AN ILLEGAL RUB?: ANALYZING CRAIGSLIST'S FIRST AMENDMENT RIGHT TO HOST ADULT SERVICES ADS

ANNIE ROSS*

I. INTRODUCTION

On September 3, 2010, the classified advertisement website Craigslist, shut down its "adult services" section in response to seventeen state attorneys general threatening to prosecute the website for facilitating prostitution and child trafficking through hosting certain third-party ads.[1] The attorneys general's

* J.D., Boston University School of Law, 2012; B.A., Tufts University, 2007. Annie Ross will be a first year associate at Sullivan & Worcester, LLP, in Boston, Massachusetts. She thanks everyone on the Boston university Public Interest law Journal who helped with her note, especially her editors Alistair Reader and Jessica Howell. She also thanks her family and friends for their support and encouragement during the note process.

[1] Tim Fleischer, *State AGs: Craigslist Should Drop Adult Services*, ABCLOCAL.GO.COM (Aug. 24, 2010), http://abclocal.go.com/wabc/story?section=news/local&id=7627864; Evan

threatened prosecution has several First Amendment implications. The First Amendment protects the freedom of speech and the freedom of the press, but the amendment's protection is not absolute.[2] The government's authority to regulate speech depends on the type of speech and how the speech is communicated.[3] The Supreme Court has considered generally how the First Amendment applies to the Internet, but it has not yet addressed the specific questions at issue for Craigslist, which involves online commercial speech.[4] To determine the appropriate level of First Amendment protection and judicial review, the Court should consider the specific communication characteristics of the Internet and websites hosting third-party content.[5]

Although Craigslist's adult services advertisements are on the periphery of the First Amendment, Craigslist is still entitled to some constitutional protection.[6] This Note argues that the attorneys general's threatened prosecution violated Craigslist's First Amendment rights under a strict scrutiny, content-based analysis because there was an impermissible chilling effect on speech.[7] Strict

---

Hansen, *Censored! Craigslist Adult Services Blocked in U.S.*, WIRED.COM (Sept. 4, 2010, 11:41 AM), http://www.wired.com/epicenter/2010/09/censored-craigslist-adult-services-blocked-in-u-s/. The attorneys general were from Arkansas, Connecticut, Idaho, Illinois, Iowa, Kansas, Maryland, Michigan, Missouri, Montana, New Hampshire, Ohio, Rhode Island, South Carolina, Tennessee, Texas and Virginia.

[2] Schenck v. United States, 249 U.S. 47, 51-52 (1919).

[3] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942); Bret Boyce, *Obscenity and Community Standards,* 33 YALE J. INT'L L. 299, 316 (2008).

[4] *See* United States v. Williams, 553 U.S. 285 (2008); Ashcroft v. ACLU (*Ashcroft II*), 542 U.S. 656 (2004); United States v. Am. Library Ass'n, 539 U.S. 194 (2003); Reno v. ACLU, 521 U.S. 844 (1997).

[5] *See Reno*, 521 U.S. at 868-69 (holding speech on the Internet is subject to strict scrutiny based on the Internet's unique communication characteristics, which include unlimited and inexpensive channels of communication; users must take affirmative steps to access information; objectionable content has warnings; and the government does not have a history of regulating the Internet); FCC v. Pacifica Found., 438 U.S. 726, 749-50 (1978) (holding the FCC may regulate radio broadcasts during certain times of the day because the broadcasts may be invasive in listeners' homes and be easily accessible to children); Red Lion Broad. Co., Inc. v. FCC, 395 U.S. 367, 388-89 (1969) (holding it is permissible under the First Amendment for the government to require radio licenses to broadcast due to the limited number of radio broadcast frequencies); Braun v. Soldier of Fortune Magazine, Inc., 968 F.2d 1110, 1117-18 (11th Cir. 1992) (finding there is a greater chilling of speech risk when the government regulates publishers of third-party content compared to the actual speakers because of different economic interests).

[6] *See* Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 188 (1999); *Reno*, 521 U.S. at 868; Cent. Hudson Gas & Elec. Corp. v. Pub. Serv.s Comm'n of N.Y., 447 U.S. 557, 566 (1980).

[7] *See Ashcroft II*, 542 U.S. at 660; *Reno*, 521 U.S. at 868; Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991); Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973).

scrutiny may apply and not the *Central Hudson* commercial speech test because of the unique characteristics of Internet websites that host third party ads.[8] Even if the four-prong *Central Hudson* test applies, which provides intermediate scrutiny, the attorneys general's threatened prosecution also violated Craigslist's First Amendment rights because the state action did not directly advance the state's interest and was more extensive than necessary.[9] Determining Craigslist's constitutional protections is relevant not only to Craigslist and similar websites, but it is also crucial in understanding what state-sponsored action is permissible to regulate the Internet while better protecting the public from dangers the Internet presents.

Part II of this Note details Craigslist's interactions with the state attorneys general. Part III provides an overview of the First Amendment, and Part IV specifically examines the First Amendment's commercial speech doctrine. Part V describes how the First Amendment has previously been applied to the Internet. Finally, Part VI applies established First Amendment jurisprudence to Craigslist's particular facts and events, and by using Craigslist as an example, this Note describes the proper First Amendment protections for websites hosting online personal advertisements.

II. THE INTERNET AND CRAIGSLIST

The Internet is a technology that has revolutionized how people receive and share information.[10] It is a global network that connects computers and allows people to communicate, access, and send massive amounts of information, such as text, pictures, audio, videos, and interactive dialogue.[11] "Internet Service Providers" (ISPs) are the commercial companies, such as Comcast or America Online, which for a fee, provide users with access to the global network.[12] People may use the Internet through email, chat rooms, instant messaging, and the World Wide Web, which hosts websites.[13] Distinct mediums, such as newspapers, radio, television, and telephones, have converged via the Internet, which is more interactive than traditional one-way transmissions.[14] There is no centralized access point to the Internet, or Web, that may control membership

---

[8] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 502 (1996); *Red Lion*, 395 U.S. at 388-89; Wendy Seltzer, *Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 HARV. J.L. & TECH. 171, 181-83 (2010).

[9] *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 555 (2001); *Greater New Orleans*, 527 U.S. at 188; *44 Liquormart*, 517 U.S. at 501; *Cent. Hudson*, 447 U.S. at 566.

[10] Owen Fiss, *In Search of a New Paradigm*, 104 YALE L.J. 1613, 1615 (1995).

[11] *Reno*, 521 U.S. at 849-50, 870.

[12] 47 U.S.C. § 230(f)(2) (West 2012); Tim Berners-Lee, *Long Live the Web: A Call for Continued Open Standards and Neutrality*, SCI. AM., Nov. 22, 2010, http://www.scientificamerican.com/article.cfm?id=long-live-the-web. ISPs may also be called "Interactive computer services" but the terms refer to the same type of company.

[13] *Reno*, 521 U.S. at 851.

[14] Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Dem-*

or regulate content.[15] One of the Internet's special attributes is that it provides speakers and publishers a relatively unlimited and affordable platform to reach a global audience.[16]

Craigslist.org is a website that allows people to post classified advertisements targeted to a city or geographic region.[17] In 1995, Craig Newmark started the website as a hobby, but Craigslist now employs around thirty staff members and is an incorporated entity.[18] Currently, Craigslist has over 700 local websites in seventy countries, and each month generates around 30 billion views and over 50 million new classified posts.[19] Users post ads regarding employment, housing, goods, services, local activities, and personals.[20]

One reason Craigslist is immensely popular is because it is easy to use the website.[21] To create a free advertisement without an account, a user fills out a form on Craigslist, and may include text, pictures, or website links in the post.[22] The advertisement will be posted in about fifteen minutes and remains on the website between seven and forty-five days depending on the type of advertisement and city.[23] Users may post their ads anonymously or explain the best way to contact them.[24] Craigslist does charge a fee to post some ads,[25] and these fees encourage users to abide by Craigslist's rules.[26]

Under Craigslist's Terms of Use, users may not advertise any illegal sales,

---

ocratic Heart of the First Amendment in the Age of Interactive Media, 104 YALE L.J. 1619, 1619 n.1 (1995).

[15] *Reno*, 521 U.S. at 853.

[16] *Id.*

[17] Factsheet, CRAIGSLIST, http://www.craigslist.org/about/factsheet (last visited Feb. 9, 2012).

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] Bruce Lambert, *As Prostitutes Turn to Craigslist, Law Takes Notice*, N.Y. TIMES (Sept. 5, 2007), http://www.nytimes.com/2007/09/05/nyregion/05craigslist.html?emc=eta1.

[22] FAQ, CRAIGSLIST, http://www.craigslist.org/about/help/faq (last visited Feb. 9, 2012).

[23] *Id.* On Craigslist's Boston, Chicago, Los Angeles, New York, Portland, Sacramento, San Diego, San Francisco Bay Area, Seattle, and Washington, D.C. websites, classified ads expire after seven days while resume, job, and gig postings expire after thirty days. For the other cities, all posts expire after forty-five days.

[24] *Id.*

[25] *Posting Fees*, CRAIGSLIST, http://www.craigslist.org/about/help/posting_fees (last visited Feb. 9, 2012). Users have to pay for employment posts in nineteen cities, apartment rentals in New York City, and therapeutic services posts.

[26] Mike Musgrove, *First New York, Then D.C.? Craigslist to Charge Fees*, WASH. POST (Feb. 4, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/02/03/AR2006020302749.html; James Temple, *Craigslist Removes Ads for Adult Services*, S.F. CHRON. (Sept. 5, 2010), http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/09/05/MN841F8URH.DTL.

products, or services, which covers prostitution ads.[27] In addition, users may not post content that constitutes pornography, child pornography, or obscene material.[28] Craigslist encourages users to report inappropriate advertisements by "flagging" posts, and the website will remove posts that violate its Terms of Use.[29] Craigslist's privacy policy allows Craigslist to preserve any information a user provides or that is related to the post.[30] To enforce Craigslist's Terms of Use and "protect the rights, property, or personal safety of Craigslist, its users or the general public," Craigslist may disclose this information to law enforcement.[31]

Despite Craigslist's rules and procedures, posters and readers have utilized Craigslist numerous times for criminal purposes.[32] While many low level abuses may go unnoticed, there has been extensive publicity concerning multiple heinous crimes.[33] For example, in 2007, Justine Alex Reisdorf from Minnesota pled guilty to operating an underage prostitution ring through her Craigslist ads.[34] In 2008, Ann Marie Linscott paid a contract killer who she found on Craigslist to murder a 56-year-old woman who was vying for Linscott's boyfriend.[35] In 2009, Philip Markoff, dubbed the "Craigslist Killer," was arrested for armed robbery and the murder of Julissa Brisman, who Markoff met when he answered Brisman's Craigslist advertisement for erotic massage services.[36] Markoff's case in particular garnered major media attention and prompted state law enforcement agencies to focus on Craigslist.[37]

---

[27] *Craigslist Terms of Use – Paragraph 3(a)(1-3)*, CRAIGSLIST, http://www.craigslist.org/about/terms.of.use (last visited Feb. 9, 2012); *Prohibited Items*, CRAIGSLIST, http://www.craigslist.org/about/prohibited.items (last visited May 22, 2012).

[28] *Craigslist Terms of Use – Paragraph 3(a)(1-3)*, *supra* note 27; *Prohibited Items*, *supra* note 27.

[29] *Craigslist Terms of Use,* CRAIGSLIST, http://www.craigslist.org/about/terms.of.use (last visited Feb. 9, 2012).

[30] *Id.*

[31] *Privacy Policy*, CRAIGSLIST, http://www.craigslist.org/about/privacy_policy (last visited Feb. 9, 2012). Some examples of the type of information Craigslist has the capability to save are users' emails and telephone numbers, IP address, and URL page.

[32] *See* Fleischer, *supra* note 1.

[33] *See e.g.* Fleischer, *supra* note 1; Mike Sachoff, *Woman Charged for Craigslist Killer Ad,* WEBPRONEWS (Feb. 8, 2008), http://www.webpronews.com/topnews/2008/02/08/woman-charged-for-craigslist-killer-ad; *Woman Pleads Guilty in Teen Prostitution Ring*, WCCO (Sept. 13, 2007, 11:33 AM), http://web.archive.org/web/20080501184802/http://wcco.com/topstories/prostitution.ring.teenagers.2.370262.html.

[34] *Woman Pleads Guilty in Teen Prostitution Ring*, *supra* note 33.

[35] Sachoff, *supra* note 33.

[36] June Q. Wu & Maria Cramer, *Accused 'Craigslist Killer' Philip Markoff Commits Suicide in Boston Jail*, BOSTON.COM (Aug. 15, 2010, 8:07 PM), http://www.boston.com/news/local/breaking_news/2010/08/accused_craigsl_2.html.

[37] David Sarno, *Craigslist's Erotic Services Ads Draw More Fire from States*, L.A. TIMES (May 11, 2009), http://articles.latimes.com/2009/may/11/business/fi-craigslist11/3.

Stemming from the negative publicity, several state attorneys general opened a dialogue with Craigslist in an effort to protect the public.[38] The attorneys general were concerned about Craigslist's erotic services ads and claimed the posts promoted prostitution and made pornography available to minors.[39] Initially, Craigslist created its erotic services listing in response to users' requests because users did not want to unexpectedly see an erotic service advertisement while looking dating personals.[40] According to Craigslist, the erotic services section existed for users to post ads for escorts, exotic dancers, and massages.[41] Some erotic services ads, however, were thinly veiled prostitution postings that included code words for different sex acts and pictures of nude or semi-nude people exposing their genitals.[42]

Craigslist has also attracted the ire of anti-human trafficking groups, that claim the Internet is the current preferred method for prostitution, and therefore, special measures need to be taken to protect victims.[43] Anti-human trafficking advocates wanted Craigslist's adult services section banned because the website made it easier for pimps to force women into prostitution.[44] Andrea Powell, from the group The FAIR Fund, commented: "'Craigslist is like the Wal-Mart of online sex trafficking right now in this country.'"[45]

In November 2008, Craigslist reached an agreement with forty state attorneys general and the advocacy group, National Center for Missing and Exploited Children (NCMEC), to reduce prostitution ads by instituting certain policies.[46] As a result, Craigslist required posters of "erotic services" ads to

---

[38] *Id.*; Fleischer, *supra* note 1.

[39] Fleischer, *supra* note 1; Steve Turnham & Amber Lyon, *Online Sex Ads Complicate Crackdowns on Teen Trafficking*, CNN (Sept. 15, 2010, 9:52 AM), http://www.cnn.com/2010/CRIME/09/14/us.craigslist.sex.ads/index.html?hpt=C1.

[40] Testimony of William Clinton Powell, Director, Customer Service and Law Enforcement Relations of Craigslist, Inc., Before the U.S. House of Representatives Judiciary Comm., Subcomm. on Crime, Terrorism and Homeland Security, Hearing on Domestic Minor Sex Trafficking 2 (Sept. 15, 2010), http://judiciary.house.gov/hearings/pdf/Powell1009 15.pdf [hereinafter *Powell Testimony*]; Ryan Singel, *Craigslist Shuts Down International "Adult Services" Section*, WIRED (Dec. 18, 2010, 3:18 PM), http://www.wired.com/epicenter/2010/12/craigslist-adult-services-international/.

[41] *See* Lambert, *supra* note 21.

[42] Dart v. Craigslist, Inc., 665 F. Supp. 2d 961, 962 (N.D. Ill. 2009).

[43] Steve Turnham & Amber Lyon, *Sold on Craigslist: Critics Say Sex Ad Crackdown Inadequate*, CNN (Aug. 4, 2010, 5:25 AM), http://www.cnn.com/2010/CRIME/08/03/craigslist.sex.ads/index.html.

