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# THE CHILD ONLINE PRIVACY PROTECTION ACT: THE RELATIONSHIP BETWEEN CONSTITUTIONAL RIGHTS AND THE PROTECTION OF CHILDREN

Sasha Grandison\*

## INTRODUCTION

The Internet was introduced to the world in the early 1990s and it is now one of the leading sources of information.<sup>1</sup> The world population is estimated at around 6.7 billion people and approximately 1.5 billion people are internet users.<sup>2</sup> Of the 1.5 billion Internet users, the United States has 225 million people who use the Internet, which is second only to China. Second only to China in the number of Internet users, the United States has 225 million users.<sup>3</sup>

The Internet makes distances between states shorter and allows access to the global community with the click of a mouse. It provides a forum for the dissemination of information and ideas and “has gone from being a curiosity to being a daily source for e-mail, shopping, research and news.”<sup>4</sup> But like all other technological advancements, the Internet poses serious risks. “The Internet and computers have come to play a growing role in sex crimes that are committed against children and youth.”<sup>5</sup> Approximately one in seven children receives sexual solicitation on the Internet, and four percent of children are contacted offline by solicitors.<sup>6</sup>

A child is not only at risk from encountering sexually explicit material on the Internet, but also at risk of being lured by online predators to reveal personally identifiable information. Children often times do not understand the consequence and the impact of revealing personal information on the Internet about themselves and their families. Revealing personal information may lead to offline sexual solicitation and identity theft.<sup>7</sup>

In 1998, Congress enacted the Child Online Privacy Protection Act (“COPPA” or “Act”) to combat the dangers that the Internet posed.<sup>8</sup> To comply with

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1 Internet and World Stats, Usage and Population Statistics, <http://www.internetworldstats.com> (last visited March 26, 2010).

2 *Id.*

3 *Id.*

4 Jennifer Zwick, *CASTING A NET OVER THE NET: ATTEMPTS TO PROTECT CHILDREN IN CYBERSPACE*, 10 SETON HALL CONST. L. J. 1133, 1133 (2000).

5 JANIS WOLAK ET AL., INTERNET SEX CRIMES AGAINST MINORS: THE RESPONSE OF LAW ENFORCEMENT vii (Univ. of N.H. 2003), available at <http://www.unh.edu/ccrc/pdf/CV70.pdf>.

6 JANIS WOLAK ET AL., ONLINE VICTIMIZATION OF YOUTH: FIVE YEARS LATER vii-1 (Univ. of N.H. 2006), available at [http://www.missingkids.com/en\\_US/publications/NC167.pdf](http://www.missingkids.com/en_US/publications/NC167.pdf).

7 See *supra* note 5.

8 Children’s Online Privacy Protection Act of 1998 § 6551, 15 U.S.C.A. § 6501 (2000).

COPPA, “a website operator cannot collect or disclose personally identifiable information from a child without getting prior verifiable parental consent from the child’s parent.”<sup>9</sup> While COPPA attempts to protect the privacy of children on the Internet, many critics argue that the Act infringes upon the constitutional rights of children.<sup>10</sup>

The interplay in COPPA between constitutional freedoms and the protection of children reaches equilibrium as Congress addresses privacy concerns on the Internet in the Act. This paper will analyze the constitutionality of the COPPA and its ability to remedy the conflict between a child’s freedom of expression and the protection of a child’s privacy on the Internet. Part I details the requirements of the COPPA and examines the history of privacy law. Part II analyzes failed Congressional legislation that attempted to protect children on the Internet. Part III explores the constitutional rights of children and determines whether the COPPA infringes upon those rights.

## I. COPPA AND THE PRIVACY IMPLICATIONS

### A. *The Child Online Privacy Protection Act*

The Internet poses “unique privacy and safety concerns because of the particular vulnerability of children, the immediacy and ease with which information can be collected from them, and the ability of the online medium to circumvent the traditional gate keeping role of the parent.”<sup>11</sup> Just over a decade ago, it was possible to buy and receive information about children, including their name and location.<sup>12</sup> Marketers would collect personal information from children through chat room registrations, discussion boards, and promising gifts.<sup>13</sup> The personal information received from the children was then organized in a database and sold to third parties.<sup>14</sup> In fact, in 1995, a Los Angeles television station, for only \$277, obtained a detailed printout of the ages and addresses of approximately 5,500 children in Pasadena.<sup>15</sup> The station wanted “to prove how easy it is for pedophiles to obtain mailing lists of kids.”<sup>16</sup>

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9 Nancy L. Savitt, Comment, *A Synopsis of the Children’s Online Privacy Protection Act*, 16 ST. JOHN’S L. REV. 631 (2002).

10 Charlene Simmons, *Protecting Children While Silencing Them: The Children’s Online Privacy Protection Act and Children’s Free Speech Rights*, 12 COMM. L. & POL’Y REV. 119, at 3 (2007).

