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### Playing Hot Potato With Copa: The Supreme Court Defers Deciding Whether the Child Online Protection Act is Constitutional Once Again

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**PLAYING HOT POTATO WITH COPA: THE SUPREME COURT  
DEFERS DECIDING WHETHER THE CHILD ONLINE  
PROTECTION ACT IS CONSTITUTIONAL ONCE AGAIN**

I. INTRODUCTION

Consider the following: one day after school, your child goes online to complete a homework assignment requiring the research of a favorite cartoon character. Using a popular search engine, your child types in “Pokemon” and begins a search. The search retrieves well over five million results. Your child scrolls through the search results and selects a website. This particular website, to which your child was allowed unfettered access, happens to be pornographic with extreme, graphic examples of sexual behavior. Surprisingly, many major children’s characters, including “Pokemon,” “My Little Pony,”<sup>1</sup> and popular names such as “Disney,” “Barbie,” and “ESPN,”<sup>2</sup> are linked to thousands of pornographic websites. In fact, the unintentional exposure to online pornography experienced by your child is commonplace: of the 95% of 15-17 year olds who have used the Internet, 70% have accidentally stumbled across pornography.<sup>3</sup> Inevitably, after your child’s encounter with online pornography, you immediately appreciate a larger problem. While the Internet serves as a wonderful teaching tool for your child, providing access to educational resources and the opportunity to explore hobbies and interests, it also contains harmful material, which you, your child’s school and library, and perhaps the government need to shield children. To your astonishment, you discover that the Supreme Court has twice left undecided the issue of whether the government can directly address this problem through Internet regulation.

Indeed, the problem of youth, pornography, and the Internet is expansive. Today’s computer-literate and Internet-savvy child explores an Internet containing more than 4.2 million pornographic websites.<sup>4</sup> The average age of

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1. *How Children Access Pornography on the Internet*, at <http://www.protectkids.com/dangers/childaccess.htm> (last visited Apr. 1, 2005). ProtectKids.com is an Internet service aimed at increasing awareness of children’s exposure to online pornography and the ways parents and others can combat the negative impact such exposure has on children’s development.

2. *Recent Statistics on Internet Dangers*, at <http://www.protectkids.com/dangers/stats.htm> (last visited Apr. 1, 2005).

3. *Id.*

4. TopTenREVIEWS, *Internet Pornography Statistics*, at <http://internet-filter-review.toptenreviews.com/internet-pornography-statistics.html> (last visited Apr. 1, 2005). TopTenREVIEWS, comprised of product and industry experts, reviewers, marketers, and editors,

a child's first exposure to Internet pornography is 11 years old;<sup>5</sup> 90% of 8-16 year olds have viewed pornography online with the majority of the exposure having occurred while the youths were doing homework.<sup>6</sup>

Experts agree that exposing a child to graphic sexual material is harmful in many ways.<sup>7</sup> Such exposure threatens to make children victims of sexual violence.<sup>8</sup> One in five children utilizing computer chat rooms have been approached over the Internet by pedophiles.<sup>9</sup> Eighty-nine percent of online sexual solicitations in 2001 were made in either chat rooms or via Instant Messages—communication programs that thirteen million children use regularly.<sup>10</sup> Further, exposure to pornography may incite children to act out sexually against other children.<sup>11</sup> Such exposure also interferes with a child's development and identity.<sup>12</sup>

Considering the accessibility of online pornography and the harm that such materials pose to children, the Supreme Court has recognized that society possesses a substantial interest in protecting its minors from the harmful effect of obscene material found online.<sup>13</sup> Indeed, the scope and range of interested

is an online service aimed at aiding consumers seeking to buy Internet filters by providing research results pertaining to filtering software and the scope of the online pornography problem. TopTen REVIEWS, *Company Profile*, at <http://www.toptenreviews.com/about-us.html> (last visited Apr. 1, 2005).

5. TopTenREVIEWS, *Internet Pornography Statistics*, at <http://internet-filter-review.toptenreviews.com/internet-pornography-statistics.html> (last visited Apr. 1, 2005).

6. *Recent Statistics on Internet Dangers*, at <http://www.protectkids.com/dangers/stats.htm> (last visited Apr. 1, 2005).

7. *See Harms of Porn and Resources*, at <http://www.protectkids.com/effects/index.htm> (last visited Apr. 1, 2005) (finding that exposure to Internet pornography threatens to make children victims of sexual violence; frequently results in illnesses, unplanned pregnancies, and sexual addiction; may incite children to act out sexually against other children; shapes attitudes; and interferes with a child's development and identity).

8. *Id.*

9. *Recent Statistics on Internet Dangers*, at <http://www.protectkids.com/dangers/stats.htm> (last visited Apr. 1, 2005).

10. *Id.*

11. *Harms of Porn and Resources*, at <http://www.protectkids.com/effects/index.htm> (last visited Apr. 1, 2005). *See also* ProtectKids.com, *Recent Statistics on Internet Dangers*, at <http://www.protectkids.com/dangers/stats.htm> (last visited Apr. 1, 2005) (describing two incidents where children between the ages of 11 and 13 viewed graphic, explicit materials online immediately preceding violent or sexual behavior).

12. *How Pornography Harms Children*, at <http://www.protectkids.com/effects/harms.htm> (last visited Apr. 1, 2005). "Pornography often introduces children prematurely to sexual sensations that they are developmentally unprepared to contend with. This awareness of sexual sensation can be confusing and over-stimulating for children." *Id.*

13. *Reno v. ACLU*, 521 U.S. 844, 869 (1997) (striking down the Communications Decency Act, a statute prohibiting transmission of obscene online communications to minors, as unconstitutional: "We agreed that 'there is a compelling interest in protecting the physical and psychological well-being of minors' which extended to shielding them from indecent messages

parties is extensive, including schools, parents, libraries, concerned citizens, as well as sellers of technology-based Internet protection systems, and the online adult entertainment industry as a whole.

However, irrespective of the need for Internet regulation, the Supreme Court has been unwilling to subject cyberspace to government regulation equal to that imposed on other communication media, namely radio and television.<sup>14</sup> Certainly, content-based regulation of any expressive medium raises First Amendment issues because the First Amendment provides that the government has no power to restrict expression based on the content of its message, its ideas, or its subject matter.<sup>15</sup>

On October 22, 1998, President Bill Clinton signed into law the Child Online Protection Act, ("COPA"), seeking to shield children from sexually explicit Internet material by requiring the owners of pornographic websites to install age-verification systems on their webpages.<sup>16</sup> The following day, the American Civil Liberties Union, ("ACLU"), filed suit to challenge COPA's constitutionality.<sup>17</sup> COPA's constitutionality has now been argued twice before the Supreme Court: first in 2002, ("*Ashcroft I*"), where the Court limited the scope of its decision in order to exclude any holding on the constitutionality of COPA, effectively failing to give Congress guidance as to the Supreme Court's position on such Internet regulation,<sup>18</sup> and then in 2004, ("*Ashcroft II*"), where Supreme Court left in place a preliminary injunction barring enforcement of COPA and sent the case back to a federal district court

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that are not obscene by adult standards" (quoting *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

14. Robert Corn-Revere, *Ashcroft v. ACLU II: The Beat Goes On*, 2004 CATO SUP. CT. REV. 299, 310 (2004) (describing the Court's treatment of other media, where it allowed government regulation of content, in comparison to its treatment of the Internet).

15. U.S. CONST. amend. I.

16. Corn-Revere, *supra* note 14, at 302.

17. *Supreme Court Leaves COPA Injunction in Place: Ashcroft v. ACLU*, ANDREWS TELECOMM. INDUS. LITIG. REP., Jul. 13, 2004, at 3.

18. *Ashcroft v. ACLU*, 535 U.S. 564, 585-86 (2002) [hereinafter "*Ashcroft I*"]. The majority asserted:

The scope of our decision today is quite limited. We only hold 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. We do not express any view as to whether 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 a strict scrutiny analysis once adjudication of the case is completed below. While respondents urge us to resolve these questions at this time, prudence dictates allowing the Court of Appeals to first examine these difficult issues.

*Id.*

in Pennsylvania to be decided on the merits, yet again unwilling to give its opinion concerning the constitutionality of the act.<sup>19</sup>

Certainly, those monitoring the COPA debate and Internet censorship had hoped that *Ashcroft II* would provide real answers as to the Supreme Court's position on governmental Internet regulation.<sup>20</sup> However, to the disappointment of Congress and other interested parties, the constitutionality of COPA remains in question because the *Ashcroft II* Court made only a basic interlocutory decision, finding that the federal district court did not abuse its discretion by enjoining the enforcement of COPA.<sup>21</sup> Nevertheless, the *Ashcroft II* opinion gives some insight as to the Court's stance, its reluctance to allow direct regulation of the Internet.

This article will discuss the wide-ranging implications of the Court's recent observations in *Ashcroft II*. In choosing to decide *Ashcroft II* on an interlocutory matter, a narrow, practical holding, the Court deprived Congress of the guidance it needed regarding Internet regulation legislation. By asserting that filtering software may be less restrictive than COPA, the Court has all but eradicated any hope that the Court might find COPA constitutional,<sup>22</sup> thereby sending Congress back to the drawing board to draft another law designed to shield minors from harmful internet materials.<sup>23</sup>

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19. *Ashcroft v. ACLU*, 124 S.Ct. 2783, 2783, 2791 (2004) [hereinafter "*Ashcroft II*"] ("Because we affirm the District Court's decision to grant the preliminary injunction for the reasons relied on by the District Court, we decline to consider the correctness of the other arguments . . .").

20. Emily Vander Wilt, Comment, *Considering COPA: A Look at Congress's Second Attempt to Regulate Indecency on the Internet*, 11 VA. J. SOC. POL'Y & L. 373, 406, 434 (2004). Wilt's article relays that those following the COPA debate felt confident that the Court would resolve the COPA issue in the October 2003 Term. Wilt, writing before *Ashcroft II* came before the Court, predicted that "[a]fter consuming innumerable hours of judicial resources and engendering a wealth of speculation about its destiny, the constitutionality of COPA will finally be settled this Term, when the Supreme Court considers the statute for the second time [in *Ashcroft II*]." *Id.*

21. *Ashcroft II*, 124 S.Ct. at 2791.

22. Perry A. Craft & Michael G. Sheppard, *Framed by the Times: 2003-2004 U.S. Supreme Court Decisions Reflect Current Events*, 40 TENN. B. J. 14, 19 (2004) ("[I]n [*Ashcroft II*] the court affirmed a trial court's preliminary enjoining of COPA's enforcement and likely struck a fatal blow to a second congressional attempt to combat online pornography"). The majority asserted:

Filters are less restrictive than COPA. They impose selective restrictions on speech at the receiving end, not universal restrictions at the source. Under a filtering regime, adults without children may gain access to speech they have a right to see without having to identify themselves or provide their credit card information . . . Filters also may well be more effective than COPA.

*Ashcroft II*, 124 S.Ct. at 2792.

23. See *Ashcroft II*, 124 S.Ct. at 2795. The Court implies that Congress should continue enacting statutes like COPA by stating, "On a final point, it is important to note that this opinion

Further, the *Ashcroft II* decision implies that the majority may believe that the government lacks a direct role in Internet regulation<sup>24</sup> and demonstrates the Supreme Court's protectivism of the Internet as a medium for free, unfettered communication.<sup>25</sup>

This author finds that filters are unequal to regulation by the government, which would require that publishers of pornographic websites utilize age verification systems, because filters require the public to take the initiative to turn on and use the filtering devices.<sup>26</sup> Even if the government were to implement incentive programs encouraging parents', schools', and libraries' use of filtering software,<sup>27</sup> filters do not block out as much Internet pornography, while simultaneously allowing innocuous speech, as would direct governmental regulation.<sup>28</sup> As such, filters do not effectively combat the societal evil inherent in allowing minors unrestricted access to harmful, pornographic materials.<sup>29</sup>

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does not hold that Congress is incapable of enacting any regulation of the Internet designed to prevent minors from gaining access to harmful materials." *Id.*

24. *Id.* at 2805 (Breyer, J., dissenting). In his dissent, Justice Breyer concludes that a belief that the government has no direct role in regulating the Internet might have influenced the majority's decision: "I recognize that some Members of the Court, now or in the past, have taken the view that the First Amendment simply does not permit Congress to legislate in this area." *Id.*

25. Erwin Chemerinsky, *Unanswered Questions*, 7 GREEN BAG 323, 333 (2003) ("[T]he Supreme Court is once again being protective of the internet as a medium for communication and restrictive as to the government's ability to regulate it"). See, e.g., *Reno v. ACLU*, 521 U.S. at 868-69 (striking down the Communications Decency Act, a statute prohibiting transmission of obscene online communications to minors, as violating the First Amendment and distinguishing the Internet from other communications media).

26. *Ashcroft II*, 124 S.Ct. at 2793 (noting that inherent in a filtering system is "[t]he need for . . . cooperation" from the public).

