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Preserving Internet Expression While Protecting Our Children:
Solutions Following Ashcroft v. ACLU

Steven E. Merlis

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¶1 As society advances and each generation is presented with new technology, problems inevitably follow from such technological advances. The Internet provides society with an infinite source of ideas and expression.¹ Unfortunately, the freedom and unregulated nature of the Internet also produces serious problems. One of the biggest problems created by the Internet is the potentially negative effect it can have on children.² As children explore the Internet, they are often bombarded with sexually indecent websites that may be damaging to the children's interests.³ Politicians, industry leaders, and parents have identified this risk and have devised solutions to protect children from the evils they believe lurk on sexually explicit websites. Arguably, Congress took the largest step to control this problem through its passage of the Child Online Protection Act ("COPA") in 1998.⁴ However, in June 2004, the U.S. Supreme Court declared COPA unconstitutional, finding that COPA trampled on the freedom of expression granted by the First Amendment.⁵ The interplay between Congress and the Supreme Court regarding COPA exemplifies the complex battle raging throughout America as society tries to balance the right to freely communicate through the Internet with society's responsibility to look out for the best interest of its youth. This paper describes the conflict between freedom of expression on the Internet and the protection of children.

¶2 Part I addresses the nature of the Internet and why this major conflict between First Amendment expression and protection of children exists. Part II of this paper discusses the laws Congress passed to address this problem, particularly the Communications Decency Act ("CDA") and COPA. This Part focuses on why those laws failed to pass the Supreme Court's test of constitutionality. Finally, Part III describes various options available to combat the transmission of indecent material to minors, keeping in mind the important First Amendment concerns. This section proposes that the most effective

* Candidate for Juris Doctor, May 2006, Northwestern University School of Law.

¹ Comm'n on Child Online Protection, Report to Congress 7, 11 (2000) [hereinafter *Commission*], available at <http://www.copacommission.org/report/COPAreport.pdf>.

² *Id.* at 11.

³ Namita E. Mani, *Legal Update: Judicial Scrutiny of Congressional Attempts to Protect Children from the Internet's Harms: Will Filtering Technology Provide the Answer Congress Has Been Looking For?*, 9 B.U. J. SCI. & TECH. L. 201, 202 (2003).

⁴ Child Online Protection Act, 47 U.S.C. § 231 (2000).

⁵ *Ashcroft v. A.C.L.U.*, 542 U.S. 656, 673 (2004).

solution combines a variety of approaches, and that no single law or piece of technology is sufficient to cure the problem.

I. THE INEVITABLE CONFLICT BETWEEN THE FIRST AMENDMENT AND THE PROTECTION OF CHILDREN FROM SEXUALLY INDECENT MATERIAL

¶3 What makes technological advances so exciting is also what sometimes makes them dangerous. The surprisingly quick manner that technology sweeps into society and changes our lives is normally caused in part by society's lack of preparation for the specific advancements. This lack of preparation that makes these technological advancements exciting also lessens society's ability to fully control the effects of technology, both good and bad.

¶4 Our political, social, and economic structures fail to alleviate the problems that stem from technological advancements because of our inability to predict what problems may stem from unknown and untested technology.⁶ For example, the availability of automobiles in the twentieth century blessed America with the opportunity to travel and explore the country. Unfortunately, the advantages that automobiles afforded our society created lasting negative effects: overextension, sprawl, and environmental damage.

¶5 The advancement of the Internet represents a more recent technological innovation with potentially unlimited benefits for humankind that also carries serious negative side effects.⁷ The Internet exploded into Americans' lives throughout the 1990s, bringing with it a resource unlimited in potential.⁸ The Internet revolutionized how America gets its news, shops, communicates with family and friends, and checks the morning sports scores.⁹ It has also been an amazing boon to business, allowing rapid communication and creating a global market for products previously advertised to a limited few.¹⁰ All in all, the Internet has become a vast source of expression, with people all across the world able to communicate their unique ideas to anyone with a computer.¹¹ Likewise, the decentralized nature of the Internet helps avoid the problem of single sources of power dictating what communications the masses receive.¹²

¶6 The creation of large numbers of sexually explicit websites stands as one particular development stemming from the freedom and unconstrained environment of the Internet. These websites abound all throughout the Internet and can be easily accessed by any interested party, including children.¹³ Moreover, some aggressive members of the online pornographic community trick people into accessing their pornographic sites.¹⁴ Thus, children inadvertently encounter pornographic sites when casually surfing the Internet for

⁶ See Melanie L. Hersh, *Is COPPA a Cop Out? The Child Online Privacy Protection Act as Proof that Parents, Not Government, Should Be Protecting Children's Interests on the Internet*, 28 FORDHAM URB. L.J. 1831, 1844 (2001) (technology moves faster than legislation).

⁷ *Commission*, *supra* note 1, at 11.

⁸ *See id.*

⁹ *See id.*

¹⁰ *See id.*

¹¹ *A.C.L.U. v. Reno*, 217 F.3d 162, 169 (3d Cir. 2000).

¹² *Commission*, *supra* note 1, at 13.

