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SHOULD SHIELDING CHILDREN FROM INTERNET PORNOGRAPHY AND PROTECTING FREE SPEECH BE MUTUALLY EXCLUSIVE? *ASHCROFT V. AMERICAN CIVIL LIBERTIES UNION*

Adam Gates[1]

I. INTRODUCTION

If you were to enter the search query: "How do you protect children from Internet pornography while also protecting free speech?" into the United States Supreme Court's database of legal knowledge, you might expect a search return riddled with ingenious and creative ideas for upholding free speech while also screening children from sexually explicit material. Unfortunately, the likely return you would receive is: "An answer to your query could not be found."

In *Ashcroft v. American Civil Liberties Union*,[2] the United States Supreme Court affirmed a preliminary injunction against enforcement of the Child Online Protection Act (COPA), a congressional attempt to protect minors from exposure to potentially harmful sexually explicit material on the Internet. In affirming the injunction, a five-Justice majority held that COPA was not the least restrictive alternative to further the compelling interest that the legislation sought to achieve. Therefore, the district court did not abuse its discretion in issuing the preliminary injunction because COPA was likely to burden protected speech.

This Note will discuss the Court's struggle to balance the freedom of speech with protecting society, particularly children, from obscene material, and how the Court has grappled with the difficult issue of determining what speech warrants protection and what speech warrants regulation. In addition, this Note addresses the Court's attempt to uphold and apply the timeless values and rights guaranteed by the Constitution to the various media produced by the recent technological revolution. Finally, this Note debates the constitutional validity of COPA, discusses Congress's reliance on prior precedent in drafting it, and ultimately asks whether the majority proceeded appropriately.

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1. Adam Gates graduated magna cum laude from Mississippi College School of Law in 2006. He gratefully acknowledges Professor Mathew Steffey's guidance and encouragement during the drafting of this Note. The author additionally would like to thank his wife Melanie for the many months of understanding and support during the development of this Note.
2. Ashcroft v. ACLU, 542 U.S. 656 (2004).

II. FACTS

In an attempt to protect children from pornography and other sexually explicit material on the Internet, Congress enacted the Child Online Protection Act (COPA) in 2003, effectively criminalizing the posting of obscene material that is harmful to minors.[3] COPA was Congress's second attempt to protect children from Internet pornography after the Communications Decency Act of 1996,[4] Congress's initial endeavor, was declared unconstitutional by the Supreme Court in *Reno v. ACLU*.[5] On October 22, 1998, the American Civil Liberties Union (ACLU) and other entities concerned with protecting free speech filed suit in the United States District Court for the Eastern District of Pennsylvania challenging the constitutionality of COPA under the First and Fifth Amendments and seeking injunctive relief from its enforcement.[6] The Pennsylvania district court heard evidence and argument on the plaintiff's motion for a temporary restraining order, and the court subsequently entered such an order on November 20, 1998.[7] Arguments and testimony were taken from both parties through late January of 1999, during which time briefs, expert reports, and declarations from a multitude of the named plaintiffs were also submitted.[8] In addition to the defendant's arguments in opposition to the preliminary injunction, the defendant filed a Federal Rule of Civil Procedure 12(b)(1) motion to dismiss the action based on the plaintiff's lack of standing.[9] The court deferred ruling on the defendant's motion until February 1, 1999, when it granted the preliminary injunction.[10]

In advocating for the preliminary injunction, the plaintiffs claimed that COPA burdened constitutionally protected speech, impinged the First Amendment rights of minors, and was unconstitutionally vague under the First and Fifth Amendments.[11] Further, the plaintiffs asserted that the affirmative defenses provided by COPA did not relieve the burden on protected speech, but rather imposed economic and technological burdens on Internet providers exhibiting no content harmful to minors.[12] Alternatively, the plaintiffs claimed that COPA would chill the free exchange of ideas on the Internet because the overbroad statute "covers more speech than it was intended to cover, even if it can be constitutionally applied to a

3. 47 U.S.C. § 231 (2003).

4. 47 U.S.C. § 223 (1994 ed., Supp. II).

5. Reno v. ACLU, 521 U.S. 844, 849 (1997).

6. ACLU v. Reno, 31 F. Supp. 2d 473, 476 (E.D. Pa. 1999).

7. *Id.* at 477. The defendants agreed to an extension of the temporary restraining order through Feb. 1, 1999, and the parties engaged in accelerated discovery thereafter. Due to the limited time, the court decided that it would not consolidate the trial on the merits and the injunction hearing, and proceeded only on the motion for preliminary injunction. *Id.*

8. *Id.*

9. *Id.* "The plaintiffs filed a response to the motion to dismiss to which the defendants filed a reply." *Id.*

10. *Id.* at 498.

11. *Id.* at 478–79.

12. *Id.* at 479.

narrow class of speakers."[13] Essentially, the plaintiffs argued that the defendant could not justify the burden imposed on free speech by showing that COPA was narrowly tailored to satisfy a compelling government interest or was the least restrictive means to accomplish the government's goals.[14]

In rebuttal, the government argued that COPA did not restrict adults from gaining access to material that is harmful to minors or inhibit the ability of Internet providers to provide adults with such speech.[15] The government argued that COPA's affirmative defenses provided a feasible mechanism for websites containing potentially harmful materials to restrict minors' access.[16] Moreover, the government maintained that COPA was not directed at the content on the plaintiffs' sites, but targeted commercial providers of pornography whose business revolved around exporting materials harmful to minors, and therefore was not unconstitutionally overbroad.[17] Additionally, the government asserted that the plaintiffs could not succeed on their motion for a preliminary injunction since their claim of irreparable harm was speculative, and because the plaintiffs had failed to show a likelihood of success on their assorted claims.[18]

After hearing testimony from witnesses for the government and the multitude of parties seeking the injunction, the district court granted the request for the preliminary injunction.[19] In issuing the injunction, the district court noted that enforcement of COPA would place a burden on some protected speech, and further concluded that the "respondents were likely to prevail on their argument that there were less restrictive alternatives to the statute . . . ."[20] The district court postulated that the government could not satisfy the burden of proving that COPA constituted the least restrictive means available to achieve the purported goal of restricting minors' access to potentially harmful material.[21]

The government appealed the district court's grant of a preliminary injunction to the United States Court of Appeals for the Third Circuit, which affirmed the injunction.[22] However, the court of appeals upheld the injunction on different grounds, concluding that a portion of COPA's § 231(e)(6) definition of "[m]aterial that is harmful to minors" was unconstitutionally overbroad.[23] The Third Circuit held that the "contemporary

13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 498–99.
20. Ashcroft v. ACLU, 542 U.S. 656, 663 (2004) (citing *Reno*, 31 F. Supp. 2d at 497–99).
21. *Reno*, 31 F. Supp. 2d at 497.
22. *Id.* at 498–99.
23. ACLU v. Reno, 217 F.3d 162, 166 (3d Cir. 2000) (construing 47 U.S.C. § 231(e)(6)(A)).

community standards" language of § 231(e)(6) rendered COPA unconstitutional.[24] The United States Supreme Court granted certiorari on the narrow issue of whether the community standards language, standing alone, caused COPA to be unconstitutional.[25] The Court reversed the Third Circuit's holding, emphasizing that the decision was limited to the specific issue of the constitutionality of the community standards language, and remanded the case back to the Third Circuit for continued review of the district court's grant of the preliminary injunction.[26]

After reviewing the case on remand, the Third Circuit, learning from its past miscalculation, affirmed the injunction and followed the district court's reasoning.[27] The Third Circuit held "that the statute was not narrowly tailored to serve a compelling Government interest, was overbroad, and was not the least restrictive means available for the Government to serve the interest of preventing minors from using the Internet to gain access to materials that are harmful to them."[28] Once again, the United States Government sought certiorari, and the Supreme Court granted the government's request to review the district court's grant of the preliminary injunction.[29]

The Supreme Court, considering the constitutionality of COPA a second time, framed the issue as "whether the Court of Appeals was correct to affirm a ruling by the District Court that enforcement of COPA should be enjoined because the statute likely violate[d] the First Amendment."[30] Since COPA imposed content-based restrictions on speech, the Court was forced to presume that the restrictions were invalid in order to protect the constitutionally mandated right to free speech.[31] Therefore, the burden of establishing COPA's constitutionality fell directly on the shoulders of the government.[32] After an examination of the record, the Court concluded that the government failed to carry its burden of proving that COPA's restrictions were the least restrictive means to accomplish the compelling governmental interest of protecting children from Internet pornography.[33] Justice Kennedy, writing for a five-Justice majority, affirmed the decision of the court of appeals upholding the preliminary injunction and remanded the case to the district court for a trial on the relevant issues.[34]

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24. *Id.* "[T]he average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest." 47 U.S.C. § 231 (e)(6)(A).

25. Ashcroft v. ACLU, 535 U.S. 564, 573 (2002) (*Ashcroft I*).

26. *Id.* at 585–86.

27. ACLU v. Ashcroft, 322 F.3d 240, 243 (3d Cir. 2003).

28. Ashcroft v. ACLU, 542 U.S. at 664 (citing *Ashcroft*, 322 F.3d at 243).

29. *Id.* at 660, *cert. granted*, 540 U.S. 944 (2003).

30. *Id.*

31. *Id. See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

32. *Ashcroft*, 542 U.S. at 660.

33. *Id.*

34. *Id.* at 661.

III. Background and History of the Law

Throughout history, Americans, and therefore the Supreme Court, have struggled with a conflict inherent in the exercise of all guaranteed freedoms: striking the proper balance between the free exercise of certain liberties and regulating the potential abuse of those enumerated freedoms. One such sacred freedom, that of speech, specifically enumerated by the First Amendment to the United States Constitution, has presented the Court with challenging areas of constitutional interpretation, including the regulation of obscene and indecent materials.

A. The Court's Early Struggles with Obscenity and the First Amendment

Surprisingly, not until 1957 was the Court presented with the dispositive question of whether obscenity is protected by the First Amendment's rights of free speech and freedom of the press. In *Roth v. United States*, the Court stated that "[a]lthough this is the first time the question has been squarely presented to this Court, either under the First Amendment or under the Fourteenth Amendment, expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press."[35]

In *Roth*, the petitioner was convicted of mailing obscene matter under a federal obscenity statute, and challenged the conviction on the grounds that the statute violated his First Amendment rights.[36] The Court confronted the obscenity issue by first considering the historical context of obscenity surrounding the drafting of the First Amendment.[37] The Court cited the presence of libel and obscenity laws during the time of drafting as an indicator of an intent to exclude obscenity from the protective umbrella of the First Amendment.[38] "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guarantees, unless excludable because they encroach upon the limited area of more important interest."[39] The Court found implicit in the First Amendment's history the rejection of obscenity as having any redeeming social value, and therefore having no protection from regulation as exhibited by the twenty obscenity laws enacted by Congress from 1842 to 1956.[40]

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35. Roth v. United States, 354 U.S. 476, 481 (1957).

36. *Id.* at 479–81.

37. *Id.* at 481–83.

38. *Id.* at 483.

39. *Id.* at 484. *See, e.g.,* United States v. Harris, 347 U.S. 612 (1954); Int. Bhd. of Teamsters v. Hanke, 339 U.S. 470 (1950); Kovacs v. Cooper, 336 U.S. 77 (1949); Prince v. Massachusetts, 321 U.S. 158 (1944).

