University of Florida Journal of Law & Public Policy

Volume 17 | Issue 1 Article 6

2006

Constitutional Law: The First Amendment's Effects on Congressional Efforts to Protect Minors from Obscenity on the Internet

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CASE COMMENT

CONSTITUTIONAL LAW: THE FIRST AMENDMENT'S EFFECTS ON CONGRESSIONAL EFFORTS TO PROTECT MINORS FROM OBSCENITY ON THE INTERNET*

Ashcroft v. ACLU, 124 S. Ct. 2783 (2004)

*Jonathan D. Wallace***

The Petitioner[1] passed the Child Online Protection Act (COPA), which criminalized posting material harmful to minors on the World Wide Web absent compliance with enumerated age verification procedures.[2] Respondents[3] alleged that COPA was unconstitutional because it unnecessarily restricted constitutionally protected speech for adults.[4] Respondents filed suit in the Federal District Court for the Eastern District of Pennsylvania seeking an injunction to prohibit enforcement of the Act.[5] The District Court found that COPA would burden some protected speech and Petitioner was unlikely to prove COPA was the least restrictive means available to achieve Congress's goal of shielding minors from harmful materials over the Internet.[6] Thus, the District Court granted Respondent's request for a preliminary injunction.[7] Petitioner appealed and the U.S. Court of Appeals for the Third Circuit affirmed.[8] The U.S. Supreme Court

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* Editor's Note: This work received the Spring 2005 Huber C. Hurst Award for the Outstanding Case Comment.

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1. Petitioner was Attorney General Ashcroft, acting on behalf of the United States Congress. Ashcroft v. ACLU, 124 S. Ct. 2783 (2004).

2. *See* 47 U.S.C.A. § 231 (2005).

3. Respondents included the American Civil Liberties Union (ACLU) and organizations comprised of Internet content providers, as well as other parties concerned with protecting free speech. *Ashcroft*, 124 S. Ct. at 2783, 2790.

4. *Id.* at 2791.

5. *Id.* at 2790.

6. *Id.*

7. *Id.*

8. *Ashcroft*, 124 S. Ct. at 2790. The Court of Appeals concluded that the phrase "community standards" rendered the statute unconstitutionally overbroad. *Id.*

granted certiorari.[9] The Supreme Court reversed and remanded the case to the Appellate Court,[10] which again affirmed the District Court's preliminary injunction.[11] The U.S. Supreme Court granted certiorari once again.[12] The Supreme Court affirmed and HELD, that the District Court did not abuse its discretion in granting the preliminary injunction because Petitioner failed to rebut Respondent's argument that proposed less restrictive alternatives were as effective as COPA.[13]

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[14] This protection ensures the free flow of expression and ideas.[15] The framers held this free flow essential to the functioning of a democratic society.[16] However, not all speech enjoys absolute constitutional protection.[17] Precedent suggests that the Supreme Court has always inherently assumed that obscenity is a category of speech unprotected by the First Amendment.[18] The Court confirmed this assumption with an explicit ruling in *Roth v. United States*.[19]

In *Roth* the U.S. Supreme Court addressed the question of whether a federal obscenity statute used to convict a business owner for mailing obscene advertisements and books violated the First Amendment.[20] The Supreme Court held that First Amendment protection does not apply to obscenity.[21] Thus, the Court found that obscene speech is subject to

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9. *Id.*

10. *Id.* The U.S. Supreme Court held that the community standards language alone did not make COPA overbroad. *Id.*

11. *Id.* The U.S. Court of Appeals held that COPA was not narrowly tailored to a compelling state interest, was overbroad, and was not the least restrictive alternative available to prevent minors from accessing harmful material on the Internet. *Id.*

12. *Id.*

13. *Ashcroft*, 124 S. Ct. at 2795. The Court also recognized other practical reasons to affirm the injunction. *Id.* at 2794-95. First, the potential harms of reversing the injunction outweighed those of affirming it by mistake. *Id.* at 2794. Second, serious evidential disputes remained. *See id.* Third, technological advances important to a proper analysis of the constitutional question had developed in the five years since the district court heard the case. *Id.* at 2794-95. Finally, since the commencement of litigation, two new statutes had been passed that may have been less restrictive alternatives to COPA. *Ashcroft*, 124 S. Ct. at 2795 (referring to 18 U.S.C.A. § 2252B and 47 U.S.C.A. § 941 (2004)).

