Ashcroft v. ACLU II: The Beat Goes On

Robert Corn-Revere

I. Introduction

In *Ashcroft v. ACLU*[1] the Supreme Court upheld a 1999 injunction order barring enforcement of the Child Online Protection Act (COPA) and remanded the case for further proceedings to determine the law's constitutionality.[2] The decision put off, for at least two years, a final determination of the constitutionality of the federal government's second attempt to regulate non-obscene, sexually-oriented speech on the internet. Although the 5–4 decision did not finally resolve the important constitutional issues presented by the law, the ruling's narrow practical focus obscures its importance. The majority reaffirmed and clarified some basic principles underlying First Amendment strict scrutiny and set the bar for future regulatory efforts at a high level. The case also highlights a significant doctrinal division on the Court concerning how the First Amendment should be understood and applied.

As an interim ruling that declined to address the ultimate constitutional issues in the case, *Ashcroft II* would not be particularly noteworthy if not for several factors. It was the second time the Court reviewed the federal government's second attempt to regulate speech on the internet, and its nondispositive outcome all but guarantees there will be an *Ashcroft III* (although it will be named for whomever may be the attorney general two years hence). The razor-thin 5–4 vote reflects deep divisions on the Court, but the principle on which the majority based its opinion, that the government has the burden to prove the law is more effective than less burdensome alternatives, promises significant development on remand and when the Court takes up the issue again. Moreover, none of the principal legal problems that various reviewing courts grappled with over

[1]Ashcroft v. ACLU, 124 S. Ct. 2783 (2004) (Ashcroft II).

[2]*Id.* at 2795.

the past six years are off the table. All of the issues previously addressed in the case, including the relative burdens of speech restrictions on the internet and the appropriate ''community standard'' for online speech, may yet play a role in the ultimate decision.

II. Background

A. The History of the Child Online Protection Act

The federal government has struggled to find a constitutional formulation justifying regulation of non-obscene sexual expression on the internet since 1996. Its first attempt came in the Communications Decency Act (CDA),[3] adopted as part of the Telecommunications Act of 1996, which sought to impose the same standard on the internet that the Federal Communications Commission (FCC) uses to regulate broadcast indecency. That culminated in the Supreme Court's landmark decision in *ACLU v. Reno*,[4] where the Court unanimously struck down a provision prohibiting the display of ''indecent'' materials online, and voted 7–2 to void a provision that banned the transmission of indecent information to a minor. It held that the internet receives the full protection of the First Amendment, and that the CDA's prohibitions were both vague and overly broad.[5]

The decision prompted Congress to adopt COPA, or ''Son of CDA'' as some called it.[6] In response to *ACLU v. Reno*, Congress sought to avoid the same fate for the new law by making COPA narrower than its predecessor. Unlike the CDA, COPA does not apply to all sexually-oriented information on the internet, but prohibits making ''any communication for commercial purposes'' over the World Wide Web that ''is available to any minor and that includes any material that is harmful to minors.''[7] More specifically, COPA restricts material that ''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

[3]Pub. L. No. 104-104, § 502, 110 Stat. 133, 47 U.S.C. § 223 (1994 ed. Supp. II).

[4]521 U.S. 844 (1997).

[5]*Id*. at 872–74. The parties did not challenge CDA provisions addressed to obscene communications online.

[6]Child Online Protection Act, 112 Stat. 2681–736, codified at 47 U.S.C. § 231 (1998).

[7]47 U.S.C. § 231(a)(1).

or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast.''[8] By incorporating the variable obscenity test for material considered ''harmful to minors,'' the Act requires a finding that the average person, applying contemporary community standards, would find that the material, taken as a whole, would appeal to the prurient interest of minors, and that it lacks ''serious literary, artistic, political, or scientific value for minors.''[9]

The Supreme Court has held that the government may designate some sexually oriented material as ''harmful to minors'' and may limit the sale or display of such things as ''girlie magazines'' to children.[10] Under this variable obscenity approach the government cannot unduly limit adult access to the material but may seek to screen out children. Nor may it impose vague restrictions on speech—not even for the benefit of minors—and thereby ''reduce the adult population . . . to reading only what is fit for children.''[11] Unlike the open-ended indecency standard invalidated in *Reno*, the Court has ruled that the three-part test for obscenity articulated in *Miller v. California*,[12] should be used to determine what material is obscene for minors, but with a slight difference. Reviewing courts must determine whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest *of minors*, and whether the work lacks serious literary, artistic, political, or scientific value *for minors*. Over the years, courts have held that in order to meet this standard, the material must lack serious value for ''a legitimate minority of normal, older adolescents,''[13] and the Supreme Court has indicated that regulation is limited to material that is ''virtually obscene.''[14]

[8]47 U.S.C. § 231(e)(6)(b).

[9]47 U.S.C. § 231(e)(6)(c).

[10]Ginsberg v. New York, 390 U.S. 629 (1968).

[11]Butler v. Michigan, 352 U.S. 380, 383–84 (1957). See Bolger v. Youngs Drug Products Corporation, 463 U.S. 60, 73–74 (1983); Erznoznik v. Jacksonville, 422 U.S. 205 (1975); Interstate Circuit v. Dallas, 390 U.S. 676 (1968).

[12]413 U.S. 15 (1973).

[13]American Booksellers Association v. Virginia, 882 F.2d 125, 127 (4th Cir. 1989). See American Booksellers v. Webb, 919 F.2d 1493, 1504–05 (11th Cir. 1990); Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520, 528 (Tenn. 1993).

[14]Virginia v. American Booksellers Association, 484 U.S. 383, 390 (1988).

However, it has not yet attempted to define specifically what material falls in the margin between ''adult'' and ''variable'' obscenity.

In addition to limiting its substantive reach, Congress also restricted the range of speakers to which COPA applies. Instead of regulating all who may engage in communication via the internet, as did the CDA, COPA applies to entities ''engaged in the business'' of making communications over the World Wide Web. The law defines the term broadly to include any entity that ''devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit.''[15] The law's restrictions apply to entities that ''knowingly'' post harmful material to minors on the web, or knowingly ''solicit'' such materials to be posted on the web.[16] However, it is not required that such postings be ''the person's sole or principal source of income'' or that the person actually make a profit. Thus, COPA may apply to an online business even where a very small part of its trade involves ''harmful'' materials.[17]

COPA established criminal sanctions of a $50,000 fine and six months imprisonment for ''knowing'' violations.[18] It imposed an additional fine of $50,000 for ''intentional'' violations of the law, and each day of noncompliance is considered a separate violation.[19] The law also established an additional civil fine of $50,000 for each ''knowing'' violation, again making each day of noncompliance a separate violation.[20] Like the CDA, COPA established various affirmative defenses in the event of a prosecution. If charged with a violation, a defendant may demonstrate that it restricted minors' access by use of a credit card, debit account, adult access code, adult personal identification number, digital certification of age or other ''reasonable'' measure that is feasible under available technology.[21]

B. The Litigation

1. Initial Judicial Review

On October 22, 1998, the day President Clinton signed COPA into law, the American Civil Liberties Union (ACLU) filed suit in the

[15]47 U.S.C. § 231(e)(2)(B).

