children's online privacy; it is unthinkable that a state would introduce legislation to lower the protections of its minors.

153. STATE OF MD. OFFICE OF THE ATT'Y GEN., REPORT OF THE CHILDREN'S ONLINE PRIVACY 1 (2013) (the Workgroup was required to examine and issue its report on six issues regarding children's Internet privacy: including online advertising aimed towards children, current and forthcoming federal and state regulations, and best practices used by the Internet industry).

154. *Id.*

155. *Id.* at 33.

156. *Id.* Maryland's brief analysis of the issues regarding the enactment of legislation modeled after SB 568 was woefully inadequate. For example, a member expressed that § 230 conflicts with any potential state-enacted eraser laws. The Workgroup incorrectly interpreted § 230's central purpose and most important section. The central purpose is to immunize website operators, but not against taking down content—it is for content posted by third parties that is *not* removed, meaning the eraser law has very little to do with § 230, unless a state sought to impose a penalty for non-compliance. See e.g., *Doe v. Friendfinder Network, Inc.* 540 F. Supp. 2d 288 (D.N.H. 2008) (finding no liability under § 230 where website operators honored a removal request depicting the plaintiff that was created by a third party, but the information was posted elsewhere). The biggest issue with the Workgroup's § 230 analysis is regarding a proposed advertising law. Though acknowledging that its suggestion was adoption of an advertising provision like SB 568, the report does not acknowledge that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." Holding website operators liable under an advertising law is clearly in conflict with § 230's goal of immunity. See *supra* Part III.C.1.

The Workgroup's analysis of the patchwork problem is best described as dismissive, relying on states' status as "innovators" who go "above and beyond the protections offered by federal laws," that states can pass legislation that mirrors other states, and that data breach notifications are subject to state laws "and that system is working well." *Id.* at 33. Regulation of the Internet is not the proper forum for states to be "innovators" because of its inherent borderless nature. While states can mirror each other, they are under no obligation to do so, and contrary to the Workgroup's characterization of data breach notifications, it is an area plagued by inconsistencies regarding shareholder derivative suits, consumer liability, and civil liability. See Reid J. Schar & Kathleen W. Gibbons, *Complicated Compliance: State Data Breach Notification Laws*, BLOOMBERG LAW (Aug. 9, 2013),

SB 568 and SB 501,¹⁵⁷ the Center for Democracy & Technology (“CDT”) faulted the advertising law for its potential patchwork consequences.¹⁵⁸

Despite the importance of states’ autonomy and their ability to serve as “laborator[ies]” to “try novel social and economic experiments,”¹⁵⁹ broad Internet legislation by states does not serve any of the justifications put forth for decentralized regulation.¹⁶⁰ California does have an interest in the protection of its children online, but it is no different than those of Texas, New York, or Montana. There is no local knowledge or condition that enables states to tailor online legislation to local conditions. Without question, this type of legislation creates innovation, but that is precisely the problem. If Maryland decides California is on the right track and passes a law that is similar, but not identical, website operators must spend more on compliance. In this situation, innovation is actually suppressed because incumbent operators may be capable of bearing the increased financial burden, unlike potential start-ups. While a site like Facebook may have the infrastructure, lobbyists, and other resources to track proposed legislation that may affect its business model from around the country, new companies simply do not, or do not consider it.¹⁶¹ Even larger and more established sites

<http://about.bloomberglaw.com/practitioner-contributions/complicated-compliance-state-data-breach-notification-laws/>. Support for a uniform federal approach to data breach law has increased, and now has support from President Obama, United States Attorney General Eric Holder, and on both sides of the aisle in the Senate. Some members of Congress have even suggested that additional legislation is not required and that the FTC could bring data breaches within its purview through its broad rulemaking power. Danielle Douglas, *Here’s Why the Government Wants a National Data Breach Law*, WASH. POST (Feb. 24, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/02/24/heres-why-the-government-wants-a-national-data-breach-law/>.

