Ashcroft v. ACLU: Should Congress Try, Try, and Try Again, or Does the International Problem of Regulating Internet Pornography Require an International Solution?

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Confused by the misinformed chatter of his peers and ambiguous information in his limited sex-education course at school, a fifteen-year old boy in middle America sits down at his computer. He conducts a search for information using the term "safe sex." His parents, out of concern for their children, have installed a filtering device and set it to its highest level. The boy's search comes back spotty at best. He has no idea that 50% of safe-sex health sites, including those endorsed by search engines as responsible and informative, have been filtered out.[2]

I. Introduction

In its decision in *Ashcroft v. ACLU*,[3] the Supreme Court held that the Attorney General had not convincingly rebutted the contention of plaintiff Internet content providers that filtering software was less restrictive and just as effective as the legislation Mr. Ashcroft sought to defend.[4] The Supreme Court was correct to uphold the preliminary injunction against the Child Online Protection Act[5] ("COPA"), but the Court, by reading the legal

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[2] *See* THE HENRY J. KAISER FAMILY FOUNDATION, SEE NO EVIL: HOW INTERNET FILTERS AFFECT THE SEARCH FOR ONLINE HEALTH INFORMATION (2002), *at* http://www.kaisernetwork.org/health_cast/uploaded_files/Internet_Filtering_exec_summ.pdf (on file with the North Carolina Journal of Law & Technology).

[3] 124 S. Ct. 2783 (2004).

[4] *Id.*

[5] 47 U.S.C. § 231 (2001).

issue narrowly,[6] left the American public with the lesser of two evils instead of a genuine solution. While the holding is correct in a strictly legal sense, the decision does very little to protect either children or the First Amendment.

This Recent Development traces Congress' reaction to Internet pornography, using *Ashcroft v. ACLU* as a case study to illustrate the pattern Congress traditionally follows: tailoring subsequent legislation to the specifications of Supreme Court decisions. This Recent Development argues that following Congress' pattern in this case will only lead to further litigation because filters, the solution proposed in *Ashcroft*, along with any national solution, will have a negative impact on free speech rights. This Recent Development concludes that in order to protect both children and the First Amendment, the Internet pornography industry must be treated as just that: an international industry. By urging the Internet pornography industry to accept "best practice guidelines," the United States government will be protecting children *and* the guarantees of the First Amendment.

II. At What Cost? Keeping Internet Pornography from Minors

The problem of minors accessing Internet pornography is international;[7] to ignore that the problem is international allows "solutions" that infringe on free speech rights guaranteed by the First Amendment. Filtering technology is very restrictive.[8] Even though it may be less restrictive than what was proposed in

[6] "A court assumes that certain protected speech may be regulated, and then asks what is the least restrictive alternative that can be used to achieve this goal." *Ashcroft*, 124 S. Ct. at 2791.

[7] *See generally* Parry Aftab, *White Paper, Thinking Outside the "Porn" Box, Separating the Sexual Content Debate from Issues Relating to Marketing, Commercial Practices, and Child Exploitation, at* www.wiredsafety.org/resources/pdf/xxx_whitepaper.pdf (April 2004) (on file with the North Carolina Journal of Law & Technology).

[8] *See, e.g.*, Harriet Chiang, *Internet Porn Filters Upheld; Libraries Can Be Required to Block Web Content, Justices Confirm*, S.F. CHRON., June 24, 2003, at A1.

COPA,[9] a child's search for information on "breast cancer" or "depression" may be hampered as a result of the artificial intelligence used to filter.[10] While parents have a right to restrict what their children see,[11] this right is not especially advanced by either COPA or filters; a solution requires international agreements. The United States, along with the global community, needs to foster best practice guidelines[12] and the use of clear markings in the online pornography industry. For example, the suffix .xxx has been proposed for use in pornographic websites instead of .com.[13]