27. *Id.* at 2793. The majority suggests that "Congress can give strong incentives to schools and libraries to use [filters]." *Id.*

28. *Id.* Even the majority acknowledges that "[f]iltering software . . . is not a perfect solution to the problem of children gaining access to harmful-to-minors materials" because filters "may block some materials that are not harmful to minors and fail to catch some that are." *Id.*

29. The focus of this article with regard to filtering systems is conceptual, grounded on a basic knowledge of filters' functioning, rather than providing a technologically in-depth analysis. For a thorough report on protecting children from internet pornography, including extensive analyses of filtering technologies, see COMMITTEE TO STUDY TOOLS & STRATEGIES FOR PROTECTING KIDS FROM PORNOGRAPHY, COMPUTER SCI. & TELECOMM. BOARD NAT'L RES. COUNCIL, YOUTH, PORNOGRAPHY, AND THE INTERNET 51 (Dick Thornburgh & Herbert S. Lin eds., 2002) [hereinafter YOUTH, PORNOGRAPHY, AND THE INTERNET]. The report explains generally how filters function:

Filtering technologies allow Internet material or activities that are deemed inappropriate to be blocked, so that the individual using that filtered computer cannot gain access to that material or participate in those activities. Typically, material is determined to be inappropriate on the basis of its source, its content, or the labels that have been associated with it. Determination of inappropriate content can be accomplished by computer-based

The following section will describe the history behind the regulation of sexually explicit material and the litigation history of COPA preceding *Ashcroft II*. Part III, the analysis, will analyze the majority, concurring, and dissenting opinions of *Ashcroft II*. Part IV, the author's analysis, will explore the effects and implications of the Court's holding in *Ashcroft II*.

## II. HISTORY AND BACKGROUND OF THE REGULATION OF SEXUALLY EXPLICIT MATERIALS

*Ashcroft II* was not the first time the Supreme Court encountered legislation aimed at protecting children from inappropriate, harmful material. Indeed, on more than one occasion, Congress has attempted, through statutory enactments aimed at shielding minors from pornography, to carve out as unprotected by the First Amendment an area of expression based on its obscene content.<sup>30</sup>

To meet First Amendment standards, the government must carefully tailor the scope of statutory enactments like COPA to the law's goal, namely shielding minors from obscene online material, so as to ensure that speech is restricted no further than is necessary.<sup>31</sup> Once enacted by Congress, each of these laws is inevitably challenged by groups with First Amendment concerns.<sup>32</sup> The act trickles through the court system, ultimately reaching the Supreme Court whose decision and opinion ideally uphold the law as constitutional, thereby allowing the law to take effect, or give Congress valuable guidance as to why the law is or is not constitutional. When a plaintiff challenges such a content-based speech restriction as overly broad, the

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methods, by a combination of computer-based methods and human judgment, or by human judgment alone.

*Id.*

30. Susan Hanley Kosse, *Try, Try Again: Will Congress Ever Get It Right? A Summary of Internet Pornography Laws Protecting Children and Possible Solutions*, 38 U. RICH. L. REV. 721, 723 (2004) (listing recent congressional enactments pertaining to children and online pornography: Communications Decency Act of 1996, Child Pornography Prevention Act of 1996, Child Online Protection Act (1998), Child Internet Protection Act (2000), Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003).

31. *See Reno v. ACLU*, 521 U.S. at 870-71, 874 (holding that in order to avoid violating First Amendment, the scope of a statute aimed at shielding children from online obscenities must not be ambiguous; statute must effectively address aim of legislation because substantial overbreadth of the statute indicates there exists a means of regulation less restrictive of free speech rights, means that do not suppress speech that adults have a constitutional right to receive, means that do not chill legitimate speech).

32. *See Wilt, supra* note 20, at 375 (describing the inevitable First Amendment challenges faced by an act that restricts speech, like COPA, faces: "[u]nsurprisingly, the availability of pornography on the Internet has led to extensive public criticism and, more importantly, to numerous legislative attempts to restrict, regulate, reduce, burden and ban it. These endeavors have met with consistent and considerable opposition . . .").

plaintiff must propose less restrictive alternatives to the statute.<sup>33</sup> To overcome this challenge of unconstitutionality, the government must prove that the proposed alternatives will not be as effective as the challenged statute.<sup>34</sup>

In deciding these difficult First Amendment censorship issues, the Supreme Court has developed a somewhat extensive precedential basis to which Congress looked in drafting COPA and the Court looked thereafter in deciding COPA's fate in *Ashcroft I* and *Ashcroft II*.<sup>35</sup> The following section outlines the precedent on government-regulated censorship of sexually explicit materials that came before *Ashcroft II*.

An underlying issue in the following precedent is the Court's debate over what level of scrutiny to apply in deciding the constitutionality of content-based restrictions, like those imposed by COPA, on otherwise protected speech. Theoretically, the Court employs a strict scrutiny standard in reviewing any such statute.<sup>36</sup> A traditional strict scrutiny analysis requires that the content-based prohibition is 1) the least restrictive means of achieving the aim of the regulation, and 2) narrowly tailored to accomplishing the aim of the regulation so as not to chill otherwise legitimate speech.<sup>37</sup> However, rather than automatically applying the strict scrutiny standard to the content-based restrictions discussed below, the Court has reduced the level of examination in consideration of the type of medium.<sup>38</sup>

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33. When plaintiffs challenge a content-based speech restriction, the Government, in order to ensure that speech is restricted no further than is necessary to accomplish Congress' goal, has the burden to prove that the proposed alternatives will not be as effective as the challenged statute. *See Ashcroft II*, 124 S.Ct. at 2790.

34. *See id.*

35. *Id.* at 2788. The majority acknowledges that Congress used the Court's previous decisions in drafting COPA, noting that "Congress gave consideration to our earlier decisions on this subject . . ." *Id.*

36. *See, e.g.,* *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 535-36 (1980). The Court explained what the analysis required:

The Commission's ban . . . is not, of course, invalid merely because it imposes a limitation upon speech. We must consider whether the State can demonstrate that its regulation is constitutionally permissible. The Commission's arguments require us to consider three theories that might justify the state action. We must determine whether the prohibition is (i) a reasonable time, place, or manner restriction, (ii) a permissible subject-matter regulation, or (iii) a narrowly tailored means of serving a compelling state interest . . . A restriction that regulates only the time, place, or manner of speech may be imposed so long as it is reasonable. But when regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited "merely because public officials disapprove the speaker's views."

*Id.* (citing *Niemotko v. Md.*, 340 U.S. 268, 282 (1951)).

37. *See* *Wilt*, *supra* note 20, at 434 n.216 (describing the "traditional strict scrutiny formulation" as having two points of analysis 1) the "least restrictive alternative analysis," and 2) whether the regulation is "narrowly tailored").

38. *See, e.g.,* *FCC v. Pacifica*, 438 U.S. 726, 748 (1978) (finding content-based restrictions on the broadcasting medium do not merit strict scrutiny analysis).



### A. *Obscenity*

While the Supreme Court had decided in 1957 that materials defined as “obscene” were unprotected by the First Amendment and therefore able to be regulated by the government,<sup>39</sup> not until 1973, in *Miller v. California*, (“*Miller*”), did the Court define obscenity so that Congress and the states could effectively and constitutionally ban such material. The *Miller* Court held that for a state law regulating obscenity to be constitutional, the law must have limited application to material which 1) “the average person, applying contemporary community standards’ would find . . . , taken as a whole, appeals to the prurient interest,” 2) “describes or depicts, in a patently offensive way, sexual conduct specifically defined by the applicable state law,” and 3) “taken as a whole, lacks serious, literary, artistic, political, or scientific value.”<sup>40</sup> The Court declared, “[w]e are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution.”<sup>41</sup> A five-justice majority agreed that the obscenity definition was narrow enough to provide “concrete guidelines to isolate ‘hard core’ pornography from expression protected by the First Amendment.”<sup>42</sup> Thus, the *Miller* test screens obscene and illegal pornography from the non-obscene and permissible pornography.<sup>43</sup>

### B. *Child Pornography*

In *New York v. Ferber*, (“*Ferber*”), a case decided in 1982, the Supreme Court held that child pornography, like obscenity, is a distinct category of speech unprotected by the First Amendment.<sup>44</sup> Because the law in question

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39. *Roth v. U.S.*, 354 U.S. 476, 485 (1957) (“We hold that obscenity is not within the area of constitutionally protected speech . . .”).

40. *Miller v. Cal.*, 413 U.S. 15, 24 (1973) (citing *Kois v. Wis.* 408 U.S. 229, 230 (1972)).

41. *Id.* at 27.

42. *Id.* at 27, 29.

43. *See, e.g., Wilt, supra* note 20, at 382 (“Under the *Miller* test, some, but not all, pornography will be found to be obscene”).

44. *N.Y. v. Ferber*, 458 U.S. 747, 764 (1982) (“When a definable class of material . . . bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment”). At issue in *Ferber* was a New York statute prohibiting persons from knowingly promoting a sexual performance by a child under the age of 16 by distributing material depicting such performance. *Id.* at 750. The court limited the definition of the kind of child pornography, which was unprotected by the First Amendment to “works that visually depict sexual conduct by children below a specified age.” *Id.* at 764 (explaining that “[t]here are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment . . . [a]s with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law . . .” and that “[h]ere the nature of the harm to be combated requires that the state offense be limited to works that visually depict sexual conduct by children below a specified age”).

listed the forbidden acts with sufficient precision and adequately described that category of material the production and distribution of which was not entitled First Amendment protection, the Court found that the statute in question was constitutional.<sup>45</sup> In so deciding, the Court expanded the area of sexually explicit material deemed unprotected by the First Amendment to cover child pornography as well as the obscenity that *Miller* found unprotected.

### C. Indecency

Remaining still is sexually explicit speech that is not obscenity under the *Miller* definition or child pornography under the *Ferber* definition. Although not technically “obscene,” this “indecent” material is also sexually explicit, but the Court has chosen not to completely remove all indecency from First Amendment protection as it did for obscenity and child pornography. Thus far, the Court’s “indecency” decisions have been medium-specific: the level of protection afforded is dependent on the medium in question, such as radio, telephone, or cable television.<sup>46</sup> The following cases provide an overview as to the Court’s analyses of indecency as communicated through various mediums other than the Internet.

Decided in 1969, *Red Lion Broadcasting Co. v. Federal Communications Commission* was one of the first cases to suggest that the broadcasting medium receives different treatment than other types of expression under the First Amendment.<sup>47</sup> The Court based its decision not to utilize a strict scrutiny analysis and to reduce First Amendment protections for broadcasting on the fact that radio frequencies are inherently limited in number.<sup>48</sup> This scarcity, the Court reasoned, allows the government to regulate radio stations in ways that the First Amendment otherwise disallows regulation of other forms of expression, such as written or spoken communications.<sup>49</sup>

In *Federal Communications Commission v. Pacifica*, a 1978 case,<sup>50</sup> the Court found that 1) the “pervasive presence” of the broadcasting media gave a

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45. *Id.* at 765-66.

46. *Pacifica*, 438 U.S. at 748 (“We have long recognized that each medium of expression presents special First Amendment problems”).

47. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386 (1969) (explaining that “[a]lthough broadcasting is clearly a medium affected by First Amendment interest, differences in the characteristics of new media justify differences in the First Amendment standards applied to them”) (citation omitted).

48. *Id.* at 388 (“Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish”). *Id.*

49. *Id.*

50. *Pacifica*, 438 U.S. at 726, 729. The facts of the case revolved around a provocative radio show broadcast at two o’clock in the afternoon about which the Federal Communications Commission, (“FCC”), had received a complaint from a father whose young son heard the

listener the right to be free from potentially offensive material “presented over the airwaves” that “confronts the citizen not only in public, but also in the privacy of the home,” and 2) the way in which radio is available to children, “even those too young to read,” allows the broadcasting media to be regulated.<sup>51</sup> In fact, the Court recognized that “of all forms of communication, it is broadcasting that has received the most limited First Amendment protection.”<sup>52</sup> Thus, the Court found that the government may regulate broadcasting more than other communication media.<sup>53</sup>

*Sable Communications of California Inc. v. FCC*, (“*Sable*”), a 1989 case, addressed a statute prohibiting the use of telephones as a means of providing “indecent” or “obscene” communications for commercial purposes.<sup>54</sup> Under the *Miller* test, the *Sable* Court found that the statute was valid with respect to its obscenity prohibition.<sup>55</sup> However, the Court, choosing to apply a strict scrutiny analysis, concluded that the statute’s restrictions on indecency were unconstitutional. The Court found that a total prohibition on indecency was not narrowly tailored and would, in effect, chill otherwise protected speech.<sup>56</sup> Further, the Court held that the total ban on indecency in *Sable* was unconstitutionally overbroad because the government did not prove that less restrictive alternatives would be ineffective.<sup>57</sup> The Court differentiated telephones from indecent broadcasting which requires a less-than-strict-scrutiny analysis. Radios, the Court held, are more pervasive because once a radio is turned on, the listener hears any offensive material that may be broadcast, whereas one can avoid the material at issue in *Sable* by simply

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broadcast. *Id.* The Court addressed the issue of whether Congress could constitutionally regulate indecent speech in broadcasting. *Id.*

51. *Id.* at 748-49.

52. *Id.*

53. *Pacifica*, 438 U.S. at 750-51.

54. *Sable*, 492 U.S. at 117 (stating, “The issue before us is the constitutionality of §223(b) of the Communications Act of 1934. The statute . . . imposes an outright ban on indecent as well as obscene interstate commercial telephone messages”). *Id.* The particular telephone service in question operated as follows: upon calling an adult message number and being billed, callers were able to hear “sexually oriented prerecorded telephone messages.” *Id.* at 117-18.

55. *Id.* at 124-25 (explaining that because the statute applied the “contemporary community standards’ requirement” upheld in *Miller* as a standard for obscenity, “there is no constitutional stricture against Congress’ prohibiting the interstate transmission of commercial telephone recordings”).

56. *Id.* at 131 (holding that the statute “is not a narrowly tailored effort to serve the compelling interest of preventing minors from being exposed to indecent telephone messages”).

