

DISROBE DOT COM FOR THE ACLU: *ASHCROFT V. ACLU*, A STRICT SCRUTINY  
REVIEW FOR THE CHILD ONLINE PROTECTION ACT

*“To have [a] drug pumped into your house 24/7, free, and children know how to use it better than grown-ups know how to use it -- it's a perfect delivery system if we want to have a whole generation of young addicts who will never have the drug out of their mind.”<sup>1</sup>*

**I. INTRODUCTION**

Is your child safe from sexually explicit material on the Internet? Before the relatively recent advancement of the Internet, societies have historically had the innate sense to protect children from obscene material. Censorship of sexually explicit material from children seems to be so implicit that to date there has been no broad study of its effects.<sup>2</sup> However, the Internet's free flow of information makes censoring sexually obscene material from minors a Herculean prospect. A national survey, conducted by the University of New Hampshire Crimes Against Children Research Center, reported that twenty-five percent of children who use the Internet report being subjected involuntarily to sexually explicit images.<sup>3</sup> One medical doctor compares a child's response to that of an adult.<sup>4</sup> While an adult may watch a movie that depicts racism or violence and understand how it fits into the sweep of history, a child does not have that skill.<sup>5</sup>

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<sup>1</sup> Ryan Singel, *Internet Porn: Worse than Crack?*,

[http://www.wired.com/news/technology/0,1282,65772,00.html?tw=wn\\_3techhead](http://www.wired.com/news/technology/0,1282,65772,00.html?tw=wn_3techhead) (Nov. 19, 2004) (quoting Mary Anne Layden, co-director of the Sexual Trauma and Psychopathology Program at the University of Pennsylvania's Center for Cognitive Therapy).

<sup>2</sup> ABC News, *Danger Zone? No Hard Data, But Plenty of Concern About How Kids React to Internet Porn*, [http://abcnews.go.com/sections/us/DailyNews/internetporn\\_kids020626.html](http://abcnews.go.com/sections/us/DailyNews/internetporn_kids020626.html) (June 25, 2002).

<sup>3</sup> American Academy of Pediatrics, *AAP News*, Deborah Johnson, <http://www.aap.org/advocacy/JohnsonCyberspaceAware.htm> (Feb. 2003).

<sup>4</sup> S. Andrew Spooner, M.D., F.A.A.P., American Academy of Pediatrics, *AAP News*, Deborah Johnson, <http://www.aap.org/advocacy/JohnsonCyberspaceAware.htm> (Feb. 2003).

<sup>5</sup> S. Andrew Spooner, M.D., F.A.A.P., American Academy of Pediatrics, *AAP News*, Deborah Johnson, <http://www.aap.org/advocacy/JohnsonCyberspaceAware.htm> (Feb. 2003).

To protect children from the exorbitant reservoir of pornography on the Internet, Congress passed the Communications Decency Act of 1996 (CDA).<sup>6</sup> This Act was short-lived, however, when one year later the United States Supreme Court held it to be unconstitutionally restrictive on speech in *Reno v. ACLU*.<sup>7</sup> In light of this holding, Congress' second attempt was enacting the Child Online Protection Act (COPA).<sup>8</sup> COPA was limited to commercial web sites and embodied a "harmful to minors" standard rather than the obscenity standard of the CDA.<sup>9</sup>

COPA was challenged in *Ashcroft v. ACLU*<sup>10</sup>, where the United States Supreme Court found it unconstitutional, reasoning that "[c]ontent-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of free people."<sup>11</sup> The Court found that, on balance, the harm from the loss of anonymity of an adult entering their credit card number to view pornography outweighs a child's harm in gaining access to such obscene material.<sup>12</sup>

This article will outline the statutes and cases that led to the decision in *Ashcroft v. ACLU*. For some perspective on the importance of an Internet protection statute, the impact of unsolicited pornography on children will be briefly explored in Part II. Part III will discuss the facts and procedural background of *Ashcroft v. ACLU*. Use of the standard of review, where the court applies one of three levels of scrutiny when reviewing laws, will be briefly examined in Part IV. By analyzing the cases used to support the United States Supreme Court's decision in *Ashcroft v. ACLU*, Part V will show that there is no basis for subjecting COPA to the exacting

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<sup>6</sup> 47 U.S.C.S. § 223 (2004).

