

December 2003

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Repository Citation

Shaun Richardson, *What the Supreme Court Could Learn About The Child Online Protection Act by Reading Playboy*, 12 Wm. & Mary Bill Rts. J. 243 (2003), <https://scholarship.law.wm.edu/wmborj/vol12/iss1/7>

WHAT THE SUPREME COURT COULD LEARN ABOUT THE CHILD ONLINE PROTECTION ACT BY READING *PLAYBOY*

Due to the ease of Internet searching, Congress has passed the Child Online Protection Act to protect children from sexually explicit material. Although the Supreme Court has not directly decided the issue, it has hinted that the Act may survive a First Amendment challenge. In this Note, the author argues reasons why the Act should not survive a First Amendment challenge, and that measures such as parental empowerment via government-facilitated use of Internet filtering software are preferable.

* * *

INTRODUCTION

The exponential growth of the Internet in size and popularity has revolutionized the way the world and Americans, in particular, do business, access information, and entertain themselves. Testifying to the pervasiveness of Internet use in American life is the fact that by 2001, 50.5% of American homes were connected to the Internet,¹ and 53.9% of the nation's population were Internet users.²

Like other media of communication, the Internet provides access to materials which are not suitable for all potential audience members. Specifically, sexually explicit material abounds on the World Wide Web,³ and much of that material is unsuitable for consumption by the minors who constitute a very substantial portion of Internet users.⁴ This concern has caught the attention of the U.S. Congress,

¹ BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, PUB. NO. 1136, HOUSEHOLD WITH COMPUTERS & INTERNET ACCESS: 1998 & 2001 (2002) [hereinafter HOUSEHOLD WITH COMPUTERS], at <http://www.census.gov/prod/2003pubs/02statab/infocom.pdf>.

² BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, PUB. NO. 1134, COMPUTERS & INTERNET USE BY INDIVIDUALS: 1997 & 2001 (2002), at <http://www.census.gov/prod/2003pubs/02statab/infocom.pdf>.

³ See *Am. Library Ass'n Inc. v. United States*, 201 F. Supp. 2d 401, 419 (E.D. Pa. 2002) ("[T]he absolute number of Web sites offering free sexually explicit material is extremely large, approximately 100,000 sites."), *rev'd*, 123 S. Ct. 2297 (2003). Also, a large number of commercial websites offer pornographic content for a monetary fee. See *ACLU v. Reno*, 217 F.3d 162, 167 & n.5 (3d Cir. 2000) (discussing the fact that the Child Online Protection Act only applies to those offering pornographic content for commercial purposes), *vacated by* 535 U.S. 564 (2002).

⁴ According to census data, 27.9% of children between the ages of three and eight and 68.6% of children between the ages of nine and seventeen use the Internet. HOUSEHOLD WITH COMPUTERS, *supra* note 1.

which has acted quickly to pass legislation aimed at protecting children from exposure to harmful materials online.⁵

The road to unconstitutionality is often paved with good intentions, though, and Congress's first attempt to remedy the problem, the Communications Decency Act (CDA),⁶ immediately fell prey to the strictures of the First Amendment.⁷ As for Congress's second effort, the Child Online Protection Act (COPA),⁸ a Pennsylvania district court issued a preliminary injunction enjoining enforcement of the Act before it even took effect,⁹ suggesting that COPA's future was destined to be as bleak as that of its predecessor. In 2002, though, the Supreme Court had its first encounter with COPA when the government asked the Court to overturn the preliminary injunction barring enforcement of COPA.¹⁰ Though the Court did not go so far as to overturn the injunction, as will be discussed later, the Court's decision and accompanying opinions hinted that COPA would have a fighting chance were the Court in a position to directly evaluate the facial constitutionality of the Act under the First Amendment.¹¹

This Note strives to highlight and discuss reasons why the Supreme Court should not give COPA a First Amendment green light. Reflecting upon the Court's words in *United States v. Playboy Entertainment Group, Inc.*,¹² a case involving legislation aimed at protecting children from pornographic materials on cable television, this Note will suggest that parental empowerment via government-facilitated use of Internet filtering software is an equally efficacious, less restrictive means of accomplishing the goal of childproofing the Net, rendering a regime as invasive as that proposed by COPA invalid under the First Amendment. Additionally, this Note argues that the Court's strong tradition of recognizing a parent's substantive due process right to raise his or her child as he or she sees fit militates against COPA and in favor of less invasive legislation geared toward parental empowerment.

First, this Note will provide an overview of the structures and judicial treatments of the CDA and COPA, as well as a brief exploration of the constitutional standards that guide a court when examining legislation akin to the

⁵ Communications Decency Act of 1996, 47 U.S.C. § 223 (2002) (held unconstitutional by *Reno v. ACLU*, 521 U.S. 844 (1997)); Child Online Protection Act, 47 U.S.C. § 231 (2002) (held unconstitutional by *ACLU v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003)).

⁶ 47 U.S.C. § 223.

⁷ See *Reno v. ACLU*, 521 U.S. at 844.

⁸ 47 U.S.C. § 231.

⁹ See *ACLU v. Reno*, 31 F. Supp. 2d 473, 498–99 (E.D. Pa. 1999), *aff'd*, 217 F.3d 162 (2000), *vacated by* 535 U.S. 564 *remanded to* 322 F.3d 240 (3d Cir. 2003).

¹⁰ See *Ashcroft v. ACLU*, 535 U.S. 564 (2002), *petition for cert. filed*, 72 U.S.L.W. 3130 (U.S. Aug. 11, 2003) (No. 03-218).

¹¹ See *infra* pp. 254–55.

¹² 529 U.S. 803 (2000).

CDA and COPA. Finally, this Note will examine the *Playboy* opinion and discuss the relevance that case has to the issues of Internet regulation and the constitutionality of COPA.

I. CDA

The drafters of the Communication Decency Act (CDA) sought to combat child access to Internet pornography through two separate provisions. The creators of the Act first provided a general telecommunications provision, reading as follows:

Whoever . . . by means of a telecommunication device knowingly . . . makes, creates, or solicits, and initiates the transmission of, *any* comment, request, suggestion, proposal, image, or other communication which is obscene or *indecent*, knowing that the recipient of the communication is under 18 years of age . . . shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.¹³

The drafters also provided a more computer-specific provision, which forbade the use of a computer to expose a child to “patently offensive” materials:

Whoever in interstate or foreign communications knowingly . . . uses an interactive computer service to send to a specific person or persons under 18 years of age, or uses any interactive computer service to display in a manner available to person under 18 years of age, *any* comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms *patently offensive* as measured by contemporary community standards, sexual or excretory activities or organs . . . or knowingly permits any telecommunications facility under such person’s control to be used for [such an activity] with the intent that it be used for such activity, shall be fined under title 18, United States Codes, or imprisoned not more than two years, or both.¹⁴

President Clinton signed the CDA into law on February 8, 1996,¹⁵ but just one week later, a Pennsylvania district court entered a temporary restraining order barring enforcement of the Act in response to a suit brought by the American Civil Liberties Union and a number of other organizations.¹⁶ A preliminary injunction

¹³ 47 U.S.C. § 223(a) (emphasis added).

¹⁴ *Id.* § 223(d) (emphasis added).

¹⁵ See *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), *aff’d*, 521 U.S. 844 (1997).

¹⁶ See *id.* at 827.

quickly followed.¹⁷ Thirteen months after being signed into law, the CDA came before the Supreme Court, which ultimately ruled the Act unconstitutional under the First Amendment.¹⁸

In support of its affirmation of the lower court's decision, the Court cited several First Amendment concerns, including a concern that the CDA could potentially hinder a constitutionally unacceptable volume of speech.¹⁹ As the Court pointed out, the CDA differed from past statutes with similar goals but aimed at different media in that no effort had been made to limit the CDA to commercial speech, contributing to its gaping scope.²⁰

Additionally, the Court discussed the fact that Congress, by using the phrase "interactive computer service,"²¹ had drafted the computer-specific portion of the CDA in a manner that made it applicable to all the various modalities of Internet communication, including e-mail, newsgroups, mail exploders, chat rooms, and the World Wide Web.²² Each of these modalities of Internet communication functions differently and presents its own challenges when trying to draft relevant constitutionally sound legislation.²³ The Court seemed troubled by Congress's attempt to deal with pornography on each modality with one broad, sweeping statutory regime that did not accommodate the differences among them.²⁴

Finally, the Court's overbreadth concerns about the CDA were exacerbated by the presence of the terms "indecent" and "patently offensive,"²⁵ the meanings and scopes of which the Court found not to have been specified by the Act.²⁶ The Court

¹⁷ See *id.* at 883–84.

¹⁸ See *Reno v. ACLU*, 521 U.S. 844 (1997).

¹⁹ See *id.* at 870–75.

²⁰ *Id.* at 877 ("Unlike regulations upheld in [the past], the scope of the CDA is not limited to commercial speech or commercial entities.").

²¹ See 47 U.S.C. § 223(d) (2002).

²² See *Reno v. ACLU*, 521 U.S. at 855–56.

²³ See *id.*

²⁴ The Court expressed this concern with the following words:

The problem of age verification differs for different uses of the Internet. . . . The Government offered no evidence that there was a reliable way to screen recipients and participants [using e-mail, newsgroups, and mail exploders] for age. Moreover, even if it were technologically feasible to block minors' access to newsgroups and chat rooms containing discussions of art, politics, or other subjects that potentially elicit "indecent" or "patently offensive" contributions, it would not be possible to block their access to that material and "still allow them access to the remaining content, even if the overwhelming majority of that content was not indecent."

Id. (quoting *ACLU v. Reno*, 929 F. Supp. 824, 845 (E.D. Pa. 1996)).