11 Charlene Simmons, *Protecting Children While Silencing Them: The Children’s Online Privacy Protection Act and Children’s Free Speech Rights*, 12 COMM. L. & POL’Y REV. 119, 123 (2007).

12 ELECTRONIC PRIVACY INFORMATION CENTER, *The Children’s Online Privacy Protection Act*, <http://epic.org/privacy/kids/> (last visited March 27, 2010).

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

Following growing concerns regarding the online privacy of children, the Federal Trade Commission (“FTC”) began to hold public forums in which privacy advocates, Internet industry representatives, and the public discussed issues concerning the protection of children on the Internet.<sup>17</sup> Subsequently, the FTC conducted a survey of 1,400 popular web sites in the spring of 1998, and found that out of the 1,400 sites surveyed, 212 of them were websites that targeted children.<sup>18</sup> The compiled data revealed that: (1) 85% of the total websites collected personal information; (2) the majority of the children websites collected personal information from children; and (3) only a few of the children websites posted an adequate privacy policy.<sup>19</sup>

Armed with this information, the FTC reported its findings to Congress. On October 21, 1998, the COPPA was enacted. In proposing the COPPA, the four goals addressed were:

- (1) to enhance parental involvement in a child’s online activities in order to protect the privacy of children in the online environment; (2) to enhance parental involvement to help protect the safety of children in online fora such as chatrooms, home pages, and pen-pal services in which children may make public postings of identifying information; (3) to maintain the security of personally identifiable information of children collected online; and (4) to protect children’s privacy by limiting the collection of personal information from children without parental consent.<sup>20</sup>

Essentially the COPPA was designed to address two central problems: too much solicitation aimed at children and “collection of [p]ersonal [i]nformation from children that is shared with advertisers and marketers” and “sharing information with online predators who could use it to find them online.”<sup>21</sup>

The requirements of the COPPA address the privacy and safety concerns children face with Internet use. The COPPA requires operators of websites directed at children under the age of thirteen and operators who have actual knowledge that they are collecting personal information from children, to post a link to a “notice of its information practices on the home page of its website or online service and at each area where it collects [p]ersonal [i]nformation from chil-

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17 Simmons, *supra* note 9, at 122.

18 *Id.* at 123.

19 Charlene Simmons, *Protecting Children While Silencing Them: The Children’s Online Privacy Protection Act and Children’s Free Speech Rights*, 12 COMM. L. & POL’Y REV. 119, n. 8 at 3 (2007).

20 144 CONG. REC. S11657 (daily ed. Oct. 7, 1998) (statement of Rep. Bryan).

21 Melanie L. Hersh, *Is COPPA a Cop Out? The Child Online Privacy Protection Act as Proof that Parents, Not Government, Should Be Protecting Children’s Interests on the Internet*, 28 FORDHAM URB. L.J. 1831, 1853-55 (2001).

dren.”<sup>22</sup> Personal information includes the child’s full name, home address, e-mail address, telephone number, or “any other online identifier where you can communicate directly with the child.”<sup>23</sup>

The Act also requires an operator or service provider to obtain verifiable parental consent before collecting, using, and disclosing personal information from children. The degree of consent is based upon what is subsequently done with the collected information. If the site desires to share the collected information with a third party, “the consent has to be of a much higher order.”<sup>24</sup> The COPPA also prohibits “children focused internet sites” from conditioning “participation on the site on requiring the disclosure of more personal information than necessary to participate.”<sup>25</sup>

In addition to personal information, hobbies, interests, and information collected through the use of “cookies” are covered by the Act.<sup>26</sup> “Cookies are a general mechanism” which computer programs use to “both store and retrieve information on the client side of the connection,” in effect allowing a “web site to record your comings and goings, usually without your knowledge or consent.”<sup>27</sup> Collection of data for purposes of the Act not only includes data that children knowingly give a website, but also data that a child publicly discloses online.<sup>28</sup>

The COPPA contains several exceptions to its rules, including a “safe harbor” provision.<sup>29</sup> Parental consent is not required in situations where an operator collects an e-mail address to respond to a one-time request from a child and then deletes the email address or when an operator collects a child’s or parent’s e-mail address to provide notice and seek consent.<sup>30</sup> The COPPA also grants a “safe harbor” to any operators that create self-regulatory programs to govern participants’ compliance with the Act.<sup>31</sup>

The COPPA’s stringent rules serve an important governmental interest but there are serious concerns about the impact of COPPA on small websites, the parental consent requirement, and the undue burden it places on the Internet community.<sup>32</sup> These concerns will be addressed subsequently in Part IV of this

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22 FEDERAL TRADE COMMISSION, HOW TO COMPLY WITH THE CHILDREN’S ONLINE PRIVACY PROTECTION RULE 1 (2006), available at <http://www.ftc.gov/bcp/edu/pubs/business/idtheft/bus45.pdf>.