<sup>7</sup> *Reno v. ACLU*, 521 U.S. 844, 885 (1997).

<sup>8</sup> 47 U.S.C.S. § 231 (2004).

<sup>9</sup> Kelly M. Doherty, *www.obscenity.com: An Analysis of Obscenity and Indecency Regulation on the Internet*, 32 Akron L. Rev. 259, 281 (1999); 47 U.S.C.S. § 231(a)(1) (2004).

<sup>10</sup> *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2788 (2004).

<sup>11</sup> *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2788 (2004).

<sup>12</sup> *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2794 (2004).

strict scrutiny standard of review, and should not have been found unconstitutional, since obscene speech is a category of speech that is not protected by the First Amendment.

## II. BACKGROUND

### A. Pornography – Harmful to Children

A recent survey found that one in four minors reported having at least one unwanted exposure to sexually explicit pictures during the past year.<sup>13</sup> Most psychologists agree, from their experience of observing children in their practice, that boys who look at sexually raw images develop a disrespectful attitude toward girls, while girls seem to become accepting of that kind of attitude.<sup>14</sup> Dr. Ken Haller, a professor at St. Louis University School of Medicine, concludes from his studies that if the only information children receive is unfiltered, uncensored raw images from Web sites, they are not getting responsible information.<sup>15</sup> Obscene sexual images give children a very negative message about sex, that it is connected with lewdness, rather than being attached to the human body and with a loving relationship.<sup>16</sup> Psychologists know from child development research that children cannot view circumstances in the same context as an adult.<sup>17</sup> Dr. Andrew Spooner concludes that at least with television parents can

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<sup>13</sup> National Academy of Sciences, *Internet Pornography: Are Children at Risk?*, <http://www4.nas.edu/onpi/webextra.nsf/web/porn?OpenDocument> (accessed October 4, 2004).

<sup>14</sup> ABC News, *Danger Zone? No Hard Data, But Plenty of Concern About How Kids React to Internet Porn*, [http://abcnews.go.com/sections/us/DailyNews/internetporn\\_kids020626.html](http://abcnews.go.com/sections/us/DailyNews/internetporn_kids020626.html) (June 25, 2002).

<sup>15</sup> ABC News, *Danger Zone? No Hard Data, But Plenty of Concern About How Kids React to Internet Porn*, [http://abcnews.go.com/sections/us/DailyNews/internetporn\\_kids020626.html](http://abcnews.go.com/sections/us/DailyNews/internetporn_kids020626.html) (June 25, 2002).

<sup>16</sup> Meri Wallace, ABC News, *Danger Zone? No Hard Data, But Plenty of Concern About How Kids React to Internet Porn*, [http://abcnews.go.com/sections/us/DailyNews/internetporn\\_kids020626.html](http://abcnews.go.com/sections/us/DailyNews/internetporn_kids020626.html) (June 25, 2002).

<sup>17</sup> American Academy of Pediatrics, *AAP News*, Deborah Johnson, <http://www.aap.org/advocacy/JohnsonCyberspaceAware.htm> (Feb. 2003).

control what children watch and discuss the programs with them; however, when children sit down at the computer the content is totally unpredictable.<sup>18</sup>

The origins of pornography date back to the first written records.<sup>19</sup> Pornographic themes were used by the ancient Greeks, and pornographic pictures painted by ancient Romans were discovered on walls in the city of Pompeii.<sup>20</sup> “It was not until the 1800s, however, that pornography began to become a social problem, primarily because the spread of technology—such as printing, photography, and motor vehicles—made it more readily available and because of the growth of democracy and individual freedom.”<sup>21</sup>

### *B. The First Amendment*

The First Amendment states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>22</sup>

The First Amendment protects the free flow of ideas which is a vital cornerstone in a democratic society. However, some types of speech do not come under the protection of the First Amendment.<sup>23</sup> Obscenity is one category of speech that is not protected by the First Amendment,<sup>24</sup> and is the central issue that the Court in *Ashcroft v. ACLU* had to grapple with.

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<sup>18</sup> American Academy of Pediatrics, *AAP News*, Deborah Johnson, <http://www.aap.org/advocacy/JohnsonCyberspaceAware.htm> (Feb. 2003).

<sup>19</sup> Microsoft Encarta Online Encyclopedia, *Pornography*, <http://encarta.msn.com/encnet/refpages/RefArticle.aspx?refid=761568395> (accessed Sep. 26, 2004).

