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Brandon T. Grinsted

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United States v. Playboy Entertainment Group, Inc.: A Twenty-Four-Hour Safe Harbor for Sexually Explicit Programming

In United States v. Playboy Entertainment Group, Inc., the Supreme Court reaffirmed the long-standing principal that the government has a compelling interest to protect minors from exposure to indecent material. However, the Court held that a federal statute restricting transmission of cable television channels dedicated to sexually explicit programming violated the First Amendment because the government failed to prove that the restriction was the least restrictive means of addressing a real problem.

4. 120 S. Ct. at 1885, 1893. The relevant portion of the First Amendment states that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.
I. FACTUAL BACKGROUND

In 1995 Senators Diane Feinstein and Trent Lott offered an amendment to the Telecommunications Act of 1996 in an effort to protect unsupervised children from exposure to sexually explicit "signal bleed." "Signal bleed" is a phenomenon in which audio or visual portions of a scrambled digital signal might be heard or seen. Prior to the amendment, subscribers could request, free of charge, that cable operators fully scramble or fully block audio and visual signals from unwanted programs. However, although cable operators regularly scrambled certain channels, these techniques did not completely eliminate signal bleed. Section 505 of the Telecommunications Act of 1996 was enacted to curtail the problem of signal bleed associated with sexually oriented programming. Section 505 required cable operators to either fully scramble, fully block, or limit transmission of sexually oriented programming to the hours between 10:00 p.m. and 6:00 a.m.

In order to comply with Section 505, a majority of cable operators adopted the "time channeling" approach, which had the effect of eliminating transmission of sexually explicit programming for two-thirds of the day. Playboy Entertainment Group ("Playboy") owns two adult networks that provide sexually explicit programming to cable operators who subsequently transmit those programs to paying customers.
Although Playboy's signal is initially scrambled, paying customers are provided a converter box that permits the viewer to see and hear the programs.\textsuperscript{14} According to some surveys, thirty to fifty percent of adult programming occurs prior to 10:00 p.m. If the time channel approach was adopted, Playboy could face an estimated fifteen percent reduction in revenues.\textsuperscript{15}

On February 26, 1996, Playboy filed an action in the United States Circuit Court of Appeals for the Third Circuit challenging the constitutionality of Section 505 and requesting appointment of a three-judge district court.\textsuperscript{16} Playboy sought both a declaration that Section 505 violated the First Amendment and the Due Process Clause of the Fifth Amendment as well as an injunction against enforcement of the restriction. Playboy's motion for a temporary restraining order on enforcement of Section 505 was granted; however, the three-judge panel denied Playboy's motion for preliminary injunction and lifted the temporary restraining order.\textsuperscript{17} In March 1998 the United States District Court for the District of Delaware held a full trial on the issue.\textsuperscript{18}

The district court examined Section 505 and determined that the statute exclusively regulated signals from sexually explicit programming; therefore, the court concluded that Section 505 was a content-based restriction of speech.\textsuperscript{20} As a result, the court concluded that the government had the burden of proving that the restriction was the least restrictive means in addressing a "compelling" governmental interest.\textsuperscript{21} The court recognized that the government has a compelling interest in both protecting parental supervision over what their children watch and in protecting an individual's right to be secure in his or her own home from unwanted signal bleed.\textsuperscript{22} However, the court stated that the

\begin{itemize}
\item \textsuperscript{14} \textit{Id.}
\item \textsuperscript{15} 30 F. Supp. 2d at 711 & n.15.
\item \textsuperscript{16} \textit{Id.} at 705. Playboy's action was consolidated with Graff Pay-Per-View, which is also an owner of two adult networks; however, Graff subsequently withdrew from litigation. \textit{Id.}
\item \textsuperscript{17} U.S. CONST. amend. V.
\item \textsuperscript{18} 30 F. Supp. 2d at 705.
\item \textsuperscript{19} \textit{Id.} at 706.
\item \textsuperscript{20} \textit{Id.} at 714.
\item \textsuperscript{21} \textit{Id.} at 715. This test is commonly referred to as the "strict scrutiny" test or the "least restrictive means" test. See PSINET Inc. v. Chapman, 108 F. Supp. 2d 611, 625-26 (W.D. Va. 2000); 4 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE § 20.10 (2d ed. 1992).
\item \textsuperscript{22} 30 F. Supp. 2d at 717.
\end{itemize}
government failed to prove the type, duration, and magnitude of the harm caused from exposure to sexually explicit signal bleed.\textsuperscript{23} In addition, the court held that the government failed to show that Section 505 was the least restrictive alternative in light of the existence of Section 504 of the Telecommunications Act.\textsuperscript{24} Section 504 allowed subscribers to request that cable operators block transmission of any unwanted channels.\textsuperscript{25} The court found that Section 504 was not only content neutral, but it also allowed Playboy to broadcast its programming twenty-four hours a day to those subscribers wishing to receive such material.\textsuperscript{26} However, the court concluded that Section 504 would only be an effective alternative if it was accompanied by public notice and parental awareness of the available remedies.\textsuperscript{27} As a result, the court required Playboy to ensure that cable operators provide adequate notice of the blocking devices of Section 504 in its contractual agreements.\textsuperscript{28} In light of this alternative, the court held that Section 505 was an unconstitutional restriction of speech and enjoined its enforcement.\textsuperscript{29} The government subsequently filed a direct appeal to the Supreme Court.\textsuperscript{30}