[44] *Id.*

[45] *Id.* "FAIR Fund" has since changed its name to "FAIR Girls," and FAIR represents "Free, Aware, Inspired, Restored." *About Us*, FAIR GIRLS, http://fairgirls.org/about (last visited May 22, 2012). FAIR Girls' mission is to prevent "the exploitation of girls worldwide with empowerment and education." *Id.*

[46] Testimony of Elizabeth McDougall, Partner at Perkins Coie, LLP, Counsel to Craigslist, Inc. on Online Safety, Security and Abuse, Before the U.S. House of Representatives

provide, with their personal information, a working phone number and to pay a fee with a valid credit card.[47] The purpose of obtaining users' personal information was to provide the information to law enforcement, if needed, and to deter potential illegal posters who would not want to disclose identifying information.[48] In addition, the website utilized screening software developed by NCMEC and initiated investigations and lawsuits against posters who violated its Terms of Use.[49] Further, Craigslist started to donate a hundred percent of its erotic services revenue to charities.[50]

In May 2009, Craigslist and the attorneys general agreed to more changes to help prevent prostitution, child trafficking and pornography.[51] Craigslist changed the name of its "erotic services" section to "adult services," doubled the fee for an adult services advertisement to ten dollars, posted clear warnings to users about the content before they accessed the listings, and hired attorneys to manually screen ads.[52] Screening included removing offending posts and reporting posts involving minors to the NCMEC's tip line.[53] In response to publicity about these modifications, Craigslist's founder, Craig Newmark, defended his website by claiming Craigslist was taking more preventative and precautionary measures to filter ads and report abuses to the police than any other website offering adult personals.[54] Newmark also stated that Craigslist wanted to collaborate with law enforcement and experts to prevent the misuse of its site to facilitate trafficking.[55]

On August 24, 2010, seventeen state attorneys general sent Craigslist a letter demanding that the website take down its adult services listing, or face criminal charges.[56] The attorneys general claimed Craigslist could not sufficiently curtail ads that promote prostitution and child trafficking.[57] For example, the attorneys general alleged that Craigslist's manual screeners could not catch all ads containing children offering sexual services because it is difficult to determine if the person in the ads is an adult or a minor.[58] Also, some law enforcement groups claimed they had not received many reports of possible prostitu-

---

Judiciary Comm., Subcomm. on Crime, Terrorism and Homeland Security, Hearing on Domestic Minor Sex Trafficking 3-4 (Sept. 15, 2010), http://judiciary.house.gov/hearings/pdf/McDougall100915.pdf [hereinafter *McDougall Testimony*]; Fleischer, *supra* note 1.

47 Fleischer, *supra* note 1.

48 *McDougall Testimony*, *supra* note 46, at 4.

49 *Id.*

50 *Id.*

51 *Id.*; Fleischer, *supra* note 1; Turnham & Lyon, *supra* note 43.

52 *McDougall Testimony*, *supra* note 46, at 4-5; Singel, *supra* note 40.

53 *See* Turnham & Lyon, *supra* note 43.

54 *Id.*

55 Fleischer, *supra* note 1.

56 *Id.*

57 Fleischer, *supra* note 1.

58 Turnham & Lyon, *supra* note 39.

tion or child trafficking from Craigslist.[59] NCMEC did note that Craigslist's changed procedures and manual screening of ads had eliminated the blatant pornography and nudity in the adult personal posts.[60]

On September 3, 2010, in response to the attorneys general's demand, Craigslist shut down its adult services listing.[61] On September 15, 2010, two Craigslist representatives testified before the House of Representatives' Subcommittee on Crime, Terrorism, and Homeland Security about Craigslist and sex trafficking.[62] Both Craigslist representatives stated the website had permanently closed its adult services listing but claimed shutting down Craigslist's postings was detrimental to fighting prostitution as it had become harder to identify and locate victims on less regulated websites.[63] Craigslist's representatives noted that at the time, Craigslist was the only website that had collaborated with attorneys general, law enforcement, and advocacy groups to implement safety and monitoring procedures, and had given information to authorities to target illegal posters.[64] In its defense, Craigslist stated that it rejected 700,000 ads for violating its rules in the fifteen months before shutting down its adult services listing.[65] Craigslist's CEO Jim Buckmaster commented after Craigslist removed its adult services section in response to the attorneys general's letter: "Is moving advertising around our best hope for addressing these harms? . . . Then the ads fall under personals, and how long before the demand is that we shut down personals? . . . What other sections of our site would they like us to shut down?"[66]

The attorneys general threatened to criminally prosecute Craigslist in order to pressure the website to remove its adult services section in an effort to reduce prostitution and child trafficking.[67] While having Craigslist takedown its adult services listing reduces the visibility of the possible prostitution ads, it is not clear that the takedown helps prevent prostitution and child trafficking.[68] In 2002, Fulton County District Attorney Paul Howard began a campaign to stop underage prostitution.[69] In an interview with CNN in 2010, Howard described

---

[59] *Id.*

[60] *Id.*

[61] Hansen, *supra* note 1.

[62] *McDougall Testimony*, *supra* note 46, at 1; *Powell Testimony*, *supra* note 40, at 1.

[63] *McDougall Testimony*, *supra* note 46, at 2; *Powell Testimony*, *supra* note 40, at 4.

[64] *McDougall Testimony*, *supra* note 46, at 3; *Powell Testimony*, *supra* note 40, at 2-3.

[65] Turnham & Lyon, *supra* note 39.

[66] Temple, *supra* note 26.

[67] Fleischer, *supra* note 1; Hansen, *supra* note 1.

[68] *Sexual Exploitation Online: Hearing Before the Mass. Attorney Gen. Martha Coakley*, at 2, Oct. 19, 2010, http://www.mass.gov/Cago/docs/Community/Testimony/DB.pdf [hereinafter *Boyd Testimony*] (statement of Danah Boyd, Research Associate, Harvard University's Berkman Center for Internet and Society); Lambert, *supra* note 21; Turnham & Lyon, *supra* note 39.

[69] Turnham & Lyon, *supra* note 39.

how the Internet has changed prostitution and law enforcement efforts:

What we found is that there was a wholesale transformation from young girls standing on the streets to those same young girls being sold through Craigslist and other internet vendors . . . . That has put us in a terrible position, because much of the illegal sex activity now goes on almost undetected by the police. The numbers we believe remain the same, but what has happened is that they are now out of sight.[70]

Since the Internet has changed nature of prostitution, numerous law enforcement agencies around the country have used Craigslist ads to generate leads against prostitutes and pimps, and to apprehend offenders.[71] It is harder for law enforcement to monitor many websites on their own to identify potential criminal conduct, compared to focusing on Craigslist and collaborating with the website.[72] Furthermore, sexologist Dr. Larry Falls claims forcing prostitution underground makes it more difficult for adult sex workers to operate independently from organized crime and pimps.[73] Danah Boyd, a sociologist and scholar at Harvard University's Berkman Center for Internet and Society focusing on protecting minors from online dangers, contends that removing Craigslist's adult services section is counterproductive to preventing human trafficking and sexual abuse.[74] Boyd claims new technology does not cause prostitution and sexual exploitation but makes the constant demand for commercial sex more visible.[75] She posits, if websites that make prostitution visible are eliminated, the posters will use other websites and technologies, and law enforcement will lose an opportunity to infiltrate and destroy buyer-seller relationships that support exploitation.[76]

Advanced Interactive Media Group (AIMGroup) provides analysis and consulting for online publishers, and has extensively monitored Internet escort ads.[77] In 2010 before Craigslist removed its adult services section, AIMGroup estimates Craigslist got around $30 million in revenue from the adult services ads, which at $10 per post means there were 3 million ads.[78] After Craigslist

---

[70] *Id.*

[71] Lambert, *supra* note 21; Turnham & Lyon, *supra* note 39.

[72] *Boyd Testimony*, *supra* note 68; Lambert, *supra* note 21.

[73] Joanna Chiu, *FBI Busts Consenting Adults for Having Sex - Don't They Have Anything Better to Do?*, ALTERNET (Nov. 8, 2010), http://www.alternet.org/sex/148776.

[74] *Boyd Testimony*, *supra* note 68, at 1.

[75] *Id.* at 2.

[76] *Id.*

[77] *About Us*, AIMGROUP, http://aimgroup.com/about/, (last visited May 29, 2012); *See* Mark A. Whittaker & Peter M. Zollman, *November Prostitution-ad Revenue Higher Than Year Ago*, AIMGROUP (Dec. 22, 2011), http://aimgroup.com/blog/2011/12/22/november-prostitution-ad-revenue-higher-than-year-ago/.

[78] Advanced Interactive Media Group, *Sex Ads: Where the Money Is*, 11 CLASSIFIED INTELLIGENCE REPORT 1, 1 (Sept. 14, 2010), http://aimgroup.com/files/2010/09/sex-ad-report-summary.pdf.

shut down its "adult services" listing, some users posted similar ads under Craigslist's "therapeutic massage" and "casual encounters" sections.[79] Meanwhile, other posters have utilized different websites since Craigslist removed its adult services section,[80] which supports Boyd's claims. In September 2010, the month Craigslist eliminated its adult services section, the number of unique visitors for Craigslist decreased 2.4 percent while the number of unique visitors increased 15.8 percent for Backpage.com, 94.1 percent for Eros.com, and 310.3 percent for AdultSearch.com.[81] From August 2010 to July 2011, Backpage's number of unique visitors increased 38.6 percent, from 2.3 million to 3.2 million, respectively.[82] For the twenty-two websites AIMGroup tracks that host escort advertisements, the number of unique visitors increased 13.4 percent from November 2010 to November 2011.[83]

On September 21, 2010, in response to this increase in traffic, the state attorneys general sent a letter to Backpage.com, a classified advertising website owned by the Village Voice, demanding the website shut down its adult listings.[84] In response, Backpage enacted screening and protective procedures similar to Craigslist, but it has not removed its adult personals sections.[85] Since forty-six state attorneys general believed Backpage had failed to stem prostitution and trafficking on its website, on August 31, 2011, they sent another letter to Backpage, this time requesting details concerning how Backpage has enacted its security measures.[86] In October 2011, the controllers of Village Voice Media stated that Backpage was not legally responsible for the posts, and they believe the website has a right to host the ads.[87] Unfortunately, criminal activi-

---

[79] *Id.* at 2.

[80] *Id.*

[81] Jim Townsend, *Backpage Replaces Craigslist as Prostitution-Ad Leader*, AIMGROUP (Oct. 19, 2010), http://aimgroup.com/blog/2010/10/19/backpage-replaces-craigslist-as-prostitution-ad-leader/.

[82] Mark A. Whittaker, *Online Prostitution Advertising Stunted by Craigslist's Departure*, AIMGROUP (Sept. 6, 2011), http://aimgroup.com/blog/2011/09/06/online-prostitution-advertising-stunted-by-craigslist's-departure/.

[83] Whittaker & Zollman, *supra* note 77.

[84] Nick R. Martin, *21 States Want Village Voice Media To Shut Down Adult Listings*, HEAT CITY (Sept. 22, 2010, 2:46 AM), http://www.heatcity.org/2010/09/21-states-want-village-voice-media-to-shut-down-adult-listings.html.

[85] Jaime Schumacher, *Backpage.com to Suspend Certain Areas of Personals and Adult Sections While It Implements Solid Defenses against Misuse*, BUS. WIRE (Oct. 19, 2010), http://www.businesswire.com/news/home/20101018005791/en/Backpage.com-Suspend-Areas-Personals-Adult-Sections-Implements.

[86] Chris Grygiel, *McKenna, 45 AGs, Tell Backpage.com to End Online Sex Ads*, SEATTLE PI (Aug. 31, 2011), http://www.seattlepi.com/local/article/McKenna-45-AGs-tell-Backpage-com-to-end-online-2149352.php.

[87] David Carr, *Fighting Over Online Sex Ads*, N.Y. TIMES (Oct. 31, 2011), http://www.nytimes.com/2011/10/31/business/media/backpagecom-confronts-new-fight-over-online-sex-ads.html?pagewanted=1&_r=2.

ty stemming from adult listings has not been limited to Craigslist. In December 2011, three of the four women killed and burned in car trunks in Detroit had posted on Backpage's adult services listing.[88]

Even before Craigslist shut down its adult services listing, many prostitutes utilized Facebook to attract clients.[89] In 2003, before Facebook, New York prostitutes solicited nine percent of their new clients from Craigslist.[90] Five years later in 2008, prostitutes solicited twenty-five percent of their new clients from Facebook, and only three percent from Craigslist.[91]

Whether the attorney generals will continue their efforts to have these other websites remove their adult services listings remains to be seen. In covering Backpage, *New York Times* columnist David Carr noted: "[I]t's worth remembering that while pressure from the attorneys general and Congress led to a change at Craigslist, the whack-a-mole on the Web continues. If Backpage .com retreats . . . some other alternative will immediately take its place."[92] The attorneys general actions against Craigslist and other websites that host third-party content raises numerous First Amendment concerns, which are explored in the next section.

III. THE FIRST AMENDMENT

Ratified in 1791, the First Amendment to the United States' Constitution states: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[93] The First Amendment protects an individual's ability to communicate his or her ideas and views to others, which facilitates a person's participation in government, his or her search for the truth, and personal self-fulfillment.[94] To protect people's speech, First Amendment jurisprudence favors maximum access to a variety of unique viewpoints to encourage exchanges in the marketplace of ideas.[95] Moreover, First Amendment jurisprudence prefers minimal "government regulation of speech," the idea that the state should not choose which speech is appropriate for speakers or listeners.[96] The First Amendment specifically applies to the federal government,[97] and it

---

[88] Dean Schabner, *Murdered Women Linked to Backpage.com, Cops Say*, ABCNEWS (Dec. 26, 2011, 9:26 PM), http://abcnews.go.com/blogs/headlines/2011/12/murdered-women-linked-to-backpage-com-cops-say/.

[89] Sara Yin, *Report: Sex Workers Turn To Facebook, Blackberrys*, PCMAG (Feb. 8, 2011, 2:30 PM), http://www.pcmag.com/article2/0,2817,2379653,00.asp.

[90] *Id.*

[91] *Id.* Prostitutes solicited thirty-one percent of new clients from escort agencies and eleven percent from strip clubs.

[92] Carr, *supra* note 87.

[93] U.S. CONST. amend. I.

[94] Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 346, 57 (1987).

[95] Berman & Weitzner, *supra* note 14, at 1620.

[96] *Id.*

[97] *See, e.g.*, United States v. Williams, 553 U.S. 285, 288 (2008).

also applies to state and local governments through the Fourteenth Amendment's Due Process Clause.[98] The phrase, "make no law" in the First Amendment pertains to any type of government regulation, whether it is a statute, law, ordinance, agency guideline, or state action to enforce a regulation.[99] The First Amendment applies to government restrictions on private speech, but the First Amendment's free speech clause does not apply to either speech by the government,[100] or private citizens' or organizations' restrictions on speech.[101]

A. *Freedom of Speech*

Freedom of speech is not absolute, but depends on the content of the speech and how a speaker communicates the speech, such as through print media, radio or television broadcasts, or commercial advertisements.[102] A regulation is based on the speech's content if the government's action is conditioned upon agreeing or disagreeing with the speech and its message.[103] Speech concerning political, religious, scientific, and educational ideas and facts is considered "valuable," and therefore is entitled to significant First Amendment protection.[104] "Content-based restrictions" on valuable speech are presumed to be unconstitutional, and are subject to strict scrutiny.[105] Thus, the government has the burden to prove its regulation is necessary to serve a compelling state interest, and the regulation is narrowly tailored to achieve that end.[106] Strict scrutiny is applied to content-based speech regulations due to concerns about the speech's potential influence on public debate, the government's motivation for regulating speech, and the speech's communicative impact.[107]

Compared to political, religious, scientific, and educational speech, "commercial speech" is considered to be less valuable, and does not receive the same significant level of First Amendment protection.[108] Therefore, the government is allowed to regulate commercial speech to a greater extent than traditional

---

[98] Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 749 n.1 (1976).