<sup>20</sup> Microsoft Encarta Online Encyclopedia, *Pornography*, <http://encarta.msn.com/encnet/refpages/RefArticle.aspx?refid=761568395> (accessed Sep. 26, 2004).

<sup>21</sup> Microsoft Encarta Online Encyclopedia, *Pornography*, <http://encarta.msn.com/encnet/refpages/RefArticle.aspx?refid=761568395> (accessed Sep. 26, 2004).

<sup>22</sup> U.S. Const. amend. I.

<sup>23</sup> Erwin Chemerinsky, *Constitutional Law, Principles and Policies* § 11.3, 800-801 (Aspen L. & Bus. 1997) (Categories of unprotected speech include incitement of illegal activity, fighting words, and obscenity.); *Schenck v.*

### *C. The Government Steps In*

The Communications Decency Act of 1996 (CDA) was Congress' first attempt to make the Internet safe for children.<sup>25</sup> The constitutionality of this act was quickly challenged by the American Civil Liberties Union in *Reno v. ACLU*, where the United States Supreme Court upheld the District Court's decision to enjoin enforcement of the Act.<sup>26</sup> The Court reasoned that since the CDA regulated free speech, a fundamental freedom, it must be narrowly tailored.<sup>27</sup> In holding the CDA unconstitutional, the Court found that the Act criminalized unprotected obscene speech as well as protected sexually explicit speech and was thus over-inclusive.<sup>28</sup>

## **III. ASHCROFT v. ACLU**

### *A. Facts and Procedural Background*

In an attempt to correct the shortcomings of the CDA, Congress followed up with the Child Online Protection Act (COPA). The intent with COPA was to protect children from harmful material on the Internet while preserving adults' First Amendment rights.<sup>29</sup> What sets COPA apart from the CDA is that COPA applies only to commercial web transactions which

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*United States*, 249 U.S. 47 (1919), is an example where the Court upheld an incitement statute, the Sedition Act of 1918, which in part, made it illegal to produce any material that opposed the United States during a war. The Court held that passing out a leaflet arguing that the draft violated the Thirteenth Amendment, was intended to influence people subject to the draft, and thus obstruct the war effort.; In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the court specifically held that "fighting words" are a category of speech not protected by the First Amendment.

<sup>24</sup> *Roth v. United States*, 354 U.S. 476, 492 (1957) ("...obscenity is not [an] expression protected by the First Amendment.").

<sup>25</sup> *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2789 (2004).

<sup>26</sup> *Reno v. ACLU*, 521 U.S. 844, 844-885 (1997).

<sup>27</sup> *Reno v. ACLU*, 521 U.S. 844, 879 (1997).

<sup>28</sup> *Reno v. ACLU*, 521 U.S. 844, 879 (1997).

<sup>29</sup> Kelly M. Doherty, *www.obscenity.com: An Analysis of Obscenity and Indecency Regulation on the Internet*, 32 Akron L. Rev. 259, 280 (1999).

contain material harmful to minors; it does not prohibit non-commercial activities.<sup>30</sup> COPA imposes criminal penalties for the posting of web content that is “harmful to minors” for “commercial purpose(s).”<sup>31</sup> Material that is “harmful to minors” is defined as any communication that is obscene or that (a) the average person, applying contemporary community standards, with respect to minors, would find it designed to appeal to or pander to the prurient interest; (b) any depiction of real or simulated sexual contact or act, or a lewd exhibition of genitals; and (c) taken as a whole lacks serious literary, artistic, political, or scientific value for minors.<sup>32</sup> The Act includes affirmative defenses where a person may escape conviction by demonstrating there is restricted access to minors by: (a) requiring the use of a credit card or adult personal identification; (b) accepting a digital certificate that verifies age; or (c) other reasonable measures that are feasible under available technology.<sup>33</sup>

Less than twenty-four hours after it was signed into law by President Clinton, the same groups who challenged the CDA in 1996, internet content providers and others concerned with protecting the freedom of speech, challenged COPA as unconstitutional claiming it was overbroad and jeopardized adult access to legitimate, constitutionally protected material.<sup>34</sup> At trial, the District Court enjoined COPA because it likely violated the First Amendment and the Court of Appeals affirmed.<sup>35</sup> The Government sought review from the United States Supreme Court and the case was granted certiorari.<sup>36</sup>

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<sup>30</sup> Kelly M. Doherty, *www.obscenity.com: An Analysis of Obscenity and Indecency Regulation on the Internet*, 32 Akron L. Rev. 259, 281 (1999).