157. See Statement of Llansó, *supra* note 22 for discussion of SB 501.

158. *Id.* For example, the CDT points to differing state laws regarding tanning and the sale of aerosol paint to minors. While this is permissible because these states are taking what they believe to be appropriate action, placing advertising bans on the Internet would undoubtedly create a nightmare of compliance issues. Maryland is the perfect example—it permits minors to tan, while California bans anyone under age 18. If both states had Internet advertising law bans, a website operator would have to become an expert on each state’s intricacies and collect more data about its users to be in compliance. The CDT also notes that even if the products can be advertised towards minors, it does not change that they cannot actually purchase them.

159. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

160. The five recognized justifications are: (1) ability to leverage local knowledge and expertise; (2) regulation better tailored to local conditions; (3) experimentation to promote innovation; (4) social utility is maximized by allowing local communities to shape its own goals; and (5) decision-makers are more accessible, making them more accountable. Alejandro E. Camacho & Robert L. Glicksman, *Functional Government in 3-D: A Framework for Evaluating Allocations of Government Authority*, 51 HARV. J. ON LEGIS. 19, 41 (2014).

161. Even the diligent start-up will face these issues. There are many online research guides on how to comply with existing regulations, but when instructed to check local law, these guides are usually referring to tax, employment, and entity formation issues. See, e.g., *Online Businesses*, BUSINESSUSA, <http://business.usa.gov/article/online-businesses> (last visited Mar. 21, 2014); *Online Advertising Law*, SMALL BUSINESS ADMINISTRATION, <http://www.sba.gov/content/online-advertising-law> (last visited Mar. 21, 2014).

may only have their finger on the pulse of federal legislation, but could be subject to laws like SB 568, cutting against the traditional notion of more accessible decision-makers.¹⁶² Simply put, states can pass unsound Internet legislation that is not unique to their community with the best-case scenario of effectively creating national law—a violation of the dormant Commerce Clause—or the worst-case scenario of creating a national patchwork of inconsistent or even conflicting regulations.

B. First Amendment

Even if SB 568 survived a dormant Commerce Clause challenge, it fails on First Amendment grounds.¹⁶³ The statute from *Brown v. Entertainment Merchants Association*¹⁶⁴ is remarkably similar in that “California’s legislation straddles the fence between (1) addressing a serious social problem and (2) helping concerned parents control their children. Both ends are legitimate, but when they affect First Amendment rights they must be pursued by means that are neither seriously under-inclusive nor seriously over-inclusive.”¹⁶⁵ Though proponents of SB 568 point to the effect of modern technology and the need for law to protect minors, the principles of the First Amendment “do not vary when a new and different medium for communication appears.”¹⁶⁶ The speech that SB 568 seeks to regulate is commercial speech, and therefore would be subjected to the intermediate scrutiny of *Central Hudson’s* four-part test.¹⁶⁷ California would bear the burden of demonstrating that its speech restrictions were constitutionally valid.¹⁶⁸

The first step of determining whether the “expression contains a lawful activity” is clearly met. Advertisements are speech protected by the First Amendment so long as they are not misleading or deceptive,

162. Admittedly, California is a large state home to many website operators and SB 568 created national headlines; however, they were after its passage, so even if an operator wished to voice an objection it would be too late. The fact that it was California that passed this law should not matter. Any state could potentially pass an advertising and eraser law, hijacking the national law. No solace should be found that SB 568 came from the same state as Silicon Valley. For example, the New Jersey Senate introduced a similar law several weeks after California, but the bill is now considered dead. Matt Friedman, *A Right to Delete? Bill Would Give N.J. Kids Option to Remove Regrettable Online Posts*, NJ.COM (Nov. 18, 2013, 6:30 AM), http://www.nj.com/politics/index.ssf/2013/11/a_right_to_delete_bill_would_require_kids_have_option_to_remove_regrettable_online_posts.html#incart_river.