As long as the Court leads Congress to believe that legislation will be the answer, Congress will likely continue molding legislation to the specifications of the Supreme Court's decisions.[14] COPA marks Congress' second attempt to make the Internet safe for minors in the home.[15] It was drafted in reaction to, and in strict compliance with, the Supreme Court's holding in *Reno v. ACLU*.[16] If Congress responds to the decision in *Ashcroft* by drafting yet another piece of legislation based on the specifications of this decision, it may encounter the same problem as did COPA. The Court will likely find that challengers of such legislation can suggest less-restrictive means and perhaps an international solution.[17] Any future legislation may consequently be struck down, again with neither children nor free speech any more protected. A national solution is always going to chill Internet speech because of the international nature of the Internet pornography community. Should the public be satisfied with a solution that merely chills speech comparatively less than other solutions, or should the public demand an approach that respects

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[9] *See* discussion *infra* Part III.B for a description of COPA.
[10] THE HENRY J. KAISER FAMILY FOUNDATION, *supra* note 2.
[11] *See Filtering Web Porn*, CHRISTIAN SCI. MONITOR, July 1, 2004, at 8.
[12] Aftab, *supra* note 7, at 29.
[13] *Id.*
[14] "In response to the Court's decision in *Reno*, Congress passed COPA." Ashcroft v. ACLU, 124 S. Ct. 2783, 2789 (2004).
[15] The first attempt was the Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (codified as amended in scattered sections of 47 U.S.C.).
[16] Ashcroft v. ACLU, 124 S. Ct. at 2783.
[17] *See* Aftab, *supra* note 7.

both the right of parents to protect their children *and* the First Amendment?

III. A History of Failure: Attempts to Protect Minors from Internet Pornography

A. The Communications Decency Act

The Communications Decency Act[18] ("CDA") was Congress' first attempt to protect minors from Internet pornography. The American Civil Liberties Union ("ACLU") successfully challenged the CDA.[19] Specifically, the ACLU took issue with two provisions of the CDA: (1) the criminalization of the knowing transmission of obscene or indecent communications to persons under eighteen,[20] and (2) the ban on the knowing transmission to minors of any content that "depicts or describes, in terms patently offensive, as measured by contemporary community standards, sexual or excretory activities or organs."[21]

The Supreme Court held that these provisions were in violation of the First Amendment of the United States Constitution.[22] The Court rebuked Congress for the breadth of the CDA's coverage.[23] The Court held that despite the affirmative defenses built into the act, including a good faith exception where an Internet pornography provider took reasonable steps to prevent minors from accessing his wares[24] and required proof-of-age,[25] the impact on speech was too great, and the affirmative defenses not sufficiently narrowly-tailored.[26]

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[18] 47 U.S.C. § 223 (2001). The CDA made it a crime for any person to post material on the Internet that would be considered indecent or obscene. This applied to all Internet communications, including email. *Id.*

[19] ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996).

[20] *Id.* at 827; 47 U.S.C. § 223(a)(1)(B).

[21] 47 U.S.C. § 223(d).

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

[23] *Id.* at 877 (deeming the breadth of the CDA "wholly unprecedented").

[24] 47 U.S.C. § 223(e)(5)(A).

[25] *Id.* § 223(e)(5)(B).

[26] *See* ACLU v. Reno, 521 U.S. at 876.

B. The Child Online Protection Act

Congress constructed COPA based on the specifications outlined in the *Reno* decision.[27] Where the CDA applied to all Internet communications, including email, COPA only applies to material on the World Wide Web.[28] Additionally, unlike the CDA, COPA only applies to communications made for commercial purposes. COPA imposes criminal penalties of a $50,000 fine and six months in prison for knowingly posting, for "commercial purposes," content that is "harmful to minors" on the World Wide Web.[29] Furthermore, where the CDA prohibited "indecent" and "patently offensive" communications, COPA restricts only the narrower category of material "harmful to minors."[30] In defining what is "harmful to minors," COPA uses "contemporary community standards."[31]

In *Ashcroft v. ACLU I*,[32] COPA's "contemporary community standards" received its first constitutional challenge.[33] The Court held that COPA's reliance on community standards to identify material harmful to minors did not, by itself, render the statute substantially overbroad for purposes of the First Amendment.[34] While COPA withstood the "contemporary community standards" challenge, it was felled by filters in *Ashcroft v. ACLU II*.[35]

IV. Another One Bites the Dust: *Ashcroft v. ACLU II*

The most recent challenge to COPA came to the Supreme Court via the United States Court of Appeals for the Third

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[27] *Compare* ACLU v. Reno, 521 U.S. 844 (1997), *with* 47 U.S.C. § 231 (meeting the specifications outlined in *Reno*).
[28] Ashcroft v. ACLU, 535 U.S. 564, 569 (2002).
[29] 47 U.S.C. § 231(a)(1).
[30] *Compare* 47 U.S.C. § 223 (2001) *with* 47 U.S.C. § 231.
[31] 47 U.S.C. § 231(e)(6).
[32] 535 U.S. 564 (2002).
[33] *Id.*
[34] *Id.*
[35] 124 S. Ct. 2783 (2004).

