PLAY IT AGAIN UNCLE SAM: ANOTHER ATTEMPT BY CONGRESS TO REGULATE INTERNET CONTENT. HOW WILL THEY FARE THIS TIME?

Maureen E. Browne

I. INTRODUCTION

Researching the President of the United States on the Internet, a fourth grade student types in www.whitehouse.com on her home computer, assuming she will be taken to the official government White House website. Instead, the unsuspecting child is whisked to a world of sexually explicit material and adult pornography. The Internet also enables many children to communicate with strangers via e-mail, chat rooms, or instant messaging. Many of these strangers may turn out to be child predators, and their contact with an unknowing child can lead to unwanted sexual solicitation. Incidents such as these, backed by statistics, studies, and personal testimony, reveal that every day, children surfing the Internet are being exposed to harmful and inappropriate material. This exposure, coupled with the fact that Internet use has become part of a child’s daily routine, has prompted Congress to act—to safeguard children from these online dangers.

So far, however, congressional efforts to protect children online, which began in 1996, have proven unsuccessful. Courts have repeatedly rendered federal legislation that regulates Internet content unconstitutional. Ultimately, each unsuccessful attempt has strengthened Congress’ resolve to craft new legislation in this policy area that addresses the courts’ concerns.

In its most recent attempt, the Dot Kids Implementation and Efficiency Act of 2002, Congress has enacted the narrowest legislation to date. Under this law, a new secondary domain site will be created exclusively for children. The site, otherwise known as a “cyber playground” for children on the Internet, will be established by the government via a third party registry. Once again, however, in enacting this legislation, the government has established a content-based regulation that will not survive the highest level of First Amendment scrutiny.

The Supreme Court has recognized a compelling need to protect children from harmful materials but, as this Comment will discuss, Congress’ attempts to regulate such content on the Internet have not fared well. Therefore, legal analysis of congressional activity in this area is important as we go forward, and the Internet begins to play an even greater role than it does today in children’s educational and social lives.

This Comment will analyze whether the recently enacted Dot Kids Implementation and Efficiency Act of 2002 is constitutional under the First Amendment. It is not the position of this Comment to determine from a moral or political standpoint whether or not the Internet should be regulated. This Comment assumes that it is Congress’ intent to do so, and addresses whether the

1 Website dedicated to being the “worldwide leader in adult and political entertainment,” at http://www.whitehouse.com (last visited Sept. 8, 2003).
3 The first bill enacted by Congress to protect children from harmful material online was the Communications De-
legal means that Congress has chosen to accomplish this end are constitutional.

Part II of this Comment will address Internet use among children, focusing on the harmful material they are being exposed to online. Part III defines freedom of speech protections and explains how each medium of expression presents special First Amendment problems in regulation. Parts IV, V, and VI explore Congress' first attempts at Internet content regulation, and how they have fared in the courts. Part VII analyzes Congress' most recent attempt at regulation in this area and demonstrates that the statute is unconstitutional. Finally, Part VIII of this Comment provides some suggestions on how best to protect children in the context of this unique, global, and revolutionary medium, the Internet.

II. THE INTERNET TODAY

First baptized "ARPANET," the Internet began as a United States military-led effort to design a network that would allow computers operated by the military, defense contractors, and universities involved in defense-related research to communicate with one another, even if parts of the network were damaged during war. From its primitive beginnings and limited use, the Internet has grown to become a common fixture in the everyday lives of millions of Americans across the United States ("U.S."). In fact, as a U.S. Department of Commerce report on Internet use states, "few technologies have spread as quickly." Today, approximately 143 million Americans, which translates into more than half of the nation, are using the Internet. This number, estimated by the Department of Commerce in September 2001, represents an increase of 26.5 million people in just thirteen months. And, while the Internet may have had its beginnings in the U.S., the widespread use of it is not confined to our nation's borders. The Commerce Department reports that Internet use is on the rise in countries around the world; it is a "global phenomenon."12

A. Children and the Internet

While Internet use is increasing for people in all age groups, children and teenagers use the Internet more than any other group. This phenomenon is partly attributed to Internet access at schools. More and more, children are using the Internet as an aid in completing homework, researching information, and as a form of entertainment—playing games, using e-mail, engaging in chat rooms, listening to the radio, or watching movies.14

Because children are so adept at using computers and accessing information on the Internet, parents and caregivers have expressed great concern about children being exposed to inappropriate material on the Internet. In fact, for the first time in its history, the September 2001 survey conducted by the Department of Commerce asked respondents whether they were more concerned about exposure of children to inappropriate material on the Internet or on television. A majority of respondents, over 68%, said that they were more concerned about their children's exposure to unsafe or harmful material on the Internet than on television.17

However, while concerns about harmful or inappropriate material on the Internet continue to exist, and have likely increased over the years, it seems that Internet use, especially among children and young adults, has not waned. Given the continued high level of use, congressional leaders must consider what can be done, within the confines of the Constitution, to keep children safe

---

9 U.S. DEPT. OF COMMERCE, supra note 2, at 1.
10 Id. at 4.
11 Id.
12 Id. at 5.
13 Id. at 1.
14 Id. at 52-53.
16 U.S. DEPT. OF COMMERCE, supra note 2, at 53.
17 Id.
from the inappropriate and harmful material that is placed in this most public and accessible forum, the Internet. It is important to address two key questions: just how much inappropriate material is out there, and how accessible is it to children.

B. Sexually Explicit and Harmful Material on the Internet

While the Internet has become a major research and communications tool to enhance children’s learning and increase their knowledge, it is also host to a wealth of sexually explicit material—from the “modestly titillating to the hardest-core.”18 Surfing the Internet, children are inadvertently uncovering adult material online, and even more threatening than that, they are being exposed to potential predation and sexual solicitation.19 In testimony before the Senate Commerce Committee in September 2002, Ruben Rodriguez of the National Center for Missing & Exploited Children (“NCMEC”) testified that based on a study funded by NCMEC, “one in four youth encountered unwanted pornography online, and one in five youth were sexually solicited online in the past year.”20

It is true that much of the pornography and sexually offensive material online is deliberately accessed by Internet users.21 However, even more of it can be uncovered inadvertently. Publishers of such material routinely use “copycat URLs” to take advantage of typographical errors and innocent mistakes.22 In doing so, children can mistakenly access these inappropriate sites. For instance, children attempting to find the official White House website will unintentionally access a pornographic site if they type in www.whitehouse.com rather than www.whitehouse.gov, the official government site.23 In addition, simple searches using innocuous terms such as toys, dollhouses, girls, boys, pets, teen, cheerleader, actress, beanie babies, and doggy can lead children to inappropriate websites.24

Not surprisingly, the potential harm to children caused by adult material online and the fear of children being solicited by sexual predators over the Internet has not only alarmed parents and caregivers, but law enforcement officials and legislators as well. This concern has translated into several attempts by Congress to enact legislation regulating content on the Internet. Congress’ first attempt at regulation came in 1996 with the Communications Decency Act.25 Even after the Supreme Court declared this Act unconstitutional, congressional efforts to protect children online have continued.26 Most recently, Congress enacted the Dot Kids Implementation and Efficiency Act27 in an effort to provide a “cyber-playground”28 for children on the Internet. The following sections will address the constitutionality of these legislative efforts to protect children by regulating Internet content.

III. FREEDOM OF SPEECH PROTECTIONS

Freedom of speech is a fundamental right.29 As such, the government cannot regulate the content of protected speech.30 However, this right is not always absolute.31 A presumptively invalid content-based regulation of protected speech32 can overcome the presumption of unconstitutionality if it meets the strict scrutiny standard established

---

19 See generally CRIMES AGAINST CHILDREN RESEARCH CTR., NATIONAL CTR. FOR MISSING & EXPLOITED CHILDREN, ONLINE VICTIMIZATION: A REPORT ON THE NATION’S YOUTH (2000) [hereinafter CRIMES AGAINST CHILDREN RESEARCH CTR.] (providing the first scientifically-based data on the risks faced by children on the Internet).
22 Id.
23 Id.
24 Id. at 11.
28 MacPherson, supra note 5, at A17 (dubbing a safe place for children on the Internet a "cyber-playground").
29 The First Amendment to the U.S. Constitution provides: “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I.
30 See R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (holding that the First Amendment did not permit the government to impose prohibitions on a speaker’s viewpoint).
31 See, e.g., Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) ("[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances.").
32 See R.A.V., 505 U.S. at 391.
by the Supreme Court.\textsuperscript{33} Under strict scrutiny, the regulation must be justified by a compelling governmental interest, must be narrowly tailored, and must be the least restrictive means to effectuate that interest.\textsuperscript{34}

Adhering to a strict scrutiny standard, if a court finds that there is a compelling governmental interest in enacting the legislation, it will then inquire whether the content-based regulation is narrowly tailored. This can be determined by looking to see if the statute sweeps too broadly, meaning it prohibits more than what is constitutionally allowed; or, if the statute is vague, meaning the legal standards lack sufficient clarity to provide adequate guidance. If the court finds that the regulation falls into one of these categories, then it will deem the regulation unconstitutional for its failure to be narrowly tailored.

