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THE CHILDREN'S INTERNET PROTECTION ACT IN PUBLIC SCHOOLS: THE GOVERNMENT STEPPING ON PARENTS' TOES?

Kelly Rodden*

INTRODUCTION

Public schools increasingly provide students with Internet access.¹ Schools have Internet access for mandatory online activities as part of the classroom curriculum, as well as for voluntary student use in school libraries and computer labs.² The unique nature of the Internet allows schools to expand astronomically the amount of information they can provide to students, making Internet accessibility highly appealing.³ In addition, the government has instituted programs subsidizing telecommunications services in public schools, thus increasing Internet presence in public schools by making it more affordable for schools to offer online access.⁴

One such government initiative is the Telecommunications Act, signed in 1996 by President Clinton and further defined by the Federal Communications Commission in 1997.⁵ This legislation established the Universal Service Fund, or E-rate program, designed to provide

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1. See generally Kelley Baker, *Public Schools and the Internet*, 79 Neb. L. Rev. 929 (2000); Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., *Internet Access in U.S. Public Schools and Classrooms: 1994-2001* (Sept. 2002), <http://nces.ed.gov/pubs2002/2002018.pdf> [hereinafter *Internet Access in U.S. Pub. Sch.*]; U.S. Census Bureau, U.S. Dep't of Commerce, *U.S. Census Bureau Reports on Computer, Internet Access*, U.S. Dept. of Commerce News Washington, D.C. (Sept. 6, 2001), http://www.usembassy.it/file2001_09/alia/a1090605.htm [hereinafter *U.S. Census Bureau Report*].

2. See *Internet Access in U.S. Pub. Sch.*, *supra* note 1, at 5.

3. Cf. Baker, *supra* note 1, at 929 ("Internet users can access an almost limitless array of information with the click of a mouse.")

4. See, e.g., Patricia F. First & Yolanda Y. Hart, *Access to Cyberspace: The New Issue in Educational Justice*, 31 J.L. & Educ. 385, 389-90 (2002) (suggesting that the growth of Internet access in public schools is a result of federal telecommunications subsidy programs such as E-rate).

5. Schools and Libraries Corporation, U.S. Dep't of Educ., Universal Service Program (Dec. 1997), at <http://www.ed.gov/Technology/erateforms/slcmaila.html>.

and expand affordable online services in public schools.⁶ Under this program, the government grants discounts of twenty to ninety percent for telecommunications services for public schools, depending on each school's particular need and location.⁷ Discounts apply to charges for Internet service as well as internal connections necessary to provide Internet access.⁸ Unfortunately, as government subsidies have enabled more schools to afford Internet service, and Internet presence in public schools has increased, several problems with student access to online materials have become evident.

One of the problems stemming from student Internet use in public schools is the possibility of student exposure to the substantial amount of pornographic material available on the Internet.⁹ In light of this concern, the government has implemented regulations to protect children from harmful online material.¹⁰ A recent statute targeting this goal is the Children's Internet Protection Act ("CIPA").¹¹ Signed by President Clinton in December 2000, CIPA "requires that schools and public libraries receiving federal support adopt and implement 'technology protection' measures on all modem-equipped computers as a condition of receiving federal funds."¹² In its attempt to regulate the availability of information in public schools, however, this statute