163. See *McMaster*, 371 F. Supp. 2d at 782 (“Unfortunately for Defendants, the Fourth Circuit and Supreme Court (as well as a wealth of other district courts) have explicitly rejected age verification and labeling as effective means of achieving the state’s ends of regulating harmful to minors speech on the Internet. . . . These courts have unanimously concluded that these measures are far too burdensome, and chill adults’ ability to engage in, and garner access to, protected speech for a wealth of reasons.”).

164. 131 S. Ct. 2729.

165. *Id.* at 2741.

166. *Id.* at 2733.

167. See *supra* Part II.B.

168. See *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 816 (2000); *Ammari v. City of Los Angeles*, 988 F. Supp. 2d 1139 (C.D. Cal. 2013).

and “only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.”¹⁶⁹

The remaining steps—whether the governmental interest is substantial, whether the regulation advances the interest, and whether the regulation is more expansive than necessary—favor SB 568 invalidation.

Protecting children from advertisements and allowing them to erase portions of their online presence seem to be compelling interests, but it is not evident whether SB 568 would directly advance this interest,¹⁷⁰ especially because mere speculation is not sufficient.¹⁷¹ The advertising provision is both underinclusive (minors would still be exposed to similar advertisements in other media) and overinclusive (it covers a substantial amount of constitutionally protected speech).¹⁷² Without requesting more information from its users, operators would hope to qualify for safe harbor of SB 568, or may become more selective in choosing advertisers, which could “reduc[e] the adult population . . . to . . . only what is fit for children” on those sites.¹⁷³ The California legislature’s lack of meaningful responses to critics of SB 568 also likely demonstrates that the “costs and benefits associated with the burden on speech imposed by the regulations” were not adequately analyzed.¹⁷⁴

Advertising bans on goods may also be struck down for vagueness when “they are so ambiguous that a reasonable person cannot tell what expression is forbidden and what is allowed.”¹⁷⁵ The question facing a court would then be: is “directed to minors” too ambiguous? The answer is unquestionably yes. Websites aimed at children twelve or younger are much easier to classify than sites aimed towards those who are seventeen or younger, making SB 568 different than COPPA.¹⁷⁶ The California legislature did not provide proper guidance as to when a site is “directed to minors,” leaving operators unsure as to how to com-

169. *Erznoznik*, 422 U.S. at 212.

170. *See supra* Part I.B.

171. *See Lorillard*, 533 U.S. at 555.

172. Prohibiting the advertisement of these products on sites where there are both adult and minor users does not justify regulation that advances a substantial state interest. *Cf. Educ. Media Co. at Virginia Tech, Inc. v. Insley*, 731 F.3d 291 (4th Cir. 2013) (striking down ban on alcohol advertisements for college newspapers even though there was an interest in curtailing underage drinking because it prohibited large numbers of those who were able to legally consume alcohol from receiving truthful information).

173. *Reno*, 521 U.S. at 875 (citation omitted).

174. *Lorillard*, 533 U.S. at 561 (internal quotation marks omitted).

175. *McKenna*, 881 F. Supp. 2d at 1278–79 (citing *Smith v. Goguen*, 415 U.S. 566, 569 (1974)).

176. In enforcing COPPA, the FTC has identified factors as to whether a website is “directed to children.” Children’s Online Privacy Protection Rule, 16 C.F.R. § 312.2 (2012) (“In determining whether a commercial website or online service, or a portion thereof, is targeted to children, the Commission will consider its subject matter, visual or audio content, age of models, language or other characteristics of the website or online service, as well as whether advertising promoting or appearing on the website or online service is directed to children. The Commission will also consider competent and reliable empirical evidence regarding audience composition; evidence regarding the intended audience; and whether a site uses animated characters and/or child-oriented activities and incentives.”). *See also* Statement of Llansó, *supra* note 22.

ply.¹⁷⁷ Like COPA, SB 568 seeks to restrict content available to minors online, but it is to the detriment of adults.¹⁷⁸ Conversely, the lack of precision contained in the statute's text removes any effectiveness it may have.¹⁷⁹

Advertisements are considered commercial speech, thus are offered protection under the First Amendment. While they are reviewed under intermediate instead of strict scrutiny, restrictions on the free expression of speech on the Internet have been repeatedly struck down, like SB 568 should be.