Circuit.[36] The Third Circuit upheld a preliminary injunction against enforcement of COPA based on the government's failure to rebut the plaintiff Internet providers' contention that filtering software was a plausible, less restrictive, and available alternative.[37] The United States Supreme Court held that preliminary injunctive relief was warranted on the basis of the failure by the Attorney General to rebut the providers' contentions.[38]

In particular, the Court noted that filters impose selective restrictions at the receiving end, not universal restrictions at the source.[39] The Court also noted that filters could block foreign-source materials not subject to COPA.[40] The Court listed ways that filters are potentially more effective than COPA: Use of filters does not condemn any category of speech as criminal; filter use does not chill freedom of speech; COPA may encourage providers to move overseas; and minors may have their own credit cards.[41] Filtering, the Court pointed out, need not be perfect; it need only be better than COPA.[42] While acknowledging that an argument exists that filters are not an available alternative because Congress may not require that they be used, the Court relied on the proven constitutionality of giving strong incentives to encourage their use.[43]

Far from suggesting that filters are a panacea, the Court acknowledged that filters are "not a perfect solution to the problem of children gaining access to harmful-to-minors materials. A filter may block some materials that are not harmful to minors and may fail to catch some that are."[44] But again, the Court reasserted the burden: "Whatever the deficiencies of filters, . . . the Government

[36] ACLU v. Ashcroft, 322 F.3d 240 (3d Cir. 2003).
[37] *Id.*
[38] Ashcroft v. ACLU, 124 S. Ct. 2783 (2004).
[39] *Id.* at 2792.
[40] *Id.*
[41] *Id.*
[42] *Id.* at 2793.
[43] *See, e.g.*, United States v. Am. Library Ass'n, 539 U.S. 194 (2003) (holding that Congress can give strong incentives to schools and libraries to use filters).
[44] Ashcroft v. ACLU, 124 S. Ct. at 2793.

failed to introduce specific evidence proving that existing technologies are less effective than the restrictions in COPA."[45]

The Court explained that "COPA presumes that parents lack the ability, not the will, to monitor what their children see" on the Internet.[46] The Court noted that by enacting programs to promote use of filtering software, Congress could give parents the control they seek without penalizing speech.[47] The primary precedent relied upon in this regard is the Supreme Court's decision in *United States v. Playboy Entertainment Group*.[48] In *Playboy*, the Court grappled with a content-based restriction designed to protect minors from viewing "harmful" materials.[49] The choice in that case was between a blanket speech restriction and a more specific technological solution that was available for case-by-case implementation by parents.[50] The Court held that absent a showing that the proposed less restrictive alternative would be less effective, the more restrictive option proposed by Congress could not survive strict scrutiny.[51]

Interestingly, the majority concluded its opinion in *Ashcroft II* with a message of hope for Congress: "On a final point, it is important to note that this opinion does not hold that Congress is incapable of enacting any regulation of the Internet designed to prevent minors from gaining access to harmful materials."[52]

V. A National Solution Will Necessarily Chill Free Speech

A. Congress Enacts Legislation to the Specifications of Supreme Court Decisions

As previously discussed, Congress enacted COPA in response to the Supreme Court decision in *Reno*.[53] COPA was

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[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] 529 U.S. 803 (2000).
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] Ashcroft v. ACLU, 124 S. Ct at 2795.
[53] ACLU v. Reno, 521 U.S. 844 (1997).

specifically tailored so as to avoid the pitfalls encountered by its predecessor, the CDA.[54] Should Congress continue its pattern and draft a new statute in response to the Court's decision in *Ashcroft II*, it will create legislation centered on the voluntary but heavily incentive-induced use of filters. This solution may be viewed by some as having the added advantage of addressing the problem domestically, as Congress does not have control over commercial pornography site operators abroad.