II. LEGAL BACKGROUND

Historically, the Supreme Court has recognized a legitimate interest in protecting minors from sexually explicit material; however, restrictions that result in a blanket ban on material suitable for adults have been subject to a more stringent standard of review. In 1957 the Court in \textit{Butler v. Michigan}\textsuperscript{31} held that a state statute prohibiting the distribution of material deemed to be harmful to minors was unconstitutional.\textsuperscript{32} In \textit{Butler} defendant was charged a one hundred dollar fine for

\textsuperscript{23} Id. at 716. The government attempted to prove the magnitude of the harm caused by exposure to sexually explicit programming by the following: (1) an analogy with the effects of exposure to television violence; (2) drawing an inference that viewing sexually explicit signal bleed was the same as being exposed to sexually explicit material outright; (3) expert testimony concerning "dysphoria," modeling and changed attitudes towards sexuality. \textit{Id.}
\textsuperscript{24} Id. at 718-19.
\textsuperscript{25} Id. at 718.
\textsuperscript{26} Id.
\textsuperscript{27} Id. at 718-19.
\textsuperscript{28} Id. at 719. The court stated that inserts in monthly bills, on-air advertisements, mailed notices to those requesting a lockbox, and regular notice conveyed at reasonable intervals were all viable methods to ensure notice to customers. \textit{Id.}
\textsuperscript{29} Id. at 720.
\textsuperscript{30} 120 S. Ct. at 1885.
\textsuperscript{31} 352 U.S. 380 (1957).
\textsuperscript{32} Id. at 383-84.
serving a book containing "lewd or lascivious language" to an undercover policeman. Defendant appealed his conviction on the basis that the statute was an unconstitutional restriction of speech because the statute prohibited distribution of his book to the general public.

Although the Court recognized the State's interest in protecting minors from indecent material, the Court noted that such an interest did not justify a blanket ban of material that was suitable for adults. The Court noted that the effect of banning material suitable for adults on the basis of protecting the welfare of minors would "reduce the adult population of [the state] to reading only what is fit for children." As a result, the statute was held to be unconstitutional and defendant's conviction was reversed.

Eleven years after Butler, the Court in Ginsberg v. New York upheld a state prohibition on the sale of magazines depicting female nudity to persons under the age of seventeen. After being convicted of selling two adult magazines to a sixteen-year-old boy, defendant appealed contending that the statute unconstitutionally restricted speech because the statute sought to deny minors the right to access the same material that individuals over seventeen could read and see. Confronting the issue of whether the State could restrict a minor's right to access sex material more heavily than an adult's right to access the same type of material, the Court noted that the State has an exigent interest in protecting the welfare of its citizens by preventing the distribution of objectionable material to minors. Noting the distinct effect of erotic expression on children, the Court recognized the State's supervening interest in controlling the conduct of children.

33. Id. at 381-82.
34. Id. In addition, defendant contended that the statute was unconstitutional because it banned distribution of his publication on the basis of isolated passages that appeared offensive only when separated from the book as a whole. Furthermore, defendant contended that the statute was unconstitutionally vague. However, the Court did not take such a "wide sweep" and avoided deciding the matter on these bases. Id. at 381-82.
35. Id. at 383.
36. Id. The Court stated that restricting the general reading public to material fit for minors was "to burn the house to roast the pig." Id.
37. Id. at 384.
38. 390 U.S. 629 (1968).
39. Id. at 637, 645.
40. Id. at 631, 636.
41. Id. at 636-38.
42. Id. at 639 n.6. The Court noted that immaturity and "other considerations" may justify applying different standards in analyzing the constitutionality of restrictions on the distribution of material to minors. Id.
Specifically, the Court noted that two primary interests justified the State's restriction of access to adult material by minors when it is rational for the legislature to find that such exposure might be harmful. First, the Court recognized that the State has an interest in adopting legislation designed to aid parents in the care, custody, and nurture of their children. Second, the Court noted that the State has an interest in protecting the welfare of its children. In light of these legitimate interests and the fact that the statute did not seek to impose an outright ban on all material distributed to adults as well as minors, the Court held that the statute was a reasonable restriction on speech.

The Court in Bolger v. Youngs Drug Products Corp. struck down a similar attempt to justify an outright ban on commercial speech. In Bolger, Youngs Drug Products Corp. ("Youngs"), a manufacturer and distributor of contraceptives, was notified by the postal service that its practice of unsolicited mass mailings of materials pertaining to prophylactics and contraceptives was prohibited by federal law. Youngs brought an action against the postal service alleging that the ban on mailings was an unconstitutional restriction on speech. The Court recognized that the statute sought to protect parents' interest in protecting their children from unsolicited material; however, the Court stated that an outright ban on unsolicited mailings containing material suitable for adults was unconstitutionally broad. In reaching this decision, the Court noted that parents already have adequate control over and sufficient protections from the dissemination of unwanted material from their mailboxes.

The interest of parents in controlling the information disseminated to their children as well as the intrusive nature of the particular medium of communication have both been considered by the Court in analyzing the constitutionality of restrictions on speech disseminated through

43. Id. at 639-40.
44. Id. at 639.
45. Id. at 640.
46. Id. at 634-35, 641-43.
47. 463 U.S. 60 (1983).
48. Id. at 63-64. The materials distributed by mass unsolicited mailing consisted of three types of publication: (1) flyers promoting the distributor's products including prophylactics; (2) flyers exclusively devoted to prophylactics; (3) informational pamphlets discussing the desirability and availability of condoms as well as the use of condoms in preventing venereal diseases and providing descriptions of condoms manufactured by the distributor. Id. at 63 n.4.
49. Id. at 73-74.
50. Id. at 73.
broadcast media. In *FCC v. Pacifica Foundation*, the Supreme Court considered both the parental interests set out in *Ginsberg* as well as the preventive measures available to the recipient of speech in upholding an order seeking to prohibit the radio transmission of a monologue containing indecent language.

