

BEST STAFF COMPETITION PIECE[†]

Constitutional Law—Preliminary Injunction Against Enforcement of Child Online Protection Act Upheld—*Ashcroft v. ACLU*, 124 S. Ct. 2783 (2004)

The First Amendment of the United States Constitution expressly states that “Congress shall make no law . . . abridging the freedom of speech.”¹ Due to concern over limiting the free expression of thought, courts generally construe the First Amendment to preclude the government from regulating speech based upon subject matter.² The United States Supreme Court, however, has permitted content-based restrictions on a limited basis where the speech is of minimal social value.³ In *Ashcroft v. ACLU*,⁴ the Supreme Court considered whether the Third Circuit Court of Appeals correctly affirmed an order granting a preliminary injunction against the enforcement of the Child Online Protection Act (COPA).⁵ The Court upheld the preliminary injunction, and concluded that the district court did not abuse its discretion in holding that the government failed to prove the absence of less restrictive alternatives.⁶

[†] The Suffolk University Law Review selected this case comment as the Best Staff Competition Piece for 2004. Each summer, the Law Review hosts a writing competition from which the Law Review chooses its new staff members based on their writing ability. The Editorial Board found John’s piece extremely well-written with insightful analysis. We would like to congratulate John on his achievement.

1. U.S. CONST. amend. I; *see also infra* note 20 and accompanying text (explaining rationale behind First Amendment).

2. *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (stating First Amendment generally prevents government from proscribing speech based on disapproval of ideas); *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) (contending mere offensive speech not worthy of suppression); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208-13 (1975) (invalidating statute regulating nudity in films where suppression threatens innocent or educational speech).

3. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992) (discussing past approval of content-based limitations for low-value speech). The *R.A.V.* decision conceded that freedom of speech does not encompass the right to ignore all “traditional limitations.” *Id.* at 383; *see, e.g.*, *Miller v. California*, 413 U.S. 15, 24-26 (1973) (outlining three-part test for obscenity and reaffirming obscenity regulation as permissible); *Ginsberg v. New York*, 390 U.S. 629, 636-37 (1968) (holding state criminal statute prohibiting sale of obscene materials to minors constitutional); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (holding libel not protected speech); *see also* Sheldon Nahmod, *The GFP (Green) Bunny: Reflections on the Intersection of Art, Science, and the First Amendment*, 34 SUFFOLK U. L. REV. 473, 476 (2001) (explaining low value speech as content-based regulation exception).

4. 124 S. Ct. 2783 (2004).

5. 47 U.S.C. § 231 (2004) (restricting minors’ access to harmful materials); 124 S. Ct. at 2788; *see also infra* notes 9-10 and accompanying text (explaining relevant definitions and COPA’s affirmative defense provision).

6. 124 S. Ct. at 2791 (finding plausible existence of alternatives); *see also infra* note 12 and accompanying text (discussing rationale of district court).

In its second attempt to safeguard minors from exposure to pornography on the Internet, Congress enacted COPA in 1998.⁷ The statute imposed criminal penalties for posting, “for commercial purposes,” World Wide Web content that is “harmful to minors.”⁸ The statute specifically defined what is harmful to minors, and labeled all speech within this definition as criminal speech.⁹ COPA also provided an affirmative defense to persons who utilized specific safeguards to prevent minors from accessing indecent material on their websites.¹⁰

The American Civil Liberties Union (ACLU), together with Internet providers apprehensive about the protection of free speech, filed suit in the United States District Court for the Eastern District of Pennsylvania seeking a preliminary injunction against enforcement of COPA.¹¹ The district court issued the preliminary injunction, reasoning that the government would likely fall short in its attempt to demonstrate that no less restrictive, equally effective alternative existed.¹² The Court of Appeals for the Third Circuit then affirmed the preliminary injunction on the separate grounds that the “community standards” language in COPA, by itself, rendered the statute overbroad.¹³ The Supreme Court rejected this reasoning, and vacated the specific holding

7. 47 U.S.C. § 231 (2004); see Emily Vander Wilt, Note, *Considering COPA: A Look at Congress's Second Attempt to Regulate Indecency on the Internet*, 11 VA. J. SOC. POL'Y & L. 373, 377-78 (2004) (explaining Congress began drafting COPA immediately after Court struck down Communications Decency Act (CDA)).

8. 47 U.S.C. § 231(a)(1) (2004) (criminalizing harmful postings); see also 124 S. Ct. at 2789 (observing COPA constituted second Congressional attempt to criminalize Internet speech).