¹³ *See id.*

¹⁴ Russell B. Weekes, *Cyber Zoning a Mature Domain: The Solution to Preventing Inadvertent Access to Sexually Explicit Content on the Internet?*, 8 VA. J.L. & TECH. 4 (2003).

acceptable purposes related to school work or entertainment.¹⁵ Whether it is voluntary or involuntary, children all across the country come across pornographic material on the Internet, some of which may damage their well-being.¹⁶

¶7 Much of society views this as a serious problem that requires immediate action; therefore, many segments of society try to shield society's children from this material.¹⁷ Unfortunately, many of the attempts to keep this indecent material away from children directly conflict with the First Amendment.¹⁸ While protecting our children remains an important goal, the ways that society tries to accomplish this goal must accord with the individual's right to express himself or herself, and the right to receive other parties' expressions.

¶8 Unfortunately, Congress's most recent attempts to protect children minimized the freedoms granted by the First Amendment. That forced the Supreme Court to invalidate these laws designed to protect children from sexually indecent material on the Internet.¹⁹

II. CONGRESS' FAILED ATTEMPTS TO REGULATE SEXUALLY INDECENT MATERIAL ON THE INTERNET

¶9 To eliminate the potentially damaging effect of Internet pornography on children, Congress tried multiple times to regulate sexually explicit material transmitted over the Internet.²⁰ Congress' first major attempt at suppressing sexually explicit material began in 1996 with the Communications Decency Act ("CDA").²¹ Two years after its passage, the Supreme Court declared the CDA unconstitutional based on its adverse impact on First Amendment rights.²² Following on the heels of the CDA came the Child Online Protection Act ("COPA"), a law with the same objectives as the CDA, but with narrower construction designed to meet the constitutional concerns raised by the Supreme Court in its rejection of the CDA.²³ Once again, the Supreme Court declared this law unconstitutional because of its adverse effect on First Amendment rights.²⁴ Clearly, the Court made a point that the First Amendment will not be sacrificed even in the face of legislation designed to benefit America's children. The following analysis of both pieces of legislation outlines the constitutional parameters the government must work within when crafting legislation on this issue.

¹⁵ *Id.*

¹⁶ Rebecca L. Covell, *Problems with Government Regulation of the Internet: Adjusting the Court's Level of First Amendment Scrutiny*, 42 ARIZ. L. REV. 777, 778 (2000) ("[W]hen children are forced to view pornography, it can be harmful to their natural sexual development, resulting in distorted beliefs about human sexuality.") (emphasis added).

¹⁷ *See Commission*, *supra* note 1, at 11.

¹⁸ *Id.*

¹⁹ Mani, *supra* note 3, at 202.

²⁰ Dawn S. Conrad, *Protecting Children from Pornography on the Internet: Freedom of Speech is Pitching and Congress May Strike Out*, 9 RICH. J.L. & TECH. 7 (2002-2003).

²¹ 47 U.S.C. § 223 (2000).

²² *Reno v. A.C.L.U.*, 521 U.S. 844, 885 (1997).

²³ 47 U.S.C. § 231.

²⁴ *Ashcroft v. A.C.L.U.*, 542 U.S. 656, 673 (2004).

A. The Communications Decency Act

¶10 In response to a growing concern that America's children were being inundated with sexually indecent material through the Internet, Congress responded with the CDA.²⁵ This legislation created criminal punishments for publishers who transmitted "'obscene or indecent' communications to any recipient under 18 years of age," or who displayed in a manner available "to a person under 18 years of age, communications that, in context, depict or describe, in terms 'patently offensive' as measured by contemporary community standards, sexual or excretory activities or organs."²⁶ Immediately following its adoption into law, various parties challenged the law's constitutionality, and the United States District Court for the Eastern District of Pennsylvania granted a preliminary injunction stalling the CDA's inception.²⁷ Eventually, the case, made its way to the Supreme Court, wherein the Court found the CDA unconstitutional based on its chilling effect on the First Amendment.²⁸

¶11 In deciding this case, Justice Stevens explained that the First Amendment protects non-obscene communications over the Internet.²⁹ Therefore, an attempt to infringe this liberty must withstand the test of strict scrutiny—the constitutional test given to most legislation that threatens to limit First Amendment freedoms.³⁰ To survive strict scrutiny, the government must demonstrate that the law serves a compelling governmental interest and is narrowly tailored to meet the objectives of this interest.³¹

¶12 To the Court, the CDA had the potential to substantially restrain protected speech if the law went into effect.³² Beginning from that premise, the government faced the difficult task of showing that the CDA passed strict scrutiny.

¶13 In the Court's opinion, the CDA met the first part of the test: serving a compelling governmental interest. Protecting America's youth from potentially damaging indecent material on the Internet presented a serious enough matter for Congress to restrict the First Amendment rights of Internet users.³³ However, the application of the second half of the strict scrutiny test proved to be the downfall for the CDA.³⁴ The Court found that the CDA was overly broad and was not narrowly-tailored enough to meet its goals.³⁵

¶14 To begin with, the Court found that "the many ambiguities concerning the scope of [the CDA's] coverage" attest to its overly broad nature.³⁶ The law's use of the words "indecent" and "patently offensive" to describe what type of communications would be punishable was seen by the Court as too vague a description for Internet users to rely on when making sure their communications stay in line with the CDA.³⁷ The law failed to

²⁵ 47 U.S.C. § 223.

²⁶ *Id.* at § 223(d).

²⁷ *A.C.L.U. v. Reno*, 31 F. Supp. 2d 473, 498 (E.D. Pa. 1999).

²⁸ *Reno v. A.C.L.U.*, 521 U.S. 844, 885 (1997).

