THE FIRST AMENDMENT

CONSTITUTIONAL PROTECTION OF EXPRESSION AND CONSCIENCE

WILLIAM COHEN

2005 SUPPLEMENT

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THE FIRST AMENDMENT: CONSTITUTIONAL PROTECTION OF EXPRESSION AND CONSCIENCE

by

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TABLE OF CASES

Principal cases are in bold type. Non-principal cases are in roman type. References are to Pages.

American Library Ass'n, Inc., United States v., 539 U.S. 194, 123 S.Ct. 2297, 156 L.Ed.2d 221 (2003), **23**
Ashcroft v. American Civil Liberties Union, 542 U.S. 656, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004), **4**

Clingman v. Beaver, ___ U.S. ___, 125 S.Ct. 2029 (2005), **38**
Cutter v. Wilkinson, ___ U.S. ___, 125 S.Ct. 2113 (2005), **98**

Eldred v. Ashcroft, 537 U.S. 186, 123 S.Ct. 769, 154 L.Ed.2d 683 (2003), 69
Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004), 70

Illinois v. Telemarketing Associates, Inc., 538 U.S. 600, 123 S.Ct. 1829, 155 L.Ed.2d 793 (2003), 22

Johanns v. Livestock Marketing Ass'n, ___ U.S. ___, 125 S.Ct. 2055 (2005), **34**

Locke v. Davey, 540 U.S. 712, 124 S.Ct. 1307, 158 L.Ed.2d 1 (2004), **94**

McConnell v. Federal Election Com'n, 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003), **42**
McCreary County, Ky. v. American Civil Liberties Union of Ky., ___ U.S. ___, 125 S.Ct. 2722 (2005), **70**

Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988), 22

Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980), 22
Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984), 22

Turner Broadcasting System, Inc. v. F.C.C., 520 U.S. 180, 117 S.Ct. 1174, 137 L.Ed.2d 369 (1997), 69

United States v. _____ (see opposing party)

Van Orden v. Perry, ___ U.S. ___, 125 S.Ct. 2854 (2005), **83**
Village of (see name of village)
Virginia v. Black, 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003), **11**
Virginia v. Hicks, 539 U.S. 113, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003), **1**

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TABLE OF CONTENTS

TABLE OF CASES v

CHAPTER 1 Governmental Control of the Content of Expression 1

SECTION 2. Intermezzo: An Introduction to the Concepts of Vagueness, Overbreadth and Prior Restraint 1

A. Vagueness and Overbreadth 1
Page 52. Add at end of subsection: 1
Virginia v. Hicks 1

SECTION 3. Speech Conflicting With Other Community Values: Government Control of the Content of Speech 4

B. Control of Obscenity and Pornography 4
Page 139. Add at end of subsection: 4
Ashcroft v. American Civil Liberties Union 4
C. Control of "Fighting Words" and Offensive Speech 11
Page 147. Replace RAV v. City of St. Paul: 11
Virginia v. Black 11
D. Regulation of Commercial Speech 22
Page 173. Add before 44 Liquormart, Inc. v. Rhode Island. 22

CHAPTER 2 Restrictions on Time, Place, or Manner of Expression 23

SECTION 5. Government Subsidies to Speech 23

Page 298. Add at end of chapter: 23
United States v. American Library Association, Inc. 23

CHAPTER 3 Protection of Penumbral First Amendment Rights 34

SECTION 3. FREEDOM OF ASSOCIATION 34

D. Compulsory Association Membership 34
Page 332. Replace Board of Regents of University of Wisconsin System v. Southworth: 34
Johanns v. Livestock Marketing Association 34

SECTION 4. Application of the First Amendment to Government Regulation of Elections ---- 38

A. Choosing and Electing Candidates for Public Office ---- 38
Page 356. Add at end of subsection: ---- 38
Clingman v. Beaver ---- 38
B. Political Fundraising and Expenditures ---- 42
Pages 361–366. Delete First National Bank of Boston v. Bellotti and Federal Election Commission v. National Right to Work Committee. ---- 42
Pages 373–385. Delete Nixon v. Shrink Missouri Government PAC and Federal Election Commission v. Colorado Republican Federal Campaign Committee. ---- 42
Pages 388–394. Delete McIntyre v. Ohio Elections Commission. ---- 42
Page 361. Add the following case: ---- 42
McConnell v. Federal Election Commission ---- 42