[16]*Id.*

[17]*Id.*

[18]47 U.S.C. § 231(a)(1).

[19]47 U.S.C. § 231(a)(2).

[20]47 U.S.C. § 231(a)(3).

[21]47 U.S.C. § 231(c).

U.S. District Court for the Eastern District of Pennsylvania challenging the law's constitutionality. Representing various content providers on the World Wide Web, including A Different Light Bookstore and Salon.com, the ACLU argued that COPA infringes upon constitutionally protected speech of both minors and adults, and is unconstitutionally vague. District Judge Lowell A. Reed first issued a temporary restraining order blocking enforcement of COPA, finding that plaintiffs would suffer ''serious and debilitating effects'' if they attempted to rely on COPA's affirmative defenses.[22] In addition, Judge Reed found that ''fears of prosecution under COPA will result in the self-censorship of [some plaintiffs'] online materials in an effort to avoid prosecution.[23] Although the court agreed that the ''public certainly has an interest in protecting its minors,'' it concluded that ''the public interest is not served by the enforcement of an unconstitutional law.''[24]

Judge Reed reaffirmed his preliminary decision in February 1999 and issued a preliminary injunction.[25] The court found that plaintiffs were likely to succeed on the merits of their constitutional claim—that the law would impose burdens on constitutionally protected speech, that it would chill online speech in general, and that the government had failed to demonstrate that COPA is the least restrictive means of serving its purpose. Significantly, the court considered the burdens of COPA in light of ''the unique factors that affect communication in the new and technology-laden medium of the Web.''[26] The opinion noted that any barrier erected by web-site operators and content providers to bar access even to some of the content on their sites to minors ''will be a barrier that adults must cross as well.''[27] Judge Reed added that ''perhaps we do the minors of this country harm if First Amendment protections, which they will with age inherit fully, are chipped away in the name of their protection.''[28]

[22]ACLU v. Reno, No. Civ. A. 98-5591, 1998 WL 813423, at *3 (E.D. Pa. Nov. 23, 1998).

[23]*Id*.

[24]*Id*. at *4.

[25]ACLU v. Reno, 31 F. Supp. 2d 473 (E.D. Pa. 1999).

[26]*Id*. at 495.

[27]*Id*.

[28]*Id*. at 498.

2. Ashcroft I

The U.S. Court of Appeals for the Third Circuit affirmed Judge Reed's decision, but did so for reasons not found in the district court order and not argued by the parties. Instead, the court of appeals focused on the futility of applying ''contemporary community standards'' to a global medium. The court found that ''web publishers are without any means to limit access to their sites based on the geographic location of particular Internet users.''[29] Accordingly, it concluded that that First Amendment analysis was affected dramatically by ''the unique factors that affect communication in the new and technology-laden medium of the web.''[30]

The court distinguished the way obscenity law applies to other technologies, noting that publishers can choose not to mail unsolicited sexually explicit material to certain locales and phone-sex operators can refuse to accept calls from particular communities. Because the court found that ''the Internet 'negates geometry''' and a web publisher ''will not even know the geographic location of visitors to its site,'' it reasoned that application of a First Amendment test based on community standards ''essentially requires that every Web publisher subject to the statute [must] abide by the most restrictive and conservative state's community standards in order to avoid criminal liability.''[31] It held that ''this aspect of COPA, without reference to its other provisions, must lead inexorably to a holding of the likelihood of unconstitutionality of the entire COPA statute.''[32] The court based its holding entirely on the probable unconstitutionality of the ''community standards'' concept in the internet context. The court of appeals made clear that its critique of the ''harmful to minors'' standard applies equally to the test for obscenity. It stated that *Miller v. California* ''has no applicability to the Internet and the Web, where Web publishers are currently without the ability to control the geographic scope of the recipients of their communications.''[33] It further noted that ''[t]he State may not regulate at all if it turns out that even the least restrictive means of regulation is still

[29]ACLU v. Reno, 217 F.3d 162, 175 (3d Cir. 2000).

[30]*Id.* at 174–175.

[31]*Id.* at 169, 175.

[32]*Id.* at 174.

[33]*Id.* at 180.

unreasonable when its limitations on freedom of speech are balanced against the benefits gained from those limitations.''[34]

The case advanced to the Supreme Court after the Bush administration came to power and thus became *Ashcroft v. ACLU*.[35] Just as the fortunes of the national political parties shifted after the 2000 election, the unbroken string of internet free-speech cases in which First Amendment rights had been affirmed also came to an end. The Court voted 8–1 to reverse the Third Circuit decision and to remand the case for further proceedings.[36] In doing so, however, it did not disturb Judge Reed's injunction during lower court review.

The near unanimity for the result deflected some attention from the five diverse opinions in *Ashcroft I*, which reopened doctrinal debates that were prominent in the Court's obscenity cases of the 1960s.[37] Although five justices signed onto various portions of the opinion of the Court written by Justice Thomas, the only conclusion with which they could agree was that ''COPA's reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment.''[38] Beyond that one point of agreement, there was a significant division over how community standards should apply to the internet.

Justice Thomas, joined by Justice Scalia and Chief Justice Rehnquist, took the hardest line in portions of the opinion not joined by a majority, observing that jurors may draw upon personal knowledge of their own communities where the law does not specify a particular geographic area. If, as a result, speakers on the internet must conform to varying local standards, so be it. Those who fear draconian local enforcement can simply avoid using the internet as a means of communication. As Justice Thomas put it, ''[i]f a publisher wishes for its material to be judged only by the standards of particular communities, then it need only take the simple step of utilizing a medium that enables it to target the release of its material into

[34]*Id*. at 179–180.

[35]Ashcroft v. ACLU, 535 U.S. 564 (2002) (Ashcroft I).

[36]*Id*. at 566.