A. Medium-Specific Regulation

The Supreme Court has explained that "each medium of expression presents special First Amendment problems"\textsuperscript{35} and therefore, because of each medium’s unique characteristics, the Court has held that regulation in certain media is justified.\textsuperscript{36} In other words, the First Amendment does not prohibit all government regulation of content of protected speech; it depends on the context of the broadcast.\textsuperscript{37} While regulations in certain media are held to the Court’s highest standard, strict scrutiny, regulations in other media are held to a lower or intermediate level of scrutiny.\textsuperscript{38} For instance, print media, including newspapers and magazines, receive the highest level of First Amendment protection.\textsuperscript{39} On the other hand, traditional broadcast media, encompassing radio and television, deserve a lower level of First Amendment protection.\textsuperscript{40} The Supreme Court has rationalized a lower level of protection for traditional broadcasting for various reasons, including the history of extensive government regulation of the broadcast medium;\textsuperscript{41} the scarcity of available broadcast frequencies;\textsuperscript{42} and, the "invasive" nature of the medium.\textsuperscript{43}

For example, in FCC v. Pacifica Foundation,\textsuperscript{44} Justice Stevens writing for the Court cited specific qualities that distinguished traditional broadcasting from other media and afforded it a lower level of First Amendment protection.\textsuperscript{45} First, he noted, broadcasting has "established a uniquely pervasive presence in the lives of all Americans."\textsuperscript{46} He explained that because a broadcast enters the privacy of a home, "the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder."\textsuperscript{47} Second, Justice Stevens distinguished broadcasting because it is "uniquely accessible to children, even those too young to read."\textsuperscript{48} Children need only to turn on the radio or television and listen to be instantly impacted by the broadcast. And, as Justice Stevens explained, the government has an interest in protecting children from inappropriate messages that are easily accessible to them.\textsuperscript{49} These qualities, explained the Court, distinguish traditional broadcasting from other media and uniquely justify a less

\textsuperscript{34} See, e.g., U.S. v. Playboy Entm’t Group, Inc., 529 U.S. 803, 813 (2000) (holding that a content-based speech regulation must satisfy all three criteria; it must be narrowly tailored, promote a compelling Government interest, and the least restrictive alternative to serve the Government’s purpose).
\textsuperscript{36} Id. at 744-48.
\textsuperscript{37} Id. at 746-48.
\textsuperscript{39} Miami Herald Pub’g Co. v. Tornillo, 418 U.S. 241, 258 (1974).
\textsuperscript{40} See Red Lion Broad. Co., 395 U.S. at 386 (stating that, “Although broadcasting is clearly a medium affected by a First Amendment interest . . . differences in the characteristics of new media justify differences in the First Amendment standards applied to them.”); Pacifica Found., 438 U.S. at 759 (refining the decision in Red Lion Broad. Co.).
\textsuperscript{41} See, e.g., Red Lion Broad. Co., 395 U.S. at 400.
\textsuperscript{42} Id. at 586-390 (explaining that because the broadcast spectrum was limited, the FCC could place restrictions on broadcast licenses, including restrictions with regard to content); see also Turner Broad. System, Inc., 512 U.S. at 637-39 (finding that cable television does not have the same “scarcity” of access problems that are associated with traditional broadcast). Scarcity of access refers to the availability of spectrum space for traditional broadcasting, which is regulated by the government. This access problem is not an issue with cable television. Id.
\textsuperscript{43} Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 127-28 (1989) (contrasting a commercial telephone communication to the “invasive” nature of an “outburst on a radio broadcast”).
\textsuperscript{44} 438 U.S. 726.
\textsuperscript{45} Id. at 748-49.
\textsuperscript{46} Id. at 748.
\textsuperscript{47} Id. (citing Rowan v. Post Office Dept., 397 U.S. 728 (1970)).
\textsuperscript{48} Id. at 749.
\textsuperscript{49} Id. (citing Ginsburg v. New York, 390 U.S. 629 (1968).
standard of review for broadcast media.\textsuperscript{50}

In contrast to traditional broadcasting, the Supreme Court has applied different standards of First Amendment protection to cable television. In \textit{Turner Broadcasting System v. FCC}, the Supreme Court disagreed with the government's argument that the lesser standard of protection applied to traditional broadcasting should also be applied to cable.\textsuperscript{51} Instead, the Court applied a more intermediate level of protection to cable television because, as the Court rationalized, cable television does not suffer from the same scarcity of access problems that are associated with traditional broadcasting.\textsuperscript{52} While not a strict scrutiny standard, the standard applied to cable television was a more heightened level of First Amendment protection than traditional broadcasting's standard.\textsuperscript{53}

Most recently, the Supreme Court has ruled that cable television should enjoy the most heightened level of First Amendment protection when it comes to content-based regulations.\textsuperscript{54} In \textit{United States v. Playboy Entertainment Group}, the Court explained that there is a key difference between cable and broadcasting media in that cable systems "have the capacity to block unwanted channels on a household-by-household basis."\textsuperscript{55} This "blocking" capability, which allows viewers to bar unwanted channels that broadcast inappropriate or sexually explicit material, distinguishes cable from traditional broadcast and eliminates the concerns that Justice Stevens cited in \textit{Pacific',}\textsuperscript{56} which justified the most stringent level of scrutiny for broadcasting. The Supreme Court ultimately ruled that cable television should be on the same end of the spectrum of First Amendment protection as print media.\textsuperscript{57}

The Supreme Court has established the need to apply "differential treatment,"\textsuperscript{58} or varying standards, to different media in the First Amendment context. In explaining this treatment, the lower court in \textit{Reno v. ACLU} wrote:

"Nearly fifty years ago, Justice Jackson recognized that '[t]he moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each . . . is a law unto itself.' The Supreme Court has expressed this sentiment time and again since that date, and differential treatment of the mass media has become established First Amendment doctrine . . . . This medium-specific approach to mass communication examines the underlying technology of the communication to find the proper fit between First Amendment values and competing interests.\textsuperscript{59}"

In understanding the importance the Court places on determining the "proper fit" for different media, it is not surprising that with the advent of the Internet, the Court would invariably have to determine where the Internet belongs on the spectrum of First Amendment protection.

B. The Internet is Different than Other Media

It is almost impossible to compare the Internet to one specific medium because it incorporates numerous media—telephone, cable, traditional broadcast, and print. Because it is easily accessible and offers such a wide variety of communication and information outlets—e-mail, chat rooms, and websites, citing just a few—the Supreme Court views it as a "unique medium—known to its users as 'cyberspace'—located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet."\textsuperscript{60} As such, it allows any individual or group to publish their views and opinions online, which are immediately made available to the entire community of Internet users. In this way, one could say that "freedom of speech [has taken] a great leap forward"\textsuperscript{61} in this "unique"\textsuperscript{62} forum.

Not surprisingly, because of its distinct and novel media qualities, media-specific First Amendment standards for the Internet have not been clear from the beginning, which has made it difficult for Congress to understand its limits in regulating Internet content. Congress faced its first hurdle in its ability to regulate content with the Supreme Court's decision in \textit{Reno v. ACLU}.\textsuperscript{63}

\begin{itemize}
\item \textsuperscript{50} See id. at 748-50.
\item \textsuperscript{51} \textit{Turner Broad. System, Inc.}, 512 U.S. at 661-62 (holding that the appropriate standard to evaluate cable regulation is an intermediate level of First Amendment scrutiny).
\item \textsuperscript{52} Id. at 637-38.
\item \textsuperscript{53} Id.
\item \textsuperscript{54} \textit{Playboy Entm't Group, Inc.}, 529 U.S. at 813-14 (adopting a strict scrutiny standard for cable television).
\item \textsuperscript{55} Id. at 815.
\item \textsuperscript{56} \textit{Pacific' Found.}, 438 U.S. at 748-49.
\item \textsuperscript{57} See \textit{Playboy Entm't Group, Inc.}, 529 U.S. at 815.
\item \textsuperscript{58} \textit{ACLU} v. Reno, 929 F. Supp. 824, 873 (E.D. Pa. 1996).
\item \textsuperscript{59} Id. at 873 (quoting Kovacs v. Cooper, 336 U.S. 77 (1949)).
\item \textsuperscript{60} \textit{Reno v. ACLU}, 521 U.S. 844, 851 (1997).
\item \textsuperscript{61} Joel Sanders, \textit{The Regulation of Indecent Material Accessible to Children On the Internet: Is it Really Alright to Yell Fire In a Crowded Chat Room?}, 39 CATH. L.AW. 125, 125 (1999).
\item \textsuperscript{62} \textit{Reno v. ACLU}, 521 U.S. at 851.
\item \textsuperscript{63} 521 U.S. 844 (1997).
\end{itemize}
IV. CONGRESS' FIRST ATTEMPT AT
INTERNET CONTENT REGULATION:
COMMUNICATIONS DECENCY ACT OF
1996