40. *Roth*, 354 U.S. at 485 (citing 5 Stat. 548, 566; 11 Stat. 168; 13 Stat. 504, 507; 17 Stat. 302; 17 Stat. 598; 19 Stat. 90; 25 Stat. 187, 188; 25 Stat. 496; 26 Stat. 567, 614–15; 29 Stat. 512; 33 Stat. 705; 35 Stat. 1129, 1138; 41 Stat. 1060; 46 Stat. 688; 48 Stat. 1091, 1100; 62 Stat. 768; 64 Stat. 194; 64 Stat. 451; 69 Stat. 183; 18 U.S.C.A. §§ 1461–65; 39 U.S.C.A. § 259(a) & (b)); *see also* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

Thus, the Court upheld the statute as constitutional, declaring that obscenity is not protected under the area of constitutionally protected speech or press.[41]

Roth not only established that obscene material was not protected by the First Amendment, but also endorsed the community standards test as a constitutionally robust method for distinguishing obscene materials from those possessing social value.[42] The Court phrased the test as follows: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[43] Although the plaintiff claimed that this standard was not precise enough to impose criminal penalties, the Court disagreed, declaring "[t]hat there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense."[44]

Another federal obscenity statute challenge reached the Court in 1966. In *Ginzburg v. United States*, the Court granted certiorari to determine whether a district court conviction based on obscene advertising should be reversed.[45] Unlike *Roth*, the conviction in *Ginzburg* was not merely based on the obscenity of the materials themselves, but on the obscene manner of advertising, or pandering,[46] employed by the petitioner.[47] The Court agreed with the government that while materials alone may not be obscene, the setting in which they are presented is an aid in determining the question of obscenity.[48] Although one of the publications found to be obscene was a handbook that had previously been sold exclusively to physicians and had not been considered obscene in a medical context, the Court adjudged the mailing of advertising to the public centered on the erotic aspects of the book as obscene.[49] The Court explained this distinction, maintaining that while the book may have worth in the hands of medical experts, the petitioners "did not sell the book to such a limited audience, or focus their claims for it on its supposed therapeutic or educational value; rather, they deliberately emphasized the sexually provocative aspects of the work, in order to catch the salaciously disposed."[50] Therefore, the Court held that

41. *Roth*, 354 U.S. at 485.

42. *Id.* at 489.

43. *Id.* The validity of the community standards test has been challenged throughout the years, as recently as 2002. *See* Ashcroft v. ACLU, 535 U.S. 564 (2002).

44. *Roth*, 354 U.S. at 491–92 (citations omitted).

45. Ginzburg v. United States, 383 U.S. 463, 464–65 (1966).

46. "[p]andering—'the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers.'" *Id.* at 467 (quoting *Roth*, 354 U.S. at 495–96 (Warren, C.J., concurring)).

47. *Ginzburg*, 383 U.S at 465.

48. *Id.* at 465–66.

49. *Id.* at 471.

50. *Id.* at 472.

although a publication might not be obscene in one context, the same publication might be obscene if produced, sold, and publicized to a different audience.[51]

Another notable milestone in the Supreme Court's line of cases involving obscenity came in 1968 with the case of *Ginsberg v. New York*.[52] In *Ginsberg*, the Court considered whether a New York criminal obscenity statute prohibiting the sale of material obscene to minors, but not necessarily obscene to adults, was unconstitutional on its face.[53] The appellant was convicted under the statute of knowingly selling two "girlie" magazines to a sixteen-year-old boy, and challenged the law on the basis that the State of New York could not deny minors under seventeen years of age access to materials that were not obscene for persons over seventeen.[54] The Court first established that "[o]bscenity is not within the area of protected speech or press," but reasoned that the issue presented did not warrant the traditional *Roth* obscenity analysis. Rather, the pertinent issue was New York's ability to define obscenity on the basis of its appeal to minors.[55]

The Court concluded that the state had the power to apply different standards to minors and adults, recognizing that in past cases, "even where there is an invasion of protected freedoms[,] 'the power of the state to control the conduct of the children reaches beyond the scope of its authority over adults.'"[56] The Court also recognized New York's independent interest in protecting children from potentially harmful materials and "'safeguard[ing] [them] from abuses' which might prevent their 'growth into free and independent well-developed men and citizens.'"[57] Referencing a law review article on the concept of variable obscenity,[58] which had proven useful in a similar determination by the New York Court of Appeals,[59] the Court harkened back to *Ginzburg*-like reasoning, stating that the concept of obscenity "may vary according to the group to whom the questionable material is directed or from whom it is quarantined."[60] Ultimately, the Court held that the statute did not invade freedoms of expression constitutionally secured to minors and that the New York legislature could rationally conclude that a minor's exposure to such material might be harmful. It also affirmed the state's interest in protecting minors from distribution of objectionable materials even if recognized to be suitable for adults.[61]

51. *Id.* at 475–76.

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

53. *Id.* at 631.

54. *Id.* at 636. The Court conceded that "[t]he 'girlie' picture magazines involved in the sales here are not obscene for adults." *Id.* at 635 (citing Redrup v. New York, 386 U.S. 767 (1967)).

55. *Id.* at 635.

56. *Id.* at 638 (quoting Prince v. Massachusetts, 321 U.S. 158 (1944)).

57. *Id.* at 640–41 (quoting *Prince*, 321 U.S. at 165).

58. William Lockhart & Robert McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960).

59. People v. Tannenbaum, 220 N.E.2d 783 (N.Y. 1966).

60. *Ginsberg*, 390 U.S. at 636.

61. *Id.* at 641–45.

Another landmark case in the Court's struggle with "the intractable obscenity problem"[62] was *Miller v. California*,[63] wherein the Court attempted to tidy its stance on the proper analysis for determining obscenity. As in many of the early obscenity cases, the appellant in *Miller* conducted a mass-mailing campaign to advertise the sale of adult material, which led to his conviction of a misdemeanor under the California Penal Code.[64] Chief Justice Burger, writing for the Court, reiterated that "[s]tates have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles."[65] After a synopsis of *Roth* and *Memoirs v. Massachusetts*,[66] the Court began qualifying its holding before even prescribing the new test.[67] "State statutes designed to regulate obscene materials must be carefully limited,"[68] and "[a]s a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct."[69] However, the Burger Court then, rather uncharacteristically, clearly dictated the three-part test for determining obscenity that was later employed by the Rehnquist Court:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[70]

In an attempt to quiet the concerns of the dissenting Justices, the Chief Justice maintained that "[u]nder the holdings announced today, no one will

62. Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704 (1968) (Harlan, J., concurring and dissenting).

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

64. *Id.* at 16–18. Brochures advertising four books entitled *Intercourse, Man-Woman, Sex Orgies Illustrated*, and *An Illustrated History of Pornography* were received by a restaurant. The envelope was opened by the restaurant manager and his mother, together, neither of whom had requested the brochures. *Id.* at 18.

65. *Id.* at 18–19.

66. Memoirs v. Massachusetts, 383 U.S. 413 (1966). The *Memoirs* test for discerning obscenity required the prosecution to affirmatively establish that the material being proscribed was utterly without redeeming social value, a virtually impossible task. *Memoirs* was decided in 1966. By the time *Miller v. California* reached the Court, however, the author of the *Memoirs* test, Justice Brennan, as well as all the other members of the Court had abandoned the test as unworkable. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73 (1973) (Brennan, J., dissenting).

67. *Miller*, 413 U.S. at 23–24.

68. *Id.* (*See* Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 682–85 (1968).

69. *Id.* at 24.

70. *Id.* (citing Kois v. Wisconsin, 408 U.S. 229, 230 (1972) (quoting Roth v. United States, 354 U.S. 476, 489 (1957))).

be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law . . . ."[71] The majority thought that the specific prerequisites in its opinion provided fair notice to persons engaged in businesses that may invite prosecution under federal or state laws.[72]

Concluding, Chief Justice Burger concisely summarized the majority's holding:

> we (a) reaffirm the *Roth* holding that obscene material is not protected by the First Amendment; (b) hold that such material can be regulated by the States, subject to the specific standards enunciated above . . . and (c) hold that obscenity is to be determined by applying "contemporary community standards," . . . not national standards.[73]

B. *Modern Obscenity Decisions Involving Various Media*

As the twentieth century progressed, new forms of technology developed, allowing messages, images, and videos to be transmitted with greater ease and speed throughout the United States and the world. This technological revolution was not lost on those wishing to profit from selling pornography, and it was merely a matter of time and circumstance until the highest court in the land was confronted with the "intractable obscenity problem" in media other than the mailbox.

1. Telephones

In *Sable Communications v. FCC*,[74] the Supreme Court was confronted with a constitutional challenge to the Communications Act of 1934,[75] as amended by Congress in 1988 to ban indecent as well as obscene interstate commercial telephone messages, also known as "dial-a-porn."[76] After witnessing repeated bouts between the FCC and dial-a-porn providers in various administrative and judicial fora over FCC regulations designed to protect minors,[77] Congress amended the Communications Act "to prohibit indecent as well as obscene interstate commercial telephone communications directed to any person regardless of age."[78]

The Court framed its discussion by stating that "[s]exual expression which is indecent but not obscene is protected by the First Amendment; . . .

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71. *Id.* at 27.
72. *Id.*
73. *Id.* at 36–37.
74. Sable Commc'ns v. FCC, 492 U.S. 115 (1989).
75. 47 U.S.C. § 223(b) (1982 ed., Supp.V.).
76. *Sable*, 492 U.S. 115.
77. *See* Carlin Commc'ns, Inc. v. FCC, 837 F.2d 546 (2d Cir. 1988) (Carlin III); Carlin Commc'ns, Inc. v. FCC, 787 F.2d 846 (2d Cir. 1986) (Carlin II); Carlin Commc'ns, Inc. v. FCC, 749 F.2d 113 (2d Cir. 1984) (Carlin I).
78. *Sable*, 492 U.S. at 122.

[t]he Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."[79] The government argued that a total ban on dial-a-porn was justified because nothing less could restrict minors from gaining access to the potentially harmful messages.[80] Although the Court recognized that protecting the psychological and physical well being of children was certainly a compelling interest,[81] it held that a total ban was constitutionally overreaching.[82] The Court was persuaded that the FCC's approach to restricting minors' access to dial-a-porn—by requiring credit cards and access codes, by imposing scrambling rules on providers—was a satisfactory solution.[83] Therefore, the Court held that the newly amended Communications Act's ban on dial-a-porn was not narrowly tailored to serve a compelling interest and was "another case of 'burning the house to roast the pig.'"[84]

2. City Ordinances

In *Renton v. Playtime Theaters, Inc.*, the Court considered the validity of a municipal ordinance that prohibited adult movie theaters from locating within 1000 feet of any residential zone, park, church, or school.[85] The appellant claimed that the City of Renton's ordinance violated the First and Fourteenth Amendments since the city had improperly relied on the experiences of other cities in creating the ordinance and had not established the existence of a substantial government interest.[86] The Court, in reversing the Ninth Circuit's favorable judgment for the adult theaters, concluded that the ordinance's restrictions were content neutral since they did not ban adult theaters, but merely imposed time, place, and manner restrictions on such expression in order to combat the negative secondary effects of the theaters.[87] The Court's holding effectively established that the First Amendment is not infringed if a city can control the negative social effects of adult-related businesses by exercising its zoning power while not materially interfering with the quantity and accessibility of adult-related expression.[88]

Approximately fifteen years later, in *City of Los Angeles v. Alameda Books, Inc.*, the Court was forced "to clarify the standard for determining

79. *Id.* at 126.

80. *Id.* at 129.

81. *Id.* at 126.

82. *Id.* at 131.

83. *Id.* at 130.

84. *Id.* at 131 (quoting Butler v. Michigan, 352 U.S. 380, 383 (1957)).

85. Renton v. Playtime Theaters, Inc., 475 U.S. 41, 43 (1986).

86. *Id.* at 43–46.

87. *Id.* at 46–49. *Cf.* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (striking down a St. Paul Bias-Motivated Crime Ordinance as not content neutral because it prohibited speech solely on the basis of the subjects addressed by the speech).