²⁹ *Id.* at 874.

³⁰ *Id.* at 872.

³¹ *Id.* at 871.

³² *Id.*

³³ *Reno*, 521 U.S. at 871.

³⁴ *Id.* at 874.

³⁵ *Id.*

³⁶ *Id.* at 870.

³⁷ *Id.* at 871.

define either set of words, nor did the law make any attempt to distinguish them for the purposes of the statute.³⁸ The statute also failed to indicate “whether ‘patently offensive’ and ‘indecent’ determinations should be made with respect to minors or the population as a whole.”³⁹ The vague definitions created a scenario where courts across the country might inconsistently rule on the illegality of similar communications. This unpredictability would lead to a chilling effect on people’s expressions through the Internet since the CDA imposed criminal punishments.⁴⁰ The Court viewed this “uncertainty” as evidence that the statute was not “carefully tailored to the Congressional Goal.”⁴¹

¶15 Stevens then declared that the CDA failed the strict scrutiny test because it “suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.”⁴² The right to receive speech must not fall by the wayside as Congress crafts laws to protect children, particularly if “less restrictive alternatives are available.”⁴³

¶16 The Court also found the CDA overbroad because of its applicability to noncommercial websites.⁴⁴ This broad definition had the potential to suppress speech from many nonprofits dedicated to promoting sexual health or displaying beautiful artwork because certain segments of society find this educational material “indecent” or “patently offensive.”⁴⁵ Certainly, the potential suppression of this valuable speech exceeds the compelling interest of protecting children from vile pornographers.

¶17 Finally, the Court found inadequate the affirmative defenses (such as the use of age verification devices) provided by the CDA for website publishers who display sexual or other unprotected content.⁴⁶ The Court found it infeasible for many website publishers to use age verification devices because of their expense and their imprecision in determining ages.⁴⁷ In essence, these defenses failed to provide publishers with outlets for unfettered expression across the Internet. Therefore, the CDA was shown once again to be overly broad and too great an infringement on the First Amendment.⁴⁸

B. The Child Online Protection Act

¶18 Following the devastating failure of the CDA, Congress crafted COPA in response to the constitutional deficiencies the Court found in the CDA. COPA set forth a more specific test than the CDA to determine if transmitted material was “harmful to a minor” and therefore illegal and punishable as a crime.⁴⁹ Indeed, COPA was more narrowly

³⁸ *Reno*, 521 U.S. at 871.

³⁹ *Id.* at 871 & n.37.

⁴⁰ *Id.* at 872.

⁴¹ *Id.* at 871.

⁴² *Id.* at 874.

⁴³ *Reno*, 521 U.S. at 874.

⁴⁴ *Id.* at 877.

⁴⁵ *Id.*

⁴⁶ *Id.* at 881-82.

⁴⁷ *Id.*

⁴⁸ *Reno*, 521 U.S. at 881-82..

⁴⁹ 47 U.S.C. § 231(e)(6) (2000):

The term ‘material that is harmful to minors’ means any communication, picture, image, graphic

tailored than the CDA; however, the massive infringement on the First Amendment created by COPA once again forced the Court to declare Congress' law unconstitutional.⁵⁰

¶19 Directly after its inception, a judge from the United States District Court for the Eastern District of Pennsylvania enjoined COPA.⁵¹ COPA then traveled to the United States Court of Appeals for the Third Circuit, the Supreme Court, then back to the court of appeals, and then back to the Supreme Court before finally being decided.⁵²

¶20 On COPA's initial trip to the court of appeals, the court upheld the district court's injunction but with a different reasoning. The court of appeals found that COPA's use of a community standard to determine what is "harmful to minors" deprived too large of a segment of America's population from accessing protected speech.⁵³ The court of appeals noted the uniqueness of the Internet as a form of communication; specifically, that anyone with access to the Internet may receive materials published on the web.⁵⁴ Thus, a publisher may not put something on the web but then selectively restrict its access to those geographic communities that would be most receptive to the communication. Therefore, a community standard approach to defining what material is "harmful to minors" could be set by any community in the United States, including the most conservative communities.⁵⁵ In order to avoid punishments under COPA many publishers might restrict their communications to material satisfactory to the most conservative communities.⁵⁶ The court of appeals found that this chilling effect on publishers would subsequently limit the amount and type of constitutionally protected speech available to adult recipients.⁵⁷ In sum, the concern that conservative communities would wield too much power and would too easily control the speech of this country forced the court of appeals to declare COPA unconstitutional.

¶21 The case then traveled to the Supreme Court, where the Court found that COPA's use of a "contemporary community" standard did not make the statute overbroad and thus

image file, article, recording, writing, or other matter of any kind that is obscene or that—

(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors

⁵⁰ *Ashcroft v. A.C.L.U.*, 542 U.S. 656, 706 (2004).

⁵¹ *A.C.L.U. v. Reno*, 31 F. Supp. 2d 473, 498 (E.D. Pa. 1999) (the court enjoined the implementation of COPA because "blocking or filtering technology may be at least as successful as COPA would be in restricting minors' access to harmful material online without imposing the burden on constitutionally protected speech that COPA imposes on adult users or Web site operators. Such a factual conclusion is at least some evidence that COPA does not employ the least restrictive means").

⁵² *Ashcroft*, 542 U.S. at 700.

