AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Democratic Rights/Free Speech

**Ashcroft v. American Civil Liberties Union, 542 U.S. 656** (2004)

*In 1999, Congress passed the Child Online Protection Act (COPA), after the U.S. Supreme Court struck down parts of the Communications Decency Act in* Reno v. American Civil Liberties Union *(1997). COPA prohibited posting content for commercial purposes on the World Wide Web that is obscene or that is “harmful to minors” in that it appeals to a prurient interest, depicts sexual content “in a manner patently offensive with respect to minors,” and lacks “literary, artistic, political or scientific value for minors.” Such content could be exempted if access was restricted by use of a credit card or other “reasonable measures” to exclude anyone under the age of 17 to the site.*

*A variety of groups immediately filed suit in federal district court seeking a declaration that COPA was unconstitutional. The district court ruled against the government and issued a preliminary injunction barring the enforcement of the statute, and a circuit court affirmed. The U.S. Supreme Court issued a 5-4 decision affirming the injunction and remanded the case to the district court for trial to determine whether COPA was the least restrictive means for advancing the government’s objective. The district court subsequently struck down the act as unconstitutional, and the circuit court again affirmed that ruling. The Supreme Court declined to hear the case again.*

JUSTICE KENNEDY delivered the opinion of the Court.

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. . . . When plaintiffs challenge a content-based speech restriction, the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute.

In considering this question, a court assumes that certain protected speech may be regulated, and then asks what is the least restrictive alternative that can be used to achieve that goal. The purpose of the test is not to consider whether the challenged restriction has some effect in achieving Congress’ goal, regardless of the restriction it imposes. The purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to assure that legitimate speech is not chilled or punished. For that reason, the test does not begin with the status quo of existing regulations, then ask whether the challenged restriction has some additional ability to achieve Congress’ legitimate interest. Any restriction on speech could be justified under that analysis. Instead, the court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives.

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The primary alternative considered by the District Court was blocking and filtering software. Blocking and filtering software is an alternative that is less restrictive than COPA, and, in addition, likely more effective as a means of restricting children’s access to materials harmful to them. . . .

Filters are less restrictive than COPA. They impose selective restrictions on speech at the receiving end, not universal restrictions at the source. Under a filtering regime, adults without children may gain access to speech they have a right to see without having to identify themselves or provide their credit card information. Even adults with children may obtain access to the same speech on the same terms simply by turning off the filter on their home computers. Above all, promoting the use of filters does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much diminished. All of these things are true, moreover, regardless of how broadly or narrowly the definitions in COPA are construed.

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[T]here are substantial factual disputes remaining in the case. As mentioned above, there is a serious gap in the evidence as to the effectiveness of filtering software. For us to assume, without proof, that filters are less effective than COPA would usurp the District Court’s factfinding role. By allowing the preliminary injunction to stand and remanding for trial, we require the Government to shoulder its full constitutional burden of proof respecting the less restrictive alternative argument, rather than excuse it from doing so.

[T]he factual record does not reflect current technological reality—a serious flaw in any case involving the Internet. The technology of the Internet evolves at a rapid pace. Yet the factfindings of the District Court were entered in February 1999, over five years ago. Since then, certain facts about the Internet are known to have changed. . . .

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*Affirmed*.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, concurring.

. . . . I continue to believe that the Government may not penalize speakers for making available to the general World Wide Web audience that which the least tolerant communities in America deem unfit for their children’s consumption. . . .

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In registering my agreement with the Court’s less-restrictive-means analysis, I wish to underscore just how restrictive COPA is. COPA is a content-based restraint on the dissemination of constitutionally protected speech. . . . Speakers who dutifully place their content behind age screens may nevertheless find themselves in court, forced to prove the lawfulness of their speech on pain of criminal conviction.

Criminal prosecutions are, in my view, an inappropriate means to regulate the universe of materials classified as “obscene,” since “the line between communications which ‘offend’ and those which do not is too blurred to identify criminal conduct.” *Smith v. United States* (1977). COPA’s creation of a new category of criminally punishable speech that is “harmful to minors” only compounds the problem. . . .