In its first attempt to protect children online, Congress passed the Communications Decency Act of 1996 ("CDA"), which prohibited the knowing transmission of obscene or "indecent" messages to any recipient under the age of 18. The Act also prohibited knowingly sending over, or displaying on the Internet, certain "patently offensive" material in a manner available to individuals under the age of 18. Under the CDA, the term "patently offensive" was to be measured by "contemporary community standards."67

Even before the Act became law, free speech groups and Members of Congress on both sides of the aisle expressed concern that it was unconstitutional. Then House Speaker Newt Gingrich (R-GA) declared that the bill was "clearly a violation of the Constitution."68 Democratic Senator Patrick Leahy also made it clear that he was opposed to the government taking steps to regulate the Internet.69

These initial concerns regarding the constitutionality of the CDA were eventually realized when, a year after the legislation was enacted, the Supreme Court struck down two provisions of the CDA—the "indecent transmission" provision and the "patently offensive display" provision.70 By declaring these provisions unconstitutional for their vagueness and overbreadth,71 the Court effectively rendered the entire statute unenforceable. Only the CDA's provision prohibiting the transmission of obscene material to minors on the Internet stood, which, as noted in Reno v. ACLU, is already illegal under federal law72 because obscenity does not receive First Amendment protection.73

A. Supreme Court Establishes Strict Scrutiny
Standard for the Internet

One of the principle holdings in Reno v. ACLU established that the Internet, deemed most analogous to print media by the Supreme Court, shared none of the special factors recognized by the Court in previous cases to justify government regulation of the Internet.74 Therefore, the Court found "no basis for qualifying the level of First Amendment scrutiny" that the CDA should apply to the Internet.75 In effect, the Court ruled that the Internet deserves the highest First Amendment protection.76

As the Court explained, the factors they had cited for other media that is afforded lower level scrutiny—history of extensive government regulation; scarcity of access; and its "invasive" nature—were not present in cyberspace.77 In addressing each of these factors, Justice Stevens noted:

Neither before nor after the enactment of the CDA have the vast democratic forums of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry. Moreover, the Internet is not as 'invasive' as radio or television. The District Court specifically found that '[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident' . . . . Finally, unlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a 'scarce' expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kind . . . . As the District Court found, 'the content on the Internet is as diverse as human thought.'78

The Court, rejecting the government's argument that the Internet should receive less than strict broadcasting of obscene language over the radio, and criminalizing the transportation of obscene materials).74 See Roth v. United States, 354 U.S. 476 (1957) (establishing that obscenity is not protected under the First Amendment and defining obscenity under a three-part conjunctive test). See also Chaplinsky, 315 U.S. at 571-72 (1942).
75 Reno v. ACLU, 521 U.S. at 870.
76 Id.
77 See id. at 868-70 (affirming the lower court's ruling and holding that the "most stringent review" of the CDA's provisions are necessary).
78 Id. at 868-69.
79 Id. at 868-70 (quoting from ACLU v. Reno, 929 F. Supp. 824, 842-44 (E.D. Pa. 1996)).
scrutiny review, upheld the lower court’s ruling, which concluded “that the Internet—as ‘the most participatory form of mass speech yet developed,’ is entitled to ‘the highest protection from governmental intrusion.’” \(^{81}\)

B. Applying the Strict Scrutiny Standard to the CDA

Applying strict scrutiny to the two challenged provisions of the Communications Decency Act, Sections 231(a) and (d), the Supreme Court agreed with the government that it had a compelling interest in protecting children from harmful material, but it found the provisions of the CDA to be unconstitutional because they were both vague and overbroad, and the statute was not the least restrictive means necessary to further the government’s interest. In the Court’s words, it “lacks the precision that the First Amendment requires when a statute regulates the content of speech.” \(^{85}\)

First, the Supreme Court held that the statute was vague in that it failed to define “indecent” and “patently offensive.” The Court reasoned that the absence of a definition of either of these terms would invoke uncertainty among speakers about what exactly these words mean, which would cause a “chilling effect” among Internet publishers and undermine “the likelihood” that the CDA is narrowly tailored to further the government’s interest in protecting children from harmful materials on the Internet. \(^{87}\)

In addition, the Court held the CDA to be overly broad for a number of reasons, including the fact that the statute did not consist of a “societal value” requirement, as established in *Miller v. California*, and thus, would suppress a “large amount of speech that adults have a constitutional right to receive and to address to one another.” \(^{89}\) In other words, sexually explicit material that is otherwise protected, meaning not “obscene,” and has such educational, artistic, or other redeeming social value would fall within the scope of the CDA’s prohibitions. As the Court explained, this “burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.” \(^{90}\) Their argument was supported by the established principle that sexual expression that is not obscene is protected by the First Amendment. \(^{91}\)

The legislation was also deemed overly broad because its coverage was “not limited to commercial speech or commercial entities,” but rather applied to all individuals posting messages on the Internet. \(^{92}\) The breadth of the statute’s coverage was viewed by the Court to be “wholly unprecedented.” \(^{94}\)

Additionally, the Supreme Court found that the government had failed to prove that this legislation was the least restrictive means available to achieve the compelling governmental interest in protecting children. In the Court’s view, the “community standards” requirement of the CDA would subject all Internet material to the standards of the most restrictive community. \(^{95}\) As explained by Justice Stevens in the majority opinion, applying this approach to the Internet “means that any communication available to a nation wide audience will be judged by the standards of the community most likely to be offended by the message.” \(^{96}\) To illustrate the problems inherent in using this approach, Justice Stevens continued, “[s]imilarly, a parent who sent his 17-year-old college freshman information on birth control via e-mail could be incarcerated even though neither he, his child, nor anyone in their home community found the material ‘indecent’ or ‘patently offensive,’ if the college town’s community thought


\(^{82}\) Id. at 858-60.

\(^{83}\) Id. at 875.

\(^{84}\) Id. at 874.

\(^{85}\) Id.

\(^{86}\) Id. at 871.

\(^{87}\) Id. at 871-72.

\(^{88}\) See Miller v. California, 413 U.S. 15, 24 (1973) (establishing a three-part test for obscenity, including a requirement that whether the work “which, taken as a whole,” lacks “serious literary, artistic, political, or scientific value”).

\(^{89}\) Reno v. ACLU, 521 U.S. at 874.

\(^{90}\) Id.

\(^{91}\) Id. at 874-75 (citing Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989) and quoting Carey v. Population Services Int’l, 431 U.S. 678, 701 (1977), where the Court stated, “[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression”).

\(^{92}\) Id. at 877.

\(^{93}\) Id.

\(^{94}\) Id.

\(^{95}\) Id. at 877-78.

\(^{96}\) Id.
otherwise."\(^9\)

While the Court recognized that the government's interest in safeguarding the well-being of children was compelling and justified,\(^1\) the Court rendered the content-based regulation unconstitutional because it was not narrowly tailored to further that interest\(^9\) as required under strict scrutiny review. In concluding, Justice Stevens declared, "In Sable, we remarked that the speech restriction at issue there amounted to 'burning the house to roast the pig.' The CDA, casting a far darker shadow over free speech, threatens to torch a large segment of the Internet community."\(^1\)

V. THE SECOND ATTEMPT: CHILDREN'S ONLINE PROTECTION ACT OF 1998

After their first failed attempt at Internet content regulation, Congress responded with a new legislative measure, the Child Online Protection Act of 1998 ("COPA").\(^1\) Dubbed "CDA II" by opponents of the legislation,\(^1\) it was enacted to prohibit the sale of pornographic materials on the Internet to minors.\(^1\) Specifically, the legislation prohibits a person from knowingly making, by means of the World Wide Web, any communications for commercial purposes that are "harmful to minors."\(^1\) Those who violate the law could be subject to criminal or civil penalties.\(^1\) However, only entities engaged in the commercial business of making communications that contain material harmful to minors can be held liable under the law, as opposed to entities that merely access, transport, or link the communications of another person.\(^1\) The Act defines "material that is harmful to minors" as:

- any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—
  - (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, that such material is designed to appeal to, or is designed to pander to, the prurient interest;
  - (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
  - (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.\(^1\)