<sup>31</sup> *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2789 (2004).

<sup>32</sup> *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2789 (2004).

<sup>33</sup> *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2789 (2004).

<sup>34</sup> Kelly M. Doherty, *www.obscenity.com: An Analysis of Obscenity and Indecency Regulation on the Internet*, 32 Akron L. Rev. 259, 280 (1999).

<sup>35</sup> *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2788 (2004).

<sup>36</sup> *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2790 (2004).

## *B. Supreme Court Opinion*

The United States Supreme Court focused its analysis on proposed alternatives to COPA to determine which is the least restrictive.<sup>37</sup> When a challenge to a statute is content-based restriction, the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute.<sup>38</sup> The test the Court applied – a strict scrutiny standard of review – assumes certain protected speech may be regulated.<sup>39</sup> The question then becomes, what is the least restrictive alternative that can be used to achieve that goal.<sup>40</sup> The purpose of this strict scrutiny test is to ensure that speech is restricted no further than necessary to achieve the goal, since it is important to assure that legitimate speech is not chilled or punished.<sup>41</sup>

The primary alternative considered by the District Court was blocking and filtering software.<sup>42</sup> The District Court granted the injunction because the plaintiffs had proposed that filters are a less restrictive alternative to COPA and the Government had not shown it would be likely to disprove the plaintiffs' contention at trial.<sup>43</sup> In affirming the lower courts, the United States Supreme Court reasoned that filters are less restrictive than COPA, because adults without children may gain access to speech they have a right to see without having to identify themselves or provide credit card information.<sup>44</sup> The Court further reasoned that filters impose selective restrictions on speech at the receiving end, not universal restrictions at the source.<sup>45</sup> Promoting the use of filters does not condemn as criminal any category of speech, and so the potential

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<sup>37</sup> *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2791 (2004).

<sup>38</sup> *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2791 (2004).

<sup>39</sup> *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2791 (2004).

<sup>40</sup> *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2791 (2004).

<sup>41</sup> *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2791 (2004).

<sup>42</sup> *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2792 (2004).

<sup>43</sup> *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2792 (2004).

<sup>44</sup> *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2792 (2004).

<sup>45</sup> *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2792 (2004).

chilling effect is eliminated, or at least much diminished.<sup>46</sup> The Court stated that although filtering software is not perfect, the Government failed to introduce specific evidence proving that existing technologies are less effective than the restrictions in COPA; and that the Government's burden is not merely to show that a proposed less restrictive alternative has some flaws; its burden is to show that it is less effective.<sup>47</sup>

#### IV. CONSTITUTIONAL PRINCIPLES

##### A. *Standard of Review*

The level of scrutiny is the standard or test that a court applies to determine if a Congressional statute is constitutional.<sup>48</sup> The level of review is, in essence, instructions for balancing interests that are affected by a statute.<sup>49</sup> Where a fundamental right is at stake, a high level of review will be used and the government will be required to meet a heavy burden; whereas "if it is an area of general deference to the legislature, the government will have a minimum burden to carry."<sup>50</sup> There are three levels of scrutiny: (1) the rational basis test (minimal scrutiny), (2) intermediate scrutiny, and (3) strict scrutiny (maximum scrutiny).<sup>51</sup>

Laws should generally be presumed constitutional.<sup>52</sup> An in-depth judicial examination, and thus a higher standard of review, should be applied in cases where the statute affects individual rights, or restricts the ability of the political process to repeal undesirable legislation, or discriminates against a limited minority.<sup>53</sup>

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<sup>46</sup> *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2792 (2004).

<sup>47</sup> *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2793 (2004).

<sup>48</sup> Erwin Chemerinsky, *Constitutional Law, Principles and Policies* § 6.5, 414 (Aspen L. & Bus. 1997).

<sup>49</sup> Erwin Chemerinsky, *Constitutional Law, Principles and Policies* § 6.5, 414 (Aspen L. & Bus. 1997).

<sup>50</sup> Erwin Chemerinsky, *Constitutional Law, Principles and Policies* § 6.5, 414 (Aspen L. & Bus. 1997).