C. Preemption

There are a number of ways to analyze possible preemption of SB 568. Federalism recognizes that both national and state governments are sovereign entities.¹⁸⁰ The Supremacy Clause requires that the federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."¹⁸¹ Federal preemption of state law can occur in three circumstances: explicit enactment by Congress, conflict with federal law, or when federal law occupies an area to such an extent, it would be reasonable to conclude that there is no room for state legislation in the area.¹⁸² In California's enactment of SB 568, it is likely preempted in the first and second manner by § 230 of the CDA, and in the third manner by the dormant Commerce Clause and the current regulatory landscape of protecting children online.

1. CDA Section 230

The definition¹⁸³ of operators of websites, online services, online applications, and mobile applications utilized by SB 568 is very broad and closely resembles that of the CDA's definition of "interactive computer service."¹⁸⁴ The biggest difference between the two is that SB 568 includes operators whose products are "directed to minors or who ha[ve] actual knowledge that a minor" is using the products.¹⁸⁵

177. CAL. BUS. & PROF. CODE § 22580(e) (West 2014) ("Internet Web site, online service, online application, or mobile application directed to minors' mean an Internet Web site, online service, online application, or mobile application, or a portion thereof, that is created for the purpose of reaching an audience that is predominately comprised of minors, and is not intended for a more general audience comprised of adults.").

178. See *Ashcroft v. ACLU*, 535 U.S. 564 (2002). See also *supra* Part II.C.2.

179. "[P]rimarily comprised of minors" would not include Facebook or Twitter because there are more adult users, yet it seems that these were the type of sites that were aimed at. Similarly, YouTube has videos that could be classified as "directed to minors" but the same cannot be said of the entire site. See Statement of Llansó, *supra* note 22.

180. *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012).

181. U.S. CONST. art. VI, cl. 2.

182. *Arizona*, 132 S. Ct. at 2500-01.

183. CAL. BUS. & PROF. CODE § 22580(f) (West 2014).

184. 47 U.S.C. § 230(f)(2) (2012) ("any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server").

185. BUS. & PROF. § 22580(e).

Though much of the CDA was struck down by the Supreme Court, § 230's immunity for website operators has remained intact.¹⁸⁶ This immunity would shield any imposition of liability upon website or mobile application operators. Section 230 was enacted to ensure that the Internet could continue to grow without burdensome restrictions, like SB 568. In its simplest form, "[t]he message to website operators is clear: If you don't encourage illegal content, or design your website to require users to input illegal content, you will be immune."¹⁸⁷

The advertising provisions of SB 568 thus are likely expressly preempted by § 230(e)(3) because levying punishment against website operators would be to hold them responsible for the advertisements of third parties.¹⁸⁸ This is factually identical to the *Backpage.com* cases, where the state statutes at issue attempted to impose liability by treating the website operators as speakers.¹⁸⁹ Section 230 was implemented to encourage self-policing by operators, but as the court in *McKenna* noted, a state statute with a knowledge requirement "creates an incentive for online service providers *not* to monitor the content that passes through its channels. This was precisely the situation that the CDA was enacted to remedy."¹⁹⁰ The eraser law contains a similar knowledge requirement, and to enforce SB 568 would be to upset the "unique balance" created by Congress with respect to third party liability online.¹⁹¹

2. Existing Federal Children's Privacy Laws

In addition to dormant Commerce Clause concerns,¹⁹² protecting children online is an area where the federal interest is "so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."¹⁹³ A state attempting to require an eraser law or prohibit types of advertising is certainly cognizant of federal attempts to protect children through the CDA, COPA, COPPA, CIPA, and proposed DNTK. The careful regulatory structure that these laws have sought has attempted to create a balance between protecting children and constitutional concerns. When Congress sought comment from the FTC regarding whether COPPA should be expanded to all under the age of eighteen, the FTC did not believe it would be effective because of circumvention of age verification and the difficulty of

186. 47 U.S.C. § 230(c)(2).