²⁵ See 47 U.S.C. § 223 amended by 47 U.S.C. §§ 223(a)(1)(B), (d)(1) (2003).

²⁶ See *Reno*, 521 U.S. at 871–74 & n.37 ("The general, undefined terms 'indecent' and 'patently offensive' cover large amounts of nonpornographic material with serious educational or other value.").

also expressed concern that the Act's implementation would "curtail a significant amount of *adult* communication on the Internet," which was not a goal of the CDA.²⁷

The Court theorized that fear of punishment under the CDA, coupled with the high cost of compliance,²⁸ would discourage certain types of communication, despite the fact that the communications themselves, when made from one consenting adult to another, would not be illegal under the CDA — a state of affairs which, according to the Court, would ultimately lead to a dangerously diminished level of protected adult speech on the Internet.²⁹ In short, the Supreme Court sent Congress an unequivocal invitation to revisit the drawing board.³⁰

II. COPA

Undaunted by the Court's judicial rebuff of the CDA, Congress expediently passed a replacement — the Child Online Protection Act (COPA).³¹ Congress encapsulated the conduct forbidden by COPA with the following words: "Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce *by means of the World Wide Web*, makes any communication for *commercial purposes* that is available to any minor and that includes any material that is *harmful to minors*. . . ."³² As it had done with the CDA, Congress offered affirmative defenses (i.e., suggested methods of compliance) within the text of COPA, including "requiring use of a credit card, debit account, adult access code,

²⁷ See *id.* at 876–77 (emphasis added).

²⁸ The CDA did enumerate a list of defenses to prosecution, which might also be termed "suggested methods of compliance." These suggested methods of compliance included a showing that the accused violator "has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors" to an illegal communication or a showing that the alleged violator has "restricted access . . . by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number." 47 U.S.C. § 223(e)(5) (2002). The Supreme Court was unimpressed by the presence of these defenses, however, agreeing with the district court that "it would be prohibitively expensive for noncommercial — as well as some commercial — speakers who have websites to verify that their users are adults." *Reno v. ACLU*, 521 U.S. at 876–77.

²⁹ See *Reno v. ACLU*, 521 U.S. at 876–77.

³⁰ The Supreme Court's decision explicitly left intact the authority to prohibit and punish the use of telecommunication devices to expose minors to materials found to be obscene under § 223(a)(1)(B). *Id.* at 864. The First Amendment does not protect obscene speech. See *Roth v. United States*, 354 U.S. 476, 484–85 (1957) ("But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained. . . .").

³¹ Child Online Protection Act, 47 U.S.C. § 231 (2002).

³² *Id.* (emphasis added).

or adult personal identification number" or taking "any other reasonable measures that are feasible under available technology."³³ A reading of COPA in conjunction with the Supreme Court's opinion from *Reno v. ACLU* reveals an effort on the part of Congress to remedy the concerns that led to the demise of the CDA.³⁴

First, in an apparent effort to hem in the amount of speech encompassed by the Act and thereby alleviate the overbreadth concerns that had proven deleterious to CDA, Congress implanted two important qualifications into COPA: COPA only applied to communications made "by means of the World Wide Web;" and only governed communications made for "commercial purposes."³⁵ The distinguishing characteristics did not stop there, though: in an attempt to avoid the judicial criticisms prompted by the use of the terms "indecent" and "patently offensive" in the CDA, Congress used a new phrase, "harmful to minors,"³⁶ and augmented that phrase with a definition³⁷ tracing its pedigree all the way to the front door of the Supreme Court. Congress defined the phrase using the exact language delivered by the Supreme Court itself in an earlier indecency case — *Miller v. California*.³⁸

Despite these congressional efforts to prevent COPA from going the way of the CDA, COPA encountered constitutional turbulence before it even went into effect. Just as it had done to the CDA, a Pennsylvania district court entered a temporary restraining order barring enforcement of COPA pursuant to a suit brought by many of the same plaintiffs who had opposed the CDA,³⁹ including the ACLU.⁴⁰ A

³³ *Id.*

³⁴ See *ACLU v. Reno*, 217 F.3d 162, 174 (3d Cir. 2000) ("[I]n passing COPA, Congress attempted to resolve all of the problems raised by the Supreme Court in striking down the CDA as unconstitutional.").

³⁵ See 47 U.S.C. § 231(a)(1).

³⁶ *Id.*

³⁷ The term "material that is harmful to minors" means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that 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; 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 sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

Id. § 231(e)(6).

³⁸ 413 U.S. 15, 24 (1973) (using the exact language used by COPA to define "material that is harmful to minors" in defining the term "obscene" in a criminal case involving distribution of allegedly obscene materials via mail).

³⁹ See *ACLU v. Reno*, No. 98-5591, 1998 U.S. Dist. LEXIS 18546 (E.D. Pa. Nov. 23, 1998). In addition to the ACLU, that list of plaintiffs included Androgyny Books, Inc., Artnet Worldwide Corp., Free Speech Media, Internet Content Coalition, OBGYN.NET, Philadelphia Gay News, Powell's Bookstore, Riotgrrl, Salon Internet, Inc., West Stock, Inc.,

preliminary injunction followed soon after.⁴¹ As part of its decision on whether to issue the preliminary injunction, the district court assessed the plaintiffs' likelihood of success in a trial on the merits.⁴² The court decided that the plaintiffs had a sufficient likelihood of success, partly due to the fact that there were seemingly other available means of approaching the problem, such as filtering software, that might prove less restrictive and, at least, equally efficacious when compared to COPA.⁴³

When the government appealed the district court's decision to grant the preliminary injunction, the Third Circuit affirmed, but it hinged its reasoning for doing so on grounds distinct from those relied upon by the district court.⁴⁴ Rather than focus on the question of whether a less restrictive means existed, the court devoted its attention to Congress's use of the *Miller* standards for obscenity to define the phrase "harmful to minors."⁴⁵ One of the most noteworthy features of the *Miller* standards is their reliance on "contemporary community standards."⁴⁶ The Third Circuit postulated that any attempt to apply community standards to an amorphous medium like the World Wide Web, a medium for which geographic limits to distribution cannot currently be imposed, would work a violation of the First Amendment.⁴⁷ According to the panel, allowing such standards to be applied would frustrate the constitutional rights of members of more liberal communities, whose abilities to access certain information to which they have a constitutional right would be hampered by COPA.⁴⁸ Individuals offering sexual materials on the Web for commercial purposes would have to be certain that their websites comported with the community standards of the most conservative community in the country in order to avoid running afoul of COPA.⁴⁹

American Booksellers Foundation for Free Expression, Blackstripe, Addazi, Inc., Electronic Frontier Foundation, and Electronic Privacy Information Center.

⁴⁰ See *id.* at *15–18.

⁴¹ See *ACLU v. Reno*, 31 F. Supp. 2d 473, 498–99 (E.D. Pa. 1999) (granting and order for preliminary injunction).

⁴² See *id.* at 492.

⁴³ See *id.* at 497 ("The record before the Court reveals that blocking or filtering technology may be at least as successful as COPA would be in restricting minors' access to harmful material online without imposing the burden on constitutionally protected speech that COPA imposes on adult users or Web site operators.").

⁴⁴ See *ACLU v. Reno*, 217 F.3d 162, 174–77 (3d Cir. 2000), *vacated by* 535 U.S. 564 (2002).

⁴⁵ See *id.*

⁴⁶ See *id.*

⁴⁷ See *id.*

⁴⁸ See *id.* at 177.

⁴⁹ See *id.*

COPA's case found its way to the Supreme Court in 2002 in *Ashcroft v. ACLU*⁵⁰ in which the Court passed on the question of whether the court of appeals had erred in affirming the district court's decision to issue a preliminary injunction. The Court's inquiry was limited to the sole ground relied upon by the Third Circuit, namely the "contemporary community standards" issue.⁵¹

The primary argument forwarded by COPA's opponents, which echoed the opinion of the Third Circuit, but which the Court ultimately found to be unpersuasive, was that the Internet was distinguishable from other nationwide media to which the Court had allowed application of community standards,⁵² because, unlike the state of affairs surrounding other media, there are currently no methods of geographically limiting the distribution of materials placed on the Internet. Consequently, an Internet publisher has no feasible way of avoiding those communities that might judge his communications to be "harmful to minors."⁵³ The Court held that the incorporation of "community" decency standards alone, the sole grounds relied upon by the affirming appellate court, did not render COPA unconstitutional. The Court, therefore, vacated the Third Circuit's judgment and remanded the case for consideration of other issues.⁵⁴ The Court did not lift the

⁵⁰ 535 U.S. 564 (2002), *remanded to* 322 F.3d 240 (3d Cir. 2003).

⁵¹ *See supra* text accompanying notes 37–38.

⁵² *See Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 125–26 (1989) (upholding the application of community standards for obscenity when interpreting a federal statute regulating obscene telephone communications made by "dial-a-porn" call-in businesses); *Hamling v. United States*, 418 U.S. 87, 103–10 (1974) (upholding the application of a community standard for obscenity when interpreting a federal statute forbidding the mailing of materials found to be obscene).

⁵³ *See Ashcroft v. ACLU*, 535 U.S. at 581–83.

⁵⁴ *See id.* at 585–86 ("The scope of our decision today is quite limited. We hold only that COPA's reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment.").

One should hesitate to view the Court's reversal as an outright validation of the application of "contemporary community standards" to Web content because of the variety of specific responses exhibited by the Court.

Three justices, Chief Justice Rehnquist and Justices Thomas and Scalia, did explicitly reject the plaintiffs' principal argument and the Third Circuit's reasoning, saying that controllability of a medium's reach has never served as a controlling factor in prior precedent and that it therefore should not be a controlling factor where the Internet is concerned. *Id.* at 582–84.