[37]See Robert Corn-Revere, Cyberspace Cases Force Court to Reexamine Basic Assumptions of Obscenity and Child Pornography Jurisprudence, 2001–2002 Cato Sup. Ct. Rev. 115, 142–48 (2002).

[38]535 U.S. at 585 (emphasis in original).

those communities.''[39] In this view, unreasonable local standards are moderated by the ''serious merit'' criterion, which enables appellate courts to set ''a national floor for socially redeeming value.''[40]

Justices O'Connor and Breyer each wrote separately to express their disagreement over which community standard to apply. Although both concurred in the judgment of the Court, they argued that the Constitution requires the use of a national standard to judge speech on the internet. Otherwise, Justice Breyer wrote, ''the most puritan of communities'' would have ''a heckler's Internet veto affecting the rest of the nation.''[41] He cited language from COPA's legislative history for support that Congress intended to employ an ''adult'' standard rather than a ''geographic'' standard for determining what material is ''suitable for minors.''[42] Justice O'Connor similarly expressed some concern that the use of local community standards ''will cause problems for regulation of obscenity on the Internet, for adults as well as children, in future cases.''[43] She suggested that *Miller* allowed the application of local standards but did not mandate their use, and disputed the Court's earlier conclusion that a national standard is ''unascertainable.''[44]

Justice Kennedy, joined by Justices Souter and Ginsburg, wrote that there is a very real likelihood that COPA ultimately would fail a facial challenge as an overly broad restriction on speech. He suggested that the Court should proceed cautiously in light of Congress's attempt to fashion a narrower law than the CDA, and, for that reason, the Third Circuit's community standards rationale ''stated and applied at such a high level of generality'' could not be sustained.[45] Nevertheless, Justice Kennedy explained that a range of concerns may invalidate COPA's variable obscenity standard, including the variation in community standards, the question of what constitutes the work ''as a whole'' on the internet, the type

[39]*Id*. at 583

[40]*Id*. at 579, 583 (citation omitted) (plurality op.).

[41]*Id*. at 590 (Breyer, J., concurring).

[42]*Id*.

[43]*Id*. at 587 (O'Connor, J., concurring).

[44]*Id*. at 587–88.

[45]*Id*. at 592 (Kennedy, J., concurring).

and amount of speech restricted by COPA among other factors.[46] Despite ''grave doubts that COPA is consistent with the First Amendment,'' he concluded that the Court should await a more thorough analysis by the Third Circuit.[47]

The sole dissenter was Justice Stevens, author of the Court's opinion in *Reno v. ACLU*.[48] In his view, it is ''quite wrong to allow the standards of a minority consisting of the least tolerant communities'' to regulate access to the World Wide Web.[49] In the internet context, however, Justice Stevens found that ''community standards become a sword rather than a shield'' because ''[i]f a prurient appeal is offensive in a puritan village, it may be a crime to post it on the World Wide Web.''[50] Acknowledging that COPA was an improvement over the CDA, Justice Stevens nevertheless concluded that the changes were insufficient to cure the law's constitutional deficiencies. The elements of COPA's ''harm to minors test'' did not narrow the law sufficiently, he concluded, because the ''patently offensive'' and ''prurient interests'' elements of the standard depended on a community standard.[51] The requirement that the material be ''in some sense erotic'' similarly did not narrow its scope, since ''[a]rguably every depiction of nudity—partial or full—is in some sense erotic *with respect to minors*.''[52] Similarly, the ''serious value'' prong of the test did not narrow COPA's scope, because it requires juries to determine whether the material has serious value for minors.[53] Accordingly, Justice Stevens concluded that the community standards analysis alone doomed COPA.

With these divergent opinions the Supreme Court sent the case back to the Third Circuit with little instruction beyond the clear signal that the circuit court was to broaden analysis beyond the issue of community standards.

[46]*Id*. at 592–93.

[47]*Id*. at 592–602 (citations omitted).

[48]*Id*. at 602 (Stevens, J., dissenting).

[49]*Id*. at 612.

[50]*Id*. at 603–04.

[51]*Id*. at 607–08.

[52]*Id*. at 608 (emphasis in original).

[53]*Id*. at 608–09.

On remand, the Third Circuit reaffirmed its earlier decision that the district court had not abused its discretion by preliminarily enjoining enforcement of the law, but this time ruled on broader grounds.[54] Although noting that it was not obliged to determine whether COPA was overly broad and vague, the court of appeals nevertheless did so in order to ''touch all bases.'' It found that it was essential to answer ''the vexing question of what it means to evaluate internet material 'as a whole,''' and that ''the plain meaning of COPA's text mandates evaluation of an exhibit on the Internet in isolation, rather than in context.''[55] As a result, the court concluded that COPA ''impermissibly burdens a wide range of speech and exhibits otherwise protected for adults.''[56] It also found that the term ''minor,'' as used in COPA, ''applies in a literal sense to an infant, a five-year-old, or a person just shy of seventeen.''[57] The court held that COPA's application to internet speech for ''commercial purposes'' was impermissibly broad, and it found that the law's affirmative defenses failed to insulate protected speech from liability. Among other things, the court pointed out that affirmative defenses do not provide freedom from prosecution, and noted that the law ''raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful.''[58] It also concluded that COPA was not the least restrictive means of addressing the problem, and that voluntary use of filtering software by parents was at least as effective in sheltering children from sexually-oriented materials. Finally, the court returned to the community standards issue that the Supreme Court addressed, and concluded that the law's use of community standards ''exacerbates these constitutional problems in that it further widens the spectrum of protected speech that COPA affects.''[59]

III. *Ashcroft II*: Reaffirming Basic First Amendment Principles

A. The Majority Opinion

In its second pass at COPA, the Supreme Court again declined to resolve the law's constitutionality. Justice Kennedy wrote the opinion for the Court, which focused solely on ''whether the Court of

[54]ACLU v. Ashcroft, 322 F.3d 240 (3d Cir. 2003).

[55]*Id*. at 253.

[56]*Id*. at 251–53.

[57]*Id*. at 254.

[58]*Id*. at 260.

[59]*Id*. at 261–66, 270.