23 Savitt, *supra* note 8, at 632.

24 *Id.* at 636.

25 Hersh, *supra* note 21, at 1855-56.

26 *Id.* at 1852.

27 Electronic Privacy Information Center, Cookies, <http://epic.org/privacy/internet/cookies/> (last visited on March 29, 2010).

28 Savitt, *supra* note 9, at 632.

29 FEDERAL TRADE COMMISSION, *supra* note 22, at 5.

30 *Id.* at 3.

31 Hersh, *supra* note 21, at 1856; See also *How to Comply with the Children’s Online Privacy Protection Rule*, *supra* note 24, at 5.

32 Hersh, *supra* note 21, at 1856.

paper. However, a brief examination of privacy law will lay the foundation to address the COPPA and its constitutional implications.

## B. *Privacy*

Adults have become increasingly concerned about access to personal information over the Internet and one's right to privacy. This concern is even greater for children who are susceptible to being exploited and tricked over the Internet. Privacy advocates and Internet operators have noted five primary privacy concerns over the Internet; "the selling of information, the theft of personal data by third parties, the loss of Personal Information, the destruction of data by hackers, and the presence of spam."<sup>33</sup>

### 1. Background

The right to privacy is not expressly enumerated in the U.S. Constitution. The right first gained recognition at the hands of a law review article written by Louis D. Brandeis and Samuel Warren.<sup>34</sup> Brandeis and Warren argued that privacy laws were based upon the right "to be let alone."<sup>35</sup> Then, in 1960, William Prosser identified the modern right to privacy torts: publicly disclosing private facts, depicting a person in a false light, commercial exploitation of a person's name or likeness, and intruding physically or technologically into a person's solitude.<sup>36</sup>

Although there is not an express grant of the right to privacy in the Constitution, the Supreme Court has established and recognized, through a long line of cases a number of privacy rights. The Court traced privacy rights to the First Amendment, the Fourth and Fifth Amendments, the Ninth Amendment, and in the "concept of liberty guaranteed by the first section of the Fourteenth Amendment."<sup>37</sup> This group of privacy rights include: the right to marry<sup>38</sup>, the right to

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33 Simmons, *supra* note 9, at 122.

34 MARC A. FRANKLIN ET AL., MASS MEDIA LAW: CASES AND MATERIALS 365 (Foundation Press 2005) (1995).

35 Simmons, *supra* note 9, at 121.

36 *Id.*

37 Roe v. Wade, 410 U.S. 113, 152 (1973)

38 Loving v. Virginia, 388 U.S. 1, 8 (1967) (the Supreme Court invalidated a miscegenation statute that prevented marriages between persons based on racial classifications. The Court stated that the freedom to marry "has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

have children<sup>39</sup>, the right to direct the education and upbringing of one's child<sup>40</sup>, and the right to abortion.<sup>41</sup>

## 2. Children's Right to Privacy

With the advent of computers and the Internet there has been a surge of privacy law developments in the United States. Many of the new laws were a product of the need to control "access to and use of routine information about individuals- name, address, telephone number, social information, credit card number, etc."<sup>42</sup> The protection of informational privacy continues to be a hotly debated issue. Yet, a majority of commentators agree that a child's informational privacy is grouped with the privacy right of their parent.<sup>43</sup>

The Family Educational Right to Privacy Act ("FERPA") provides that parents have control over the collection, maintenance, and use of information contained in their children's educational records.<sup>44</sup> On the other hand, however, in several cases the Supreme Court recognized a child's right to privacy.

In *Vernonia School District 47j v. Acton*<sup>45</sup> and *New Jersey v. T.L.O.*<sup>46</sup> the Supreme Court recognized a child's right to privacy, but the Court noted that the right could be curtailed in special settings.<sup>47</sup> In *Vernonia*, the Court stated that "the Federal Constitution's Fourth Amendment does not protect all subjective expectations of PRIVACY, but only those that society recognizes as legitimate; what expectations are legitimate varies with context."<sup>48</sup> Minors possess constitutional rights akin to adults.<sup>49</sup> However, "still today, unemancipated minors lack

39 *Skinner v. State of Oklahoma*, 316 U.S. 535, 536 (1942) (the Supreme Court held that a statute that required the operation of vasectomy be performed on a defendant who was labeled a habitual offender was unconstitutional. The Court noted that the statute deprived individuals of the basic "right to have offspring.").

40 *See Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (the Supreme Court promulgated the doctrine that parents and guardians have a liberty interest in directing the upbringing and education of children under their control).

41 *See Roe*, 410 U.S. at 113 (held that a state may only regulate abortion after the end of the first trimester of a woman's pregnancy for justifications reasonably related to the mother's health. Once the pregnancy is at the stage of viability, the state may regulate and even prohibit abortion procedures except where the mother's life or health is in danger. Prior to the end of the first trimester, the decision to have an abortion is solely up to the woman and the medical judgment of the attending physician); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (affirmed the central holding of *Roe v. Wade*, but introduced a new test; undue burden test, to evaluate abortion regulations before the viability of a fetus).