These three members of the Court further explained that unsure Internet publishers do have a method of controlling the communities exposed to their communications; namely, they can pick a medium more controllable than the Internet. *See id.* at 583. This particular stance is somewhat troubling and questionable considering the following words from the Court's *Reno v. ACLU* opinion, which was joined by both Justice Thomas and Justice Scalia: "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *See Reno v. ACLU*, 521 U.S. 844, 880

injunction banning enforcement of COPA, however, explaining that such action would have to wait because issues yet to be addressed by the appellate court remained in the case.⁵⁵

In March 2003, the Third Circuit delivered its response to the Supreme Court by reaffirming the district court's issuance of a preliminary injunction barring enforcement of COPA.⁵⁶ This time, the Third Circuit left no stone unturned, holding that COPA is not narrowly tailored,⁵⁷ that other means exist that are both

(1997) (quoting *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 163 (1939) (reversing two convictions under ordinances banning the distribution of handbills without a permit)).

Resting on the other extreme was Justice Stevens, the lone dissenter, who entirely disagreed with the reasoning of Rehnquist, Scalia, and Thomas, and who found more merit in the arguments of the plaintiffs and the Third Circuit. See *Ashcroft v. ACLU*, 535 U.S. at 605–12 (Stevens, J., dissenting).

The stances of the remaining five justices were not as clear. Justice O'Connor concurred in the decision to reverse and remand as well as in a portion of the main opinion. Unlike her colleagues, however, she suggested that the applicability of "community standards" to Internet content was not a settled issue and that, if presented in certain situations, specifically in the form of an as-applied challenge, she might be inclined to provide a different response. See *id.* at 587 (O'Connor, J., concurring) ("In an as-applied challenge, for instance, individual litigants may still dispute that the standards of a community more restrictive than theirs should apply to them. And in future facial challenges to regulation of obscenity on the Internet, litigants may make a more convincing case for substantial overbreadth.").

Justices Kennedy, Souter, and Ginsburg took a different position on the subject, concurring in the judgment but saying that the question of whether "community standards" could constitutionally be applied to Internet speech was inseparable from the other issues implicated by COPA and that, therefore, the question was unanswerable on the record before them, necessitating a reversal and a remand of the case. See *id.* at 591–602 (Kennedy, J., concurring) ("We cannot know whether variation in community standards renders the Act substantially overbroad without first assessing the extent of the speech covered and the variations in community standards with respect to that speech.").

Finally, Justice Breyer, concurring in the judgment and in part of the main opinion, assumed his own unique stance, explaining away the First Amendment issue by stating his belief that Congress was referencing "the Nation's adult community taken as a whole" when using the term "community standards" in COPA. See *id.* at 589–91 (Breyer, J., concurring).

For an examination of the question of whether "community standards" may be applied to Internet communications under the First Amendment and an analysis of alternative solutions, see William D. Deane, Comment, *COPA and Community Standards on the Internet: Should the People of Maine and Mississippi Dictate the Obscenity Standard in Las Vegas and New York?*, 51 CATH. U. L. REV. 245, 283–99 (2001).

⁵⁵ See *Ashcroft v. ACLU*, 535 U.S. at 586.

⁵⁶ See *ACLU v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003) ("We hold that the District Court did not abuse its discretion in granting the preliminary injunction, nor did it err in ruling that the plaintiffs had a probability of prevailing on the merits of their claim inasmuch as COPA cannot survive strict scrutiny.").

⁵⁷ *Id.* at 248–53 (pointing both to the language of the statute, particularly the phrase "harmful to minors," and to the undefined term "commercial purpose," as well as the limited

less restrictive and equally capable of meeting the government's interest in protecting children,⁵⁸ and that COPA suffers from overbreadth in that it threatens a constitutionally unacceptable quantity of otherwise protected speech.⁵⁹

What comes next for COPA? The likely answer to that question is another appeal to the Supreme Court by the Department of Justice, seeking invalidation of the preliminary injunction that currently bars enforcement of COPA.⁶⁰

Reading Between the Lines — How Does the Supreme Court Really Feel About COPA?

The Court's opinion in *Ashcroft v. ACLU* is an interesting and somewhat perplexing read for one hoping to discern the Court's true opinion of COPA (i.e., how it would rule if the question of the overall facial validity of COPA under the First Amendment were squarely before it). In its convoluted multi-part opinion, the Court sent conflicting messages on this question. On the one hand, the Court clearly stated the limited scope of its decision in *Ashcroft v. ACLU*, constantly reiterating that its ruling was limited to the specific question of whether incorporation of the *Miller* standards into COPA alone rendered the Act facially invalid.⁶¹ On the other hand, though, the Court's decision eroded a major route of

affirmative defenses offered by the statute as factors contributing to a finding that COPA is not sufficiently narrowly tailored).

⁵⁸ *Id.* at 253–57 (discussing use of filtering software as a less restrictive but equally effective alternative to COPA) (citing various portions of *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000)).

⁵⁹ *See id.* at 257–59 (explaining that COPA endangers many protected pieces of speech with its language, again, particularly focusing on the “harmful to minors” and “commercial purposes” language, as well as the limited affirmative defenses offered by the statute, all of which, according to the court, generate an unconstitutional “chilling” effect on speech that is otherwise protected by the First Amendment).

⁶⁰ If congressional supporters of COPA had their way, COPA would fight the judiciary to its last breath, as evidenced by the statement of COPA's drafters, Rep. Michael G. Oxley (R-OH), co-sponsor, Rep. James C. Greenwood (R-PA), and the Chairman of the House Commerce Committee, Thomas J. Bliley (R-VA), upon learning of the district court's decision to preliminarily enjoin enforcement of the Act: “We continue in our steadfast support of the COPA, and we urge the Department of Justice to continue defending this law at trial or on appeal all the way to the U.S. Supreme Court.” Heather L. Miller, Note, *Strike Two: An Analysis of the Child Online Protection Act's Constitutional Failures*, 52 FED. COMM. L.J. 155, 167 & n.97 (1999) (quoting John Schwartz, *Judge Halts Law to Keep Children from Web Porn*, DETROIT NEWS, Feb. 2, 1999, at 7A).

On August 11, 2003, John Ashcroft expressed the unwavering support of the Department of Justice for COPA, filing a petition for a writ of certiorari with the Supreme Court. *See Ashcroft v. ACLU*, 535 U.S. 564 (2002), petition for cert. filed, 72 U.S.L.W. 3130 (U.S. Aug. 11, 2003) (No. 03-218).

⁶¹ *See Ashcroft v. ACLU*, 535 U.S. at 585 (“We do not express any view as to whether

facial attack open to COPA opponents during a trial on the merits, namely an attack focusing on the inclusion of “contemporary community standards,” which arguably made success for COPA proponents during a trial on the merits at least more likely than before. Further, in a portion of the opinion explicitly joined by four justices, the Court paid COPA lip service for evidencing an improvement over its predecessor, the CDA, saying, “COPA, by contrast, does not appear to suffer from the same flaw because it applies to significantly less material than did the CDA. . . .”⁶² Those four justices were particularly impressed by the presence of “prurient interest”⁶³ and “serious value”⁶⁴ prongs, both integral components of the *Miller* community standards, as limitations on the scope of COPA.⁶⁵ Finally, the three justices who chose only to join in the Court’s judgment suggested that any facial challenge to COPA must be handled with extreme care due to the fact that individuals who had witnessed the striking down of the CDA had also drafted and signed COPA into law, meaning the Court should presume that these legislators drafted and passed COPA with the intent of avoiding the pitfalls of the CDA.⁶⁶

Thus, the question of whether a majority of the Supreme Court sees COPA as friend or foe remains open and will remain so at least until the Supreme Court is given another opportunity to pass on the question of whether the preliminary injunction issued against COPA was erroneous. It does seem, though, as if the Court in *Ashcroft v. ACLU* was hinting that COPA stands a chance of surviving strict scrutiny when the issue next appears before the Court.

COPA suffers from substantial overbreadth for other reasons, whether the statute is unconstitutionally vague, or whether the District Court correctly concluded that the statute likely will not survive strict scrutiny. . . .”).

⁶² *Id.* at 578 (Rehnquist, C.J., O’Connor, J., Scalia, J., and Thomas, J., concurring).

⁶³ 47 U.S.C. § 231(e)(6) (2002). For the exact statutory language, see *supra* note 37.

⁶⁴ *Id.*

⁶⁵ See *Ashcroft v. ACLU*, 535 U.S. 580–81 (“When the scope of an obscenity statute’s coverage is sufficiently narrowed by a ‘serious value’ prong and a ‘prurient interest’ prong, we have held that requiring a speaker disseminating material to a national audience to observe varying community standards does not violate the First Amendment.”) (citing *Hamling v. United States*, 418 U.S. 87, 103–10 (1974) (upholding the application of a community standard for obscenity when interpreting a federal statute forbidding the mailing of materials found to be obscene)).

⁶⁶ See *id.* at 591–92 (Ginsburg, J., Kennedy, J., and Souter, J., concurring) (“Congress and the President were aware of our decision, and we should assume that in seeking to comply with it they have given careful consideration to the constitutionality of the new enactment. . . . [T]he Judiciary must proceed with caution and identify overbreadth with care before invalidating the Act.”).