Appeals was correct to affirm a ruling by the district court that enforcement of COPA should be enjoined because the statute likely violates the First Amendment.''[60] In contrast to *Ashcroft I*, where the Court faulted the Third Circuit for focusing on a single issue (albeit one that has not been part of the district court's rationale), the *Ashcroft II* Court itself based its decision on one point—whether the government had satisfactorily proved that the law is the least restrictive means of accomplishing its purpose. Noting that the Third Circuit had construed various statutory terms and had determined that COPA was unconstitutional, the Court observed that ''[n]one of those constructions of statutory terminology . . . were relied on by or necessary to the conclusions of the District Court.''[61] As a consequence, the Court limited its holding to determining whether the district court's rationale for issuing a preliminary injunction was valid, and it declined ''to consider the correctness of the other arguments relied on by the Court of Appeals.''[62]

The decision remanded the case to the district court for a trial on the merits, and maintained the interim injunction to avoid chilling free speech through the threat of prosecutions, a threat the Court characterized as an ''extraordinary harm.''[63] Allowing the preliminary injunction to stand pending further factfinding and review, according to the majority, ''require[s] the Government to shoulder its full constitutional burden of proof.''[64] The Court was again divided, although not so badly fractured as in *Ashcroft I*. Justice Kennedy's majority opinion was joined by Justices Stevens, Souter, Thomas, and Ginsburg. Justice Stevens wrote a concurring opinion, which was joined by Justice Ginsburg. Justice Scalia filed a dissent, as did Justice Breyer, who was joined by Chief Justice Rehnquist and Justice O'Connor.

Importantly, the majority opinion reaffirmed the high level of constitutional protection that the Court has accorded the internet. This view of technology and the First Amendment fundamentally reverses the approach the Court took regarding speech transmitted

[60]Ashcroft v. ACLU II, 124 S. Ct. 2783, 2788 (2004).

[61]*Id.* at 2791.

[62]*Id.*

[63]*Id.* at 2794.

[64]*Id.*

via new communications technologies in the decades before *Reno v. ACLU*.[65] With other media, when they were new, the Court only grudgingly and incrementally extended First Amendment protections. This was true of broadcasting (which has yet to receive full protection),[66] cable television,[67] and, to a certain extent, telecommunications.[68] But with the debut of the internet, the Court stressed that ''our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.''[69] The Court continued this trend in *Ashcroft II,* holding that the government's burden of proof was compounded by the fact that ''[t]he technology of the Internet evolves at a rapid pace.''[70] For that reason, and because of the risk of chilling speech in the interim, the Court erred on the side of the First Amendment and upheld the district court's injunction.

Justice Kennedy's majority opinion focused primarily on the technology of internet content filters, which the Court had taken note of in previous cases. In *Reno v. ACLU*, for example, the Court noted that ''[s]ystems have been developed to help parents control the material that may be available on a home computer with Internet access.''[71] The *Reno* Court was commenting only on the voluntary private use of filters in the home and found that the existence of such technologies exacerbated the CDA's constitutional problems by highlighting the law's overbreadth. In *American Library Association v. Ashcroft*,[72] on the other hand, the Court upheld conditions associated with federal subsidies that require schools and libraries to use internet content filters.[73] Although it acknowledged that filters may both over- and underblock designated websites, the Court concluded that this fact did not violate the First Amendment because libraries

[65]*Supra* note 4.

[66]Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); FCC v. League of Women Voters of California, 468 U.S. 364 (1984).

[67]Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986); Turner Broadcasting System v. FCC, 512 U.S. 622, 644–46 (1994). But see United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000).

[68]Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989).

[69]Reno v. ACLU, 521 U.S. 844, 870 (1997).

[70]Ashcroft v. ACLU II, 124 S. Ct. 2783, 2794 (2004).

[71]Reno, 521 U.S. at 854–55.

[72]539 U.S. 194 (2003).

[73]*Id*. at 214

are not designated as ''public forums'' and because adults may request that filters be disabled.[74]

The Court's renewed emphasis on internet content filters in *Ashcroft II* reveals the government's rather schizophrenic attitude toward the technology in recent cases. In *Reno*, the government had criticized filters as a limited and ineffective alternative to regulation, while in *American Library Association*, it adopted filters as its preferred solution. On the other side of the argument, opponents of the CDA first raised filters as an effective alternative to the law while opposing them as censorship in the library setting. However, the constitutional dispute was never about whether filters necessarily are ''good'' or ''bad,'' but over who should decide when they must be used. When individuals choose to use content filters on their home computers it is an exercise in parenting, but when government mandates their use it is an effort to control content. In *Ashcroft II*, for example, the government's main complaint about filters was that their use was voluntary and therefore inherently less effective than a mandatory approach to the problem.[75]

In the face of the government's shifting positions on the specific issue of internet content filters, Justice Kennedy's majority opinion sought to clarify the Court's least restrictive means test in First Amendment strict scrutiny cases. The purpose of the test, according to the majority, is ''to ensure that speech is restricted no further than necessary,'' not to consider ''whether the challenged restriction has some effect in achieving Congress' goal, regardless of the restriction it imposes.''[76] Accordingly, the inquiry does not take the status quo as a given and ask whether the challenged regulation adds some incremental ability to address the problem. Such an approach could be used to justify any restriction on speech, according to the Court. Instead, reviewing courts must ask ''whether the challenged regulation is the least restrictive means among available, effective alternatives.''[77]

[74]*Id*. at 205–06, 208–09.

[75]Brief for the Petitioner, Ashcroft v. ACLU II, 124 S. Ct. 2783 (2004) (No. 03-218), available at 2003 WL 22970843, at *40 (''By contrast, the court of appeals' blocking alternative is voluntary, it does not eliminate all harmful material, it has the effect of blocking material that is not harmful, and it imposes significant costs and burdens on parents.'').

[76]Ashcroft v. ACLU II, 124 S. Ct. 2783, 2791 (2004).

[77]*Id*.

In this connection, the *Ashcroft II* opinion made clear that less restrictive alternatives need not be part of some government program, but instead may involve the volitional use of technology that the market makes available. That is, the First Amendment test relates to less restrictive *alternatives* and not necessarily less restrictive *regulations*. The Court specifically rejected the government's complaint that the filtering technology is voluntary, pointing out that ''[t]he need for parental cooperation does not automatically disqualify a proposed less restrictive alternative.''[78] It also declined to accept the government's characterization of private, market-based filters as an existing feature of the regulatory system that COPA merely supplemented. As a counterpoint to primarily private solutions, the Court also noted that other less restrictive regulations had been adopted since COPA was enacted, including a prohibition on misleading domain names and creation of a ''child-friendly'' internet domain.[79]

Although the majority opinion suggested that the government might legitimately *encourage* the use of content filters, it did not posit such official measures as a prerequisite to finding that technology can be an adequate alternative to regulation.[80] Indeed, the majority seemed to assume that it would not be constitutionally permissible to require the use of filtering software. Noting that software ''is not a perfect solution'' because it ''may block some materials that are not harmful to minors and fail to catch some that are,'' the Court nevertheless rejected the argument ''that filtering software is not an available alternative because Congress may not require it to be used.''[81] It found that the inability to compel the use of blocking technology ''carries little weight'' in light of the fact that Congress can promote the use of filters, citing the ''strong incentives'' upheld

[78]*Id*. at 2793.