CHAPTER 4 Freedom of the Press ---- 69

SECTION 6. Special Problems of the Electronic Media ---- 69

Page 462. Add after Turner Broadcasting System v. Federal Communications Commission: ---- 69

CHAPTER 5 Religion and the Constitution ---- 70

SECTION 1. The Establishment Clause ---- 70

B. Government Religious Exercises, Ceremonies, Displays, and Practices ---- 70
Page 482. Add after Santa Fe Independent School District v. Doe: ---- 70
Page 487. Replace County of Allegheny v. American Civil Liberties Union: ---- 70
McCreary County, Kentucky v. American Civil Liberties Union of Kentucky ---- 70
Van Orden v. Perry ---- 83

SECTION 2. The Free Exercise of Religion ---- 94

Page 578. Add after Church of Lukumi Babalu Aye, Inc. v. Hialeah: ---- 94
Locke v. Davey ---- 94
Page 588. Add at end of chapter: ---- 98
Cutter v. Wilkinson ---- 98

CHAPTER 1

GOVERNMENTAL CONTROL OF THE CONTENT OF EXPRESSION

SECTION 2. INTERMEZZO: AN INTRODUCTION TO THE CONCEPTS OF VAGUENESS, OVERBREADTH AND PRIOR RESTRAINT

A. VAGUENESS AND OVERBREADTH

Page 52. Add at end of subsection:

Virginia v. Hicks

539 U.S. 113, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003).

Justice Scalia delivered the opinion of the Court.

The issue presented in this case is whether the Richmond Redevelopment and Housing Authority's trespass policy is facially invalid under the First Amendment's overbreadth doctrine.

I

A

The Richmond Redevelopment and Housing Authority (RRHA) owns and operates a housing development for low-income residents called Whitcomb Court. Until June 23, 1997, the city of Richmond owned the streets within Whitcomb Court. The city council decided, however, to "privatize" these streets in an effort to combat rampant crime and drug dealing in Whitcomb Court—much of it committed and conducted by nonresidents. . . . The city then conveyed these streets by a recorded deed to the RRHA (which is a political subdivision of the Commonwealth of Virginia). . . . [T]he RRHA posted red-and-white signs on each apartment building—and every 100 feet along the streets—of Whitcomb Court, which state: "NO TRESPASSING[.] PRIVATE PROPERTY[.] . . ." The RRHA also enacted a policy authorizing the Richmond police

> "to serve notice, either orally or in writing, to any person who is found on Richmond Redevelopment and Housing Authority property when such person is not a resident, employee, or such person cannot demonstrate *a legitimate business or social purpose* for being on the premises. Such notice shall forbid the person from returning to the property. Finally, Richmond Redevelopment and Housing Authority authorizes Richmond Police Department officers to arrest any person for trespassing after such person, having been duly notified, either stays upon or returns to Richmond Redevelopment and Housing Authority property."

Persons who trespass after being notified not to return are subject to prosecution under Va. Code Ann. § 18.2–119 (1996):

> "If any person without authority of law goes upon or remains upon the lands, buildings or premises of another, or any portion or area thereof, after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian or other person lawfully in charge thereof . . . he shall be guilty of a Class 1 misdemeanor."

B

Respondent Kevin Hicks, a nonresident of Whitcomb Court, has been convicted on two prior occasions of trespassing there and once of damaging property there. Those convictions are not at issue in this case. While the property-damage charge was pending, the RRHA gave Hicks written notice barring him from Whitcomb Court, and Hicks signed this notice in the presence of a police officer. Twice after receiving this notice Hicks asked for permission to return; twice the Whitcomb Court housing manager said "no." That did not stop Hicks; in January 1999 he again trespassed at Whitcomb Court and was arrested and convicted under § 18.2–119.