88. *Renton*, 475 U.S. at 54–55.

whether an ordinance serves a substantial government interest under *Renton*."[89] The *Alameda* Court summarized the *Renton* analysis as three steps: first, an ordinance cannot ban adult theaters altogether, but only from within certain distances from churches, schools, and other "sensitive" locations; second, the ordinance must be content neutral to escape strict scrutiny; and third, the city must show that its ordinance was enacted to accomplish a substantial government interest and that reasonable alternative avenues of communication remained available.[90] Further clarifying its holding, the Court stated, "[i]n *Renton*, the Court distinguished the inquiry into whether a municipal ordinance is content neutral from the inquiry into whether it is 'designed to serve a substantial government interest and do[es] not unreasonably limit alternative avenues of communication.'"[91] The latter inquiry simply asks whether a municipality can demonstrate a connection between the ordinance's regulated speech and the secondary effects that spurred the adoption of the ordinance.[92]

The dispute in *Alameda* centered around an ordinance prohibiting more than one adult establishment from doing business in the same building, and prohibiting such enterprises within 1000 feet of each other or within 500 feet of a religious institution, school, or public park.[93] The City of Los Angeles based this ordinance on a 1977 study linking high concentrations of adult businesses with higher rates of crime than surrounding communities, concluding that such an ordinance would effectively curb criminal activity.[94] Although the Ninth Circuit Court of Appeals did not agree with the city's assertion,[95] the Supreme Court did, holding that the city could reasonably rely on the study in enacting the ordinance, and that reducing crime was a substantial government interest.[96] The Court relied on its prior holding, stating that "[i]n *Renton*, we specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech."[97] The Court concluded that at that early stage of litigation,[98] the City of Los Angeles, by relying on the 1977 study, had complied with its evidentiary burden of demonstrating a reasonably relevant connection between the adult businesses and an increased crime rate.[99]

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89. City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 433 (2002).

90. *Id.* at 434.

91. *Id.* at 440.

92. *Id.* at 441. "[A] municipality may rely on any evidence 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." *Id.* at 438 (citing *Renton*, 475 U.S at 51-52).

93. *Id.* at 429-30.

94. *Id.* at 430.

95. Alameda Books, Inc. v. City of Los Angeles, 222 F.3d 719, 728 (9th Cir. 2000).

96. *Alameda*, 535 U.S. at 435-36.

97. *Id.* at 438.

98. The case arrived at the Court on a motion for summary judgment by the adult theaters claiming only that the 1977 study failed to prove the city's justification for its ordinance. *Id.* at 439.

99. *Id.* at 438-443.

3. Cable Television

In the late 1980s, the majority of Americans began to enjoy the variety provided by cable television, collectively breaking free from the antenna-provided "Big Three"[100] and experiencing many new channels devoted to a vast array of interests. Cable television provided a plethora of viewing options to an already couch-potato public, while also allowing many new parties an avenue directly into America's living rooms. Due to the revolutionary nature of this technology, regulation was inevitable.

One of these regulations, the Cable Television Consumer Protection and Competition Act of 1992 (The Act),[101] was challenged in *Denver Area Educational Telecommunications Consortium v. FCC.*[102] The petitioners, cable television access programmers and cable viewers, appealed from a judgment by the D.C. Circuit upholding the constitutionality of The Act's provisions regulating the "broadcasting of 'patently offensive' sex-related material on cable television."[103] Three provisions were challenged by the petitioners: one, § 10(a), permitted cable programmers to prohibit the broadcast of self-defined sexually explicit material on "leased access channels;"[104] the second, § 10(b), required leased channel operators to block the designated programming; and the third section, § 10(c), applied to the regulation of "public, educational, or governmental channels."[105]

In its analysis of the three provisions, the Court struck down sections 10(b) and 10(c) as unconstitutional, concluding that the restrictions were not sufficiently narrowly tailored to accomplish the compelling governmental interest of protecting children from sexually graphic material.[106] However, the Court upheld section 10(a) of The Act, noting a child's easy access to cable broadcasting and reasoning that the section addressed "an extraordinarily important problem . . . the need to protect children from exposure to patently offensive sex-related material."[107] Further, section 10(a)'s permissive nature, along with "its viewpoint-neutral application, [was] a constitutionally permissible way to protect children from the type of sexual material that concerned Congress," while also accommodating each party's First Amendment rights.[108]

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100. ABC, NBC, and CBS.

101. 106 Stat. 1486, § 10(a), (b), & (c); 47 U.S.C. § 532(h) & (j), and note following § 531.

102. Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727 (1996).

103. *Id.* at 732.

104. "A 'leased channel' is a channel that federal law requires a cable system operator to reserve for commercial lease by unaffiliated third parties. About 10 to 15 percent of a cable system's channels would typically fall into this category." *Id.* at 734.

105. " '[P]ublic, educational, or governmental channels' . . . are channels that, over the years, local governments have required cable system operators to set aside for public, educational, or governmental purposes as part of the consideration an operator gives in return for permission to install cables under city streets and to use public rights-of-way." *Id.*

106. *Id.* at 753–66.

107. *Id.* at 743. *See* Sable Commc'ns v. FCC, 492 U.S. 115, 126 (1989).

108. *Denver*, 518 U.S. at 747.

4. Virtual Pornography

In a 2002 case, *Ashcroft v. Free Speech Coalition*,[109] the Court considered the constitutionality of a statute sharing with COPA the goal of protecting children. In *Free Speech Coalition*, a trade association of adult businesses attacked provisions of the Child Pornography Prevention Act of 1996 (CPPA),[110] which banned sexually explicit images that appeared to depict minors, either through use of youthful-looking adults or computer imaging, but that were not produced using actual minors, a practice also referred to as virtual pornography.[111] The Attorney General argued that the prohibition of virtual child pornography was necessary to discourage pedophilic activity and also to strip actual pedophiles of the defense of virtual imaging.[112] The Court held that the ban on virtual pornography was unconstitutionally overbroad since the proscribed expression was neither actual child pornography nor obscene, and was, therefore, entitled to protection under current precedent.[113] Explaining the majority's holding, Justice Kennedy wrote, "[t]he overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process."[114]

A comparison could also be drawn between COPA's affirmative defense provisions and CPPA section 2252A(c), which allowed a "defendant to avoid conviction for nonpossession offenses by showing that the materials were produced using only adults and were not otherwise distributed in a manner conveying the impression that they depicted real children."[115] Through this provision, the government intended to shift the burden to the accused to prove the speech in question was not in violation of CPPA after prosecution had already begun.[116] The Court found, however, that this provision raised serious constitutional concerns due to its narrow scope of protection, effectively leaving "unprotected a substantial amount of speech not tied to the Government's interest in distinguishing images produced using real children from virtual ones."[117] Exercising judicial restraint, the Court declined to decide whether the government could impose the affirmative defense burden on a speaker, adding that this particular "defense is incomplete and insufficient, even on its own terms," and, hence, the provision could not save the statute.[118]

109. Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002).
110. 18 U.S.C. § 2251 *et seq.*
111. *Free Speech Coal.*, 535 U.S. at 239–41.
112. *Id.* at 241–42.
113. *Id.* at 252–58.
114. *Id.* at 255.
115. *Id.*
116. *Id.*
117. *Id.* at 256.
118. *Id.*

C. Struggling with the Entrance of an Unknown Entity: The World Wide Web

Today, the Internet pervades American society. It has experienced phenomenal growth and plays a crucial role in millions of lives on a daily basis; thus, it is easy to forget that this behemoth was no more than a whispered rumor in tech-savvy circles less than twenty years ago. Even in 1996, when the Court heard *Reno v. ACLU*,[119] a challenge to the constitutionality of the Communications Decency Act of 1997 (CDA),[120] Justice Stevens felt obligated to dedicate three pages of the majority opinion to a general overview of the Internet. He included a general introduction to the World Wide Web and also acquainted the reader with some Internet jargon, including terms such as "links," "mouse," "surfer" and "e-mail," with each defined and printed in quotation marks.[121] While these terms are now in the vocabulary of the average seven-year-old, Justice Stevens felt the need in 1997, only nine short years ago, to introduce these terms to the presumably educated readers of Supreme Court opinions. This demonstrates the unprecedented growth of the Internet and the inherent difficulty of regulating and defining an exploding, evolving, and abstract entity.

In *Reno*, the Court addressed a challenge by numerous plaintiffs (including the ACLU) to sections 223(a) and 223(d) of the CDA, with which the government sought to protect minors from sexually explicit materials on the Internet.[122] The government appealed from a preliminary injunction issued by a three-judge panel sitting for the District Court for the Eastern District of Pennsylvania. The panel had held that the provisions were too sweeping and were likely to chill the expression of adults. It also found the definition of "obscene" to be unconstitutionally vague.[123]

The majority opinion affirmed the lower court's ruling. The Court found that specific portions of the CDA were unconstitutional; they lacked important features of previously upheld statutes, such as parental consent, a concrete definition of "indecent," a limitation of application to only commercial transactions, no punitive provisions, and content-neutrality.[124]

Justice Stevens, writing for a seven-Justice majority, first reviewed the principal authorities relied upon by the government—*Ginsberg v. New York*, *FCC v. Pacifica Foundation*, and *Renton v. Playtime Theaters, Inc.*[125] The majority reasoned that the CDA differed from the New York state statute upheld in *Ginsberg* in four respects: first, the New York statute did not bar parents from purchasing regulated magazines for their children if they wished; second, the New York statute applied to commercial transactions only; third, the New York statute required proscribed material to be

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

120. 47 U.S.C. § 223 (2000).

121. *Reno*, 521 U.S. at 850–53.

122. *Id.* at 861–62.

123. *Id.* at 862–63.

124. *Id.* at 865–85.

125. Ginsberg v. New York, 390 U.S. 629 (1968); FCC v. Pacifica Found., 438 U.S. 726 (1978); Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986).

"utterly without redeeming social importance for minors," while the CDA had no such requirement; and finally, the New York statute described a minor to be any person under seventeen, while the CDA classified minors as persons under eighteen years of age.[126] Furthermore, the order issued by the FCC in *Pacifica* was a limitation on when an indecent radio broadcast could be made as opposed to whether it could be broadcast. The Court also made a distinction between the different media, reasoning that a radio listener could not be adequately protected from unexpected programming, while the risk of encountering indecent material through the Internet "by accident is remote because a series of affirmative steps is required to access specific material."[127] The Court also distinguished the government's argument from its holding in *Renton*, stating that "the CDA is a content-based blanket restriction on speech," while the zoning ordinance in *Renton* was aimed at combating the secondary effects of adult expression and not the expression itself.[128] The Court declared, "[t]hese precedents, then, surely do not require us to uphold the CDA and are fully consistent with the application of the most stringent review of its provisions."[129]

The government also argued that since the CDA's "patently offensive" standard is one prong of the obscenity test in *Miller v. California*,[130] it could not be unconstitutionally vague.[131] The Court disagreed, holding that the *Miller* definition of "patently offensive" was much narrower, and that the remaining two prongs of the test not included in the CDA were essential to the obscenity analysis.[132] The Court went on to reiterate its holding in *Sable Communications v. FCC*,[133] stating that "we have made it perfectly clear that '[s]exual expression which is indecent but not obscene is protected by the First Amendment.'"[134] Therefore, the CDA failed to satisfy the strict scrutiny applied to content-based statutes by not being narrowly tailored or the least restrictive method to accomplish the government's concededly compelling interest.