While the legislation imposes civil and criminal liabilities, it also provides an "affirmative defense"\(^1\) to entities to avoid prosecution under the law. This defense provides protection to a commercial distributor of Internet material if they make a "good faith" effort to restrict access to harmful materials by minors "by requiring [the] use of a credit card, debit account, adult access code, or adult personal identification number; by accepting a digital certificate that verifies age; or by any other reasonable measures that are feasible under available technology."\(^1\)

A. Addressing the Supreme Court's Concerns in Reno v. ACLU

In the House Commerce Committee report addressing the Child Online Protection Act,\(^1\) the Committee cited statistics that revealed that in just two years since the Communications Decency Act of 1996 was enacted (and subsequently ruled unconstitutional), the Internet's popularity and accessibility to minors had increased dramatically. The population of minors on the Internet had almost doubled in a year according to the Federal Trade Commission.\(^1\) In addition, that number was likely to further increase as a "national effort [was] underway to connect every school and library to the Internet."\(^1\) It was predicted that this national effort would result in 95% of all schools...
having access to the Internet by the year 2000.115 Furthermore, the Committee found that as Internet use and accessibility among children had grown in just two years, so had the availability of online pornography. In fact, the Committee noted that in 1996, almost 50% of the content available on the Internet was inappropriate for children, and just two years later in 1998, that number had grown to almost 70%.116

In light of these findings, Congress recognized that there was still a need—perhaps an even more compelling need—for legislation restricting children’s exposure to harmful material on the Internet.117 Thus, even after the Supreme Court ruled the CDA unconstitutional in Reno v. ACLU, Congress made a second attempt to draft legislation that would restrict children’s exposure to pornographic material online, which became known as the Children’s Online Protection Act, and was subsequently enacted into law.

In this second attempt, Congress took care to draft legislation that specifically responded to the First Amendment concerns raised by the Court in Reno v. ACLU.118 While the Supreme Court noted that there is a well-recognized interest in protecting children,119 the Court also stated that this interest does not “justify an unnecessary broad suppression of speech addressed to adults.”120 In other words, the means used to further this interest must be narrowly tailored. Aware of a need to repair the CDA, Congress drafted COPA in such a way that they believed the new law would “not result in an unnecessarily broad suppression of speech.”121

First, Congress addressed the definitions of “indecency” and “patently offensive” provided in the CDA, which the Supreme Court deemed vague and overly broad.122 In COPA, language describing “material that is harmful to minors”123 replaced the content standards provided in the CDA. Under the definition provided in COPA, Congress explicitly described material that is harmful to minors, including material that “depicts, describes, or represents . . . an actual or simulated sexual act or sexual contact.”124 In addition, Congress included the requirement that the material is harmful to minors if, “taken as a whole, [it] lacks serious literary, artistic, political, or scientific value for minors.”125 By adding this language and drafting a new definition, Congress hoped to address concerns of overbreadth. This language would limit the amount of material that would have been unnecessarily suppressed under the definitions provided in the CDA. As the House Commerce Committee expressed, they intended for this new definition to “parallel the Ginsberg and Miller definitions of obscenity.”126

In Miller v. California, the Supreme Court set forth a three-prong test for obscenity that is still controlling today.127 Under Miller, the test for obscenity is:

whether the ‘average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest; whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.128

In Reno v. ACLU, the Supreme Court ruled that the CDA failed the second prong of the Miller test.129 Therefore, in drafting COPA, Congress tried to address this failure by including the “material that is harmful to minors” language.

Second, in addressing the concerns of the overbreadth of the CDA’s coverage, Congress limited the scope of COPA by only applying it to communications made for “commercial purposes,”130 rather than to all individual Internet publishers.131 In addition, the scope of the legislation was also limited to material on the World Wide Web, as opposed to the broader world of the Internet, which includes e-mails and chat rooms.132

---

115 Id.
116 Id. at 10.
117 Id. at 9-11.
118 Id. at 12.
121 See discussion infra Part IV.
123 Id. §§231(e)(6)(B).
124 Id. §231(e)(6)(C).
126 Id. at 24 (1998).
127 Reno v. ACLU, 521 U.S. at 872-73.
129 Ashcroft v. ACLU, 535 U.S. 564, 599-600 (2002) (explaining how Congress responded to the Supreme Court’s concerns regarding the breadth of the CDA’s coverage).
130 Id.
B. Ashcroft v. ACLU

While Congress took pains to craft legislation that would respond to the Court's concerns with the CDA, once enacted, COPA faced challenges as well. Within a day after COPA was signed into law, and a month before the law was set to go into effect, the ACLU filed an action in the United States District Court for the Eastern District of Pennsylvania seeking a preliminary injunction on the COPA on the basis that it violated adults' rights under the First and Fifth Amendments. The plaintiffs argued that it created a ban on constitutionally-protected adult speech, was not the least restrictive means of furthering the compelling governmental interest, and was overbroad.

The District Court held that because COPA prohibits publishers from posting material that is "harmful to minors," it was a content-based regulation of "nonobscene sexual expression;" and, because such expression is protected under the First Amendment, the court ruled that the statute was "presumptively invalid and is subject to strict scrutiny." Under strict scrutiny, the Court explained that the regulation must be "the least restrictive means of furthering the articulated interest." Applying this test, the District Court found that the government would not be able to meet its burden at trial in proving that COPA is the least restrictive means in preventing minors from accessing harmful material on the Internet, and therefore, the plaintiffs had succeeded in establishing a likelihood of success at trial. The District Court then granted the plaintiff's motion for a preliminary injunction, barring the government from enforcing the Act pending a trial.

The Attorney General of the United States appealed the lower court's ruling to the United States Court of Appeals for the Third Circuit, which affirmed the District Court's ruling.

However, rather than reviewing the District Court's strict scrutiny analysis and basing its decision on these grounds, the Court of Appeals found an alternative basis for finding the statute to be unconstitutional. The Court of Appeals declared COPA to be unconstitutional because they found that the statute's "use of 'contemporary community standards' to identify material that is harmful to minors rendered the statute substantially overbroad." The Court of Appeals reasoned that because web publishers are unable to verify the geographic location of all readers, under "contemporary community standards," all speech on the web would be subject to the most restrictive community standards. The government remained enjoined from enforcing COPA absent further action. By finding COPA to be unconstitutional based on the basis of community standards on the Internet, "most observers agree[d] that the [Third] Circuit threw everyone a curve when it raised the issue." On certiorari, in an 8-to-1 decision, the Supreme Court vacated the Court of Appeals' judgment and remanded the case to the lower courts for further action. Reviewing the narrow issue of whether COPA likely violated the First Amendment because it relies, in part, on community standards to identify material that is harmful to minors, Justice Thomas writing for the Court stated, "[w]e hold only that COPA's reliance on community standards to identify 'material that is harmful to minors' does not by itself render the statute overbroad for purposes of the First Amendment." The Court remanded the case back to the Court of Appeals to examine whether COPA is unconstitutional for other reasons, including whether it is overbroad for reasons other than reliance on community standards; whether it is too vague; or, whether the District Court correctly concluded it will likely not survive strict

---

131 ACLU v. Reno, 217 F.3d 162, 169 (3d Cir. 2000).
133 Id. at 476.
134 Id. at 476-77.
135 Id. at 493.
136 Id.
137 Id. (quoting Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989).
138 Id. at 497.
139 Id. at 498.
140 Id. at 499.
C. The Fate of COPA

On March 6, 2003, on remand from the Supreme Court, the Third Circuit Court of Appeals, for the second time, held that COPA was “constitutionally infirm.”\(^1\) The ruling upheld the injunction barring the government from enforcing the law.\(^2\) The Court found that COPA, which they deemed to be “clearly” a content-based restriction, failed to satisfy strict scrutiny because it is not narrowly tailored\(^3\) and because it does not use the least restrictive means to further the government’s compelling interest.\(^4\) In their opinion, the Third Circuit recognized that Congress, in drafting COPA, had attempted to “cure the problems” that rendered the CDA unconstitutional.\(^5\) However, the Court ultimately found that even though COPA was narrower than the CDA, it still contained a number of provisions that rendered it unconstitutional.\(^6\)

The government may ask the Third Circuit to rehear the case or appeal to the U.S. Supreme Court, but it is likely that the government would face an uphill battle in light of the “grave doubts”\(^7\) many of the Justices previously expressed regarding COPA’s overbreadth.\(^8\)

VI. THE THIRD ATTEMPT: CHILDREN’S INTERNET PROTECTION ACT OF 2000

Citing the fact that the Supreme Court has consistently reaffirmed that the government has a compelling interest in protecting children from exposure to sexually explicit material,\(^9\) and in finding that children are being exposed to this inappropriate material online by accessing the Internet at home, at school, and in public libraries, Congress attempted yet again to regulate content on the Internet as a means to further this compelling interest. This time, however, to avoid First Amendment challenges to the legislation, Congress targeted their efforts at public schools and libraries,\(^10\) reasoning that a school or library, in accepting federal funding, “becomes a partner with the Federal government in pursuing this compelling interest.”\(^11\)

The Children’s Internet Protection Act (“CIPA”)\(^12\) was signed into law on December 21, 2000. Under this law, libraries and public schools that receive certain federal technology funds must certify that they are using and enforcing the operation of a “technology protection measure” that prevents computer patrons (adults and minors) from accessing visual depictions that are “obscene, child pornography, or harmful to minors.”\(^13\)

A. American Library Association v. United States

After CIPA was signed into law, the American Library Association (“ALA”) and other groups, including website publishers and library patrons, brought a suit against the United States arguing that CIPA was unconstitutional.\(^14\) The ALA claimed that the law’s provision requiring software filtering on all computers effectively acts as a content-based restriction on patrons’ access to constitutionally-protected speech.\(^15\) In effect, the law would force public libraries to violate the First Amendment. The ALA also argued that

---

\(^{149}\) Id. at 585-86.