6. *Id.*

7. *Id.*

8. *Id.*

9. See generally *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401, 419 (E.D. Pa. 2002) (discussing the amount and accessibility of sexually explicit material on the Internet); Mark C. Alexander, *The First Amendment and Problems of Political Viability: The Case of Internet Pornography*, 25 Harv. J.L. & Pub. Pol'y 977, 981 (2002) (noting a growing "concern over the easy accessibility to and the sheer volume of sexually explicit material on the Internet, especially in light of the increasing number of children online"); Kathleen Conn & Perry A. Zirkel, *Legal Aspects of Internet Accessibility and Use in K-12 Public Schools: What Do School Districts Need to Know?*, 146 W. Ed. L. Rep. 1, 7 (2000) ("The increasing use of the Internet as an educational tool... has the potential to bring disturbing, non-educationally appropriate images into school libraries and classrooms at the click of a computer mouse."); Rebecca L. Covell, Note, *Problems with Government Regulation of the Internet: Adjusting the Court's Level of First Amendment Scrutiny*, 42 Ariz. L. Rev. 777, 777-78 (2000) (describing mechanisms that trap and force users to view pornography on the Internet, and explaining why this is particularly harmful for minors); Sally Rutherford, Note, *Kids Surfing the Net at School: What Are the Legal Issues?*, 24 Rutgers Computer & Tech. L.J. 417 (1998) (providing a general discussion about inappropriate material on the Internet and possible consequences of children viewing this information); *infra* Part I.A.

10. Two early examples of government attempts to protect children from exposure to harmful material on the Internet include the Communications Decency Act, 47 U.S.C. § 223 (a) (2000) (amended); and the Child Online Protection Act, 47 U.S.C. § 231(a) (2000) (currently enjoined following ongoing litigation). See *infra* Part I.B.1.

11. Children's Internet Protection Act, 47 U.S.C. § 254 (2000).

12. Kathleen Conn, *Protecting Children From Internet Harm (Again): Will the Children's Internet Protection Act Survive Judicial Scrutiny?*, 153 W. Ed. L. Rep. 469, 473 (2001).

raises important legal questions, including (but not limited to) what information students should have access to, and who is the appropriate agent to make this decision.¹³

This Note discusses legal issues surrounding CIPA and specifically assesses whether CIPA's regulation of student Internet access in schools violates parents' constitutional right to raise and educate their children.¹⁴ Part I of this Note provides a general background of student Internet use, including the extent of the Internet's presence in public schools, problems arising from this presence, and how this issue has been addressed by Congress. This part includes a detailed discussion of CIPA, one of Congress's efforts to protect children from harmful material on the Internet, and explains some legal questions about this statute. Part II outlines one legal controversy in particular: whether CIPA intrudes on parental liberty. This part presents both sides of the argument—parents' potential accusations that CIPA infringes their constitutional right to raise their children, versus the state's defense that CIPA does not unconstitutionally interfere with parents' rights. Finally, Part III argues that CIPA does not violate parents' constitutional right to rear their children because the state has a strong interest in protecting children from accessing inappropriate material at school, the state has the authority to create laws to achieve this objective, and, furthermore, the statute does not affect parents' decision-making authority over this issue in private realms outside of schools.

I. BACKGROUND

The following section presents background information necessary to understand both CIPA itself, and the events leading up to its inception. Section A discusses the prominence of Internet access in public schools, and explains some of the problems resulting from students using online services. Section B outlines three Congressional attempts to address these problems, including CIPA.

A. *Internet Presence in Schools*

In 1997, an estimated 60% of children's Internet access "t[ook] place outside the home, principally in schools and libraries."¹⁵ A 2002 survey showed a continuing trend, with only three in ten children

13. Cf. Conn & Zirkel, *supra* note 9, at 1 ("Legal issues arise from the unique characteristics of the Internet . . . [and] [s]uch issues in the school setting include the constitutionality of limiting access to Internet information in classrooms and school libraries . . .").

14. See *infra* notes 108-15 and accompanying text (describing parents' constitutional right to raise and educate their children).

15. Baker, *supra* note 1, at 930 (referring to a study presented at the Internet Online Summit in December 1997).

using the Internet at home.¹⁶ The Department of Education published a study reporting that as of the fall of 2001, 99% of public schools in the United States provided students with Internet access.¹⁷ Internet service in the classroom, specifically, increased from 3% in 1994, to 87% in 2001.¹⁸ Internet service now typically is included not only in classrooms, but also for voluntary student use—for example in school libraries—both during and sometimes outside of school hours.¹⁹ As the Internet has become more prominent in schools, online access increasingly is valued as a helpful resource.²⁰ Additionally, many consider Internet instruction an important aspect of educational development, necessary to familiarize students with technological resources that they will be expected to use in the outside world.²¹ Attitudes such as these further encourage schools to acquire Internet access for their students.