187. *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008).

188. 47 U.S.C. § 230(e)(3) ("[N]o liability may be imposed under any State or local law that is inconsistent with this section.").

189. *McKenna*, 881 F. Supp. 2d 1262; *Cooper*, 939 F. Supp. 2d 805; *Hoffman*, 2013 WL 4502097.

190. 881 F. Supp. 2d. at 1273. *See also Zeran*, 129 F.3d at 333 ("Like the strict liability imposed by the *Stratton Oakmont* court, liability upon notice reinforces service providers' incentives to restrict speech and abstain from self-regulation.").

191. *Cf. McKenna*, 881 F. Supp. 2d. at 1274.

192. *See supra* Part III.A.

193. *Cf. Arizona*, 132 S. Ct. at 2501.

distinguishing what is directed to children versus adults.¹⁹⁴ Allowing SB 568 or any other state law that attempts to regulate the behavior of minors and their relationship with website operators online would disrupt this delicate balance which has continued to evolve over the past fifteen years.

IV. POTENTIAL SOLUTIONS

A. Federal Regulation?

The Internet has evolved substantially since Congress has enacted any major Internet legislation aimed towards children, the most recent being COPPA in 1998. Several statistics identified by the Census Bureau illustrate how far this evolution has come. The percentage of households with Internet access has increased from 18.0% just before COPPA,¹⁹⁵ to 71% today.¹⁹⁶ Additionally, usage by children has nearly doubled in every age group, most notably in statistics regarding daily usage, with 50% of children aged six to nine and 67% of eight year olds logging on.¹⁹⁷ The National Telecommunications and Information Administration (“NTIA”) has noted that 98% of Americans live in areas where broadband service is available, of whom 69% take advantage.¹⁹⁸ Mobile broadband speeds have also risen and more Americans own an Internet-capable smartphone than a traditional mobile device.¹⁹⁹ Social networking sites like Facebook have benefitted greatly from the availability of high-speed Internet, and its record numbers of users continues to grow.²⁰⁰ It was in response to these usage statistics that the

194. FEDERAL TRADE COMM’N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESSES AND POLICYMAKERS 59 (2012), *available at* <http://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacy-report.pdf>.

195. U.S. CENSUS BUREAU, HOME COMPUTERS AND INTERNET USE IN THE UNITED STATES: AUGUST 2000, Fig. 1 (Sept. 2001); *see also* STATE OF MD, OFFICE OF THE ATT’Y GEN., REPORT OF THE CHILDREN’S ONLINE PRIVACY (2013).

196. U.S. CENSUS BUREAU, HOME COMPUTERS AND INTERNET USE IN THE UNITED STATES, Fig. 1 (May 2013).

197. AVIVA LUCAS GUTNICK ET AL., SESAME WORKSHOP, ALWAYS CONNECTED: THE DIGITAL MEDIA HABITS OF YOUNG CHILDREN, 16, 30 (2011), *available at* http://www.joan-ganzcooneycenter.org/wp-content/uploads/2011/03/jgcc_alwaysconnected.pdf. *See also* STATE OF MD, OFFICE OF THE ATT’Y GEN., REPORT OF THE CHILDREN’S ONLINE PRIVACY I (2013). The Census Bureau has identified that 83.2% of children between ages three and seventeen live in a home with a computer. U.S. CENSUS BUREAU, HOME COMPUTERS AND INTERNET USE IN THE UNITED STATES, Fig. 1 (May 2013).

198. NAT’L TELECOMM. AND INFO. ADMIN. ET AL., EXPLORING THE DIGITAL NATION: AMERICA’S EMERGING ONLINE EXPERIENCE 1–2 (2013).

199. *Id.* at 1 (46% of Americans have a smartphone, while 41% have a traditional mobile phone).