[99] U.S. CONST. amend. I; Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 740 (1996).

[100] Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 467, 469 (2009).

[101] *Denver Area Educ.*, 518 U.S. at 737.

[102] *See id. at* 741; Ashcroft v. ACLU (*Ashcroft II*), 542 U.S. 656, 660 (2004); Near v. Minnesota, 283 U.S. 697, 708 (1931).

[103] *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994).

[104] Boyce, *supra* note 3, at 318.

[105] *Ashcroft II*, 542 U.S. at 660; Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991); Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973).

[106] *See generally* cases cited *supra* note 105.

[107] Stone, *supra* note 94, at 57.

[108] Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 3 (2000).

valuable speech, and the restrictions are subject to intermediate scrutiny as detailed in *Central Hudson*'s four-prong test.[109] The government has more power to restrict speech that directly incites action or is connected to conduct, as opposed to restricting plain speech due because it may indirectly incite action and conduct.[110] For a state's regulation to amount to simply restricting conduct, the regulation must be unrelated to the communicative action's expression.[111]

Finally, the First Amendment does not protect some types of speech because the speech is considered to be either not valuable or only slightly valuable, and society's interest in morality outweighs its value.[112] Unprotected speech includes speech that is crime-inducing, "fighting words," obscene, libelous, copyrighted, and false or deceptive advertising.[113] Important for Craigslist is that the First Amendment protects indecent speech that does not rise to the level of obscenity.[114] The government may extensively regulate speech that the First Amendment does not protect.[115] Depending on what type of speech is at issue and how valuable it is, there are different standards and tests to determine if and how the government may regulate the speech.[116]

Government regulations that impose benefits or burdens on speech without referring to the expressed views or ideas of the speech are called "content-neutral."[117] Content-neutral restrictions usually concern how speech is communicated, the time or place of the communication, or the secondary effects of the speech.[118] Also, content-neutral regulations are subject to intermediate scrutiny.[119] Therefore a government's speech regulation may be constitutional if it advances important state interests unrelated to suppressing the speech, and if the regulation's incidental suppression of speech does not substantially burden

---

[109] Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 573 (1980); *Id. See infra* pp. 25-26 for discussion of the *Central Hudson* four-prong commercial speech test.

[110] United States v. O'Brien, 391 U.S. 367, 377 (1968).

[111] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 567 (2001).

[112] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); *see also* Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1133 (2005).

[113] *Chaplinsky*, 315 U.S. at 572. Whether Craigslist's ads are crime-inducing or obscene is outside the scope of this note. Generally, for speech to qualify as "crime-inducing," the speech must to lead to imminent lawless action. Speech is considered "obscene" based on the test in *Miller v. California*, 413 U.S. 15 (1973). While some of Craigslist ads could be considered to incite illegal conduct or be obscene, not all of the ads do, and the First Amendment protects those ads.

[114] Reno v. ACLU, 521 U.S. 844, 869-70 (1997); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 72 (1983).

[115] *Chaplinsky*, 315 U.S. at 572.

[116] Boyce, *supra* note 3, at 316.

[117] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 643 (1994).

[118] City of Ladue v. Gilleo, 512 U.S. 43, 49 (1994).

[119] *Turner*, 512 U.S. at 662.

more speech than necessary to achieve the state's interests.[120] Hence, the government's burden to justify a regulation increases when a regulation imposes greater restrictions on the marketplace of ideas.[121]

The Constitution protects speakers whose speech may be "chilled" through the vagueness, overbreadth, and prior restraint doctrines.[122] A "chilling effect" on speech occurs if a threat of prosecution would prevent speech because the speaker is afraid of the repercussions of communicating the speech.[123] Hence, the speaker censors himself to avoid liability rather than fight for his constitutional rights.[124] First Amendment jurisprudence seeks to avoid such chilling effects so that the public does not loose the benefit of protected speech, which provides a diverse array of information and ideas to the public.[125] Also, the harm to a speaker may be irreparable because the speaker loses an opportunity to reach an audience.[126] As Chief Justice Charles Hughes eloquently stated in the 1931 case *Near v. Minnesota* regarding the freedom of the press: "[I]t is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits."[127]

The vagueness doctrine stipulates that a statute may be unconstitutional under the Fifth Amendment's Due Process Clause if the statute's prohibitions are too broad, and therefore does not distinguish between proscribed and permitted speech or conduct.[128] Government restrictions must have specific standards for those enforcing the laws, such as police officers, judges, and juries, to prevent arbitrary, ad hoc, discriminatory, or subjective application.[129] Under the overbreadth doctrine, a court may invalidate a clear and precise law when the law suppresses a substantial amount of protected speech in order to prohibit unprotected speech.[130] The rationale is that muting protected speech causes a greater harm to society than allowing unprotected speech to go unpunished.[131]

Finally, the prior restraint doctrine presumes government actions that restrain speech before the speech is communicated are unconstitutional.[132] For the government to permissibly restrain speech before it is spoken, the government must

---

[120] *Id.*

[121] Stone, *supra* note 94, at 58.

[122] GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1109 (6th ed. 2009).

[123] Dombrowski v. Pfister, 380 U.S. 479, 486 (1965).

[124] *Id.*

[125] *Id.*; Seltzer, *supra* note 8, at 176.

[126] *Dombrowski*, 380 U.S. at 486; Seltzer, *supra* note 8, at 176.

[127] Near v. Minnesota, 283 U.S. 697, 718 (1931).

[128] United States v. Williams, 553 U.S. 285, 304 (2008); Broadrick v. Oklahoma, 413 U.S. 601, 607 (1973).

[129] Kolender v. Lawson, 461 U.S. 352, 357-58 (1983); Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971).

[130] *Broadrick*, 413 U.S. at 612.

[131] *Id.*

[132] Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

specifically define what speech is unprotected by the First Amendment.[133] Moreover, the government must prove that the speech is unprotected in a prompt judicial decision "because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression . . . ."[134]

To prevent speakers from overly self-censoring, the vagueness, overbreadth, and prior restraint doctrines focus on how the government may constitutionally ban or burden speech rather than what type of speech is protected.[135] Courts may overlook the form of informal censorship and recognize the substance of the government's action sufficiently inhibits speech.[136] In the event of prosecution, there may be a chilling effect on speech regardless of whether the prosecution is likely to be successful or not.[137] For example, a publisher or a website that hosts third-party content is more likely to bow to threats of prosecution because the speech is not their own.[138] Threats of criminal prosecution are considered to pose more of a threat to speakers than threats of civil prosecutions, and thus are more dangerous to free speech.[139] Finally, courts may invalidate a government speech restriction based on how it affects potential speakers even if the speech may be constitutionally restrained by other means.[140]

Prostitution, solicitation and loitering ordinances serve as examples regarding how the First Amendment's chilling of speech doctrines apply to ensure constitutionally permissible speech is protected. While speech that constitutes an offer to provide a commercial sexual act is illegal and hence not protected by the First Amendment,[141] the applicable ordinances must comport with constitutional requirements that prevent the chilling of speech, such as the vagueness and overbreadth doctrines.[142] A statute will be unconstitutionally vague if it does not provide sufficient notice to the average person to know what conduct is illegal, and more importantly, if it lacks precise standards since it encourages arbitrary enforcement of the statute.[143] A prostitution statute that has a non-exhaustive list of factors that may manifest illegal conduct is impermissibly vague because people will not know what exact factors will be sufficient to

---

[133] Freedman v. Maryland, 380 U.S. 51, 58 (1965).

[134] *Id.*

[135] STONE ET AL., *supra* note 122, at 1109.

[136] *Bantam Books*, 372 U.S. at 67.

[137] Dombrowski v. Pfister, 380 U.S. 479, 487-89 (1965).

[138] Braun v. Soldier of Fortune Magazine, Inc., 968 F.2d 1110, 1117-18 (11th Cir. 1992); Seltzer, *supra* note 8, at 181-82.

[139] Virginia v. Hicks, 539 U.S. 113, 119 (2003).

[140] STONE ET AL., *surpa* note 122, at 1109.

[141] *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973).

[142] Kolender v. Lawson, 461 U.S. 352, 361 (1983).

[143] *Id.* at 357-58; Silvar v. Eighth Jud. Dist. Ct. ex rel. County of Clark, 129 P.3d 682, 685 (Nev. 2006); Coleman v. Richmond, 364 S.E.2d 239, 244 (Va. 1988).

constitute an illegal act.[144] Such a statute provides law enforcement with too much discretion to determine if the circumstances amount to sufficient probable cause to arrest.[145]

In addition, a statute may be impermissibly overbroad if it infringes on protected First Amendment speech and conduct, and therefore chills free expression.[146] For instance, a prostitution loitering statute is unconstitutionally overbroad if it includes ordinary conduct that may merely suggest prostitution since innocent people will refrain from acting to avoid arrest.[147] Also, a statute will be overbroad if it lacks a specific intent provision that requires the person to intend to solicit another for prostitution.[148] Hence, prostitution, solicitation and loitering ordinances illustrate how the vagueness and overbreath doctrines operate to prevent the chilling of First Amendment protected speech, and show that criminal statutes addressing potentially harmful activities need to comport with the First Amendment.[149]

B. *Freedom of the Press*

The First Amendment accords the press protections similar to individuals' protections, and generally the same rules and doctrines apply.[150] Laws that target the press or its specific elements "for special treatment 'pose a particular danger of abuse by the State,' and so are always subject to at least some degree of heightened First Amendment scrutiny."[151] Hence, restrictions on publishers and distributors are subject to traditional, content-based strict scrutiny.[152] The First Amendment's freedom of the press guarantee, however, does not mean the press is immune from general laws, such as libel, anti-trust, or taxes.[153]

Broadcasters, which include radio and television mediums, have fewer First Amendment protections than individual speakers, publishers, and distributors for a few reasons.[154] First, broadcasters have a special privilege in operating

---

[144] *Silvar*, 129 P.3d at 685-87

[145] *Id.*

[146] *Id.* at 687-88; Wyche v. State, 619 So. 2d 231, 234-35 (Fla. 1993).

[147] *Silvar*, 129 P.3d at 688-89.

[148] *Id.*; Seattle v. Slack, 784 P.2d 494, 497 (Wash. 1989); Milwaukee v. Wilson, 291 N.W.2d 452, 457 (Wis. 1980).

[149] Kolender v. Lawson, 461 U.S. 352, 361 (1983).

[150] Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 737 (1996); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 636 (1994); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 254 (1974).

[151] *Turner*, 512 U.S. at 640-41 (quoting Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 228 (1987)).

[152] *Tornillo*, 418 U.S. at 258.

[153] Assoc. Press v. Nat'l Labor Relations Bd., 301 U.S. 103, 132-33 (1937).

[154] *See generally Tornillo*, 418 U.S. 241; Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969); Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943).

one of the limited frequencies for radio and television stations.[155] Therefore, broadcasters have the unique responsibility to present to the public a sufficient amount and range of content, and the Federal Communication Commissions (FCC) can ensure market competition between speakers.[156] Second, broadcasts may invade the private space of a listener or viewer's home without him taking many affirmative steps to receive the information.[157] As an example, the FCC can restrict when an indecent radio show is broadcasted because otherwise a child may unintentionally hear the show by merely turning on the radio.[158] Therefore, the content of broadcasts may be restricted based on the time and manner of the broadcast to protect the public.[159]

Cable television regulations are subject to a standard of review that is in between publishers and traditional broadcast standards because the government's interest in protecting viewers is different.[160] Cable television is not entitled to strict scrutiny because cable companies have the capacity to deny competitors' stations and thus prevent the television user from viewing the station.[161] This is in contrast to newspaper companies, which cannot restrain a reader from reading another newspaper.[162] Hence, the government may regulate cable television as a specific mode of communication to ensure private interests do not impermissibly burden the "free flow of information and ideas."[163]

Cable television, however, is afforded greater protection under the First Amendment than radio and broadcast television stations because cable providers do not have a special responsibility to provide certain content due to the unlimited number of cable channels.[164] Also the FCC does not have the same duty to protect the public from inadvertently viewing objectionable content since cable television subscribers have control over the content by choosing which stations they buy.[165] For example, in the 2000 case *United States v. Playboy Entertainment Group, Inc.*, the Supreme Court invalidated a federal statute that required cable companies to either scramble or limit pornography channels to certain hours.[166] Content-based restrictions to protect minors from harmful materials need to be the least restrictive option among equally effective

---

[155] *Turner*, 512 U.S. at 650; *Red Lion*, 395 U.S. at 388-89.

[156] *Turner*, 512 U.S. at 651; *Red Lion*, 395 U.S. at 388-89.

[157] FCC v. Pacifica Found., 438 U.S. 726, 749-50 (1978).

[158] *Id.* at 744-48.

[159] *Id.*

[160] *Turner*, 512 U.S. at 637.

[161] *Id.* at 656.

[162] *Id.* at 656-57.

[163] *Id.* at 657.

[164] *Id.* at 638-39.

[165] United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 826-27 (2000).

[166] *Id.* at 806-07.

alternatives.[167] Congress' statute did not survive strict scrutiny because the Court found that a specific technological solution available to parents, calling the cable company to block the station, was a less restrictive option that was equally effective.[168]

Internet regulations, similar to press restrictions, are subject to strict scrutiny and are not subject to broadcasters' lower standard of review because there are minimal financial burdens on Internet speech as there are unlimited channels of communication, and there is no central gatekeeper to communicating.[169] Also Internet speech is subject to strict scrutiny because it is unlikely that Internet content will unexpectedly invade a user's home as with radio broadcasts but will usually have a disclaimer so users do not need to be protected in the same manner.[170] As the Supreme Court noted in *Red Lion Broadcasting Co. v. FCC* concerning radio stations, the "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."[171]

IV. THE FIRST AMENDMENT AND COMMERCIAL SPEECH

A. *Commercial Speech Standards*

The Supreme Court has defined commercial speech as an "expression related solely to the economic interests of the speaker and its audience."[172] The "core . . . of commercial speech" is speech that only proposes a financial transaction.[173] A combination of numerous features may determine if speech is commercial, such as if the speech is an advertisement, if the speech references a specific item, or if the speaker is economically motivated.[174] If an advertisement promotes an activity that the First Amendment protects, such as distributing religious pamphlets, then the advertisement cannot be restricted as commercial speech.[175] A speaker may not however, try to include a protected activity or public issue in their advertisements solely to receive more First Amendment protection.[176]

Until 1976, it was unclear if the First Amendment applied to commercial speech.[177] In the 1942 case *Valentine v. Chrestensen*, the Court upheld a stat-

---

[167] *Id.* at 826-27.

[168] *Id.*

[169] Reno v. ACLU, 521 U.S. 844, 868-69 (1997).

[170] *Id.*

[171] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969).

[172] Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980).

[173] Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983); Va. State Bd. of Pharm., v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976).

[174] *Bolger*, 463 U.S. at 66-67.

[175] *Id.* at 67 n.14.

[176] *Id.* at 67-68.