9. 47 U.S.C. § 231(6) (2004) (declaring certain speech criminal). Section 231(e)(6)(a) defined material 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.” *Id.*

10. 47 U.S.C. § 231(c) (2004). Section 231(c) outlined methods that website operators could employ to verify age. *Id.*; see also Heather Jacobson & Rebecca Green, *Computer Crimes*, 39 AM. CRIM. L. REV. 273, 300 (2002) (highlighting how website operators could avoid prosecution by requiring age verification). While opponents of COPA stress that it deprives adults of speech that they are entitled to see, COPA defenders contend that adults are not denied access to this material if they can merely confirm their status as adults. David L. Hudson, Jr., *Enforcing Morality: Court Again Tackles Adult Content Restrictions and the First Amendment*, 90 A.B.A. J. 14, 14 (2004).

11. *ACLU v. Reno*, 31 F. Supp. 2d 473, 496 (E.D. Pa. 1999) (finding government could not satisfy burden of proving COPA represented least restrictive alternative), *aff'd on other grounds*, 217 F.3d 162, 166 (3d Cir. 2000) (holding “contemporary community standards” of identifying material “harmful to minors” rendered statute overbroad), *aff'd on remand*, *Ashcroft v. ACLU*, 322 F.3d 240 (3d Cir. 2003) (announcing COPA's reliance on “community standards” not sufficient to render it overbroad).

12. *ACLU v. Reno*, 31 F. Supp. 2d 473, 496 (E.D. Pa. 1999) (finding government could not satisfy burden of proving COPA represented least restrictive alternative), *aff'd on other grounds*, 217 F.3d 162, 166 (3d Cir. 2000) (holding “contemporary community standards” of identifying material “harmful to minors” rendered statute overbroad), *aff'd on remand*, *Ashcroft v. ACLU*, 322 F.3d 240 (3d Cir. 2003) (announcing reliance on “community standards” insufficient to render COPA overbroad).

13. *ACLU v. Reno*, 217 F.3d 162, 166 (3d Cir. 2000) (opining use of term “contemporary community standards” would restrict speech to most conservative standards), *aff'd on remand*, *Ashcroft v. ACLU*, 322 F.3d 240 (3d Cir. 2003) (holding “community standards” acceptable because restrictions analogous to obscenity test).

reached by the court of appeals that the “community standards” language alone violated First Amendment jurisprudence.¹⁴ On remand, the court of appeals concluded that the statute was still overbroad, not narrowly tailored, and not the least restrictive legislative approach to restrict a minor’s access to harmful material.¹⁵

Granting certiorari again, the Supreme Court applied strict scrutiny because COPA placed content-based restrictions on protected speech.¹⁶ The Court chose not to address all of the lower court’s concerns regarding the breadth of COPA, but instead focused closely on the availability of less restrictive alternatives.¹⁷ The Court concluded that the district court correctly determined that the government would likely fail to disprove blocking and filtering software as a viable alternative.¹⁸ Thus, the Court affirmed that the district court did not abuse its discretion.¹⁹

The First Amendment guarantees that Congress shall not limit the free expression of thought.²⁰ The Court considers content-based restrictions presumptively invalid because such regulation has the potential of suppressing certain ideas and viewpoints.²¹ While applying this exacting scrutiny, however,

14. *Ashcroft v. ACLU*, 535 U.S. 564, 577-78 (2002) (holding “community standards” acceptable), *aff’d on remand*, *Ashcroft v. ACLU*, 322 F.3d 240 (3d Cir. 2003).

15. *ACLU v. Reno*, 217 F.3d 162, 166 (3d Cir. 2000) (opining term “contemporary community standards” overly broad), *aff’d on remand*, *Ashcroft v. ACLU*, 322 F.3d 240 (3d Cir. 2003) (holding term “contemporary community standards” acceptable).

16. 124 S. Ct. at 2788 (discussing necessity of strict scrutiny for content-based restrictions threatening free society). *Contra id.* at 2798 (Scalia, J., dissenting) (rejecting strict scrutiny where businesses emphasize sexually provocative aspects of products).

17. 124 S.Ct. at 2792 (discussing filters as less restrictive). In addition to the less restrictive alternative reasoning, the Court pointed out three important practical reasons for letting the preliminary injunction stand: the possible chill on protected free speech due to threat of prosecution; many factual disputes remaining in the case; and the prudence of allowing continued fact finding because Internet technology evolves at a rapid pace. *Id.* at 2794.