B. Congress Will Likely Provide Incentives for the Use of Filters

The Internet was designed both for global access and to avoid obstructions; it is borderless.[55] Because the Internet is global, in order to control what is accessible on the Internet, any successful regulation will have to be global.[56] As a result, any legislation drafted by Congress is likely to be either ineffective[57] or over-broad. Because Congress only has jurisdiction over U.S.-based commercial pornography site operators, any measures that criminalize pornographic Internet sites may do nothing more than drive the site operators overseas, where Congress is truly powerless[58] so long as it operates conventionally.[59]

The difficulty of adapting old rules to the new medium of the Internet is well documented in the area of obscenity laws.[60] Congress' answer thus far to the quandary posed by international pornography site operators has been to encourage and functionally

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[54] Ashcroft v. ACLU, 124 S. Ct. 2783.

[55] Aftab, *supra* note 7, at 27.

[56] *Id.*

[57] *See id.* ("Regulatory schemes are largely ineffective when it comes to controlling the entire Internet.").

[58] Ashcroft v. ACLU, 124 S. Ct at 2792.

[59] This is to say that if Congress were to adopt measures in cooperation with the international community, as per Ms. Aftab's suggestions, to foster the Internet pornography industry's use of best practice guidelines, Congress would have power to protect children and the First Amendment. This, however, is obviously an unconventional use of Congressional authority.

[60] *See, e.g.*, Ashcroft v. ACLU, 535 U.S. 564, 603 (2002) (Stevens, J., dissenting).

require filters on public computers. For example, the Children's Internet Protection Act[61] ("CIPA") provides that a library may not receive two forms of federal assistance related to Internet access unless the library has a policy of Internet safety for minors that includes the operation of a technology protection measure such as filters.

In *U.S. v. American Library Ass'n*,[62] the Court held that "[b]ecause public libraries' use of Internet filtering software does not violate their patrons' First Amendment rights, CIPA does not violate the Constitution, and is a valid exercise of Congress' spending power."[63] Based on this precedent and the decision in *Ashcroft II*, Congress is likely to draft legislation that includes powerful incentives, like those used in *American Library Ass'n*, in order to encourage and functionally require[64] the use of filters on computers across the country.

C. The Price of Catching the International as Well as US-Source Obscenity is Free Speech

The Internet pornography industry is involved in a cat-and-mouse game with those who try to regulate it.[65] The risk that Internet pornography providers will outsmart filters is great.[66] Equally great is the risk that filters will chill Internet speech, filter too much useful information, and violate the First Amendment. Thus far, the Supreme Court has held only that filters are likely[67] a

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[61] Children's Internet Protection Act (CIPA), Pub. L. No. 106-554, 114 Stat. 2763A-335 (2000) (codified at 20 U.S.C. § 9134(f) (2000) and 47 U.S.C. § 254(h) (2000)).

[62] 539 U.S. 194 (2003).

[63] *Id.* at 214.

[64] In *U.S. v. American Library Ass'n*, the Court held that public libraries could not receive the federal assistance that they specifically required to provide Internet access unless they installed filtering software. As such, it does not resemble an incentive-based program so much as one of compliance or deprivation. 539 U.S. 194, 212 (2003).

[65] *See Filtering Web Porn*, *supra* note 11.

[66] *Id.*

[67] It should be noted that the instant case is on remand to determine the updated facts about filters; the possibility remains that COPA could be ruled less restrictive than filters.

lesser evil to the First Amendment when compared to the CDA and COPA.

Recently, a study by the Kaiser Family Foundation revealed the weaknesses of filtering technology.[68] Kaiser conducted a test of general health, sexual health, and pornography Internet sites against seven filtering products set at three different configurations.[69] At the least restrictive level, the study showed filters fail to block as much as 13% of pornography while incorrectly blocking an average of 1.4% of general health sites and 9% of sexual health information.[70] Incorrect blocking swelled to as much as 50% at more restrictive levels.[71] Even when set at their least restrictive level, filters block an average of one in ten non-pornographic health sites resulting from searches using the terms "condoms," "safe sex," and "gay."[72] At the intermediate level of restriction, 27% of health sites related to "condoms" were blocked.[73] Interestingly, the Kaiser study found that the proportion of pornographic sites blocked did not increase markedly based on the configuration of the filter.[74] Parents anxious to protect their children from Internet pornography, however, may set the filter to its highest level, thereby blocking an average of 24% of health sites.[75] It is not difficult to surmise the effect of filters on all aspects of Internet speech from the findings of the Kaiser study.