200. Facebook has 1.23 billion monthly active users, of whom, 757 million log on daily and 556 million log on with their smartphone. Ami Sedghi, *Facebook: 10 Years of Social Networking, in Numbers*, THE GUARDIAN (Feb. 5, 2014, 9:38 AM), <http://www.theguardian.com/news/datablog/2014/feb/04/facebook-in-numbers-statistics>. Perhaps the most remarkable statistic regarding the dominant force in social networking, is that 73% of those aged twelve to seventeen use the site. Facebook continues to strengthen its brand, purchasing the popular messaging application WhatsApp for \$19 billion,

California legislature acted in passing the advertising restriction and eraser law.

For better or worse, Congress passes fewer laws regulating the Internet than the states.²⁰¹ The current landscape of Internet law both explains and promotes innovation.²⁰² Even for companies like Google or Facebook, it can be nearly impossible to track every state legislature for laws that may greatly affect them; this problem is exacerbated for start-ups.²⁰³ Conversely, federal laws pass through extensive lobbying processes, making it more difficult to pass bad laws, and receiving meaningful comments on those that are enacted.²⁰⁴

Given that there seems to be no consensus as to the best way to protect minors online, federal legislation may not come to fruition. At times, it is even the people themselves who voice opinions over bad proposed legislation.²⁰⁵ Another potential problem with using the federal government as the proper legislator of online privacy is a potential lack of trust by the public.²⁰⁶

B. *Global Regulation*²⁰⁷

Global regulation of the Internet would be ideal to operators because there would be no question regarding applicable legal conventions. However, widespread laws are likely impossible. Problems facing children online are not unique to the United States, and part of social networks' allure is that they are able to span and connect users across

Instagram for \$1 billion (150 million users, 70% of whom log on daily), and has attempted to purchase SnapChat for \$3 billion. Adam Hartung, *Three Smart Lessons From Facebook's Purchase of WhatsApp*, FORBES (Feb. 24, 2014, 4:27 PM), <http://www.forbes.com/sites/adamhartung/2014/02/24/zuckerbergs-3-smart-leadership-lessons-from-facebook-buying-whatsapp/>.

201. See Goldman, *supra* note 151 at 5.

202. *Id.*

203. *Id.* Though state legislatures do pass laws that benefit society, there are other concerns. For example, some may fault Congress for deadlock, but in the states the problem is the converse—both branches of government belong to the same party, perhaps making it too easy to enact legislation without significant dialogue. In a study by University of Chicago Professor Boris Shor and Princeton University Professor Nolan McCarty, they found California to be the most polarized state. Niraj Chokshi, *Think Congress is Polarized? Half the States are Worse*, WASH. POST (Jan. 15, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/01/15/think-congress-is-polarized-half-the-states-are-worse/>.

204. See Goldman, *supra* note 151, at 6.

205. See, e.g., Amy Goodman, *The Sopa Blackout Protest Makes History*, THE GUARDIAN (Jan. 18, 2012, 6:51 PM), <http://www.theguardian.com/commentisfree/cifamerica/2012/jan/18/sopa-blackout-protest-makes-history> (detailing the proposed Stop Online Piracy and Protect IP Acts, which would have made it more difficult for websites to sell or distribute pirated material, but online petitions and blackouts by websites killed the laws).

206. Claire Cain Miller, *Revelations of N.S.A. Spying Cost U.S. Tech Companies*, N.Y. TIMES (Mar. 21, 2014), <http://www.nytimes.com/2014/03/22/business/fallout-from-snowden-hurting-bottom-line-of-tech-companies.html> (spying by the federal government of American citizens has created an environment of mistrust surrounding the NSA).