COPA’s criminal penalties are, moreover, strong medicine for the ill that the statute seeks to remedy. To be sure, our cases have recognized a compelling interest in protecting minors from exposure to sexually explicit materials. As a parent, grandparent, and great-grandparent, I endorse that goal without reservation. As a judge, however, I must confess to a growing sense of unease when the interest in protecting children from prurient materials is invoked as a justification for using criminal regulation of speech as a substitute for, or a simple backup to, adult oversight of children’s viewing habits.

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JUSTICE BREYER, with whom CHIEF JUSTICE REHNQUIST and JUSTICE O’CONNOR join, dissenting.

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The Act’s definitions limit the material it regulates to material that does not enjoy First Amendment protection, namely legally obscene material, and very little more. . . .

The only significant difference between the present statute and Miller’s definition consists of the addition of the words “with respect to minors.” . . . But the addition of these words to a definition that would otherwise cover only obscenity expands the statute’s scope only slightly. That is because . . . . material that appeals to the “prurient interest[s]” of some group of adolescents or postadolescents will almost inevitably appeal to the “prurient interest[s]” of some group of adults as well.

The “lack of serious value” requirement narrows the statute yet further—despite the presence of the qualification “for minors.” That is because one cannot easily imagine material that has serious literary, artistic, political, or scientific value for a significant group of adults, but lacks such value for any significant group of minors. . . .

. . . . In sum, the Act’s definitions limit the statute’s scope to commercial pornography. It affects unprotected obscene material. Given the inevitable uncertainty about how to characterize close-to-obscene material, it could apply to (or chill the production of) a limited class of borderline material that courts might ultimately find is protected. But the examples I have just given fall outside that class.

The Act does not censor the material it covers. Rather, it requires providers of the “harmful to minors” material to restrict minors’ access to it by verifying age. . . .

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In sum, the Act at most imposes a modest additional burden on adult access to legally obscene material, perhaps imposing a similar burden on access to some protected borderline obscene material as well.

 I turn next to the question of “compelling interest,” that of protecting minors from exposure to commercial pornography. No one denies that such an interest is “compelling.” . . .

. . . . Conceptually speaking, the presence of filtering software is not an alternative legislative approach to the problem of protecting children from exposure to commercial pornography. Rather, it is part of the status quo, i.e., the backdrop against which Congress enacted the present statute. It is always true, by definition, that the status quo is less restrictive than a new regulatory law. It is always less restrictive to do nothing than to do something. But “doing nothing” does not address the problem Congress sought to address—namely that, despite the availability of filtering software, children were still being exposed to harmful material on the Internet.

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In sum, a “filtering software status quo” means filtering that underblocks, imposes a cost upon each family that uses it, fails to screen outside the home, and lacks precision. Thus, Congress could reasonably conclude that a system that relies entirely upon the use of such software is not an effective system. And a law that adds to that system an age-verification screen requirement significantly increases the system’s efficacy. That is to say, at a modest additional cost to those adults who wish to obtain access to a screened program, that law will bring about better, more precise blocking, both inside and outside the home.

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My conclusion is that the Act, as properly interpreted, risks imposition of minor burdens on some protected material—burdens that adults wishing to view the material may overcome at modest cost. At the same time, it significantly helps to achieve a compelling congressional goal, protecting children from exposure to commercial pornography. There is no serious, practically available “less restrictive” way similarly to further this compelling interest. Hence the Act is constitutional.

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JUSTICE SCALIA, dissenting.

. . . . Both the Court and Justice Breyer err, however, in subjecting COPA to strict scrutiny. Nothing in the First Amendment entitles the type of material covered by COPA to that exacting standard of review. “We have recognized that commercial entities which engage in ‘the sordid business of pandering’ by ‘deliberately emphasiz[ing] the sexually provocative aspects of [their nonobscene products], in order to catch the salaciously disposed,’ engage in constitutionally unprotected behavior.” *United States v. Playboy Entertainment Group, Inc.* (2000). . . .

There is no doubt that the commercial pornography covered by COPA fits this description. . . . Since this business could, consistent with the First Amendment, be banned entirely, COPA’s lesser restrictions raise no constitutional concern.