The study clearly shows that filters censor speech. Speech is stifled at its destination, if not its source. While the Court in *Ashcroft v. ACLU II* has only decided that filters are *probably* less likely than COPA to chill free speech,[76] their use may not be the best way to protect First Amendment rights. Is this result good enough?

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[68] *See* THE HENRY J. KAISER FAMILY FOUNDATION, *supra* note 2.
[69] *See Id.*
[70] *Id.* at 6–7.
[71] *Id.* at 8.
[72] *Id.* at 6.
[73] *Id.*
[74] *Id.*
[75] *Id.* at 8.
[76] *See* ACLU v. Ashcroft, 322 F.3d 240 (3d Cir. 2003).

VI. Seeking International Solutions to Protect National Rights

If COPA is insufficient and filters are too much, what can be done to ensure the dual goals of protecting children from Internet pornography and the guarantees of the First Amendment? Parry Aftab, a cyberlawyer, proposes separating the sexual content debate from the solvable issues relating to marketing and commercial practices.[77] She proposes a multi-part, international solution. She suggests that the international community make it in a pornography site operator's best interest to adopt best practice guidelines.[78] Once they have adopted these guidelines, the operators will be given the suffix .xxx for their web addresses.[79] Consumers, understanding that they can choose between sites that will protect their privacy and financial information, and those that will not, will demand better commercial practices from sites they frequent.[80] Obviously those who oppose all forms of pornography and those who believe that regulation of pornography is wrong will find fault with Aftab's approach. However, the conventional approach is a history of failures. The plan laid out by Aftab acknowledges the importance of free speech rights and the reality of the international nature of Internet pornography.

Aftab points out that many online industries operate successfully under applicable "best practice guidelines."[81] The online pornography industry has avoided adopting such standards or guidelines.[82] As a result, the online pornography industry is rife with fraud and e-commerce abuses.[83] Credit card companies have long recognized the absence of best practice guidelines in this industry and have labeled Internet pornography providers as "high risk," thereby resulting in credit card chargebacks, penalties, and high fees.[84] The strain of operating under these costs, as well as

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[77] Aftab, *supra* note 7.
[78] *Id.* at 5.
[79] *Id.*
[80] *Id.* at 6.
[81] *Id.* at 4.
[82] *Id.* at 4.
[83] *Id.*
[84] *Id.* at 22.

the use of filters and the amount of competition among pornographic Internet sites, make this an industry ripe for regulation.[85] The adoption of best practice guidelines is an important first step towards regulation. These guidelines would prohibit unscrupulous and abusive marketing practices while requiring better privacy and security practices.[86] The result would be less unintended exposure to children, including no pop-up ads or acquisition of domain names based on common misspellings of non-sexual Internet site names,[87] while adults would retain the right to choose what to read and see. Such best practice guidelines are usually adopted with governmental encouragement.

For those Internet pornography companies that adopt best practice guidelines, there would be a valuable reward: a .xxx suffix.[88] This suffix becomes a marker of the best practice guidelines; it is functionally a sign of the quality of business practices so that consumers can choose sites that will not steal their credit card numbers or spam their children.[89] Ideally, this .xxx suffix would signify not only a site that had accepted the best practice guidelines but also an easy category of material that parents could choose to block from computers in a similar manner to the blocking of certain television channels. This removes the largest threat posed by filters to the First Amendment because there would be no risk of over-blocking. Blocking would be specific and voluntary at the site of receipt. There obviously exists an argument that the only genre of porn sites left for kids to happen-upon will be the truly bad ones that do not comply with the best practice guidelines. These best practice guidelines are not the magic bullet. It will, however, be hard for these sites to survive in an industry dominated by best practice guideline sites with the .xxx suffix.