In considering whether the First Amendment denies the government power to restrict public broadcast of indecent language, the Court noted that the broadcast media is accorded less protection than other mediums of expression. The Court noted that the intrusive nature of radio transmission is readily apparent in determining the constitutionality of restrictions because the listener does not receive warning prior to receiving unexpected transmissions; therefore, the individual's right to privacy may be infringed. In addition, the Court declared that broadcasting is especially accessible to children and that the parents' right to control what their children hear justifies treating broadcasting differently than other forms of communication. Finally, the Court noted that, unlike the restriction in *Butler*, the FCC's proposed restriction did not amount to a complete ban on the subject material. As a result, the Court held that the Commission's action was constitutional.

Although the Court in *Pacifica* relied heavily on the pervasive nature of the broadcast medium in reaching its conclusion that the regulation of speech was constitutional, the Court has struck down similar

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53. *Id.* at 748-50. The monologue was entitled "Filthy Words" and was given by humorist George Carlin in front of a live audience. The monologue was twelve minutes long and consisted of a variety of expletives. *Id.* at 729, 751-55. After a man complained to the FCC that he had unintentionally received the broadcast while driving with his young son at about 2:00 p.m., the FCC issued an order declaring that the broadcast was "patently offensive" and sought to limit the transmission of the monologue to times when children were unlikely to hear it. *Id.* at 729-33.
54. *Id.* at 748. The Court declared that "each medium of expression presents special First Amendment problems. And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Id.* (citation omitted).
55. *Id.* at 748-49.
56. *Id.* at 749-50.
57. *Id.* at 750 n.28. The FCC did not impose immediate sanctions against Pacifica; however, it did state that if subsequent complaints were received, sanctions would be imposed. *Id.* at 730. After issuing the order, the FCC determined that the monologue was "patently offensive" and issued an opinion stating that the "time channeling" approach was intended to be utilized to prevent children from hearing such material. *Id.* at 732-33.
58. *Id.* at 750-51. The Court noted that the relevant factors considered were the time of the day when the transmission was broadcast, the content of the program, and the pervasiveness of the medium involved. *Id.* at 750.
restrictions in which less restrictive means are available to protect minors from exposure to indecent material. In *Sable Communications of California, Inc. v. FCC*, the Court held that a complete ban on indecent telephone messages violated the First Amendment. In *Sable*, Sable Communications of California, Inc. ("Sable"), a communications company, offered prerecorded sexually oriented phone messages to callers for a special fee. Section 223(b) of the Communications Act of 1934 imposed a blanket prohibition against all indecent and obscene interstate telephone messages. As a result, Sable filed an action against the FCC seeking a declaration that section 223(b) was an unconstitutional restriction on speech and sought an injunction against the statute's enforcement.

In determining whether the statute's ban on indecent messages was constitutional, the Court followed *Ginsberg* and recognized that there is a compelling governmental interest in protecting the well-being of minors; however, the Court stated that the government could only regulate constitutionally protected speech if the restriction was the least intrusive means to achieve that interest. The Court distinguished *Pacifica* by noting both the presence of a complete ban rather than a "time channeling" restriction and the fact that telephone callers were not a "captive audience" as were listeners to radio broadcasts. The Court declared that the telephone medium required listeners to take active steps to receive the desired communication; therefore, telephone callers

59. Id. at 748-49; see also Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 131 (1989).
61. Id. at 127-28.
62. Id. at 118-19.
63. 47 U.S.C. § 223(b) (1994). This section was added to the Communications Act of 1934 in order to specifically address "dial-a-porn," which was not covered in the original statute. 492 U.S. at 120. The original section sought to restrict access to sexually explicit messages by minors and did not criminalize providing obscene or indecent messages to adults. Id. at 120-21. However, the amended version instituted a complete ban, making it illegal to provide indecent or obscene messages to anyone. This amended version was at issue in *Sable.* Id. at 122-23.
64. 492 U.S. at 122. Callers outside the area in which Sable was operating could call long distance and access the messages; therefore, Sable's activities constituted interstate commercial activity that was regulated by the statute. Id. at 118.
65. Id. at 118.
66. Id. at 126. The Court also considered another provision that imposed an outright ban on obscene telephone messages and determined that the provision was constitutional because the First Amendment's protection did not extend to obscene material. Id. at 124.
67. Id. at 127.
were not susceptible to unexpected outbursts of reception as were radio
listeners or recipients of unsolicited mailings.\footnote{68}

The Court concluded that the ban on indecent messages was unconsti-
tutional because the total ban was excessive in light of the existing
alternatives.\footnote{69} Although the FCC claimed that section 223(b) was
enacted because Congress believed that nothing short of a complete ban
would be effective, the Court declared that there was nothing in the
legislative record that suggested the absence of viable alternatives.\footnote{70}
The Court noted that scrambling, access codes, and credit card rules
were viable alternatives and would not restrict speech to the extent of
a complete ban; as a result, the Court concluded the ban was unconsti-
tutional as it reflected another attempt to "burn[] the house to roast the
pig."\footnote{71}