14. U.S. CONST. amend. I, cl. 3.

15. *See* Roth v. United States, 354 U.S. 476, 484-85 (1957).

16. *See id.*

17. *See id.* at 484-85.

18. *See id.* at 481.

19. *Id.* at 485.

20. *Roth*, 354 U.S. at 479-81.

21. *Id.* at 485.

regulation.[22] Justice Brennan reasoned that obscenity completely lacked the redeeming social value the First Amendment sought to protect and that the interests of order and morality clearly outweighed any possible benefit derived from obscenity.[23]

The Court then rejected a standard that evaluated obscenity simply by the effect of an isolated passage on the most susceptible persons.[24] Instead, the Court ruled that obscenity must be judged by the effects the material as a whole had on an average person's prurient interest, applying contemporary community standards.[25] Petitioner did not challenge the finding that the mailings were obscene, but rather the constitutionality of the statute criminalizing distribution of such mailings.[26] Thus, the Court affirmed Petitioner's conviction.[27]

With *Roth* as precedent, the Court continued to recognize obscenity as unprotected speech.[28] However, sixteen years of uncertainty regarding what constitutes legally obscene material forced the Court to formulate a more concrete definition in *Miller v. California.*[29] In *Miller*, the petitioner was convicted of violating a California obscenity statute because he knowingly distributed obscene advertisements through the mail.[30] The petitioner challenged the constitutionality of the state statute, which the California courts interpreted as establishing a notion of statewide "contemporary community standards" to determine whether the materials he distributed were obscene.[31]

On appeal, the Supreme Court ruled that speech would be considered obscene if it met three requirements.[32] First, the material as a whole must appeal to a reasonable person's prurient interest, applying contemporary community standards.[33] Second, the material must depict or describe, in a

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22. *Id.* at 488.

23. *See id.* at 485 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)). Obscenity was defined as "material which deals with sex in a manner appealing to prurient interest." *Id.* at 487.

24. *See id.* 488-90.

25. *See Roth*, 354 U.S. at 489. Prurient describes "material having a tendency to excite lustful thoughts." *Id. at* 488 n.20.

26. *Id.* at 479-80.

27. *Id.* at 494.

28. *See, e.g.*, Miller v. California, 413 U.S. 15, 23, 36 (1973).

29. *See id.* at 29. The Court described the history of obscenity regulation as problematic, tortured, and as a strain on the courts. *See id.* at 20, 29.

30. *See id.* at 22, 24, 29.

31. *See* Brief of Petitioner at 3, Miller v. California, 413 U.S. 15 (1973) (No. 70-73).

32. *See Miller*, 413 U.S. at 22, 29.

33. *Id.*

patently offensive way, sexual conduct as defined by state law.[34] Third, the material, taken as a whole, must lack serious literary, artistic, political, or scientific value.[35] Concluding that the Appellant was originally convicted under a more limited understanding of obscenity, the Court vacated and remanded the case for further proceedings consistent with the new obscenity standard.[36]

The U.S. Supreme Court has continued to apply the *Miller* standard to classify obscenity.[37] In *Reno* v. *American Civil Liberties Union*, Appellees questioned the constitutionality of two key provisions of the Communications Decency Act (CDA) by requesting an injunction.[38] One provision criminalized knowingly transmitting obscene or indecent messages to minors using the Internet.[39] The other provision prohibited using the Internet to knowingly send or display patently offensive messages to minors that depict or describe sexual activities or organs.[40] The Supreme Court again acknowledged the prohibition of obscene speech.[41] However, the CDA was overbroad due to ambiguous language that encroached upon protected speech.[42] The Court found that the vague terms "indecent" and "patently offensive" could ultimately silence some speakers whose message would be constitutionally protected.[43]