III. SUGGESTIONS TO THE COURT — WHY COPA SHOULD BE SENT THE WAY OF THE CDA

When the Supreme Court next meets COPA, it should declare the Act unconstitutional on two separate grounds. First and foremost, COPA does not represent the least restrictive means of meeting the government's compelling interest in controlling child exposure to Internet pornography, making the Act intolerable to the First Amendment. The Court's recent decision in the *Playboy* case⁶⁷ supports this argument, as does the Third Circuit's citing of the availability of other less restrictive means as one of several reasons for again affirming the district court's preliminary injunction against COPA.⁶⁸ Second, the Court has long recognized a parent's substantive due process right to raise his or her children as he or she sees fit, with certain limitations.⁶⁹ The existence of this right and the importance of safeguarding it weigh against adoption of an invasive regime of regulation such as that embodied by COPA. Before either of these arguments may be properly presented, a brief exploration of prior First Amendment jurisprudence and principles and of the way courts have applied those principles to COPA thus far is in order.

A. When is the First Amendment Implicated?

The most obvious types of government activity implicating the First Amendment are government actions that specifically forbid communication of a certain type or manner on the basis of content,⁷⁰ or government actions that relegate certain types of communications to particular "time[s], place[s] and manner[s]," regardless of the content of the involved speech.⁷¹ One less obvious but equally

⁶⁷ See *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000).

⁶⁸ See *ACLU v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003).

⁶⁹ See discussion *infra* Part VI.

⁷⁰ For examples of such content-based regulations, see 18 U.S.C. § 1461 (2002) (forbidding the mailing of, among other things, "obscene, lewd, lascivious, indecent, filthy or vile" materials) and 47 U.S.C. § 223(b) (2002) (forbidding, among other things, the use of a telecommunications device for commercial purposes to make an "obscene communication").

⁷¹ See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104, 115–21 (1972) (upholding as a valid restriction on the time, place, and manner of speech, a city ordinance prohibiting activities near a school that are or would be disturbing to the "peace or good order" of the school, regardless of the content of the involved speech); *Cox v. New Hampshire*, 312 U.S. 569, 574–76 (1941) (upholding a state statute requiring the obtaining of a license in order to stage a parade on public streets, where the relevant licensing board was found to not be vested with the sort of "unfettered discretion" that would allow it to make decisions based upon the content of the speech shared by those applying for a license).

The question of whether a government action or regulation rightfully falls into the "time,

implicating set of circumstances arises when a government statute burdens communications of a certain content type with required fees, onerous regulations, threats of punishment for failure to comply with guidelines, etc., to the point of discouraging the making of such communications at all, even where constitutionally protected, and possibly to the point of discouraging nontargeted but similar speech. The Court has described such content-based government action as having a "chilling" effect on speech.⁷² The judiciary has placed the CDA and COPA in this latter category of First Amendment implication.⁷³

place, and manner" category, like most questions of constitutional law, can be a slippery one, especially where matters of indecent communications are concerned. For example, when dealing with zoning ordinances affecting adult movie houses but not other types of movie houses, the Supreme Court has on at least two occasions placed the zoning ordinance at bar in the "time, place, and manner" category, relying on the government's contention that its interest in passing and enforcing the regulations was not the curbing of movies with adult content but, rather, was the curbing of the negative "secondary effects" associated with the presence of such movie houses, such as increased crime rates and decreased property values. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49–52 (1986) (upholding a city ordinance that prohibited adult movie theaters from locating within a specified distance from residential zones); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70–73 (1976) (upholding a city ordinance that prevented adult movie theaters from locating near other "regulated uses" or near residential zones). In other words, the Court held that the distinction among speech being made was based on effect on crime rate and property value, not speech content.

⁷² *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244–51 (2002) (striking down, on First Amendment grounds, a federal law banning images which appear to feature minors in a pornographic context when, in actuality, no minors were involved in the creation of the images, due to the "chilling" effect such a prohibition might have on otherwise protected speech); *Dombrowski v. Pfister*, 380 U.S. 479, 493–96 (1965) (striking down an anti-communism statute criminalizing failure to register on behalf of those who were members of what the statute termed "subversive organization[s]," citing concerns for the "chilling" effect the statute had on protected rights of expression and association).

⁷³ *See Reno v. ACLU*, 521 U.S. 844, 871–72 (1997) ("[T]he CDA . . . raises special First Amendment concerns because of its obvious chilling effect on free speech. The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images."); *ACLU v. Ashcroft*, 322 F.3d 240, 258–59 (3d Cir. 2003) (agreeing with the district court that Web publishers who attempt to comply with COPA would likely encounter economic disincentives because requiring publishers to collect personal information on individual users might discourage Internet users from accessing the publishers' communications, even adult Web surfers, which would, in turn, lower the profits of Web publishers of adult materials, discouraging them from publishing at all), *petition for cert. filed*, 72 U.S.L.W. 3130 (U.S. Aug. 11, 2003) (No. 03-218); *ACLU v. Reno*, 31 F. Supp. 2d 473, 497 (E.D. Pa. 1999) (discussing COPA, "[A] chilling effect could result in the censoring of constitutionally protected speech . . ."), *aff'd*, 217 F.3d 162 (3d Cir. 2000), *vacated*, 535 U.S. 564 (2002).

B. Levels of Scrutiny

One of the first questions a court engaging in First Amendment analysis must answer is the question of which level of scrutiny the court must apply to the statute or government action in question. The aforementioned categorization based on whether a suspect statutory regime or government action distinguishes among speech on the basis of content or on the basis of the "time, place, and manner" plays a pivotal role in this threshold inquiry.⁷⁴ Government action distinguishing on the basis of content, *unlike* "time, place, and manner" restrictions,⁷⁵ invokes the Court's highest level of scrutiny, strict scrutiny, which requires the government to demonstrate an interest that is "compelling" coupled with means of serving that interest that are "narrowly" or "carefully" tailored.⁷⁶ Regulations distinguishing communications on the basis of whether the message is "indecent" or "harmful to minors," like the CDA and COPA, are regulations based on content, so when defending them against a First Amendment attack, the government must demonstrate an interest that is "compelling" and means that are "narrowly tailored" to serve that interest.⁷⁷ Further, the Supreme Court has already made clear that courts must apply an unqualified form of strict scrutiny to Internet provisions like the CDA and COPA.⁷⁸

⁷⁴ See, e.g., *Reno v. ACLU*, 521 U.S. 844, 867–70 (1997) (deciding whether the CDA could best be characterized as a content-based restriction on speech or a "time, place, and manner" restriction before deciding which level of First Amendment scrutiny should be applied to the CDA).

⁷⁵ So-called "time, place, and manner" restrictions on speech, however, invoke a lower level of scrutiny, requiring only that the government demonstrate a "substantial" interest in taking action and that the government not unreasonably foreclose other routes of making the same communications. See *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (examining the constitutionality of a zoning ordinance restricting the location of adult theaters in relation to residential zones).

⁷⁶ See, e.g., *Reno v. ACLU*, 521 U.S. at 879; *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends."); *Elrod v. Burns*, 427 U.S. 347, 363 (1976) ("If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.").

⁷⁷ See *Reno v. ACLU*, 521 U.S. at 879. The Supreme Court has directly addressed the question of whether a statute like the CDA or COPA should be treated as a "time, place, and manner" restriction on speech. See *id.* When defending the CDA, the government asserted that the number of other avenues available for the sorts of information affected by the CDA rendered the Act a mere restriction on "time, place, and manner." *Id.* The Court responded to that argument with the following: "CDA regulates speech on the basis of its content. A 'time, place, and manner' analysis is therefore inapplicable." *Id.*

⁷⁸ When passing on questions of sexually explicit materials in certain media in the past, specifically the broadcast media, the Court has lowered the level of scrutiny applied. See

FCC v. Pacifica Found., 438 U.S. 726, 748–50 (1978) (“[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection.”).

The Supreme Court has cited several reasons for this diminished level of scrutiny applied to regulations bearing on the broadcast media. First, the Court has cited the “uniquely pervasive presence” of the broadcast media in American life, a state of affairs that, according to the Court, brings the First Amendment rights of the media into direct tension with what has been described as the “individual’s right to be left alone.” *Id.* at 748–49. Additionally, the Court has justified this diminished level of protection by pointing to the easy access children of all ages have to the broadcast media. *Id.* at 749–50. Finally, the Court has also cited the unique physical limitations of the broadcast media (i.e., the fact that there are a limited number of frequencies and a theoretically limitless number of would-be broadcasters) as a justification for the allowance of greater government control and regulation of the broadcast media, reasoning that the government must be given leeway in order to bridge the gap between supply and demand in a fair manner. *See Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388–89 (1969) (involving a challenge to the constitutionality of the FCC’s fairness doctrine rules, which required broadcasters to present both sides of an argument).

However, the Court has distinguished the Internet from broadcast media in this respect, finding no history of pervasive regulation of the Internet, which is traceable to the fact that the Internet, unlike traditional broadcast media, is a medium of limitless communication outlets, and to the fact that the Internet is not as invasive, according to the Court, as traditional broadcast media. *See Reno v. ACLU*, 521 U.S. at 868–70. This distinction between the broadcast media and the Internet has led the Court to extend unqualified First Amendment protections to Internet communication. *See id.* at 870 (“[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet].”).

For an argument that the Internet is so analogous to broadcast media that courts should grant Internet communications the same qualified First Amendment protections as those accorded to broadcast media, see Rebecca L. Covell, Note, *Problems with Government Regulation of the Internet: Adjusting the Court’s Level of First Amendment Scrutiny*, 42 ARIZ. L. REV. 777, 792–93 (2000) (arguing that “mousetrapping” and “pagejacking” scams that result in the sudden pop-up of sexually explicit materials on the computer screen with no affirmative steps having been taken by the user to make them appear as well as the easy accessibility of the Internet to modern children are factors that make the Internet analogous to the invasive and easily accessible broadcast media, meaning that the Court should grant Internet publishers the same qualified First Amendment protections as those enjoyed by the broadcast media).