At trial, Hicks maintained that the RRHA's policy limiting access to Whitcomb Court was both unconstitutionally overbroad and void for vagueness. On appeal of his conviction, . . . the Virginia Supreme Court . . . found the policy defective because it vested too much discretion in Whitcomb Court's manager to determine whether an individual's presence at Whitcomb Court is "authorized," allowing her to "prohibit speech that she finds personally distasteful or offensive even though such speech may be protected by the First Amendment." . . .

II

A

Hicks does not contend that he was engaged in constitutionally protected conduct when arrested; nor does he challenge the validity of the trespass *statute* under which he was convicted. Instead he claims that the RRHA *policy* barring him from Whitcomb Court is overbroad under the First Amendment, and cannot be applied to him—or anyone else. The First Amendment doctrine of overbreadth is an exception to our normal rule regarding the standards for facial challenges. . . .

. . .

B

Petitioner asks this Court to impose restrictions on "the use of overbreadth standing," limiting the availability of facial overbreadth challenges to those whose *own conduct* involved some sort of expressive activity. The United States as *amicus curiae* makes the same proposal, and urges that Hicks' facial challenge to the RRHA trespass policy "should not have been entertained." The problem with these proposals is that we are reviewing here the decision of a *State* Supreme Court; our standing rules limit only the *federal* courts' jurisdiction over certain claims. "[S]tate courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law." . . . Whether Virginia's courts should have *entertained* this overbreadth challenge is entirely a matter of state law.

This Court may, however, review the Virginia Supreme Court's holding that the RRHA policy violates the First Amendment. We may examine, in particular, whether the claimed overbreadth in the RRHA policy is sufficiently "substantial" to produce facial invalidity. These questions involve not standing,

but "the determination of [a] First Amendment challenge on the merits." ... Because it is the Commonwealth of Virginia, not Hicks, that has invoked the authority of the federal courts by petitioning for a writ of certiorari, our jurisdiction to review the First Amendment merits question is clear ... The Commonwealth has suffered, as a consequence of the Virginia Supreme Court's "final judgment altering tangible legal rights," an actual injury in fact—inability to prosecute Hicks for trespass—that is sufficiently "distinct and palpable" to confer standing under Article III ... We accordingly proceed to that merits inquiry, leaving for another day the question whether our ordinary rule that a litigant may not rest a claim to relief on the legal rights or interests of third parties ... would exclude a case such as this from initiation in federal court.

C

The Virginia Supreme Court found that the RRHA policy allowed Gloria S. Rogers, the manager of Whitcomb Court, to exercise "unfettered discretion" in determining who may use the RRHA's property. ... Specifically, the court faulted an "unwritten" rule that persons wishing to hand out flyers on the sidewalks of Whitcomb Court need to obtain Rogers' permission. This unwritten portion of the RRHA policy, the court concluded, unconstitutionally allows Rogers to "prohibit speech that she finds personally distasteful or offensive."

... The Virginia Supreme Court, based on its objection to the "unwritten" requirement that demonstrators and leafleters obtain advance permission, declared the *entire* RRHA trespass policy overbroad and void—including the written rule that those who return after receiving a barment notice are subject to arrest. Whether these provisions are severable is of course a matter of state law, ... and the Virginia Supreme Court has implicitly decided that they are not—that all components of the RRHA trespass policy must stand or fall together. It could not properly decree that they fall by reason of the overbreadth doctrine, however, unless the trespass policy, *taken as a whole*, is substantially overbroad judged in relation to its plainly legitimate sweep. ...

Hicks has not made such a showing with regard to the RRHA policy taken as a whole ... Consider the "no-return" notice served on nonresidents who have no "legitimate business or social purpose" in Whitcomb Court: Hicks has failed to demonstrate that this notice would even be given to anyone engaged in constitutionally protected speech. ... Hicks has failed to demonstrate that *any* First Amendment activity falls outside the "legitimate business or social purpose[s]" that permit entry. As far as appears, until one receives a barment notice, entering for a First Amendment purpose is not a trespass.