[177] *Va. State Bd. of Pharm.*, 425 U.S. at 760-61.

ute that banned the distribution of advertising materials on streets because the Constitution did not restrain the government concerning "purely commercial advertising."[178] Later in the 1951 case *Breard v. Alexandria*, an ordinance prohibiting door-to-door solicitations for periodicals was upheld as the selling of the magazines meant there was a commercial transaction, which put the solicitations outside of the First Amendment's protections.[179] Other decisions recognizing speech entitled to First Amendment protections noted the speech at issue was not "purely commercial."[180]

In the 1976 case, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the Supreme Court clarified earlier decisions and held the First Amendment protects commercial speech from unwarranted government regulation for numerous reasons.[181] First, the First Amendment generally protects speech that a speaker has paid to communicate as well as speech that is in a medium sold for money, such as newspapers or movies.[182] Hence, "[i[f there is a kind of commercial speech that lacks all First Amendment protection, . . . it must be distinguished by its content . . . ," and not that the speech is part of a commercial transaction.[183] Second, a speaker does not lose his First Amendment's protections simply because his interest is purely economic.[184] Third, consumers have a significant interest "in the free flow of commercial information," which allows them to make informed decisions about what and where to buy products in the country's capitalistic economy.[185] Fourth, society also has a substantial interest to ensure commercial information is freely accessible because the information may contribute to public debate about policy decisions, which goes to the core of the First Amendment's purpose.[186] There is no requirement, however, that commercial speech must include important information for consumers or society, or be tasteful and moderate to be constitutionally protected.[187] Finally, First Amendment jurisprudence stipulates that suppressing information to protect the public is more dangerous than the threat of people misusing the information.[188] Therefore, it is preferable to have the channels of communication open to avoid a paternalistic approach to restricting speech.[189]

While commercial speech is entitled to First Amendment protection, it is

---

[178] 316 U.S. 52, 54 (1942).
[179] 341 U.S. 622, 42 (1951).
[180] *Va. State Bd. of Pharm.*, 425 U.S. at 758.
[181] *Id.* at 761-70.
[182] *Id.* at 761.
[183] *Id.*
[184] *Id.* at 762.
[185] *Id.* at 763.
[186] *Id.* at 764-65.
[187] *Id.*
[188] *Id.* at 770.
[189] *Id.*

afforded fewer protections under the First Amendment.[190] There are "'common-sense' distinction[s] between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech,"[191] and the state has an interest in ensuring "the stream of commercial information flow cleanly as well as freely."[192] In addition, if commercial and non-commercial speech were treated the same under the First Amendment, non-commercial speech's constitutional protections may be diluted.[193]

Usually the First Amendment does not allow content-based speech restrictions but commercial speech may be regulated based on its content because of two unique features.[194] First, commercial speakers know their market and products well, so they can more easily determine the accuracy of the message and the lawfulness of the underlying activity compared to other speakers.[195] Second, commercial speech is generated in order to further the speaker's economic interest, therefore commercial speech is less likely chilled by overbroad regulations.[196] Some permissible restrictions on commercial messages may have to conform to a specific format or include warnings and disclaimers because commercial speech enjoys less First Amendment protection.[197] Further, states may restrict aggressive sale techniques that may wield undue influences on consumers.[198]

The Supreme Court established the current four-prong test to determine if a governmental commercial speech regulation is constitutional in the 1980 case, *Central Hudson Gas & Electric Corporation v. Public Services Commission of New York*.[199] First, a court must determine if the commercial speech at issue is protected by the First Amendment, which means the commercial speech must both be for a legal activity and be truthful.[200] Hence, if the commercial speech is either for an unlawful service or product, or is misleading, then the First Amendment does not protect the speech.[201] As a result, the government may

---

[190] *Id.* at 771 n.24.

[191] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978). *See also* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 63 (1983).

[192] *Va. State Bd. of Pharm.*, 425 U.S. at 770, 771 n.24, 772. *See also Bolger*, 463 U.S. at 63.

[193] *Ohralik*, 436 U.S. at 456.

[194] Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 564 n.6 (1980).

[195] *Id.*; *Va. State Bd. of Pharm.*, 425 U.S. at 771 n.24.

[196] *Cent. Hudson*, 447 U.S. at 564 n.6.

[197] *Va. State Bd. of Pharm.*, 425 U.S. at 771 n.24.

[198] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 498 (1996).

[199] *Cent. Hudson*, 447 U.S. at 566.

[200] *Id.* at 563-64.

[201] *Id.*

fully restrict the speech and the rest of the *Central Hudson* test is inapposite.[202]

If the First Amendment does protect the commercial speech, the second prong of the Central Hudson test is whether the government's interest served by the regulation is "substantial."[203] The third part of the *Central Hudson* test is to "determine whether the regulation directly advances the governmental interest asserted."[204] A regulation will be invalid if it ineffectively or remotely advances the government's interest.[205] Fourth, a court must determine if the regulation is "not more extensive than is necessary to serve that interest."[206] The state may neither restrict speech that poses no danger to the state's goal nor completely suppress speech when a narrower regulation would achieve the state's interest as effectively.[207] Courts should review regulations that completely suppress commercial speech to achieve non-speech related policies with special care.[208] Blanket bans on commercial speech have not been upheld unless the speech was "deceptive or unlawful".[209] Under the test, the party that wants to uphold a commercial speech restriction has the burden to justify the regulation.[210]

Since commercial speech is afforded less protection compared to other speech protected by the First Amendment, the *Central Hudson* test stipulates that whether a speech restriction is constitutional depends "on the nature both of the expression and of the governmental interests served by its regulation."[211] In the case, the Supreme Court invalidated a New York statute that completely banned a utility company from advertising and promoting its electric services.[212] Under the test's fourth prong, the regulation was more restrictive than necessary to achieve the state's goal of energy conservation for two reasons.[213] First, the Commission's regulation banned all promotional advertisements even if the ads promoted devices or services that would not cause an increase in energy use.[214] Second, the Commission's conservation interest could have been protected by more limited restrictions, such as restricting the content or format of the ads, requiring ads to include information about the efficiency of a service, or previewing the ads before they were published.[215]

---

202 *Id.*
203 *Id.*
204 *Id.* at 566.
205 *Id.* at 564.
206 *Id.* at 566.
207 *Id.* at 565.
208 *Id.* at 566 n.9.
209 *Id.*
210 *See id.* at 570.
211 *Id.* at 563.
212 *Id.* at 570.
213 *Id.*
214 *Id.*
215 *Id.* at 570-71.

Lawyers, judges, and scholars have criticized the *Central Hudson* test over the years and have advocated for a new test that is more straightforward and provides greater protections for commercial speech.[216] The Supreme Court, however, has refused invitations to strike down the test when petitioners have asked for strict scrutiny over intermediate review for commercial speech.[217] Nevertheless, beginning in the early 1990s, the Court has clarified *Central Hudson*'s requirements and applied the test more strictly.[218] Concerning *Central Hudson's* first prong, the government's authority to restrict speech advertising socially harmful activities or items such as gambling, alcohol, or lottery tickets, is not as broad as its authority to regulate the actual activities or items.[219] Courts would struggle to define what qualifies as a "vice" activity and these items may be legally bought.[220] Further, if some people may legally do the activity, it is unconstitutional to prohibit targeted advertising to these legal consumers.[221] Under the test's second prong to decide if the government's interest is substantial, a court may consider whether Congress adopted a nationwide policy that endorses the asserted interest.[222] If Congress does not have a national policy about an issue, then this weighs against the government having a substantial interest.[223]

Elaborating on *Central Hudson*'s third prong concerning whether a regulation directly advances the government's interest, the Supreme Court detailed how the government must prove its case in *Edenfield v. Fane*: "[t]his burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[224] The nexus between a state's ends and its means may be supported by "history, consensus, and 'simple common sense,'" and does not need to be proved by empirical evidence.[225] In general, the Supreme Court has acknowledged that advertising creates a demand for products and thus, limiting

---

[216] Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 184 (1999); C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981, 983 (2009).

[217] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554-55 (2001); *Greater New Orleans*, 527 U.S. at 184.

[218] *See Lorillard*, 533 U.S. at 554-55; *Greater New Orleans*, 527 U.S. at 182; 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 509-10, 531 (1996); Edenfield v. Fane, 507 U.S. 761, 770-71 (1993).

[219] *44 Liquormart*, 517 U.S. at 513-14.

[220] *Id.*

[221] This That and the Other Gift and Tobacco, Inc. v. Cobb Cnty., Ga., 285 F.3d 1319, 1324 (11th Cir. 2002).

[222] *Greater New Orleans*, 527 U.S. at 187.

[223] *Id.*

[224] Edenfield v. Fane, 507 U.S. 761, 770-71 (1993).

[225] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554-55 (2001) (quoting Florida Bar v. Went For It, Inc., 515 U.S. 618, 628 (1995) (internal citations omitted).

advertisements may decrease the interest for a product.[226] The Court, however, still requires some proof that the advertising restriction directly advances the state's interest.[227] For example, in *Lorillard Tobacco Co. v. Reilly*, the government sufficiently supported its regulation of tobacco ads to prevent minors from using tobacco products through numerous Federal Department of Agriculture studies, Surgeon General reports, and congressional findings spanning from the early 1970s through the 1990s.[228] In addition, the restriction's effect must be evaluated in light of the government's complete regulatory scheme and not in isolation.[229] As an example, in *Rubin v. Coors Brewing Company*, the Court struck down a federal statute that prohibited brewers from listing the beer's alcohol content on the bottle's labels since the statute simultaneously allowed brewers to advertise the alcohol content, which defeated the purpose of banning alcohol content on the bottle.[230] Finally, it is impermissible for the government to ban advertising by one speaker and not another when both speakers have virtually the same message because the government's interests will not be directly advanced if non-targeted speakers continue to communicate, unless the government shows a "sound reason why such lines (between speakers) bear any meaningful relationship to the particular interest asserted."[231]

Central Hudson's fourth prong, which considers whether a restriction is more extensive than necessary, addresses the means by which the governmental action affects the restricted party.[232] To satisfy the test, the government need not use the least restrictive means possible or prove the restriction is a perfect fit.[233] The government does, however, have to show that the restriction is: (1) a reasonable means/ends fit; (2) proportional to its interests; and (3) carefully calculated to balance the costs and benefits of its burden between speakers and listeners.[234] When determining if a restriction is too extensive, a court should consider the state's other available alternatives and the intrusiveness and effectiveness of these alternatives.[235] For example, it is impermissible to regulate offensive speech unless there is a captive audience that cannot avoid it.[236]

The Constitution also prevents states from banning or burdening speech

---

[226] *Id.* at 557; Rubin v. Coors Brewing Co., 514 U.S. 476, 487 (1995).

[227] *See Lorillard*, 533 U.S. at 561.

[228] *Id.* at 557-61.

[229] Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 192 (1999).

[230] *Rubin*, 514 U.S. at 488.

[231] *See Greater New Orleans*, 527 U.S. at 193-94.

[232] United States v. Edge Broad. Co., 509 U.S. 418, 427-28 (1993).

[233] *Greater New Orleans*, 527 U.S. at 188.

[234] *Id.*; Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 561 (2001).

[235] *Greater New Orleans*, 527 U.S. at 188; 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 507 (1996).

[236] Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 72 (1983); FCC v. Pacifica Found., 438 U.S. 726, 745 (1978).

based solely on the fact that some adults may find it offensive or indecent.[237] Only if the speech rises to the level of obscenity may the government impose such harsh restrictions.[238] In *Bolger v. Youngs Drug Products Corporation*, the Court determined that recipients of unsolicited mailed contraception ads were not a "captive audience" in the same way as broadcast listeners.[239] In so ruling, the Court reasoned that such recipients could avert their eyes and throw away the ads.[240] If a regulation does not satisfy *Central Hudson*'s third and fourth prongs, whether the burden on speech is limited is immaterial because "[t]here is no *de minimis* exception for a speech restriction that lacks sufficient tailoring or justification."[241]

In *44 Liquormart Inc. v. Rhode Island*, a plurality of four Justices for the Court articulated a stricter version of the *Central Hudson* test to be applied when a restriction completely prohibits speech.[242] The statutes at issue banned all advertisements that included an alcoholic beverage's price and applied to any publishers and broadcasters.[243] Given the drastic nature of a complete ban on speech, the plurality offered two reasons for requiring a showing that the ban will 'significantly' – as opposed to 'directly' or 'materially' – advance state interests.[244] First, when a state completely bans truthful and non-misleading ads, the justifications for reviewing commercial speech restrictions under intermediate review rather than strict scrutiny do not apply because the speaker cannot use his greater knowledge of the advertised products to determine if an ad proposes a legal transaction and is truthful.[245] Also if ads are categorically prohibited, the speaker's economic interests for disseminating the advertisement, which would make the speaker ensure the advertisement is legal and truthful, do not exist.[246] Since the speaker losses the opportunity to communicate a legal and truthful ad, a complete ban on commercial speech needs to "significantly" compared to "directly" or "materially" advance the government's interest.[247] Second, First Amendment jurisprudence disfavors what it views as paternalistic complete bans on speech and prefers to let the public determine the value of the ads.[248] Thus, when a government restriction completely prohibits commercial speech, a stricter version of the *Central Hudson*

---

237 *Bolger*, 463 U.S. at 72.

238 *Id.*

239 *Id.*

240 *Id.*

241 Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 567 (2001).

242 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996).

243 *Id.* at 489-90.

244 *Id.* at 505.

245 *Id.* at 502-03.

246 *Id.*

247 *Id.* at 505.

248 *Id.* at 503-04.

test may apply.[249]

B. *Commercial Speech and the Media*

While the Supreme Court has addressed how the First Amendment applies to publishers and broadcasters disseminating advertisements, it has not had the opportunity to determine how ads on the Internet may be constitutionally regulated.[250] The written press has the same or more commercial speech protections compared as individual speakers.[251] Typically, broadcasters have limited First Amendment protections compared to individual speakers and the written press due to both the limited number of communication channels and the intrusive nature of broadcasts.[252] Broadcasters, however, have similar First Amendment rights concerning commercial speech as individual speakers.[253] Examining the Supreme Court cases about publishers' and broadcasters' commercial speech rights is important because the decisions reflect how *Central Hudson* has been applied to media outlets disseminating ads concerning potentially illegal and vice activities, which is relevant for how *Central Hudson* may be applied to commercial speech on the Internet.

Publishers may be entitled to more First Amendment protections than actual speakers.[254] While the First Amendment does not protect an actual speaker's offer to conduct or engage in illegal transactions,[255] a publisher's constitutional rights need to be considered before liability may be imposed for disseminating an illegal advertisement.[256] If the burden on a publisher is too heavy to determine whether an advertisement involves illegal conduct, then publishers might self-censor to avoid liability.[257] The publisher's self-censoring would constitute a chilling effect on speech because the public would be deprived of information.[258] For publishers, there is a greater risk a government regulation may result in a chilling of speech since publishers are not communicating their own speech, but serving as a platform for the actual speaker, and therefore publishers do not have the same economic interests that make commercial speech har-

---

[249] *Id.* at 505.

[250] Megan E. Frese, Note, *Rolling the Dice: Are Online Gambling Advertisers "Aiding and Abetting" Criminal Activity or Exercising First Amendment-Protected Commercial Speech?*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 547, 582 (2004-2005).

[251] *See* Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 180 (1999); *Id.* at 489-90.

[252] Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74 (1983).

[253] *See Greater New Orleans*, 527 U.S. at 180.

[254] *See* Braun v. Soldier of Fortune Magazine, Inc., 968 F.2d 1110, 1117 (11th Cir. 1992).

[255] United States v. Williams, 553 U.S. 285, 297 (2008); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1973).

[256] *Braun*, 968 F.2d at 1117.

[257] *Id.*

[258] *Id.*

dier to withstand greater state regulation.[259] Because advertising is pervasive and significant to our society, preventing publishers' speech from becoming chilled is an important concern.[260] Speech does not necessarily lose its constitutional commercial speech protections based on the possibility that an advertisement will lead to illegal results.[261] Third-party websites that host user generated content, such as Craigslist, are similar to publishers, and the same chilling of speech concerns are present.[262]

While broadcasters have less First Amendment protections than individual speakers concerning traditional, valuable speech, broadcasters have the same commercial speech rights as individual speakers.[263] In the 1999 case *Greater New Orleans Broadcasting Association, Inc. v. United States*, the Supreme Court held that 18 U.S.C. § 1304, a federal statute that banned broadcasting private casino advertisements where gambling is legal, was unconstitutional as applied to FCC-licensed radio and television stations in Louisiana.[264] Section 1304 did not apply to state-sponsored gambling and lotteries, non-profit gaming, or private, tribal casinos.[265] The statute inflicted criminal penalties on violators, but typically the FCC imposed administrative sanctions against violators.[266] A Louisiana broadcasters' association and its members challenged the constitutionality of § 1304 as it applied to them and sought an injunction against the enforcement of the statute.[267] The broadcasters complained that the threat of criminal and FCC sanctions prevented them from airing promotional ads for private, for-profit casinos that they would otherwise broadcast.[268]

In *Greater New Orleans Broadcasting*, the Supreme Court applied *Central Hudson*'s four-part test to the broadcasters.[269] All parties agreed that the speech at issue was commercial and that the speech satisfied the test's first prong as the ads concerned legal activities in Louisiana and were not misleading.[270] Under the second prong, the government claimed that banning the ads served two substantial interests.[271] First, the ban reduced social costs connected to casino gambling, including organized crime, narcotics trafficking, and other illegal activities, as well as enticing people with the false and irresistible

---

259 *Id.* at 1117-18.