Similarly, in \textit{Reno} \textit{v. ACLU}\footnote{72} the Supreme Court recognized the
interest in protecting the well-being of children as compelling; however,
the Court held that a prohibition on the knowing transmission of
obscene communications over the internet was unconstitutional in light
of both the existing alternatives available and the noninvasive nature of
the medium.\footnote{73} In \textit{Reno} plaintiffs challenged the constitutionality of two
provisions of the Telecommunications Act of 1996,\footnote{74} which sought to

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\footnote{68} Id. at 127-28.
\footnote{69} Id. at 131. These alternatives consisted of credit card access, access codes, and
message scrambling. \textit{Id.} at 121-22. The credit card access system would restrict messages
to those individuals who provided a valid credit card number. The access codes would
restrict messages to only those individuals who had an authorized identification code,
which would only be provided to those eighteen or older. \textit{Id.} Message scrambling would
only allow those individuals who had a descrambler to hear messages. The sale of the
descramblers would be restricted to adults. \textit{Id.} at 122.
\footnote{70} Id. at 130-31.
\footnote{71} \textit{Id.} at 131 (quoting Butler, 352 U.S. at 383).
\footnote{72} 521 U.S. 844 (1997).
\footnote{73} \textit{Id.} at 868-79. The Court noted that existing systems allowed parents to control
what their children were exposed to on the internet. \textit{Id.} at 854-55. The Court found that
these systems could either limit access to a pre-approved list of sources or block
inappropriate messages or objectionable sites. \textit{Id.} at 855.
\footnote{74} 47 U.S.C. § 223(a),(d) (1994 & Supp. III 1997). Section 223(a) prohibits the knowing
transmission of obscene or indecent material, by a telecommunications device, to a person
under eighteen years of age and subjects violators to imprisonment, fine, or both. \textit{Id.}
§ 223(a). Section 223(d) prohibits knowingly displaying or sending "patently offensive"
material to a child under eighteen years of age through the use of an interactive computer.
\textit{Id.} § 223(d).

Initially twenty plaintiffs filed an action against the Attorney General and the Justice
Department; however, a second action was filed and twenty-seven additional plaintiffs
joined. The separate actions were subsequently consolidated into a single suit. 521 U.S.
prohibit the knowing transmission of obscene or indecent material over the internet to children.\(^{75}\)

Noting that the "invasive" nature of the medium may justify a governmental regulation, the Court found that messages or images over the internet require some affirmative action on the part of the recipient and the risk that objectionable material would appear accidentally were slim; therefore, the Court found the internet to be less invasive than the radio medium involved in \textit{Pacifica}.\(^{76}\) Although the Court followed \textit{Ginsberg} and recognized a compelling interest in protecting the well-being of minors, the Court held that the restriction was overbroad and posed a significant burden on internet communication between adults.\(^{77}\)

In light of the burdens the restriction would place on internet communications and the absence of evidence showing that the existing safeguards were ineffective, the Court held that the restriction was not the least restrictive means to accomplish its compelling interest.\(^{78}\) As a result, the provisions were held to be invalid.\(^{79}\)

In \textit{Denver Area Educational Telecommunications Consortium, Inc. v. FCC},\(^{80}\) the Court examined the constitutionality of a federal statute\(^{81}\) that sought to regulate sexually explicit programming provided on public and leased television channels.\(^{82}\) The Court followed \textit{Sable} and found

\(^{75}\) 521 U.S. at 861.

\(^{76}\) \textit{Id.} at 861, 868-70. The Court stated that the "history of extensive Government regulation of the broadcast medium; the scarcity of available frequencies at its inception; and its 'invasive' nature" all may justify a regulation of a particular broadcast medium. \textit{Id.} at 868 (citations omitted). The Court noted that most sexually explicit images were preceded by a warning prior to appearance on a computer screen. \textit{Id.} at 869. The Court also stated that \textit{Pacifica} could be distinguished because the radio medium creates the risk that the listener may be "taken by surprise by an indecent message." \textit{Id.} at 870 (quoting \textit{Sable}, 492 U.S. at 128).

\(^{77}\) \textit{Id.} at 877-78. The Court noted that it agreed that "there is a compelling interest in protecting the physical and psychological well-being of minors' which extended to shielding them from indecent messages that are not obscene by adult standards." \textit{Id.} at 869 (quoting \textit{Sable}, 492 U.S. at 126).

The Court stated that requiring senders of internet messages to know the age of their recipients, in the absence of an effective age-verification system, "would surely burden communication among adults." \textit{Id.} at 876. The Court further held that the restriction was "wholly unprecedented. Unlike the regulations upheld in \textit{Ginsberg} and \textit{Pacifica}, the scope of [the restriction] is not limited to commercial speech or commercial entities." \textit{Id.} at 877.

\(^{78}\) \textit{Id.} at 879.

\(^{79}\) \textit{Id.} at 885.


\(^{82}\) 518 U.S. at 732-33. The Court distinguished leased channels from public channels by noting that leased channels were those channels that federal law required operators to reserve for commercial lease, whereas public channels were those channels that local
that the governmental interest in protecting children from "patently offensive sex-related material" was indeed compelling and that the pervasiveness of television broadcasts was similar to the radio broadcast in *Pacifica.* However, the Court held that a provision that required operators to place sexually explicit programming on a separate channel and then to block that channel until a subscriber requested access to the programming was an unconstitutional restriction of speech.