As for the written provision authorizing the police to arrest those who return to Whitcomb Court after receiving a barment notice: That certainly does not violate the First Amendment as applied to persons whose postnotice entry is not for the purpose of engaging in constitutionally protected speech. And Hicks has not even established that it would violate the First Amendment as applied to persons whose postnotice entry *is* for that purpose. ... [T]he notice-barment rule subjects to arrest those who reenter after trespassing and after being warned not to return—*regardless* of whether, upon their return, they seek to engage in speech. Neither the basis for the barment sanction (the prior trespass) nor its purpose (preventing future trespasses) has anything to do with the First Amendment. Punishing its violation by a person who wishes to engage in free speech no more implicates the First Amendment than would the punishment of a person who has (pursuant to lawful regulation) been banned from a public park after vandalizing it, and who ignores the ban in order to

take part in a political demonstration. Here, as there, it is Hicks' nonexpressive *conduct*—his entry in violation of the notice-barment rule—not his speech, for which he is punished as a trespasser.

Most importantly, both the notice-barment rule and the "legitimate business or social purpose" rule apply to *all* persons who enter the streets of Whitcomb Court, not just to those who seek to engage in expression. . . . Applications of the RRHA policy that violate the First Amendment can still be remedied through as-applied litigation, but the Virginia Supreme Court should not have used the "strong medicine" of overbreadth to invalidate the entire RRHA trespass policy. Whether respondent may challenge his conviction on other grounds—and whether those claims have been properly preserved—are issues we leave open on remand.

. . .

Justice Souter, with whom Justice Breyer joins, concurring.

I join the Court's opinion and add this afterword to flag an issue of no consequence here, but one on which a future case might turn. In comparing invalid applications against valid ones for purposes of the First Amendment overbreadth doctrine, the Supreme Court of Virginia apparently assumed that the appropriate focus of the analysis was the "unwritten" element of the housing authority's trespass policy, that is, the requirement that nonresidents distributing literature or demonstrating on the property obtain prior authorization. . . . We, on the other hand, take a broader view of the relevant law, by looking to the potential applications of the entire trespass policy, written and unwritten. It does not matter here, however, which position one takes on the appropriate "law" whose overbreadth is to be assessed, for there is no substantial overbreadth either way. . . . But in other circumstances, the scope of the law chosen for comparison with invalid applications might decide the case. It might be dispositive whether, say, a city's speech ordinance for a public park is analyzed alone or as one element of the combined policies governing expression in public schoolyards, municipal cemeteries, and the city council chamber. Suffice it to say that today's decision does not address how to go about identifying the scope of the relevant law for purposes of overbreadth analysis.

SECTION 3. SPEECH CONFLICTING WITH OTHER COMMUNITY VALUES: GOVERNMENT CONTROL OF THE CONTENT OF SPEECH

B. CONTROL OF OBSCENITY AND PORNOGRAPHY

Page 139. Add at end of subsection:

Ashcroft v. American Civil Liberties Union

542 U.S. 66, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004).

Justice Kennedy delivered the opinion of the Court.

This case presents a challenge to a statute enacted by Congress to protect minors from exposure to sexually explicit materials on the Internet, the Child Online Protection Act (COPA). 112 Stat. 2681–736, codified at 47 U.S.C. § 231. We must decide whether the Court of Appeals was correct to affirm a ruling by

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the District Court that enforcement of COPA should be enjoined because the statute likely violates the First Amendment.

In enacting COPA, Congress gave consideration to our earlier decisions on this subject, in particular the decision in *Reno v. American Civil Liberties Union,* 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). ... The imperative of according respect to the Congress, however, does not permit us to depart from well-established First Amendment principles. Instead, we must hold the Government to its constitutional burden of proof.

Content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people. To guard against that threat the Constitution demands that content-based restrictions on speech be presumed invalid ... and that the Government bear the burden of showing their constitutionality.... This is true even when Congress twice has attempted to find a constitutional means to restrict, and punish, the speech in question.

This case comes to the Court on certiorari review of an appeal from the decision of the District Court granting a preliminary injunction. ... The Government has failed, at this point, to rebut the plaintiffs' contention that there are plausible less restrictive alternatives to the statute. Substantial practical considerations, furthermore, argue in favor of upholding the injunction and allowing the case to proceed to trial. For those reasons, we affirm the decision of the Court of Appeals upholding the preliminary injunction, and we remand the case so that it may be returned to the District Court for trial on the issues presented.