⁵³ *A.C.L.U. v. Reno*, 217 F.3d 162, 173-74 (3d Cir. 2000) (the court declared that "[t]he overbreadth of COPA's definition of 'harmful to minors' applying a 'contemporary community standards' clause . . . so concerns us that we are persuaded that this aspect of COPA, without reference to its provisions, must lead inexorably to a holding of a likelihood of unconstitutionality of the entire COPA statute").

⁵⁴ *Id.* at 176.

⁵⁵ *Id.* at 177.

⁵⁶ *Id.*

⁵⁷ *Id.*

unconstitutional.⁵⁸ The Court noted that Congress drafted COPA to make its “harmful to minors” element parallel a part of the definition of legally obscene speech laid out by the Court in *Miller v. California*.⁵⁹ In *Miller*, the Court found it appropriate to use a community standards test to determine if speech was legally obscene and therefore unprotected under the First Amendment.⁶⁰ Thus, in evaluating the court of appeals’ ruling, the Supreme Court found that COPA could not be declared overbroad simply based on its use of a “community standards” test because the Court previously approved a similar test in *Miller*.⁶¹ In making this determination, the Court noted that its holding was very narrow and based on this specific issue.⁶² The Court remanded the case back to the court of appeals for another review of COPA’s constitutionality (aside from the community standards issue).⁶³

¶22 The court of appeals declared COPA unconstitutionally overbroad after hearing the case the second time.⁶⁴ In applying strict scrutiny to COPA, the Court found that COPA served the compelling governmental interest of “protecting minors from material online.”⁶⁵ However, the Court found that COPA failed the second part of the strict scrutiny test because it was not “narrowly tailored.”⁶⁶ Declaring that COPA failed to pass the strict scrutiny test, the court of appeals held that the district court appropriately used its discretion in granting a preliminary injunction against COPA.⁶⁷

¶23 Hearing the case for a second time, the Supreme Court affirmed “the decision of the Court of Appeals upholding the preliminary injunction” against COPA.⁶⁸ However, early in its decision, the Court noted that Congress crafted COPA as a response to the Court’s invalidation of the CDA.⁶⁹ In fact, the Court praised Congress for drafting the language of COPA to compensate for the deficiencies the Court cited in the CDA.⁷⁰ The Court even made a point to note that it would take into account, when judging the constitutionality of a law, whether Congress passed a law in accordance with the advice and precedent of the Supreme Court.⁷¹ Still, the Court found that regardless of Congress’ attention to precedent in drafting COPA, COPA’s infringement on the First Amendment was too substantial to find COPA constitutional.⁷²

⁵⁸ *Ashcroft v. A.C.L.U.*, 535 U.S. 564, 583-84 (2002).

⁵⁹ *Id.* at 584-85; *Miller v. California*, 413 U.S. 15, 24 (1973).

⁶⁰ *Miller*, 413 U.S. at 24.

⁶¹ *Ashcroft*, 535 U.S. at 584-85.

⁶² *Id.* at 585-86.

⁶³ *Id.* at 586.

⁶⁴ *A.C.L.U. v. Ashcroft*, 322 F.3d 240, 243 (3d Cir. 2003).

⁶⁵ *Id.* at 251.

⁶⁶ *Id.*

⁶⁷ *Id.* at 271.

⁶⁸ *Ashcroft v. A.C.L.U.*, 542 U.S. 656, 698 (2004).

⁶⁹ *Id.* (“In enacting COPA, Congress gave consideration to our earlier decisions on this subject, in particular the decision in *Reno v. ACLU*, 521 U.S. 844, 138 L. Ed. 2d 874, 117 S. Ct. 2329 (1997). For that reason, ‘the judiciary must proceed with caution and . . . with care before invalidating the Act.’ *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 592, 152 L.Ed. 2d 771, 122 S. Ct. 1700 (*Ashcroft I*) (Kennedy, J., concurring in judgment)”).

⁷⁰ *Id.*

⁷¹ *Ashcroft v. A.C.L.U.*, 542 U.S. 656, 698 (2004).

⁷² *Id.*

¶24 When getting into the meat of its decision, the court focused on the issue of whether or not Congress narrowly tailored COPA enough to meet the compelling interest of protecting children while also maintaining the sanctity of the First Amendment.⁷³ Justice Kennedy's opinion held that alternatives to COPA existed that would have been just as, if not more, effective in protecting children from indecent material on the Internet, and that would be less disruptive to rights of expression.⁷⁴

¶25 The Court suggested a variety of less restrictive alternatives. Filtering software (strongly recommended by the district court) stood out to the Court as an equally effective yet less restrictive alternative.⁷⁵ Justice Kennedy explained how filters allow individuals to control what they access on the Internet while maintaining the ability of publishers to communicate whatever they wish. As Justice Kennedy noted: "Filters are less restrictive than COPA. They impose selective restrictions on speech at the receiving end, not universal restrictions at the source."⁷⁶ The Court also found that filters protected children from indecent material, while still providing adults, including parents, the ability to access the Internet's infinite amount of speech simply by turning off their filter.⁷⁷ Justice Kennedy also noted that the use of filters prevented the need to criminalize speech; a notion that stood in contrast to the basic premise of COPA.⁷⁸ Ensuring that individuals would not be punished for their speech guaranteed that there would not be a chilling effect on publishers' speech as there would be with COPA. By eliminating the potential for a chilling effect, the filter prevailed as a more effective and reasoned alternative.