Also, the Supreme Court has previously qualified the First Amendment rights of publishers making commercial speech:

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n, 447 U.S. 557, 566 (1980).

C. The Government's Interest . . . Compelling?

The government has at least one strong weapon at its disposal: the Supreme Court has held in the past⁷⁹ and continues to hold⁸⁰ that the government has a compelling interest in protecting children from exposure to obscene and indecent sexual materials.⁸¹ Thus, the constitutionality of most government actions and legislation aimed at meeting this interest has hinged, and will likely continue to hinge, on the Court's view of the means chosen by the government to meet its goals and on the question of whether those means are "carefully tailored."⁸²

D. Government Interest Meets Tailoring

A sufficiently compelling reason for the government to leap into action is not equivalent to a license to pass any and all legislation capable of solving the problem where First Amendment protections are implicated to the highest degree.⁸³ After the government has proposed a solution, there still remains the question of whether that solution is "carefully" or "narrowly tailored."⁸⁴ In application, this inquiry often translates into the question of whether there is open to the government an alternative route of action that is at least equally efficacious in solving the problem

The district court who issued the preliminary injunction barring COPA, however, made clear that precedent establishing such qualifications were inapplicable to COPA. *See ACLU v. Reno*, 31 F. Supp. 2d at 493 (pointing to the fact that the Supreme Court found no reason to qualify the First Amendment protection accorded to the speech targeted by the CDA in *Reno v. ACLU*).

⁷⁹ *See Pacifica Found.*, 438 U.S. at 749–50 (recognizing the government's compelling interest in protecting youth from exposure to indecent materials in a case involving an allegedly indecent radio broadcast); *Ginsberg v. New York*, 390 U.S. 629, 640–41 (1968) (recognizing the New York legislature's power to enact legislation designed to protect children from "abuse" and upholding legislation prohibiting the sale of obscene materials to minors as being a legitimate exercise of that power).

⁸⁰ *See Reno v. ACLU*, 521 U.S. at 875.

⁸¹ It would appear that protection of children from harmful materials represents the only compelling governmental interest upon which the government may rely in this arena. When defending the CDA, the government advanced the additional argument that they have an "[e]qually significant" interest in promoting Internet growth and that regulations, such as those embodied in the CDA, served to promote that interest. *Id.* at 885. The Court was less than receptive to this argument, saying, "[W]e find this argument singularly unpersuasive. The dramatic expansion of this new marketplace of ideas contradicts the factual basis of this contention." *Id.*

⁸² *See supra* note 76 and accompanying text.

⁸³ *See supra* note 76 and accompanying text.

⁸⁴ *See supra* note 76 and accompanying text.

targeted by the action or law but that impinges on First Amendment rights to a lesser degree.⁸⁵ If it is the case that an equally efficacious, less restrictive route remains open to the government, the government may not proceed with its proposed plan of action without running afoul of the First Amendment. Depending on the case, the question of narrow tailoring might also be framed as an inquiry as to whether the statute or government action suffers from overbreadth (i.e., whether the action or law at issue is overinclusive), unnecessarily affecting more protected speech than necessary to accomplish the government's compelling goal or goals.⁸⁶

When dealing with First Amendment cases involving sexually explicit materials in the past, the Court has made one thing clear where tailoring is concerned: Regardless of the strength of the government's interest in protecting children, "[t]he level of discourse [among adults] cannot be limited to that which would be suitable for a sandbox."⁸⁷

Lack of narrow tailoring ultimately proved fatal to the CDA, with the Court focusing on the overbreadth of the statute.⁸⁸ The Court did conduct a cursory exploration into the issue of whether there was an equally efficacious, less restrictive means available for meeting the government's interest,⁸⁹ but the Court apparently found all the ammunition it needed in the text of the statute itself, which, according to the Court, featured far too few limitations capable of hemming in the scope of the statute to an acceptable degree.⁹⁰

⁸⁵ See, e.g., *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000) (holding unconstitutional under the First Amendment a statute requiring operators of adult cable channels to either implement changes that would alleviate the issue of "signal bleed" of adult programming altogether, a fairly expensive undertaking, or to limit programming to the hours of 10:00 p.m. to 6:00 a.m. due to the availability of a less restrictive, equally efficacious means); *Elrod v. Burns*, 427 U.S. 347, 369–70 (1976) (holding that patronage dismissals of government employees violated the First Amendment because they generally were not the least restrictive means of accomplishing the compelling government ends of encouraging government efficiency due to the availability of other equally efficacious, less restrictive means, such as the limitation of such dismissals to policymaking positions only).

⁸⁶ See *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105, 121–22 (1991) (holding unconstitutional under the First Amendment a law hindering the ability of one who has committed a crime to write about the commission of that crime and thereby make a profit for being overinclusive and, therefore, insufficiently narrowly tailored).

⁸⁷ *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73–75 (1983) (striking down a federal statute forbidding the unsolicited mailing to homes of information on contraception); see also *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 128 (1989); *Butler v. Michigan*, 352 U.S. 380, 383–84 (1957) ("We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children.").

⁸⁸ See *Reno v. ACLU*, 521 U.S. 844, 874–85 (1997).

⁸⁹ See *id.* at 879.

⁹⁰ See *id.* at 874–85.

No court has yet directly (i.e., in a trial on the merits) evaluated the question of whether COPA is sufficiently narrowly tailored; though, the district court that enjoined its enforcement did discuss it in the context of deciding whether the plaintiffs had successfully made the requisite showing of a likelihood of success on the merits,⁹¹ as did the Third Circuit during its second examination of COPA after remand from the Supreme Court.⁹² Each of those courts seemed convinced that COPA was not sufficiently narrowly tailored,⁹³ yet, as has already been discussed, the Supreme Court on appeal did seem to be impressed by Congress's having drafted into COPA certain limitations which were nowhere to be found in the ill-fated CDA.⁹⁴

This fact is one of utmost importance, for it suggests that the parties opposing COPA might have to go a step further than they had to go in order to defeat the CDA if they wish to succeed in persuading the Court that COPA is irreconcilable with the First Amendment. Indeed, this turn of events suggests that in order to prevail at the Supreme Court level on the theory that COPA is violative of the First Amendment, its opponents will now have to press more firmly the question of whether there exists a less restrictive, equally efficacious means of serving the government's interest in protecting children.

E. The Least Restrictive Means — COPA's Last Stand

COPA opponents and the courts handling their claims have already discussed the question of whether a less restrictive, equally efficacious means of childproofing the Internet exists.⁹⁵ Most of these discussions have centered on the topics of filtering software and of whether parental implementation of such software represents a less restrictive, equally efficacious solution to the issue at hand.⁹⁶

⁹¹ See *ACLU v. Reno*, 31 F. Supp. 2d 473, 496–97 (E.D. Pa. 1999), *aff'd*, 217 F.3d 162 (3d Cir. 2000), *vacated*, 535 U.S. 564 (2002).

⁹² See *ACLU v. Ashcroft*, 322 F.3d 240, 250–61 (3d Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3130 (Aug. 11, 2003) (No. 03-218).

⁹³ See *id.* (pointing to both the language of the statute, particularly the phrases “harmful to minors” and “commercial purpose,” as well as the limited affirmative defenses offered by the statute as factors contributing to a finding that COPA is not sufficiently narrowly tailored); *ACLU v. Reno*, 31 F. Supp. 2d at 496–97 (expressing doubt as to the ability of the government to prove sufficiently narrow tailoring at a trial on the merits).

⁹⁴ See *supra* pp. 255.

⁹⁵ Both the district court in *ACLU v. Reno*, 31 F. Supp. 2d at 497, and the Third Circuit in *ACLU v. Ashcroft*, 322 F.3d at 261–66, have already passed on this least-restrictive means argument, and each court has found the argument persuasive, citing it as a reason for ruling that COPA opponents were likely to succeed in an eventual trial on the merits.

⁹⁶ See *ACLU v. Ashcroft*, 322 F.3d at 261–66 (pointing to filtering/blocking software as a less restrictive alternative to COPA to support its finding that COPA is not the least restrictive avenue of government action available); *ACLU v. Reno*, 31 F. Supp. 2d at 497.

However, as the Third Circuit pointed out during its first discussion of COPA, such *parental* action is not *governmental* action aimed at meeting a *governmental* interest.⁹⁷ Indeed, parental use of filtering software represents parental action aimed at meeting parental interests, regardless of the fact that parental and governmental interests happen to overlap where children and Internet pornography are concerned.⁹⁸

Thus, COPA opponents should be careful in framing their arguments and should avoid simplifying the argument to the point of claiming that potential parental action alone sufficiently obviates the need for COPA or some other congressional action. In other words, COPA opponents should avoid cutting the government out of the equation altogether; instead, they should make an argument that casts the government and parents as cooperative entities in the fight against child access to computer pornography. This argument should focus on promulgating legislation designed to empower both parents and the government to meet their compelling interests in protecting children from the perils of the Web, either by partnering the government with filtering software providers or via government programs designed to educate parents on the importance of limiting the types of materials their children access on the Net.⁹⁹ In turn, when COPA opponents properly make such an argument, the Supreme Court, in light of past precedent, should heed this argument

Evidence was presented that blocking and filtering software is not perfect, in that it is possible that some appropriate sites for minors will be blocked while inappropriate sites may slip through the cracks. However, there was also evidence that such software blocks certain sources of content that COPA does not

Id.

⁹⁷ See *ACLU v. Reno*, 217 F.3d 162, 171 n.16 (3d Cir. 2000) (“We are of the view that such actions do not constitute government action, and we do not consider this to be a lesser restrictive means for the government to achieve its compelling interest.”).