18. 124 S.Ct. at 2792 (discussing filters as viable less restrictive legislative alternative). *But cf. id.* at 2801 (Breyer, J., dissenting) (stressing legislative inaction always less restrictive than maintaining status quo). In his dissent, Justice Breyer also states that a narrow construction of the statute would remove protected material from the scope of the statute. *Id.* at 2805 (Breyer, J., dissenting); *cf. id.* at 2796 (Stevens, J., concurring) (describing threat to valuable speech due to severity of fine and prison term as punishment). In his concurrence, Justice Stevens contends that criminal prosecutions are inappropriate for regulating materials classified as obscene. *Id.* (Stevens, J., concurring). Justice Stevens emphasizes a concern for regulation in substitution for parenting. *Id.* (Stevens, J., concurring); *see also supra* note 17 (delineating practical reasons for majority upholding injunction).

19. 124 S. Ct. at 2791; *see also Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (noting preliminary injunction determined by likelihood of prevailing on merits).

20. U.S. CONST. amend. I; *see also Bose Corp. v. Consumers Union of the U.S., Inc.*, 466 U.S. 485, 503-04 (1984) (stressing freedom of speech as aspect of individual liberty and essential in quest for truth).

21. *United States v. Playboy Entm’t Group Inc.*, 529 U.S. 803, 812 (2000) (stating irrelevant whether COPA bans or merely burdens protected speech for strict scrutiny); *see, e.g., Reno v. ACLU*, 521 U.S. 844, 874 (1997) (holding CDA’s restrictions unacceptable when less restrictive alternatives available); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (holding most exacting scrutiny necessary for content-based regulation); *Sable Communications of Cal. v. FCC*, 492 U.S. 115, 126 (1989) (maintaining content-based regulations permissible only when government chooses least restrictive alternative).

the Court has allowed content-based regulations in a few limited areas.²²

For a content-based restriction to survive strict scrutiny, the government must prove that it has a “compelling interest” in regulating the speech.²³ Furthermore, the statutory means must be “narrowly tailored” to the achievement of those interests, and the statute must be the least restrictive legislative option.²⁴ First Amendment jurisprudence also requires that the statute is not overbroad.²⁵ In 1996, Congress attempted to shield children from Internet pornography by passing the Communications Decency Act (CDA), which the Supreme Court struck down in *Reno v. ACLU*²⁶ because it was substantially overbroad in many respects.²⁷ The *Reno* Court also expressed concern that the vagueness of the CDA and the difficulty of compliance would substantially suppress protected speech.²⁸

In the 2000 case of *United States v. Playboy Entertainment Group Inc.*,²⁹ the Court reviewed the constitutionality of federal statute, 47 U.S.C. § 561, requiring adult entertainment cable operators to fully scramble programs for non-subscribers or limit transmissions.³⁰ The Court found the law

22. See *supra* note 3 and accompanying text (highlighting where content-based regulation permissible).

23. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 836 (2000) (Breyer, J., dissenting) (observing Court must first determine if restrictions justified by compelling state interest).

24. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) (contending strict scrutiny test necessary to prevent unjustified restrictions); see also John Schwartz, *Antipornography Law Keeps Crashing into First Amendment*, N.Y. TIMES, June 30, 2004, at A2 (suggesting Supreme Court likely considers consumer software less restrictive than government legislation).

25. *Reno v. ACLU*, 521 U.S. 844, 879 (1997) (expressing concern with multiple provisions of Communications Decency Act). The *Reno* Court took particular exception to the phrase “interactive computer service,” which it applied to all modalities of Internet communication. *Id.* at 860. The statute’s inclusion of the terms “indecent” and “patently offensive” also increased the *Reno* Court’s concerns about the statute’s overbreadth. *Id.* at 876-78; see also Shaun Richardson, *What the Supreme Court Could Learn About the Child Online Protection Act by Reading Playboy*, 12 WM. & MARY BILL RTS. J. 243, 246-47 (2003) (explaining Court sent Congress message for more narrow statute).

26. 521 U.S. 844 (1997).

27. *Reno v. ACLU*, 521 U.S. 844, 879 (1997) (discussing overbreadth of modalities and substance covered); see also Maureen E. Brown, *Play It Again Uncle Sam: Another Attempt by Congress to Regulate Internet Content. How Will They Fare This Time?*, 12 COMM. L. CONSPECTUS 79, 84 (2004) (contending Supreme Court effectively made CDA unenforceable by declaring certain provisions unconstitutional).