\(^{150}\) Id. at 602 (Kennedy, Souter, Ginsburg, J.J., concurring).

\(^{151}\) Id. at 586.

\(^{152}\) ACLU v. Ashcroft, 322 F. 3d 240, 245 (3d Cir. 2003 on remand from the Supreme Court in Ashcroft v. ACLU, 535 U.S. 564).

\(^{153}\) Id. at 271.

\(^{154}\) Id. at 265.

\(^{155}\) Id.

\(^{156}\) Id. at 245.

\(^{157}\) Id.

\(^{158}\) Ashcroft v. ACLU, 535 U.S. at 602.

\(^{159}\) Id.


---


\(^{161}\) Id. at 9-10.

\(^{162}\) Id. at 6.


\(^{164}\) Id. §9134(f)(1)(A)(i)-(ii).


\(^{166}\) Id.
software filters are unreliable and ineffective, blocking otherwise appropriate content and failing to block certain inappropriate material.167 The ALA did not challenge CIPA’s restrictions on public schools.168

A three-judge District Court from the Eastern District of Pennsylvania held that CIPA was unconstitutional under the First Amendment, reasoning that because of limitations inherent in software filtering technology, any public library that followed CIPA’s requirements would restrict library patrons’ access to a substantial amount of constitutionally-protected speech. Furthermore, the Court asserted that there were other less restrictive means than requiring software filtering to further the government’s compelling interest in protecting children from sexually explicit material online.169

B. United States v. American Library Association

In November 2002, following the lower court’s ruling, the Supreme Court agreed to hear arguments in this case. During oral arguments regarding the constitutionality of CIPA on March 5, 2003, the government conceded that software filters block some constitutionally-protected speech and do not block some pornographic speech.170 However, the government argued that libraries are free to decline federal funds under the law and thus were not required to install filtering software.171 Justice Kennedy expressed concern with the government’s assertion.172

On the other side, Chief Justice Rehnquist and Justice O’Connor, Justice Scalia, and Justice Breyer expressed some doubts with the American Library Association’s key argument that CIPA requires libraries to violate the First Amendment rights of patrons by preventing adults from viewing material that they have a constitutional right to view.173 The ALA argued that Internet access in a public library should be viewed as a “designated public forum,” and as such, the government cannot restrict the viewpoint of speakers in that forum unless it satisfies the standards of strict scrutiny.174 Justices expressing concern with this argument seemed to agree with the government’s contention that viewing libraries as public forums would negatively affect a library’s ability to choose which materials to include or exclude from their print collection.175 The ALA, however, was arguing that “Internet access in a public library,”176 not the library itself, is equivalent to a designated public forum.

C. Supreme Court Upholds CIPA

Congressional efforts to regulate Internet content had not fared well in the courts up until June 2003. The Third Circuit’s most recent ruling on March 6, 2003, in ACLU v. Ashcroft,177 which deemed COPA unconstitutional, dealt another blow to governmental efforts to restrict access to online content. Many observers surmised that the tendency of federal courts and the Supreme Court to restrain government efforts to regulate Internet content foreshadowed what the Supreme Court would ultimately decide regarding the constitutionality of the Children’s Internet Protection Act. However, these observers were proven wrong when the Supreme Court, by a 6-3 vote, reversed the lower court’s decision and upheld CIPA, ruling that the law does not violate library patrons’ First Amendment rights and does not induce libraries to violate the Constitution.178 Writing the plurality opinion for the Court, Chief Justice Rehnquist explained that to determine whether the law would force libraries to violate the First Amendment, the Court looked to the traditional role of libraries in society.179 In doing so, the Court found that public libraries, in fulfilling their missions of “facilitating learning and cultural enrichment,”180 must enjoy broad discretion in deciding what materials to provide to their

---

167 Id.
169 Am. Library Ass’n, 201 F. Supp. 2d at 490.
171 Id.
172 Id.
173 Id.
174 Brief of Appellees American Library Association, et

175 CONGRESS DAILY, supra note 170.
176 Brief of Appellees, supra note 174, at 15.
177 322 F.3d 240 (3d Cir. 2003). See also discussion infra Part V.C.
179 Id. at 2303-04.
180 Id. at 2303.
VII. CONGRESS’ LATEST ATTEMPT: DOT KIDS IMPLEMENTATION AND EFFICIENCY ACT OF 2002

Shortly before the end of the 107th Congress, in another attempt to prevent children from being exposed to harmful and inappropriate material online, lawmakers passed the Dot Kids Implementation and Efficiency Act of 2002 (“Dot Kids Act”). This new law facilitates the creation of a second-level Internet domain, a “.kids” domain. It will restrict information on the site to material that is “suitable for minors” and “not harmful to minors.” The second-level “.kids” domain will be created under the recently commissioned “.us” country code, which is America’s sovereign Internet domain, thus limiting the scope of the law to the United States rather than the global Internet community. Its purpose is to create a safe haven for American children on the Internet and to promote a positive online experience for them. Congressman Fred Upton (R-MI), a supporter of the legislation, explained that the bill “in essence, sets up a children’s library section of the Internet.”

Under this Act, the National Telecommunications and Information Administration (“NTIA”), an agency of the U.S. Department of Commerce, is responsible for overseeing the operation of the new domain. A registry, or operator, would be selected by the government to operate and maintain the new domain site. The registry would also be responsible for drafting written content standards for the site that are “consistent with the ‘suitable for minors’ and ‘not harmful to minors’ standards” established by the legislation. However, the law allows NTIA to take “any other action that the NTIA considers necessary to


181 Id. at 2304.
182 Id. at 2305.
183 Id.
184 Id. at 2304 (referring to the Supreme Court’s decisions in Arkansas Educ. Television Comm’n v. Forbes, 523 U.S. 666, 672-73 (1998) and Nat’l Endowment for the Arts v. Finley, 524 U.S. 569 (1998)).
185 Id. (discussing the Supreme Court’s decision in Forbes, 523 U.S. at 672-73 (1998)).
186 Id. (referencing the Supreme Court’s decision in Finley, 524 U.S. 569).
187 Id.
189 Id. §157(a).
190 Julie Wheeler, Representing the Kids of America, at
 establish, operate, or maintain the new domain in accordance with the purposes” of the bill.\footnote{Dot Kids Implementation and Efficiency Act, §157(c)(12).} Furthermore, if NTIA finds, upon its own review or a “good faith petition” of the registry, that the new domain is not serving its purpose, the NTIA can suspend operation of the “kids” domain.\footnote{Id. §157(i).}

Once the written content standards are established, the registry must enter into written agreements with registrars, commonly known as publishers, who chose to use the domain to ensure that they are in compliance with the established content standards.\footnote{H.R. REP. No. 107-449, at 11 (2002).} In addition, the registry must create a process that provides “prompt, expeditious and impartial dispute resolution” and accords due process to publishers,\footnote{Id. at 12.} so that in cases where material that is already on the site is believed to conflict with the content standards, the registry can make a determination of whether to exclude that material or to allow it to remain. The law requires that the new domain be operational within one year after the date of enactment—by December 4, 2003.\footnote{Dot Kids Implementation and Efficiency Act, §157(c)(9).}

With the Supreme Court’s most recent decision regarding online regulation,\footnote{See Ashcroft v. ACLU, 535 U.S. 564 (2002) (holding that the reliance on “community standards” to identify harmful material to minors did not by itself render the Children’s Online Protection Act unconstitutional, but enjoining enforcement of the Act until the lower court rendered judgment on further unresolved First Amendment issues).} the Court’s ruling in United States v. American Library Association,\footnote{See discussion infra Part VI. B.} legislators, law enforcement, free speech groups, and the public are left to wonder what will become of Congress’ latest, but likely not final, attempt to regulate content on the Internet. If free speech groups or Internet publishers challenge this new “content-based restriction”\footnote{H.R. REP. No. 107-449, at 8 (2002) (explaining that the Committee believes the creation of a new domain under this legislation to be a “content-based restriction” that is “Constitutionally sound”).} on speech, will the law stand?