In reaching its conclusion, the Court noted that although there was a compelling interest in protecting children from sexually explicit programming, the "segregate and block" requirements were too restrictive in light of existing statutory requirements such as scrambling and requested blocking. In the absence of evidence that these alternatives were ineffective and that the segregate and block restriction governments required to be set aside for public education or governmental purposes. *Id.* at 734.

The statute contained three provisions. Section 10(a) applied to leased channels and permitted cable operators to decide whether to broadcast sexually explicit programming. *Id.* at 737. Section 10(b) also applied to leased channels and required cable operators to place sexually explicit programming on a separate channel, to block that channel, then to unblock the channel within thirty days after a customer sent in a written request for access to the channel. *Id.* at 753-54. Section 10(c) was similar to 10(a) in that it permitted cable operators to decide whether to prohibit broadcast of sexually explicit programs; however, 10(c) applied to public rather than leased channels. *Id.* at 760.

83. *Id.* at 743-44. The Court stated that "[c]able television broadcasting ... is as 'accessible to children' as over-the-air broadcasting, if not more so." *Id.* at 744 (quoting *Pacifica,* 438 U.S. at 749).

84. *Id.* at 760. The Court also considered the constitutionality of a provision that permitted cable operators to decide on their own whether to broadcast sexually explicit programming and determined that such a provision was constitutional because it was inherently different than a complete ban. *Id.* at 746-47. In reaching this conclusion, the Court found that the provision "restrict[ed] speech less than, not more than, the ban at issue in *Pacifica.*" *Id.* at 745. Furthermore, the Court held that the restriction could be distinguished from *Sable* (telephone) because the medium at issue in *Sable* (telephone) was "significantly less likely to expose children to the banned material, was less intrusive [than television], and allowed for significantly more control over what comes into the home than either broadcasting or [] cable transmission." *Id.* at 748.

85. *Id.* at 759-60. The Court noted that current law already required cable operators to scramble or block sexually explicit programming on leased channels dedicated to such material. *Id.* at 756 (citing Telecommunications Act of 1996 § 505, 47 U.S.C. § 561). In addition, the Court noted that cable operators were already required to honor a subscriber's request to block such channels. *Id.* (citing Telecommunications Act of 1996 § 504, 47 U.S.C. § 560). Furthermore, the Court noted that "V-Chip" technology will be required to be placed on televisions and will automatically block sexually explicit or otherwise offensive programming. *Id.*
was necessary to protect children from sexually explicit material, the Court held the restriction was unconstitutional. 86

Finally, the Court held that a separate provision permitting a cable operator to prohibit sexually explicit programming on public access channels was unconstitutional because there was insufficient evidence indicating that there was a widespread problem of children becoming exposed to sexually explicit programs on public access channels. 87 In light of existing control systems associated with public broadcasting, the Court concluded that the provision was too restrictive and therefore constituted an unconstitutional restriction on speech. 88

Because of the Court's decision in Denver, cable operators were free to decide whether and when to transmit adult programming to subscribers. 89 However, the scrambling technology utilized by operators to prevent transmission of adult programs was not perfect. 90 In Playboy the Court confronted the risk posed to children as a result of these technological problems and again found itself defending the First Amendment. 91

III. RATIONALE OF THE COURT

In a five to four opinion, the Court in Playboy held that a federal statute requiring cable operators to either fully scramble, fully block, or restrict transmission of sexually explicit programming to certain times of the day was an unconstitutional restriction of speech. 92 Although the majority found the restriction to be a burden on speech rather than an

86. Id. at 756-60. The Court also refused to concede that the practical difficulties associated with devices that permitted parents to block out offensive programming (lockboxes) justified the segregate and block restriction. Id. at 758-59.
87. Id. at 760, 766. The Court declared that "[t]he Commission itself did not report any examples of 'indecent' programs on public access channels." Id. at 764 (emphasis in original).
88. Id. at 761-66. The Court noted that the public broadcasting system is subject to local, public, private, and nonprofit organizations that are "capable of addressing the problem, should it arise, of patently offensive programming broadcast to children, making it unlikely that many children will in fact be exposed to programming considered patently offensive in that community." Id. at 762-63. In addition, the Court noted that there were existing control mechanisms within the public broadcast system that could "avoid, minimize, or eliminate any child-related problems concerning 'patently offensive' programming." Id. at 763-64.
89. See id. at 733.
90. 120 S. Ct. at 1883.
91. Id. at 1882-83.
92. Id. at 1882, 1893.
outright ban, the Court refused to adopt a lower standard of scrutiny. The majority conceded that the government has an interest in protecting minors from harmful exposure to sexually explicit material; however, the Court held that this interest was not sufficient to justify a content-based restriction in light of the available alternatives.

Justice Kennedy delivered the opinion for the Court and was joined by Justices Stevens, Souter, Thomas, and Ginsburg. Kennedy first identified the statute as a content-based restriction on speech because the statute was only applied "to channels primarily dedicated to 'sexually explicit adult programming . . . that is indecent'" and was not concerned with other channels. In addition, the Court noted that the statute would have the practical effect of eliminating transmission of adult programming during times of the day when a significant percentage of such programming was viewed. Therefore, the Court declared that "[i]t is of no moment that the statute does not impose a complete prohibition" and imposed the "same rigorous scrutiny" as applied to a complete ban. As a significant content-based restriction on speech, the majority declared that the government had the burden of proving that the restriction is the least restrictive means to serve a compelling governmental interest in light of the existing alternatives.