Justice O'Connor, joined by the Chief Justice, wrote a concurring opinion reasoning that the CDA was merely "an attempt by Congress to create 'adult zones' on the Internet."[135] She recognized the government's right to create these adult zones, stating, "[s]tates have long denied minors access to certain establishments frequented by adults. . . . The Court has previously sustained such zoning laws . . . ."[136] Justice O'Connor acknowledged that a "zoning" law is valid only if adults are still able to obtain the

126. *Reno*, 521 U.S. at 865–66.
127. *Id.* at 867.
128. *Id.* at 867–68.
129. *Id.* at 868.
130. Miller v. California, 413 U.S. 15 (1973) (see discussion *supra* text accompanying notes 62–73).
131. *Reno*, 521 U.S. at 873.
132. *Id.*
133. Sable Commc'ns v. FCC, 492 U.S. 115 (1989).
134. *Reno*, 521 U.S. at 874 (quoting *Sable*, 492 U.S. at 126).
135. *Id.* at 886.
136. *Id.* at 887–88.

regulated speech.[137] Therefore, according to O'Connor, the CDA was invalid since it restricted adult access to protected materials in some circumstances. However, the statute was unconstitutional only in that sense.[138]

In a later case, *United States v. Playboy*, the Justices foreshadowed their current positions on the difficult balance between free speech and protecting children from sexually explicit material.[139] Although *Playboy* did not factually involve the Internet, the Court's conclusion and subsequent division had a deep impact upon the analysis applied in those disputes. *Playboy* involved an appeal to the Court by cable television programmers to find unconstitutional the "signal bleed" provision of the Telecommunications Act of 1996,[140] which required programmers either to scramble sexually explicit channels or to limit broadcasting them to specific time slots.[141] In finding section 505 of the Telecommunications Act unconstitutional, the Court first acknowledged that the regulation was content based since it applied only "to channels primarily dedicated to 'sexually explicit adult programming or other programming that is indecent.' "[142] As a practical matter, the Court found the only way channels could comply with the Act was to limit broadcasts, which resulted in protected speech being silenced for two-thirds of the day, regardless of the presence of minors or the wishes of the viewers.[143] Applying strict scrutiny, the Court relied on the district court's finding that section 504 of the statute (which allowed subscribers to request cable operators to block or fully scramble certain channels) was a less restrictive alternative to section 505.[144] Based on the government's inability to satisfy its burden of showing that section 505 was "the least restrictive means for addressing a real problem," the Court affirmed the district court's ruling that the provision violated the First Amendment.[145]

The issue in *Playboy* divided the Court, with five Justices finding the Telecommunications Act unconstitutional and four arguing to uphold the statute, the same split in *Ashcroft v. ACLU*.[146] The majority opinion in *Playboy*, written by Justice Kennedy, was joined by Justices Stevens, Souter, Thomas, and Ginsburg, while Justice Scalia drafted his own dissent and joined in Justice Breyer's dissenting opinion, which was also joined by Justice O'Connor and Chief Justice Rehnquist.[147]

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137. *Id.* at 888.

138. *Id.*

139. United States v. Playboy, 529 U.S. 803 (2000).

140. 47 U.S.C. § 561 (2000).

141. *Playboy*, 529 U.S. at 806. "[T]he statute and its implementing regulations require cable operators either to scramble a sexually explicit channel in full or to limit the channel's programming to the hours between 10 p.m. and 6 a.m." *Id.* at 808.

142. *Id.* at 811.

143. *Id.* at 812.

144. *Id.* at 816–27.

145. *Id.* at 827.

146. Ashcroft v. ACLU, 542 U.S. 656 (2004).

147. *Playboy*, 529 U.S. 803. Justice Stevens also joined the fray with his own concurrence specifically criticizing Justice Scalia's claims of pandering. *Id.* at 828.

Justice Scalia's dissent argued that section 505 of the statute could easily be upheld "by finding that it regulates the business of obscenity."[148] Although Justice Scalia conceded that many of the individual programs broadcast were not obscene, he found that the channels, as commercial entities, had engaged "in the sordid business of pandering" and therefore, were not constitutionally protected.[149] He explained, "[w]e are more permissive of government regulation in these circumstances because it is clear from the context in which exchanges between such businesses and their customers occur that neither the merchant nor the buyer is interested in the work's literary, artistic, political, or scientific value."[150] Justice Scalia concluded that since the government could completely block the broadcasts, section 505's limiting effects were constitutional as a restraint on unprotected speech.[151]

Justice Breyer arrived at a different conclusion from the majority opinion by defining the issue in a different light. He interpreted the Telecommunications Act, specifically sections 504 and 505, to allow viewers to choose whether their households should receive adult programming by requesting it through section 505 or by specifically requesting not to receive channels dedicated to adult programming through section 504.[152] Justice Breyer implicitly faulted the majority for claiming that the Act focused too intently on "signal bleed," as he felt the statute addressed the issue only indirectly.[153] Further, he did not see the Act as effecting a complete ban on the programming in contention, but merely imposing a burden on adult speech by regulating the time of broadcast.[154] He thought that burden acceptable, stating, "this Court has upheld laws that do not ban the access of adults to sexually explicit speech, but burden that access through geographical or temporal zoning."[155] Finally, Justice Breyer dismissed the argument that the programs had any value outside of prurient interest, declaring that "[t]he channels do not broadcast more than trivial amounts of more serious material such as birth control information, artistic images, or the visual equivalents of classical or serious literature."[156]

Justice Breyer's dissent also challenged the majority's contention that the government had not established signal bleed as a "pervasive problem."[157] He posed an intriguing question:

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148. *Id.* at 831 (Scalia, J., dissenting).

149. *Id.* at 831–35 (Scalia, J., dissenting) (quoting Ginzburg v. United States, 383 U.S. 463, 467, 472 (1966)).

150. *Id.* at 832.

151. *Id.* at 835 (Scalia, J., dissenting).

152. *Id.* at 837 (Breyer, J., dissenting).

153. *Id.* at 837–38.

154. *Id.* at 838.

155. *Id. See, e.g.,* Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986); FCC v. Pacifica Found., 438 U.S. 726 (1978).

156. *Playboy*, 529 U.S. at 839 (Breyer, J., dissenting).

157. "There is little hard evidence of how widespread or how serious the problem of signal bleed is." *Id.* at 819.

> If signal bleed is not a significant empirical problem, then why, in light of the cost of its cure, must so many cable operators switch to nighttime hours? . . . If, as the majority suggests, the signal bleed problem is not significant, then there is also no significant burden on speech created by § 505. The majority cannot have this evidence both ways."[158]

Clearly, Justice Breyer disagreed with the majority's framing of the issue and interpretation of the government's evidence; however, his "major point of disagreement" with the majority opinion was the finding that section 504 constituted a less restrictive alternative.[159] Breyer prefaced his analysis of section 504 by noting, "a 'less restrictive alternativ[e]' must be 'at least as effective in achieving the legitimate purpose that the statute was enacted to serve.'"[160] Breyer's dissent characterized section 504 as allowing parents to tell cable operators to keep adult channels out of their cable subscription, while section 505 blocked adult programming unless parents explicitly consented to its transmission into their home.[161] Breyer found that section 505 served the same interest as commonly upheld zoning laws that deny children the right to enter X-rated theaters or adult cabarets when parents cannot exercise supervision of the child's actions.[162] In finding that section 505's restrictions were constitutionally permissible, Breyer relied on the government's compelling interest in helping parents prevent minors from accessing sexually explicit materials, concluding that section 505 "restricts speech no more than necessary to further that compelling need."[163]

As recently as the spring of 2003, in *United States v. American Library Ass'n*, the Court passed judgment on the constitutionality of the Children's Internet Protection Act (CIPA), an elder sibling of COPA, holding that compliance with the statute would not violate the First Amendment.[164] CIPA forbade libraries from receiving federal assistance unless the library installed filtering software to block access to obscene or pornographic images and to prevent minors from gaining access to such materials.[165] A group of library patrons, website publishers, and other parties similarly affected by CIPA challenged the statute and prevailed at the district court level, the court holding that Congress had exceeded its spending power by forcing libraries to effectively violate the First Amendment in order to receive federal funding.[166] The district court found that CIPA provisions constituted a content-based restriction on public fora warranting strict scrutiny

158. *Id.* at 840 (emphasis omitted).
159. *Id.* at 840–41.
160. *Id.* (quoting Reno v. ACLU, 521 U.S. 844, 874 (1997)).
161. *Id.* at 841–42 (Breyer, J., dissenting).
162. *Id.* at 842.
163. *Id.* at 846.
164. United States v. Am. Library Ass'n, 539 U.S. 194, 199 (2003).
165. *Id.*
166. *Id.* at 202–03.

and that the filtering software required by CIPA was not the least restrictive alternative to accomplish the government's objective.[167]

Chief Justice Rehnquist, joined by Justices O'Connor, Thomas, and Scalia, considered the history and purpose of the library system and found that libraries were not created as public fora per se; rather, public libraries were created to facilitate research, learning, and recreational reading.[168] The Court held that precedent validated CIPA's restrictions because "Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives," and, therefore, the application of strict scrutiny and public forum analysis by the district court was not proper.[169] Moreover, the plurality opinion reasoned that since a library's duty is to exercise judgment in making collection decisions and to satisfy "its traditional role in identifying suitable and worthwhile material[,] it is no less entitled to play that role when it collects material from the Internet than when it collects material from any other source."[170] The Court acknowledged that a site-by-site qualifying by each library is unrealistic; therefore, in order to distinguish appropriate material from obscene material, CIPA's provisions were entirely reasonable.[171]

Although Chief Justice Rehnquist's plurality opinion appeared clear and well reasoned, several other Justices disagreed with either the method the Chief Justice employed to reach his conclusion or the conclusion itself. Justice Kennedy and Justice Breyer each drafted separate concurrences, Justice Stevens filed his own dissent, and Justice Ginsberg joined the dissenting opinion of Justice Souter. Each opinion espoused a different approach to the mixed First Amendment/Spending Clause issue; however, the most notable, due to an apparent change of heart in subsequent opinions, was Justice Stevens's dissent. He concluded that CIPA was "a blunt nationwide restraint on adult access to 'an enormous amount of valuable information,'" and that there are "fundamental defects in the filtering software that is now available or that will be available in the foreseeable future."[172] Stevens found that since "software relies on key words or phrases to block undesirable sites, it does not have the capacity to exclude a precisely defined category of images."[173] He concluded that the filtering software would result in "underblocking," a process that allows some sexually explicit material to pass through while giving parents a false sense of security, and also "overblocking" of thousands of sites containing innocuous material.[174] Colorfully expressing his disdain for CIPA's required filtering software, Justice Stevens stated, "[i]n my judgment, a statutory blunderbuss

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167. *Id.*

168. *Id.* at 203–04.

169. *Id.* at 203–05. *See* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998).

170. *Am. Library*, 539 U.S. at 208.

171. *Id.*

172. *Id.* at 220–21 (Stevens, J., dissenting).

173. *Id.* at 221.

174. *Id.* at 222.

that mandates this vast amount of 'overblocking' abridges the freedom of speech protected by the First Amendment."[175]

IV. Instant Case

A. Majority Opinion of the Court

In *Ashcroft v. ACLU*, a five-Justice majority[176] of the United States Supreme Court affirmed a preliminary injunction against enforcement of the Child Online Protection Act (COPA) issued by the District Court for the Eastern District of Pennsylvania and remanded the case to the district court for a trial on the issues.[177] The majority opinion, delivered by Justice Kennedy, framed the issue as "whether the court of appeals was correct to affirm a ruling by the district court that enforcement of COPA should be enjoined because the statute likely violates the First Amendment."[178]

Justice Kennedy described COPA as a statute enacted by Congress to protect minors from exposure to sexually explicit materials on the Internet whose drafters gave consideration to the Court's earlier decisions on the subject.[179] Justice Kennedy recognized the drafters' consideration of these precedents, commenting on the judiciary's duty to proceed carefully in considering the constitutionality of COPA in order to accord respect to Congress. He balanced this assertion, however, noting that "according respect to Congress . . . does not permit us to depart from well-established First Amendment principles."[180] The majority construed COPA as a content-based restriction on speech, and therefore to "guard against that threat the Constitution demands content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality."[181] Justice Kennedy, along with the other four Justices in the majority, agreed with the district court judge's conclusion that the government had failed in its attempt to satisfy its burden by rebutting the plaintiffs' assertion that there were less restrictive alternatives to the provisions of COPA.[182]

The Court first reviewed the COPA provisions at issue, explaining that "COPA imposes criminal penalties of a $50,000 fine and six months in prison for the knowing posting, for 'commercial purposes,' of World Wide Web content that is 'harmful to minors.'"[183] COPA defines a minor as "any person under 17 years of age,"[184] and material harmful to minors as:

175. *Id.*

176. Ashcroft v. ACLU, 542 U.S. 656, 659 (2004) (Justice Kennedy delivered the majority opinion of the Court which was joined by Justices Stevens, Souter, Thomas, and Ginsburg).