28. Richardson, *supra* note 25, at 247 (explaining Court particularly concerned about curtailment of adult speech). Richardson notes that the Supreme Court sent a clear message to Congress to redraft the statute in a manner that did not limit adult communication. *Id.*; see also Kevin W. Saunders, *The Need for a Two (or More) Tiered First Amendment to Provide for the Protection of Children*, 79 CHI.-KENT. L. REV. 257, 258 (2004) (opining CDA unconstitutionally limited adult consumption by criminalizing protected speech).

29. 529 U.S. 803 (2000).

30. 47 U.S.C. § 561 (2004) (requiring full blocking or no programming during day); *United States v. Playboy Entm't, Inc.*, 529 U.S. 803, 807 (2000) (holding requested blocking from parents less restrictive than government mandated blocking). The *Playboy* Court applied strict scrutiny in striking down a statute that required cable companies to fully scramble indecent programming or limit the programming to times when children are unlikely to view television. *Playboy*, 529 U.S. at 807. While the *Playboy* majority struck down the statute because of less restrictive alternatives, it conceded that the government can address the problem of children’s exposure to indecent materials. *Id.* at 826-27; see also *Reno v. ACLU*, 521 U.S. 844, 849 (1997) (reiterating Congressional goal of protecting children from harmful materials legitimate); Denver Area Educ.

unconstitutional because parents could request full blocking, and therefore, the law was not the least restrictive alternative.³¹ The Court concluded that allowing parents to control their children's exposure is less restrictive than a government mandate.³²

In *Ashcroft v. ACLU*, the Supreme Court reviewed, for the first time, whether the district court abused its discretion in issuing a preliminary injunction against the enforcement of COPA.³³ Applying strict scrutiny, the Court held that the district court did not abuse its discretion, both because less restrictive alternatives existed and practical implications favored keeping the injunction in place.³⁴ The Court focused primarily on blocking and filtering software as a viable and less restrictive alternative to COPA.³⁵

The Court reasoned that filters are a less restrictive alternative because they impose restrictions on the consumer, rather than on the provider or source of protected speech.³⁶ The Court noted that filters neither limit adult access nor criminalize protected speech.³⁷ Using *Playboy* as precedent, the Court

Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 743 (1996) (holding protection of minors "compelling" interest); Appellant's Opening Brief at 16-18, 32-35, *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000) (No. 98-1682) (contending independent compelling government interest in protecting minors from pornography); Ashutosh Bhagwat, *What If I Want My Kids to Watch Pornography?: Protecting Children from "Indecent" Speech*, 11 WM. & MARY BILL RTS. J. 671, 682 (2003) (asserting Court left open possibility of government intervention where parents fail in protection); *cf. Playboy*, 529 U.S. at 842 (Breyer, J., dissenting) (expressly stating independent compelling interest in protection of children from virulent pornography). *But see* Brief of Amici Curiae Sexuality Scholars, Researchers, Educators, and Therapists in Support of Appellee at 5, *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000) (No. 98-1682) (stating government possesses no independent compelling interest in protecting children from pornography).

31. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 815 (2000) (finding targeted blocking fulfills government objective of supporting parents in protecting children from indecent material). *But see* Vander Wilt, *supra* note 7, at 424 (detailing distinctions between statutes under review in *Playboy* and COPA). *See generally* *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194 (2003) (holding Congress can offer incentives to use filters). Vander Wilt explains that the reasoning of *Playboy* should not apply to COPA because Internet blocking software places the financial cost of protecting children entirely on parents, in contrast to *Playboy* where the voluntary opt-out option financially burdens the producers of indecent material. *Id.* Vander Wilt contends that Internet filtering software prohibits all Congressional involvement, in contrast to *Playboy*, where Congress could still impose notice restrictions and requirements for household blocking. *Id.* at 424-25. Vander Wilt also argues that the *Playboy* Court did not wish to deprive the government of all authority to regulate indecent material. *Id.* at 425. Additionally, the author points to the appeals court's acknowledgment that blocking and filtering software is not a government action. *Id.* at 423.

32. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 824 (2000) (stating court should not assume parents will fail to act).

33. 124 S. Ct. at 2788 (determining no abuse of discretion because of alternatives).

34. *Id.* (discussing standard of review for content-based regulations); *supra* note 17 and accompanying text (delineating Court's practical reasons for upholding preliminary injunction); *see also supra* text accompanying note 18 (discussing alternative of filtering software).

35. 124 S. Ct. at 2792 (describing blocking software as less restrictive and likely more effective in restricting children's access). The Court also took into consideration the fact that the Commission on Child Online Protection unambiguously found filters more effective than age-verification requirements. *Id.*

36. *Id.* at 2792 (stating filters allow adults access to protected speech without identification process). *But cf. id.* at 2801 (Breyer, J., dissenting) (suggesting monetary costs and potential embarrassment insufficient for First Amendment violation).