57. *Sable*, 492 U.S. at 131 (finding that the statute, “in its present form, has the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear” and, as such, the statute “is another case of ‘burn[ing] the house to roast the pig.’” (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957))).

choosing not to call the telephone service in question.<sup>58</sup> Thus, stringently applying the strict scrutiny standard, the Court strikes down regulations prohibiting indecent telephone services.

In 1996, in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, (“*Denver Area*”), the Court decided the constitutionality of three provisions of a statute aimed at reducing children’s exposure to indecent material on cable television.<sup>59</sup> The Court refused to create a single standard of scrutiny that would apply to all future media cases and utilized a more flexible strict scrutiny approach that involved balancing the importance of the problem addressed by the statute against the level of restriction the statute imposed on speech.<sup>60</sup>

However, in 2000, the Court in *United States v. Playboy Entertainment Group, Inc.*, (“*Playboy*”), did not use the “flexible” strict scrutiny test of *Denver Area*, but rather clearly established that strict scrutiny was required for content-based regulation of cable.<sup>61</sup> Noting the essential difference between cable and broadcasting, the Court stated, “Cable systems have the capacity to block unwanted channels on a household-by-household basis.”<sup>62</sup> The Court held that because less restrictive means were available, namely a system requiring cable operators to completely block offensive material for patrons

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58. *Id.* at 127-28 (“In an emphatically narrow holding, the *Pacifica* Court concluded that special treatment of indecent broadcasting was justified” because “it did not involve a total ban on broadcasting indecent material” and the Court “relied on the unique attributes of broadcasting . . . [that] can intrude on the privacy of the home without prior warning as to program content”).

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

60. *Id.* at 743-44. (“The First Amendment interests involved . . . require a balance between those interests served by the access requirements themselves (increasing the availability of avenues of expression to programmers who otherwise would not have them) and the disadvantage to the First Amendment interests of cable operators and other programmers (those to whom the cable operator would have assigned the channels devoted to access)”) (citations omitted). Utilizing the balancing strict scrutiny test, the *Denver* Court found only one provision constitutional. That provision authorized cable operators to choose not to show indecent materials and provided operators with flexibility to choose how to respond to the needs of their children and unconsenting adult audience. The other two, unconstitutional provisions, required operators to confine all indecency to one channel that subscribers could access only after written request to the operator for access to that channel. *Id.* at 733.

61. *U.S. v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000) (“Since [the statute] is a content-based speech restriction, it can stand only if it satisfies strict scrutiny”). In *Playboy*, a supplier of adult programming and owner of adult networks, sought a permanent injunction against the Telecommunications Act of 1996, requiring cable operators to either completely scramble a sexually explicit channel so that nonpaying customers would not experience “signal bleed,” where “either or both audio or visual portions of scrambled programs might be heard or seen” by nonpaying customers, or to restrict operating hours of such a channel. *Id.* at 807-08.

62. *Id.* at 815.

requesting such blocking rather than requiring operators to scramble all sexually explicit channels, the statute failed strict scrutiny.<sup>63</sup>

Thus, the precedent on content-based indecency restrictions demonstrates that the Court, in consideration of the type of medium involved, does not automatically apply strict scrutiny.<sup>64</sup> Because the pervasiveness of radio broadcasting takes away listeners' freedom to choose whether or not to hear offensive material, the Court reduces the level of scrutiny so as to allow the government to regulate the radio.<sup>65</sup> However, because telephone services and cable television provide patrons with the choice of whether to access such material, the Court applies strict scrutiny in an effort to protect such communications from government regulation.<sup>66</sup> It is against this precedential backdrop that indecency regulation of a new medium, the Internet, came to the Court.

#### D. *The Communications Decency Act*

Passed during the tremendous spread of the Internet during the 1990s, the Communications Decency Act, ("CDA"), addressed Congress' concerns with the increasing availability of online pornography to children by creating penalties for the offense of "indecency," the sending of offensive material over the internet.<sup>67</sup> CDA's penalties were limited by two affirmative defenses: 1)

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63. *Id.* at 823 ("There is no evidence that a well-promoted voluntary blocking provision would not be capable at least of informing parents about signal bleed (if they are not yet aware of it) and about their rights to have the bleed blocked (if they considered it a problem and have not yet controlled it themselves)").

64. *See, e.g., Pacifica*, 438 U.S. at 748 (finding content-based restrictions on the broadcasting medium do not merit strict scrutiny analysis); *Playboy*, 529 U.S. at 813 (holding that the cable television medium, as opposed to the broadcasting medium, requires strict scrutiny).

65. *Pacifica*, 438 U.S. at 748-49. The Court found that 1) the "pervasive presence" of the broadcasting media gave a listener the right to be free from potentially offensive material "presented over the airwaves" that "confronts the citizen not only in public, but also in the privacy of the home," and 2) the way in which radio is available to children, "even those too young to read," allows the broadcasting media to be regulated more. In fact, the court recognized that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Id.*

66. *Sable*, 492 U.S. at 131 (applying the strict scrutiny standard, the Court struck down regulations prohibiting indecent telephone service); *Playboy*, 529 U.S. at 813 (utilizing strict scrutiny when evaluating cable regulation).

67. Wilt, *supra* note 20, at 376 ("With the tremendous growth and spread of the Internet during the 1990s came an unprecedented accessibility to pornography and other sexually explicit material. Concerned about the increasing availability of such materials to children . . . Congress passed the CDA, which criminalized the transmission or display, via any telecommunications device or interactive computer service, of any indecent material to any person under the age of eighteen"). Recall that indecency remains protected speech; it is neither obscene nor child pornography, materials that the Court has said are unprotected and can therefore be regulated by

protecting those who had taken “in good faith, reasonable, effective, and appropriate actions under the circumstances” to shield children from harmful material,<sup>68</sup> and 2) covering those who restricted access by requiring proof of age such as credit card or an adult identification numbers.<sup>69</sup>

In 1997, in the case of *Reno v. American Civil Liberties Union*, (“*Reno*”), the Supreme Court struck down as unconstitutional CDA’s provisions enacted to protect children from “indecent” and “patently offensive” Internet material, terms that CDA did not define, thereby rendering the act overly broad and in violation of the First Amendment rights of adults.<sup>70</sup> While CDA provided that “patently offensive” materials were to be determined by “contemporary community standards,” a standard that the *Miller* Court had upheld as constitutional in defining obscenity, the statute lacked the qualifications and limitations possessed by the *Miller* definition.<sup>71</sup>

The Court utilized a strict scrutiny approach. In choosing to apply “the most stringent review” of CDA, the *Reno* Court pointed out the importance of the Internet as a new, immensely wide-ranging medium that, unlike radio or television, is less invasive because communications over the Internet do not appear on an individual’s computer unbidden.<sup>72</sup> Further, CDA differed from statutes that had come before the Court earlier where the Court had upheld content-based restrictions of sexually explicit material because CDA 1) did not allow parents the option of consenting to their children’s exposure to restricted materials, 2) was punitive, and 3) was not limited to commercial transactions.<sup>73</sup> Having failed on their first attempt to regulate children’s exposure to explicit

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the government, and the Court has routinely applied a strict scrutiny standard to indecency. See discussion *supra* pp. 9-13.

68. 47 U.S.C. § 223(e)(5)(A) (2003).

69. *Id.* at § 223(e)(5)(B).

70. *Reno v. ACLU*, 521 U.S. at 875. The Court held:

It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults . . . [t]he Government may not “reduc[e] the adult population . . . to . . . only what is fit for children.”

*Id.* (citations omitted).

71. *Id.* at 873 (finding that CDA lacks two limitations of the *Miller* test: 1) “that the proscribed material be ‘specifically defined by applicable state law,’” a requirement that “reduces the vagueness inherent in the open-ended term ‘patently offensive’ as used in the CDA,” and 2) that the *Miller* definition was “limited to ‘sexual conduct,’” as opposed to the CDA which includes non-sexual conduct such as “excretory activities”).

72. *Id.* at 868-69 (relaying the findings of the district court that “communications over the Internet do not invade an individuals home or appear on one’s computer unbidden” and that it is “seldom [that one] encounter[s] content by accident”).

73. *Id.* at 864-69.

Internet material, Congress went back to the drawing board to draft COPA with the holding of the *Reno* Court in mind.<sup>74</sup>

*E. The Child Online Protection Act*

While COPA shares CDA's primary aim, the prohibition on the transmission of certain indecent materials by imposing criminal and civil sanctions for such activity, Congress modified COPA in accordance with the *Reno* Court's criticisms of CDA.<sup>75</sup> Congress limited the scope of COPA: 1) COPA applies only to commercial materials;<sup>76</sup> 2) COPA applies only to materials on the World Wide Web,<sup>77</sup> not to the Internet outside the World Wide Web such as e-mails and chat rooms to which it is impossible to restrict minors' access;<sup>78</sup> and 3) COPA changes CDA's vague "indecent" and "patently offensive" standard to a "harmful to minors" standard which is clarified by a three prong test that further defines what materials are harmful to minors.<sup>79</sup>

74. *See Ashcroft II*, 124 S.Ct. at 2788 ("[I]n enacting COPA, Congress gave consideration to our earlier decisions . . . in particular the decision in *Reno* . . . For that reason, 'the Judiciary must proceed with caution and . . . with care before invalidating the Act'" (quoting *Ashcroft I*, 535 U.S. 564, 592).

75. *Id.*

76. 47 U.S.C. § 231(a)(1) (2003) ("Whoever . . . makes any communication for commercial purposes . . ."). Congress narrowed COPA's scope in this respect in response to the Court's findings in *Reno*. *See Reno*, 521 U.S. at 865 (noting that the CDA differs from other statutes upheld in that it was not limited to commercial transactions).

77. § 231(a)(1) ("Whoever . . . by means of the World Wide Web, makes any communication . . .").

78. COPA narrowed its scope in this respect in response to the Court's findings in *Reno*. *See Reno v. ACLU*, 521 U.S. at 855-56 (finding that that "there is no effective way to determine the identity or the age of a user who is accessing material through e-mail . . . newsgroups or chat rooms").

79. § 231(a)(1) ("Whoever . . . makes any communication . . . that includes material that is harmful to minors . . ."); Kosse, *supra* note 30, at 730 (noting that COPA "was noticeably narrower than the CDA . . . the standard was changed from the [CDA's] ambiguous, indecent and patently offensive standard to a harmful to minors standard"). Under COPA's three prong test to determine whether liability will attach and to identify whether material is "harmful to minors," it must be proven that:

1. 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;
2. 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
3. taken as a whole, lacks serious literary, artistic, political or scientific value for minors.

§ 231(e)(6)(A)-(C).

One day following its enactment, the ACLU brought suit to challenge COPA.<sup>80</sup> Since its enactment, injunctions have prevented COPA from taking effect.<sup>81</sup>

*F. Ashcroft I*

In *Ashcroft I*, the Court upheld COPA's use of "contemporary community standards" to identify harmful-to-minors material, finding that the use of that standard alone did not render the act overbroad.<sup>82</sup> The Court in *Ashcroft I* specifically limited the scope of its decision to the issue of COPA's use of community standards, choosing not to address whether COPA was substantially overbroad for other reasons or unconstitutionally vague.<sup>83</sup> The Court, in an 8-1 decision, vacated the lower court's ruling and remanded the case to the court of appeals to reconsider whether the district court had been correct to grant the preliminary injunction.<sup>84</sup>

### III. ANALYSIS OF ASHCROFT II

The Supreme Court granted certiorari again and in June 2004 ruled against the government in *Ashcroft II* by a 5-4 margin.<sup>85</sup> Justice Kennedy wrote the majority opinion, joined by Justices Souter and Thomas with whom Justice Stevens, joined by Justice Ginsburg, concurred.<sup>86</sup> The majority applied a strict

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80. Kosse, *supra* note 30, at 730-31 (stating that "[t]he day after COPA became effective, the ACLU filed suit claiming that the statute violated the First and Fifth Amendments because it was vague and infringed upon the protected speech of adults").

81. *Id.*

82. *Ashcroft I*, 535 U.S. at 584-85. The plaintiffs argued that the use of community standards rendered COPA overbroad because it would "require Web publishers to shield some material behind age verification screens that could be displayed openly in many communities across the Nation if Web speakers were able to limit access to their sites on a geographic basis." The Court found 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. Unlike the CDA's use of the contemporary community standard, the Court explained, COPA's scope is narrower, applying to a limited amount of material, namely only commercial communications on the World Wide Web, and defining the harmful-to-minors standard in a manner similar to that upheld in *Miller*. *Id.*

83. See *Ashcroft II*, 124 S.Ct. at 2790 (stating that the *Ashcroft I* Court "emphasized . . . that [the] decision was limited to that narrow issue" of whether the community-standards language made COPA unconstitutional).

84. *Ashcroft I*, 535 U.S. at 564, 586. For a brief overview of legislation passed since 1996 related to shielding children from sexually explicit materials found on the Internet, see the chart formulated by Susan Hanley Kosse in her article that summarizes Internet pornography laws aimed at protecting children. The chart chronologically depicts the legislation and litigation related to Internet regulation. Kosse, *supra* note 30, at 724.

85. *Ashcroft II*, 124 S.Ct. at 2787, 2795.