<sup>51</sup> Erwin Chemerinsky, *Constitutional Law, Principles and Policies* § 6.5, 414-417 (Aspen L. & Bus. 1997).

<sup>52</sup> Erwin Chemerinsky, *Constitutional Law, Principles and Policies* § 6.5, 415 (Aspen L. & Bus. 1997).

<sup>53</sup> Erwin Chemerinsky, *Constitutional Law, Principles and Policies* § 6.5, 415 (Aspen L. & Bus. 1997).

The rational basis test is the lowest, minimal level of review.<sup>54</sup> Under this standard, “a law will be upheld if it is rationally related to a legitimate government purpose.”<sup>55</sup> Any possible legitimate purpose is sufficient.<sup>56</sup> The means chosen may be any reasonable way to accomplish the objective.<sup>57</sup> Under this test, the burden of proof falls to the party challenging the law.<sup>58</sup>

Intermediate scrutiny is the middle level of review.<sup>59</sup> Under this standard, a law will be upheld as constitutional if there is a “substantial relation” to an important government purpose.<sup>60</sup> “In other words, the government’s objective must be more than just a legitimate goal for government to pursue; the court must regard the purpose as ‘important.’ The means chosen must be more than a reasonable way of attaining the end; the court must believe that the law is substantially related to achieving the goal.”<sup>61</sup> Under the intermediate scrutiny test, the burden of proof shifts to the government.<sup>62</sup>

The maximum level of scrutiny is strict scrutiny.<sup>63</sup> Congressional laws “...analyzed by a reviewing court under strict scrutiny...are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”<sup>64</sup> The Government must show that the law is “...specifically and narrowly framed to accomplish [its] purpose.”<sup>65</sup> Proof is required to show that the law is the least restrictive or least discriminatory alternative.<sup>66</sup> If there are other

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<sup>54</sup> Erwin Chemerinsky, *Constitutional Law, Principles and Policies* § 6.5, 415 (Aspen L. & Bus. 1997).

<sup>55</sup> *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988).

<sup>56</sup> *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 188 (1980).

<sup>57</sup> Erwin Chemerinsky, *Constitutional Law, Principles and Policies* § 6.5, 415 (Aspen L. & Bus. 1997).

<sup>58</sup> Erwin Chemerinsky, *Constitutional Law, Principles and Policies* § 6.5, 415 (Aspen L. & Bus. 1997).

<sup>59</sup> Erwin Chemerinsky, *Constitutional Law, Principles and Policies* § 6.5, 415 (Aspen L. & Bus. 1997).

<sup>60</sup> *Lehr v. Robertson*, 463 U.S. 248, 266 (1983).

<sup>61</sup> Erwin Chemerinsky, *Constitutional Law, Principles and Policies* § 6.5, 415 (Aspen L. & Bus. 1997).

<sup>62</sup> Erwin Chemerinsky, *Constitutional Law, Principles and Policies* § 6.5, 416 (Aspen L. & Bus. 1997).

<sup>63</sup> Erwin Chemerinsky, *Constitutional Law, Principles and Policies* § 6.5, 416 (Aspen L. & Bus. 1997).

<sup>64</sup> *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995).

<sup>65</sup> *Wygant v. Jackson Board of Education*, 476 U.S. 267, 280 (1986).

<sup>66</sup> Erwin Chemerinsky, *Constitutional Law, Principles and Policies* § 6.5, 416 (Aspen L. & Bus. 1997).

less restrictive alternatives, then the law is not “necessary” to accomplish the end.<sup>67</sup> Under strict scrutiny, the government has the burden of proof to show that the law is necessary to accomplish a compelling government purpose; otherwise the law will be struck down.<sup>68</sup> Strict scrutiny is used when the Court evaluates discrimination, interference with fundamental rights, and interference with freedom of speech.<sup>69</sup>

Additionally, in evaluating government restrictions of speech to determine what standard of review to apply, courts will consider whether the law is content-based or content-neutral, and whether it is unconstitutionally overbroad.<sup>70</sup>

A content-based statute will “...restrict expression because of its message, its ideas, its subject matter or its content.”<sup>71</sup> Content-neutral speech, on the other hand, means that the law applies to all speech regardless of the message.<sup>72</sup> “Content-based regulations are presumptively invalid.”<sup>73</sup> “Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right.”<sup>74</sup> Where the law is deemed to be content-based the Court uses “...the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.”<sup>75</sup>

Under this definition a law suppressing the free use of pornography, such as COPA, would seem to be content-based and therefore unconstitutional. However, there are some categories of speech that are unprotected by the First Amendment, including incitement of illegal

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<sup>67</sup> Erwin Chemerinsky, *Constitutional Law, Principles and Policies* § 6.5, 416 (Aspen L. & Bus. 1997) (citing *Simon & Schuster v. New York Crime Compensation Bd.*, 502 U.S. 105, 118 (1991)).