[79]*Id*. at 2790–91 (citing 18 U.S.C. § 2252B (Supp. 2004) and 47 U.S.C. § 941 (Supp. 2004)).

[80]Ashcroft II, 124 S. Ct. at 2793.

[81]*Id*. The mandatory use of internet content filters in the public library setting has been found to violate the First Amendment. Mainstream Loudoun v. Board of Trustees, 24 F. Supp. 2d 552 (E.D. Va. 1998). The Court in *American Library Association* found only that the conditioned subsidies were constitutional to the extent adult library patrons could ask that filters be disabled and access readily permitted to blocked websites. United States v. American Library Association, 539 U.S. 194, 203–09 (2003).

in *American Library Association* and alluding to other measures the government might adopt to encourage the development of filters by industry and use by parents.[82]

The *Ashcroft II* majority explained the nature of the government's burden under the ''least restrictive means'' test. It emphasized the importance of keeping the ''starch in our constitutional standards'' because content-based prohibitions ''have the constant potential to be a repressive force in the lives and thoughts of a free people.''[83] As a consequence, those challenging a law on First Amendment grounds are not required ''to introduce, or offer to introduce, evidence that their proposed alternatives are more effective.''[84] Instead, the government ''has the burden to show they are less so.''[85] This constitutional obligation is not discharged by showing that a proposed alternative ''has some flaws''; the government must demonstrate that the alternative measures are ''less effective'' than the law.[86] Measuring the relative benefits of various alternatives is inherently speculative but the comparison among solutions is based on the Court's estimation of the *potential* effect of each alternative. Thus, the question posed in *Ashcroft II* is not whether most parents have in fact installed internet content filters; it is whether filters, if used, would be more or less effective than a legal prohibition.

This reading of the Court's less restrictive means analysis is supported by *United States v. Playboy Entertainment Group, Inc.*,[87] which the majority characterized as the ''closest precedent on the general point.''[88] In *Playboy* the Court invalidated a government regulation intended to shield children from unsolicited sexually-oriented sounds and images from ''signal bleed''—imperfectly scrambled adult cable channels that can be seen in the homes of non-subscribers. Like *Ashcroft II*, the case turned on whether the government had satisfied its burden to show that the law at issue was the least restrictive means of addressing the problem. The *Playboy* Court held

[82]Ashcroft II, 124 S. Ct. at 2793.

[83]*Id*. at 2788, 2794.

[84]*Id*. at 2793.

[85]*Id*.

[86]*Id*.

[87]*Supra* note 67.

[88]Ashcroft II, 124 S. Ct. at 2793.

that the government failed to meet its obligation because the law in question provided a voluntary (i.e., ''opt-in'') blocking option that parents could use in addition to the mandatory restrictions that were challenged on First Amendment grounds.[89] It reached this conclusion despite the fact that ''fewer than 0.5% of cable subscribers requested full blocking'' during the time the more restrictive prohibition was enjoined and only the voluntary option was available.[90]

The *Playboy* Court noted the ''uncomfortable fact'' that ''the public greeted [voluntary blocking] with a collective yawn'' during the time it was the sole blocking alternative.[91] It reasoned, however, that the less than enthusiastic reaction could be explained as readily by the possibility that the problem it sought to address was less of a concern to parents than the government supposed, or that the voluntary option was insufficiently publicized. Either way, it was the government's burden to prove that such plausible explanations for its limited use were wrong and that voluntary blocking suffered from ''technological or other limitations.''[92] In addition to the less restrictive regulation, the Court also pointed to ''market-based solutions'' (such as programmable televisions and channel-mapping set-top boxes) that provided less restrictive alternatives.[93]

The Court's emphasis on the theoretical, as opposed to the actual effectiveness of voluntary alternatives measured by the extent of their use, is rooted in the First Amendment philosophy that the ''citizen is entitled to seek out or reject certain ideas or influences without Government interference or control.''[94] If an effective means of avoiding unwanted speech is readily available, direct restrictions on expression are disfavored even if people have elected not to use the less burdensome option. Justice Kennedy explained that ''[t]echnology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us.''[95] He continued the same

[89]United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 816 (2000).

[90]*Id*.

[91]*Id*.

[92]*Id*. at 816, 818–19.

[93]*Id*. at 821.

[94]*Id*. at 818.

[95]*Id*. at 817–18.

line of reasoning in *Ashcroft II*, by focusing on the capacity of internet content filters to block unwanted speech rather than asking how often such software is used. With respect to the latter question Justice Kennedy suggested that filters could be effective if adequately promoted because ''COPA presumes that parents lack the ability, not the will, to monitor what their children see.''[96]

The Court listed a number of reasons why content filters in the home may be more effective than legal restrictions in shielding children from unwanted sexual images. Whereas COPA applies only to images on the World Wide Web, filters may sift information transmitted via all forms of internet communication, including email. In addition, while COPA limits material available only on U.S.-based websites, filters may block information from any source regardless of its geographic location. According to the Court, this fact alone ''makes it possible that filtering software might be more effective in serving Congress' goals,'' especially since providers of sexually-oriented materials could avoid COPA's reach (if it ultimately were to be upheld) simply by moving their operations overseas. At the same time, the use of filters is obviously less restrictive because they impose only ''selective restrictions on speech at the receiving end, not universal restrictions at the source.''[97]

On this basis the majority concluded that the Third Circuit was correct in finding that the district court's grant of injunctive relief was not an abuse of discretion. It remanded the case for further findings as to the effectiveness of internet filters, observing that the district court's initial findings of fact were more than five years old. Also noting the rapid rate of development for the internet, the majority suggested ''[i]t is reasonable to assume that other technological developments important to the First Amendment analysis have also occurred during that time.''[98]

B. The Concurring Opinion

In a brief concurrence, Justice Stevens reiterated his position from *Ashcroft I* that COPA is unconstitutional because it subjects the World

[96]Ashcroft v. ACLU II, 124 S. Ct. 2783, 2793 (2004).

[97]*Id.* at 2792.

[98]*Id.* at 2791, 2794.