86. *Id.* at 2787.



scrutiny analysis.<sup>87</sup> The issue decided by the court was whether the federal district court's grant of a preliminary injunction was correct.<sup>88</sup> The Court upheld the injunction, explaining that there was a substantial likelihood that the plaintiffs would prevail on their argument that COPA does not meet strict scrutiny because less restrictive alternatives, namely filters, exist.<sup>89</sup> Justice Breyer dissented, joined by Chief Justice Rehnquist and Justice O'Connor. Justice Scalia wrote a separate dissent.<sup>90</sup> In this interlocutory decision, the Court simply refused to lift a court order stopping enforcement of the provisions of COPA and did not decide COPA's constitutionality, remanding the case on that issue back to the Third Circuit.<sup>91</sup>

#### A. *Majority Opinion*

The majority began by explaining the focus of its analysis, the interlocutory matter of whether the lower court's decision to grant the injunction was proper.<sup>92</sup> With this narrow focus delineated, the majority expressly declined to consider the correctness of the other arguments that the court of appeals relied upon in affirming the injunction, namely the court of appeal's consideration of the constitutionality of COPA's terms.<sup>93</sup> The Court

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87. *Id.* at 2791 (stating the applicable standard of scrutiny used for content-based speech restrictions is whether “less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve”) (quoting *Reno v. ACLU*, 521 U.S. at 874). *See also* Chemerinsky, *supra* note 25, at 333 (“[T]he [*Ashcroft II*] case is notable because the Court used strict scrutiny in evaluating government regulation of sexual speech”).

88. *Ashcroft II*, 124 S.Ct. at 2788 (explaining that they “must decide whether the Court of Appeals was correct to affirm a ruling by the District Court that the enforcement of COPA should be enjoined because the statute likely violates the First Amendment”).

89. *Id.* at 2795 (holding that “the Government has not shown that the less restrictive alternatives proposed by respondents should be disregarded” and that “[t]hose alternatives, indeed, may be more effective than the provisions of COPA” and, therefore, “[t]he District Court did not abuse its discretion when it entered the preliminary injunction”). The court also gave procedural reasons for upholding the injunction and remanding the case for a fully trial on the merits:

First, the potential harms from reversing the injunction outweigh those of leaving it in place by mistake . . . Second, there are substantial factual disputes in the case . . .

Third . . . the factual record does not reflect current technological reality—a serious flaw in any case involving the Internet.

*Id.* at 2794.

90. *Id.* at 2787.

91. *Id.* at 2795.

92. *Ashcroft II*, 124 S.Ct. at 2788 (explaining *Ashcroft II*'s procedural history: “This case comes to the Court on certiorari review of an appeal from the decision of the District Court granting a preliminary injunction. The Court of Appeals reviewed the decision of the District Court for abuse of discretion. Under that standard, the Court of Appeals was correct to conclude that the District Court did not abuse its discretion . . .”).

93. *Id.* at 2791 (“We agree with the Court of Appeals that the District Court did not abuse its discretion in entering the preliminary injunction” but “our reasoning . . . is based on a narrower,

concentrated primarily on the issues addressed by the district court: the plaintiff's contention that there existed less restrictive alternatives to COPA and whether the government met its burden of proving that the plaintiff's proposed alternatives would not be as effective as the challenged statute.<sup>94</sup> The majority provided two main analyses 1) the less-restrictive-alternative analysis, and 2) procedural reasons for remanding the case.<sup>95</sup>

First, the majority found that filters are less restrictive than COPA because filters "impose selective restrictions on speech at the receiving end not universal restrictions at the source" as are imposed by COPA's requirement that users identify themselves before allowing access to material.<sup>96</sup> A "filtering regime" allows adults, by simply turning the filter off, to access speech that they have a right to see without having to comply with COPA regulations, such as providing credit card information or identifying themselves.<sup>97</sup> Whereas COPA condemns as criminal a certain category of speech and requires website publishers to use age-verification systems at the source of the speech, ("source regulation"), a filtering regime condemns no speech, blocking certain speech when triggered to do so by key words found in a received communication, ("end regulation"), and thereby creates no chilling effect on speech.<sup>98</sup> Thus, the majority found that filters are less restrictive.<sup>99</sup>

Moving on, the majority determined that filters *may* be more effective in censoring sexually explicit material because filters block objectionable content regardless of where it originates, whereas COPA blocks only content posted on the United State's World Wide Web.<sup>100</sup> Further, because filters can apply to other means of Internet communication, like e-mail, filters are more effective than COPA, which applies only to websites on the World Wide Web.<sup>101</sup> Thus, under COPA, children can still access harmful Internet material originating in foreign countries, material that filters can block.<sup>102</sup> Internet providers can elude COPA's restraints easily by moving their operations to foreign locations.<sup>103</sup> Additionally, the age-verification systems required by COPA, the majority stated, "may be subject to evasion and circumvention, for example by

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more specific grounds than the rationale of the Court of Appeals . . . none of [the Court of Appeal's] constructions of statutory terminology . . . were relied on by or necessary to the conclusions of the District Court[.]" and thus, "we decline to consider the correctness of the other arguments relied on by the Court of Appeals").

94. *Id.* at 2792.

95. *See id.* at 2783-2795.

96. *Id.* at 2792.

97. *Ashcroft II*, 124 S.Ct. at 2792.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Ashcroft II*, 124 S.Ct. at 2792.

103. *See id.*

minors who have their own credit cards.”<sup>104</sup> Thus, COPA failed to pass strict scrutiny: not only are filters less restrictive, but the government also failed to demonstrate that COPA is more effective, that it reaches *more* pornographic materials that are harmful to minors, than the proposed less restrictive alternative, namely filters.<sup>105</sup>

The majority then addressed two of the government’s arguments against filters as reasonable alternatives to COPA. The majority conceded that filters might block some non-harmful materials and allow access to some harmful materials.<sup>106</sup> But irrespective of this possibility, the majority found that the government failed to disprove that overall filters were less effective than COPA’s “source regulation.”<sup>107</sup> Practically, the majority reasoned, remanding the case for a full trial would allow for presentation of new evidence on this point, new evidence regarding the effectiveness of current filtering technology.<sup>108</sup> Then, responding to the government’s argument that filters are not an acceptable alternative because Congress cannot require their use, the majority held that congressionally enacted incentive programs could encourage the use of filters in schools and libraries.<sup>109</sup> The majority continued, holding that the need for voluntary parental use of filters did not automatically disqualify filters as an available alternative because a court should not presume that parents, given complete information, would fail to use filters.<sup>110</sup> Thus, the Court concluded, filters are an effective alternative because “[b]y enacting programs to promote use of filtering software, Congress could give parents [the] ability [to monitor what their children access online] without subjecting protected speech to severe penalties.”<sup>111</sup>

Moving on to its second reason for affirming the district court’s imposition of a preliminary injunction, the majority provided four practical reasons for letting the injunction stand pending a full trial on the merits.<sup>112</sup> First, the majority noted that “the potential harms from reversing the injunction outweigh[ed] those of leaving it in place”—the harm in allowing COPA to take effect at the risk of chilling protected speech outweighed the harm of allowing the injunction to stand and postponing COPA’s imposition of criminal sanctions for a decision on the merits.<sup>113</sup> Second, because substantial factual disputes remained in the case, allowing the preliminary injunction to stand and

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104. *Id.*

105. *Id.* at 2792-93.

106. *Id.* at 2793.

107. *Ashcroft II*, 124 S.Ct. at 2793.

108. *Id.* at 2794.

109. *Id.* at 2793 (citing *United States v. American Library Assn., Inc.*, 539 U.S. 194 (2003)).

110. *Id.* (citing *Playboy*, 529 U.S. at 824).

111. *Id.* at 2793.

112. *Ashcroft II*, 124 S.Ct. at 2794.

113. *Id.*

remanding for trial forced the government to “shoulder its full constitutional burden of proof respecting the less restrictive alternative argument, rather than excus[ing] it from doing so.”<sup>114</sup> Third, the majority reasoned that because the factual record lacked updated technological information, a necessity in Internet litigation, and contained only the five-year-old information used at the district court level affirming the injunction, remanding for trial would allow the parties to update and supplement the record with current technological findings.<sup>115</sup> Finally, because of the court of appeal’s focus on COPA’s definitions as rendering it unconstitutional, the court found that the parties had thus far been unable to devote their attentions to proving the question of the relative restrictiveness and effectiveness of COPA’s alternatives and remanding the case would give the parties an opportunity to do so.<sup>116</sup>

### B. *Concurring Opinion*

Justice Stevens, with whom Justice Ginsburg joined, agreed with the majority’s less-restrictive-means analysis and gave a concurring opinion so as to “underscore just how restrictive COPA is.”<sup>117</sup> Justice Stevens found COPA’s imposition of criminal prosecutions as a means of regulating obscene materials was inappropriate in light of the vagueness inherent in any standard of obscenity or indecency.<sup>118</sup> Justice Stevens also noted that the interest in protecting minors from viewing sexually explicit material may not warrant the gravity of the criminal burdens imposed by COPA.<sup>119</sup>

### C. *Dissenting Opinions*

Justice Breyer, with whom Chief Justice Rehnquist and Justice O’Connor joined, argued that Congress could not protect children from exposure to online commercial pornography in another manner that was less restrictive than COPA.<sup>120</sup> Justice Breyer examined 1) the burdens imposed by COPA, 2) COPA’s ability to further a compelling interest, and 3) the proposed less restrictive alternatives.<sup>121</sup>

Justice Breyer first argued that COPA limits its definition of regulated material, harmful-to-minors material, to the definition of obscenity upheld in

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114. *Id.*

115. *Id.* at 2794-95.

116. *Id.* at 2795.

117. *Ashcroft II*, 124 S.Ct. at 2795-96 (Stevens, J., concurring).

118. *Id.* (“Criminal prosecutions are . . . an inappropriate means to regulate the universe of materials classified as ‘obscene,’ since ‘the line between communications which ‘offend’ and those which do not is too blurred to identify criminal conduct’” (quoting *Smith v. United States*, 431 U.S. 291, 316 (1977))).

119. *Id.* at 2796-97.

120. *Id.* at 2787, 2798 (Breyer, J., dissenting).

121. *Id.* at 2798.

*Miller*.<sup>122</sup> The *Miller* definition held that material is obscene as to adults if it “appeals to the prurient interest;” depicts sexual conduct in a “patently offensive way;” and, “taken as a whole, lacks serious literary, artistic, political or scientific value.”<sup>123</sup> By adding to *Miller*’s definition, which would otherwise cover only obscenity, the words “with respect to minors”<sup>124</sup> and “for minors,”<sup>125</sup> COPA “only slightly” expands *Miller*’s obscenity definition to cover harmful-to-minors material, specifically indecent material that specifically “seek[s] a sexual response from” minors.<sup>126</sup> Further, Justice Breyer pointed out that COPA “does not censor the material it covers,” merely requiring providers of harmful-to-minors material to screen those wishing to access the site, a requirement that would impose little monetary costs to web site owners.<sup>127</sup> Additionally, the risk of embarrassment to users who might be required to provide age-verification information to access a site does not automatically violate the Constitution.<sup>128</sup> Justice Breyer concluded that COPA “at most imposes a modest additional burden on adult access to legally obscene material, perhaps imposing a similar burden on access to some protected borderline obscene material as well.”<sup>129</sup> Thus, Justice Breyer found that the First Amendment permits an alternative holding than that of the majority. Construing COPA narrowly, allows reconciliation between COPA’s language and the requirements of the First Amendment.<sup>130</sup>

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122. *Ashcroft II*, 124 S.Ct. at 2799 (Breyer, J., dissenting).

123. *Miller*, 413 U.S. at 24.

124. 47 U.S.C.A. § 231(e)(6)(A) (stating the first prong of the three prong test as to what material is harmful to minors; defining material that is harmful to minors as that which “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”).

125. § 231(e)(6)(C) (giving the third prong of the test as to what material is harmful to minors; defining material that is harmful to minors as that which “taken as a whole, lacks serious literary, artistic, political, or scientific value for minors”).

126. *Ashcroft II*, 124 S.Ct. at 2799 (Breyer, J., dissenting). Justice Breyer noted that minors are defined as “some group of adolescents or post-adolescents.” *Id.* See also, *id.* at 2800 (“In sum, the Act’s definitions limit the statute’s scope to commercial pornography” and “[i]t affects unprotected obscene material,” as defined in *Miller*. Thus, “[g]iven the inevitable uncertainty about how to characterize close-to-obscene material, [COPA] could apply to (or chill the production of) [only] a limited class of borderline material that courts might ultimately find is protected”).

127. *Id.* at 2800-01 (stating that “[a]ccording to the trade association for the commercial pornographers who are the statute’s target, use of such verification procedures is ‘standard practice’ in their online operations”).

128. *Id.* at 2801. (“[T]he Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment”) (quoting *American Library*, 539 U.S. at 209 (plurality opinion)).

129. *Ashcroft II*, 124 S.Ct. at 2801 (Breyer, J., dissenting).

130. *Id.* at 2805.

Turning to the question of whether COPA furthered a compelling interest, Justice Breyer found that COPA significantly furthers COPA's aim of protecting minors from exposure to commercial pornography<sup>131</sup> because no alternative to COPA exists that furthers COPA's goal as effectively. Justice Breyer found that filters are not an alternative legislative approach to shielding children from online pornography.<sup>132</sup> In fact, the availability of filters constituted part of the problem, the "status quo," to which Congress responded by enacting COPA.<sup>133</sup> Thus, in finding filters less restrictive than COPA, the majority has essentially affirmed the status quo which, "by definition, . . . is less restrictive than [any] new regulatory law" that goes beyond the status quo.<sup>134</sup> The relevant inquiry, Justice Breyer then found, was whether the status quo, inclusive of filters, addressed the compelling interest and whether COPA helped further that interest more than the filter-inclusive status quo.<sup>135</sup> Justice Breyer concluded that COPA's age-verification requirements furthered the compelling interest more than filtering because filters possess insufficiencies that propelled Congress to enact COPA: 1) filtering allows some harmful material to pass through unhindered; 2) filtering software costs money for families to install; 3) filtering depends on parents deciding and enforcing at which computer their children will use the Internet; 4) filtering blocks much valuable, innocuous material.<sup>136</sup>

Justice Breyer then discussed the less restrictive alternative offered by the majority.<sup>137</sup> Justice Breyer agreed with the majority that government encouragement of filter usage could be effective if the government designated a vast amount of resources to giving parents and schools filters and training them on how to use filters effectively.<sup>138</sup> But, Justice Breyer noted, such an expansive governmental program is extreme and expensive<sup>139</sup> and "a judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down."<sup>140</sup> Thus, Justice Breyer

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131. *Id.* at 2801 (citing *Denver*, 518 U.S. at 743 ("interest in protecting minors is 'compelling'")).