As a matter of policy, Justice Stevens was not willing to limit adults to speech fit for minors.[44] He reasoned that any legislation that encumbered protected speech was presumptively invalid.[45] However, the government could rebut this presumption by proving that the legislation was narrowly tailored to serve a compelling state interest.[46] The government failed to rebut Appellee's contention that less restrictive alternatives would be as

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34. *Id.*

35. *Id.*

36. *See id.* at 36-37.

37. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 872-74 (1997).

38. *Id.* at 849.

39. Communications Decency Act (CDA), 47 U.S.C.A. § 223(a) (1994); *see also Reno*, 521 U.S. at 859.

40. U.S.C.A. § 223(d). The statute listed several affirmative defenses. 47 U.S.C.A. § 223(e). Such defenses included good faith efforts to restrict access to only adults by requiring credit card verification or adult identification codes before transmitting targeted material. *Id.* § 223(e)(5)(A).

41. *See Reno*, 521 U.S. at 882-83 (applying the statute's severability clause to uphold the CDA insofar as it regulated obscenity).

42. *See id.* at 870-72.

43. *See id.* at 874, 877.

44. *See id.* at 875.

45. *See id.* at 882.

46. *See Reno*, 521 U.S. at 879.

effective as the CDA.[47] Thus, the Supreme Court affirmed the District Court's injunction.[48] Even with the government's strong interest in protecting minors, the burden imposed on protected speech could not be justified if it could be avoided by drafting the statute more carefully.[49]

In the instant case, the U.S. Supreme Court continued its application of the *Miller* obscenity standard and again held that any government regulation of non-obscene material must be subjected to the most exacting level of review.[50] COPA was Congress's response to the *Reno* decision.[51] The Act criminalized the commercial posting of material harmful to minors on the Internet unless one took precautionary steps to prevent minors from accessing such material.[52] The instant Court accepted the District Court's finding that COPA burdened some protected speech.[53] Justice Kennedy reasoned that to ensure protected speech was restricted no further than necessary to achieve the compelling goal of protecting minors from harmful material, the government bore the burden of proving that any proposed alternatives would be less effective than COPA.[54]

The instant Court concluded that alternatives proposed by Respondent would be less restrictive on protected speech and were likely a more effective means of achieving Congress's goal.[55] Accordingly, the preliminary injunction against the enforcement of COPA was affirmed upon the instant Court's finding that the District Court's decision was not an abuse of discretion.[56]

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47. *See id.*

48. *Id.* at 885.

49. *See id.* at 874.

50. *See* Ashcroft v. ACLU, 124 S. Ct. 2783, 2791 (2004).

51. *Id.* at 2789.

52. *See id.* Those in compliance with precautionary procedures were provided an affirmative defense. *Id.* Such preventive procedures were similar to the provisions present in *Reno v. ACLU*. *See also supra* note 39.

53. *See Ashcroft*, 124 S. Ct. at 2791. However, Justice Scalia concluded that the speech burdened by COPA enjoyed no constitutional protection and could have been banned entirely. *See id.* at 2797 (Scalia, J., dissenting).

54. *See id.* at 2791.

55. *See id.* at 2794. The Supreme Court concentrated on blocking and filtering software as less restrictive alternatives to COPA. *See id.* at 2792-94. The Government argued that such options were not available alternatives because Congress may not mandate their use. *See id.* at 2793. The Supreme Court rejected this argument. *See id.* The Government's claim carried little weight because the Court reasoned that Congress could encourage software implementation and promote software development by offering strong incentives to cooperative parties. *See id.*

56. *Id.* at 2795.