I

A

COPA is the second attempt by Congress to make the Internet safe for minors by criminalizing certain Internet speech. ...

In response to the Court's decision in *Reno,* Congress passed COPA. COPA imposes criminal penalties of a $50,000 fine and six months in prison for the knowing posting, for "commercial purposes," of World Wide Web content that is "harmful to minors." § 231(a)(1). Material that is "harmful to minors" is defined 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, 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." § 231(e)(6).

"Minors" are defined as "any person under 17 years of age." § 231(e)(7). A person acts for "commercial purposes only if such person is engaged in the business of making such communications." ...

While the statute labels all speech that falls within these definitions as criminal speech, it also provides an affirmative defense to those who employ

specified means to prevent minors from gaining access to the prohibited materials on their Web site. A person may escape conviction under the statute by demonstrating that he

> "has restricted access by minors to material that is harmful to minors—
>
> "(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;
>
> "(B) by accepting a digital certificate that verifies age, or
>
> "(C) by any other reasonable measures that are feasible under available technology." § 231(c)(1).

Since the passage of COPA, Congress has enacted additional laws regulating the Internet in an attempt to protect minors. For example, it has enacted a prohibition on misleading Internet domain names, . . . in order to prevent Web site owners from disguising pornographic Web sites in a way likely to cause uninterested persons to visit them. See Brief for Petitioner 7 (giving, as an example, the Web site "whitehouse.com"). It has also passed a statute creating a "Dot Kids" second-level Internet domain, the content of which is restricted to that which is fit for minors under the age of 13. . . .

. . .

II

A

This Court, like other appellate courts, has always applied the abuse of discretion standard on the review of a preliminary injunction. . . . If the underlying constitutional question is close, therefore, we should uphold the injunction and remand for trial on the merits. Applying this mode of inquiry, we agree with the Court of Appeals that the District Court did not abuse its discretion in entering the preliminary injunction. . . .

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

The purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to assure that legitimate speech is not chilled or punished. For that reason, the test does not begin with the status quo of existing regulations, then ask whether the challenged restriction has some additional ability to achieve Congress' legitimate interest. Any restriction on speech could be justified under that analysis. Instead, the court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives.

In deciding whether to grant a preliminary injunction stage, a district court must consider whether the plaintiffs have demonstrated that they are likely to prevail on the merits. . . . As the Government bears the burden of proof on the ultimate question of COPA's constitutionality, respondents must be deemed likely to prevail unless the Government has shown that respondents' proposed less restrictive alternatives are less effective than COPA. Applying that analysis, the District Court concluded that respondents were likely to prevail. . . . That conclusion was not an abuse of discretion, because on this record there are a number of plausible, less restrictive alternatives to the statute.

The primary alternative considered by the District Court was blocking and filtering software. Blocking and filtering software is an alternative that is less restrictive than COPA, and, in addition, likely more effective as a means of

restricting children's access to materials harmful to them. The District Court, in granting the preliminary injunction, did so primarily because the plaintiffs had proposed that filters are a less restrictive alternative to COPA and the Government had not shown it would be likely to disprove the plaintiffs' contention at trial.

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

Filters also may well be more effective than COPA. First, a filter can prevent minors from seeing all pornography, not just pornography posted to the Web from America. . . . COPA does not prevent minors from having access to those foreign harmful materials. That alone makes it possible that filtering software might be more effective in serving Congress' goals. Effectiveness is likely to diminish even further if COPA is upheld, because the providers of the materials that would be covered by the statute simply can move their operations overseas. It is not an answer to say that COPA reaches some amount of materials that are harmful to minors; the question is whether it would reach more of them than less restrictive alternatives. In addition, the District Court found that verification systems may be subject to evasion and circumvention, for example by minors who have their own credit cards. Finally, filters also may be more effective because they can be applied to all forms of Internet communication, including e-mail, not just communications available via the World Wide Web.

. . .