132. *Id.*

133. *Id.* at 2801-02.

134. *Ashcroft II*, 124 S.Ct. at 2801-02 (Breyer, J., dissenting).

135. *Id.* at 2802.

136. *Id.*

137. *Id.* at 2804 (stating, "I turn, then, to the actual 'less restrictive alternatives' that the Court proposes. The Court proposes two real alternatives, i.e. two potentially less restrictive ways in which Congress might alter the status quo in order to achieve its 'compelling' objective").

138. *Id.*

139. *Ashcroft II*, 124 S.Ct. at 2804 (Breyer, J., dissenting).

140. *Id.* at 2804 (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 188-89 (1979) (concurring opinion)).

found that incentive programs encouraging filter usage were not a reasonable alternative to COPA.

In conclusion, Justice Breyer suggested that the Court's holding presented two more issues.<sup>141</sup> First, the issue that the *Ashcroft II* Court again failed to decide COPA's fate, and remanded the issue yet again to the district court "[a]fter eight years of legislative effort, two statutes, and [more than one] Supreme Court case . . ."<sup>142</sup> Justice Breyer reminded the majority that Congress, in passing COPA, adhered to the Court's specific directives in *Reno* concerning the characteristics of a statute that would successfully protect children from exposure to online pornography while also protecting adults' constitutional rights to access such material.<sup>143</sup> Because COPA successfully adhered to the Court's directive in *Reno* and the *Ashcroft II* majority has nonetheless held that COPA did not pass strict scrutiny, Justice Breyer concluded that members of the Court might believe that the First Amendment does not allow Congress to regulate the area of internet expression that COPA addresses.<sup>144</sup> If such is the case, Justice Breyer argued, then the Court should "say so clearly" because holding that the act fails on less-restrictive-alternative grounds and remanding the case once again seems to "promise" Congress "legislative leeway" that might not exist if the majority believes that the government has no role in internet regulation.<sup>145</sup>

Finally, Justice Breyer suggested that the majority's holding, which rested on a less-restrictive-means analysis, was ambiguous.<sup>146</sup> The majority's holding did not answer the question of whether striking down COPA would amount to more or less protection of speech.<sup>147</sup> Justice Breyer explained that the majority's decision reduced the government's options to either "ban totally," which suppresses legitimate speech as well as indecent speech, or "do nothing at all," which allows unprotected, obscene speech to circulate freely.<sup>148</sup> Whereas, COPA, Justice Breyer elaborated, provided a "middle way:" rather than prosecuting all obscenity to the maximum extent possible or doing nothing at all, the government could, through COPA, insist that commercial publishers of Internet pornography provide age verification screens on their sites and, only if they fail to do so, prosecute them.<sup>149</sup>

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141. *Id.*

142. *Id.* at 2804-05.

143. *Id.* at 2805.

144. *Ashcroft II*, 124 S.Ct. at 2805 (Breyer, J., dissenting) ("I recognize that some Members of the Court, now or in the past, have taken the view that the First Amendment simply does not permit Congress to legislate this area").

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Ashcroft II*, 124 S.Ct. at 2806 (Breyer, J., dissenting).

In his separate dissent, Justice Scalia agreed with Justice Breyer in finding that COPA was constitutional. Justice Scalia, however, took issue with the fact that both the majority opinion and Justice Breyer's dissent utilized a strict scrutiny analysis when a less exacting standard was appropriate for commercial pornography because, Justice Scalia found, such materials are unprotected speech.<sup>150</sup>

#### IV. AUTHOR'S ANALYSIS OF *ASHCROFT II*

The Supreme Court's treatment of COPA in *Ashcroft II*, deciding the case on an interlocutory matter rather than addressing the constitutional issue, has significant bearing on COPA's future. An analysis of the circumstances surrounding and possible motivations behind the Court's decision proves a fruitful analysis in terms of predicting the fate of COPA and Internet regulation as a whole.

Generally, the October Term of 2003, in which the Court decided *Ashcroft II*, was a fairly typical representation of recent Supreme Court terms.<sup>151</sup> The Court decided the exact same number of cases that it did the year before and, of those decisions, roughly the same proportion were 5-4 decisions.<sup>152</sup> Notably, the *Ashcroft II* decision veers from the Supreme Court's usual practice and the other decisions of the October Term of 2003 in two respects.

First, the 5-4 opinion in *Ashcroft II* does not follow the customary pattern. The *Ashcroft II* decision was written by Justice Kennedy, joined by Justices Stevens, Souter, Thomas, and Ginsburg, with whom Justices Breyer, O'Connor, Rehnquist, and Scalia dissented.<sup>153</sup> This differs from the usual

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[COPA] tells the Government that, instead of prosecuting bans on obscenity to the maximum extent possible . . . it can insist that those who make available material that is obscene or close to obscene keep that material under wraps, making it readily available to adults who wish to see it, while restricting access to children. By providing this third option—a "middle way"—[COPA] avoids the need for potentially speech-suppressing prosecutions.

*Id.*

150. *Id.* at 2797 (Scalia, J., dissenting).

Nothing in the First Amendment entitles the type of material covered by COPA to that exacting standard of review. "We have recognized that commercial entities which engage in the sordid business of pandering by deliberately emphasizing the sexually provocative aspects of [their nonobscene products] in order to catch the salaciously disposed, engage in constitutionally unprotected behavior." There is no doubt that the commercial pornography covered by COPA fits this description.

*Id.* (quoting *Playboy*, 529 U.S. at 831 (Scalia J., dissenting) (citations omitted)).

151. Chemerinsky, *supra* note 25, at 323 (analyzing some of the significant decisions of the October 2003 term).

152. *Id.* (stating that the Court decided the same number of cases in the previous term as it did in the October 2003 term in which the Court decided 73 cases after briefing and oral argument, 21 of which were 5-4 decisions).

153. *Ashcroft II*, 124 S.Ct. at 2787.



composition of the majority in 5-4 decisions: Justices Rehnquist, O'Connor, Scalia, Kennedy, and Thomas.<sup>154</sup> The *Ashcroft II* majority does not even follow the second most common majority in 5-4 decisions: Justice Stevens, O'Connor, Souter, Ginsburg, and Breyer.<sup>155</sup> This anomaly in the Justices' usual voting patterns indicates that there is likely some issue in *Ashcroft II* that distinguishes it from the typical Supreme Court case.

Second, also inconsistent with past practice, the *Ashcroft II* Court left open the issue of COPA's constitutionality.<sup>156</sup> The Supreme Court decided the relatively simple interlocutory matter and remanded the merits to the lower court. Rather than following usual practice of deciding the merits simultaneously with procedural issues, the Court opted to wait for COPA to return again.<sup>157</sup> This break from usual Supreme Court practice ignited speculation that the Court might have particular concerns with the issues involved in *Ashcroft II*.

Indeed, the Supreme Court treated COPA differently, breaking from past practice perhaps in response to some particular issues inherent in COPA and *Ashcroft II*. The following analysis of the *Ashcroft II* decision discusses some of the reasons for and implications of the Supreme Court's decision.

#### A. *Failing to Give Congress Guidance*

One of the most noteworthy aspects of *Ashcroft II* was the Court's express decision to make no decision on the merits. Although *Ashcroft II* was decided on June 29, 2004, the last day of the Supreme Court's October 2003 term,<sup>158</sup> it is unlikely that the Court's eagerness to finish the term explains their failure to give Congress concrete guidance regarding COPA's constitutionality. Stopping short of reaching the merits, *Ashcroft II* is merely "a garden-variety

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154. Chemerinsky, *supra* note 25, at 323 (stating that of the 21 5-4 decisions in the October 2003 term, "[a]s always, the most common majority in the 5-4 rulings was comprised of Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas").

155. *Id.*

156. See *Ashcroft II*, 124 S.Ct. 2783; Chemerinsky, *supra* note 25, at 323-24. Chemerinsky notes that the October 2003 term left unresolved many issues: "[T]he Court left open important questions by issuing only a narrow holding." Chemerinsky, *supra* note 25, at 324. See, e.g., *Tenn. v. Lane*, 541 U.S. 509 (2004) (holding that a disabled person may sue state governments under the Americans with Disabilities Act but neglecting to address whether other suits may be brought against states under the act); *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (2004) (holding that an individual may sue under the Alien Tort Claims Act but failing to clearly establish when suits will be allowed).

157. See *Ashcroft II*, 124 S.Ct. 2783; Chemerinsky, *supra* note 25, at 324. ("I cannot think of any recent Supreme Court Term where so much was left undecided. All of these issues will now be faced by the state courts and the lower federal courts. Ultimately, almost all of these questions will return to the Supreme Court in the years ahead for further clarification").

158. *Ashcroft II*, 124 S.Ct. 2783; Chemerinsky, *supra* note 25, at 323 (noting that the October Term 2003 ended on June 29, 2004, the day that *Ashcroft II* was decided).

interlocutory decision in which the court simply refused to lift a court order stopping enforcement of [COPA's] provisions."<sup>159</sup> In doing so, the Court consciously passed up an opportunity to end the debate over COPA's constitutionality, instead allowing the debate to continue slowly through the court system.<sup>160</sup>

Three points illustrate the majority's failure to give Congress clear directives. First, the language of the Court's opinion is indicative of the majority's intentional indecisiveness on the issue, stating only that filters "may . . . be more effective than COPA."<sup>161</sup> While the Court acknowledges imperfections in filters, the majority is unwilling to concretely express its position as to whether such imperfections render filters less effective than COPA.<sup>162</sup> Rather, the Court only states that the government has the burden of showing that filters are less effective,<sup>163</sup> a conclusion based on evidentiary matters and one that affords any interpretation as to the Court's position *other* than as providing direct guidance as to the Court's position on COPA's constitutionality.

Second, the Court expressly avoids giving its stance as to the effectiveness of filters by giving vague, procedural rationales for remanding the case.<sup>164</sup> The Court states that remand will allow the parties to present updated evidence as to the effectiveness of filters because such information "might make a difference."<sup>165</sup> After many years of legislating and litigating COPA, Justice

159. Bernard James, *First Amendment: What 'Locke' Portends*, NAT'L L. J., Aug. 2, 2004 at S10 (reviewing First Amendment decisions of Supreme Court's 2003-2004 term). Bernard James is a professor of constitutional law at Pepperdine University School of Law. *Id.*

160. *Id.* (arguing that as a result of the Court's failure to decide COPA's constitutionality, "the debate over its constitutionality crawls to trial").

161. *Ashcroft II*, 124 S.Ct. at 2792. The Court, in its review of the evidence considered by the District Court in making the decision to grant the preliminary injunction, stated that filters "are less restrictive than COPA" and "may well be more effective than COPA." *Id.* (emphasis added).

162. *Id.* at 2793 (finding that filters "may block some materials that are not harmful to minors and fail to catch some that are") (emphasis added).

163. *Id.* ("Whatever the deficiencies of filters . . . the Government failed to introduce specific evidence proving that existing technologies are less effective than the restrictions in COPA[,] and, thus, "[i]n the absence of a showing as to the relative effectiveness of COPA and the alternatives proposed by respondents, it was not an abuse of discretion for the District Court to grant the preliminary injunction").

164. *Id.* at 2794. The majority explains "important practical reasons" for remanding the case: First, the potential harms from reversing the injunction outweigh those of leaving it in place by mistake . . . Second, there are substantial factual disputes in the case . . . Third . . . the factual record does not reflect current technological reality—a serious flaw in any case involving the Internet.

*Ashcroft II*, 124 S.Ct. at 2794.

165. *Id.* at 2795 (emphasis added) (noting that the evidence relied upon by the Court is that relied upon by the District Court which is five years old and "[b]y affirming the preliminary

Breyer, in his dissent, expresses confusion with the majority's decision to remand the case for *further* proceedings.<sup>166</sup> Justice Breyer begs the rhetorical question:

What [further] proceedings [are needed]? I have found no offer by either party to present more relevant evidence. What remains to be litigated? I know the Court says that the parties may 'introduce further evidence' as to the 'relative restrictiveness and effectiveness of alternatives to the statute.' But I do not understand what that new evidence might consist of.<sup>167</sup>

As such, the "important practical reasons" provided by the majority for its decision to remand were vague, leaving the government and Justice Breyer confused as to what other evidence the government must present.

Finally, as noted by Justice Breyer in his dissent and acknowledged by the majority, Congress wrote COPA in response to the Court's holding in *Reno* regarding content-based restrictions on Internet pornography.<sup>168</sup> Justice Breyer states:

Congress read *Reno* with care. It dedicated itself to the task of drafting a statute that would meet each and every criticism of the predecessor statute[, the CDA,] that this Court set forth in *Reno*. It incorporated language from the Court's precedents, particularly the *Miller* standard, virtually verbatim. And it created what it believed was a statute that would protect children from exposure to obscene professional pornography without obstructing adult access to material that the First Amendment protects. What else is Congress supposed to do?<sup>169</sup>

Unfortunately, Congress cannot look to the *Ashcroft II* decision to answer Justice Breyer's question because the *Ashcroft II* Court failed to give Congress clear guidance as to how COPA failed the *Reno* Court's directives, choosing instead to skirt the issue by deciding the case on grounds other than the merits.