The majority first attacked the government's contention that the problem of signal bleed was of such magnitude to justify the restriction of Section 505. The Court stated that there was no proof as to the likelihood that a minor would be subject to signal bleed nor any evidence establishing the duration or quality of such transmissions. Although

93. Id. at 1885-86. The Court stated that "[t]he distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." Id. at 1886.

94. Id. at 1885-87.

95. Id. at 1882.

96. Id. at 1885 (quoting 47 U.S.C. § 561). The Court noted that "[t]he statute is unconcerned with signal bleed from any other channels." Id.

97. Id. at 1886. In reaching this conclusion, the majority noted "that the only reasonable way for a substantial number of cable operators to comply with the letter of Section 505 is to time channel, which silences the protected speech for two-thirds of the day" and relied upon the district court's finding that "'30 to 50% of all adult programming is viewed by households prior to 10 p.m.,' when the safe-harbor period begins." Id. (quoting 30 F. Supp. 2d at 711).

98. Id.

99. Id. at 1886. The Court stated, "[a]s we consider a content-based regulation, the answer should be clear: The standard is strict scrutiny." Id.

100. Id. at 1889.

101. Id. The Court stated that "[t]he First Amendment requires a more careful assessment and characterization of an evil in order to justify a regulation as sweeping as
the government presented evidence of isolated incidents of exposure and provided an estimate of the potential of such exposure, the majority declared that such evidence was insufficient to accurately quantify the actual extent of the problem. As a result, the majority held that the government had not proven the existence of a significant widespread problem justifying the restrictions of Section 505.

While investigating the alternatives available to regulate the problem of exposure of minors to sexually explicit material, the majority noted that the cable broadcasting system is a unique broadcast medium that has the capacity to block objectionable material on a house-by-house basis. The majority emphasized that "targeted blocking is less restrictive than banning" and that the present restriction could not stand if these methods were viable alternatives. The majority then declared that the government had not proven that the less restrictive alternative of Section 504 was inadequate to address the problem of signal bleed.

Under Section 504, cable operators are required to block particular programming upon request by the subscriber. Although the government contended that Section 504 would be ineffective to prevent signal

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102. Id. at 1890-91. At trial, the government presented evidence of complaints made by city officials, two city councillors, and one senator to their respective cable operator, congressman, and to the FCC about signal bleed. In addition, there was evidence of a particular incident involving a child who was staying over at a friend's house and was exposed to signal bleed. 30 F. Supp. 2d at 709. The government presented expert testimony showing that 39 million homes with 29.5 million children were potentially exposed to signal bleed. This evidence was based upon the Advertising Bureau's estimates and Census figures. In addition, the expert estimated that, based on the number of subscribers to two adult channels (Spice and Playboy), there were an estimated 38.65 million homes with the potential to become exposed to signal bleed from sexually explicit programming. 30 F. Supp. 2d at 708-09 n.9.

103. 120 S. Ct. at 1890-91. The majority stated that the "Government made no attempt to confirm the accuracy of its estimate through surveys or other field tests . . . [w]ithout some sort of field survey, it is impossible to know how widespread the problem in fact is." Id. at 1890-91.

104. Id. at 1887.

105. Id.

106. Id. at 1892. Although the Court found that the Government failed to establish that a publicized Section 504 would be ineffective, the majority declared that the district court should not have attempted to implement the notice requirements by judicial decree. The majority stated that "[t]he appropriate remedy was not to repair the statute, it was to enjoin the speech restriction." Id. at 1891-92.

107. Section 504 requires cable operators to block any undesired channel when the subscribing customer makes such a request. 47 U.S.C. § 560. See supra note 8 and accompanying text.
bleed in cases in which parents were indifferent, the majority declared that there was nothing in the evidence showing that Section 504 would be ineffective if parents were adequately notified of their right to request blocking. Furthermore, the majority noted that a publicized Section 504 would provide parents with the information they needed to make well-informed decisions and would allow parents to block unwanted programming even after 10:00 p.m. The Court concluded that Section 505 could not offer this type of assistance to cable customers. Finally, the Court noted, although a publicized Section 504 could not totally eliminate the problem of signal bleed, children would also be exposed to signal bleed under Section 505. The majority stated that "it is hardly unknown for [children] to be unsupervised in front of the television set after 10 p.m."

The majority concluded that the government failed to sufficiently prove a problem of such magnitude to justify the restriction on daytime programming and that the government failed to show that existing less restrictive alternatives were inadequate. As a result, the majority held that the “Government has failed to show that § 505 is the least restrictive means for addressing a real problem” and that Section 505 was an unconstitutional content-based restriction on speech under the First Amendment.

Justice Breyer, joined by Justice O'Connor, Chief Justice Rehnquist, and Justice Scalia, dissented, contending that the evidence was sufficient to prove the seriousness of the problem of signal bleed and that Section 504 was not an effective alternative. The dissent first stated that