177. *Id.*

178. *Id.* at 660.

179. *Id.*

180. *Id.*

181. *Id.* (citation omitted).

182. *Id.*

183. *Id.* at 661 (quoting 47 U.S.C. § 231(a)(1) (2000)).

184. 47 U.S.C. § 231(e)(7).

> [A]ny communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest; (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sex act, or a lewd exhibition of the genitals or post-pubescent female breast; and (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.[185]

Other pertinent provisions included the definition of a person acting for "commercial purposes," which COPA defined as any "person engaged in the business of making such communications."[186] Hence, the following definition of "engaged in the business" was also required:

> [T]he person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities (although it is not necessary that a person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income). A person may be considered to be engaged in the business of making, by means of the World Wide Web, communications for commercial purposes that include material that is harmful to minors, only if the person knowingly causes the material that is harmful to minors to be posted on the World Wide Web or knowingly solicits such material to be posted on the World Wide Web . . . .[187]

COPA's drafters also included an affirmative defense provision to narrow the statute's broad scope:

> It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors—(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number; (B) by accepting a

185. 47 U.S.C. § 231(e)(6)(A)(B)(C).
186. 47 U.S.C. § 231(e)(2)(A).
187. 47 U.S.C. § 231(e)(2)(B).

> digital certificate that verifies age; or (C) by any other reasonable measures that are feasible under available technology.[188]

The Court, applying an abuse-of-discretion standard on the review of the preliminary injunction, preceded its analysis by stating that "[i]f the underlying constitutional question is close, therefore, we should uphold the injunction and remand for trial on the merits."[189] Referencing the district court's holding that COPA was likely to burden some speech protected for adults, Justice Kennedy eschewed the Third Circuit's ambitious construction of COPA's provisions and declined to consider the correctness of the Third Circuit's statutory construction.[190] In granting the preliminary injunction, the district court had to decide whether the plaintiff was likely to prevail on the merits of the case.[191] Since the burden was on the government, the plaintiffs were presumed to prevail unless the government could show that the plaintiffs' proposed alternatives were less effective than COPA.[192] The majority concluded that the district court did not abuse its discretion in finding that the plaintiffs had demonstrated they were likely to prevail on the merits since the government did not carry its burden by proving COPA the least restrictive alternative.

Since the district court agreed with the plaintiffs' contention that less restrictive alternatives existed, the Supreme Court engaged in an analysis to determine whether the district court abused its discretion based on its conclusion. The purpose of the least-restrictive-alternative inquiry "is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to assure that legitimate speech is not chilled or punished."[193] Further, the Court noted that the proper inquiry is "whether the challenged regulation is the least restrictive means among available, effective alternatives."[194]

Justice Kennedy first addressed blocking and filtering software, finding that the "software is an alternative that is less restrictive than COPA, and, in addition, likely more effective as a means of restricting children's access to materials harmful to them."[195] The majority considered filtering and blocking software less restrictive than COPA because the software imposes selective restrictions on speech at the receiving end of the transmission as opposed to the source.[196] Moreover, the Court found that the software allowed adults to gain access to COPA-regulated speech without having to identify themselves or provide credit card information, and also allowed

188. 47 U.S.C. § 231 (c)(1)(A)(B)(C).
189. Ashcroft v. ACLU, 542 U.S. 656, 664–65 (2004).
190. *Id.* at 665.
191. *Id.* at 666.
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.* at 667.
196. *Id.*

parents to switch the filter on and off to protect their children while accessing the speech themselves.[197] Most important to the Court was that the filtering software did not impose any criminal penalties on speech as COPA did, which the Court found had the potential to chill forms of protected speech.[198]

The Court also agreed with the district court that filtering software may possibly be more effective than COPA's provisions since one district court witness testified that approximately forty percent of pornography originates outside of the United States, and therefore outside of COPA's jurisdiction.[199] The majority felt that this "alone makes it possible that filtering software might be more effective in serving Congress's goals."[200] Also, the Court postulated that if COPA were upheld, the statute could be circumvented by pornographers moving their operations to foreign soil or by children acquiring and using their own credit cards to access the sites.[201] Justice Kennedy also cited the findings of the Commission on Child Online Protection, a committee that studied the various means of restricting minors' access to harmful materials on the Internet, which found that filters are more effective than age-verification requirements.[202] Thus, the Court concluded that not only had the government failed to satisfy its burden of showing the proposed alternatives were less effective, but a government commission appointed to consider the issue designated the proposed alternatives (filtering and blocking software) more effective as well.[203]

Justice Kennedy did, however, acknowledge that filtering and blocking software "is not a perfect solution to the problem of children gaining access to harmful-to-minors materials."[204] The majority found that while filtering software may be overinclusive as well as underinclusive, the government failed to present specific evidence to the district court proving that.[205] Since the government did not present sufficient evidence of filtering software's weaknesses, it failed to carry the burden of showing that COPA's provisions were superior to the proposed alternatives and hence it was proper for the district court to grant the preliminary injunction.[206]

The majority opinion then specifically addressed, either through a sense of obligation or in defense of itself, the contrary argument that "filtering software is not an available alternative because Congress may not

197. *Id.*

198. *Id.*

199. *Id.* at 667.

200. *Id.*

201. *Id.* at 667–68.

202. *Id.* at 668 (citing Commission on Child Online Protection, Report to Congress, at 19–21, 23–25, 27 (Oct. 20, 2000), assigning a score for "effectiveness" of 7.4 for server-based filters and 6.5 for client-based filters, as compared to 5.9 for independent adult-ID verification, and 5.5 for credit card verification).

203. *Id.*

204. *Id.*

205. *Id.* at 668–69.

206. *Id.* at 669.

require it to be used."[207] Justice Kennedy declared that this argument carried "little weight, because Congress undoubtedly may act to encourage the use of filters," referring to precedent in which the Court had already held that Congress could provide incentives to schools and libraries to use the technology.[208] Kennedy also argued that Congress "could also take steps to promote their development by industry, and their use by parents."[209] The majority opinion argued that the need for parental cooperation did not prevent an alternative from being feasible, and that by providing incentives Congress could effectively give parents the ability to protect their children without subjecting protected speech to potentially severe penalties.[210]

Justice Kennedy also referred to the Court's decision in *United States v. Playboy*,[211] calling the opinion the "closest precedent on the general point" and stating that the reasoning in that opinion required the Court to affirm the preliminary injunction.[212] *Playboy* involved a similar choice for the Court between a "blanket speech restriction and a more specific technological solution that was available to parents who chose to implement it."[213] The Court found in *Playboy* that the government failed to meet its burden of showing that the proposed less restrictive alternative was less effective and therefore did not survive strict scrutiny.[214] Relying on the reasoning of *Playboy*, the majority opinion reasserted that the preliminary injunction should be affirmed since "[t]o do otherwise would be to do less than the First Amendment commands."[215]

Justice Kennedy next enumerated four "practical reasons" why the preliminary injunction should stand pending a trial on the merits.[216] First, the majority contended that "the potential harms from reversing the injunction outweigh those of leaving it in place by mistake" due to the potential for self-censorship and chill of protected speech.[217] In addition, the possibility of disrupting any prosecutions under COPA is nonexistent since no charges have been filed under the statute.[218] Second, a gap in the evidence as to the effectiveness of filtering software exists that should be addressed at trial.[219] Third, the factual record did not represent the current state of technology due to the district court's fact-finding taking place in

207. *Id.* at 669.

208. *Id.* (citing United States v. Am. Library Ass'n, 539 U.S. 194 (2003).

209. *Id.*

210. *Id.* at 669–70.

211. United States v. Playboy, 529 U.S. 803 (2000) (see discussion *supra* text accompanying notes 139–64).

212. *Ashcroft*, 542 U.S. at 670.

213. *Id.*

214. *Playboy*, 529 U.S. at 826.

215. *Ashcroft*, 542 U.S. at 670.

216. *Id.*

217. *Id.* at 670–71.

218. *Id.* at 671.

219. *Id.*

1999, over five years before this case.[220] The Court recognized that a temporal delay in fact-finding is inevitable, but this dispute's procedural background was exceptional because of the quick evolution of the Internet and the fact that this was the case's second trip to the Supreme Court.[221] Thus, "[r]emand [would] . . . permit the district court to take account of the changed legal landscape."[222]

Kennedy's final "practical reason" offered a ray of hope to the government: "this opinion does not hold that Congress is incapable of enacting any regulation of the Internet designed to prevent minors from gaining access to harmful materials."[223] The majority felt that by remanding the case, the parties could offer new evidence to further examine the effectiveness and feasibility of alternatives to the statute.[224] The Court made clear that its opinion did not prevent the "District Court from concluding, upon a proper showing by the Government that meets the Government's constitutional burden as defined in this opinion, that COPA is the least restrictive alternative available to accomplish Congress's goal."[225] Following his hope-inspiring words for congressional drafters, Justice Kennedy concluded the majority opinion with the equivalent of a splash of cold water on Congress's collective face, reasserting the Court's affirmation of the preliminary injunction, its finding that the district court did not abuse its discretion, and remanding the case back to the district court for a trial on the merits.[226]

B. Concurring Opinion of Justice Stevens

Justice Stevens, joined by Justice Ginsberg, agreed with the conclusion of the majority, but did not believe that the reasons cited by the majority were the only characteristics of COPA that rendered it (or were likely to render the statute) unconstitutional.[227] Justice Stevens took the opportunity to reiterate his agreement with the Third Circuit Court of Appeals in *Ashcroft I*,[228] regarding the contention that COPA's "community standards" language singularly caused the statute to be unconstitutional.[229] "I continue to believe that the Government may not penalize speakers for making available to the general World Wide Web audience that which the least tolerant communities in America deem unfit for their children's consumption."[230]

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220. *Id.*
221. *Id.* at 671–72.
222. *Id.* at 672.
223. *Id.*
224. *Id.* 672–73.
225. *Id.* at 673.
226. *Id.*
227. *Id.* at 673–74 (Stevens, J., concurring).
228. Ashcroft v. ACLU, 535 U.S. 564 (2002).
229. *Ashcroft*, 542 U.S. at 673 (Stevens, J., concurring).
230. *Id.* at 674.