One argument to the contrary is worth mentioning—the argument that filtering software is not an available alternative because Congress may not require it to be used. That argument carries little weight, because Congress undoubtedly may act to encourage the use of filters. We have held that Congress can give strong incentives to schools and libraries to use them. It could also take steps to promote their development by industry, and their use by parents. It is incorrect, for that reason, to say that filters are part of the current regulatory status quo. The need for parental cooperation does not automatically disqualify a proposed less restrictive alternative. In enacting COPA, Congress said its goal was to prevent the "widespread availability of the Internet" from providing "opportunities for minors to access materials through the World Wide Web in a manner that can frustrate parental supervision or control." . . . COPA presumes that parents lack the ability, not the will, to monitor what their children see. By enacting programs to promote use of filtering software, Congress could give parents that ability without subjecting protected speech to severe penalties.

The closest precedent on the general point is our decision in *Playboy Entertainment Group. Playboy Entertainment Group,* like this case, involved a content-based restriction designed to protect minors from viewing harmful materials. The choice was between a blanket speech restriction and a more specific technological solution that was available to parents who chose to implement it. . . . Absent a showing that the proposed less restrictive alterna-

tive would not be as effective, we concluded, the more restrictive option preferred by Congress could not survive strict scrutiny.... In the instant case, too, the Government has failed to show, at this point, that the proposed less restrictive alternative will be less effective. ...

B

There are also important practical reasons to let the injunction stand pending a full trial on the merits. First, the potential harms from reversing the injunction outweigh those of leaving it in place by mistake....

Second, there are substantial factual disputes remaining in the case. As mentioned above, there is a serious gap in the evidence as to the effectiveness of filtering software. ... By allowing the preliminary injunction to stand and remanding for trial, we require the Government to shoulder its full constitutional burden of proof respecting the less restrictive alternative argument, rather than excuse it from doing so.

Third, and on a related point, the factual record does not reflect current technological reality—a serious flaw in any case involving the Internet. The technology of the Internet evolves at a rapid pace. Yet the factfindings of the District Court were entered in February 1999, over five years ago. Since then, certain facts about the Internet are known to have changed. ... It is reasonable to assume that other technological developments important to the First Amendment analysis have also occurred during that time. More and better filtering alternatives may exist than when the District Court entered its findings. Indeed, we know that after the District Court entered its factfindings, a congressionally appointed commission issued a report that found that filters are more effective than verification screens.

. . .

Remand will also permit the District Court to take account of a changed legal landscape. Since the District Court made its factfindings, Congress has passed at least two further statutes that might qualify as less restrictive alternatives to COPA—a prohibition on misleading domain names, and a statute creating a minors-safe "Dot Kids" domain. See *supra,* at 4. Remanding for trial will allow the District Court to take into account those additional potential alternatives.

Justice Stevens, with whom Justice Ginsburg joins, concurring.

When it first reviewed the constitutionality of the Child Online Protection Act (COPA), the Court of Appeals held that the statute's use of "contemporary community standards" to identify materials that are "harmful to minors" was a serious, and likely fatal, defect. ... I continue to believe that the Government may not penalize speakers for making available to the general World Wide Web audience that which the least tolerant communities in America deem unfit for their children's consumption, but COPA's use of community standards is not the statute's only constitutional defect. Today's decision points to another: that, as far as the record reveals, encouraging deployment of user-based controls, such as filtering software, would serve Congress' interest in protecting minors from sexually explicit Internet materials as well or better than attempting to regulate the vast content of the World Wide Web at its source, and at a far less significant cost to First Amendment values. Because implementation of the various adult-verification mechanisms described in the statute provides only an affirmative defense, ... even full compliance with COPA cannot guarantee freedom from prosecution. Speakers who dutifully place their con-

tent behind age screens may nevertheless find themselves in court, forced to prove the lawfulness of their speech on pain of criminal conviction. . . .

Criminal prosecutions are, in my view, an inappropriate means to regulate the universe of materials classified as "obscene," . . . [E]ven with Justice Breyer's guidance, I find it impossible to identify just how far past the already ill-defined territory of "obscenity" he thinks the statute extends. Attaching criminal sanctions to a mistaken judgment about the contours of the novel and nebulous category of "harmful to minors" speech clearly imposes a heavy burden. . . .

. . .