42 FRANKLIN, *supra* note 36, at 366.

43 *Ginsberg v. New York*, 390 U.S. 629 (1968).

44 *Zwick*, *supra* note 4, at 1143.

45 *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646 (1995).

46 *New Jersey v. T.L.O.*, 469 U.S. 809 (1984).

47 *Id.*

48 *Vernonia*, 515 U.S. at 654.

49 *See, e.g., Vernonia*, 515 U.S. at 646; *T.L.O.*, 469 U.S. at ?

some of the most fundamental rights. . .including the right of liberty . . . to the control of their parents or guardians.”<sup>50</sup> Thus, a child’s constitutional rights, including the right to privacy, can be diminished or lessened. Students in a school setting have “a lesser expectation of privacy than members of the population generally.”<sup>51</sup> Specifically, a school setting permits “a degree of supervision and control that could not be exercised over free adults.”<sup>52</sup>

## II. HISTORY OF LEGISLATION TO PROTECT CHILDREN ON THE INTERNET

COPPA is not Congress’ first attempt to protect a child’s safety and welfare on the Internet. The Communications Decency Act (“CDA”) and the Child Online Protection Act (“COPA”) were enacted by Congress to address the detrimental effects that sexually explicit material can have on children.<sup>53</sup> In spite of the government’s significant interest, both the CDA and the COPA were found to be unconstitutional.<sup>54</sup>

### A. *Communications Decency Act*

Congress enacted the CDA in 1996, which was a section of the Telecommunications Act of 1996. “The CDA endeavored to make illegal any telecommunications contact that was intended to send indecent and obscene materials to minors.”<sup>55</sup> A specific provision of the CDA prohibited the transmission of any communication which is obscene or indecent” with knowledge that the recipient is under eighteen years of age.<sup>56</sup> The Act also provided that a party cannot knowingly transmit or display any communication that depicted or described patently offensive and sexual or excretory activities or organs to minors.<sup>57</sup>

Immediately following the enactment of the CDA, the act faced extreme backlash from the legal community. Groups like Morality in Media, the American Family Association, and the Department of Justice expressed concerns over the First Amendment and privacy rights threatened by the act.<sup>58</sup> The Center for Democracy and Technology stated that the Act, “threatened the very existence of the Internet as a means for free expression, education, and political discourse.”<sup>59</sup>

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50 *Vernonia*, 515 U.S. at 654.

51 *Id.* at 657 (quoting *New Jersey v. T.L.O.*, 469 U.S. at 348).

52 *Id.* at 646.

53 Communications Decency Act, 47 U.S.C. § 223 (1996); Child Online Protection Act, 47 U.S.C. § 231 (1998).

54 *Reno v. ACLU*, 521 U.S. 844 (1997); *ACLU v. Reno*, 31 F. Supp. 2d 473 (E.D. Pa. 1999).

55 Hersh, *supra* note 22, at 1847.

56 47 U.S.C. § 223(a) (1) (B) (1996).

57 *Id.* § 223(d) (1) (B).

58 Free Speech: The Communications Decency Act- Legislative History, Center for Democracy & Technology, (2007), <http://www.cdt.org/speech/cda/cda.shtml>.

59 Communications Decency Act (CDA), Center for Democracy & Technology, <http://www.cdt.org/grandchild/cda/> (last visited March 31, 2010).

The American Civil Liberties Union (ACLU) challenged the CDA, arguing that “the provisions that banned ‘indecent’ and ‘patently offensive’” speech transmitted online were unconstitutional.<sup>60</sup> The ACLU believed that the terms were too vague for “Internet users to rely on when making sure their communications stay in line with the CDA.”<sup>61</sup> The Act did not define ‘indecent’ and ‘patently offensive’ nor were the terms distinguished within the statute.<sup>62</sup>

The Supreme Court ultimately agreed with the ACLU. In *Reno v. ACLU*, the Court held that the CDA was unconstitutional because it was facially overbroad and violated the First Amendment.<sup>63</sup> The Court found that the CDA’s terminology was “vague and inconsistent,” the act was unconstitutionally broad, and “had the effect of limiting communications to which adults were constitutionally entitled.”<sup>64</sup> The Court reasoned that the vagueness of the provisions that banned “indecent” and “patently offensive” speech would “lead to a chilling effect on people’s expressions through the Internet since the CDA imposed criminal punishments.”<sup>65</sup> Accordingly, the CDA failed to meet the second part of the strict scrutiny test because the ambiguity of the terms demonstrated the statute was not narrowly tailored.