In his concurrence, Justice Stevens emphasized how criminal legislation was "an inappropriate means to regulate [obscenity]."[57] He argued that COPA was overly harsh because those in violation of the statute would be subject to imprisonment and large fines.[58] Also, the Act's affirmative defenses would only force those prosecuted to bear the burden of proving compliance.[59] Finally, Justice Stevens reasoned that the blurred line separating the obscene from the non-obscene makes criminalizing obscenity inappropriate.[60]

Justice Breyer's dissent recognized that COPA only regulated legally obscene material and very little more.[61] Justice Breyer pointed out that COPA defined material harmful to minors with nearly the exact language the U.S. Supreme Court used in the *Miller* obscenity standard.[62] He noted the only important difference between the two definitions was that the first two prongs of the COPA definition of "harmful to minors" included the phrase "with respect to minors" and the third included the phrase "for

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57. *See id.* at 2796 (Stevens, J., concurring).

58. *See Ashcroft*, 124 S. Ct. at 2796 (Stevens, J., concurring).

59. *See id.* (Stevens, J., concurring).

60. *Id.* (Stevens, J., concurring).

61. *See id.* (Breyer, J., dissenting).

62. *See id.* 2798-99 (Breyer, J., dissenting). The *Miller* obscenity standard defines material to be legally obscene if:

> (a) . . . the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) . . . the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) . . . the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 2798 (Breyer, J., dissenting) (quoting Miller v. California, 413 U.S. 15, 24 (1973)). COPA defines material to be within its scope of regulation if:

> (A) the average person, applying contemporary community standards, would find, taking the material as a whole *and with respect to minors*, [that the material] is designed to appeal to, or is designed to pander to, the prurient interest; (B)[the material] 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) [the material] taken as a whole, lacks Serious literary, artistic, political, or scientific value *for minors*.

Child Online Protection Act (COPA), 47 U.S.C.A. §231 (2005) (emphasis added).

minors."[63] Justice Breyer determined that this language discrepancy only slightly restricted some speech that is obscene to minors but not to adults.[64] Arguing that the alternatives proposed by Respondent were more restrictive than the small burden imposed on protected speech, Justice Breyer claimed COPA was sufficiently narrowly tailored to overcome the government's burden.[65]

By affirming the preliminary injunction prohibiting the enforcement of COPA,[66] the U.S. Supreme Court acknowledged the significance of the First Amendment's mission to protect all speech with any redeeming social value.[67] The Supreme Court granted the same protection to the borderline obscene as it would to any other fundamental right.[68] However, the Court's decision severely hindered Congress's ability to regulate material harmful to minors over the Internet,[69] especially when Congress's choice for regulation is criminal legislation.[70] Ultimately, the decision leaves a lingering question concerning future congressional attempts to protect minors from obscenity on the Internet.

The instant case suggests that as long as the U.S. Supreme Court chooses to use the *Miller* standard to define obscenity, Congress's attempts to regulate material specifically obscene to minors will likely encroach upon protected speech.[71] The *Reno* decision sent the message to Congress that the next time it tried to regulate obscenity on the Internet, it must draft the legislation carefully so as not to infringe upon protected speech.[72] Congress relied on this decision and drafted COPA in the most cautious

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63. *See Ashcroft*, 124 S. Ct. at 2799 (Breyer, J., dissenting) (emphasizing Congress's efforts to match the material COPA regulated to the interests of minors). However, COPA is also different from the *Miller* obscenity standard in that it defines sexually offensive conduct, where the *Miller* standard left this definition open to state interpretation. *See Miller v. California*, 413 U.S. 15, 24 (1973).

64. *See Ashcroft*, 124 S. Ct. at 2799 (Breyer, J., dissenting) (stating that the statute's overbreadth did not extend beyond borderline cases).