260 Eimann v. Soldier of Fortune Magazine, Inc., 880 F.2d 830, 838 (5th Cir. 1989).

261 *Id.*

262 *See* Reno v. ACLU, 521 U.S. 844, 853 (1997).

263 *See* Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 180 (1999).

264 *Id.* at 176.

265 *Id.* at 179.

266 *Id.* at 177.

267 *Id.* at 181.

268 *Id.* at 180-81.

269 *Id.* at 184-89.

270 *Id.* at 184.

271 *Id.* at 185.

hopes of financial gain.[272] Second, the ban helped states that made gambling illegal by forbidding broadcasts that could reach listeners in adjoining states.[273] The Court accepted these interests as "substantial," but the basis for this decision was unclear because states allow other kinds of gambling that have the same costs and hopes of financial gain, and the restriction does not reach these other types of gambling.[274]

Applying *Central Hudson*'s third prong, the Court found that the causal chain resulting from the ban on private casino ads, which would decrease the demand for private casinos and reduce gambling's detrimental effects, could not materially advance the government's interests when the statute allows for public lotteries and Indian casino broadcasting ads.[275] While the ban would have some overall impact on the demand for gambling, the Court found the private casino ads would simply channel gamblers to one casino over another, rather than reduce gambling more generally.[276] Furthermore, the government could not offer a reason for targeting private casinos rather than public gaming and Indian casinos to achieve its asserted interests.[277] The Court noted: "[e]ven under the degree of scrutiny that we have applied in commercial speech cases, decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment."[278] In addition, under *Central Hudson*'s fourth prong, there were many less restrictive measures that the state could have taken to achieve its interests, such as prohibiting gambling with credit cards, limiting cash machines at casinos, or putting limits on maximum bets.[279] Since § 1304 failed *Central Hudson*'s third and fourth prongs, it unconstitutionally restricted radio and television stations' First Amendment rights to broadcast private casinos' legal promotional advertisements.[280] Therefore, *Greater New Orleans* demonstrates that the *Central Hudson* commercial speech test is applied strictly to broadcast advertisements, even for vice activities.

V. The First Amendment and the Internet

Courts, legislators, and executive government officials must examine the First Amendment's ideal values and the ways in which each government branch has regulated the Internet thus far in order to determine how the First Amendment may apply to Craigslist and other websites that host third-party

---

272 *Id.*
273 *Id.*
274 *Id.* at 186.
275 *Id.* at 188-89.
276 *Id.* at 189.
277 *Id.* at 193.
278 *Id.* at 193-94.
279 *Id.* at 192.
280 *Id.* at 195-96.

content.[281] The Supreme Court has addressed how the First Amendment applies to the Internet in the case of obscene speech,[282] but not commercial speech.[283] Examining how the Court has applied First Amendment obscenity jurisprudence to the Internet highlights important First Amendment concerns for Internet speech, and how *Central Hudson*'s commercial speech test may applied be to the Internet. Congress has enacted numerous statutes to regulate Internet speech, and the judicial branch has blessed some of the regulations while invalidating others.[284] In addition, the executive branch, mostly acting through the FCC, is another source of Internet regulation.[285]

Determining First Amendment protections is particularly important because the Internet and new technological possibilities may serve First Amendment core values, such as increasing access to diverse ideas and viewpoints, and expanding freedom of expression.[286] The Internet requires two critical characteristics to enhance First Amendment values.[287] One, the Internet should be "open and decentralized" to create numerous opportunities to share information and communicate.[288] Two, Internet users must have sufficient control to pick what speech they want and do not want, which will eliminate the need for government regulation to protect users.[289] Some scholars argue that the Internet will fully realize the First Amendment's potential because the low cost to communicate online will lead to more speakers, and speech will be more accessible to the public than ever before.[290] By contrast, the Internet could turn people into consumers rather than better citizens because users have the power

---

[281] Berman & Weitzner, *supra* note 14, at 1619-20; Berners-Lee, *supra* note 12, at 5.

[282] Reno v. ACLU, 521 U.S. 844, 864 (1997).

[283] *See* Frese, *supra* note 250, at 582.

[284] *Compare* United States v. Williams, 553 U.S. 285, 297 (2008) ("Offers to engage in illegal transactions are categorically excluded from First Amendment protection."), United States v. Am. Library Ass'n, 539 U.S. 194, 214 (2003) (upholding a statute that requires public libraries to download software blocking obscenity), *and* Ashcroft v. ACLU (*Ashcroft I*), 535 U.S. 564, 586 (2002) (holding that the Child Online Protection Act was not unconstitutionally overbroad), *with* Ashcroft v. ACLU (*Ashcroft II*), 542 U.S. 656, 670 (2004) ("[T]he Government has failed to show, at this point, that the proposed less restrictive alternative will be less effective."), *and* Ashcroft v. Free Speech Coal., 535 U.S. 234, 258 (2002) (striking the Child Pornography Prevention Act of 1996); *see also Reno*, 521 U.S. at 844.

[285] Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv., 545 U.S. 967, 997 (2005) (upholding the FCC's interpretation of the "telecommunications service" provision of the Communications Act of 1934 and its application the Internet); Comcast Corp. v. FCC, 600 F.3d 642, 661 (D.C. Cir. 2010).

[286] Berman & Weitzner, *supra* note 14, at 1619-20.

[287] *Id.* at 1620.

[288] *Id.* at 1621.

[289] *Id.*

[290] Seth F. Kreimer, *Technologies of Protest: Insurgent Social Movements and the First Amendment in the Era of the Internet*, 150 U. PA. L. REV. 119, 124 (2001) ("Access to the Internet lowers the cost of producing and disseminating information and argument, and

to self-select what information they access online, which will support their own ideas and views.[291] Under this theory, users will not be exposed to the different views and ideas that encourage public debate and are crucial for a democracy.[292]

Initially, it was unclear whether either traditional strict scrutiny or broadcasters' intermediate scrutiny level of First Amendment judicial review would apply to speech on the Internet.[293] In 1997, the Supreme Court addressed First Amendment protections regarding the Internet in the landmark case *Reno v. ACLU*.[294] In *Reno*, plaintiffs challenged the constitutionality of two Communications Decency Act ("CDA") regulations enacted to protect minors from receiving and viewing illicit Internet content.[295] The CDA provided publishers two defenses against liability: the publishers could (1) take "good faith, reasonable, effective, and appropriate actions," or (2) require age verifications, such as credit card numbers or adult member codes to access illicit material.[296] Because the CDA provisions were content-based, the Supreme Court applied strict scrutiny and found the provisions unconstitutionally vague and overbroad.[297]

Of the many important findings the Supreme Court made in *Reno*, the most significant conclusion was that Internet speech should be subject to strict scrutiny, and not intermediate scrutiny, because the Internet is significantly different than radio or television broadcasts.[298] The Court permits greater government regulation of broadcasters due to the long history of government regulation stemming from broadcast's limited communication channels and invasive nature.[299] By contrast, the Internet has unlimited and inexpensive channels of communication, and hence Internet speakers do not have a special responsibility to provide the public with an array of content.[300] Additionally, the Internet is not invasive in people's homes because users will rarely encounter material "by accident," but instead have to take affirmative steps to access information.[301] Also, most objectionable content has warnings about its nature before a user views the content.[302] Finally, not only do broadcast's features not exist on the Internet to warrant government regulation, the government does not have the

---

hence the capital required to enter public dialogue."); Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1806 (1995).

[291] Fiss, *supra* note 10, at 1617.

[292] *Id.*

[293] *See generally* Berman & Weitzner, *supra* note 14, at 1629.

[294] Reno v. ACLU, 521 U.S. 844, 849 (1997).

[295] *Id.* at 849.

[296] *Id.* at 860-61.

[297] *Id.* at 864, 874.

[298] *Id.* at 860-61, 868.

[299] *Id.* at 868.

[300] *Id.* at 868-69.

[301] *Id.* at 869.

[302] *Id.*

same extensive history of regulating the Internet.[303] Since Internet speech is different from radio and television broadcasts, there is no reason to subject the Internet medium to a lower level of First Amendment protection different from traditional, valuable speech.[304]

By concluding that the CDA would impermissibly chill speech, the Court held that traditional vagueness, overbreadth, and prior restraints doctrines apply to the Internet.[305] The chilling of speech doctrines applied in full force to the CDA since the statute was a content-based regulation and not a content-neutral regulation.[306] The CDA provisions at issue were impermissibly vague; hence, speakers would be unsure what speech is prohibited and which speech is not so speakers will overly self-censor.[307] In addition, the CDA's harsh criminal liability provisions made it more likely that the CDA would chill speech.[308] CDA's vague definitions were also unconstitutional under the First Amendment because there is a risk the CDA will be enforced in a discriminatory manner.[309]

The CDA provisions were unconstitutionally overbroad because they suppressed a significant amount of constitutionally protected adult speech in order to protect minors when a less restrictive alternative that is at least as effective in protecting minors was available.[310] Since online audiences are so broad, it would be difficult to restrict minors' access to content without also unintentionally restricting adult's access.[311] The *Reno* Court found that parental supervision, through the use of filtering software, provided a reasonably effective alternative for protecting minors from indecent speech.[312] Other less restrictive alternatives included tagging objectionable material to alert parents; making exceptions for artistic or educationally valuable speech; or regulating portions of the Internet differently, such as commercial websites.[313] Finally, the Court found that Congress did not narrowly tailor the CDA to protect minors from illicit Internet content because Congress did not have any hearings and the CDA's definition of prohibited material was vague.[314]

In response to *Reno*, Congress enacted the Child Online Protection Act

---

303 *Id.* at 868-69.

304 *Id.* at 870.

305 *See id.* at 871-72.

306 *Id.* at 871-72.

307 *Id.* at 870-71 (identifying the statute's confusing use of the phrases "indecent" and "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs").

308 *Id.* at 872.

309 *Id.*

310 *Id.* at 874.

311 *Id.* at 876.

312 *Id.* at 877.

313 *Id.* at 879.

314 *Id.* at 879, 871.

(COPA) to protect minors from sexually explicit material on the Web.[315] The subsequent legal challenges to COPA provided the Supreme Court an opportunity to address specific First Amendment issues.[316] In the 2002 case *Ashcroft v. ACLU (Ashcroft I)*, the Court considered the appropriate standards for Web publishers.[317] A plurality constitutionally upheld COPA's analysis under *California v. Miller*'s community standards approach.[318] According to the plurality, the Internet should not be treated differently under *Miller*'s community standards requirement, but rather Web publishers should be subject to the same requirements as other publishers.[319] Hence, Web publishers have the burden to prevent their materials from being viewed in an unwelcoming community if they publish nationally.[320] This holding was based on the findings in *Hamling v. United States,*[321] and *Sable Communications of California, Inc. v. FCC,*[322] where it was immaterial if the speakers had the ability to target a specific geographic region with their content.[323] The plurality emphasized that the decision was very narrow and only held that COPA's use of community standards to determine if materials is "'harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment."[324]

For the holding that Web publishers have the burden to direct which communities their speech enters, the plurality only had three justices.[325] In concurring or dissenting opinions, six justices did not believe *Hamling* and *Sable* applied because the speakers in those cases had the ability to restrict the availability of their material by geographic region, and burdening the online speakers to control where their messages were received would suppress too much speech.[326] In his dissent, Justice Stevens noted that the Internet is different than mass mailings or dial-a-porn because "information (on the Internet), once posted, is accessible everywhere on the network at once. The speaker cannot control access based on the location of the listener, nor can it choose the pathways through which its speech is transmitted."[327] In his concurring opinion, Justice Kennedy, joined by Justices Souter and Ginsburg, cited *Red Lion* and stated the

---

315 Ashcroft v ACLU (*Ashcroft I*), 535 U.S. 564, 569 (2002)

316 *Id.*

317 *Id.* at 583.

318 *Id.* at 577-78, 580 (citing California v. Miller, 413 U.S. 15, 24 (1973)).

319 *Id.* at 583.

320 *Id.*

321 418 U.S. 87, 107 (1974) (holding community standards apply to obscene mailings).

322 492 U.S. 115, 126 (1989) (holding community standards apply to "dial-a-porn" hotlines).

323 *Ashcroft I*, 535 U.S. at 580-82.

324 *Id.* at 585.

325 *Id.* at 566, 583.

326 *Id.* at 587 (O'Connor, J., concurring in part); *id.* at 590-91 (Breyer, J., concurring in part); *id.* at 594-95 (Kennedy, J., concurring); *id.* at 605-06 (Stevens, J., dissenting).

327 *Id.* at 605 (Stevens, J., dissenting).

Court needs to analyze new technology separately from existing technology for First Amendment purposes, as the burdens on speakers' and the government's interests are affected by the specific medium.[328] While many of the justices noted that applying local community standards to the Internet is problematic,[329] Justice O'Connor directly stated "a national standard is necessary" to determine if material is obscene on the Internet in order to not suppress protected speech.[330]

In *Ashcroft v. ACLU (Ashcroft II)*, the subsequent case concerning COPA, the Supreme Court addressed how Internet speech may be chilled and discussed constitutional methods to protect minors from harmful material.[331] In a five to four decision, the Court held the district court's preliminary injunction was permissible because COPA is a content-based restriction and the government did not satisfy its burden to prove a proposed, less restrictive alternative was less effective to further the government's compelling interest to protect minors from harmful material on the Web.[332] The preliminary injunction was proper because there was a significant risk COPA would chill speech, since "speakers may self-censor rather than risk the perils of trial" as the statute provided for criminal sanctions and only an affirmative defense was possible.[333] In addition, the majority found blocking and filtering software would be a plausible, less restrictive, and more effective option compared to COPA.[334] Filters are a plausible method to achieve the government's compelling interest to protect minors because Congress may offer incentives for filters to be used and developed.[335] Also, "[t]he need for parental cooperation does not automatically disqualify a proposed less restrictive alternative" because it may be assumed parents will act to protect their children.[336] How the Supreme Court has applied the First Amendment to the government's efforts to regulate obscenity on the Internet demonstrates First Amendment concerns for Internet speech, and informs how *Central Hudson* may be applied to possible prostitution ads on Craigslist.

In addition to the judicial branch's exposition on the First Amendment, Congress has enacted several statutes regarding Internet regulation and free speech.[337] One of the most significant pieces of legislation Congress passed is

---

[328] *Id.* at 595 (Kennedy, J., concurring) ("The economics and the technology of each medium affect both the burden of a speech restriction and the Government's interest in maintaining it.").

[329] *Id.* at 590 (Breyer, J., concurring in part); *id.* at 597 (Kennedy, J., concurring).

[330] *Id.* at 587 (O'Connor, J., concurring in part).

[331] Ashcroft v. ACLU (*Ashcroft II*), 542 U.S. 656, 666-70 (2004).

[332] *Id.* at 673.

[333] *Id.* at 670-71.

[334] *Id.* at 666-68.

[335] *Id.* at 669.