¶26 The Court then argued that filters might protect children from sexually indecent material more so than COPA.⁷⁹ Filters keep out pornography from overseas websites, whereas the United States would lack jurisdiction to prosecute foreign pornographers under COPA.⁸⁰ Also, filters prevent the influx of indecent speech from "all forms of Internet communications, including email," instant messaging, and the entire World Wide Web. On the other hand, COPA applied only to communications published on the World Wide Web.⁸¹

¶27 The Court then described why the affirmative defenses created to protect children—while helping website owners avoid liability—would not protect children from indecent material.⁸² Using age-verification technology to limit website access would not prevent children from maneuvering around the technology and accessing indecent sites.⁸³ In fact, "the District Court found that verification systems may be subject to evasion and circumvention, for example by minors who have their own credit cards."⁸⁴ Moreover, the

⁷³ *Id.* at 702.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Ashcroft v. A.C.L.U.*, 542 U.S. 656, 702 (2004).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Ashcroft v. A.C.L.U.*, 542 U.S. 656, 702 (2004).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

Court's most substantial critique of the age-verification defense emerges from Justice Kennedy's reference to the "Commission on Child Online Protection, a blue-ribbon commission created by Congress in COPA itself."⁸⁵ Congress charged this Commission to evaluate a variety of options designed to protect minors from indecent material transmitted over the Internet. Justice Kennedy notes that this Commission "unambiguously found that filters are more effective than age-verification requirements."⁸⁶

¶28 After looking at the promising option of Internet filters and the deficiencies of the age verification system proposed by COPA, the Supreme Court held that sufficient evidence existed to support the district court's injunction of COPA.⁸⁷ Therefore, the Court temporarily upheld the injunction.⁸⁸ However, the Court found that the factual circumstances that led the district court to its initial decision might have significantly changed since the time the case was initially heard in 1999; therefore, the Court instructed the district court to decide the case again based on any new technological information.⁸⁹ However, by the end of the opinion, the Court's instructions read as a whole give the appearance that the Court thinks narrower alternatives exist and the district court should once again issue an injunction.⁹⁰ Because the Supreme Court essentially declared the CDA and COPA unconstitutional, it appears that actors outside of Congress will need to pursue the goal of protecting children from indecent content on the Internet.

III. ALTERNATIVES TO COPA – WHAT IS OUT THERE THAT CAN PROTECT OUR CHILDREN?

¶29 While the fall of COPA reaffirms our country's commitment to the First Amendment, the decision has a number of negative consequences. To begin with, America is left wondering how to protect its children from the dangers of indecent material online. Congress' two major attempts to help protect children from sexually improper material both failed. Currently, it appears that a solution to protect children from the dangers of the Internet will not be found in a wide-sweeping piece of legislation implemented by Congress; precedent dictates that the Court will rule against anything that abridges the First Amendment and is not narrowly tailored. Therefore, society should look at other options to find a way to protect children while maintaining the integrity of the First Amendment.

¶30 This section of the paper evaluates various methods to protect children from indecent Internet material. In particular, this section discusses the use of filtering software and various approaches to cyber zoning. Although none of these solutions will

⁸⁵ *Id.*

⁸⁶ *Ashcroft v. A.C.L.U.*, 542 U.S. 656, 702 (2004).

⁸⁷ *Id.* at 704.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Kennedy's references to the new types of evidence that might be available are all references to evidence that would be beneficial to opponents of COPA, such as the COPA report detailing the benefits of filtering software.

solve the problem alone, a mixture of these methods offers a good chance of protecting children while preserving the First Amendment.⁹¹

A. Filtering Software

¶31 The use of filtering software to protect children from indecent material on the Internet is a popular solution. On an abstract level, the use of filters stands as an effective option to protect children. In theory, filters allow publishers to put whatever they want on the Internet (thus preserving their First Amendment rights) while allowing parents to selectively choose what Internet material they want their children to see (protecting children). As Justice Kennedy wrote, filters “impose selective restrictions on speech at the receiving end, not universal restrictions at the source.”⁹²

¶32 Therefore, publishers may publish whatever they want. Their speech would not be chilled, for they would hold no fear of being prosecuted for criminal violations. In addition, parents could set filters to block the specific types of material that they want their children to avoid. This seems more desirable than having the government decide, across-the-board, what content children may receive. As one commentator noted (while making a reference to the “community standards” provision of COPA), “[T]he smallest community every American belongs to is their household or family community. It is this community that in the end should be the deciding force on what is viewed . . . not a nameless, faceless group deciding an artificial standard that will subject the entire nation to their attitudes.”⁹³ Filters may bring this statement to life.

¶33 Furthermore, the Internet provides children with a wealth of valuable educational information that helps them develop into adults.⁹⁴ The Internet supplies children and teenagers with information on sexual education, the reality of drug use, and information on relationships.⁹⁵ The Internet helps children learn about these sensitive topics because some children remain fearful or shy about discussing these issues with their parents. The use of filters allows children to access more of this material while not encountering potentially damaging sexually explicit material.⁹⁶

¶34 An important study completed by the Kaiser Family Foundation (“KFF”) found that, if used properly, filters could be very effective at restricting minors’ access to indecent websites while allowing minors to access important educational websites.⁹⁷ This stands in contrast to the methods of COPA that had the possibility of chilling not just sexually indecent speech, but also speech relating to sexual health and sexual education. Furthermore, the KFF report noted that using filters at their least restrictive setting brought about the best balance.⁹⁸ It concluded that “at the least restrictive or

⁹¹ *Commission*, *supra* note 1, at 9.