Justice Scalia, dissenting. I agree with Justice Breyer's conclusion that the Child Online Protection Act (COPA), 47 U.S.C. § 231, is constitutional. See *post,* at 14 (dissenting opinion). Both the Court and Justice Breyer err, however, in subjecting COPA to strict scrutiny. Nothing in the First Amendment entitles the type of material covered by COPA to that exacting standard of review. . . .

There is no doubt that the commercial pornography covered by COPA fits this description. The statute applies only to a person who, "as a regular course of such person's trade or business, with the objective of earning a profit," . . . and "with knowledge of the character of the material," § 231(a)(1), communicates material that depicts certain specified sexual acts and that "is designed to appeal to, or is designed to pander to, the prurient interest," . . . Since this business could, consistent with the First Amendment, be banned entirely, COPA's lesser restrictions raise no constitutional concern.

Justice Breyer, with whom the Chief Justice and Justice O'Connor join, dissenting.

. . .

. . . [T]he Court is wrong. I cannot accept its conclusion that Congress could have accomplished its statutory objective—protecting children from commercial pornography on the Internet—in other, less restrictive ways.

1

. . . [T]he Act, properly interpreted, imposes a burden on protected speech that is no more than modest.

A

The Act's definitions limit the material it regulates to material that does not enjoy First Amendment protection, namely legally obscene material, and very little more. A comparison of this Court's definition of unprotected, "legally obscene," material with the Act's definitions makes this clear. . . .

B

The Act does not censor the material it covers. Rather, it requires providers of the "harmful to minors" material to restrict minors' access to it by verifying age. They can do so by inserting screens that verify age using a credit card, adult personal identification number, or other similar technology. See § 231(c)(1). In this way, the Act requires creation of an internet screen that minors, but not adults, will find difficult to bypass.

. . .

In addition to the monetary cost, and despite strict requirements that identifying information be kept confidential, . . . the identification requirements inherent in age-screening may lead some users to fear embarrassment. Both monetary costs and potential embarrassment can deter potential viewers and, in that sense, the statute's requirements may restrict access to a site. But this Court has held that in the context of congressional efforts to protect children, restrictions of this kind do not automatically violate the Constitution. And the Court has approved their use. . . .

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

II

I turn next to the question of "compelling interest," that of protecting minors from exposure to commercial pornography. No one denies that such an interest is "compelling." . . . Rather, the question here is whether the Act, given its restrictions on adult access, significantly advances that interest. In other words, is the game worth the candle?

The majority argues that it is not, because of the existence of "blocking and filtering software." The majority refers to the presence of that software as a "less restrictive alternative." But that is a misnomer—a misnomer that may lead the reader to believe that all we need do is look to see if the blocking and filtering software is less restrictive; and to believe that, because in one sense it is (one can turn off the software), that is the end of the constitutional matter.

But such reasoning has no place here. Conceptually speaking, the presence of filtering software is not an *alternative* legislative approach to the problem of protecting children from exposure to commercial pornography. Rather, it is part of the status quo, *i.e.,* the backdrop against which Congress enacted the present statute. It is always true, by definition, that the status quo is less restrictive than a new regulatory law. It is always less restrictive to do *nothing* than to do *something.* But "doing nothing" does not address the problem Congress sought to address—namely that, despite the availability of filtering software, children were still being exposed to harmful material on the Internet.

Thus, the relevant constitutional question is not the question the Court asks: Would it be less restrictive to do nothing? Of course it would be. Rather, the relevant question posits a comparison of (a) a status quo that includes filtering software with (b) a change in that status quo that adds to it an age-verification screen requirement. Given the existence of filtering software, does the problem Congress identified remain significant? Does the Act help to address it? These are questions about the relation of the Act to the compelling interest. Does the Act, compared to the status quo, significantly advance the ball? . . .

The answers to these intermediate questions are clear: Filtering software, as presently available, does not solve the "child protection" problem. It suffers from four serious inadequacies that prompted Congress to pass legislation instead of relying on its voluntary use. First, its filtering is faulty, allowing some pornographic material to pass through without hindrance. . . . [I]n the absence of words, the software alone cannot distinguish between the most obscene pictorial image and the Venus de Milo. . . .

Second, filtering software costs money. Not every family has the $40 or so necessary to install it.

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