[336] *Id.*

[337] *See* United States v. Williams, 553 U.S. 285, 289 (2008) (Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003); *Ashcroft II*, 542 U.S. at

the Communications Decency Act (CDA), which was enacted in 1996.[338] Before the CDA, ISPs may have been deemed "publishers" if they screened, monitored, edited, or deleted content, which would have made ISPs liable for numerous civil claims, such as torts and civil rights discrimination.[339] The CDA's purposes were to encourage ISPs to monitor and control their networks for objectionable content without fearing liability due to the policing and to promote the development of Internet technology with minimal government interference.[340] To achieve these goals, Section 230 of the CDA stipulates ISPs should not be treated as publishers or editors for any information provided, created, or developed by another content provider, who may be a person or entity.[341] ISPs are also not liable for third-party content even if the ISP receives notice about the objectionable content.[342] If an ISP is sued, the ISP may use the CDA as an affirmative defense.[343] While the CDA offers civil immunity to ISPs for most third-party content, ISPs are not immune from criminal liability.[344] Also, the party that creates the content or posts the message cannot escape liability.[345] If an ISP helps create or develop the content at issue, then the ISP may be jointly liable along with the individual user.[346]

With the CDA, Congress made a policy decision to not prevent harmful Internet speech through imposing liability on ISPs for third-party content because allowing such liability would be similar to intrusive governmental restrictions on speech.[347] In addition, Congress recognized there is too much available Internet content for ISPs to monitor, and therefore if ISPs were liable, they may restrict speech and not self-regulate.[348] Under the CDA, ISPs are defined as services or systems that provide access for people to use the Internet[349], but courts have expanded the definition of an ISP to include websites, such as dat-

---

659 (Child Online Protection Act of 1998); United States v. Am. Library Ass'n, 539 U.S. 194, 199 (2003) (Children's Internet Protection Act of 2000); Reno v. ACLU, 521 U.S. 844, 858 (1997) (Communications Decency Act of 1996).

338 *See* Zeran v. AOL, Inc., 129 F.3d 327, 328 (4th Cir. 1997).

339 *Id.* at 330-31; Chicago Lawyers' Com. for Civil Rights under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 668 (7th Cir. 2008).

340 47 U.S.C. § 230(b) (West 2012); Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1122-23 (9th Cir. 2003); *Zeran*, 129 F.3d at 330.

341 47 U.S.C. § 230(c)(1) (West 2012); *Carafano*, 339 F.3d at 1122; *Zeran*, 129 F.3d at 330.

342 *Zeran*, 129 F.3d at 333.

343 *See id.* at 329-30.

344 47 U.S.C. § 230(e)(1) (West 2012).

345 *Zeran*, 129 F.3d at 330.

346 Brian J. McBrearty, Note, *Who's Responsible? Website Immunity Under the Communications Decency Act and the Partial Creation or Development of Online Content*, 82 TEMP. L. REV. 827, 833 (2009).

347 *Zeran*, 129 F.3d at 330-31.

348 *Id.* at 333.

349 47 U.S.C. § 230(f)(2) (West 2012).

ing sites,[350] social networking sites,[351] and Craigslist.[352]

A relevant appeals court decision is the 2008 case *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*[353] In *Chicago Lawyers*, a public interest organization sued Craigslist for allegedly violating the Fair Housing Act (FHA) because the website hosted housing advertisements posted by third parties that discriminated against protected classes.[354] The Seventh Circuit held Craigslist was not liable for the discriminatory ads because the CDA stipulates a website may not be treated like the speaker or publisher of content supplied by someone else.[355] Apart from the CDA, the court noted that the FHA is usually enforced against publishers, and while Craigslist resembles a newspaper's classified section, the website operates more like a common carrier, such as telephone and courier services, because Craigslist does not create or publish any of its content.[356] Also, Craigslist did not "cause" the illegal advertisements because the website only provides a forum to post the ads and does not offer incentives for ads to be discriminatory.[357] In addition, it would be difficult for Craigslist to filter or screen all ads posted on its website.[358] The court concluded that the Lawyers' Committee could forward Craigslist's illegal ads to the state attorney general, who could pursue the poster, but it may not directly sue the messenger Craigslist pursuant to section 230 of the CDA.[359]

In the decision, the Seventh Circuit recognized numerous problems preventing Craigslist from filtering and screening posted ads.[360] It would be expensive for Craigslist to hire enough staff to manually screen all of its ads because the website operates a system that then received more than 30 million posts per month in 450 cities.[361] Further, there would be a long delay between when the advertisement was submitted to Craigslist and when the advertisement was posted on the site if each advertisement needed to be manually reviewed.[362] Finally, different people have varying judgments about what ads could be discriminatory.[363] The concerns about Craigslist being able to effectively monitor

---

350 Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1123-24 (9th Cir. 2003).

351 Doe v. MySpace, Inc., 528 F.3d 413, 420 (2008).

352 Chicago Lawyers' Com. for Civil Rights under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 669-70 (7th Cir. 2008).

353 *Id.* at 666.

354 *Id.* at 668.

355 *Id.* at 668, 671-72.

356 *Id.* at 668, 671 (quoting 47 U.S.C. § 230(c)(1)).

357 *Id.* at 671-72.

358 *Id.* at 668-69.

359 *Id.* at 672.

360 *Id.* at 668-69.

361 *Id.*

362 *Id.* at 669.

363 *Id.*

the postings on its site may apply to many other websites that host third-party content.

Another relevant case is the 2009 decision, *Dart v. Craigslist, Inc.*[364] where Illinois' Cook County Sheriff Thomas Dart sued Craigslist for public nuisance because he claimed the website knowingly promoted and facilitated prostitution through its "erotic services" section.[365] Dart stated Craigslist was the "largest source for prostitution" in the United States and since January 2007, he had arrested over 200 people connected to the website.[366] The Illinois district court, however, granted Craigslist's motion for summary judgment because the CDA provides civil immunity for ISPs that host third-party material.[367] Contrary to Dart's claim, the court found Craigslist neither caused nor induced individuals to post illegal ads by providing an "erotic services" section and allowing people to search the posts.[368] The court only briefly addressed the First Amendment and stated the ads "may even be entitled to some limited protection under the First Amendment."[369]

Since Congress enacted the CDA, the Internet has been subject to minimal governmental regulation from the legislative and executive branches.[370] In the 2005 case, *National Cable & Telecommunications Association v. Brand X Internet Services,* the Supreme Court upheld the FCC's interpretation of the Communications Act, which was that ISPs that provide broadband cable access to the Internet are exempt from mandatory common-carrier regulations.[371] Because consumers use ISPs to access websites and other information sources and not solely to transmit and receive messages, broadband cable providers are not subject to traditional common-carrier regulations because they offer integrated services.[372] The FCC's reason for treating ISPs that provide Internet access through telephone lines differently is that ISPs now offer companies alternative access through land cables.[373] Since there are multiple points of access, the FCC concluded broadband cable services should be subject to minimal governmental oversight.[374] The Court noted it is preferable to have limited state regulation of the Internet in order to promote technological investment and innovation through economic competition.[375]

---

[364] 665 F. Supp. 2d 961 (N.D. Ill. 2009).

[365] *Id.*

[366] *Id.* at 962-63.

[367] *Id.* at 967-68, 970.

[368] *Id.* at 968.

[369] *Id.*

[370] *See* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv., 545 U.S. 967, 1001 (2005); Comcast Corp. v. FCC, 600 F.3d 642, 644 (D.C. Cir. 2010).

[371] *Brand X Internet*, 545 U.S. at 973.

[372] *Id.* at 998-1000.

[373] *Id.* at 1000-01.

[374] *Id.* at 1001.

[375] *Id.*

In the 2010 case *Comcast Corporation v. FCC*, the Court of Appeals for the District of Columbia held the FCC did not sufficiently justify its ability to regulate ISPs' network management policies that dictate how much bandwidth is delegated to certain online activities.[376] The FCC needed specific statutory authority to govern Comcast's network management policies and could not rely on its ancillary authority based solely on congressional policy objectives.[377] The court distinguished the FCC's regulation of telephone companies and radio and television broadcasters since the FCC had explicit statutory authority to govern these providers because there was a limited number of available channels to communicate, and the FCC needed to intervene to ensure competitive market rates.[378] If the FCC were allowed to regulate Comcast's network management policies without statutory authorization, "it would virtually free the Commission from its congressional tether."[379] The FCC has provided special exceptions for ISPs due to the Internet's unique characteristics,[380] and when the FCC has tried to regulate ISPs, the judicial branch has prevented the executive branch from acting without legislative authority.[381] In sum, the judicial, legislative, and executive branches have decided to regulate the Internet to a minimal extent due to the Internet's specific characteristics in order to comport with the First Amendment while enabling technological advances.[382]

VI. LEGAL ANALYSIS OF CRAIGSLIST'S FIRST AMENDMENT RIGHTS

In August 2010 when seventeen state attorneys general threatened to criminally prosecute Craigslist for hosting adult services ads since they claimed Craigslist facilitated prostitution and child trafficking, they violated Craigslist's First Amendment rights under either a strict scrutiny content-based speech analysis,[383] or a *Central Hudson* commercial speech analysis.[384] It is not clear, however, which judicial analysis would be applied to the facts that led to Craigslist removing its adult services section if Craigslist were to challenge the attorneys general's actions in court.[385] The Supreme Court has not had the opportu-

---

[376] Comcast Corp. v. FCC, 600 F.3d 642, 644 (D.C. Cir. 2010).

[377] *Id.*

[378] *Id.* at 654-56.

[379] *Id.* at 655.

[380] *Brand X Internet*, 545 U.S. at 998-1000.

[381] *Comcast Corp.*, 600 F.3d at 644.

[382] See *supra* Part V and accompanying footnotes.

[383] *See* Ashcroft v. ACLU (*Ashcroft II*), 542 U.S. 656, 660 (2004); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991); Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973).

[384] *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 555 (2001); Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 188 (1999); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996); Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980).

[385] *See* Ashcroft v. ACLU (*Ashcroft I*), 535 U.S. 564, 587 (2002) (O'Connor, J., concur-

nity to determine if the *Central Hudson* commercial speech test should be applied to the Internet and websites that host third-party content.[386] It may not be appropriate to apply *Central Hudson* to government restrictions on websites like Craigslist because the websites lack the characteristics of traditional commercial speakers, which may lead to an impermissible chilling of speech.[387] If these arguments were successful, then the attorneys general's threatened prosecution would be subject to a traditional strict scrutiny speech analysis and the government would not be able to satisfy the narrow tailoring requirements.[388] Nevertheless, if a court did apply the *Central Hudson* test to Craigslist, the attorneys general's actions fail this intermediate scrutiny test as well.[389] Therefore, the attorneys general violated Craigslist's constitutional rights under either a strict scrutiny or *Central Hudson*'s intermediate scrutiny analysis.[390] Determining which level of judicial scrutiny is appropriate for Craigslist is crucial because how Craigslist is regulated may influence how other websites and the Internet may be constitutionally governed in the future.[391] Also, it is important to consider how the legislative, executive, and judicial branches can work in tandem to expand First Amendment values through the Internet.[392]

A. *Why Strict Scrutiny and Not Central Hudson May be the Appropriate Level of Judicial Review*

While the *Central Hudson* commercial speech test usually applies to advertisements, there are a few arguments that Craigslist and similar websites that host third-party advertisements should not be subject to the *Central Hudson* test. One argument is that commercial Internet speech is not an area of traditional government regulation.[393] In general, the First Amendment protects commercial speech to a lesser degree than "valuable" speech because the government traditionally regulates speech that proposes a commercial transac-

---

ring in part); *Ashcroft I*, 535 U.S. at 590 (Breyer, J., concurring in part); *Ashcroft I*, 535 U.S. at 594-95 (Kennedy, J., concurring); *44 Liquormart*, 517 U.S. at 502; Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969).

386 Frese, *supra* note 250, at 582.

387 *44 Liquormart*, 517 U.S. at 502; *Red Lion*, 395 U.S. at 388-89; Seltzer, *supra* note 8, at 181-83.

388 *See Ashcroft II*, 542 U.S. at 660; *Simon & Schuster*, 502 U.S. at 118; *Broadrick*, 413 U.S. at 611-12.

389 *See Lorillard Tobacco*, 533 U.S. at 555; *Greater New Orleans*, 527 U.S. at 188; *44 Liquormart*, 517 U.S. at 501; *Cent. Hudson*, 447 U.S. at 566.

390 *See Ashcroft II*, 542 U.S. at 660; *Lorillard Tobacco*, 533 U.S. at 555; *Greater New Orleans*, 527 U.S. at 188; *44 Liquormart*, 517 U.S. at 501; *Simon & Schuster*, 502 U.S. at 118; *Cent. Hudson*, 447 U.S. at 566; *Broadrick*, 413 U.S. at 611-12.

391 *See* Berman & Weitzner, *supra* note 14, at 1619-20; Berners-Lee, *supra* note 12.

392 Berman & Weitzner, *supra* note 14, at 1619-20; Berners-Lee, *supra* note 12.

393 *See* Reno v. ACLU, 521 U.S. 844, 868-69 (1997).

tion.[394] The Internet, however, is a new medium and since its inception, it has mostly not been regulated due to its unique features.[395] With the CDA in 1996, Congress chose to immunize ISPs and websites from many civil claims since it recognized the Internet is different from traditional media, and Congress wanted to encourage Internet technological development.[396] Instead of government regulation that could chill speech, Congress intended to facilitate self-regulation by ISPs and websites.[397] Since the CDA does not apply to criminal prosecutions, the attorneys general were able to threaten to hold Craigslist liable as a publisher, which Congress found could raise First Amendment issues and harm Internet development.[398]

In addition, the FCC has recognized that ISPs are different from other communication entities because online communication channels are unlimited, and hence market forces should direct regulation and not the government.[399] Lastly, the FCC does not need to regulate the Internet to protect the public from offensive speech because the Internet is not invasive like broadcasts.[400] When the FCC has tried to regulate the Internet, it has been judicially prevented since the agency does not have specific statutory authorization to regulate ISPs in a similar fashion to other mediums and services.[401] While the state has an interest in the "clean" as well as free flow of information, the First Amendment stipulates it is preferable for speakers and listeners, and not the government, to determine what speech and information they communicate.[402] To ensure the Internet is regulated in a manner consistent with First Amendment principles, it is essential the Internet be decentralized, and users have control over what speech they communicate and receive.[403]

A second argument against applying the *Central Hudson* test is that the justifications for providing commercial speech less First Amendment protections do not apply to Craigslist.[404] The government is permitted to regulate commercial speech to a higher degree than non-commercial speech because commercial

---

394 *Lorillard Tobacco*, 533 U.S. at 554, 565.

395 *Reno*, 521 U.S. at 868-69.

396 47 U.S.C.A. § 230(b) (West 2012); Zeran v. AOL, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

397 47 U.S.C.A. § 230(b) (West 2012); *Zeran*, 129 F.3d at 330.

398 *See* 47 U.S.C.A. § 230(e)(1) (West 2012); *Zeran*, 129 F.3d at 330-31, 333.

399 Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv., 545 U.S. 967, 998-1001 (2005).

400 *Reno*, 521 U.S. at 868-69.