<sup>68</sup> *Miller v. Johnson*, 515 U.S. 900, 919 (1995).

<sup>69</sup> Erwin Chemerinsky, *Constitutional Law, Principles and Policies* § 6.5, 417 (Aspen L. & Bus. 1997).

<sup>70</sup> Erwin Chemerinsky, *Constitutional Law, Principles and Policies* § 11.2, 757-758 (Aspen L. & Bus. 1997).

<sup>71</sup> *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972).

<sup>72</sup> Erwin Chemerinsky, *Constitutional Law, Principles and Policies* § 11.2.1, 760 (Aspen L. & Bus. 1997).

<sup>73</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

<sup>74</sup> *Turner Broadcasting System v. Federal Communication Commission*, 512 U.S. 622, 641 (1994).

<sup>75</sup> *Turner Broadcasting System v. Federal Communication Commission*, 512 U.S. 622, 642 (1994).

activity, defamation, and obscenity.<sup>76</sup> Although these categories by definition are content-based, a law restricting its free expression will not be deemed unconstitutional based on the restraint of its content.<sup>77</sup> Nevertheless, “in an area where the government can regulate speech, such as obscenity, a law that regulates much more expression than the Constitution allows to be restricted will be declared unconstitutional on overbreadth grounds.”<sup>78</sup> A law is overbroad if it regulates substantially more speech than the Constitution allows.<sup>79</sup>

### *B. Standard of Review applied to Obscenity Statutes*

Although the opponents of COPA have used freedom of speech to cloak their argument of its unconstitutionality, not all speech is protected under the First Amendment, and should therefore not be subjected to a strict scrutiny standard of review.

In *Roth v. United States*, the United States Supreme Court held that obscenity is a category of speech unprotected by the First Amendment.<sup>80</sup> In *Roth*, a federal and a state statute were challenged as violating the free speech guarantees of the First and Fourteenth Amendments.<sup>81</sup> The federal statute made delivery or mailing of obscene material criminally punishable, while the state statute made writing or publishing obscene material criminally punishable.<sup>82</sup> While all ideas with even the slightest redeeming social importance will have the full protection of the guarantees, the Court found that the unconditional phrasing of the First

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<sup>76</sup> Erwin Chemerinsky, *Constitutional Law, Principles and Policies* § 11.2.1, 759 (Aspen L. & Bus. 1997).

<sup>77</sup> *Roth v. United States*, 354 U.S. 476, 492 (1957) (“...obscenity is not [an] expression protected by the First Amendment.”).

<sup>78</sup> Erwin Chemerinsky, *Constitutional Law, Principles and Policies* § 11.2.2, 765 (Aspen L. & Bus. 1997).

<sup>79</sup> Erwin Chemerinsky, *Constitutional Law, Principles and Policies* § 11.2.2, 764 (Aspen L. & Bus. 1997); In *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981), a city ordinance intended to prohibit an adult bookstore’s live nude dancers was found to also prohibit all other live entertainment, which would encompass live events such as plays and concerts. The Court found the ordinance to be overbroad since it prohibited speech that is protected by the First Amendment.

<sup>80</sup> *Roth v. United States*, 354 U.S. 476, 492 (1957).

<sup>81</sup> *Roth v. United States*, 354 U.S. 476, 479 (1957).

<sup>82</sup> *Roth v. United States*, 354 U.S. 476, 480 (1957).