Interestingly enough, when passing on the COPA issue for the second time, the same Third Circuit judges who handled the court’s first examination of COPA — Senior Circuit Judge Garth and Circuit Judges Nygaard and McKee — assessed the argument that filtering and blocking software represented a less restrictive means capable of rendering COPA unconstitutional. See *ACLU v. Ashcroft*, 322 F.3d at 261–66. Despite the court’s earlier statement that parental use of filtering software did not constitute government action (See *ACLU v. Reno*, 217 F.3d at 171 n.16), the court held that filtering and blocking software programs were a less restrictive means of accomplishing the goals of COPA, and that the existence of those technologies was a factor mitigating against a finding of First Amendment compliance for COPA. See *ACLU v. Ashcroft*, 322 F.3d at 261–66.

The Third Circuit offered no explanation for this attitude change. Thus, it would be very prudent of COPA opponents to be mindful of the existence of the argument that the mere availability of filtering and blocking software alone is not government action in a constitutional sense, for this argument could very well be a weapon of choice for COPA proponents as they take their case back to the Supreme Court.

⁹⁸ See *ACLU v. Reno*, 217 F.3d at 171 n.16.

⁹⁹ Suggested legislation will be offered. See *infra* Part V.

and, therefore, again send Congress back to the legislative drawing board. One may find insight on how to successfully make such an argument and on why such an argument should persuade the Court via an examination of the Court's 2000 opinion in *United States v. Playboy Entertainment Group, Inc.*¹⁰⁰

IV. SUBSCRIBING TO *PLAYBOY*

A. *Playboy at a Glance*

In an effort to curb instances of children accessing fleeting sexual images in the form of "signal bleed"¹⁰¹ from imperfectly scrambled adult cable channels, Congress passed section 505 of the Telecommunications Act of 1996.¹⁰² Enforcement of this provision gave adult cable channels a choice between two courses of action: either fully scramble adult channels for all nonsubscribers — a prohibitively expensive undertaking — or limit programming to hours when children are least likely to be watching television, a span of time administratively set at 10:00 p.m. to 6:00 a.m. by the Federal Communications Commission (FCC).¹⁰³ As the *Playboy* Court pointed out, because of financial realities, most affected parties chose the latter of these two options, resulting in what the Court termed "a significant restriction of communication."¹⁰⁴

Playboy Entertainment Group, Inc., and other interested parties challenged the law on First Amendment grounds, primarily claiming that a less restrictive, equally efficacious means of remedying the "signal bleed" problem was available in the form of section 504 of the Telecommunications Act of 1996,¹⁰⁵ which requires cable television providers to "fully scramble or otherwise fully block" any channel upon customer request free of charge.¹⁰⁶ Plaintiffs persuaded the Court with this argument, and as a result, the Court held that section 504, coupled with effective notice of its existence and function to consumers, was an equally efficacious, less

¹⁰⁰ 529 U.S. 803 (2000).

¹⁰¹ The following excerpt from the *Playboy* opinion defines the term "signal bleed": "Scrambling could be imprecise, however; and either or both audio and visual portions of the scrambled programs might be heard or seen, a phenomenon known as 'signal bleed.'" *Id.* at 806.

¹⁰² 47 U.S.C. § 561 (2000).

¹⁰³ *See Playboy*, 529 U.S. at 806–07.

¹⁰⁴ *Id.* at 809.

¹⁰⁵ 47 U.S.C. § 560 (2000).

¹⁰⁶ *Playboy*, 529 U.S. at 809–10 (quoting section 504 of the Telecommunications Act of 1996).

restrictive means for the government to achieve its compelling end.¹⁰⁷ The Court theorized that parents wishing to shield their children from the dangers of signal bleed could and would utilize the government-granted tool of section 504 as a means of achieving that end.¹⁰⁸ In following this line of reasoning, the Court made clear that it would not simply assume that section 504 would be ineffective¹⁰⁹ and that it particularly would not assume that parents empowered with proper notice of the availability of section 504 would not act.¹¹⁰ Ultimately, citing both this less restrictive means issue and the failure of the record to even reflect a serious “signal bleed” problem to be remedied,¹¹¹ the Court declared section 505 unconstitutional under the First Amendment.¹¹²

B. Lessons from Playboy

The primary lesson offered by *Playboy* to those approaching the constitutionality of COPA is this: when the government’s goal is to protect children from harmful sexual materials conveyed via a certain medium, it may not accomplish that goal under the First Amendment by using an invasive statutory regime that chills speech if passing and enforcing legislation that empowers parents to remedy the problem on their own would serve as less restrictive but equally efficacious government action capable of protecting children.¹¹³

Applying this lesson directly to COPA, if COPA opponents can show that Congress could emplace alternative legislation that would empower parents to remedy the problem of children accessing Internet pornography and that such legislation would be both less restrictive than COPA and equally or more efficacious than the regime established by COPA at protecting children, then the Court should not allow COPA through the gates of the First Amendment.¹¹⁴

¹⁰⁷ *Id.* at 823–26 (“The Government also failed to prove § 504 with adequate notice would be an ineffective alternative to § 505.”).

¹⁰⁸ *See id.*

¹⁰⁹ *See id.* at 824–25 (expressing doubt as to the validity of the government’s “offhand suggestion” that section 504 would fail due to a lack of parental action and pointing to the inability of the record to support any such contention).

¹¹⁰ *Id.* at 824 (“[A] court should not presume parents, given full information, will fail to act.”).

¹¹¹ *Id.* at 822–23 (“We agree that the Government has failed to establish a pervasive, nationwide problem justifying its nationwide daytime speech ban.”).

¹¹² *Id.* at 827.

¹¹³ *See id.* at 809–10.

¹¹⁴ At least one commentator has seen fit to warn against the application of *Playboy* principles to the Internet. *See* Melanie L. Hersch, Note, *Is COPPA a Cop Out? The Child Online Privacy Protection Act as Proof That Parents, Not Government, Should Be Protecting Children’s Interests on the Internet*, 28 *FORDHAM URB. L.J.* 1831, 1839–40 (2001) (“It is tempting to analogize the Internet to cable television. However, cable television

Filtering software comes into play at this point. Filtering software allows the blocking of particular sites and types of sites.¹¹⁵ If Congress were to promulgate legislation that facilitated parental use of these software technologies and if that legislation were both less restrictive than COPA and at least as efficacious as COPA, such legislation would be to COPA what section 504 was to section 505 in *Playboy* — a less restrictive, equally efficacious avenue of government action whose very existence mandates the striking down of COPA under the First Amendment.¹¹⁶

This approach would address the previously discussed concerns forwarded by the Third Circuit that parental use of filtering software, in and of itself, does not constitute government action;¹¹⁷ actual government action would play a pivotal role in any such regime. Further, as will be discussed in detail later, such a regime would exceed COPA in another constitutional respect: it would redeem the rights of parents to make decisions regarding the materials to which their children are exposed.¹¹⁸

is distinguished from the Internet by the limited amount of content that can be broadcast on its channels, a constraint resulting from the scarcity of broadcast frequencies. The Internet, by contrast, has unlimited broadcasting potential.”).

However, any differences between the media of cable television and the Internet did not prevent the Third Circuit from relying heavily on the *Playboy* opinion during its second COPA analysis. See *ACLU v. Ashcroft*, 322 F.3d 240, 261–66 (3d Cir. 2003) (relying on *Playboy* in its least restrictive means analysis). Perhaps the Third Circuit felt comfortable engaging in this cross-medium analysis because of one thing that the Internet and cable television have in common: both are media to which the Supreme Court has extended unqualified First Amendment protection. See *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (“[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet].”); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 639 (1994) (“In light of these fundamental technological differences between broadcast and cable transmission, application of the more relaxed standard of scrutiny . . . is inapt when determining the First Amendment validity of cable regulation.”) (citation omitted). This common trait mitigates against the argument that there is danger in analogizing the Internet and cable television for First Amendment purposes.

Further, the Supreme Court itself might find factual fault with an argument distinguishing the Internet and cable television on the basis of broadcast potential. As the Court pointed out in *Turner Broadcasting System*, “given the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium.” *Turner*, 512 U.S. at 639. If the Supreme Court is correct in its assessment of the state of cable television, then it is fair to say that an attempt to distinguish cable television and the Internet based on a difference in broadcasting potential finds no support in reality.

¹¹⁵ See *infra* pp. 267–68.

¹¹⁶ See *Playboy*, 529 U.S. at 810, 827.

¹¹⁷ See *supra* note 97.

¹¹⁸ See *infra* pp. 274–75.

Still, questions remain. What exactly would this legislation look like and require? Would such legislation be less restrictive than COPA? Would it be at least equally efficacious in meeting the government's compelling interest? Each of these questions will be examined in turn.

V. PROPOSED ALTERNATIVES TO COPA

The following proposals by no means exhaust the universe of solutions open to Congress; indeed, only Congress's collective imagination and the strictures of the Constitution limit the size of that universe. In light of the fact that the proposals to come rely heavily upon filtering software, an overview of the functions of such software programs will first be provided.