### B. *The Child Online Protection Act*

After the CDA was deemed unconstitutional, Congress enacted the COPA to remedy the problems that were left unresolved by the Act. Referred to as “CDA II” or “Son of CDA,” the COPA was passed in 1998 as part of the Omnibus Appropriations Act for the Fiscal Year 1999.<sup>66</sup> Like the CDA, the COPA was aimed at determining if material transmitted over the Internet was harmful to minors and therefore illegal and punishable as a crime.<sup>67</sup> To resolve the problems cited in *Reno*, the COPA’s focus was narrowed.<sup>68</sup> The Act only: (1) applied to online speech for commercial purposes, (2) applied to material displayed on the World Wide Web, and (3) restricted access to materials that were harmful to minors.<sup>69</sup>

60 Hersh, *supra* note 21, at 1847.

61 Steven E. Merlis, *Preserving Internet Expression While Protecting Our Children: Solutions Following Ashcroft v. ACLU*, 4 NW. J. TECH & INTELL. PROP. 117 (2005).

62 *Id.* at 120.

63 *Reno v. ACLU*, 521 U.S. 844 (1997).

64 Zwick, *supra* note 4, at 1137-38.

65 Merlis, *supra* note 61, at 119.

66 Zwick, *supra* note 4, at 1143.

67 See, Kerry Di Gioia, *Regulation of Speech on the Internet and the First Amendment: Should the Government Be the Primary Protector of Children from Harmful Material on the Internet?*, 29 OKLA. CITY U.L. REV. 617, 621 (2004).

68 Hersh, *supra* note 21, at 1838.

69 Simmons, *supra* note 9, at 6.

Like its predecessor, the COPA was challenged on grounds that it infringed upon constitutional free speech rights.<sup>70</sup> In 2000, the Third Circuit Court of Appeals upheld a lower court decision holding that the community standards test in COPA rendered the statute unconstitutionally overbroad.<sup>71</sup> In *Miller v. California*, the test for obscenity was solidified.<sup>72</sup> The Supreme Court held that “a contemporary standards test should be used to determine what materials are obscene.”<sup>73</sup> The Third Circuit Court later articulated that “a community standards test would require every Web communication to abide by the most restrictive community standards, which is not a constitutionally permitted burden on free speech.”<sup>74</sup>

Following the Third Circuit decision, the government sought and obtained certiorari. After several appeals and additional rulings from the Third Circuit Court, the Supreme Court ultimately upheld the Third Circuit’s ruling that the COPA may be unconstitutional.<sup>75</sup> The Supreme Court invalidated COPA because the government failed to show that the statute was the least restrictive means for the government to prevent minors from accessing harmful materials on the Internet.<sup>76</sup>

The demise of the CDA and the COPA demonstrate the constant struggle between government regulation and constitutional rights. Protecting children’s privacy on the Internet is a substantial governmental interest. Like COPA, however, the COPPA is also criticized for presenting similar constitutional issues.

### III: CONSTITUTIONAL ASPECTS OF COPPA AND CHILDREN’S FREE SPEECH RIGHTS

#### A. *Constitutional Rights of Children*

The Supreme Court has rendered numerous decisions regarding the constitutional rights of children. An examination of these case holdings span the spectrum: many decisions hold that children have constitutional rights akin to adults, while others restrict the constitutional rights of children in certain settings. In *In*

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70 *ACLU v. Reno*, 31 F. Supp. 2d 473 (E.D. Pa. 1999).

71 *See, e.g. ACLU*, 217 F.3d at 162.

72 *Miller v. California*, 413 U.S. 15, 24 (1973) (holding that obscene material is not protected by the First Amendment. The Court held that the test for obscenity is: (a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.)

73 *Miller*, 413 U.S. at 24; Sarah B. Evans, *Hear No Evil, Speak No Evil: Protecting the Nation’s Children From Sexually Explicit Material on the Internet*, 13 TEMP. POL. & CIV. RTS. L. REV. 253, 255 (2003).

74 Evans, *supra* note 73, at 258.

75 *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

76 *Id.*

*re Gault*, the Supreme Court held that children possess the same constitutional rights as adults; "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."<sup>77</sup> Dissenting in *Wisconsin v. Yoder*, Justice Douglas argued that children "are possessed of fundamental rights which the State must respect."<sup>78</sup> Nonetheless, the decisions provide insight into the constitutional implications of the COPPA.

The notion of children possessing constitutional rights was further explored in *Tinker v. Des Moines Independent Community School District*.<sup>79</sup> Middle school students were suspended from school for wearing black armbands to protest the Vietnam War.<sup>80</sup> The Supreme Court upheld the constitutional rights of the students to wear the black armbands in opposition to the war, noting that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>81</sup> More notably, the Court extended the constitutional rights of children beyond the purviews of the school yard, proclaiming that "[s]tudents in school as well as out of school are 'persons' under the Constitution."<sup>82</sup>

Although the Court recognizes the constitutional rights of children, there is a long standing concept that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults."<sup>83</sup> The state has a legitimate interest in protecting the well-being of a child; however, the state's exercise of power to protect children must be done so as to "not make children second-class rights holders."<sup>84</sup> Thus, the constitutional rights of children may only be infringed upon in distinct situations.