⁹² *Ashcroft v. A.C.L.U.*, 542 U.S. 656, 696 (2004).

⁹³ Kristin Ringeisen, *Recent Decision: The Use of Community Standards by the Child Online Protection Act to Determine if Material is Harmful to Minors Is not Unconstitutional: Ashcroft v. American Civil Liberties Union*, 41 DUQ. L. REV. 449, 465 (2003).

⁹⁴ Henry J. Kaiser Family Foundation, *See No Evil: How Internet Filters Affect the Search for Online Health Information*, Executive Summary, at 3 (2002).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 6.

⁹⁸ *Id.*

intermediate configurations, the filters tested do not block a substantial proportion of general health information sites; however, at the most restrictive configuration, one in four health sites are blocked.”⁹⁹ The report then explained that “while using a more restrictive setting for the filters results in a significant increase in blocking of health sites, it yields only a marginal increase in effectiveness at blocking pornography.”¹⁰⁰ This study seems to imply that filters could delicately balance First Amendment concerns of access to educational information with society’s interest in protecting its youth.

¶35 While support exists for filters, this technology is not without flaws.¹⁰¹ The most commonly cited problem with filters is their tendency to be over-inclusive or under-inclusive.¹⁰² Filters are under-inclusive when they do not block indecent websites. Filters are over-inclusive when they block websites that are not indecent. Under-inclusion occurs when filtering software relies on pre-established lists to filter out indecent websites.¹⁰³ These lists become dated quickly unless the user of the filtering program constantly updates the software.¹⁰⁴ Filtering software also may fail to block websites that consist mainly of indecent images without text.¹⁰⁵ For the most part, filters work through an analysis of text; therefore, websites with pictures but no text sometimes sneak through a filter’s grip.¹⁰⁶

¶36 Over-inclusion normally occurs through a filtering program’s standardized manner of declaring websites indecent based on individual words in the text.¹⁰⁷ Unfortunately, since filters cannot detect the meaning of text or nuanced language, filters sometimes block educational websites containing words typically associated with indecent

⁹⁹ *Id.*

¹⁰⁰ Henry J. Kaiser Family Foundation, Executive Summary at 12.

¹⁰¹ Understanding how filters operate in real life helps one understand that filters are not currently the one-stop solution for protecting children. One commentator describes the operations of different types of filters. Weekes, *supra* note 14, at 4:

In general a software filter employs an algorithm to “test” the appropriateness of the activity or material . . . Generally filtering software employs one or more of the following filtering methods. First, filters screen sites based on domain names or IP addresses. This is based on predefined lists of good (white lists) and bad (black list) sites. Black lists are lists of sites that are deemed inappropriate, and that the user is prevented from accessing. White lists are lists of sites that are deemed appropriate, and that the user is allowed to access . . . Second, labels can be used as a means of filtering inappropriate content. Meta-tags (metadata) can contain information about the website. Metadata includes a description of the site and search terms. Search engines index results based on the search terms or keywords. Search engines often arrange index results based on the number of times the word(s) in the query appear(s) on the site . . . Third, filtering software uses textual analysis. Textual analysis examines of all the text on a site or page and compares the text against a list of words that are strongly associated with inappropriate content. For example, words like “nudity,” “sex,” “beaver,” “breast,” etc. may be blocked or flagged for inappropriate content.

¹⁰² *Id.*

¹⁰³ Committee to Study Tools and Strategies for Protecting Kids from Pornography and Their Applicability to Other Inappropriate Internet Content, National Research Council, *Youth, Pornography, and the Internet* § 12.1.2., Dick Thornburg et al. eds., 2002) [hereinafter *Youth*], available at http://bob.nap.edu/html/youth_internet/.

¹⁰⁴ Weekes, *supra* note 14, at 4.

¹⁰⁵ Kevin W. Saunders, *Do Children Have the Same First Amendment Rights as Adults?: The Need for a Two (or More) Tiered First Amendment to Provide for the Protection of Children*, 79 CHI.-KENT. L. REV. 257, 259 (2004).

¹⁰⁶ *Id.*

¹⁰⁷ *Youth*, *supra* note 103, at § 12.1.2.

publications.¹⁰⁸ Over-inclusion also occurs because some filter manufacturers make sure that their filters preference over-inclusion. For example, “[b]ecause most filters are deployed to forestall complaints, and complaints are more likely to be received about underblocking rather than overblocking, filter vendors have more incentive to block content that may be controversial than to be careful about not blocking content that should not be blocked.”¹⁰⁹

¶37 Overblocking raises serious First Amendment concerns, particularly since the algorithms that power these filters remain undisclosed to the public because of business competition reasons.¹¹⁰ Filtering software that fails to provide its users the type of protected speech they want could lead to a degradation of the First Amendment.¹¹¹ Indeed, when the government mandates filters in public settings (such as public libraries) significant censorship issues arise.¹¹² However, this argument against filters fails to apply to filters voluntarily used in private homes. Parents hold the power to control their filters, and if they encounter any unpalatable restraints on expression, they can adjust the filters or remove the filters altogether.