A. Filtering Software — A Crash Course

One may install filtering software on an individual computer or on a network that serves numerous computers.¹¹⁹ Once installed, filtering software takes action when a computer user attempts to access a site on the World Wide Web by either entering a Web address into a Web browsing program or clicking on a link using a Web browsing program.¹²⁰ Once triggered, the filtering software program examines the address the user is attempting to access and compares that address to a list of "control addresses" that the manufacturer of the software has previously catalogued and categorized.¹²¹ The filtering program checks to see if the entered address has been categorized; if the address has been categorized, the program checks to see if the category into which it falls is a category which the user has a right to access per the parameters set by the software administrator,¹²² who, for present discussion purposes, would likely be a parent or guardian. If the site is one the user is allowed to access, he or she may visit the site; if not, the filtering program denies the user access to the site.¹²³ In response to the constant expansion of the Internet, manufacturers of filtering software periodically make updated lists of "control addresses" available to users; however, this update process generally does not involve review of sites currently on lists, meaning that, absent a request for review, a site will remain listed as a "control address," even if the owner of the site removes all adult materials.¹²⁴

¹¹⁹ *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401, 427–30 (E.D. Pa. 2002), *rev'd*, 123 S. Ct. 2297 (2003).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

As the judiciary has pointed out on several occasions, filtering software is not perfect, and its use does result in the blocking of some sites that are not pornographic in nature, but are instead of educational or cultural value, a phenomenon termed "overblocking."¹²⁵ On the other hand, the realities of the Internet, its astronomical rate of growth and constant flux in content, make it impossible for filtering software companies to create a product that will block each and every site with adult or pornographic content, resulting in what those in the field refer to as "underblocking."¹²⁶

B. Legislation to Sponsor Parental Education on the Availability and Use of Filtering Software

One COPA alternative open to Congress is legislation supporting implementation of an educational program for parents on the importance of monitoring their children while using the Internet, either in person or via use of filtering software. This statutorily mandated education program could mirror parental education initiatives in other areas, such as substance abuse,¹²⁷ and could require the FCC to pursue public service announcements on television, on the radio, in print, and even on the Internet itself.¹²⁸

C. Legislation Requiring Internet Service Providers to Provide Parents with Information on Filtering Software

Were Congress to desire a more aggressive and invasive approach to the problem, they might consider enacting legislation requiring Internet service providers (ISPs) to disseminate information on Internet filtering software to all customers.¹²⁹ A system of civil penalties for failure to comply with the

¹²⁵ *Id.* at 437-42 (discussing various studies on the "overblocking" rate of some of the most popular brands of filtering software and ultimately concluding that six to fifteen percent of sites blocked by filtering software, if not more, should not be blocked).

¹²⁶ *Id.*

¹²⁷ See 42 U.S.C.S. § 290bb-21(b) (1994 & Supp. 2003) (listing among the duties of the Director of the Office for Substance Abuse Prevention, the duty to prepare for distribution documentary films and public service announcements for television and radio to educate the public about the dangers of alcohol and drug abuse).

¹²⁸ See *id.* § 290bb-21(b)(10).

¹²⁹ At least one state, Texas, has chosen this route, statutorily requiring all ISPs to provide information on their homepage about filtering/blocking software and a link directing parents to a download site for such software:

A person who provides an interactive computer service to another person for a fee shall provide free of charge to each subscriber of the service in this state a link leading to fully functional shareware, freeware, or demonstration versions of software or to a service that, for at least one operating system, enables the

requirements of such a statute would provide the government with a method of enforcement.¹³⁰

D. Creation of a National Database of Commercial Pornographic Websites for Distribution to Filtering Software Manufacturers

There is yet another tact Congress could take in its efforts to childproof the Net: Congress could institute a registration requirement for adult websites and could use registration information to create a database of such sites that could be shared with filtering software manufacturers. This would aid filtering software makers in compiling the lists of “control addresses” that power their products.¹³¹

Congress could delegate the duty of creating and maintaining this database to the FCC and could grant it the power to require all individuals operating commercial adult websites to submit an on-line registration form identifying their Web address or addresses. The FCC could then add addresses to the database. To make this registration requirement enforceable, Congress could provide for a system of criminal and/or civil penalties for failure to register. Further, Congress could empower the FCC to require all suppliers of Web space and accompanying addresses to disseminate information on the registration requirement to all individuals to whom they provide these services. Again, the threat of civil and/or criminal penalties for noncompliance could serve as a method of enforcement.

When drafting the legislation necessary to enable this system, Congress could draw upon the lessons learned from the treatment of the CDA and COPA by the judicial system. For example, it would be wise for lawmakers to limit the scope of the law so that it would only pertain to commercial publications, as Congress did with COPA.¹³² However, it would also be wise for Congress to provide a definition for the term “commercial” in order to eliminate vagueness within the law. Congress did not take this step with COPA,¹³³ and its failure to do so arguably obviated any

subscriber to automatically block or screen material on the Internet.

TEX. BUS. & COM. CODE § 35.102 (Vernon 2003).

¹³⁰ This is the mode of enforcement that the Texas legislature has chosen to ensure compliance with section 35.102:

A person is liable to the state for a civil penalty of \$2,000 for each day on which the person provides an interactive computer service for a fee but fails to provide a link to software or a service as required by Section 35.102. The aggregate civil penalty may not exceed \$60,000.

§ 35.103(a).

Also, the Texas legislature has made clear that no ISP will be held liable for the effectiveness or reliability of any software or service for which it provides a link. *See* § 35.102(d).

¹³¹ *See supra* p. 267.

¹³² *See supra* notes 32, 35 and accompanying text.

¹³³ *See supra* note 57.

ground it might have gained in the eyes of the judiciary when it chose to limit the scope of the Act to commercial speech in the first place.

Additionally, one improvement cited by courts when comparing COPA to the CDA was the limitation placed upon the communication media to which COPA applied.¹³⁴ Congress explicitly restricted the scope of COPA to publications on the Web, thereby excluding e-mail, newsgroups, and other forms of cyber-communication.¹³⁵ Congress would be wise to repeat this restriction when drafting future legislation.

Finally, it would behoove Congress to choose its words carefully when delineating the types of sites falling within the scope of the registration requirement. Admittedly, the Court did not universally applaud the use of the *Miller* community standards in COPA to define "material harmful to minors,"¹³⁶ however, the Court did decide that inclusion of such standards alone was not enough to support a facial challenge against COPA,¹³⁷ signifying some level of acceptance of the standards by most members of the Court. Thus, Congress might be well advised to incorporate the *Miller* community standards into legislation requiring registration as a way of delineating the body of Internet sites to which the registration requirement would apply. An examination of the Courts' reception of the CDA makes one thing clear: Congress should avoid using undefined, vague terms like "patently offensive."¹³⁸

The implementation of a registration requirement and the creation and maintenance of a database would probably not be a cheap affair; however, there are several funding possibilities for such an operation. Congress could generate funding by charging software manufacturers a fee for access to the FCC database.¹³⁹ Also, Congress might even go so far as to impose a modest processing fee upon

¹³⁴ See *supra* note 35 and accompanying text.

¹³⁵ See *supra* note 35 and accompanying text.

¹³⁶ See *Ashcroft v. ACLU*, 535 U.S. 564, 585–86 (2002).

¹³⁷ See *supra* note 54.

¹³⁸ See *supra* notes 25–26 and accompanying text.

¹³⁹ Economic incentives for software manufacturers to purchase access to the government's database would exist. Filtering software manufacturers currently invest a great deal of resources into amassing their bodies of control addresses. See *Am. Library Ass'n, Inc. v. United States*, 201 F. Supp. 2d 401, 430–36 (E.D. Pa. 2002) (discussing the arduous process used by filtering software manufacturers to compile their lists of "control addresses"), *rev'd on other grounds*, 71 U.S.L.W. 4465 (U.S. June 23, 2003). Allowing the government to do that labor for them could possibly result in fiscal savings. Further, the government's database would pose two additional attractions: due to the mandatory nature of the registration requirement, any list yielded by that process would likely be more thorough and complete than any lists compiled by software manufacturers, and use of a government database might also generate consumer confidence, which would likely yield an increase in sales.

those who register their sites; however, such a fee would have to be carefully limited so as to not create an unacceptable “chilling” effect on speech.¹⁴⁰

E. Less Restrictive?

In order for any of these proposed legislative efforts to provide support for the arguments of COPA detractors, COPA opponents would have to show the legislative efforts to be government action less restrictive on speech than COPA.¹⁴¹ As previously mentioned, the primary First Amendment concern with COPA is that of whether it “chills” speech to a degree intolerable to the First Amendment.¹⁴² Thus, the relevant question would be whether these proposed regimes would have less of a “chilling” effect on speech than would COPA.

The answer to this question falls in the affirmative where a parental education initiative is concerned. Legislation resulting in public service announcements encouraging parents to take a more active role in monitoring their children’s Internet use would certainly do less to discourage would-be Internet speakers than would COPA. COPA threatens direct criminal prosecution for failure to take precautions which, for many, would probably be unbearably expensive¹⁴³ and requires Internet publishers to collect personal information on users, a practice with the potential to discourage both access of and publication of speech.¹⁴⁴ An educational initiative, unlike COPA, would not burden publishers; if it placed a burden on anyone, it would be the government agency charged with the duty of implementing it or the parents subjected to it.

Further, an educational initiative would cast parents as the primary actors in the process of protecting children from harmful materials on the Internet. As the Third Circuit recently pointed out, use of filtering software in the home is a voluntary matter and is a decision to be made by the parent.¹⁴⁵ Thus, any filtering or blocking of speech that actually took place would be directly traceable to a voluntary decision made by the parent, which would drastically minimize the accountability of the government for any squelching of speech.

¹⁴⁰ See *supra* pp. 265–66 and note 85.

¹⁴¹ See *supra* pp. 265–66 and note 85.

¹⁴² See *supra* notes 72–73 and accompanying text.

¹⁴³ See *supra* note 28.

¹⁴⁴ See *supra* note 73.

¹⁴⁵ See *ACLU v. Ashcroft*, 322 F.3d 240, 264 (3d Cir. 2003) (“[H]ere we only consider the *voluntary* use of [filtering and blocking] software by parents who have chosen to use this means to protect their children.”) (distinguishing *Am. Library Ass’n v. United States*, 201 F. Supp. 2d 401, 410 (E.D. Pa. 2002) (holding state-compelled, *mandatory* use of filtering software by library patrons to violate the First Amendment), *rev’d on other grounds*, 71 U.S.L.W. 4465 (U.S. June 23, 2003)).