A 1986 case upheld a high school's suspension of a student for reciting a speech with sexual innuendos at an official school assembly.<sup>85</sup> The Court found that the speech was not political and was "disruptive to the learning process fostered by the school setting."<sup>86</sup> Therefore, the speech was not entitled to full protection of the First Amendment and the constitutional rights of children in the school environment were reduced. The Court pronounced the general rule that the "constitutional rights of students are not automatically coextensive with the rights of adults in other settings."<sup>87</sup>

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77 *In re Gault*, 387 U.S. 1, 7 (1967).

78 *Wisconsin v. Yoder et al.*, 406 U.S. 205, 226 (1971).

79 *Tinker v. Des Moines Indep. Comty. Sch. Dist.*, 393 U.S. 503 (1969).

80 *Id.*

81 *Id.* at 506.

82 *Id.* at 509.

83 Simmons, *supra* note 10, at 6.

84 Simmons, *supra* note 10, at 6.

85 *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

86 Simmons, *supra* note 11, at 7.

87 *Bethel Sch. Dist.*, 478 U.S. at 680.

Children's constitutional rights were further eroded in *Hazelwood School District v. Kuhlmeier*.<sup>88</sup> Here, the Court ruled that schools could censor student newspapers that are sponsored by the school.<sup>89</sup> Due to the fact that the "speaker" was the school itself, the Court concluded that the school had the right to "disassociate itself."<sup>90</sup>

Justice Burger identified three main rationales for restricting the constitutional rights of children: (1) the special vulnerability of children, (2) their lack of experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them, and (3) the importance of parents' guiding role.<sup>91</sup> These rationales are applicable to both inside and outside the school setting. Consequently, they can be used to justify the restriction of a child's speech in other settings, such as on the Internet.

### B. *Constitutionality of COPPA*

Throughout the course of Congressional legislating to protect children on the Internet, there has been a struggle to find a balance between regulation of the medium and protection of constitutional rights of free speech. The COPPA further exemplifies how the government walks the fine line between regulation and infringing upon individual constitutional rights. When the COPPA was first introduced, many groups raised concerns regarding the limitation of a child's ability to speak, and the terms "disclosure" and "collection."<sup>92</sup>

Original opponents of the COPPA argued that "the definitions went beyond the statutory language and threatened to upset the balance between protecting children's privacy and ensuring their ability to participate online."<sup>93</sup> The final version of the COPPA narrowed the definition of "disclosure" and changed the definition of "collection."<sup>94</sup> Following the final version of the Act, original opponents praised the COPPA, while new opponents expressed additional concerns.

New critics of the COPPA challenged the constitutionality of the Act on several grounds. First, some critics argue that the COPPA "infringes the free speech rights of web sites by forcing them to self-censor their content."<sup>95</sup> The parental consent requirement of the COPPA is alleged to lead to "self-censorship"<sup>96</sup> of speech directed towards children.<sup>97</sup> Secondly, critics state that the Act places an

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88 *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

89 *Hazelwood Sch. Dist.*, 484 U.S. at 260.

90 *Id.* at 268.

91 *Id.*

92 Simmons, *supra* note 11, at 121.

93 *Id.*

94 *Id.*

95 *Id.* at 122.

96 Simmons, *supra* note 11, at 122.

97 Simmons, *supra* note 11, at 122.

undue burden on commercial web site operators.<sup>98</sup> Many websites have either disallowed children from access to its website or shut down completely due to the amount of funding necessary to comply with the COPPA.<sup>99</sup> “When it is cheaper and easier for companies simply not to run children-focused websites, ultimately there will be fewer choices for child appropriate Internet content websites.”<sup>100</sup> Thirdly, critics have questioned the effectiveness of the Act. Lastly, the greatest concern with the COPPA is its alleged infringement on the constitutional rights of children. Critics acknowledge that while protection of children “remains an important goal,” the means employed by the government must coexist with the child’s “right to express himself or herself, and the right to receive other parties’ expression.”<sup>101</sup>

### C. COPPA and the Free Speech Rights of Children

Both adults and children alike have the protection of the First Amendment. Nevertheless, the regulation of speech is neither prohibited nor unconstitutional when specific requirements are met. The nature of the regulation directly affects how the court will examine the Act.

To determine whether the COPPA infringes upon children’s right to free speech, it must first be established whether the Act is content neutral or content based.