In drafting this legislation, members of Congress were clear to distinguish this legislation from previous legislation enacted to protect children online. In remarks made during a House Committee Hearing evaluating the bill, ranking member of the House Telecommunications and Internet Subcommittee Edward Markey (D-MA) emphasized that, “this approach departs from previous congressional activity in this policy area.”\footnote{Mark-Up on the .Kids Domain Before the House Comm. On Energy and Commerce, 107th Cong. 8 (2002) (statement of Rep. Edward Markey, Member, Telecommunications Subcomm.) [hereinafter Statement of Markey].} However, while Members of Congress repeatedly stressed that First Amendment concerns were addressed in shaping this legislation,\footnote{See H.R. REP. No. 107-449 (2002).} this Act may likely suffer the same fate as the CDA and the COPA. If challenged in court, this new content-based regulation would not survive strict scrutiny.

A. The Government’s Argument

Ironically, the government has acknowledged that the “.kids” domain that will be established under this new law is a content-based restriction.\footnote{Id. at 8.} As such, and because of the standard the Supreme Court has applied to material on the Internet, the content-based regulations imposed by the new law must meet strict scrutiny review in order to overcome the presumption of unconstitutionality.\footnote{See discussion infra Part III.A.}

In meeting this standard, the government argues that the Supreme Court has consistently recognized the compelling interest in shielding children from sexually explicit material.\footnote{H.R. REP. No. 107-449, at 8 (2002) (citing Ginsberg v. New York, 390 U.S. 629 (1968); FCC v Pacifica Found., 438 U.S. 726 (1978); and Sable Communications of California v. FCC, 492 U.S. 115 (1989)).} For example, the House Energy and Commerce Committee cited laws that require pornography to be sold behind the counter or in shrink wrap at newstands, and regulations limiting the broadcast of certain content during prime time hours, as regulations that have been upheld because the government had a compelling interest in protecting children from harmful material.\footnote{Id.} Furthermore, the government argues that the means used to achieve this “compelling” end are narrowly tailored. The new law would not impose any restrictions on an adult’s ability to use the remainder of the “.us” domain, or any other part of the World Wide Web for that matter, to publish
their own materials.212 Adults would only be restricted from publishing their material on the “kids.us” domain if it was deemed “harmful to minors” by the registry. The government contends that the Dot Kids legislation is “no different than creating a children’s section of a public library.”213

B. Voices of Free Speech Groups

Although this legislation has not been challenged in court, First Amendment groups were grumbling and expressing their concern with the legislation even before it became law. For instance, the American Civil Liberties Union (“ACLU”) objects to the Dot Kids Act because it establishes a “kid-friendly” space on the Internet, and then controls the content that will be included on that space, effectively “set[ting] up a system of government censorship.”214 The ACLU argues that because the information available on the domain will be restricted to that which is “suitable for minors and not harmful to minors,”215 it is a content-based regulation that must satisfy strict scrutiny in order to overcome the presumption of unconstitutionality.216

In addition, the ACLU contends that requiring content to be screened by a third-party registrar does not resolve the issue of censorship. As the ACLU explains, this law allows the government, through NTIA, to effectively control the content of the speech on the site. The Center for Democracy and Technology (“CDT”), another free speech organization, shares these concerns about governmental oversight and control of content on the Internet.217 Free speech groups also expressed concerns with the effectiveness in creating a new site for children—citing difficulties with maintaining and enforcing the site, and the realities regarding the number of children who would actually use the site.218

Free speech groups are not the only ones who have objected to the law. At a hearing before the House Energy and Commerce Committee in November 2001, then head of NTIA, Nancy J. Victory, testifying about an earlier but similar version of the legislation, remarked that she had concerns about the constitutionality of the legislation because the bill establishes a content standard and requires the Department of Commerce, although indirectly, to regulate online content based on this standard.219 She explained that the courts in the past have held that government-mandated standards such as these are problematic.220

NeuStar, Inc., (“NeuStar”) the company responsible for establishing content standards, also voiced strong concern with the legislation.221 Jim Casey, Director of Policy and Business Development explained that they were not the appropriate body to deem what constitutes appropriate content and what does not, explaining that, “[i]t puts us in a position that’s really outside our core competency.”222

Additionally, the Children’s Online Protection Act Commission, a congressionally-appointed panel responsible for finding ways to protect children online, questioned the real value of a lower-level voluntary domain site restricted to material for minors.223 The Commission acknowledged that such an approach would not be effective at regulating content in e-mail, chat rooms, or instant messaging—the services children take advantage of most often on the Internet. In addition, the Commission suggested that this method could actually have an adverse effect on law enforcement because the concentration of children’s activities in this domain site could attract predators.225 Instead, the Commission argued

212 Id.
213 Id.
214 Letter from Laura Murphy, Director of ACLU, and Marvin J. Johnson, Legislative Counsel of ACLU, to the Members of the U.S. Senate, (Nov. 6, 2002) (on file with author) [hereinafter Letter to Senate].
215 Dot Kids Implementation and Efficiency Act, §157(a).
216 Letter to Senate, supra note 214.
217 Letter from Alan Davidson, Associate Director of Center for Democracy and Technology, and Paula Bruening, Staff Counsel of CDT, to Congressman Ron Wyden and Senator George Allen, (Sept. 12, 2002) (on file with author).
218 Letter to Senate, supra note 214.
220 Id.
222 Id.
223 COMMISSION ON CHILD ONLINE PROTECTION (COPA COMMISSION), 106th CONG. REPORT TO CONGRESS 30 (2000).
224 Id.
225 Id.
that one of the best ways to protect children online is to educate parents and children about avoiding harmful material on the Internet.\footnote{\textit{Id.} at 9.}

C. Applying Strict Scrutiny

As has been discussed at length in this Comment, a content-based regulation on speech is presumptively invalid and can only be upheld if it meets the heightened standard of strict scrutiny.\footnote{\textit{Id.} at 9.} In order to meet this heightened standard, the regulation must be justified by a compelling governmental interest, narrowly tailored to further that interest, and the least restrictive means available to advance that interest.\footnote{See discussion \textit{infra} Part III.}

1. \textit{Dot Kids Act: A Content-Based Regulation}

Although the legislative history of the bill acknowledges that this legislation is a content-based restriction, the government could still attempt to argue that it is not in fact content-based, and therefore, strict scrutiny analysis is inapplicable. Rather, the government may suggest that the statute is content-neutral, and thus would not have to satisfy strict scrutiny.

The content-neutral argument is based on the idea that the Dot Kids Act is simply "cyberzoning" on the Internet; not a blanket restriction on content. Congressman Edward Markey captured this point when he stated that the bill is "not aimed at censoring Internet content, per se, but rather simply organizing content suitable for kids in a safe and secure cyber zone."\footnote{Statement of Markey, \textit{supra} note 206.} The government finds further support for their content-neutral argument in its claims that the government itself is not selecting the speech to be prohibited; instead, content is determined by the registry, NeuStar.

A similar line of reasoning was used, without much success, in \textit{Boos v. Barry}.\footnote{\textit{Boos v. Barry}, 485 U.S. 312, 319 (1988).} In \textit{Boos}, the Supreme Court rejected the government's view that the statute at issue was content-neutral. The Court found it to be a content-based regulation because it prohibited public discussion of "an entire topic."\footnote{\textit{Id.}} Drawing on the Court's previous decision in \textit{Renton v. Playtime Theatres, Inc.}, which upheld zoning ordinances that barred adult movie theaters in residential neighborhoods,\footnote{Renton, 475 U.S. at 49.} the Court in \textit{Boos} determined that content-based speech regulations are those which are justified only by reference to the content of the speech being regulated,\footnote{Id. at 320 (quoting Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)).} whereas, content-neutral restrictions are justified "without reference to the content of the regulated speech."\footnote{\textit{Renton v. Playtime Theatres, Inc.}, 475 U.S. 41, 54-55 (1986).}

For instance, in \textit{Renton}, zoning ordinances were passed, not to curtail the distribution of inappropriate behavior or speech, but rather to address the "secondary effects" that the adult theatres fostered, such as crime and decreasing property values.\footnote{\textit{Forsyth County v. Nationalist Movement}, 505 U.S. 123, 130-33 (1992).} The Court held that these zoning ordinances should be analyzed as a form of time, place, and manner restriction on speech because the purpose of the ordinances was to curb the "secondary effects" of the theatres; the regulations did not "focus on the direct impact of speech," or the primary effects.\footnote{\textit{Id.}} In a time, place, and manner analysis, the government's interest is not related to the communicative impact of the behavior or the speech,\footnote{See Forsyth County v. Nationalist Movement, 505 U.S. 123, 130-33 (1992).} and it is not held to the most stringent scrutiny.