Although the majority stated that "Congress is [not] incapable of enacting any regulation of the Internet designed to prevent minors from gaining access to harmful materials,"<sup>170</sup> *Ashcroft II* basically sends Congress away without direction to attempt blindly to formulate an act that the Supreme Court *may* or *may not* validate. Indeed, the *Ashcroft II* opinion does not offer many possibilities to Congress. The Court, in deciding a mere interlocutory matter,

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injunction and remanding for trial, we allow the parties to update and supplement the factual record to reflect current technological realities").

166. *Id.* at 2805 (Breyer, J., dissenting).

167. *Id.* at 2805 (citation omitted).

168. *Id.* at 2788. The majority states that "[i]n enacting COPA, Congress gave consideration to our earlier decisions on this subject, in particular the decision in *Reno* . . ." *Ashcroft II*, 124 S.Ct. at 2788 (citation omitted). See also *id.* at 2805 (Breyer, J. dissenting) (noting that "Congress passed [COPA] in response to the Court's decision in *Reno*").

169. *Id.* at 2805 (citations omitted).

170. *Id.* at 2795.

simply contrasted end regulation against source regulation, finding end regulation *might* be a less restrictive alternative.<sup>171</sup> Although the majority did give Congress one offhand suggestion, that Congress might enact incentives to encourage volitional filter usage,<sup>172</sup> the *Ashcroft II* Court did not provide Congress with an in-depth explanation of this suggestion, any statutory interpretation of COPA, or any other guidance regarding what type of Internet regulation law might pass constitutional muster.<sup>173</sup>

Contrary to the majority, the dissenting opinions suggest ways in which a more in-depth reading might, at least, give Congress more guidance and, at best, produce an entirely different result. Justice Scalia suggested lowering the standard of scrutiny applied to COPA.<sup>174</sup> Justice Breyer conducted a narrow reading of COPA.<sup>175</sup> Conversely, the majority simply decided the matter on interlocutory grounds and neglected giving Congress any guidance other than that Congress still *may* be able to enact a constitutional statute that regulates the Internet.<sup>176</sup>

*Ashcroft II*'s shallow, interlocutory decision was surely a disappointment to Congress. Indeed, the majority failed to foreclose any possibilities: the Court *may* or *may not* find filters are a viable alternative to COPA; the Court *may* find new evidence that *may* or *may not* be presented on remand “make[s] a difference”<sup>177</sup> as to COPA’s constitutionality; the Court *may* or *may not* find the government can sufficiently prove filters are ineffective; and the Court *may* or *may not* take into account that COPA is based on the Court’s directives in *Reno*. The *Ashcroft II* decision leaves the government confused regarding the Court’s position on COPA and, more generally, “source” regulation designed to shield minors from online pornography. Justice Breyer conjectures that

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171. *Id.* (“On this record, the Government has not shown that the less restrictive alternatives proposed by respondents should be disregarded. Those alternatives, indeed, *may* be more effective than the provisions of COPA”) (emphasis added).

172. *Ashcroft II*, 124 S.Ct. at 2793 (stating that Congress can “take steps to promote [the] development [of filters] by industry, and [the] use [of filters] by parents”).

173. *Id.* at 2791. The Court expressly stated that its holding was confined to the interlocutory matter and that it confined its rationale narrowly as well, deciding the matter “on a narrower, more specific grounds than the rationale the Court of Appeals adopted.” *Id.*

174. *Id.* at 2797 (Scalia, J., dissenting) (criticizing the majority “in subjecting COPA to strict scrutiny” because “[n]othing in the First Amendment entitles the type of material covered by COPA to that exacting standard of review”).

175. *Id.* at 2799 (Breyer, J., dissenting). Justice Breyer notes that COPA’s terms, which the Court of Appeals found too broad, are nearly identical to those validated as narrow enough in *Miller*. Thus, Justice Breyer finds a narrowing construction to be a valuable analysis. *Ashcroft II*, 124 S.Ct. at 2799 (Breyer, J., dissenting). *See also* Corne-Revere, *supra* note 14, at 324 (noting Justice Breyer’s concerted effort to narrowly read COPA: “Justice Breyer’s dissent is remarkable for its unusual reading of the ‘harmful to minors’ standard. His effort to bring a heightened level of precision and to narrow the variable obscenity standard is a worthy goal . . .”).

176. *Ashcroft II*, 124 S.Ct. at 2795.

177. *Id.*

“some Members of the Court . . . [may] have taken the view that the First Amendment simply does not permit Congress to legislate this area.”<sup>178</sup> However, Justice Breyer states that if that view is the impetus for the majority’s decision, then the Court should have indicated that to Congress in *Ashcroft II*.<sup>179</sup>

*B. Role of Federal Government in Internet Regulation*

As Justice Breyer suggests in his dissent, the reasoning behind the majority’s decision in *Ashcroft II* may be that the majority believes that the federal government has no place, no constitutional role, in directly regulating the Internet.<sup>180</sup> Illustrative of this are the majority’s statements indicating a preference for end regulation, such as filters, that “impose selective restrictions . . . at the receiving end,” as opposed to source regulation, such as COPA, that imposes “universal restrictions” on internet providers that are enforced by the government through criminal and civil sanctions.<sup>181</sup> If the Court prefers end regulation to direct government control at the source of online pornography, then the Court takes the primary responsibility for protecting children from harmful Internet materials out of the government’s hands.

Confirming this position in his concurrence, Justice Stevens finds that it is parents’ responsibility to protect children from harmful Internet material. Taking issue with COPA’s imposition of civil and criminal liability on offenders, Justice Stevens explains his “growing sense of unease when the interest in protecting children from prurient materials is invoked as a justification for using criminal regulation of speech as a substitute for, or a simple backup to, adult oversight of children’s view habits.”<sup>182</sup> Further, in support of end regulation as a preferable alternative to COPA, the majority explains that parents can turn on filters when children use the computer and then turn off “the filter on their home computers” to “obtain access” to otherwise filtered speech.<sup>183</sup> Clearly, the majority sends the message that parents, not the government, are to be their children’s censors.<sup>184</sup> Having implied that the government lacks a direct role in Internet regulation, the Supreme Court has demoted the societal interest in shielding children from

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178. *Id.* at 2805 (Breyer, J., dissenting).

179. *Id.*

180. *Id.* (“I recognize that some Members of the Court, now or in the past, have taken the view that the First Amendment simply does not permit Congress to legislate in this area”).

181. *Ashcroft II*, 124 S.Ct. at 2792.

182. *Id.* at 2797 (Stevens, J., concurring).

183. *Id.* at 2792.

184. *See In Loco Parentis*, N.J. L. J. , Jul. 5, 2004, at 22 (arguing that the *Ashcroft II* decision communicates that “[i]n a free society, parents must be their children’s censors: Censorship is not a job for the federal government”).

online pornography, sending the message that the goal of COPA is not urgent.<sup>185</sup>

Considering that the *Ashcroft II* Court seems to imply that the government lacks a direct role in Internet regulation, why did the *Ashcroft II* Court not direct Congress to stop wasting its time attempting to enact a statute aimed at protecting children from pornography dependent on direct government regulation? In his dissent, Justice Breyer asks this question as well and, not finding an answer, states that if the Court feels that the federal government should not regulate Internet speech, it “should say so clearly.”<sup>186</sup> Until the Court clearly states its position, Congress will not know whether to continue to enact legislation concerning Internet regulation through direct governmental enforcement.

### C. *Filters vs. COPA*

Based on the evidence before them, the *Ashcroft II* majority found that filters may be a less restrictive alternative to COPA,<sup>187</sup> and thereby, that the government may have no direct role in Internet censorship.<sup>188</sup> The following section analyzes this finding by 1) providing an empirical study of filters and, based on this exemplar, analyzing 2) whether the volitional use of filters is an effective means of controlling children’s access to harmful Internet pornography, and 3) whether filters are less restrictive of legitimate speech.

The following study evaluates the effectiveness of filters by analyzing the content of information blocked by filters, that is, the relative amounts of pornography versus the amounts of non-obscene, legitimate speech blocked by filters.<sup>189</sup> This study also presents an accurate portrayal of how most filters work: filters usually operate on some form of word-blocking; users turn on a

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185. *See id.* (arguing that by implying that the government lacks a direct role in Internet regulation, the *Ashcroft II* Court indicates that “[a]cting in loco parentis is not the most effective use of Congress’s time”).

186. *Ashcroft II*, 124 S.Ct. at 2805 (Breyer, J., dissenting).

187. *Id.* at 2795.

On this record, the Government has not shown that the less restrictive alternatives proposed by respondents should be disregarded. Those alternatives, indeed, may be more effective than the provisions of COPA. The District Court did not abuse its discretion when it entered the preliminary injunction. The judgment of the Court of Appeals is affirmed, and the case is remanded for proceedings consistent with this opinion.

*Id.*

188. *See In Loco Parentis*, *supra* note 184, at 22 (arguing that the *Ashcroft II* decision communicates that “[i]n a free society, parents must be their children’s censors: Censorship is not a job for the federal government”).

189. *See* Kate Reder, *Ashcroft v. ACLU: Should Congress Try, Try, and Try Again, or Does the International Problem of Regulating Internet Pornography Require an International Solution?*, 6 N.C.J.L. & TECH. 139, 148 (2004) (summarizing the purpose and results of the study).

filter and may set the level of blocking desired, from a very restrictive configuration to a less restrictive setting.<sup>190</sup>

The Kaiser Family Foundation conducted a study, (“Kaiser study”), that tested the material blocked from various websites, including general health, sexual health, and pornography websites, by different filtering devices set at different configurations. The study found that when the setting was less restrictive, the filters failed to block much pornography but allowed more legitimate speech from non-pornographic sites. When the setting was more restrictive, the filters successfully blocked more pornography but erroneously blocked more legitimate materials. Even at the least restrictive setting, the filters incorrectly blocked about one out of ten non-pornographic, health-related websites. Thus, a parent wishing to screen pornography on a child’s computer who sets the filter’s configuration to the most restrictive level can expect the filter to incorrectly block an average of 24 percent of non-pornographic, legitimate websites.<sup>191</sup> These results have been confirmed by many studies, including those of the Computer Science and Telecommunications Board working in conjunction with the National Research Council.<sup>192</sup>

The Kaiser study illustrates the debate over filters’ effectiveness: filters are potentially underinclusive, failing to block a significant amount of Internet pornography, and overinclusive, blocking constitutionally protected speech such as every instance of the word “breast” and thus, all breast cancer websites.<sup>193</sup> The report by Computer Science and Telecommunications Board

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190. See *id.* See also Kosse, *supra* note 30, at 738-39 (describing the two categories of filtering software: “predetermined blocking filters,” which require a user to select one of five methods by which to block speech, or “rate-based filters,” which allow users “to rate sites by creating descriptive labels”). For a thorough report on protecting children from Internet pornography, including extensive analyses of filtering technologies, see YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 29, at 51.

191. See Reder, *supra* note 189, at 148 (summarizing the Kaiser study and arguing that the results demonstrate that filters block obscene materials at the high price of blocking non-obscene, legitimate speech as well). To view the complete study, see The Henry J. Kaiser Family Foundation, *See No Evil: How Internet Filters Affect the Search for Online Health Information*, at [http://www.kaisernetwork.org/health\\_cast/uploaded\\_files/Internet\\_Filtering\\_exec\\_summ.pdf](http://www.kaisernetwork.org/health_cast/uploaded_files/Internet_Filtering_exec_summ.pdf) (Dec. 2002).

192. See YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 29, at 58 (“All of the technologies of filtering that are discussed above have inherent uncertainties associated with them, which lead them to make errors of both commission (misinterpreting a site as inappropriate) or omission (not identifying an inappropriate site”); Kosse, *supra* note 30, at 739 (“Many of the [filtering] programs use some form of word-blocking that often leads to the overinclusive blocking of constitutionally protected material . . . Critics of filtering software argue that this technology can be underinclusive as well”).

193. See Kosse, *supra* note 30, at 739.

[M]any of the [filtering] programs use some form of word blocking that often leads to the overinclusive blocking of constitutionally protected material. For example, certain

and the National Research Council concluded that filters were inherently fallible in terms of “overblocking” and “underblocking.”<sup>194</sup> The report found that, “[d]ue to the nature of filtering, these two types of errors are inevitable[.]” and while “[i]t is possible to adjust” one’s filter “such that the occurrence of one type of error is reduced[.] . . . reducing one type of error will always result in increasing the other type of error.”<sup>195</sup> Parents have also agreed with such findings, concluding that filters are not sufficient means of addressing the problem of children’s exposure to online pornography.<sup>196</sup>

In his dissent, Justice Breyer argues that this recognized ineffectiveness of filters impelled efforts to design a statute allowing for direct government regulation, efforts which resulted in COPA’s promulgation.<sup>197</sup> The *Ashcroft II* majority disagreed with Justice Breyer’s assertion that filters were the status quo and suggested that the government can implement incentive programs encouraging the use of filtering software, thereby raising the bar above the status quo.<sup>198</sup> Indeed, Congress will likely respond to the majority’s suggestion by enacting such an incentive program.<sup>199</sup>

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programs banned the word “breast,” unintentionally blocking all websites dealing with breast cancer. Critics of filtering software argue that this technology can be underinclusive as well.