401 Comcast Corp. v. FCC, 600 F.3d 642, 654-56 (D.C. Cir. 2010).

402 Va. State Bd. of Pharm., v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

403 Berman & Weitzner, *supra* note 14, at 1620.

404 *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 502 (1996); Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564 n.6 (1980); *Va. State Bd. of Pharm.*, 425 U.S. at 771 n.24.

speakers know their products well, and it is easier for the speaker to determine if the advertisement is accurate and concerns a lawful activity.[405] In addition, commercial speakers have an economic interest in communicating, and hence they are less likely to chill their speech due to government restrictions.[406] Craigslist, however, is not like a typical commercial speaker, and therefore the justifications for lower First Amendment protections for commercial speech do not apply.[407] Unlike a traditional commercial speaker, Craigslist does not know very much about the products and content of the advertisements on its website because it hosts third-party generated ads and not its own.[408] As a result, imposing commercial speech requirements on Craigslist turns the website into a publisher, who is responsible for its content.[409] In *Chicago Lawyers'*, the Seventh Circuit recognized it would be difficult for Craigslist to monitor its ads because it would be very expensive for Craigslist to hire enough staff to screen the posts, manual screening would result in long delays before an advertisement is posted, and people have different opinions about when an advertisement may constitute illegal speech.[410]

In addition, Craigslist does not have an economic interest in adult services ads, and the speech at issue was actually chilled by the attorneys general's threats.[411] While Craigslist did generate revenue from its adult services sections, the revenue did not monetarily benefit the website.[412] Instead, Craigslist instituted fees for adult services ads to deter posters and gather information about the posters that could be given to law enforcement.[413] Craigslist used the revenue to hire attorneys who manually monitored the adult service listing and donated the rest of the proceeds to anti-trafficking advocacy groups.[414] In fact, Craigslist had an economic incentive to shut down its adult services section to avoid criminal prosecution and to stop the negative publicity, which chilled posters' speech.[415]

To alleviate concerns about chilling free speech, the Supreme Court could

---

[405] *44 Liquormart*, 517 U.S. at 502; *Cent. Hudson*, 447 U.S. at 564 n.6 (1980); *Va. State Bd. of Pharm.*, 425 U.S. at 771 n.24.

[406] *44 Liquormart*, 517 U.S. at 502; *Cent. Hudson*, 447 U.S. at 564 n.6 (1980); *Va. State Bd. of Pharm.*, 425 U.S. at 771 n.24.

[407] Chicago Lawyers' Com. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 668-69 (7th Cir. 2008); Dart v. Craigslist, Inc., 665 F. Supp. 2d 961, 968 (N.D. Ill. 2009).

[408] *See Chicago Lawyers'*, 519 F.3d at 668-69; *Dart*, 665 F. Supp. 2d at 968; Seltzer, *supra* note 8, at 181-83.

[409] *See* Zeran v. AOL, Inc., 129 F.3d 327, 333 (4th Cir. 1997).

[410] *Chicago Lawyers'*, 519 F.3d at 668-69.

[411] *See Cent. Hudson*, 447 U.S. at 564 n.6.

[412] *See McDougall Testimony*, *supra* note 46, at 4; Turnham & Lyon, *supra* note 43.

[413] *McDougall Testimony*, *supra* note 46, at 4

[414] *McDougall Testimony*, *supra* note 46, at 4; Turnham & Lyon, *supra* note 43.

[415] *See* Fleischer, *supra* note 1.

apply a different *Central Hudson* test for websites that host third-party commercial speech.[416] The Court has held First Amendment requirements should be re-considered for new technologies, and has applied a variety of judicial tests to different communication mediums based on the medium's specific characteristics to ensure that speech is restricted to the least extent.[417] For example, the First Amendment protects cable television to a higher extent than broadcast television due to the availability of many channels and cable subscribers' control over the content they view.[418] In order to ensure viewers are not constrained in their communication choices, however, cable television is protected to a lower extent than publishers.[419] Nevertheless, the three-justice plurality in *Ashcroft I* applied traditional First Amendment obscenity rules for mailings and telephone hotlines to the Internet.[420] Six other justices, however, recognized that the Internet is different and Web publishers should have a lower burden to ensure their content is permissible because Internet content cannot be limited to a targeted geographic area.[421] In addition, the Court in *44 Liquormart* modified the *Central Hudson* test because commercial speech's traditional justifications were not present when there was a total ban on advertisements.[422] The Court could similarly implement a stricter test for Craigslist and comparable websites in order to protect speakers' First Amendment rights in the new Internet medium.[423]

B. *The Attorneys General's Threatened Prosecution Violated Craigslist's First Amendment Rights under a Content-Based, Strict Scrutiny Analysis Due to Chilling of Speech Concerns*

If a court decides not to apply *Central Hudson*'s commercial speech test to Craigslist, then the attorneys general's threatened prosecution would be subject to a content-based, strict scrutiny analysis.[424] Typically, content-based restrictions on speech are subject to strict scrutiny while content-neutral restrictions are subject to intermediate scrutiny.[425] The state attorneys general claimed the

---

[416] *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 502 (1996).

[417] United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 826-27 (2000); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 656-57 (1994); FCC v. Pacifica Found., 438 U.S. 726, 744-48 (1978); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969).

[418] *Turner*, 512 U.S. at 656-57; *see also Playboy*, 529 U.S. at 826-27.

[419] *Turner*, 512 U.S. at 656-57; *see also Playboy*, 529 U.S. at 826-27.

[420] Ashcroft v. ACLU (*Ashcroft I*), 535 U.S. 564, 583 (2002).

[421] *Id.* at 587 (O'Connor, J., concurring in part); *id.* at 590 (Breyer, J., concurring in part); *id.* at 594-95 (Kennedy, J., concurring); *id.* at 606 (Stevens, dissenting).

[422] *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 502 (1996).

[423] *See id.*; Berman & Weitzner, *supra* note 14, at 1619-20; Seltzer, *supra* note 8, at 181-83.

[424] *See* Reno v. ACLU, 521 U.S. 844, 860-61, 868 (1997).

[425] Ashcroft v. ACLU (*Ashcroft II*), 542 U.S. 656, 660 (2004); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994).

third-party posts in Craigslist's adult services section promoted prostitution and child trafficking.[426] While the attorneys general were concerned about usual content-neutral issues, such as the secondary effects of the advertisements,[427] the forced shut-down of Craigslist's adult services section was mainly content-based since the attorneys general targeted Craigslist due to the actual text and pictures in the ads and not due to merely the ads being posted.[428] Hence, the attorneys general targeted Craigslist based on the content of its adult services' posts.[429] Content-based restrictions on speech are presumed to be unconstitutional and are subject to a strict scrutiny analysis, which means the government has to prove its speech restriction is needed to serve a compelling state interest and the restriction's means is narrowly tailored to its ends.[430] The government would not be able to satisfy its burden because the attorneys general's threatened prosecution unlawfully chilled Craigslist's and its users' speech.[431]

The attorneys general's threatened criminal prosecution of Craigslist resulted in an unconstitutional chilling effect on Craigslist and its users' speech in multiple ways.[432] First, the forced removal of Craigslist's adult services section was impermissibly overbroad since an intolerable amount of protected speech was suppressed in an effort to regulate unprotected speech.[433] Craigslist's adult services section included illegal and obscene posts but also included many lawful ads and these ads may not be banned in order to prohibit the illegal ads.[434] From January till September 3, 2010, AIMGroup estimated Craigslist had $30 million in adult services revenue, which equals to about 3 million ads.[435] Craigslist reported it had rejected 700,000 ads for violating its rules in the fifteen months before removing its adult services listing.[436] If Craigslist removed an equal proportion of violating ads over the fifteen months, then in 2010, 350,000 of adult services ads, or between eleven and twelve percent, were not constitutionally protected.[437] If the same proportion of violating ads and permissible ads continued, the attorneys general's threatened prosecution would

---

[426] *See* Fleischer, *supra* note 1; Hansen, *supra* note 1.

[427] *See* City of Ladue v. Gilleo, 512 U.S. 43, 48 (1994); Fleischer, *supra* note 1; Hansen, *supra* note 1.

[428] *See Turner*, 512 U.S. at 642; Fleischer, *supra* note 1.

[429] *See Turner*, 512 U.S. at 642; Fleischer, *supra* note 1.

[430] *Ashcroft II*, 542 U.S. at 660; Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991); Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973).

[431] *See* Virginia v. Hicks, 539 U.S. 113, 119 (2003); Dombrowski v. Pfister, 380 U.S. 479, 488-89 (1965).

[432] *See* Fleischer, *supra* note 1.

[433] *See* Reno v. ACLU, 521 U.S. 844, 874 (1997); *Broadrick*, 413 U.S. at 612.

[434] *See Dombrowski*, 380 U.S. at 488-89; STONE ET AL., *supra* note 122, at 1109.

[435] Advanced Interactive Media Group, *supra* note 78, at 1.

[436] Turnham & Lyon, *supra* note 39.

[437] *See id.*; Advanced Interactive Media Group, *supra* note 78, at 1.

apply to just under ninety percent of Craigslist's adult services ads that were constitutionally protected.[438]

Constitutional prostitution statutes must include definitive standards about what conduct is prohibited to give notice to speakers and guidelines to law enforcement in order to not unduly envelop legal conduct.[439] In addition, a lawful prostitution ordinance must have a specific intent element that requires the person to act with the intent to commit or solicit prostitution.[440] Some of Craigslist's ads would constitute illegal offers for prostitution but many of the ads that offer erotic dancing, escort services, and telephone conversations would not since it is unclear if the poster had the specific intent to engage in prostitution.[441] Further, it would be difficult to contend Craigslist had specific intent to aid and abet prostitution since the website prohibits illegal ads under its Terms of Use, hired manual advertisement screeners, and removed non-complying ads.[442] Under *Miller*'s obscenity test, it is likely some of the ads would be deemed obscene while other ads would not be obscene but indecent, depending on if the advertisement was "patently offensive" since it included "hard core" sexual conduct that consisted of sexual acts or "lewd exhibition of the genitals".[443] Thus, while some posts in Craigslist's adult services section were not protected by the First Amendment because they constituted illegal offers or obscene content, the First Amendment protected nearly ninety percent of posts because they merely offered "vice" activities or were indecent.[444]

Second, the attorneys general's actions were impermissibly vague since they had too much discretion in enforcing prostitution laws because they were able to target Craigslist and not similar websites, such as Backpage.com and Facebook.[445] Third, the threatened prosecution was an unconstitutional prior restraint on speech because the attorneys general did not specifically identify

---

[438] *See* Advanced Interactive Media Group, *supra* note 78, at 1; Turnham & Lyon, *supra* note 39.

[439] *See* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971); Silvar v. Eighth Judicial Dist. Court *ex rel.* County of Clark, 129 P.3d 682, 687-88 (Nev. 2006).

[440] *Silvar*, 129 P.3d at 685-89; City of Seattle v. Slack, 784 P.2d 494, 497 (Wash. 1989); Coleman v. City of Richmond, 364 S.E.2d 239, 244 (Va. 1988); City of Milwaukee v. Wilson, 291 N.W.2d 452, 457 (Wis. 1980).

[441] *See* cases cited *supra* note 440.

[442] *See McDougall Testimony*, *supra* note 46, at 4-5; Fleischer, *supra* note 1; Turnham & Lyon, *supra* note 43.

[443] *See* Miller v. California, 413 U.S. 15, 25-26 (1973).

[444] *See* Reno v. ACLU, 521 U.S. 844, 874 (1997); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 513-14 (1996); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 72-73 (1983); *Miller*, 413 U.S. at 25-26.

[445] *See* United States v. Williams, 553 U.S. 285, 304 (2008); Kolender v. Lawson, 461 U.S. 352, 357-58 (1983); Broadrick v. Oklahoma, 413 U.S. 601, 607 (1973); Carr, *supra* note 87; Hansen, *supra* note 1.

what adult services posts they considered constituted prostitution solicitations, which is important in order to provide for judicial review of Craigslist's First Amendment rights.[446] Fourth, threats of criminal prosecution are considered to create a higher risk that speech will be chilled compared to civil prosecution threats.[447] Finally, publishers and websites that host third-party content are more likely to bow to prosecution threats because they act as a forum for the actual speakers and are not communicating their own speech.[448] Thus, for publishers and websites, it is not worth the risk of disseminating questionable content and exposing themselves to liability, and they have few incentives to fight for a third-party's freedom of speech rights.[449]

Since Craigslist and other websites that host third-party ads are dissimilar to traditional commercial speakers and publishers, and thus there is significant risk speech will be chilled, it may not be appropriate to apply *Central Hudson*'s commercial speech test to these websites under the First Amendment.[450] The Supreme Court, however, has rejected opportunities to alter *Central Hudson*'s application to commercial speech,[451] and the test has been applied to publishers and broadcasters.[452] In addition, traditional First Amendment jurisprudence has been extended to the Internet, as *Reno* applied obscenity standards to the Internet.[453] Since it is unclear if the arguments that Craigslist's ads should not be considered typical commercial speech would be successful, it is prudent to analyze the attorneys general's threats under *Central Hudson*'s commercial speech test.[454]

C. *The Attorneys General's Threatened Prosecution Violated Craigslist's First Amendment Rights under the Central Hudson Commercial Speech Test*

If *Central Hudson*'s commercial speech test is applied and hence Craigslist is treated like a publisher, the attorneys general's threatened prosecution still violates the First Amendment.[455] Before the test may be applied, a court must

---

[446] *See* Freedman v. Maryland, 380 U.S. 51, 58 (1965); Fleischer, *supra* note 1; Hansen, *supra* note 1.

[447] *See* Virginia v. Hicks, 539 U.S. 113, 119 (2003).

[448] *See* Seltzer, *supra* note 8, at 181-82.

[449] *See Freedman*, 380 U.S. at 59; Braun v. Soldier of Fortune Magazine, Inc., 968 F.2d 1110, 1117-18. (11th Cir. 1992); Seltzer, *supra* note 8, at 181-82.

[450] *See supra* text accompanying notes 393-449.

[451] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554-55 (2001); Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 184 (1999).

[452] *Greater New Orleans,* 527 U.S. at 195-96; 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489-90 (1996).

[453] Reno v. ACLU, 521 U.S. 844, 860-61 (1997).

[454] *See Lorillard*, 533 U.S. at 554-55; *Greater New Orleans*, 527 U.S. at 184.

[455] *See* Cent. Hudson Gas & Elec. Corp. v. Public Servs. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

determine whether the speech is "commercial."[456] Commercial speech usually proposes a monetary transaction, and therefore certain features of the speech may indicate it is "commercial."[457] For example, the speech may be an advertisement about a specific product, or the speaker may be financially motivated.[458] Craigslist's adult services ads would most likely be considered commercial speech, as the poster paid Craigslist to host his advertisement, and the poster is proposing a service in exchange for payment.[459]

If a government speech regulation satisfies *Central Hudson*'s four prongs, then the regulation is constitutional.[460] Under *Central Hudson*'s first prong, the commercial speech at issue must "concern lawful activity and not be misleading" for the First Amendment to protect the speech.[461] Therefore, if an advertisement promotes an unlawful activity, the First Amendment does not protect the advertisement, and the government may regulate the advertisement to the fullest extent, making *Central Hudson* inapplicable.[462] The government does not, however, have more authority to restrict advertisements promoting "vice" activities compared with other advertisements simply because the government may regulate the underlying conduct to a greater extent.[463]

The attorneys general claimed Craigslist's ads promoted or related to illegal activities, such as prostitution and child trafficking.[464] Therefore, the attorneys general targeted speech they determined the First Amendment did not protect.[465] As described above, the attorneys general were mistaken because only a portion of the ads would escape First Amendment protection, while many other ads are protected speech because they do not constitute prostitution solicitation.[466] Although many people may think Craigslist's adult services ads are not desirable, the government cannot overly restrict "vice" activities.[467] The First Amendment protects the erotic dancers, escorts, and sex hotline posts in

---

[456] *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983).

[457] *Id.* at 66-67.

[458] *Id.*

[459] *See id.*

[460] *Cent. Hudson*, 447 U.S. at 566.

[461] *Id.*

[462] United States v. Williams, 553 U.S. 285, 297 (2008); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1973).

[463] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 512-14 (1996).

[464] Fleischer, *supra* note 1.

[465] *See Williams*, 553 U.S. at 297; Reno v. ACLU, 521 U.S. 844, 859-61, 868 (1997) (discussing the Communications Decency Act of 1996, which "prohibits the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age").

[466] *See* Silvar v. Eighth Jud. Dist. Ct. *ex rel.* Cnty. of Clark, 129 P.3d 682, 685-89 (Nev. 2006); Coleman v. Richmond, 364 S.E.2d 239, 244 (Va. 1988).