108. 120 S. Ct. at 1892-93. The government also contended that the possibility that requested blocking devices might fail, the time it takes to respond to such requests, and the possibility that cable operators may switch channels would render Section 504 ineffective. 30 F. Supp. 2d at 713, 718-19. Furthermore, the government presented evidence that the cost of distributing a large number of blocking devices would not be economically feasible for operators because the cost would eventually exceed the operator’s profits thereby creating the risk that programming would be canceled. Id. at 713. The Court responded that this argument was based on the mere “assumption that a sufficient percentage of households, informed of the potential for signal bleed, would consider it enough of a problem to order blocking devices—an assumption for which there is no support.” 120 S. Ct. at 1892.
109. Id. at 1893.
110. Id.
111. Id. at 1892-93.
112. Id. at 1893.
113. Id.
114. Id. at 1885, 1893.
115. Id. at 1898 (Breyer, J., dissenting). Although agreeing with the principal dissent, Justice Scalia wrote a separate dissenting opinion. 120 S. Ct. at 1895 (Scalia, J.,
Section 505 was enacted not to just “control incomplete scrambling” but was also concerned with eliminating the problems of insufficient scrambling techniques utilized by cable operators through the implementation of uniform statutory requirements. In addition, the dissent emphasized that Section 505 was not a total ban on speech, but rather represented a burden on the selected speech that was proper in the pursuit of a legislative effort to protect children. Finally, the dissent noted that the statute was not overbroad because it applied only to channels primarily dedicated to sexually explicit programming. Thus, the dissent contended that this case “does not present the kind of narrow tailoring concerns seen in other cases.”

The dissent emphatically disagreed with the majority’s conclusion that the government failed to prove the seriousness of the signal bleed problem. The dissent noted that the government’s statistical evidence concerning the number of households with children combined with the fact that seventy-five percent of scrambling systems were inadequate illustrated that twenty-nine million children in homes were at risk of exposure to signal bleed. Furthermore, the dissent noted that the anecdotal evidence provided by the government’s expert witnesses as well as the complaints made by the public officials were probative of a more widespread and serious problem.

The dissent also disagreed with the majority’s conclusion that Section 504 was an effective alternative to Section 505. According to the dissenting Justice Scalia contended that Playboy was advertising its nonobscene material in a “patently offensive” manner and that such commercial behavior is not protected under the First Amendment. According to Justice Scalia, “[s]ection 505 regulates just this sort of business.” In reaching his conclusion that Section 505 was constitutional, Justice Scalia stated that “[s]ince the Government is entirely free to block these transmissions, it may certainly take the less drastic step of dictating how, and during what times, they may occur.”

116. 120 S. Ct. at 1898-99 (Breyer, J., dissenting).
117. Id. at 1899. The dissent stated that “the majority’s characterization of this statutory scheme as ‘prohib[ing] . . . speech’ is an exaggeration.” Id. at 1899. The dissent declared that the statute would make adult programming less profitable; however, “[l]aws that burden speech . . . may create serious First Amendment issues, but they are not the equivalent of an absolute ban on speech itself.” Id.
118. Id. at 1900.
119. Id.
120. Id.
121. Id.
122. Id. The dissent also claimed that if the majority was correct in concluding that the problem of signal bleed was not serious, then the statute would not impose a significant burden on cable operators to attempt to remedy the problem. Id.
123. Id. at 1900-02.
dissent, the two sections served different goals. The dissent contended that Section 504 gives parents the right to take affirmative steps to request a particular channel to be blocked and that Section 505 was inherently different in that it blocks transmission of adult channels to children whose parents were unaware of their rights under Section 504 or were unable to supervise their children’s viewing habits at critical times. Therefore, the dissent argued that Section 505 was intended to operate in the absence of parental supervision and was similar to laws that deny a minor’s access to “adult cabarets or X-rated movies.” The dissent emphasized that the government has a compelling interest in protecting minors from access to sexually explicit material in the absence of adult supervision and emphatically attacked any implication that such an interest was anything less than compelling.

In addition, the dissent argued that a publicized Section 504 would not be an effective alternative to Section 505. According to the dissent, advertising Section 504 could not aid parents in discovering their children’s viewing habits, nor could it resolve the practical difficulties associated with the amount of time it took to set up a blocking device and the problems associated with faulty installations. Furthermore, the dissent contended Playboy’s programming could be totally eliminated if more than a minimal amount of subscribers requested blocking devices. Finally, the dissent argued that the “remote possibility” that a publicized Section 504 might achieve the government’s objective could not support the conclusion that Section 504 was as effective as Section 505. According to the dissent, the government was entitled to “a degree of leeway . . . when it chooses among possible alternatives in light of predicted comparative effects.”

124. Id. at 1901.
125. Id.
126. Id.
127. Id. at 1901-02.
128. Id. at 1902.
129. Id.
130. Id. at 1903. The dissent stated that if more than six percent of Playboy’s viewers exercised their rights under Section 504, then Playboy’s costs would rise “to the point that Playboy would be forced off the air entirely, a consequence that would not seem to further anyone’s interest in free speech.” Id. (citation omitted).
131. Id.
132. Id. at 1901. The dissent claimed that “a ‘less restrictive alternative’ must be ‘at least as effective in achieving the legitimate purpose that the statute was enacted to serve.’” Id. (quoting Reno, 521 U.S. at 874). The dissent also declared that “[t]hese words imply a degree of leeway, however small, for the legislature when it chooses among possible alternatives in light of predicted comparative effects.” Id.
to allow the Court to imagine or create possible alternatives would enable the Court to nullify duly enacted statutes.\textsuperscript{133}

The dissent noted that the Court had historically upheld restrictions on speech when a compelling interest was at stake and when the "First Amendment poses a barrier that properly is high, but not insurmountable."\textsuperscript{134} The dissent emphasized that the government had a compelling interest in protecting children from a serious problem, and the government had proven that Section 504 was ineffective in resolving that problem.\textsuperscript{135} Noting that Section 505 imposed a burden upon speech rather than a complete ban, the dissent declared that Section 505 "restricts speech no more than necessary to further that compelling need."\textsuperscript{136} As a result, the dissent concluded that Section 505 was a constitutional restriction on speech.\textsuperscript{137}