65. *See id.* at 2804 (Breyer, J., dissenting).

66. *Id.* at 2795.

67. *See supra* text accompanying notes 14-15.

68. *See Ashcroft*, 124 S. Ct. at 2791.

69. *See supra* text accompanying notes 49-50.

70. *See Ashcroft*, 124 S. Ct. at 2796 (Stevens, J., concurring).

71. *See id.* at 2798-99 (Breyer, J., dissenting); *see also* Reno v. ACLU, 521 U.S. 844, 882 (1997).

72. *See Reno*, 521 U.S. at 874 (stating that "[t]he burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective" in achieving the congressional purpose); *see also Ashcroft*, 124 S. Ct. at 2788-89.

way possible.[73] Congress defined what it was attempting to regulate with nearly the exact language it knew courts would use to judge the statute's constitutionality in the likely event of a constitutional challenge.[74] However, to be sure the legislation protected the particular interests of minors, Congress included the phrases "with respect to minors" and "for minors" in the definition of the material being regulated.[75]

This slight variation in language resulted in COPA regulating not the legally obscene but rather what was obscene to minors.[76] The *Miller* obscenity standard requires that material appeal to a reasonable person's prurient interest.[77] However, COPA regulated material that appealed specifically to a minor's prurient interest.[78] Although most material that appeals to the prurient interest of a minor also appeals to the prurient interests of an adult,[79] the burden placed upon the small amount of material obscene to minors, but not to adults, caused COPA to intrude into material not defined as obscenity under the *Miller* standard.[80] Thus, the instant case demonstrates that if courts continue to apply the *Miller* standard to judge obscenity, any regulation of material obscene specifically to minors will violate some small amount of constitutionally protected speech, regardless of Congress's best efforts to avoid such violation.[81]

Whether such encroachments on protected speech will be unconstitutional is very much determined by what level of protection the

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73. *See Ashcroft*, 124 S. Ct. at 2805 (Breyer, J., dissenting).

74. *See supra* note 60. The Supreme Court invalidated the CDA in the *Reno* decision nearly a year before Congress passed COPA. *Reno*, 521 U.S. at 885. Therefore, at the time they were drafting COPA, Congress knew precisely what standard of obscenity the Court would be likely to use if the constitutionality of COPA should be questioned in the future. *See Ashcroft*, 124 S. Ct. at 2805 (Breyer, J., dissenting).

75. *See supra* note 60.

76. *See Ashcroft*, 124 S. Ct. at 2799-2800 (Breyer, J., dissenting).

77. This part of the *Miller* obscenity standard requires that "(a) . . . the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . ." Miller v. California, 413 U.S. 15, 24 (1973).

78. *See Ashcroft*, 124 S. Ct. at 2799-2800 (Breyer, J., dissenting).

79. Justice Breyer argues that very little material appeals to a child's prurient interest that does not also appeal to an adult. *See id.* at 2799 (Breyer, J., dissenting). Justice Breyer even suggests that the scope of what appeals to an adult's prurient interest may be more expansive than that of a minor because some pre-pubescent minors may not yet sexually respond. *See id.* (Breyer, J., dissenting).

80. *See id.* at 2800 (Breyer, J., dissenting). Justice Breyer refers to this area as borderline obscene material. *Id.* (Breyer, J., dissenting).

81. *See id.* (Breyer, J., dissenting).