Wide Web to the community standards of ''the least tolerant communities in America.''[99] This time, however, he was joined by Justice Ginsburg, who in *Ashcroft I* had joined in an opinion written by Justice Kennedy that expressed ''grave doubts that COPA is consistent with the First Amendment''[100] but did not consider the community standards issue dispositive. Justice Stevens stressed the extent to which COPA's criminal penalties were excessively restrictive, concluding that criminal penalties ''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.'''[101] He noted that the problem of vagueness was even more problematic with ''the novel and nebulous category of 'harmful to minors' speech.'' Justice Stevens expressed a ''growing sense of unease'' when the law is used ''as a substitute for, or a simple backup to, adult oversight of children's viewing habits.''[102] Accordingly, he concluded that COPA's constitutionality should be reviewed with ''special care,'' particularly since ''Congress might have accomplished the goal of protecting children from harmful materials by other, less drastic means.''[103]

C. The Dissents

Justice Scalia's dissent was diametrically opposed to the majority's insistence on careful constitutional review. ''Nothing in the First Amendment,'' he wrote, requires ''commercial entities which engage in 'the sordid business of pandering''' to be held to strict scrutiny.[104] Quite to the contrary, he articulated the startling proposition that COPA is lawful because ''commercial pornographers'' could be banned entirely without ''constitutional concern.''[105] He reached this conclusion despite the fact that adults have a constitutional right to

[99]*Id.* at 2796 (Stevens, J., concurring).

[100]Ashcroft v. ACLU I, 535 U.S. 564, 594–602 (2002) (Kennedy, J., concurring) (citations omitted).

[101]Ashcroft II, 124 S. Ct. at 2796 (Stevens, J., concurring) (quoting Smith v. United States, 431 U.S. 291, 316 (1977) (Stevens, J., dissenting)).

[102]Ashcroft II, 124 S. Ct. at 2797 (Stevens, J., concurring).

[103]*Id*. at 2796–97.

[104]*Id*. at 2797 (Scalia, J., dissenting).

[105]*Id*.

access materials considered to be ''harmful to minors.''[106] Justice Breyer's dissent, on the other hand, accepted the majority's premise that COPA is subject to strict scrutiny. However, joined by Chief Justice Rehnquist and Justice O'Connor, he concluded that COPA is constitutional because it imposes only a ''modest'' burden on protected speech and that Congress could not have achieved its objective in less restrictive ways.

A central assumption of Justice Breyer's dissent is that COPA's definitions ''limit the material it regulates to material that does not enjoy First Amendment protection, namely legally obscene material, and very little more.''[107] He characterized the law's ''harmful to minors'' standard as adopting ''the *Miller* standard, virtually verbatim'' and suggested that any extension of COPA beyond the category of adult obscenity would reach ''only borderline cases.''[108] Although the dissent acknowledged that the law's formulation of the three-part *Miller* test for obscenity was qualified by the statements that a work must appeal to the prurient interest ''with respect to minors'' and lack serious literary, artistic, political, or scientific value ''for minors,'' Justice Breyer discounted these differences as insignificant. Material that appeals to the prurient interests ''of adolescents or postadolescents will almost inevitably appeal to the 'prurient interest[s]' of some group of adults as well,'' he reasoned, and the same goes for serious merit: ''[O]ne 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.''[109]

Although he acknowledged that ''the obscene and the nonobscene do not come tied neatly into separate, easily distinguishable packages,''[110] Justice Breyer bolstered his claim regarding the narrowness of COPA with a series of examples drawn from the record. He asserted that works of serious merit that included ''an essay about a young man's experience with masturbation and sexual shame,'' a discussion of ''homosexuality, . . . or the consequences of prison

[106]See, e.g., Virginia v. American Booksellers Association, 484 U.S. 383, 384 (1988).

[107]Ashcroft II, 124 S. Ct. at 2797–98 (Breyer, J., dissenting).

[108]*Id.* at 2799, 2805.

[109]*Id.* at 2799.

[110]*Id.* at 2806.

rape,'' a ''graphic illustration of how to use a condom,'' or the controversial images of photographer Robert Mapplethorpe would not be restricted by COPA.[111] He concluded that these and other examples of sexual imagery did not fall within the ''limited class of borderline material,'' notwithstanding the ''inevitable uncertainty about how to characterize close-to-obscene material.''[112] Justice Breyer based this conclusion on an assumption that such materials do not pander to the prurient interest of significant groups of minors and are not without serious value for significant groups of minors. He also noted the requirement that material be evaluated ''as a whole'' further limits the scope of COPA.[113]

Another limitation on COPA's restrictiveness, according to Justice Breyer, is that it ''does not censor the material it covers'' but only requires the ''providers of 'harmful to minors' material to restrict minors' access to it by verifying age.''[114] Recognizing that measures necessary to implement the law would entail monetary costs and certain inconveniences, Justice Breyer described these as ''a modest additional burden on adult access to legally obscene material.''[115] This analysis did not contemplate the burden that a criminal conviction under COPA would entail, but the dissent rejected Justice Stevens' argument that the line between protected and unprotected speech is too ''blurred'' to permit the application of criminal law. Justice Breyer concluded simply that removing a ''major sanction'' would make the statute ''less effective.''[116]

The heart of Justice Breyer's opinion is a critique of the majority's analysis of the ''least restrictive means'' requirement. Claiming that ''the Constitution does not . . . require the government to disprove the existence of magic solutions,'' he argued that ''the presence of filtering software is not an *alternative* legislative approach to the problem of protecting children.''[117] Justice Breyer explained that the Court should not compare COPA and filters against one another

[111]*Id.* at 2799–2800.

[112]*Id.* at 2800.

[113]*Id.* at 2799–2800.

[114]*Id.* at 2800.

[115]*Id.* at 2800–01.

[116]*Id.* at 2804.

[117]*Id.* at 2801, 2804 (emphasis in original).

and try to determine which was more effective or less restrictive. Doing nothing, he noted, is always less restrictive than doing something.[118] Instead, he combined the ''least restrictive means'' prong of the First Amendment analysis with his assessment of the compelling interest in protecting children and his assumption that COPA would materially advance that interest. The result was more organic: COPA is constitutional because, given the status quo (which includes filters), there remains a compelling problem to be solved and the law will help reduce the problem.[119] Justice Breyer discounted the majority's point that a substantial portion of internet pornography originates overseas by suggesting that the amount of material that nevertheless would be regulated is not ''insignificant.''[120]

The dissent listed four ''serious inadequacies'' of filtering software ''that prompted Congress to pass legislation instead of relying on its voluntary use.''[121] These problems include: (1) filters underblock and therefore do not solve the ''child protection'' problem; (2) software costs money that not every family can afford; (3) filtering depends for its effectiveness on the voluntary actions of parents; and (4) filters ''lack precision'' and thereby block ''a great deal of material that is valuable.''[122] These criticisms really boil down to two issues: Voluntary solutions place the burden on parents to take action and filters are an imprecise tool that both over- and underblocks the targeted expression.