While student access to the Internet has numerous advantages and offers valuable opportunities, there are disadvantages as well. One of these is that a substantial amount of the information available on the Internet is obscene, or at least considered inappropriate for minors to view.²² The government has argued that “the Internet threatens to render irrelevant all prior efforts to protect children from indecent material.”²³ The extensive presence of sexually explicit material on

16. *U.S. Census Bureau Report*, *supra* note 1 (reporting statistics from Current Population Survey data). This survey also noted that only 20% of families with household incomes below \$25,000 had Internet access at home. *Id.*

17. Internet Access in U.S. Pub. Sch., *supra* note 1, at 3 (noting an increase from 1994, when only 35% of public schools had online service).

18. *Id.*

19. *Id.* at 5 (reporting that in 2001, 51% of public schools with Internet access also provided this service outside of regular school hours).

20. *See supra* note 3.

21. *See Baker*, *supra* note 1, at 929 (“Familiarity with computer technology and the Internet is vital to our children’s future.”); Philip T.K. Daniel & Patrick Pauken, *The Electronic Media and School Violence: Lessons Learned and Issues Presented*, 164 W. Ed. L. Rep. 1, 1 (2002) (“[T]he goals and missions of education must be transformed so that the eager participants—the students—may be prepared to contribute and succeed in this increasingly technological world.”).

22. The Supreme Court defined “obscenity” in *Miller v. California*, 413 U.S. 15 (1973), as work that

(a) . . . “the average person, applying contemporary community standards” would find that . . . taken as a whole, appeals to the prurient interest . . .

(b) . . . depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) . . . taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (citations omitted). Additionally, material that does not quite meet this standard, but is nonetheless sexually explicit, might still be harmful to children.

23. Anthony Niccoli, Legislative Reform, *Least Restrictive Means: A Clear Path for User-Based Regulation of Minors’ Access to Indecent Material on the Internet*, 27 J. Legis. 225, 226 (2001) (quoting Transcript of Oral Argument at 3, *Reno v. ACLU*, 521 U.S. 844 (1997) (No. 96-511)). The Court has repeatedly upheld state actions aimed at protecting minors from harmful material, in the interest of their general welfare and sense of morality. *See Miller*, 413 U.S. at 18-19 (“This Court has recognized that

the Internet is notable and growing. Pornographic websites multiplied from approximately 28,000 to 60,000 between 1998 and 2000.²⁴ By 2002, the Internet contained an estimated 100,000 pornographic web sites that were accessible without any charge or registration,²⁵ plus tens of thousands of pages of child pornography.²⁶ The number of visitors to these sites has increased as well.²⁷

Not only is the amount of sexually explicit material on the Internet problematic, but the availability and accessibility of this information is a concern as well. As previously mentioned, many sexually explicit sites are free of charge and do not require user registration information.²⁸ Innocuous domain names and ambiguous site descriptions sometimes make it difficult to avoid viewing pornographic material.²⁹ Users often unintentionally reach sexually explicit sites,³⁰ and recurring pop-up windows impede users' ability to exit these sites once they are accessed.³¹ Industry mechanisms such as "kidnappings"—redirecting users from legitimate websites to pornographic ones—and "mousetrappings"—disabling "back" and "close" buttons, and linking users to additional sexually explicit sites—force users to view pornographic information against their will.³² Furthermore, the structure of the Internet affords accidental exposure to inappropriate information more readily than other forms of media because "sex on the Internet is not segregated and signposted like in a bookstore."³³

the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of . . . exposure to juveniles." (footnote omitted) (citing as examples of this recognition *Stanley v. Georgia*, 394 U.S. 557, 567 (1969); *Ginsberg v. New York*, 390 U.S. 629, 637-43 (1968); *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 690 (1968); *Redrup v. New York*, 386 U.S. 767, 769 (1967); *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964))).