Stevens also wrote to express agreement with the majority's finding that filtering technology would serve Congress's interest in protecting children as well as or better than COPA's provisions, and "to underscore just how restrictive COPA is."[231] Stevens described COPA as "a content-based restraint on the dissemination of constitutionally protected speech" that used criminal prosecution as punishment for noncompliant speakers.[232] Moreover, Justice Stevens also expressed his disdain with COPA's potential for burden shifting, remarking that even speakers who abide with COPA by requiring age verification may shoulder the burden of proving, in court, their compliance with the statute.[233] Stevens's main point of contention, however, was with COPA's criminal penalties, which he declared "inappropriate means to regulate the universe of material classified as 'obscene,'" and which imposed a heavy burden on the exercise of free speech.[234]

In closing, Justice Stevens made a point of expressing his agreement that protecting minors from sexually explicit materials is a compelling government interest, and as a "parent, grandparent, and great-grandparent" he endorsed that goal whole-heartedly.[235] However, he felt the gravity of the burdens imposed upon free speech by COPA were not justified simply to act as a backup for adult oversight of children.[236]

C. *Dissenting Opinion of Justice Scalia*

Justice Scalia's dissent stayed the course regarding his stance on obscenity-regulating statutes, as he concluded that COPA was constitutional since commercial pornography "could, consistent with the First Amendment, be banned entirely."[237] Scalia agreed with Justice Breyer's conclusion that COPA was constitutional, although he argued that Justice Breyer and the majority erred in applying strict scrutiny.[238] Scalia asserted, "we have recognized that commercial entities which engage in 'the sordid business of pandering' by 'deliberately emphasiz[ing] the sexually provocative aspects of [their non-obscene products], in order to catch the salaciously disposed,' engage in constitutionally unprotected behavior."[239]

Justice Scalia also construed COPA more narrowly than the majority, finding that COPA applied only to persons who knowingly, in the regular course of business, wished to profit by transmitting material "designed to

231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.* 674–75.
235. *Id.* at 675 (Stevens, J., concurring).
236. *Id.*
237. *Id.* at 676 (Scalia, J., dissenting).
238. *Id.*
239. *Id.* (citing United States v. Playboy, 529 U.S. 803, 831 (2000) (Scalia, J., dissenting) (quoting Ginzburg v. United States, 383 U.S. 463, 467 (1966)). *See also* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 443–44 (2002) (Scalia, J., concurring); FW/PBS, Inc. v. Dallas, 493 U.S. 215, 256–61 (1990) (Scalia, J., concurring in part and dissenting in part).

appeal to, or designed to pander to, the prurient interest."[240] Based on this construction of COPA's provisions and the conclusion that strict scrutiny was not warranted, Scalia proclaimed COPA to be of no constitutional concern.[241]

D. *Dissenting Opinion of Justice Breyer*

Espousing a narrow construction of COPA and a more in-depth "less-restrictive-alternative" analysis, Justice Breyer, joined by Justice O'Connor and Chief Justice Rehnquist, dissented, concluding that "the Act (COPA), properly interpreted, imposes a burden on protected speech that is no more than modest."[242] Justice Breyer wrote to express his disagreement with the majority's assertion that "Congress could have accomplished its statutory objective—protecting children from commercial pornography on the Internet—in other, less restrictive ways."[243]

Justice Breyer began his analysis by reasoning that "the term 'less restrictive alternative' is a comparative term," and therefore a proper determination of constitutionality cannot be made without first examining the extent of the burden COPA imposes on protected speech.[244] By comparing the Court's definition of "legally obscene" from *Miller v. California*[245] with COPA's definitions, Breyer found that COPA applied to material that did not enjoy First Amendment protection, "and very little more."[246] Breyer found "[t]he only significant difference between the present statute and *Miller's* definition consists of the addition of the words 'with respect to minors' and 'for minors.'"[247] He argued that this addition of words to the *Miller* definition only slightly expanded the scope of the test due to the limiting requirement that the material must first appeal to the prurient interest.[248] "And material that appeals to the 'prurient interests' of some groups of adolescents or post-adolescents will almost inevitably appeal to the 'prurient interests' of some groups of adults as well."[249]

Breyer also argued that COPA's "lack of serious value" provision acted to narrow the statute even further since speech that has serious literary, artistic, political, or scientific value for adults will have the same value for minors and therefore would not be affected.[250] Breyer purported to construe the provisions of COPA literally, consistent with Congress's intent of "putting material produced by professional pornographers behind

240. *Id.* (quoting 47 U.S.C. § 231(e)(6)(A)).
241. *Id.* at 676 (Scalia, J., dissenting).
242. *Id.* at 677–78 (Breyer, J., dissenting).
243. *Id.* at 677.
244. *Id.*
245. Miller v. California, 413 U.S. 15, 24 (1973).
246. *Ashcroft*, 542 U.S. at 678 (Breyer, J., dissenting).
247. *Id.* at 679 (internal citations omitted) (quoting from § 231(e)(6)(A) and § 231(e)(6)(C) of COPA).
248. *Id.*
249. *Id.*
250. *Id.*

screens that will verify the age of the viewer."[251] Justice Breyer felt that the narrow construction of COPA's provisions answered the majority of free-speech concerns of the respondents and the majority opinion.[252] To demonstrate the proper application of the COPA test, Justice Breyer cited an array of borderline materials, from "a serious discussion about birth control practices" to "J.D. Salinger's *Catcher in the Rye*," finding that none of this protected speech satisfied COPA's two-prong test of appealing to prurient interest and lacking in serious value.[253]

Based on his construction of COPA, Justice Breyer concluded that the statute's definitions limited the scope of the law to commercial pornographers, thus only affecting unprotected obscene material.[254] He conceded, however, that even narrowly construed, COPA could act to chill the production of a limited class of close-to-obscene material.[255]

Justice Breyer also recognized that "the screening requirement imposes some burden on adults who seek access to the regulated material, as well as on its providers."[256] Referencing the district court's fact-finding, Breyer briefly discussed the added cost to website operators and pointed out that a trade association for commercial pornographers characterized the use of age verification as "'standard practice' in their online operations."[257] In addition to the monetary cost to website providers, Justice Breyer also recognized that a portion of users would not access regulated sites due to fear of embarrassment.[258] "But this Court has held that in the context of congressional efforts to protect children, restrictions of this kind do not automatically violate the Constitution."[259] Breyer again asserted that, at most, COPA's provisions imposed "a modest additional burden on adult access to legally obscene material . . . ."[260]

Justice Breyer then discussed the effectiveness of COPA in advancing the compelling interest of protecting children from commercial pornography. He began by rebutting the majority's assertion that filtering software was a less restrictive alternative, labeling this "a misnomer—a misnomer that may lead the reader to believe that all we need do is look to see if the blocking and filtering software is less restrictive . . . ."[261] Breyer contended that filtering software was "part of the status quo, i.e., the backdrop against

251. *Id.* at 680 (citing S. Rep. No. 105-225, p. 3 (1998)).

252. *Id.* (Breyer, J., dissenting).

253. *Id.*

254. *Id.* at 681.

255. *Id.* at 681–82.

256. *Id.* at 682.

257. *Id.*

258. *Id.* at 682–83 (Breyer, J., dissenting).

259. *Id.* at 683. *See* United States v. Am. Library Ass'n, 539 U.S. 194, 209 (2003) (plurality opinion) ("[T]he Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment").

260. *Id.*

261. *Id.* at 683–84.

which Congress enacted the present statute," and therefore was not an alternative solution.[262] Based on this assertion, he declared, "[i]t is always less restrictive to do nothing than to do something."[263] Therefore, Breyer reasoned, since filtering software was currently available and employed by those wishing to filter certain materials, and children were still being exposed to harmful material on the Internet, filtering software was clearly not a more effective alternative to COPA.[264]

Justice Breyer asserted that filtering software also suffered from "four serious inadequacies that prompted Congress to pass legislation instead of relying on its voluntary use."[265] First, Breyer characterized filtering software as faulty, using Justice Stevens's dissenting opinion in *United States v. American Library Ass'n* to illustrate his point.[266] Breyer agreed with Stevens's statement that there are "fundamental defects in the filtering software that is now available or that will be available in the foreseeable future."[267] Breyer also noted that filtering software was not sophisticated enough to precisely define a specific category of images, resulting in children still potentially being exposed to harmful material.[268] Second, Breyer pointed out that filtering software was certainly not free and that not all families had the means to purchase the software.[269] Third, Breyer noted that filtering software relies on parents' will and ability to use it, which may not be a reasonable reliance given the state of the average American family.[270] Fourth in Breyer's quadrangle of fault was filtering software's propensity for overblocking material containing valuable and protected information. He relied on the ACLU's assertion to Congress that "the software is simply incapable of discerning between constitutionally protected speech and unprotected speech."[271]

Addressing the majority's counterargument that even if COPA were upheld, forty percent of pornography is of foreign origin and therefore unaffected by the statute, Breyer argued that COPA would make a difference with respect to sixty percent of commercial pornography on the Internet, a number he could not call insignificant.[272] He also concluded that it would be reasonable for Congress to conclude, based on an ineffective status quo involving filtering software, that "adding an age-verification requirement for a narrow range of material[ ] would more effectively shield children

262. *Id.* at 684 (italics omitted).

263. *Id.* (italics omitted).

264. *Id.* at 684 (Breyer, J., dissenting).

265. *Id.* at 684–85.

266. *Id.* at 685. *See* United States v. Am. Library Ass'n, 539 U.S. 194, 221 (2003) (Stevens, J., dissenting).

267. *Am. Library*, 539 U.S. at 221.

268. *Ashcroft*, 542 U.S. at 685 (Breyer, J., dissenting).

269. *Id.*

270. *Id.*

271. *Hearing on Internet Indecency before the S. Comm. on Commerce, Science, and Transp.*, 105th Cong. 2d Sess., 64 (1998).

272. *Ashcroft*, 542 U.S. at 687 (Breyer, J., dissenting).

from commercial pornography."[273] Furthermore, Breyer explained his narrow construction of COPA stating that "we must interpret the Act to save it, not to destroy it."[274]

Finally, Justice Breyer discussed the actual less restrictive alternatives available to Congress by addressing two of the majority's proposed alternatives. Breyer labeled the majority's assertion that Congress could encourage and incentivize the use of filtering software as unrealistic.[275] Breyer declared that "the Constitution does not, because it cannot, require the Government to disprove the existence of magic solutions," for educated minds can always imagine some kind of slightly less restrictive approach.[276] Secondly, Breyer felt that the majority's alternative of decriminalizing COPA would simply render it less effective, removing any teeth from its punitive provisions.[277] He summarized his conclusions stating that COPA imposed minor burdens on speech that adults may overcome through modest cost, and he found "no serious, practically available 'less restrictive' way similarly to further this compelling interest. Hence, the Act is constitutional."[278]

Justice Breyer followed his analysis of the pertinent subject matter with a general airing of grievances regarding the majority's handling of the case. He posed the rhetorical question, "what has happened to the 'constructive discourse between our courts and our legislatures' that 'is an integral and admirable part of the constitutional design'?"[279] He questioned the wisdom of remanding the case to the district court and asked what further proceedings are necessary "[a]fter eight years of legislative effort, two statutes, and three Supreme Court cases."[280] Breyer also commented on Congress's obvious reliance in drafting COPA on the Court's opinion in *Reno*, asking "[w]hat else was Congress supposed to do?"[281] He acknowledged that some Justices have taken the position that Congress cannot place regulations on the First Amendment and almost condoned the position, but chastised those members of the Court for not making their intentions clear.[282] Breyer reasonably explained that he felt COPA could have been saved by a narrow construction and, furthermore, it is the Court's duty to reconcile a statute's language to the First Amendment, if possible.[283]

273. *Id.*
274. *Id.* (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937)).
275. *Id.* at 688.
276. *Id.*
277. *Id.* at 689.
278. *Id.* 689 (Breyer, J., dissenting).
279. *Id.* (quoting Blakely v. Washington, 542 U.S. 296, 326 (2004) (Kennedy, J., dissenting)).
280. *Id.*
281. *Id.* at 690.
282. *Id.*
283. *Id.* at 690–91 (citing McConnell v. Fed. Election Comm'n, 540 U.S. 93, 180 (2003) ("where a saving construction of the statute's language 'is fairly possible,' we must adopt it.") (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