In this regard, Justice Breyer's complaints about the inadequacies of filtering software were notable. Citing Justice Stevens' dissent in *American Library Association*, he pointed out that filters do not have the capacity to exclude a precisely defined category of images and therefore ''cannot distinguish between the most obscene pictorial image and the Venus de Milo.''[123] He also quoted testimony that such software ''is simply incapable of discerning between constitutionally protected and unprotected speech'' and noted that ''[n]othing in

[118]*Id.* at 2802.

[119]*Id*.

[120]*Id.* at 2802–03.

[121]*Id*. at 2802.

[122]*Id.* at 2802–03.

[123]*Id*. at 2802.

the District Court record suggests the contrary.''[124] Although such concerns about filtering technology may well be warranted, they rest rather uncomfortably with Justice Breyer's own observations in *American Library Association* that filters '''provide a relatively cheap and effective' means of furthering [the government's] goals.''[125] While he acknowledged that filters tended to both overblock and underblock the speech targeted by the regulations, he noted that ''no one has presented any clearly superior or better fitting alternatives.''[126] On remand, the district court will put Justice Breyer's conclusions regarding filters to the test—both those he expressed in *American Library Association* and in *Ashcroft II*.

IV. Where Do We Go from Here?

Usually when a case is remanded from the Supreme Court the issues the lower court must address are more focused than in the initial round of litigation. In the very rare instance in which a case is remanded more than once, the remaining issues usually are refined further still. But that is not what happened in *Ashcroft II*. The Court remanded the case to update the factual record on technological developments relevant to its least restrictive means analysis, but none of the issues that relate to the ultimate question of COPA's constitutionality have been resolved.[127] Because the Court affirmed only the district court's decision to issue a preliminary injunction, all of the issues that go to the merits still must be decided. These include a decision on COPA's scope and whether it is overly broad, how to apply the obscenity test in the online context—including determining what constitutes the work ''as a whole'' and which community standard to use—and whether the law represents the least restrictive means of addressing the government's concerns in light of current technology. Some of these issues, such as the question of community standards, reopen decades-old doctrinal rifts that were put to rest only temporarily by the decision in *Miller v. California*.[128]

[124]*Id.* at 2802–03.

[125]United States v. American Library Association, 539 U.S. 194, 219 (2003) (Breyer, J., concurring).

[126]*Id.* at 219 (citation omitted).

[127]Ashcroft II, 124 S. Ct. at 2795.

[128]For a more complete discussion of this point, see Corn-Revere, *supra* note 37.

The only point about which the Court has achieved near consensus is that regulating expression on the internet in the interest of protecting children requires the government to satisfy strict First Amendment scrutiny. Justice Scalia is the sole holdout for a less rigorous standard of review, and his dissent in *Ashcroft II* harkens back to the era before *Roth v. United States*[129] where the Court made clear that ''[a]ll ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the [First Amendment] guarantees.''[130] The rest of the justices may agree on which standard is appropriate, but how they apply it in this case is a product of distinctly different worldviews.

The principal doctrinal disagreement among the justices arises from their divergent conceptions of the least restrictive means analysis. Justice Kennedy's majority opinion in *Ashcroft II* conducts this analysis from the perspective of individual choice. In this view, if a particular household has the ability to use technology to screen out unwanted expression, such voluntary action may be an adequate alternative to the use of legal sanctions that apply across the board. This philosophy was articulated in *Playboy Entertainment Group* (with the same 5–4 split), where Justice Kennedy emphasized that the purpose of the First Amendment was to permit citizens ''to seek out or reject certain ideas or influences without Government interference or control.''[131] Technology provides the means by which individuals may make such choices, and so long as they can be made effectively, there is no need for government intervention.[132]

Justice Breyer's position represents a more collectivist approach to the least restrictive means analysis. In this view, it does not matter that any individual may take steps that effectively protect his or her household from unwanted communications. In the real world it is understood that not everyone will make such choices, so that a voluntary approach is really a ''magic solution'' and not a true alternative to regulation. Accordingly, the analysis downplays individual choice and assesses the adequacy of alternatives from the

[129]354 U.S. 476 (1957).

[130]*Id.* at 484.

[131]United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 818 (2000).

[132]*Id.* at 817–18.

perspective of society as a whole. After defining any existing use of filters as a status quo baseline, it asks whether the government still has a compelling interest and if the regulation at issue would provide some incremental benefit. If the answer is yes, then the regulation should be allowed.

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

For the majority, filters can be an effective alternative to the extent they can help effectuate individual choices. Justice Kennedy described filters as imposing ''selective restrictions on speech at the receiving end, not universal restrictions at the source,'' and he noted that adults without children can access speech without restriction and that parents can turn off filters whenever they want. He added that filters do not ''condemn as criminal any category of speech'' and that technology can be configured to reach more of the internet, and more websites, than does the law. A significant virtue of this option, according to the majority, is that the use of filters is voluntary, not mandatory.[133]

What to the majority is a virtue is the principal vice of filtering software according to Justice Breyer. The fact that it is not required for all users means that filters cannot be considered as an alternative ''legislative'' approach to the problem. For the same reason, his main critique of the effectiveness of filtering software is that it fails to duplicate legal controls. That is, it does not restrict all expression that would legally be considered ''harmful to minors'' and blocks additional material that would not violate the law.[134] This complaint about filters is revealing, for it shows Justice Breyer's interest in filters is in evaluating their use as a proxy for law, and not as a tool that can empower users and enhance individual choice. Indeed,

[133]Ashcroft v. ACLU II, 124 S. Ct. 2783, 2792 (2004).