There are incentives for the Internet pornography providers to adopt these practices. If Internet sites can indicate that they offer better privacy and more secure services to their customers,

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[85] *Id.*
[86] *Id.* at 21.
[87] *Id.* at 10.
[88] *See id.* at 29.
[89] *See id.*

these actions should bring more consenting adult customers to their sites. If given the choice, customers of *any* product are likely to choose the one that guarantees more privacy and security. Currently, pornography sites have a problem collecting on credit card charges because credit card companies are often reluctant to work with the adult online industry.[90] In fact, due to the high number of customer disputes, the only industry against whom American Express has adopted an across-the-board ban on card use is online pornography.[91] If the Internet pornography providers earned .xxx status and the sterling credit record required for it, credit card companies might be willing to reconsider their positions.

Other solutions have been suggested. The mainstream media has urged more parental supervision.[92] The National Academies' National Research Council has suggested placing an emphasis on social and education strategies that teach children how to make choices once they are online but declined to endorse parental supervision as a solution.[93] On the other end of the spectrum, liberal voices join the debate by invoking the slippery slope of censorship.[94] The clear and realistic proposal offered by Aftab is by far the most convincing solution to the problem of underage access to Internet pornography. It both recognizes the

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[90] *Id.* at 23–24.

[91] Roy Bragg, *Porn Nets Big Profits; Web Sites Take in as Much as $3 Billion a Year and Growing*, SAN ANTONIO EXPRESS-NEWS, Sept. 17, 2000, at 1J.

[92] ABC NEWS, *No Easy Answer, Study: Technology Alone Won't Block Online Porn from Kids*, *at* http://abcnews.go.com/Technology/story?id=98012&page=1 (May 2, 2004) (on file with the North Carolina Journal of Law & Technology).

[93] COMMITTEE TO STUDY TOOLS AND STRATEGIES FOR PROTECTING KIDS FROM PORNOGRAPHY AND THEIR APPLICABILITY TO OTHER APPROPRIATE INTERNET CONTENT, NATIONAL RESEARCH COUNCIL, YOUTH, PORNOGRAPHY, AND THE INTERNET (Dick Thornburgh & Herbert S. Lin, eds., 2002), *available at* http://www.nap.edu/books/0309082749.html.

[94] *See, e.g.*, MARJORIE HEINS, THE FREE EXPRESSION POLICY PROJECT, *Internet Filters are Now a Fact of Life, but Some are Worse Than Others* (2004) *at* http://www.fepproject.org/reviews/ayre.html (on file with the North Carolina Journal of Law & Technology) (reviewing Lori Bowen Ayre, FILTERING AND FILTERING SOFTWARE (2004)).

international nature of the problem and does not get mired in the debate over pornography itself.

VII. Conclusion

The availability of Internet pornography to minors is certainly an international problem, and a national solution is both underinclusive, since the U.S. cannot prosecute international Internet pornographers, and overinclusive, since filters block out a huge amount of non-pornographic information. Should Congress draft legislation providing incentives for individual families to install filtering technology onto their home computers, free speech will be in danger. Unfortunately, because of the Court's decision in *Ashcroft v. ACLU II*, Congress is likely to do just that.

Instead of following the Court's opinion in its next legislative attempt, Congress should think unconventionally. The Court had only to decide which was less restrictive on free speech yet still effective in protecting children: COPA or filters. It was not choosing from a universe of options, and it was not deciding which was *least* restrictive and *most* effective. It is Congress' job to propose the solution. The Court's holding here is not conclusive and will not solve the twin problems currently posed by Internet pornography. The concept offered by Aftab, best practice guidelines and the .xxx suffix, is just one idea. As a society, we may have to acknowledge that Internet pornography providers are here to stay. We cannot simply push them out of our national borders. The Internet is, by definition, borderless. The answer to the new medium is not creating restrictive virtual borders that chill free speech. We must be more practical and stop debating pornography so we can guarantee effective protection for both children *and* the Constitution.

Until Congress accepts that a national solution is fallible, we will have to choose which we value more: protecting minors from obscenity or the First Amendment. In seeking an answer to the problem of Internet pornography, we should not settle for the lesser of the evils. We should be seeking an effective, practical solution.