[467] *44 Liquormart*, 517 U.S. at 512-14.

the same way as the Court has determined alcoholic beverages,[468] tobacco,[469] and private casino ads are protected.[470] *Central Hudson*'s first prong is satisfied since the First Amendment protects Craigslist's third-party posts that are neither illegal nor misleading.[471]

The second part of *Central Hudson*'s test is whether the government's asserted interest served by its regulation is substantial.[472] The attorneys general targeted Craigslist to remove its adult services section because they contended that the ads promoted prostitution and child trafficking.[473] The government easily satisfies the second prong because protecting the public by regulating criminal conduct or legal activities that lead to social costs constitutes a substantial government interest.[474]

Central Hudson's third prong requires government speech regulations to "directly and materially advance" the government's asserted interests.[475] It is insufficient for a restriction to simply have some effect on or to remotely advance the state's ability to achieve its interest.[476] The government may not satisfy its burden based on speculation or conjecture, but the government must prove that the asserted harms are real and that the speech restriction will alleviate the harms to a "material degree."[477] To prove the restriction will advance the state's interest, the state may reference studies, anecdotes, history, consensus, and common sense, and the state is not required to proffer empirical data.[478] The restriction may be evaluated based on the government's overall regulatory scheme concerning the speech at issue.[479] Finally, the government cannot permissibly target one speaker over another speaker when the speakers have the same message.[480]

The forced shutdown of Craigslist's adult services section did not directly or materially advance the interests of the state attorneys general, and hence their

---

[468] *Id.* at 513-14; Rubin v. Coors Brewing Co., 514 U.S. 476, 490-91 (1995).

[469] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554-56 (2001).

[470] Greater New Orleans Broad. Ass'n. v. United States, 527 U.S. 173, 184 (1999).

[471] Cent. Hudson Gas & Elec. Corp. v. Public Servs. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

[472] *Id.*

[473] Fleischer, *supra* note 1.

[474] *Greater New Orleans*, 527 U.S. at 185.

[475] *Cent. Hudson*, 447 U.S. at 566; *see also* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 555 (2001).

[476] *See* Edenfield v. Fane, 507 U.S. 761, 771 (1993).

[477] *Greater New Orleans*, 527 U.S. at 188 (quoting *Edenfield*, 507 U.S. at 770-71).

[478] *Lorillard*, 533 U.S. at 555 (quoting Fla. Bar v. Went For It, Inc., 515 U.S. 618, 628 (1995)).

[479] *Greater New Orleans*, 527 U.S. at 193-94.

[480] *Id.*

threatened prosecution fails *Central Hudson*'s third prong.[481] The attorneys general insisted Craigslist remove its adult services section because if the section did not exist, then allegedly there would be less criminal activity, such as prostitution and forced child trafficking.[482] It is unclear whether a few isolated examples involving Craigslist's use for illegal purposes is sufficient evidence to support a claim that removing Craigslist's adult services section "directly and materially" advances the state's interest on the theory that fewer advertisements result in less consumer demand.[483]

There is evidence, however, that the attorneys general's forced shutdown of Craigslist's adult services section has been detrimental to achieving their goals.[484] First, third-party posters have either placed ads in other Craigslist sections or have migrated to different websites, such as Backpage.com, Adult-Search.com, and Facebook.[485] Hence, the attorneys general's threats have simply made users to select different forums and have not prevented the suspect ads and related illegal conduct.[486] This is demonstrated through Backpage's rise and the Detroit murders in December 2011.[487] Second, forcing the potentially illegal ads from Craigslist to other websites is disadvantageous to the attorneys general's interests because the ads and possible illegal conduct will be more difficult to locate, regulate, and prosecute.[488] Chiefly, Craigslist screened adult service ads and required identifying personal information, such as telephone numbers and credit card information through fees, that the website could give to law enforcement or advocacy groups.[489] In addition, it is more difficult for law enforcement to investigate many different websites, particularly when other websites monitor their content for potential criminal conduct to a lesser degree than Craigslist.[490]

The attorneys general's removal of Craigslist's adult services section also did not directly advance their goals because they did not consider the government's

---

[481] *See Lorillard*, 533 U.S. at 555; *Greater New Orleans*, 527 U.S. at 188; Cent. Hudson Gas & Elec. Corp. v. Public Servs. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

[482] *See* Fleischer, *supra* note 1; Turnham & Lyon, *supra* note 39.

[483] *See Lorillard*, 533 U.S. at 557; Rubin v. Coors Brewing Co., 514 U.S. 476, 487 (1995).

[484] *See Boyd Testimony*, *supra* note 68, at 2; Advanced Interactive Media Group, *supra* note 78, at 2; Townsend, *supra* note 81.

[485] Whittaker & Zollman, *supra* note 77; Whittaker, *supra* note 82; Advanced Interactive Media Group, *supra* note 78, at 2; Townsend, *supra* note 81.

[486] Schabner, *supra* note 88; Whittaker & Zollman, *supra* note 77; Whittaker, *supra* note 82; Advanced Interactive Media Group, *supra* note 78, at 2; Townsend, *supra* note 81.

[487] Schabner, *supra* note 88; Whittaker & Zollman, *supra* note 77; Whittaker, *supra* note 82; Advanced Interactive Media Group, *supra* note 78, at 2; Townsend, *supra* note 81.

[488] *Boyd Testimony*, *supra* note 68, at 2; Turnham & Lyon, *supra* note 39.

[489] *McDougall Testimony*, *supra* note 46, at 3-5; *Powell Testimony*, *supra* note 40, at 2-4.

[490] *Boyd Testimony*, *supra* note 68, at 2; *McDougall Testimony*, *supra* note 46, at 2; *Powell Testimony*, *supra* note 40, at 4; Turnham & Lyon, *supra* note 39.

overall regulatory scheme for the Internet, but only focused on Craigslist.[491] The Internet has not been subject to much government regulation, but by vaguely applying traditional criminal laws concerning prostitution and aiding and abetting to the Internet, the attorneys general changed the government's policy without specific legislative authorization.[492] Also, many statutes that regulate the Internet offer affirmative defenses for publishers who take good faith steps to prevent the dissemination of illegal materials.[493] Craigslist enacted numerous measures to protect its users, such as requiring fees and credit card information, posting warnings, and monitoring ads.[494] Therefore, the website would be free from criminal liability under most statutes specifically tailored for the Internet.[495]

Finally the attorneys general impermissibly targeted Craigslist due to high profile criminal acts connected to the website, compared to similar websites that host the same types of ads.[496] Neither Backpage, Facebook, nor the other twenty-two websites that host adult personals were targeted for criminal prosecution at the same time as Craigslist.[497] As the Supreme Court held in *Greater New Orleans*, the government violates the First Amendment when it selectively picks speakers who convey identical messages.[498] Usually suppressing commercial speech will decrease the demand for a product,[499] but with online adult services ads, the demand is constant and other websites will fill the void left by Craigslist.[500] Since posters use websites other than Craigslist, which has a detrimental effect on the attorneys general's goals, the attorneys general's forced shut down of Craigslist's adult services section does not directly or material

---

[491] Greater New Orleans Broad. Ass'n. v. United States, 527 U.S. 173, 192-93 (1999).

[492] *See* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv., 545 U.S. 967, 998-1000 (2005) (upholding the FCC's determination that sell Internet service are not telecommunications companies and therefore are not subject to the Communications Act of 1934); Comcast Corp. v. FCC, 600 F.3d 642, 644 (D.C. Cir. 2010) (finding that the FCC does not have the authority to regulate an Internet service provider's networking applications); Fleischer, *supra* note 1.

[493] *See* Ashcroft v. ACLU (*Ashcroft II*), 542 U.S. 656, 662 (2004); Reno v. ACLU, 521 U.S. 844, 860-61 (1997).

[494] *McDougall Testimony*, *supra* note 46, at 3-5; *Powell Testimony*, *supra* note 40, at 2-4; Turnham & Lyon, *supra* note 43.

[495] *See Ashcroft II*, 542 U.S. at 662; *Reno*, 521 U.S. at 860-61.

[496] Fleischer, *supra* note 1. *See* Whittaker & Zollman, *supra* note 77.

[497] *See* Carr, *supra* note 87; Fleischer, *supra* note 1; Whittaker & Zollman, *supra* note 77.

[498] Greater New Orleans Broad. Ass'n. v. United States, 527 U.S. 173, 193-94 (1999) (concerning the different treatment for private casino ads compared to public and tribal gaming).

[499] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 561 (2001); Rubin v. Coors Brewing Co., 514 U.S. 476, 488 (1995).

[500] *Boyd Testimony*, *supra* note 68, at 2.

advance their interest.[501] Therefore, the attorneys general's threatened prosecution violated *Central Hudson*'s third prong.[502]

The attorneys general's actions also violated *Central Hudson*'s fourth prong.[503] The test's fourth part requires speech regulation to "not be more extensive than is necessary to serve" the government's interest.[504] The state does not have to use the "least restrictive means" possible to advance its interest, but there needs to be a "reasonable fit" between the means and the ends; specifically, the means need to be proportionally tailored to accomplish the state's objectives.[505] A court should examine other options to achieve the government's interests, and determine how restrictive and effective the regulation at issue is compared to proposed alternatives.[506] In addition, the First Amendment generally prohibits restricting too much protected speech in order to regulate unprotected speech.[507] Finally, it is important to consider whether the government "carefully calculat[ed] the costs and benefits associated with the burden" that its regulation imposed on speech.[508]

The attorneys general's forced removal of Craigslist's entire adult services section was more extensive than necessary, and therefore fails *Central Hudson*'s fourth part.[509] First, removing Craigslist's adult services section is too restrictive and not as effective as other alternatives for regulating potentially illegal ads.[510] Therefore, the attorneys general's means to serve the states' ends does not constitute a reasonable fit.[511] Removing Craigslist's adult services section was too restrictive because it banned all posts whether they proposed an illegal transaction or merely a vice activity.[512] Based on Craigslist's and AIM-Group's numbers, First Amendment protections apply to nearly ninety percent of Craigslist's adult personal ads.[513] As the Supreme Court found in *Central*

---

[501] *Rubin*, 514 U.S. at 488; Advanced Interactive Media Group, *supra* note 78, at 2; Townsend, *supra* note 81.

[502] *See Rubin*, 514 U.S. at 488; Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

[503] *See Cent. Hudson*, 447 U.S. at 566.

[504] *Id.*

[505] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 561 (2001).

[506] Greater New Orleans Broad. Ass'n. v. United States, 527 U.S. 173, 188 (1999); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 507 (1996).

[507] Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 69 (1983).

[508] *Lorillard*, 533 U.S. at 561; City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 (1993).

[509] Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

[510] *Greater New Orleans*, 527 U.S. at 192; *44 Liquormart*, 517 U.S. at 507; *Id.*

[511] *See Lorillard*, 533 U.S. at 566-67; *Cent. Hudson*, 447 U.S. at 566.

[512] *Lorillard*, 533 U.S. at 566-67; *Greater New Orleans*, 527 U.S. at 188; *Cent. Hudson*, 447 U.S. at 570-71.

[513] *See* Advanced Interactive Media Group, *supra* note 79, at 1; Turnham & Lyon, *supra* note 39.

Hudson about a New York statute prohibiting a utility company from advertising, a complete ban on ads will violate the fourth prong if a less restrictive alternative is available, such as previewing ads before they are disseminated.[514]

Forcing Craigslist to take down its adult services section was also ineffective at preventing third-party posts that may propose an illegal transaction because the ads still run on other websites that are less monitored.[515] Hence, it is easier for unlawful offers and conduct to proliferate.[516] In addition, eliminating Craigslist's adult services listing is less effective because it is harder for law enforcement to identify and target criminal conduct on other websites and pursue offenders without Craigslist's help.[517]

It would have been less restrictive and more effective for the attorneys general to continue working with Craigslist to improve the website's safety precautions and monitoring rather than removing the website's adult services section completely and having the prostitution ads posted on other websites.[518] As a result, the attorney general would be able to better track and prosecute pimps and prostitutes, and find child forced into trafficking.[519] Instead, removing Craigslist's adult services section has made it harder on law enforcement.[520] Also, as indicated in *Ashcroft II*, instead of one website not being able to host third-party ads while other websites may, it is preferable to utilize software filters to screen for illegal ads.[521]

Second under *Central Hudson*'s fourth prong, the forced shut down of Craigslist's adult services section was more extensive than necessary because the state attorneys general did not carefully calculate how their actions would burden Craigslist's and its users' First Amendment rights.[522] The attorneys general's threats stemmed from public and political pressure, due to well publicized criminal misuses of Craigslist, which indicates that the attorneys general's reacted haphazardly instead of weighing the pros and cons of restricting

---

[514] *Cent. Hudson*, 447 U.S. at 570-71.

[515] Advanced Interactive Media Group, *supra* note 78, at 2; Townsend, *supra* note 81; Yin, *supra* note 89.

[516] *Boyd Testimony*, *supra* note 68, at 2; Advanced Interactive Media Group, *supra* note 78, at 2; Townsend, *supra* note 81.

[517] *Boyd Testimony*, *supra* note 68, at 2; Turnham & Lyon, *supra* note 39; Lambert, *supra* note 21.

[518] *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 505 (1996).

[519] *See Boyd Testimony*, *supra* note 68, at 2; *McDougall Testimony*, *supra* note 46, at 3-5; *Powell Testimony*, *supra* note 40, at 2-4; Turnham & Lyon, *supra* note 39; Lambert, *supra* note 21.

[520] *See Boyd Testimony*, *supra* note 68, at 2; *McDougall Testimony*, *supra* note 46, at 2; *Powell Testimony*, *supra* note 40, at 4; Turnham & Lyon, *supra* note 39; Lambert, *supra* note 21.

[521] Ashcroft v. ACLU (*Ashcroft II*), 542 U.S. 656, 666-67 (2004).

[522] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 561 (2001); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 (1993).

speech.[523] Also the fact that Craigslist was the only website initially targeted when other websites hosted similar ads demonstrates that the attorneys general did not carefully calculate their speech restriction, and thus enforced the law in an unconstitutionally arbitrary manner.[524] Since the attorneys general's forced shutdown of Craigslist's adult services listing was more extensive than necessary, the attorneys general's threatened prosecution fails *Central Hudson*'s fourth prong and violated Craigslist's First Amendment rights.[525] Because the attorneys general's actions did not satisfy *Central Hudson*'s third and fourth prongs, it is irrelevant to what degree Craigslist's or its users' free speech rights have been burdened since there is no *de minimis* exception under the test.[526]

VII. CONCLUSION

The attorneys general's threatened criminal prosecution and forced shutdown of Craigslist's adult services section violated the website's First Amendment rights either under a strict scrutiny analysis for a content-based speech restriction, or under the *Central Hudson* commercial speech test. The analysis of Craigslist's constitutional rights is valuable not only for the website itself, but because Craigslist's ordeal may influence the future of Internet regulation and how state actions may comport with First Amendment policies while discovering the best ways to protect the public from the obvious dangers the Internet creates. Craigslist's adult services posts may be offensive and distasteful, but the First Amendment still protects the speech. Thus, the attorneys general's actions creates an impermissible precedent for regulating Internet speech. The manner in which the government may constitutionally restrict third-party content online needs to be addressed before the government violates the First Amendment again.

---

[523] Chris Sorensen, *When Sex Doesn't Sell*, MACLEANS (Feb. 7, 2011, 12:43 PM), http://www2.macleans.ca/2011/02/07/when-sex-doesnt-sell/.

[524] Greater New Orleans Broad. Ass'n. v. United States, 527 U.S. 173, 193-94 (1999); Carr, *supra* note 87; Fleischer, *supra* note 1.

[525] *Id.*; 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 507 (1996); Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

[526] *Lorillard*, 533 U.S. at 567.