*Id.*

194. YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 29, at 58.

195. *Id.*

196. See *Ashcroft II*, 124 S.Ct. at 2802 (Breyer, J., dissenting).

[F]iltering software depends on parents willing to decide where their children will surf the Web and able to enforce that decision. As to millions of American families, that is not a “reasonable possibility” because “[m]ore than 28 million school age children have both parents or their sole parent in the work force, at least 5 million children are left alone at home without supervision each week, and many of those children will spend afternoons and evenings with friends who may well have access to computers and more lenient parents.”

*Id.* See also YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 29, at 161. This report explained that “filters cannot guarantee that inappropriate material will not be accessed” and thus require adult supervision to ensure such. *Id.* at 304. Considering that the “number of unmarried-partner homes increased by 60 percent” from 1999 to 2000, parents are increasingly unable to supervise their children’s computer usage. *Id.* at 161.

197. *Ashcroft II*, 124 S.Ct. at 2802 (Breyer, J., dissenting) (“Filtering software . . . suffers from . . . serious inadequacies that prompted Congress to pass legislation instead of relying on its voluntary use”).

198. *Id.* at 2793 (stating that Congress can “take steps to promote [the] development [of filters] by industry, and [the] use [of filters] by parents . . . [i]t is incorrect, for that reason, to say that filters are part of the current regulatory status quo”).

199. For a discussion of this issue, see Reder, *supra* note 189, at 147 (discussing the likelihood of Congress providing incentives for the use of filters based on the holding in *Ashcroft II* and that of *American Library*, where the Court held that public libraries’ use of Internet filtering software did not violate patrons’ First Amendment rights and, therefore, CIPA did not violate the Constitution) (citing *American Library*, 539 U.S. at 212).



However, as suggested by the Kaiser study, filters have inherent deficiencies that, even with incentive programs encouraging their use, render filters less effective than COPA.<sup>200</sup> Source regulation, such as COPA, does not depend on filter-like machines that are fundamentally ill-equipped to distinguish between context-dependent meanings of words, but rather it requires online pornography providers themselves to employ age verification systems that patrons must bypass before access is allowed.<sup>201</sup> Fundamentally, encouraging more people to use filters more often will not affect their inherent fallibility. Thereby, incentive programs that encourage widespread filter use will not raise filters, as inherently fallible machines, above the filter-inclusive status quo existing before COPA's enactment.

Based on his finding that a filtering status quo is less effective than COPA, Justice Breyer presented a convincing and interesting argument criticizing the majority's conclusion that filters are less restrictive than COPA.<sup>202</sup> Justice Breyer found that the majority, by inquiring as to whether a filtering status quo is less restrictive than COPA, is essentially asking: Is it less restrictive to do nothing (leave the filtering status quo alone) than to allow COPA to take effect (thereby increasing the level of protection from that of a filtering status quo)?<sup>203</sup>

Thus, conceptually, by finding filters are a less restrictive alternative to COPA, the majority affirms the current regulatory status quo, one that, in the words of Justice Breyer, "does not solve the 'child protection' problem."<sup>204</sup>

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200. See Reder, *supra* note 189, at 148 (summarizing the Kaiser study and arguing that the results demonstrate that filters block obscene materials at the high price of blocking non-obscene, legitimate speech as well). See also YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 29, at 58 (concluding that filters are inherently fallible in terms of "overblocking" and "underblocking" and finding that, "[d]ue to the nature of filtering, these two types of errors are inevitable" and while "[i]t is possible to adjust" one's filter "such that the occurrence of one type of error is reduced . . . reducing one type of error will always result in increasing the other type of error").

201. Carrie Netterville-Heieck, Note, *Ashcroft v. ACLU: Protecting Our Children From Harmful Online Material Without Infringing Upon First Amendment Rights*, 4 WHITTIER J. CHILD & FAM. ADVOC. 95, 110 (2004) (explaining that COPA would require "age and identity verification . . . to access adult Web sites"). For a thorough explanation of the various kinds of age verification software, see YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 29, at 59.

202. *Ashcroft II*, 124 S.Ct. at 2801-02. (Breyer, J., dissenting).

203. *Id.* In his dissent, Justice Breyer, discussing the majority's position that filters are a reasonable alternative to COPA, stated that filters are:

part of the status quo, i.e., the backdrop against which Congress enacted [COPA]. It is always true, by definition, that the status quo is less restrictive than a new regulatory law. It is always less restrictive to do nothing than to do something. But "doing nothing" does not address the problem Congress sought to address—namely that, despite the availability of filtering software, children were still being exposed to harmful material on the Internet.

*Id.*

204. *Id.* at 2802.

Irrespective of whether Congress enacts incentive legislation, parents should be concerned that the *Ashcroft II* Court has affirmed the inherent fallibility of filters, the status quo against which COPA was enacted, as a more effective and less restrictive means of protecting children from online pornography.

*D. The Supreme Court's Protectivism of the Internet*

While the majority and dissenting opinions in *Ashcroft II* clashed on almost all points, from whether the Court should have decided the case on the merits to whether COPA was more or less effective than filters,<sup>205</sup> the Court “achieved a near consensus” regarding the use of strict scrutiny to evaluate COPA.<sup>206</sup> Only Justice Scalia advocated a less rigorous level of scrutiny.<sup>207</sup>

The use of strict scrutiny in evaluating content-based restriction of sexual speech has not always been the approach employed by the Court.<sup>208</sup> The Court usually regards obscene, sexually explicit speech as deserving only minimal protection and therefore the Court will attempt to use a less stringent standard in evaluating proposed restrictions on such speech.<sup>209</sup> But faced with new and different communication mediums, the Court has recently used a strict scrutiny approach to content-based restrictions, thereby setting forth a major change in the law with implications that would seem to limit future government attempts to regulate sexual speech.<sup>210</sup> In choosing to analyze COPA through the most

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205. For an interesting theory as to the reasons for the differences between the majority and dissenters in *Ashcroft II*, see Corn-Revere, *supra* note 14, at 322. Corn-Revere postulates:

The difference between the *Ashcroft II* majority and the dissenters is even more extreme than to say that for one side the glass is half full and for the other it is half empty. The majority position is akin to saying that nothing prevents parents from getting a glass of water if they want one. But to the dissenters, no such thing as a glass exists unless the government provides it. To the extent the “glass” in this metaphor is the existence of Internet filtering software, the divergent perspectives of the justices significantly affect their respective evaluations of the technology.

*Id.*

206. *Id.* at 321 (stating that the *Ashcroft II* justices, “achieved a near consensus . . . that regulating expression on the internet in the interest of protecting children requires the government to satisfy strict First Amendment scrutiny”).

207. *Ashcroft II*, 124 S.Ct. at 2797 (Scalia, J., dissenting) (criticizing the majority “in subjecting COPA to strict scrutiny” because “[n]othing in the First Amendment entitles the type of material covered by COPA to that exacting standard of review”). See also Corn-Revere, *supra* note 14, at 321 (“Justice Scalia is the sole holdout for a less rigorous standard of review . . .”).

208. Chemerinsky, *supra* note 25, at 333 (“[*Ashcroft II*] is notable because the Court used strict scrutiny in evaluating government regulation of sexual speech. Traditionally, non-obscene sexual speech has been regarded as having little value and has been only minimally protected.”).

209. *Id.* See, e.g., *Miller v. Cal.*, 413 U.S. 15, 37 (1973) (holding that obscene speech is not afforded First Amendment protection and the government can thus regulate obscenity).

210. Chemerinsky, *supra* note 25, at 333-34. See *Reno v. ACLU*, 521 U.S. at 868-69. The Court utilized a strict scrutiny approach in analyzing CDA. In choosing to apply “the most stringent review” of CDA, the *Reno* Court pointed out the importance of the Internet as a new,

stringent lens available, the *Ashcroft II* Court conveyed a deliberate protectivism of the Internet medium.<sup>211</sup>

Speculation abounds as to the potential motivations for the Court's protectivism of the Internet. Perhaps this protectivism can be explained by analyzing the nature of the Internet as an expressive medium. The nature of the Internet medium is quite different from other more traditional media such as the telephone and radio.<sup>212</sup> Certainly, the scope and range of communications possible over the Internet are vast and ever expanding.<sup>213</sup> In fact, the Internet was designed to be borderless, so as to allow global access and avoid obstructions.<sup>214</sup> This knowledge alone might lead the Court to be wary of allowing regulatory attempts to reign-in an area of communications with such new and indiscernible boundaries.<sup>215</sup>

Exacerbating the problems encountered from the nature of the Internet as an ever-expanding medium is the extremely complex nature of that which COPA seeks to regulate. The Court has always approached content-based speech restrictions cautiously, but even more so is the Court wary of the regulation of sexually explicit material.<sup>216</sup> Formulating a constitutional statute that regulates sexually explicit material is exceedingly difficult, requiring legislators to "settle in the abstract upon a constitutionally acceptable category of material that should be withheld from children," which is problematic

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immensely wide-ranging medium that, unlike radio or television, is less invasive because communications over the Internet do not appear on an individual's computer unbidden. *Id.*

211. Chemerinsky, *supra* note 25, at 333 ("[*Ashcroft II*] is important because the Supreme Court is once again being very protective of the internet as a medium for communication and restrictive as to the government's ability to regulate it").

212. YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 29, at 32-33, 35 (listing the key features of the internet medium that distinguish it from other, more traditional media, including that the internet 1) "supports a high degree of interactivity," 2) "is high decentralized," 3) "is intrinsically a highly anonymous medium," and 4) "is a highly convenient medium"). The report also asserts that the "capital costs of becoming an Internet publisher are relatively low" and that "because nearly anyone can put information onto the Internet, the appropriateness, utility, and even veracity of information on the Internet are generally uncertified and hence unverified." *Id.* at 35.

213. See Kosse, *supra* note 30, at 721. Kosse comments on the expansive nature of the Internet, stating that "[i]n 2002, the Internet was made up of more than 600 million users worldwide[.]" and "[t]here are now more than 150 countries linked by the Internet." *Id.*

214. Reder, *supra* note 189, at 146 & nn. 7 & 55 ("The Internet was designed both for global access and to avoid obstructions; it is borderless") (citing Parry Aftab, White Paper, *Thinking Outside the 'Porn' Box, Separating the Sexual Content Debate from Issues Relating to Marketing, Commercial Practices, and Child Exploitation*, at [www.wiredsafety.org/resources/pdf/xxx\\_whitepaper.pdf](http://www.wiredsafety.org/resources/pdf/xxx_whitepaper.pdf) (April 2004)).

215. See *Ashcroft II*, 124 S.Ct. at 2794 (acknowledging that "[t]he technology of the Internet evolves at a rapid pace").

216. James, *supra* note 159, at S10 ("[*Ashcroft II*] represents an important reminder of the justices' long-standing suspicious attitude against content-based restrictions on speech").

considering “the geographic variation within the United States among standards for assessing such material and the fact that so much covered material originates abroad . . . .”<sup>217</sup> Thus, the complex, hard-to-define nature of both the Internet and sexually explicit material might render the Court suspect of any legislative attempt at regulation on both fronts.

While the Court has not revealed its motivations behind affording the Internet a high level of constitutional protection, after *Ashcroft II* little doubt remains that the Court plans on treating the Internet very differently than other media. In the past, the Court extended First Amendment protection to then-new technologies, namely radio, television, and cable television, only after much reservation and debate.<sup>218</sup> However, faced with the newest technology of the Internet, the Court has not hesitated to immediately apply the highest level of constitutional protection.<sup>219</sup>

#### *E. When COPA Next Faces the Supreme Court*

Any Supreme Court case decided by a 5-4 majority presents the possibility that if the issue comes before the Court again, the passage of time or a change in the composition of the Court might tip the scale in a different direction.<sup>220</sup> As COPA’s fate is currently undecided, the issue of COPA’s constitutionality will almost definitely come before the Supreme Court again.<sup>221</sup> When it does, 1) President George W. Bush may have had nominated a new justice to the

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217. Patricia L. Bellia, *Surveillance Law Through Cyberlaw’s Lens*, 72 GEO. WASH. L. REV. 1375, 1458 n.353 (2004) (citing *Ashcroft II* as an example of a case where filtering was found an attractive alternative “to direct regulation of sexually explicit content” because of the complexities involved in regulating sexually explicit material).

218. Corn-Revere, *supra* note 14, at 309-10.

Importantly, the majority opinion [of *Ashcroft II*] reaffirmed the high level of constitutional protection that the Court has accorded the Internet. This view of technology and the First Amendment fundamentally reverses the approach the Court took regarding speech transmitted via new communications technologies in the decades before *Reno v. ACLU*. With other media, when they were new, the Court only grudgingly and incrementally extended First Amendment protections.

*Id.*

219. *Id.* at 310 (“[W]ith the debut of the internet, the Court stressed that ‘our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium’”).

220. Craft, *supra* note 22, at 15 (“Not infrequently, the court decides cases by a 5-4 vote” and thus, when such a decision goes before the Court again, “[a] one-vote swing could shift the balance” on a particular issue).