U.S. Supreme Court decides to assign to the burdened speech.[82] The instant Court continues the established practice of subjecting the government to the highest level of scrutiny when legislation regulates speech protected by the First Amendment.[83] If the Court implements this standard of review in the future, it is likely to continue to invalidate statutes like COPA.[84] Although laws protecting minors from harmful material on the Internet are likely to serve a compelling state interest,[85] Congress's challenge remains to narrowly tailor legislation specifically to meet this interest.[86] This is a very tough burden to overcome.[87] The Supreme Court will automatically presume that any statute restricting protected speech is invalid.[88] Then the government is burdened with disproving the assumption that the alternatives proposed by a challenger are both less restrictive on protected speech and as effective as the statute at fulfilling Congress's objective.[89]

Given this difficult task, criminal legislation will rarely be the least restrictive alternative means of protecting minors from obscenity on the Internet.[90] In American jurisprudence, criminal sanctions are the most severe form of discipline.[91] As Justice Steven's concurrence in the instant case makes clear, any effective alternative is likely to be less restrictive than criminal prosecution.[92] Thus, attempts to criminalize constitutionally protected speech subject to the most exacting level of scrutiny are likely to fail.[93]

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82. *See id.* at 2791 (applying strict scrutiny review lead to the affirmation of an injunction against COPA); *cf. id.* at 2797 (Scalia, J., dissenting) (arguing that the application of strict scrutiny by the majority was improper and applying a lesser standard of review would have lead to the injunction on COPA being lifted).

83. *See Ashcroft*, 124 S. Ct. at 2791; *see generally* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813, 816 (2000) (using strict scrutiny to declare unconstitutional a statute that required cable providers to fully block signals to sexually oriented television or limit the hours of transmission to times children were unlikely to be viewing).

84. *See Ashcroft*, 124 S. Ct. at 2791; *see also Playboy*, 529 U.S. 803 at 827; Reno v. ACLU, 521 U.S. 844, 885 (1997).

85. In *Reno*, Justice Stevens noted that the Supreme Court had repeatedly recognized the compelling governmental interest in protecting children from harmful materials. *See Reno*, 521 U.S. at 874.

86. *See Ashcroft*, 124 S. Ct. at 2791-93, 2795.

87. *See id.* at 2791-92 (discussing the Government's burden of proof).

88. *Id.*

89. *Id.*

90. *See id.* at 2796 (Stevens, J., concurring).

91. *See Ashcroft*, 124 S. Ct. at 2796 (Stevens, J., concurring).

92. *See id.* (Stevens, J., concurring).

93. *See id.* (Stevens, J., concurring).

The instant Court ultimately chose to elevate the rights of commercial pornographers and their patrons above Congress's objective of shielding American children from obscenity.[94] As the law currently stands, future congressional attempts to protect minors by criminalizing the unregulated proliferation of materials obscene specifically to minors over the Internet will likely encroach on some speech that enjoys the protection of strict scrutiny review.[95] Thus, Congress will likely continue to fail in such legislative attempts until the U.S. Supreme Court chooses to change its position on obscenity.

The Supreme Court could easily choose to exercise such power. First, the Court could choose to expand the definition of obscenity to encompass what is obscene to the most susceptible individuals.[96] Adopting this definition would allow Congress to criminalize materials specifically obscene to minors that fall within the scope of obscenity without encroaching upon protected speech. Given the historical turmoil surrounding the Supreme Court's struggle with obscenity, a different, more encompassing definition is probable.[97] Alternatively, the Supreme Court may choose to continue to apply the *Miller* obscenity standard, but lower the level of protection assigned to the burdened speech. Invalidation of legislation criminalizing protected speech would not occur nearly as often if the government action was not subjected to such a high level of scrutiny.[98] Considering the most carefully drafted legislation on point only burdens a small amount of borderline obscene speech, the Supreme Court could simply justify this downgrade of protection status in the interest of defending our children's innocence.[99]

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94. *See id.* at 2804-06 (Breyer, J., dissenting).

95. *See supra* text accompanying notes 73-92.

96. *Contra* Reno v. ACLU, 521 U.S. 844,875 (1997) (refusing to limit adults to speech fit for minors).

97. *See supra* note 28 and accompanying text.

98. *See supra* text accompanying notes 81-92.

99. *See* Ashcroft v. ACLU, 124 S. Ct. 2783, 2798-2800, 2804-06 (2004) (Breyer, J., dissenting).