As for legislation requiring ISPs to disseminate information on filtering software, such a provision would be analogous to section 504 of the Telecommunications Act of 1996,¹⁴⁶ to which the Supreme Court gave its stamp of approval in *Playboy*,¹⁴⁷ in that it would place the burden on the service provider to enable parents to take action to protect their children. Also, the dangers of noncompliance would rest with ISPs and not with Internet speakers, making it unlikely that such legislation would result in any sort of "chilling" of speech.

Finally, with regard to creation of an adult website database and institution of a mandatory registration requirement, it is arguable that the registration requirement would spawn a certain level of "chilling" effect on speech due to the fact that its institution would require publishers of adult materials to take extra precautions not required of publishers of most other sorts of materials. However, the question to be answered is whether such a regime would be less restrictive than COPA.

Even if Congress chose to implement a system of criminal and civil penalties for noncompliance with the registration requirement and to authorize the assessment of a modest fee, a registration requirement would still differ from COPA in one key respect: unlike COPA, a registration requirement would not be so financially burdensome as to discourage publication.¹⁴⁸

F. Equally Efficacious?

Having established that the Court would likely find any or all of the proposed COPA alternatives to be less restrictive, the question of whether the alternatives would be as capable of achieving the government's goal of protecting children as would COPA (i.e., whether the proposed methods would be equally efficacious)

¹⁴⁶ See Telecommunications Act of 1996 § 504, 47 U.S.C. § 560 (2003) (requiring cable television providers to "fully scramble or otherwise fully block" any channel upon customer request free of charge).

¹⁴⁷ See *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816–26 (2000) (striking down a provision on least-restrictive-means grounds due to the availability of section 504 as a less restrictive alternative open to the government).

¹⁴⁸ Some might argue that a registration requirement would chill speech by requiring the submission of personal information to the government, a requirement that some publishers could find undesirable to the point of discouragement due to the fear of having their identities or personal information associated with an adult website. However, it would not be entirely necessary to require submission of personal information as part of the registration process. Congress and/or the FCC could simply require submission of information sufficient to identify and tag the relevant website. Collection of personal information could be saved for the enforcement stage of the process, during which personal information could be sought and collected but only in an effort to identify the owner of a website found to have not been properly registered. Under such a system, one who fully complied with the law could rest assured that personal information would not be collected by the government and associated with an adult website, obviating any speech-chilling concerns.

remains. Of extreme relevance to this inquiry is the recent holding by the Third Circuit that use of filtering software alone, without the benefit of any of the aforementioned legislative schemes, represents a solution that is just as effective as COPA.¹⁴⁹ The Third Circuit based this holding, in part, on the fact that filtering software is capable of reaching the following classes of potentially harmful materials which fall outside of the scope of COPA: material published on foreign websites, materials on noncommercial websites, and materials published on non-“http” protocols.¹⁵⁰ Logic suggests that if the use of filtering software alone is as effective as COPA, then use of filtering software, coupled with any or all of the proposed legislative efforts, each of which stands only to make use of filtering software even more effective, would represent a solution to the problem that is definitely as effective or more effective than COPA.

The argument that filtering software is less effective than COPA because of its reliance on parental action in order to succeed still exists.¹⁵¹ The logical extension of this argument is that government intervention in the form of COPA would be more effective because the government would be duty bound to enforce the Act, whereas parents could freely choose not to use filtering software, thereby leaving their children at risk and unprotected.¹⁵²

The government offered this argument to the Third Circuit, but the court did not budge on its holding that filtering software represents an equally efficacious alternative.¹⁵³ Opposing the government’s argument, the court cited *Playboy*, in which the Supreme Court stated the following: “[A] court should not presume parents, given full information, will fail to act.”¹⁵⁴ Thus, just as the Supreme Court refused to assume that parents would not request the cable company to fully scramble adult channels in *Playboy*, when examining the question of whether government facilitation of filtering software use is an equally efficacious alternative to COPA, the Court should not assume that parents will not use filtering software.

Implementation of any of the proffered legislative alternatives or any combination of them would likely have the result of increasing the efficacy of

¹⁴⁹ See *supra* note 58 and accompanying text. As mentioned earlier, see *supra* note 97, there is the argument that the Third Circuit committed error with this holding because parental use of filtering software is not government action and cannot, therefore, foil the constitutionality of COPA. Assuming that error was committed (it is the position of this Note that it was), the Third Circuit’s analysis of the effectiveness of filtering software remains intact and untainted by the error because the question of whether parental use of filtering software constitutes government action has no bearing on the court’s evaluation of the efficacy of filtering software as compared to COPA.

¹⁵⁰ See *ACLU v. Ashcroft*, 322 F.3d at 262.

¹⁵¹ See *id.* at 262–64.

¹⁵² See *id.*

¹⁵³ See *id.*

¹⁵⁴ *Id.* at 262 (quoting *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 805 (2000)).

filtering software, either by encouraging more widespread use of filtering software or by making individual use of filtering software more thorough. If use of filtering software alone is as efficacious as COPA for the reasons cited by the Third Circuit,¹⁵⁵ then it logically follows that an approach to the problem that incorporates use of filtering software with any one or combination of the proposed legislative alternatives, each of which would likely serve to augment the effectiveness of filtering software, would represent an approach even more efficacious than COPA, mitigating against the constitutionality of COPA.

VI. COPA AND PARENTAL RIGHTS — THE SUBSTANTIVE DUE PROCESS ARGUMENT AGAINST COPA

The overwhelming majority of the debate surrounding COPA and, indeed, the overwhelming majority of this Note has focused on whether COPA comports with the First Amendment. However, there is another viable avenue of attacking COPA's constitutionality, namely the argument that COPA violates the due process rights of parents. COPA's transgression of this constitutional right provides an additional reason for the courts to declare COPA unconstitutional and instead to opt for one of the legislative alternatives offered, which leave room for and defer to the exercise of parental discretion. Also, as stated earlier, the Court has recently hinted that it might find COPA's language to be sufficiently narrowly tailored upon a full review.¹⁵⁶ This provides an impetus to push any available alternative arguments in order to regain any ground lost by COPA opponents, including this particular argument.

The Supreme Court has long recognized the right of a parent to make certain childrearing decisions, a right that the Court has placed under the heading of substantive due process.¹⁵⁷ The contexts in which this right has been recognized in the past include the following: the right of parents to enroll their children in private schools, as opposed to public schools;¹⁵⁸ the right of parents to engage a teacher to educate their child in the German language;¹⁵⁹ and the right of parents to make

¹⁵⁵ See *supra* notes 56–59 and accompanying text.

¹⁵⁶ See *supra* pp. 254–55..

¹⁵⁷ See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (encapsulating the right with the following words: “the liberty of parents and guardians to direct the upbringing and education of children under their control”); see also *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (“The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”).

¹⁵⁸ See *Pierce*, 268 U.S. at 534–36.

¹⁵⁹ See *Meyer v. Nebraska*, 262 U.S. 390, 399–403 (1923).

decisions concerning child visitation by grandparents.¹⁶⁰ Perhaps even more relevant to COPA is the fact that the Supreme Court pointed to interference with the rights of parents to exercise discretion over the material to which their children are exposed as a factor recommending against the constitutionality of the CDA in *Reno v. ACLU*.¹⁶¹

COPA interferes with parents' due process rights by attacking speech at the source, rather than at the receiving end.¹⁶² By taking this approach, COPA eliminates any opportunity a parent might have to decide for himself or herself whether certain material or classes of material are unsuitable for his or her own children.¹⁶³ The filtering software at the center of each of the proposed alternatives, on the other hand, leaves control in the hands of parents, who are free to decide whether to install the software at all and who have the opportunity to configure filtering software in a manner that allows certain categories of materials while blocking others.¹⁶⁴

In light of the history of recognition for the rights of parents to make childrearing decisions and in light of the availability of legislative alternatives which, unlike COPA, leave that right intact, the Court should cite the violation of parents' substantive due process rights under the Fifth and Fourteenth Amendments¹⁶⁵ as an additional, buttressing reason for striking down COPA.

VII. CONCLUSION

The Internet has already and will continue to pose a legion of new challenges for courts and legislatures, who must work toward innovative ways of monitoring and policing this new frontier, while also encouraging its growth and safeguarding the rights of citizen users. Of all the steps Congress might take to try to keep pace with the growth and development of the Net, taking shortcuts that tread on the constitutionally guaranteed rights of the citizenry should not be one. COPA, like the CDA before it, is simply an impermissible shortcut. The Court might be impressed with Congress's effort and marked improvement, but when reviewing COPA, the Court must remember that the central question remains that of whether there are other ways of accomplishing the task at hand that will work just as well,

¹⁶⁰ See *Troxel v. Granville*, 530 U.S. 57, 65–74 (2000).

¹⁶¹ See *Reno v. ACLU*, 521 U.S. 844, 865 (1997) ("Under the CDA . . . neither the parents' consent — nor even their participation — in the communication would avoid the application of the statute.").

¹⁶² See *id.*

¹⁶³ See *id.*

¹⁶⁴ See *supra* pp. 267–68 and notes 119–24 and accompanying text.

¹⁶⁵ U.S. CONST. amend. V ("No person . . . be deprived of life, liberty, or property, without due process of law. . . ."); U.S. CONST. amend. XIV ("No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .").

but that will do less harm to speech and substantive due process rights. Where COPA is concerned, there are many viable alternatives, and, in light of past precedent, this reality should seal COPA's fate in the eyes of the Court.

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