[134]*Id*. at 2801–02 (Breyer, J., dissenting).

parents may well want to select filtering software that blocks far more than the law would restrict because they believe that the chosen product is more tailored to their personal philosophies and values. In such a case, inconsistency with the law would make the filter more effective, not less, because it better approximates the personal preferences of the user. Justice Breyer's additional complaint that filters ''cost money'' fails to recognize that most major Internet Service Providers offer filtering as a feature of their service and that additional filtering software and other user empowerment options are available from numerous sources online.[135]

The communitarian versus individualist perspective permeates other issues on which the majority and dissenters disagree as well. For example, the majority's conclusion that COPA is ineffective because of the existence of foreign websites is predicated on the point of view of the individual user: Even if the law restricted most sexually-oriented websites, any particular child could readily gain access to one or more of the many thousands of offshore sites that COPA cannot reach.[136] Thus, as a practical matter, the law has little if any effect. But Justice Breyer based his conclusion regarding the positive impact of COPA on an analysis of the World Wide Web in the aggregate. He assumed that COPA's impact would be significant because ''most'' sexually-oriented websites may be subject to the law,[137] even if individuals may still find ''harmful to minors'' material.

Finally, the opposing evaluations of COPA's censorial effect are colored by the justices' views regarding the extent to which the First Amendment is intended to protect individual rights as opposed to more general societal interests. The majority's effort to keep ''the starch in the standards'' was explained by its awareness that content restrictions ''have the constant potential to be a repressive force in the lives and thoughts of a free people.''[138] As Justice Kennedy wrote in *Playboy Entertainment Group*, ''[w]e cannot be influenced . . . by the perception that the regulation in question is not a major one because the speech is not very important. The history of the law of

[135]See, e.g., www.getnetwise.org.

[136]Ashcroft II, 124 S. Ct. at 2792.

[137]*Id*. at 2803 (Breyer, J., dissenting).

[138]*Id*. at 2788.

free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly.''[139] The central question for First Amendment purposes is one of individual autonomy, for any evaluation of the relative value of expression is a judgment ''for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.''[140] Justice Breyer, on the other hand, wrote that the impact of COPA in the aggregate would be ''modest'' and that the burdens on speech are acceptable because only a small subset of publishers would be affected and the expression to be restricted of limited value.[141]

Apart from its strikingly different approach toward the nature of First Amendment protections, Justice Breyer's dissent is remarkable for its unusual reading of the ''harmful to minors'' standard. His effort to bring a heightened level of precision and to narrow the variable obscenity standard is a worthy goal but the analysis is difficult to follow. For example, Justice Breyer asserts that ''harmful to minors'' material is virtually indistinguishable from adult obscenity as defined in *Miller* (which relates only to patently offensive depictions of hard core sexual conduct), yet fails to reconcile this conclusion with the statutory language that provides that the lewd exhibition of a ''post-pubescent female breast''[142] can violate COPA. While he acknowledges the tension between the standard for obscenity and COPA's definitions, which provide that a work must be evaluated as a whole ''with respect to minors'' and serious merit evaluated ''for minors,''[143] his conclusion that these limiting terms have no effect is not logical.

Justice Breyer recites a litany of edgy but meritorious examples from the record (e.g., Robert Mapplethorpe photographs and discussions of prison rape) that he asserts do not even fall into the ''borderline'' between protected and nonprotected speech, but provides no supporting analysis for his conclusion that these examples ''fall outside that class.''[144] Quite to the contrary, Chief Justice Rehnquist and

[139]United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 826 (2000).

[140]*Id*. at 818.

[141]Ashcroft II, 124 S. Ct. at 2801 (Breyer, J., dissenting).

[142]*Id*. at 2798 (emphasis in original).

[143]*Id*. at 2799.

[144]*Id*. at 2800.

Justice O'Connor, who joined in Justice Breyer's dissent, wrote in *Reno* that ''discussions about prison rape or nude art . . . do not necessarily have any such [redeeming] value for minors.''[145] Justice Breyer's conclusion runs contrary to experience as well, since an art gallery was prosecuted in the past for the display of Mapplethorpe photographs and other controversies have arisen with respect to controversial art.[146] The tenuous nature of this analysis is compounded by the fact that he appears to equate terms such as ''commercial pornography'' with ''obscenity'' and asserts incorrectly that material appealing to a ''prurient interest'' is that which ''seeks a sexual response.''[147] Contrary to this characterization, the Court defines ''prurient interest'' as relating to a shameful or morbid interest in sex.[148] Material that evokes a ''normal'' or ''healthy'' interest in sex, even among adolescents, is not considered ''harmful to minors.''[149] As a result, Justice Breyer's conclusion that COPA would impose only modest burdens on a narrow category of speech is dubious.

V. Conclusion

On remand, the continuing litigation over COPA will not be confined to the narrow question of whether filtering software is effective in light of technological advances. When it reaches the merits of this constitutional challenge, the district court will be called upon to resolve the full range of First Amendment issues that were raised

[145]Reno v. ACLU, 521 U.S. 844, 896 (1997) (O'Connor, J., dissenting in part).

[146]See Cincinnati v. Contemporary Arts Center, 566 N.E.2d 214 (Ohio Mun. 1990). See also Brooklyn Institute of Arts & Sciences v. New York, 64 F. Supp. 2d 184 (E.D.N.Y 1999).

[147]Ashcroft II, 124 S. Ct. at 2799–2800 (Breyer, J., dissenting).

[148]Miller v. California, 413 U.S. 15, 24 (1973).

[149]E.g., American Booksellers Association, Inc. v. McAuliffe, 533 F. Supp. 50 (N.D. Ga. 1981) (statute prohibiting sale or display to minors of material containing nude figures held overbroad); Allied Artists Pictures Corporation v. Alford, 410 F. Supp. 1348 (W.D. Tenn. 1976) (ordinance prohibiting exposing juveniles to offensive language held invalid); American Booksellers Association. v. Superior Court, 129 Cal. App. 3d 197 (Cal. Ct. App. 1982) (photographs with a primary purpose of causing sexual arousal held not to be harmful to minors); Calderon v. Buffalo, 402 N.Y.S.2d 685 (N.Y. App. Div. 1978) (ordinance restricting sales to juveniles held to be overbroad); Oregon v. Frink, 653 P.2d 553 (Ore. 1982) (statute prohibiting dissemination of nudity to minors is overly broad).

when the case was first filed, including how to define community standards in the online context. Although the basic First Amendment principles upon which the case was remanded have been endorsed by a solid majority of justices, the margin of support is slim. And the differences between those in the current majority and minority camps go to the central meaning of the First Amendment. The eventual decision may have a significant effect on how the First Amendment applies to the internet, how strict scrutiny is applied, and how the obscenity and ''harmful to minors'' doctrines are defined. In short, the significance of this case to First Amendment law has only increased in the six years it has been in litigation. Much can happen as the case makes its way through the lower courts, including a potential change in the composition of the Supreme Court.