IV. IMPLICATIONS

The Court has consistently recognized a compelling interest in protecting minors from exposure to sexually explicit material; however, the Court has not formulated an ironclad rule to determine whether parents or the government should bear the responsibility of protecting children from exposure to such material. Recognizing the importance of freedom of speech in ordered society, the Court has adopted a standard of scrutinizing content-based restrictions on speech that requires the government to show the existence of a widespread problem that justifies a particular restriction. In addition, the Court has consistently required the government to show such restrictions on speech are the least intrusive in light of existing alternatives. Although the Court's adherence to such a heightened degree of scrutiny is not intended to completely eliminate governmental restriction of indecent material, \textit{Playboy} makes it clear that the government will face three primary obstacles that may make it practically impossible to justify governmental regulation of society's new communications media.

First, \textit{Playboy} places such a heavy evidentiary burden on the government in proving the existence and magnitude of a problem that any attempt by the government to justify a restriction on the dissemination of sexually explicit material will more than likely fail. \textit{Playboy}

\textsuperscript{133} \textit{Id.} The dissent attacked the majority's conclusion in "finding 'adequate alternatives' where there are none" as "reduc[ing] Congress' protective power to the vanishing point." \textit{Id.} at 1904.

\textsuperscript{134} \textit{Id.}

\textsuperscript{135} \textit{Id.} at 1903.

\textsuperscript{136} \textit{Id.}

\textsuperscript{137} \textit{Id.}
makes it clear that anecdotal, statistical estimates, and evidence of isolated incidents of exposure are not sufficient to prove the existence of a problem that will justify governmental regulation of speech. However, given the fact that many minors are at home unsupervised while watching television or accessing the internet, such evidence of exposure may never be accurately ascertained. If children are unsupervised during a portion of the daytime hours, then the actual extent of exposure may never be known unless the minor personally files a complaint or a parent discovers the indecent material being transmitted; as a result, an accurate survey of the actual magnitude of the problem may never materialize.

Second, *Playboy* requires the government to prove the actual extent of harm to children from exposure to indecent material; however, the detrimental effects of exposure may not be accurately ascertained until a child becomes a young adult. Although at least one court has responded to this potential problem, *Playboy* does not provide courts with any ascertainable standard to determine what degree of evidence is required to show a causal connection between a minor’s exposure to indecent or graphical material and psychological harm. It still remains to be seen whether courts will respond to *Playboy* by requiring the government to show evidence of more definitive scientific research when addressing the element of causation; however, by requiring the government to show more than anecdotal evidence, *Playboy* creates a potentially “insurmountable obstacle” when the legislature seeks to address a problem that has unknown psychological ramifications.

Third, *Playboy* allows courts to look not only at the existing less-restrictive alternatives that may be available, but it also allows courts to invalidate legislation if there is the mere possibility of viable alternatives. With the advent of modern technology, the possibility of potentially viable alternatives is limitless and courts will have broad discretion to determine what will be possible in the near future. Because the limits of modern technology are vague at best, courts will have the power to invalidate a proposed restriction on indecent material according to their own notions of what is possible and how existing regulations may be improved. Allowing the courts to look at the possible

138. See supra note 104.
139. See supra note 104.
140. See American Amusement Mach. Ass’n v. Kendrick, No. 00-3643, 2001 U.S. App. LEXIS 4371, at *19-22 (7th Cir. March 23, 2001) (holding that a city ordinance limiting access of minors to violent video games could not be justified on the basis of a study that lacked a finding that graphical video games have caused an individual to commit a crime or have caused an increase in violence).
alternatives rather than existing alternatives will authorize judges to invalidate prohibitions on speech based on alternatives that may not be economically or practically feasible under the circumstances. Although Playboy makes it clear that courts are not free to "repair" existing statutes, the limitations on the judicial power to scrutinize legislation in light of what may someday be possible is not entirely clear.\textsuperscript{141}

Finally, Playboy emphasizes that any restriction that substantially burdens speech will be subject to the same scrutiny as a complete ban on the subject material.\textsuperscript{142} Under this approach, any entity disseminating sexually explicit material may prove that a restriction is unconstitutional simply because it is no longer profitable to engage in such an enterprise although the restriction does not seek to completely prohibit such speech. By refusing to draw a distinction between laws burdening speech from laws banning speech, the Court acknowledges the fact that a significant restriction may practically result in a ban on an entity's ability to disseminate its material; however, the Court does not clearly ascertain what degree of restriction will amount to a ban. Because the Court does not provide guidance as to what constitutes a "significant" burden, lawyers will continue to argue that the economic ramifications of a regulation justify holding that legislation unconstitutional. If the Court distinguished burdens from bans, legislation seeking to restrict communication rather than to ban such outright speech would not be subject to such litigation and dispute.

Modern technology has provided society with fast, efficient, and effective communication systems that allow individuals to interact with each other regardless of geographical or cultural boundaries. The accessibility of the internet and cable television increases the risk of exposure to potentially harmful material by children, and Playboy has created a standard of scrutiny that may prove to be insurmoutable for the government in seeking to control those risks. In a world of high-tech gadgets and digital communication, sexually explicit programming has been given a safe harbor with impenetrable boundaries.

Brandon T. Grinstead

\textsuperscript{141} See supra note 108 and accompanying text.
\textsuperscript{142} See supra note 92 and accompanying text.