¶38 The serious problems with filters do not stem from their effect on the First Amendment. Rather, the lack of protection filters sometimes provide remains the greatest problem. As previously mentioned, filters oftentimes underblock indecent websites for one reason or another. As noted in a criticism to the KFF study, “the filters failed to work 10% of the time – one out of ten (1 in 10) sites. Consider how long it would take a curious teen or a staff member at an unsupervised computer to check out ten blocked sites to find the one that is unblocked.”¹¹³ In essence, with an infinite number of websites devoted to pornography, it is only a matter of time before children find unblocked pornographic sites, thereby rendering filtering software ineffective.

¶39 In addition, the high level of computer literacy of children allows them to bypass filters through tricks that go undetected by their less computer savvy parents.¹¹⁴ Filters also prove ineffective when children access computers outside their homes, particularly at

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at § 12.1.8.

¹¹⁰ NANCY WILLARD, WHO DEFINES EVIL: STATEMENT REGARDING THE KAISER FAMILY FOUNDATION STUDY ON HOW FILTERING AFFECTS ACCESS TO HEALTH INFORMATION, <http://responsiblenetizen.org/onlinedocs/pdf/whodefinesevil.pdf>.

¹¹¹ *Commission*, *supra* note 1, at 21.

¹¹² *See* U.S. v. Am. Library Assoc., Inc., 539 U.S. 194 (2003).

¹¹³ Willard, *supra* note 110.

¹¹⁴ *Youth*, *supra* note 103, at § 12.1.2:

It may be possible to defeat the filter itself. When this occurs, a specific Web page that the filter should block is made accessible to the user. Defeating the filter may sometimes be accomplished by:

- Uninstalling the filter;
- Obtaining the privileges needed to disable the filter. While such privileges are intended for the parental supervisor (and are usually password-enabled), the ability of youth to obtain privileges is not uncommon in households in which the resident teenager serves as the de facto system administrator because of superior technical knowledge;
- Accessing the Web page indirectly through a proxy server, a translation service, an anonymizing service, or some other route;
- Finding a click route to the page other than the one that was directly blocked; and/or
- Manipulating the reload/refresh and back/forward keys.

friends' homes.¹¹⁵ Furthermore, the existence and the benefits of filters remain unknown to many parents.¹¹⁶

¶40 Overall, filtering software presents a promising method for suppressing children's access to indecent pornographic material on the Internet. The imprecision of filters and the ability of children to bypass their parents' installation of the filters constitute definite downsides. But parents who stay up-to-date with their filtering programs and update their software likely will find that filters substantially deter their children from accessing pornography. Also, as parents familiarize themselves with the benefits of filters, possibly through publicly funded education campaigns, the everyday use of filters in homes might grow in popularity. As filtering technology continues to improve, this software will only increase in importance as a tool to balance the interests of Internet expression and the protection of children.

¶41 In crafting solutions for this problem, commentators tend to call for comprehensive and balanced solutions. Similarly, this paper argues that filtering technology should be the major method for protecting children from indecent material, while a number of other methods should serve as complements.

B. Cyber Zoning

¶42 Cyber-zoning should complement filtering software in the attempt to balance the First Amendment with the protection of America's children. Creating a new domain name for websites with adult material might stop children from accessing sites intended for adults; moreover, creating a domain name for websites with children's material might promote the construction of an entire Internet universe dedicated to minors.¹¹⁷

¶43 Congress already passed a bill setting up a second level ".kids" domain.¹¹⁸ This domain only includes websites directed towards the interests of children and which are not "harmful to minors."¹¹⁹ Through time this law will beneficially impact society, and in particular America's children. This domain has the potential to be the only area that children need to access for their Internet needs. This area could provide children with entertainment, education, and games. Moreover, companies such as Disney certainly will utilize an area of the Internet where their products and programming will be well-received.¹²⁰ Through basic supply and demand, publishers will push kid-friendly materials of high quality, and children will surf through this single destination with a wide assortment of interesting and healthy websites. In sum, there is no reason this domain could not develop into something substantial.¹²¹

¶44 Unfortunately, only young children might feel the positive effects of this domain.¹²² Even Justice Kennedy, in his praise of the domain, noted that the domain and the material

¹¹⁵ Conrad, *supra* note 20, at 7.

¹¹⁶ *Id.*

¹¹⁷ Commission, *supra* note 1, at 28-30.

¹¹⁸ 47 U.S.C. § 941 (2000).

¹¹⁹ *Id.*

¹²⁰ Saunders, *supra* note 105, at 257.

¹²¹ Youth, *supra* note 103, at § 13.2.8.

¹²² Weekes, *supra* note 14, at 4.

found on the domain is for “minors under the age of 13.”¹²³ The type of material that a seven-year-old finds interesting differs from the type of information sought after by a sixteen-year-old. While seven-year-olds research magical unicorns, sixteen-year-olds use the Internet to learn about their sexual health.