37. *Id.* at 2792 (explaining criminalization of free speech chills free expression); *see also supra* note 18

observed that allowing parents to control what their children can access on the Internet is preferable to permitting Congress to do so.³⁸ Therefore, the Court upheld the preliminary injunction.³⁹

The Court skipped over the first portion of the strict scrutiny test, regarding a compelling state interest, and moved directly to the least restrictive alternative analysis.⁴⁰ While this majority did not specifically address the issue of an independent compelling interest, the Court has previously asserted that the government has an independent compelling interest in protecting children from dangerous subject matter.⁴¹ Justice Breyer correctly noted in his dissent that the question is not whether the interest is compelling, but rather whether the legislative act advances the interest in the least restrictive manner.⁴²

The majority justified its opinion by labeling filters as a less restrictive alternative.⁴³ Such a contention ignores that filters are not a legislative alternative at all, but rather are the ineffective status quo.⁴⁴ While the majority added that filters may become more prevalent via Congressional incentive, there is little indication that this will actually occur.⁴⁵

The majority relied heavily on the reasoning in *Playboy* that a court should choose a technological solution available to parents over a wholesale restriction on protected speech.⁴⁶ In doing so, however, the majority overlooked significant distinctions between alternatives to the statute in *Playboy* and alternatives to COPA.⁴⁷ The *Playboy* Court endorsed an alternative that placed the financial burden on the producers of indecent speech, rather than on consumers, by compelling full blocking upon request.⁴⁸ *Playboy* also allowed the government to maintain a role because Congress could still impose notice

(discussing concurrence's disdain for criminal penalties).

38. 124 S. Ct. at 2798 (stating government failed to prove lack of alternatives); see *supra* text accompanying note 32 (discussing Court's new preference for parental control).

39. 124 S. Ct. at 2791.

40. See *id.* (failing to discuss whether protecting children from pornography constitutes compelling interest).

41. See *supra* note 30 and accompanying text (discussing whether government possesses independent compelling interest in protecting children from harmful material).

42. 124 S. Ct. at 2801 (Breyer, J., dissenting) (declaring protection of minors from exposure to commercial pornography constitutes undisputed compelling interest); see *supra* note 30 and accompanying text (discussing debate over independent compelling interest).

43. 124 S. Ct. at 2792 (stating government must show alternatives less effective).

44. *Supra* note 18 (discussing Justice Breyer's disapproval of citing filters as alternative).

45. 124 S. Ct. at 2793 (suggesting filtering software as available alternative because Congress may act to encourage filters). *Contra id.* at 2804. (Breyer, J., dissenting) (maintaining negation of "magic solutions" not necessary under strict scrutiny); *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring) (stating negation of all remote alternatives not necessary).

46. 124 S. Ct. at 2793.

47. Vander Wilt, *supra* note 7, at 424-25 (detailing distinctions between COPA and statute under review in *Playboy*).

48. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 810 (2000) (explaining required scrambling without charging consumer); Vander Wilt, *supra* note 7, at 424 (stressing providers would incur cost of voluntary opt-out).

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restrictions and other requirements on cable providers.⁴⁹ The *Ashcroft* Court suggested an alternative to COPA that is not legislative at all, but rather surrenders all responsibility to parents.⁵⁰ Justice Breyer correctly concluded that such reasoning will effectively deprive Congress of all latitude in regulating indecent speech on the Internet because parental control will always be less restrictive than a government mandate.⁵¹

In *Ashcroft v. ACLU*, the Court severely constricted Congress's ability to protect children from indecent speech on the Internet. The Court was correct to apply strict scrutiny when Congress endeavored to regulate speech based upon content, but was incorrect to bar government involvement entirely. The Court's ruling thus obstructed a federal statute that should have survived under the First Amendment.

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49. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 810 (2000) (discussing adequate notice of signal bleed during sexually-oriented programming); Vander Wilt, *supra* note 7, at 424-25 (contending Court recognized importance of not leaving Congress helpless in face of problems).

50. *See* 124 S. Ct. at 2805 (Breyer, J., dissenting) (asserting majority's decision precludes all Congressional action). Justice Breyer opined that the majority adopted a theory of less restrictive alternatives when it may have intended to endorse a categorical prohibition of criminal penalties for obscenity. *Id.* (Breyer, J., dissenting).

51. 124 S. Ct. at 2805 (Breyer, J., dissenting) (determining majority decision proscribes all future Congressional action).