Applying these principles, the Court would have to find that the Dot Kids Act is a content-based regulation, and not simply a zoning ordinance on the Internet, as Congressman Markey claims. The government's purpose for enacting the Dot Kids Act is to protect children from the harmful effects of inappropriate content online. In this instance, speech on the Internet is being regulated because of its potential direct or "primary" impact on children; the emotive impact of this speech on children is not a "secondary effect."\footnote{\textit{Boos}, 485 U.S. at 320-21 (citing examples of}
based regulation that must be analyzed as such under the most stringent scrutiny.

Further support for this argument is found in the Supreme Court’s decision in Reno v. ACLU.\(^{230}\) The Court held that the CDA was a content-based restriction to be analyzed under the most heightened standard. The Court rejected the government’s assertion that the CDA is “cyberzoning” on the Internet.\(^{240}\) It distinguished the CDA from a zoning ordinance because the purpose of the CDA was “to protect children from the primary effects of ‘indecent’ and ‘patently offensive’ speech, rather than any ‘secondary’ effect of such speech.”\(^{241}\)

The language of the Dot Kids Act itself also demonstrates that it is a content-based regulation. The statute directs the government to draft written content standards, albeit indirectly, via NeuStar. While it is true that the Act prohibits the government from directly establishing these content standards,\(^{242}\) the government retains a degree of editorial control and ultimate authority to shut down the domain if the new domain “is not serving its intended purpose.”\(^{243}\) As Congressman Shimkus (R-IL), a strong advocate of the legislation, explains, “[o]n the remote chance that “kids.us” degenerates into a place with harmful material, the bill calls for the Department of Commerce to ‘pull the plug’ on the space.”\(^{244}\) This is where the government’s assertion that the government itself is not selecting the speech to be prohibited falls apart. The editorial control the government maintains over the domain site is clearly a “censorship scheme”\(^{245}\) that would have to survive the most stringent scrutiny to be found constitutional.

Furthermore, the Dot Kids’ legislative “scheme” clearly cannot be analogized to legislation establishing the public broadcasting system\(^{246}\) because the Public Broadcasting Act of 1967 specifically provides that the government may not control the contents or distribution of public broadcasting programming.\(^{247}\) In fact, for more than twenty five years, public broadcasting has been funded by the federal government two years ahead of the fiscal year in which the funding is allocated. This advance funding mechanism addresses First Amendment concerns by helping insulate public broadcasting from politically-motivated interference with programming.

2. Compelling Interest is Recognized

Once it is established that the Dot Kids Act is a content-based regulation, it must be subject to strict scrutiny analysis. First, the restriction must be necessary to serve a compelling state interest.\(^{248}\) There is a well-recognized interest in protecting children from harmful material;\(^{249}\) therefore, there is no dispute that the government’s interest in protecting children from harmful materials online is compelling. However, as the Supreme Court explained in Reno v. ACLU, that interest “does not justify an unnecessarily broad suppression of speech.”\(^{250}\) This is where the disagreement lies—whether the Dot Kids Act is narrowly tailored, and the least restrictive means to satisfy this compelling interest.

3. Not Narrowly Tailored to Satisfy Government’s Interest

The government contends that the Dot Kids legislation is narrowly tailored to meet the government’s compelling interest.\(^{251}\) However, this assertion fails to recognize prior Supreme Court decisions in which the Court has ruled that the “availability of alternatives” demonstrates that the statute is not sufficiently narrowly tailored.\(^{252}\) Applying this principle, because other less restrictive

---


\(^{231}\) Id. at 867-68.

\(^{232}\) Id. at 868.

\(^{233}\) Dot Kids Implementation and Efficiency Act, §157(c)(1).

\(^{234}\) Id. §157(i).

\(^{235}\) Child-Friendly Internet Domain: Hearing on S.2537, the Dot Kids Implementation and Efficiency Act of 2002, Before the Sen-
alternatives for protecting children online already exist, such as Internet safety education, the Court would have to hold that the Dot Kids Act measure is not sufficiently narrowly tailored to satisfy strict scrutiny.

a. Overly Broad

The question of whether a regulation is narrowly tailored to serve a compelling interest is similar to asking whether a statute is overly broad. A statute is overbroad if it prohibits more than what is constitutionally allowed, or sweeps more broadly than is permissible.\(^{255}\) In this case, the Court is likely to rule that the Dot Kids is not narrowly tailored because it restricts a substantial amount of constitutionally-protected speech for adults and minors over the age of twelve.

First, the definition "harmful to minors" provided in the Dot Kids Act renders the legislation substantially broad. The term "minors" as provided in the Dot Kids Act parallels the definition provided in Congress' earlier legislative effort, the Children's Online Protection Act, with the exception that the Dot Kids Act's definition of "minors" is limited to those under thirteen years of age,\(^{254}\) whereas COPA defines "minors" as those under seventeen years of age.\(^{255}\) By shrinking the population of "minors," the Dot Kids legislation attempts to narrow this definition. However, re-defining the term "minors" does nothing to correct the overbreadth of this legislation.\(^{256}\)

In some instances, the standards established in the legislation under the term "minors" would prohibit speech that is unconstitutional. But in other instances, the Dot Kids Act’s narrow definition of "minors" would exclude any material from the domain that is harmful to those twelve years and under, effectively prohibiting a vast amount of constitutionally-protected speech for adults and for minors over the age of twelve. For instance, material that is "suitable" and important for fourteen-year-olds to obtain, such as health information or sex education, may not be “suitable” for five-year-olds, and thus would be barred from the site. In the end, this narrowing of the term "minors" prohibits an even greater amount of speech that is not only constitutionally-protected for adults, but is constitutionally-protected for children over the age of twelve. It sweeps more broadly than even COPA.

Additionally, the Dot Kids Act is overly broad because it proscribes speech that is constitutionally-admissible even for minors under the age of thirteen. The Dot Kids legislation "prohibits hyperlinks in the new domain that take new domain users outside of the new domain."\(^{257}\) This provision would exclude a significant number of Internet publishers and speakers who do not even publish sexually explicit or obscene material, but who choose to have hyperlinks on their site. For instance, the PBS Kids’ website,\(^{258}\) one of the most popular websites for kids, would be excluded from the new domain because the PBS site has hyperlinks to relevant newspaper articles, volunteer organizations, and youth groups.

In attempting to counteract claims of overbreadth, the government could offer the additional argument that the Dot Kids measure does not prohibit more than what is allowed because it leaves open other alternative means of communication.\(^{259}\) Congress suggested exactly this during mark-up of the bill.\(^{260}\) Congressman Markey explained that the legislation does not subject all Internet communications to a "harmful to minors" standard; it only applies to one subdomain in the entire ".us" domain.\(^{261}\)

This argument, however, failed when the government used it in Reno v. ACLU, and it will fail in this context as well. As the Supreme Court ruled in Reno, it is "immaterial" whether such speech would be feasible on other areas of the Internet because the legislation regulates speech on the basis of its content; therefore, any time, place, and manner analysis is inapplicable.\(^{262}\) Therefore, regardless of whether the legislation leaves open

\(^{253}\) See e.g., Reno v. ACLU, 521 U.S. at 879-80 (attempting to curb the overbreadth of the CDA, the government argues that it is constitutional because it leaves open other channels of communication).


\(^{255}\) ACLU v. Ashcroft, 322 F.3d at 246.

\(^{256}\) Id. at 268 (explaining how the term "minor" renders COPA overly broad).

\(^{257}\) Dot Kids Implementation and Efficiency Act, §157(c)(11).

\(^{258}\) The PBS Kids' website is found at http://www.pbskids.org.
other alternative means of communication, the Dot Kids Act is still overly broad.

b. Vague

The Act is also rendered unconstitutional because it is vague. The Third Circuit explained, "[a] statute is void for vagueness if it 'forbids . . . the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.'"\(^\text{263}\) In this instance, NeuStar must determine what is "suitable for minors" and "not harmful to minors." However, a recent government report demonstrates that there is much disagreement about which material is suitable for minors and which material is harmful.\(^\text{264}\) One critic of the legislation, commenting on the difficulty in determining what the content of the new domain should be, said, "What would probably happen is that we would end up with content that meets the lowest common denominator. The dot.kids wouldn't have any value."\(^\text{265}\) As critics suggest and the government's own report demonstrates, because the statute's words do not seem to have a "common understanding," NeuStar will face great difficulty in defining these terms in a way that makes it clear to an ordinary person what exactly is prohibited from the new domain. As a result, the Dot Kids Act's terms would not withstand a vagueness challenge. In sum, the Dot Kids Act must be rendered unconstitutional because it is not narrowly tailored to satisfy strict scrutiny.