Breyer also questioned whether the majority's holding would result in more or less protection for expression since the majority opinion effectively removed COPA from a prosecutor's options.[284] Breyer argued that COPA presented a compromise allowing obscene material to be viewed by those who wish to see it while protecting those whom it may harm.[285] He asserted that such a middle road helped to avoid any total ban on speech and that the majority's view may cause some speech to be chilled by the all-or-nothing laws already in effect.[286]

V. ANALYSIS

A. *Construing COPA to Save, Not Destroy*

As noted by Justice Kennedy in the majority opinion, COPA was Congress's second attempt at drafting a constitutionally valid statute regulating minors' access to potentially harmful, sexually explicit material on the Internet. Kennedy also observed that Congress paid careful attention to the Court's opinion in *Reno v. ACLU* in drafting COPA by attempting to placate tentative members of the Court with a more reasoned approach and tempered language. In fact, until one reads Justice Kennedy's and Justice Stevens's opinions dissecting COPA and effectively construing certain provisions into arguably valid, but unlikely "worst case scenarios," COPA reads as a reasonable attempt to regulate commercial pornography. Since the freedom COPA wishes to constrict is the sacred right of free speech, perhaps such a construction is warranted to expose any possible abuses. Furthermore, since the Court granted certiorari only on the narrow issue of abuse of discretion by the district court in the issuance of the preliminary injunction and declined to find the Third Circuit's construction of COPA valid, any criticism must be directed towards the Court's inaction as opposed to a faulty interpretation of COPA. However, as Justice Breyer stated, "we must interpret the Act (COPA) to save it, not destroy it," and entertaining a reasonable interpretation of COPA is a worthwhile endeavor, at least for the drafters' sake.[287]

In order to demystify what Justice Stevens described as "a content-based restraint on the dissemination of constitutionally protected speech,"[288] a review of Congress's first attempt at Internet regulation, which resulted in *Reno v. ACLU*, is required. In *Reno*, the Communication Decency Act (CDA) was found by all the members of the Court to be unconstitutional, and while it was a failed attempt, Congress was wise enough to learn from the Court's concerns about the CDA in its drafting of COPA.[289]

284. *Id.* at 691 (Breyer, J., dissenting).
285. *Id.*
286. *Id.*
287. *Id.* at 687.
288. *Id.* at 674.
289. Reno v. ACLU, 521 U.S. 844 (1997).

The majority opinion in *Reno* found fault with many of the CDA's provisions, including its standard for determining whether material was "patently offensive."[290] Although the statute included one prong of the *Miller v. California* obscenity test, the Court complained that the other two prongs "critically limit[ed] the uncertain sweep of the obscenity definition."[291] Therefore, relying on the Court's instructions in *Reno*, COPA's drafters defined "material that is harmful to minors" as:

> any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that— (A) the average person, applying contemporary community standards, would find, taking the material as a whole and *with respect to minors*, is designed to appeal to, or is designed to pander to the prurient interest; (B) depicts, describes, or represents, in a manner patently offensive *with respect to minors*, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sex act, or a lewd exhibition of the genitals or post-pubescent female breast; and (C) taken as a whole, lacks serious literary, artistic, political, or scientific value *for minors*.[292]

The *Miller* test for obscenity, approved as constitutional by the Court, is as follows:

> The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[293]

A comparison of the two definitions obviously reveals Congress's motivation and apparent surrender to the Court's will regarding obscenity determinations. As Justice Breyer discussed in his dissent, the additions to the *Miller* test in COPA's definition of "material that is harmful to minors" are negligible.[294] Congress simply supplemented the language of the Court in *Miller* to properly tailor the inquiry to minors and further the purpose of the statute. Undoubtedly COPA's drafters considered inserting the *Miller*

290. *Id.* at 873.
291. *Id.*
292. 47 U.S.C. § 231 (2000).
293. Miller v. California, 413 U.S. 15, 24 (1973) (citing Kois v. Wisconsin, 408 U.S. 229, 230 (1972) (quoting Roth v. United States, 354 U.S. 476, 489 (1957))).
294. Ashcroft v. ACLU, 542 U.S. 656, 677–80 (2004) (Breyer, J., dissenting).

test, unmodified, into the statute, but decided against it since the addition tailored the statute to its subject matter without altering the scope of its analysis and conclusion. As was recognized by Justice Breyer, salacious material that elicits a sexual response from minors will also appeal to the prurient interest of some adults, and therefore this threshold requirement of COPA did not expand the obscenity test prescribed by the Court in *Miller*.[295]

Moreover, the majority opinion chose to ignore an opportunity to narrow COPA even further by acknowledging the context of the *Miller* test. In *Miller*, Chief Justice Burger, writing for the majority, confidently stated "[u]nder the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive '*hard core*' sexual conduct specifically defined by the regulating state law, *as written or construed*."[296] Clearly COPA was not a state law; however, the Court could have simply declared in its opinion that it was construing COPA, a federal law, to only apply to hard-core materials as defined by COPA's definition of "material that is harmful to minors," because this is the application for which the test was prescribed. Since COPA's definition of "material that is harmful to minors" is "any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene . . . ,"[297] continuing with the *Miller* test immediately following, this construction would allow COPA to apply only to obscene materials or materials depicting "patently offensive 'hard core' sexual conduct."[298] Such a declaration by the Court would result in an obvious overlap of obscene materials and materials portraying hard-core sexual conduct, but more importantly, it would protect borderline material such as J.D. Salinger's *Catcher in the Rye* or Kenneth Starr's report on the Clinton-Lewinsky scandal, as only the most ambitious prosecutor would classify this material as describing hard-core sexual conduct with no other value besides appealing to the prurient interest.

Also apparent from a plain reading of COPA's "material that is harmful to minors" definition is the limiting provision of the *Miller* test that the regulated speech must, "taken as a whole, [lack] serious literary, artistic, political, or scientific value" in order to be proscribed.[299] The Court in *Reno* listed the lack of a provision such as this in the CDA as a factor that led to the statute being struck down as unconstitutional. In comparing the CDA to the New York state statute the Court upheld in *Ginsberg v. New York*, the *Reno* Court included this omission in a list of four provisions differentiating the two laws.[300] Thus, Congress, attempting to learn from

295. *Id.* at 679.
296. *Miller*, 413 U.S. at 27 (emphasis added).
297. 47 U.S.C. § 231(e)(6).
298. *Miller*, 413 U.S. at 27.
299. *Compare Miller*, 413 U.S. at 24, *with* 47 U.S.C. § 231(e)(6).
300. Reno v. ACLU, 521 U.S. 844, 865–66 (1997).

its past mistakes and striving to comply with the dictates of the Court, inserted the third leg of the *Miller* test into COPA.

Also listed by the *Reno* Court among its four differentiating characteristics was the lack of a provision limiting the CDA to commercial transactions. COPA's drafters, paying close attention to the Court's opinion, virtually centered the statute around a "commercial purposes" requirement.[301] COPA's title declares that its goal is to restrict "access by minors to materials *commercially distributed* by means of world wide web that are harmful to minors."[302] COPA further provides that an individual is in violation of the Act only if he or she "knowingly causes the material that is harmful to minors to be posted . . . with the objective of earning a profit . . . ."[303] Thus, an individual must purposely post obscene or hard-core material on the Internet with the purpose of making a profit in order to even warrant inquiry under COPA.

However, even a business engaged in commercial pornography would not violate COPA as long as it took reasonable measures to keep children from accessing its sites. COPA section 231(c)(1) provided an affirmative defense to prosecution if the defendant, in good faith, restricted access to materials harmful to minors.[304] The provider is protected under this provision as long as the website required verification by credit card, debit account, adult access code, adult personal identification number, digital certificate verifying age, or any other reasonable measure feasible under available technology.[305] The CDA also contained an affirmative defense provision that provided a defense if the transmitter restricted access by requiring use of a verified credit card or adult identification.[306] The Court relied on the district court's finding that this defense was "not economically feasible for noncommercial speakers to employ such verification" and concluded that the defense did not narrow the scope of the statute enough to save it.[307] However, COPA clearly would not apply to noncommercial speakers due to the commercial transactions requirements, and thus COPA's drafters satisfied the *Reno* Court's wishes again.

Justice Stevens did, however, raise a valid point in his concurrence regarding the burden-shifting effect of COPA. "[E]ven full compliance with COPA cannot guarantee freedom from prosecution. Speakers who dutifully place their content behind age screens may nevertheless find themselves in court, forced to prove the lawfulness of their speech on the pain of criminal conviction."[308] Although it may be argued that such occurrences are simply part of the risk associated with being a purveyor of commercial

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301. *See* 47 U.S.C. § 231(e).
302. 47 U.S.C. § 231 (emphasis added).
303. 47 U.S.C. § 231(e)(2)(B).
304. 47 U.S.C. § 231(c)(1).
305. *Id.*
306. Reno v. ACLU, 521 U.S. 844, 881 (1997).
307. *Id.*
308. Ashcroft v. ACLU, 542 U.S. 656, 674 (2004) (Stevens, J., concurring).

pornography, this provision spawns a feeling of uneasiness in most Americans. COPA's affirmative action provision, by effectively transferring the burden of proving the lawfulness of speech to the speaker, makes the accused prove innocence, which does not comport with the traditional concept of the American legal system and raises many free-speech concerns.

Congress may not have drafted the perfect statute, but COPA could still be a viable source of protection for minors were it not significantly narrowed by the Court's literal construction of it. Plainly stated, COPA applies to commercial pornographers who do not take any reasonable measures to restrict children under seventeen years of age from accessing their product. COPA's drafters diligently pursued the Court's approval by tailoring COPA to conform with the Court's recommendations in *Reno*, but their efforts still did not satisfy a majority of the Court's members. In Justice Breyer's words, "What else was Congress supposed to do?"[309] The Court, which the nation looks to for opinions fortified with reasonableness, did not appear reasonable in the least with the issuing of the majority opinion in *Ashcroft v. ACLU.* A review of the United States Supreme Court's cases struggling with defining and regulating obscenity points out the difficulty the nine-member Court has had in this area. Given Congress's multitude of conflicting interests, how does the Court expect the 535 members of Congress to concoct a more precise definition than the *Miller* test? Surely, the First Amendment should not suffer due to Congress's struggle to satisfy the high burden of drafting the perfect statute, but COPA plainly supplied sufficient warnings to commercial pornographers who did not feel an obligation to limit children's access to sexually explicit materials. Thus, the statute could, and should, have been saved instead of destroyed.

B. Filtering and Blocking Software: An Effective Alternative?

COPA, as a content-based speech regulation, warranted strict scrutiny despite Justice Scalia's best efforts to hold on to "pandering," and thus the Court correctly asked whether COPA was "the least restrictive means among available, effective alternatives."[310] The majority answered this question in the negative, proposing that filtering and blocking software was less restrictive than COPA and likely more effective in restricting minors' access to potentially harmful sexual materials.[311] However, the Court proclaimed the benefits of filtering and blocking software perhaps too enthusiastically, as at least one concurring Justice and the named plaintiffs in the action contradicted the Court's conclusions in prior records.