As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based . . . by contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral.<sup>102</sup>

The Court has also recognized that even if an act is “neutral on its face,” it may be “content based if its manifest purpose is to regulate speech because of the message it conveys.”<sup>103</sup> The threshold question before the Court is always “whether the government has adopted the regulation because of agreement or disagreement with the message the speech conveys.”<sup>104</sup>

The COPPA regulates the collection of personal information over the Internet by children without the consent and knowledge of their parents. The main objective of the Act is to regulate only personal information. The message the speech conveys is not what is desired to be regulated, rather the collection of the speech

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98 Simmons, *supra* note 11, at 122.

99 Hersh, *supra* note 21, at 1844.

100 *Id.*

101 Merlis, *supra* note 61, at 119.

102 *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 639 (1994).

103 *Id.* at 641.

104 *Id.* at 639.

itself is the concern. Beyond the definition of what constitutes “personal information,” the Act does not reference the “the ideas or views expressed.”<sup>105</sup> For that reason, the COPPA is content neutral.

Since content-neutral regulations “do not pose the same inherent dangers to free expression that content-based regulations do,”<sup>106</sup> content-neutral regulations receive the intermediate level of scrutiny. In order for a content-neutral regulation to be sustained, the government must show that: (1) the regulation furthers an important or substantial governmental interest; (2) the governmental interest is unrelated to the suppression of free expression; and (3) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>107</sup>

A number of critics argue that the COPPA does not serve a substantial interest, because the interest alleged “does not assert more than a generalized interest in children’s development.”<sup>108</sup> However, the National Center for Missing and Exploited Children estimates that one in seven children, between the ages of ten and seventeen, experience online sexual solicitation.<sup>109</sup> Additionally, the FTC noted “sexual predators use the Internet to identify and contact children whom they wish to victimize.”<sup>110</sup>

Not only is the COPPA protecting the safety of children, Congressional findings indicate that children may not understand the effects of revealing information about themselves and “the Internet gives marketers the capability of interacting with your children and developing a relationship without your knowledge.”<sup>111</sup> An author of the COPPA, Senator Bryan, stated that some websites were asking children questions such as; “what the family income was, does the family own stocks or certificates of deposit, did their grandparents give them any financial gifts?”<sup>112</sup> A particular concern of Senator Bryan was the collection of answers to the aforementioned questions, without the knowledge of the parents.<sup>113</sup> Answers to questions of this nature put parents and the immediate family at risk, as well as, the children themselves.

It is unmistakably apparent the COPPA’s main purposes are to protect children from marketing scams and online sexual solicitation. More importantly, the

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105 Simmons, *supra* note 11, at 127.

106 *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 198 (1997).

107 *Turner*, 512 U.S. at 649.

108 See, e.g. Barry J. Reingold, Jason Rylander, *Privacy vs. Speech, Again: Even a Law Meant to Protect Kid’s Online Privacy Conflicts with the First Amendment*, LEGAL TIMES, at 3 (2001).

109 THE NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN ONLINE VICTIMIZATION OF YOUTH: FIVE YEARS LATER (2006), [http://www.missingkids.com/en\\_US/publications/NC167.pdf](http://www.missingkids.com/en_US/publications/NC167.pdf).

110 Simmons, *supra* note 11, at 10.

111 See 144 Cong. Rec. S8483 (daily ed. July, 17 1998).

112 See, e.g. Simmons, *supra* note 9, at 9; 105 Cong. Rec. S8,482 (1998).

113 See 144 Cong. Rec. S8483 (daily ed. July, 17 1998) (statement of Rep. Bryan); Simmons, *supra* note 11, at 9.

COPPA is aimed at preventing sexual solicitation offline from predators who use personal information to contact children. The COPPA therefore serves a specific interest of protecting the safety and welfare of a child while encouraging social growth.

In *Turner Broadcasting Systems v. Federal Communications Commission*, the Court held that the government must prove real harm, not just anticipated harm, to justify a speech restriction.<sup>114</sup> Based on this requirement, critics argue that the COPPA only addresses “potential harms.”<sup>115</sup> However, the critics’ claim is misguided. Evidence from the previously mentioned Los Angeles television station report confirms that personal information obtained from children from chat rooms, discussion boards, and marketing ploys was compiled into lists that were then sold to individuals; many of whom could have used this information for illegal purposes.

Furthermore, harms by pedophiles and online sexual solicitation are also far from merely potential. According to one survey, one in five children who “regularly use the Internet received sexual solicitations or approaches during a [one]-year period.”<sup>116</sup> This statistic illustrates that pedophilia and sexual solicitations pose a real and imminent threat to children. Accordingly, the government’s interest in protecting a child’s personal information from marketers and pedophiles is important and substantial. The next step is to determine whether the governmental interest is unrelated to the suppression of free expression.<sup>117</sup>

In *Turner*, the Court concluded that the Federal Communication Commission’s “must carry” provisions were not related to the suppression of free expression, or to the content of any speaker’s messages.<sup>118</sup> The Court relied upon the interrelated interests expressed by Congress. Similarly, Congress declared that the COPPA is to serve four previously mentioned interrelated interests:

- (1) to enhance parental involvement in a child’s online activities in order to protect the privacy of children in the online environment;
- (2) to enhance parental involvement to help protect the safety of children in online fora such as chatrooms, home pages, and pen-pal services in which children may make public postings of identifying information;
- (3) to maintain the security of personally identifiable information of children collected online; and
- (4) to protect children’s privacy by limiting the collection of personal information from children without parental consent.<sup>119</sup>

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114 See, e.g. *Simmons*, *supra* note 11, at 10; *Turner*, 512 U.S. at 630.