Amendment was not intended to protect every utterance.<sup>83</sup> Implicit in the history of the First Amendment is the rejection of obscenity as having any redeeming social importance.<sup>84</sup> In determining what constitutes obscene speech, the Court applied this test: “whether to the average person, applying contemporary community standards, the dominant theme of material taken as a whole appeals to prurient interest.”<sup>85</sup>

*Miller v. California* involved the application of a state’s criminal obscenity statute whereby sexually explicit materials had been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials.<sup>86</sup> The United States Supreme Court again held that obscene material is unprotected by the First Amendment.<sup>87</sup>

In *Ashcroft v. ACLU*, however, the majority cited *United States v. Playboy Entertainment Group* as “the closest precedent on general point.”<sup>88</sup> The *Playboy Entertainment Group* case involved a challenge to the Telecommunications Act of 1996 as unnecessarily restrictive content-based legislation violative of the First Amendment.<sup>89</sup> The statute required cable television operators who provide channels “primarily dedicated to sexually-oriented programming” either to “fully scramble or otherwise fully block” those channels or to limit their transmission to hours when children are unlikely to be viewing, set by administrative regulation as the time between 10 p.m. and 6 a.m.<sup>90</sup> The Court found that the speech in question was defined by its content; and the statute which sought to restrict it was content-based.<sup>91</sup> The Court held the Government had

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<sup>83</sup> *Roth v. United States*, 354 U.S. 476, 483-484 (1957).

<sup>84</sup> *Roth v. United States*, 354 U.S. 476, 484 (1957).

<sup>85</sup> *Roth v. United States*, 354 U.S. 476, 489 (1957).

<sup>86</sup> *Miller v. California*, 413 U.S. 15, 18 (1973).

<sup>87</sup> *Miller v. California*, 413 U.S. 15, 36 (1973).

<sup>88</sup> *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2793 (2004).

<sup>89</sup> *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 807 (2000).

<sup>90</sup> *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 806 (2000).

<sup>91</sup> *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 811 (2000).

failed to show that the statute was the least restrictive means for addressing the problem in question.<sup>92</sup>

## V. ANALYSIS

The *Child Online Protection Act* should not have been subjected to a strict scrutiny standard of review and should not have been found unconstitutional, since obscene speech is a category of speech that is not protected by the First Amendment.

Justice Scalia, dissenting in the *Ashcroft v. ACLU*, stated the majority is subjecting COPA to strict scrutiny, and nothing in the First Amendment entitles the type of material covered by COPA to that exacting standard of review.<sup>93</sup> Justice Scalia asserted that this Court has recognized that commercial entities who deliberately emphasize the sexually provocative aspects of their nonobscene products, engage in constitutionally unprotected behavior.<sup>94</sup> Commercial pornography covered by COPA fits this description.<sup>95</sup> Justice Scalia concludes that since this type of business could, consistent with the First Amendment, be banned entirely, COPA's lesser restrictions raise no constitutional concern.<sup>96</sup>

In using *United States v. Playboy Entertainment Group* as “the closest precedent on general point,” the majority has set their argument up to be inherently flawed. The Court's rationale for using *Playboy Entertainment Group* was that, like *Ashcroft v. ACLU*, the case involved a content-based restriction designed to protect minors from viewing harmful material.<sup>97</sup> Content-based regulations are presumptively invalid and must meet strict scrutiny.<sup>98</sup> However,

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<sup>92</sup> *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 827 (2000).

<sup>93</sup> *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2797 (2004) (Scalia, J., dissenting).

<sup>94</sup> *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2797 (2004) (Scalia, J., dissenting).

<sup>95</sup> *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2797 (2004) (Scalia, J., dissenting).

<sup>96</sup> *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2797 (2004) (Scalia, J., dissenting).

<sup>97</sup> *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2794 (2004).

<sup>98</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

there are some categories of speech that are unprotected or less protected by the First Amendment, such as obscenity.<sup>99</sup> These unprotected categories of speech, by definition, are content-based.<sup>100</sup> In *Playboy Entertainment Group*, the Court applied a strict standard of review to a content-based statute that on the surface appears to be an obscenity statute. However, all parties in the case agreed that the speech was not obscene.<sup>101</sup> In *Playboy Entertainment Group*, unlike *Ashcroft v. ACLU*, all parties agreed on the premise that Playboy's programming had First Amendment protection.<sup>102</sup> The parties in *Playboy Entertainment Group* found these points to be undisputed: (1) the content is not alleged to be obscene, (2) adults have a constitutional right to view Playboy's programming, (3) the Government disclaims any interest in preventing children from seeing or hearing it with the consent of their parents, and (4) Playboy has concomitant rights under the First Amendment to transmit it.<sup>103</sup> COPA, on the other hand, is specifically targeting speech that is obscene. This makes COPA more analogous to the statutes in *Roth* and *Miller* where the U.S. Supreme court applied a rationale basis test to determine the constitutionality of the statute.<sup>104</sup>

Instead of using *Playboy Entertainment Group*, the Court could have found a closer analogy in *Roth* and *Miller*, where the courts applied a rational basis standard to determine the

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<sup>99</sup> *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57-58 (1973) (“...[W]e hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to the passerbys.”).