First, in a 1998 Hearing on Internet Indecency before the Senate Committee on Commerce, Science, and Transportation, the ACLU, named petitioner in this action, harshly criticized filtering and blocking software and testified that the software was "simply incapable of discerning between

309. *Id.* at 690 (Breyer, J., dissenting).
310. *Id.* at 666.
311. *Id.* at 667–68.

constitutionally protected and unprotected speech."[312] The ACLU also declared that "filtering software block[s] out valuable and protected information, such as information about the Quaker religion, and web sites including those of the American Association of University Women, the AIDS Quilt, [and] the Town Hall Political Site . . . ."[313] Further, the ACLU claimed filtering software "inappropriately blocks valuable protected speech, and does not effectively block the site [it is] intended to block."[314]

Justice Stevens, only one year and six days before *Ashcroft v. ACLU* was decided, also found "fundamental defects" in the filtering software that was available or likely to develop in the near future.[315] In *United States v. American Library Ass'n*, Justice Stevens's dissent declared that the same software the majority in *Ashcroft v. ACLU* proposed Congress promote with federal funds was grossly under- and overinclusive.[316] "Because the software relies on key words or phrases to block undesirable sites, it does not have the capacity to exclude a precisely defined category of images."[317] He maintained that a statute using filtering software as a way to protect children from sexual materials would "provide parents with a false sense of security without really solving the problem," since "it is inevitable that a substantial amount of material will never be blocked."[318] Stevens also abhorred the software's potential for overblocking, claiming that "thousands of pages that contain content that is completely innocuous for both adults and minors" would be unnecessarily restricted.[319] He concluded that "[n]either the interest in suppressing unlawful speech nor the interest in protecting children from access to harmful materials justifies this overly broad restriction on adult access to protected speech."[320]

Justice Breyer also cited other valid practical reasons filtering software fell short of COPA's properly interpreted provisions in his dissent in *Ashcroft v. ACLU.* He noted the monetary cost of filtering software and the inability of parents to guarantee that filtering software is on every computer their children use.[321] As Breyer succinctly pointed out, not every family has the means to purchase filtering software, while commercial pornographers who profit from the dissemination of material harmful to minors can shoulder the cost COPA imposes on them with relative ease.[322] Computers pervade children's lives and a minor is usually no more than a

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312. *Id.* at 686 (Breyer, J., dissenting) (quoting *Hearing on Internet Indecency before the S. Comm. on Commerce, Science, and Transp.*, 105th Cong. 2d Sess., 64 (1998).

313. *Id.*

314. *Id.*

315. United States v. Am. Library Ass'n, 539 U.S. 194, 221–22 (2003) (Stevens, J., dissenting).

316. *Id.*

317. *Id.* at 221.

318. *Id.* at 222.

319. *Id.*

320. *Id.*

321. Ashcroft v. ACLU, 542 U.S. 656, 685 (2004) (Breyer, J., dissenting).

322. *Id.* ("Not every family has the $40 or so necessary to install [filtering software]. . . . By way of contrast, age screening costs less . . . [only] up to 20 cents per password or $20 per user for an identification number.")

few clicks away from potentially harmful material. The majority showcased its disconnect from everyday Americans by ignoring the fact that parents, no matter how zealously they attempt to keep harmful Internet materials from their children, cannot supervise a child's Internet use all the time. Certainly, as Breyer advocated, imposing a modest burden on adults seeking such material is a more sensible solution than requiring parents to be omniscient.

Considering the mountain of evidence and conclusions from diverse parties, the majority's declaration that filtering software is more effective than COPA's provisions is somewhat suspect. It is true that Justice Kennedy recognized that "[f]iltering software . . . is not a perfect solution to the problem of children gaining access to harmful-to-minors materials."[323] However, by this statement, Justice Kennedy helps to invalidate his own conclusion that filtering software is more effective than COPA. The majority's purported "better" alternative to COPA is passive at best, as filtering software is "part of the status quo," as Justice Breyer argued.[324] Because filtering software is currently available to any parent with the means and will to purchase it, and Justice Kennedy acknowledges that the "problem of children gaining access to harmful-to-minors materials" still exists, the majority calls for Congress's promotion of a defective solution. How can the promotion of a less-than-effective means of regulation remedy a problem that it is currently failing to correct?

The majority also argued that filtering and blocking software may be more effective than COPA on one fact alone: COPA cannot regulate the estimated forty percent of pornography from foreign countries.[325] Justice Kennedy added that the statute's "[e]ffectiveness [was] likely to diminish even further if COPA [were] upheld, because the providers of the materials that would be covered by the statute simply can move their operation overseas."[326] This statement ignores that any parent concerned with his or her child's access to harmful materials would not scoff at a sixty percent reduction in the chances of encountering hard-core pornography on the Internet. Furthermore, Kennedy's statement ignores the transaction cost, logistical challenges, and increased overhead associated with an international move by any business which, when compared with the relatively insignificant expense of complying with COPA, seriously reduces the likelihood of this scenario. In the alternative, if COPA did force commercial pornographers engaging in unprotected speech to move their operation overseas to evade the reaches of the statute, would a mass exodus of domestic commercial pornographers be so undesirable?

By comparing the criteria that the majority believed would constitute a true alternative to COPA—"least restrictive means," "available," and "effective"—filtering and blocking software falls one short of this hat trick.

323. *Id.* at 668.

324. *Id.* at 684 (Breyer, J., dissenting).

325. *Id.* at 667.

326. *Id.*

Filtering and blocking software is simply not as effective as COPA, and therefore did not constitute a feasible alternative to Congress's best efforts. It must be noted that the district court found that the government did not present sufficient evidence to show that filtering software was less effective than COPA's provisions; however, such a conclusion was fully in the discretion of the Supreme Court if its members chose to so conclude. Perhaps the majority was feeling conservatively liberal on June 29, 2004,[327] not wanting to be accused of judicial activism. However, by only affirming the district court's preliminary injunction and sending this case on another leg of its never-ending odyssey, the Court effectively told Congress to market filtering software to parents instead of telling pornographers to restrict access to minors at a minimal cost.

C. Practical, at Least in Theory

One definition of the word "practical" is "[o]f, relating to, governed by, or acquired through practice or action, rather than theory, speculation, or ideals."[328] Justice Kennedy asserted that "[t]here are important practical reasons to let the injunction stand pending a full trial on the merits."[329] Kennedy felt that "the potential harms from reversing the injunction outweigh[ed] those of leaving it in place by mistake," and also that there was "a potential for extraordinary harm and serious chill upon protected speech."[330] It could also be argued that the potential harm to minors through continued exposure to sexually explicit materials outweighed the possibility that borderline indecent speech would be chilled. Therefore, to ascertain which course of action would result in the most practical solution, one must consider the viability of the harms.

Since Justice Kennedy chose to ignore a discussion of the potential for harm to children that might occur if the injunction were upheld, a short review of pornography's harmful effects on children is warranted. Exposing children to pornography can have a multitude of adverse effects on their emotional and sexual well-being. One study found a correlation between early exposure to pornography (under fourteen years of age) and a greater involvement in deviant sexual activities, particularly rape.[331] Furthermore, experts in child psychology look for two possibilities when children engage in premature sexual activity: experience and exposure. Such activity likely means that the child may have been exposed to sexuality through pornography.[332]

Generally, children mimic and imitate adult activities they observe, and no study is needed to prove that children will be more likely to engage

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327. The date of the Court's decision in *Ashcroft*. *Id.* at 656.

328. *Am. Heritage Dictionary of the English Language* 1421 (Anne H. Soukhanov ed., 3d ed., Houghton Mifflin Co. 1996).

329. *Ashcroft*, 542 U.S. at 670.

330. *Id.* at 671.

331. DONNA RICE HUGHES WITH PAMELA T. CAMPBELL, KIDS ONLINE: PROTECTING YOUR CHILDREN IN CYBERSPACE 83 (1998).

332. *Id.* at 88.

in sex if they are exposed to it without supervision. At least one expert argues that "pornography short-circuits and/or distorts the normal personality development process and supplies misinformation about a child's sexuality, sense of self, and body that leaves the child confused, changed, and damaged."[333]

Hughes and Campbell describe the effect of pornography on children:

> During certain critical periods of childhood, a child's brain is being programmed for sexual orientation. During this period, the mind appears to be developing a "hardwire" for what the person will be aroused by or attracted to. Exposure to healthy sexual norms and attitudes during this critical period can result in the child developing a healthy sexual orientation. In contrast, if there is exposure to pornography during this period, sexual deviance may become imprinted on the child's "hard drive" and become a permanent part of his or her sexual orientation.[334]

Clearly, the possibility of actual harm occurring through a child's exposure to pornography is very real, and not in the least theoretical.

Justice Kennedy's concern that some free speech would be chilled is likely valid, yet the harm resulting from a reversal of the preliminary injunction pales in comparison to pornography's effect on children. Any chill on protected speech would be minimal and continue only as long as the court system took to decide the fate of COPA. Would not a more practical majority opinion be concerned with the possible harm to children if the injunction were upheld as opposed to a possible chill on pornographic postings? And further, might a temporary chill on such postings be beneficial by helping limit minors' access to sexually explicit material? Adults would still have access to, according to Justice Kennedy's estimates, forty percent of online pornography without providing any information, and access to all domestic sites with the modest burden of providing some reasonable type of age verification. Of course, the majority opinion was dutifully guarding the freedom of speech from potential abuses; however, the staunch theoretical position that no regulation of speech is valid can have harmful practical effects, and in this case, children came up on the wrong side of theory.

D. *In Pursuit of the Perfect Balance: Protecting Children and the Freedom of Speech*

Any dispute involving such passion-inducing topics as the freedom of speech and the well-being of children is difficult and complex, but the difficulty of reaching a mutually satisfying resolution increases exponentially when these two interests are put in conflicting positions. Also, given this case's meandering procedural history, going on for years, and the Court's

333. *Id.* at 92.
334. *Id.* at 91–92.

remand of the dispute for more in-depth fact-finding, the situation is aggravated even further. However, fault is not readily allotted upon either of the conflicting positions in this case—Justice Kennedy's majority opinion and Justice Breyer's dissent are both masterfully written, reasoned, and fully defensible in any arena.

The central catalyst for disagreement between the two positions is each Justice's conflicting interpretation of COPA. Justice Breyer attempted to salvage COPA by putting a "constitutionally valid" spin on COPA's provisions, while Justice Kennedy refrained from any construction and sided with the district court judge that COPA likely burdened some protected speech. Perhaps Justice Kennedy's majority opinion did the "right" thing by refraining from deciding more than required and allowing the district court to dig into new and more current facts while providing the government one more chance to save COPA. However, this course of action may effectively invalidate COPA simply due to the ever-advancing nature of the Internet. Perhaps Justice Breyer's opinion would have been the "right" course given the harmful effects of pornography on children and the minimal effects COPA would have on protected indecent speech. Both arguments warrant respect, and District Court Judge Reed of the Eastern District of Pennsylvania faces a difficult challenge on remand.

VI. CONCLUSION

Throughout the epic history of this case, every judicial officer confronted with this dilemma has noted the importance of protecting children from sexually explicit material, yet their mentioning of this "most compelling interest" seems to have been no more than lip service, considering the results. In the name of protecting free speech, the Court has effectively left America's children to the pornographic wolves by not securing them from the harmful effects of commercial pornography. The Court purports to appreciate the significance of the phenomenon that is the Internet and its role in everyday life, yet the reality is that the Court has not taken sufficient measures to ensure that children can access the web without being exposed to sexually explicit material.

The Court has arguably been led astray due to the abstract nature of the Internet and the uncharted territory the Internet treads. For example, the Court does not allow adult theaters and adult bookstores within several city blocks of a school, church, or other sensitive area,[335] but will allow a pornography vendor to peddle his wares to children while in the safety of their own homes. Of course, the Court allows zoning restrictions based on the negative secondary effects adult theaters and adult nightclubs on surrounding areas, yet fails to recognize the seriousness of the negative secondary effects that pornography has on children. Simply by asking an adult for some reasonable type of age verification, COPA could prevent a child from stumbling upon hard-core sexual images while researching a science

335. Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986).

project or book report. Is this simple request truly unreasonable or oppressive? By invalidating COPA, the Court has shown that it feels more comfortable with this outcome than with the "tragic" possibility that a webmaster may not feel free to post questionably indecent material on his sometimes pornographic, sometimes artistic websites. It is difficult to imagine that this is the reality the Framers of the Constitution wished to effect when drafting the First Amendment.