¶45 However, assuming that sixteen and seventeen-year-old minors would not be restricted to the “.kids” domain, the domain could substantially help in the fight to protect children from indecent material. When used in combination with filtering software, parents could restrict their five-year-old child’s access to the “.kids” domain, and therefore, prevent their child from seeking out or inadvertently encountering indecent websites.¹²⁴ Moreover, something just as beneficial that this domain may provide is an increased sense of autonomy among young children. By trusting the combination of filters and the domain, parents could grant their children more freedom to roam around the Internet unaccompanied.¹²⁵

¶46 The establishment of a mature “.xxx” domain also presents unique benefits. With a mature domain, websites could legally publish whatever material they want, and adult Internet users would have a central forum to explore their sexual curiosities.¹²⁶ Moreover, if used in combination with a filter, parents could restrict their children’s intentional and inadvertent access to indecent material simply by blocking the “.xxx” domain.¹²⁷

¶47 However, definite downsides exist that limit the value of such a plan, particularly if a “.xxx” tag is required (not voluntary) for sites with indecent content. Without an adjudicatory body to ensure the registration of adult sites, such a domain would be “only moderately effective.”¹²⁸ In such a scenario, many indecent websites would retain their previous domain names and lurk in the general Internet, remaining accessible for unsuspecting children. And even with an adjudicatory body that acts as an enforcement mechanism, serious downsides remain.

¶48 To begin with, it seems improbable that an adjudicatory body could hear and decide whether each individual website with risqué material requires a “.xxx” stamp.¹²⁹ There are simply too many websites with too much content for an adjudicatory body to make informed decisions regarding the content of every risqué website.¹³⁰ Another problem develops when websites change some of the content on their pages, *i.e.* an art website that displays Dutch master painters one month and then switches to Gauguin the next month. Would website publishers really have their websites re-evaluated each time they change their websites?

¶49 Moreover, there would also be a practical problem regarding enforcement. Limited government resources would only allow a limited amount of prosecution against people who position their websites in an inappropriate domain.

¹²³ Ashcroft v. A.C.L.U., 542 U.S. 656, 699 (2004).

¹²⁴ *Youth*, *supra* note 103, at 13.2.8.

¹²⁵ Saunders, *supra* note 105, at 261.

¹²⁶ *Youth*, *supra* note 103, at § 13.1.1.; Weekes, *supra* note 14, at 4.

¹²⁷ Weekes, *supra* note 14, at 4.

¹²⁸ *Commission*, *supra* note 1, at 28; Weekes, *supra* note 14, at 4.

¹²⁹ *Youth*, *supra* note 103, at § 13.1.5.

¹³⁰ *Id.*

¶50 In addition, the minimization of website owners' First Amendment rights would stand as a large problem arising out of the creation of a mature domain. To begin with, many website owners would prefer not to display their material on a ".xxx" domain because it would carry a stigma.¹³¹ Website owners who display borderline indecent materials, such as naked art or sexual health information would face the most risk.¹³² These individuals might not want to compromise the integrity of their materials by throwing them onto a mature domain full of pornography. Therefore, they might be restrained in how they use their websites to express themselves.

¶51 The implementation of a mandatory adult domain would be a poor idea for both constitutional and practical reasons. However, a voluntary adult domain might present some benefits. Certainly some indecent website owners would prefer to publish their material on an adult domain.¹³³ They might find that such a location makes it easier to attract customers who specifically want pornography.¹³⁴ All in all, a voluntary adult domain would complement the use of filters while a mandatory adult domain would simply be impractical and run contrary to the First Amendment.

¶52 The creation of new top level ".kids" and ".xxx" domains would serve as a boon to parents trying to effectively use filtering technology. Parents could program the filters to allow or disallow children from visiting certain domains. Moreover, these domains, if used on a voluntary basis, would respect the First Amendment, and provide website owners with a target audience to best direct their websites, products, and viewpoints.

IV. CONCLUSION

¶53 As amazing as the Internet is, serious problems associated with its rapid introduction into our society exist. The Internet became such a vital part of Americans' lives so quickly that legislators, parents, and the computer-technology industry failed to adequately prepare for the problems the Internet created. The negative effect on children from indecent sexual material transmitted over the Internet has evolved into a major problem. Now, society must recognize this problem and develop new ways to cope with it. In designing methods to protect children, all groups of society must recognize that any attempt to protect children must take into account the place of the First Amendment in American society. Previous attempts, such as Congress' legislative adventures, CDA and COPA, illustrate how potential solutions that ignore the First Amendment will not receive approval from the Supreme Court.

¶54 A plan of attack that respects the First Amendment provides the best set of solutions. Through such a plan parents would hold most of the power and responsibility to raise and protect their children. By not allowing universal censorship of websites, parents must individually navigate their children's activities on the Internet. In the end, this may result in the best scenario for every party involved. Parents will raise their children exactly how they want, with a minimal amount of government interference. Children will receive increased attention from their parents, and they will inherit a unique value system instead of a universal system guided by Congress' collective

¹³¹ *Commission*, *supra* note 1, at 28.

¹³² *Youth*, *supra* note 103, at § 13.1.2.

¹³³ *Weekes*, *supra* note 14, at 4.

¹³⁴ *Id.*

morals.¹³⁵ The pornography industry will continue their businesses over the Internet without fear of criminal sanctions by the government. Finally, all people will have free reign to choose which websites they wish to access.

¶55

Parental monitoring should prevail as the major method for protecting children; principally, this includes the use of filters and increased communication between parents and their children. If the Supreme Court's rejection of CDA and COPA shows anything, it seems that the government might want to stay hands off and let parents get to work.

¹³⁵ Certainly, some parents do not care and will not provide enough guidance over their children's activities on the Internet. However, this negative consequence must be accepted in order to avoid having Congress substantially alter the type of speech available online through overly broad content regulation.