4. Not the Least Restrictive Means

The Supreme Court has explained that the burden on adult speech is unacceptable "if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve."\(^\text{267}\) Not only is the Dot Kids Act rendered unconstitutional because it is not narrowly tailored, but it is also unconstitutional because it is not the least restrictive means to further the government’s interest—to safeguard children from harmful material online.

In this context, a method or policy, such as promoting Internet safety education, that would not burden constitutionally-protected speech would be a less restrictive means; much less restrictive than the "kids" domain pushed by Congress. In fact, two important government reports released in the past few years found that the best way to protect children from harmful material online was by educating children and their parents about Internet safety.\(^\text{268}\) One of these reports, commissioned by Congress and issued by the National Academies' National Research Council (NRC), specifically stated that while technology and public policy "have important roles to play," they will not provide a complete solution to protecting children online.\(^\text{269}\) What is important, the NRC study concluded, is "social and educational strategies to develop in minors an ethic of responsible choice and the skills to effectuate these choices and to cope with exposure" so as to prevent children from being harmed by exposure to inappropriate materials online.\(^\text{270}\) Thus, without prohibiting any form of speech, the government could easily fund programs that educate parents and children about safe ways to search the Internet.

Furthermore, the government could assume a policy of encouraging the private sector to create safe "cyber playgrounds," for children on the Internet. Encouraging private sector efforts avoids government regulation of speech on the Internet, and would be just as effective in protecting children as government-established domains. Nancy Victory stressed in her testimony before Congress that the NTIA supports private sector efforts to address concerns that children are being exposed to harmful material on the Internet. She applauded private sector initiatives to provide children access to quality content on the Internet.\(^\text{271}\)

The "kids" domain will not be successful if web understanding").

\(^{263}\) ACLU v. Ashcroft, 322 F.3d at 269 (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)).

\(^{264}\) Brief of Plaintiffs-Appellees at 32, Ashcroft v. ACLU, 535 U.S 564 (2002) (No. 99-1324) (citing a congressional report conducted by the National Research Council, which found that there is "widespread disagreement" about what is inappropriate for minors).

\(^{265}\) MacPherson, supra note 5 at A17.

\(^{266}\) Boos, 485 U.S. at 332 (defining the vagueness test as "communicating its reach in words of common

\(^{267}\) Reno v. ACLU, 521 U.S. at 874 (quoting Sable Communications, 492 U.S. at 126).

\(^{268}\) Letter to Senate, supra note 214.

\(^{269}\) National Research Council, Youth, Pornography and the Internet Executive Summary §14.3 (2002) [hereinafter National Research Council].

\(^{270}\) Id.

\(^{271}\) Statement of Victory, supra note 219.
publishers refuse to publish, or are prohibited from publishing their material on the site. Trying to convince children's web publishers, or registrars, to publish their material on the new domain could be an uphill battle because of the stringent registration requirements provided in the legislation. The Dot Kids Act requires registrars to enter into written agreements “that require that use of the new domain is in accordance with the standards and requirements to the registry.”

Currently, website publishers and registrars are not required to enter into written agreements or to police their own efforts. There is very little incentive for them to publish on a site where they would be expected to follow such stringent requirements.

Furthermore, the domain may not be effective because it is unlikely that children will visit the site. One provision of the Dot Kids Act prohibits “two-way and multiuser interactive services” in the new domain, except in cases where a registrar can guarantee that the services adhere to the content standards developed for the domain. As the House Committee Report explains, this provision is intended to prohibit services such as instant messaging, chat, and e-mail. However, children are using the Internet today to e-mail and engage in chat rooms more than any other age group in the U.S., and more than many other online activities. It only makes sense that children are going to go where they can use the services that they want to use—e-mail, chat, and instant messaging. If the “.kids” domain does not offer these services, children will not visit it.

Finally, the government could more effectively further its interest in safeguarding children by funding initiatives that enforce criminal statutes already in place—child pornography laws and laws prohibiting obscenity. Money spent cracking down on Web publishers and speakers who violate these laws is money spent wisely. In the end, the “.kids” domain will not play any part in decreasing children’s exposure to the harmful material that is found throughout the Internet.

As an added twist, a recent study found that parents are more likely to surf the Internet with their children. In fact, parents’ involvement with their children’s Internet use increased significantly from 2000 to 2002. The same study, conducted by the Corporation for Public Broadcasting, reported that 81% of parents felt the Internet is important to their children’s learning. Perhaps children are not being exposed to indecent material as much as we think. Perhaps children are actually reaping the benefits of the Internet.

D. Not Justified as a Medium-Based Regulation

While the Dot Kids Act fails strict scrutiny, it is true that in some mediums, such as traditional broadcast, Congress has upheld content-based regulations on a lower level scrutiny because, viewed in the context of that medium, “special treatment” is justified. The Supreme Court has cited various reasons for this “special treatment” for certain media—the history of government regulation, the scarcity of available broadcast frequencies, and the “invasive” nature of the medium.

Many would argue that the Internet’s characteristics encompassing print, traditional broadcast, and cable media—should justify a similar “special treatment” by the courts. Therefore, content-based regulations on the Internet, not unlike those placed on broadcasting, would be subject to a lower level of scrutiny. However, one of the Supreme Court’s principal holdings in was that the Internet shared none of the special factors recognized to justify government regulation, and thus deserves the highest level of First Amendment protection. So, unless the Supreme Court is willing to review its conclusion

---

272 Dot Kids Implementation and Efficiency Act, §157(c)(2).
273 Id. §157(c)(10).
275 U.S. DEPT. OF COMMERCE, supra note 2, at 52 (finding that teenagers and young adults are online to engage in chat rooms more than any other age group and older children and young adults use e-mail at much higher levels than adults).
276 NATIONAL RESEARCH COUNCIL, supra note 269, at §14.
277 CORPORATION FOR PUBLIC BROADCASTING, CONNECTED TO THE FUTURE: A REPORT ON CHILDREN’S INTERNET USE (2002).
278 Id. at 7.
279 Id.
280 See FCC v. Pacifica Found., 438 U.S. 726 (1978) (upholding a declaratory order of the FCC holding that broadcast of a vulgar and offensive monologue during the afternoon could be subject to administrative sanctions because, as the Court explained, constitutional protection available for a vulgar monologue, though not obscene, depended on the context of the broadcast).
281 Reno v. ACLU, 521 U.S. at 866-67.
282 Id. at 868-870.
that these previously cited factors, which justify the application of a lower-level of scrutiny to content-based regulations in certain media, "are not present in cyberspace,"\textsuperscript{283} strict scrutiny analysis on Internet content regulations will stand.

VIII. CONCLUSION

In the last decade, the Internet has revolutionized the way we live, conduct business, and communicate. As one telecommunications analyst concluded, the Internet "exercises enormous influence on the commercial, educational, and social future" of Americans.\textsuperscript{284} It also provides an unbridled source of information for children to use in their learning and education. However, this source of great promise for children can also be a source of great concern\textsuperscript{285} because of the ready availability of sexually explicit and harmful materials on the Internet.

Congress has attempted to protect America's most vulnerable group, children, but legislative initiatives have largely failed. In the future, lawmakers must re-evaluate their past efforts and heed the advice of experts and commissions to determine the best approaches for protecting children online. Hopefully they will realize there is no magic bullet\textsuperscript{286} that will effectively protect children in this global community. In fact, one of the best methods may be as simple as funding educational and social initiatives that teach children and parents about the inherent dangers of the Internet.\textsuperscript{287} Ad campaigns can promote public awareness of new technologies available to protect children on the Internet. Congress may also consider encouraging private sector initiatives that block or filter harmful material. The online industry also has a responsibility to play a role in protecting children. Additional, consideration should be given to increase funding for law enforcement efforts to aggressively enforce anti-obscenity laws. Each of these proposed methods can be just as effective, if not more so, than efforts initiated by Congress to date. These approaches balance First Amendment values with the compelling need to protect children from harmful material online. Unlike past efforts, they will pose the least adverse impact on constitutionally-protected speech.

\textsuperscript{283} Id. at 868.
\textsuperscript{285} NATIONAL RESEARCH COUNCIL, YOUTH, supra note 269, at §1.1.
\textsuperscript{286} Id. at §14.3 (concluding that "There is no single or simple answer to controlling the access of minors to inappropriate material on the Web.").
\textsuperscript{287} Id.