221. Corn-Revere, *supra* note 14, at 320. Corn-Revere comments that on COPA’s status: “[b]ecause the Court affirmed only the district court’s decision to issue a preliminary injunction, all of the issues that go to the merits still must be decided.” *Id.*

Court, and 2) the cutting-edge technology issues involved in *Ashcroft II* will likely have evolved.<sup>222</sup>

Even before the most recent presidential election, scholars and political analysts emphasized that the outcome of the election would have great implications in terms of changes in the Supreme Court's composition.<sup>223</sup> The re-election of the conservative President George W. Bush, and his almost certain opportunity to fill at least one vacancy on the Supreme Court, has great implications as to how COPA's constitutionality will be resolved.<sup>224</sup> President Bush's choice in a Supreme Court replacement will certainly test his conservative commitment as well as his post-election promise to Democrats: "Americans are expecting a bipartisan effort."<sup>225</sup> Liberal groups predict that President Bush, in facing such a test, will likely chose a conservative candidate, especially if he is called to replace the conservative Chief Justice Rehnquist.<sup>226</sup>

However, an analysis of how a change in the Supreme Court might affect COPA based on conservative or liberal tendencies might not be constructive. Usually, in order of most conservative to least, the line-up of the justices are as follows: 1) Justice Thomas, 2) Justice Scalia, 3) Justice Rehnquist, 4) Justice Kennedy, 5) Justice O'Connor, 6) Justice Breyer, 7) Justice Souter, 8) Justice Ginsburg, and 9) Justice Stevens.<sup>227</sup> *Ashcroft II* serves as an example of a 5-4 opinion with no clear-cut conservative-liberal line: the 5-4 opinion was written by Justice Kennedy (middle), joined by Justices Stevens (liberal), Souter (liberal), Thomas (conservative), and Ginsburg (liberal), with whom Justices

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222. *Id.* at 326. ("Much can happen as [*Ashcroft II*] makes its way through the lower courts, including a potential change in the composition of the Supreme Court").

223. *The Presidential Election: How Will the Outcome Shape Our Legal System?*, THE LEGAL INTELLIGENCER, Nov. 1, 2004, at 2 (arguing that the outcome of the 2004 election will influence the legal system in terms of who the President will nominate for high court). *See also* Tony Mauro, *Judge Battles Likely to Mark Bush's New Term*, THE RECORDER, Nov. 8, 2004, at 1 (speculating that President Bush's "presidential term [may be] marked by judicial confirmation battles that rival or exceed in intensity those of Bush's first term").

224. *See* Craft, *supra* note 22, at 15 ("[C]ourt watchers predict that the winner of the 2004 presidential election will likely name two or more justices and leave his mark on the court for a generation").

225. Mauro, *supra* note 223, at 1 ("When or if a Rehnquist replacement is named, liberal groups are gearing up for battle, in case Bush's olive branch, offered to Democrats in post-election remarks, does not extend to nominations. 'Americans are expecting a bipartisan effort and results,' Bush said . . .").

226. *Id.* ("Liberal groups are skeptical of Bush's comments, given the sharply conservative bent of some of his first-term judicial nominees").

227. E-mail from Roger Goldman, Professor of Law, Saint Louis University School of Law, to Anne S. Johnston, law student, Saint Louis University School of Law (Tuesday, Nov. 16, 2004 3:35 PM CST) (on file with author). Goldman noted that Justice Kennedy may sometimes "flip flop with O'Connor depending on issue." *Id.*

Scalia (conservative), Breyer (liberal), Rehnquist (conservative) and O'Connor (middle) dissented.<sup>228</sup>

Political party support of COPA has also crossed traditional conservative-liberal distinctions. Although the typical stereotype is that liberals oppose and conservatives support COPA and related censorship issues,<sup>229</sup> in many respects support of COPA has been bipartisan. COPA was introduced in the Senate by Republican Senator Dan Coats of Indiana.<sup>230</sup> In the House, Republican Representative Michael Oxley sponsored a near-identical bill.<sup>231</sup> Democrat President Bill Clinton signed COPA into law.<sup>232</sup>

Thus, while it is sure that President Bush will likely have an opportunity to nominate at least one justice to the Supreme Court, the effect of his choice of a conservative or a liberal appointment remains uncertain. When it comes to the First Amendment issues like COPA, the justices do not follow a strictly conservative or liberal voting pattern.<sup>233</sup>

Further, the passage of time between the Court's recent decision to remand *Ashcroft II* and when the Court faces COPA again might change the views of some of the justices. The *Ashcroft II* Court stated specifically that among its reasons for remanding the case was the practical justification that a remand would allow the parties to present updated technological data regarding filters and the Internet.<sup>234</sup> Having a history of approaching the ever-changing Internet medium with extreme caution,<sup>235</sup> perhaps the justices need time to get comfortable with the cutting-edge technology of the Internet and to understand it as more than an abstract, malleable medium before deciding whether it can be regulated. The scope of the Court's analysis, curtailing the possible means of protecting children from online pornography to one end of the spectrum or the other, namely to either source regulation, like COPA, or end regulation, like filters,<sup>236</sup> indicates a narrow perception of the vastness of the Internet, of the "grey" areas of cyberspace. If and when the justices do get acclimated to

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228. *Id.*

229. Reder, *supra* note 189, at 151 (discussing how "liberal voices [usually] join the debate by invoking the slippery slope of censorship").

230. Wilt, *supra* note 20, at 378 (detailing the legislative history of COPA).

231. *Id.* at 378-79.

232. *Id.* at 376.

233. E-mail from Roger Goldman, Professor of Law, Saint Louis University School of Law, to Anne S. Johnston, law student, Saint Louis University School of Law, (Tuesday, Nov. 16, 2004 3:35 PM CST) (on file with author).

234. *Id.* at 2794.

235. Chemerinsky, *supra* note 25, at 333 ("[*Ashcroft II*] is important because the Supreme Court is once again being very protective of the internet as a medium for communication and restrictive as to the government's ability to regulate it").

236. *Ashcroft II*, 124 S.Ct. at 2792 (finding that filters "impose selective restrictions on speech at the receiving end, not universal restrictions at the source").

the Internet, their views regarding whether the government can constitutionally regulate the Internet might broaden.

*F. Where Does Congress Go From Here?*

Perhaps a more illuminating question is: how did the Supreme Court expect Congress to use and interpret the *Ashcroft II* holding? Considering the narrow practical focus of the *Ashcroft II* decision, there is no simple answer.<sup>237</sup>

Indeed, Congress' expectations from *Ashcroft II* were quite different than the result. Congress enacted COPA in response to the Court's directives in *Reno* that specifically addressed those aspects of CDA which rendered it unconstitutional.<sup>238</sup> Certainly the government expected that COPA would be challenged by the ACLU and other groups.<sup>239</sup> Undoubtedly, Congress expected that whatever the outcome of such litigation, however long such litigation lasted, there would eventually be an outcome: the Court would tell Congress if and why COPA is or is not constitutional. But after years of COPA litigation and having reached the Supreme Court twice, the Court has again failed to provide Congress with any such insight, and as COPA begins its third climb from the lower courts up, Congress is left wondering if there is an end to the litigation process.<sup>240</sup>

What Congress can take from *Ashcroft II* is the understanding that the Court has reservations, albeit unexplained reservations, about direct, source regulation of the Internet by the government and, in lieu of such direct control, seems more than ready to endorse filters as an alternative.<sup>241</sup> Further, the

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237. See Corn-Revere, *supra* note 14, at 299 (describing *Ashcroft II*'s ruling as one of "narrow practical focus").

238. *Ashcroft II*, 124 S.Ct. at 2788; *Reno v. ACLU*, 521 U.S. at 885. The majority states that "[i]n enacting COPA, Congress gave consideration to our earlier decisions on this subject, in particular the decision in *Reno*." *Ashcroft II*, 124 S.Ct. at 2788. See also *id.* at 2805 (Breyer, J., dissenting). Justice Breyer's dissent notes that "Congress passed [COPA] in response to the Court's decision in *Reno* . . ." *Id.*

239. See Wilt, *supra* note 20, at 375 ("Unsurprisingly, the availability of pornography on the Internet has led to extensive public criticism and, more importantly, to numerous legislative attempts to restrict, regulate, reduce, burden and ban it. These endeavors have met with consistent and considerable opposition . . ."). In describing CDA's procedural history, Wilt notes that, "[a]s is typical for an indecency statute, [after CDA was enacted] twenty plaintiffs immediately filed suit challenging the constitutionality of the CDA, and alleging that it violated the First and Fifth Amendments." *Id.* at 376.

240. See Corn-Revere, *supra* note 14, at 320 ("The [*Ashcroft II*] Court remanded the case to update the factual record on technological developments relevant to its least restrictive means analysis, but none of the issues that relate to the ultimate question of COPA's constitutionality have been resolved. Because the Court affirmed only the district court's decision to issue a preliminary injunction, *all of the issues that go to the merits still must be decided*") (emphasis added).

241. See *Ashcroft II*, 124 S.Ct. at 2792 (finding that filters "impose selective restrictions on speech at the receiving end, not universal restrictions at the source"). See *supra* text

Court displays a protectivism of the Internet which can be best explained by a Court who views the Internet medium with trepidation,<sup>242</sup> so unwilling to reach within its nebulous boundaries that the Court prefers to remand the issue of COPA's constitutionality to the lower courts before making any decisions regarding source regulation of the Internet.

In the meantime, while Congress waits for a substantive decision on the merits, maybe it will, as the *Ashcroft II* majority suggested,<sup>243</sup> enact incentive programs encouraging filter usage.<sup>244</sup> The court has upheld such programs recently in application to libraries.<sup>245</sup> But, inevitably, any incentive enactment that extends beyond libraries will be challenged, sparking the litigation process anew.<sup>246</sup> Congress, confident that filters are not a solution to the problem,<sup>247</sup> no doubt views any such incentive program as only temporary and only a distant second place behind direct governmental regulation of the Internet.

However, perhaps incentive programs can, in the long run, give Congress the ammunition it needs to convince the Court that filters are not effective alternatives. Comprehensive data that might be compiled from such programs may persuasively establish filters as an inadequate alternative to direct governmental control. Unfortunately, this possibility is, at best, an optimistic hope for an outcome of *Ashcroft II*, and, at worst, a fanciful and completely

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accompanying note 236 ("The scope of the [*Ashcroft II*] Court's analysis, curtailing the possible means of protecting children from online pornography to . . . either "source" regulation, like COPA, or "end" regulation, like filters, indicates a narrow perception of the . . . "grey" areas of cyberspace. If and when the justices do get acclimated to the internet, their views regarding whether the government can constitutionally regulate the internet might broaden").

242. See Chemerinsky, *supra* note 25, at 333 ("[*Ashcroft II*] is important because the Supreme Court is once again being very protective of the internet as medium for communication and restrictive as to the government's ability to regulate it").

243. *Ashcroft II*, 124 S.Ct. at 2793 (stating that Congress can "take steps to promote [the] development [of filters] by industry, and [the] use [of filters] by parents").

244. For a discussion of this issue, see *Reder*, *supra* note 189, at 147 (discussing the likelihood of Congress providing incentives for the use of filters based on the holding in *Ashcroft II* and that of *American Library* (where the Court held that "[b]ecause public libraries' use of Internet filtering software does not violate their patrons' First Amendment rights, CIPA does not violate the Constitution . . .") (quoting *American Library*, 539 U.S. at 212 (2003))).

245. *American Library*, 539 U.S. at 194, 212 (upholding as constitutional the Children's Internet Protection Act ("CIPA"), which mandates that a public library may not receive some types of Internet-related federal assistance unless that library's internet safety policy includes protective technology such as filters). For the complete CIPA statute, see 20 U.S.C. § 9134(f) (2003) and 47 U.S.C. § 254(h) (2002).

246. See *Reder*, *supra* note 189, at 147 (describing the legislation-followed-by-litigation process of Internet regulation: "The Internet pornography industry is involved in a cat-and-mouse game with those who try to regulate it").

247. *Ashcroft II*, 124 S.Ct. at 2802 (Breyer, J., dissenting) ("Filtering software . . . suffers from . . . serious inadequacies that prompted Congress to pass legislation instead of relying on its voluntary use").



unfounded speculation. One outcome of *Ashcroft II* is definite: there is no end in sight for the problem of children's exposure to online pornography.

#### V. CONCLUSION

The problem that COPA aims to address, that of children's exposure to online pornography, is an immediate and urgent crisis. Undoubtedly, Congress, parents, and the Internet industry as a whole would have preferred that the *Ashcroft II* Court decided COPA's constitutionality, stating clearly what its decision implies, that the government has no role in regulating the internet, rather than *Ashcroft II*'s narrow, practical decision. By endorsing filters, which either overblock legitimate speech or underblock pornography, and upholding the injunction prohibiting COPA from taking effect, the *Ashcroft II* Court neither protected children nor protected speech. Truly, the *Ashcroft II* decision frustrates to its core the congressional effort behind COPA's enactment.

It is no wonder that in the wake of the Supreme Court's decision, Congress is left disgruntled and confused. Indeed, in enacting COPA, Congress did exactly what the Court told it to do in *Reno*. Nevertheless, after years of litigation, the Court has twice refused to comment on COPA's constitutionality and now has stated in *Ashcroft II* that filters *might* be a less restrictive alternative, an implication that effectively leaves COPA with uncertain, doubtful constitutional viability. The government is left trying to tread water with a law that is no longer afloat until it reaches the Supreme Court again, and even then the Court might still harbor trepidation of the Internet as an uncharted ocean of communication.

Meanwhile, Congress has no promising options: it can hope that a favorable re-balancing of *Ashcroft II*'s 5-4 scales might occur before the Court faces COPA again, or Congress might attempt to pass incentive programs to encourage filter use. Considering that Congress has no faith in filters' ability to address the online pornography problem, such programs seem doomed from the start. But while waiting for COPA's slow ascent to the Supreme Court, Congress will likely go forward with filter incentive legislation as opposed to waiting for an official Court ruling on COPA. Undoubtedly, Congress understands that the *Ashcroft II* Court, in choosing to remand rather than decide COPA's fate, likely wanted to let the lower courts grapple with COPA's constitutionality first before making their own decision regarding the regulation of the Internet's vast technological terrain.

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