207. Full exploration of the issues regarding global regulation of the Internet is beyond the scope of this Note. For a more full theoretical discussion of global Internet law see David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996); see also Goldsmith & Sykes, *supra* note 52.

national borders.²⁰⁸ What may be considered harmful changes based on cultural norms, as does the level of access available to the Internet.²⁰⁹ Thus, current Director of the Intellectual Property Division of the World Economic Forum, Antony Taubman, was most likely right that the “the Internet will transform international governance more than international institutions will transform the Internet.”²¹⁰

C. *Self-Regulation*

Self-regulation by both parents and website operators is the best option from both a practical and efficiency viewpoint. Any governmental solution regarding privacy is difficult to tailor because individuals have differing views.²¹¹ This divergence is likely to be exacerbated because parents may have differing views over what they believe to be the proper regulation for their children, which wouldn't necessarily align with their beliefs about their own privacy. Further, children would receive far less autonomy over what they were able to do online. Some sites like Twitter provide specific guidance to teenagers regarding proper online etiquette.²¹²

The best solution to protecting the scarlet letter into adulthood that an unfortunate social media post can cause is education on multiple levels. First, CIPA created Internet education requirements, which should be expanded and upgraded for social media. Second, website operators should follow the lead of sites like Twitter and provide clear guidelines for teenagers. Though age verification does not always work, if signup procedures included this information and perhaps even required a quiz, teens would not simply click through terms of service. Finally, no amount of regulation or self-policing will ever be more effective than proper parental guidance. Traditional ways that parents controlled their teens on the Internet have been seriously limited because of mobile devices, but setting proper boundaries and explaining the ramifications of becoming a viral story would greatly benefit the protection of children online.

D. *Is Legislation Really Necessary?*

Whether by eraser buttons, advertising bans, do not track legislation, or some other form, children deserve the right to protection from themselves and others. However, as many commenters and legislators call for, there is no substitute for education of minors on proper

208. See generally Anupam Chander, *Facebookistan*, 90 N.C. L. REV. 1807 (2012).

209. EVA LIEVENS, PROTECTING CHILDREN IN THE DIGITAL ERA: THE USE OF ALTERNATIVE REGULATORY INSTRUMENTS, 499 (2010).

210. Antony Taubman, *International Governance and the Internet*, in LAW AND THE INTERNET 3, 43 (Lilian Edwards & Charlotte Waelde eds., 2009).

211. See Rueben Rodrigues, *Privacy on Social Networks: Norms, Markets, and Natural Monopoly*, in THE OFFENSIVE INTERNET 237, 246 (Saul Levmore & Martha C. Nussbaum eds., 2010).

212. *Teens*, TWITTER, <https://support.twitter.com/groups/57-safety-security/topics/265-tips/articles/20169990-safety-tips-for-teens> (last visited Mar. 21, 2014).

Internet etiquette.²¹³ One of the biggest practical faults that Professor Goldman points to in SB 568's eraser law is that it gives children the illusion of control.²¹⁴ This illusion of control does not curtail youthful indiscretion, and some commenters actually suggest that it should not be curtailed, but rather, "[w]e should not yield youthfulness to the merciless memory of digital recorders."²¹⁵ Professor Chander suggests that at the very least, youths need a public disclosure right of action.²¹⁶ He best summarizes the need to protect children online as "striv[ing] to give youth a measure of decisional privacy."²¹⁷

CONCLUSION

It is hard to disagree with President Kennedy that children are our most valuable resource. As such, they deserve protection online comparable to what they receive in the physical world. Legislation failing to reach its stated purpose is not a new phenomenon, but well-intentioned states' attempts to protect children online are best described by Professor Goldman as misguided.²¹⁸ Legislation of the Internet that affects interstate commerce belongs solely to Congress, and when states like California, Maryland, and New Jersey attempt to exert control, it sets a dangerous precedent of a state patchwork of differing regulations. Protecting children online is an important goal, but not to the detriment of the deeply held American ideals, namely federalism and the freedom of speech.

213. *Id.*

214. *See* Goldman, *supra* note 3.

215. Anupam Chander, *Youthful Indiscretion in the Internet Age*, in *THE OFFENSIVE INTERNET* 124, 126 (Saul Levmore & Martha C. Nussbaum eds., 2010).

216. *Id.* at 138. Professor Chander refers generally to youthful indiscretion in the Internet age and specifically discusses the increased harm of nude images.

217. *Id.* at 139.

218. *See* Goldman, *supra* note 3.