<sup>100</sup> Erwin Chemerinsky, *Constitutional Law, Principles and Policies* § 11.2.1, 759 (Aspen L. & Bus. 1997).

<sup>101</sup> *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 811 (2000).

<sup>102</sup> *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 811 (2000).

<sup>103</sup> *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 811 (2000).

<sup>104</sup> *Roth v. United States*, 354 U.S. 476, 489 (1957) (“[W]e hold that these statutes, applied according to the proper standard for judging obscenity, do not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited.”); *Miller v. California*, 413 U.S. 15, 36-37 (1973) (“[W]e [hold] that obscene material is not protected by the First Amendment...that such material can be regulated by the States, subject to...specific safeguards enunciated...without a showing that the material is ‘utterly without redeeming social value’; and...that obscenity is to be determined by applying ‘contemporary community standards,’ ...not ‘national standards.’”).

constitutionality of the obscenity statutes.<sup>105</sup> Both cases contain statutes that targeted the dissemination of obscene material, and as in COPA, made an offense of the statute criminally punishable.<sup>106</sup> In *Roth*, the dissemination for the federal statute was in the form of delivery through the U.S. mail, and the dissemination in the state statute was through writing and publishing of obscene material.<sup>107</sup> In *Miller*, the dissemination was in the form of aggressive sales action of sexually obscene material upon unwilling recipients who had not indicated a desire to receive such material.<sup>108</sup>

The dissemination of material over the Internet is similar to these cases. First, similar to the U.S. mail, the Internet is a vehicle for dissemination. Material does not arrive to the recipient in the form of a paper hard copy through the Internet, but the content, sexually obscene or otherwise, is viewed by the eyes of the recipient in the same fashion. Second, articles and content are written and published on the Internet just as those same articles and content could be written and published in books and magazines. Finally, aggressive sales action on the Internet come in the form of (a) sexually obscene sites registered as non-obscene sites on Internet search engines, (b) obscene content in unwanted spam email, and (c) unsolicited pop-up ads. COPA was designed to protect the unwanted receipt of obscene material from commercial entities,<sup>109</sup> which is the same purpose the *Roth* and *Miller* statutes were designed for. In neither case did the U.S. Supreme Court hold those statutes up to a strict scrutiny standard of review. COPA should therefore have been treated in a similar fashion, and held to a rational basis standard of review.

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<sup>105</sup> *Roth v. United States*, 354 U.S. 476, 489 (1957); *Miller v. California*, 413 U.S. 15, 36-37 (1973).

<sup>106</sup> *Roth v. United States*, 354 U.S. 476, 480 (1957); *Miller v. California*, 413 U.S. 15, 18 (1973).

<sup>107</sup> *Roth v. United States*, 354 U.S. 476, 480 (1957).

<sup>108</sup> *Miller v. California*, 413 U.S. 15, 18 (1973).

<sup>109</sup> *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2789 (2004).

## VI. CONCLUSION

The *Child Online Protection Act* was designed to protect children from unwanted contact with sexually obscene material. Since obscene material is a form of speech that is unprotected by the First Amendment, the majority in *Ashcroft v. ACLU*, should not have used the highest standard of strict scrutiny to find COPA unconstitutional. The majority's use of *Playboy Entertainment Group*, as "the closest precedent on general point,"<sup>110</sup> was inherently flawed since all parties in that case stipulated that the material in question was not obscene. The majority should have followed obscenity statute cases that more closely aligned with COPA, such as *Roth v. United States* and *Miller v. California*. The Court should therefore have subjected COPA to rational basis standard of review, as was done in *Roth* and *Miller*, where the law will be upheld if it is rationally related to a legitimate interest.

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<sup>110</sup> *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2793 (2004).

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