115 *Simmons*, *supra* note 11, at 10.

116 U.S. DEPARTMENT OF JUSTICE, OVC Bulletin: Internet Crimes Against Children (2005), [http://www.ojp.usdoj.gov/ovc/publications/bulletins/internet\\_2\\_2001/welcome.html](http://www.ojp.usdoj.gov/ovc/publications/bulletins/internet_2_2001/welcome.html)

117 *Turner*, 520 U.S. at 184.

118 *Turner*, 520 U.S. at 180.

119 144 Cong. Rec. S11657 (daily ed. Oct. 7, 1998) (statement of Rep. Bryan).

The goals and interests of the COPPA are not concerned with the content of the child's message or with suppressing free expression. Therefore, the COPPA passes the second element.

To satisfy the last element, "a regulation need not be the least speech-restrictive means of advancing the government's interests."<sup>120</sup> The central aspect of the COPPA is that website operators must obtain verifiable parental consent before collecting personal information from children.<sup>121</sup> Many critics posit a number of alternatives to the parental consent requirement.

Opponents to the COPPA argue that it is feasible for the Internet industry to self-regulate, allowing the "individual freedom, responsibility, and accountability that make up the Internet culture" to foster.<sup>122</sup> Two prominent self-regulation programs are Truste and BBBOnline®.<sup>123</sup> Both programs issue licenses to web operators to display the programs' privacy seals, on the condition that the website follows certain guidelines.<sup>124</sup> In addition, websites can self-regulate by deleting personal information from the website.

As another alternative, many critics contend that parents can play an active role in the protection of their child's personal information by investing in filtering devices. Filtering devices enable a parent "to determine, in advance, how much information their children may disclose to websites, as well as how much information websites may disclose, if any, to third parties."<sup>125</sup>

Contrary to opponents' positions, the "less-restrictive" approach "has never been a part of the inquiry into the validity of content-neutral regulations on speech."<sup>126</sup> The Supreme Court in *Turner* stated, "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech restrictive alternative."<sup>127</sup>

Despite the abovementioned alternatives, the COPPA "promotes a substantial government interest that would be achieved less effectively absent the regulation."<sup>128</sup> Not all web operators participate in programs such as Truste and BBBOnline®. Furthermore, web operators that do participate only face the removal of the right to display the programs' seals if they are found in violation of the programs' policies.<sup>129</sup> Additionally, not every family can purchase filtering de-

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120 *Turner*, 512 U.S. at 649.

121 Child Online Privacy Protection Act, 15 U.S.C. § 6501 (1998).

122 Hersh, *supra* note 21, at 1842.

123 Zwick, *supra* note 4, at 1148.

124 Zwick, *supra* note 4, at 1148.

125 Zwick, *supra* note 4, at 1149.

126 *Turner*, 520 U.S. at 200.

127 *Id.* at 201.

128 *Turner*, 512 U.S. at 649.

129 Zwick, *supra* note 4, at 1448.

vices. Devoid of government regulation, children whose families can afford to invest in self-regulatory devices will have their personal information protected, while millions of other children remain vulnerable to the exact ploys the COPPA intends to protect against. Lastly, the COPPA does not “burden substantially more speech than is necessary to further the government’s legitimate interests.”<sup>130</sup> The COPPA leaves open alternative means of communication for children on the Internet. The Act only intends to restrict the collection of personal information without the knowledge or consent of the parent. Hence, a child is still permitted to participate in monitored chat rooms and discussion boards. The COPPA does not prohibit a child from other methods of communication on the Internet such as e-mail. The COPPA does not offend a child’s First Amendment right to free speech.

### CONCLUSION

Protecting children’s privacy and safety online is a priority of both the government and parents. But protection should not arise at the expense of children’s First Amendment free speech rights. Internet privacy rights must be “balanced against other competing interest of the public, law enforcement, government agencies and private commercial interests.”<sup>131</sup> The COPPA strikes an appropriate balance of protecting children from marketers and sexual predators online, while allowing children to take advantage of the plethora of benefits the Internet has to offer.

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130 *Turner*, 512 U.S. at 649.

131 *See, e.g. Hersh, supra* note 21, at 8; *Carey v. Population Serv. Int’l.*, 431 U.S. 678 (1977).