24. Alexander, *supra* note 9, at 981.

25. In addition, there are many pornographic sites that have some fees or verification process, plus numerous sites that contain material that is sexually explicit, but fall short of being characterized as "pornography."

26. See *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401, 406 (E.D. Pa. 2002).

27. Alexander, *supra* note 9, at 981 (citing a study indicating that pornography site visitors increased approximately 30% between December 1999 and February 2001).

28. *Am. Library Ass'n*, 201 F. Supp. 2d at 419. The court noted that approximately 100,000 Internet pornography sites could be accessed without any expense or verification process. *Id.* at 406; see also *ACLU v. Reno*, 31 F. Supp. 2d 473, 476 (E.D. Pa. 1999) (noting that pornographic web sites often show explicit images for free, as a "teaser" to persuade users to subscribe to the sites).

29. See Alexander, *supra* note 9, at 983.

30. See, e.g., *ACLU v. Reno*, 31 F. Supp. 2d at 476 (reporting that innocently entering the word "dollhouse" or "toys" into a search engine may produce links to pornographic sites).

31. See *Am. Library Ass'n*, 201 F. Supp. 2d at 419.

32. Covell, *supra* note 9, at 777-78.

33. Alexander, *supra* note 9, at 982 (quoting David Finkelhor et al., Crimes Against Children Research Center, Online Victimization: A Report on the Nation's

Allowing students to view sexually explicit information at school offends common societal notions, and contradicts the responsibilities and functions of public schools. Public schools must provide students with a vast array of information and different viewpoints, while simultaneously making discretionary choices about the inclusion and exclusion of material to which students have access.³⁴ Specifically, public schools act “*in loco parentis*, to protect children . . . from exposure to sexually explicit, indecent, or lewd speech.”³⁵ Furthermore, public schools must consider potential criminal and civil liability stemming from student exposure to harmful material. Schools that fail to implement measures to prevent student exposure to inappropriate information may face parental actions for negligence or injunctions prohibiting student Internet use.³⁶

B. Congress's Response to the Problem of Children Accessing Sexually Explicit Material on the Internet in School

In response to the problem of student access to sexually explicit information on the Internet and liability concerns arising from this issue, many public schools voluntarily have implemented regulatory mechanisms.³⁷ Congress, however, also has responded to these

Youth 34 (2001), http://www.unh.edu/ccrc/Youth_Internet_info_page.html).

34. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (“The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society’s countervailing interest in teaching students the boundaries of socially appropriate behavior.”); see also *Bd. of Educ. v. Pico*, 457 U.S. 853, 863-64 (1982) (recognizing the need to give schools discretion to make determinations about the information to which children are exposed); Glenn Kubota, Comment, *Public School Usage of Internet Filtering Software: Book Banning Reincarnated?*, 17 Loy. L.A. Ent. L.J. 687, 704-06 (1997) (discussing the indoctrinative nature of schools).

35. *Fraser*, 478 U.S. at 684.

36. See Conn & Zirkel, *supra* note 9, at 10; Rutherford, *supra* note 9, at 429.

37. Many schools have created acceptable use policies (“AUPs”) prohibiting particular Internet uses, such as viewing sporting events or pornography. See Mark S. Nadel, *The First Amendment’s Limitations on the Use of Internet Filtering in Public and School Libraries: What Content Can Librarians Exclude?*, 78 Tex. L. Rev. 1117, 1130 (2000). AUPs are contracts outlining acceptable Internet usage that typically require parent and student signatures before students are authorized to use Internet terminals in school. See Internet Access in U.S. Pub. Sch., *supra* note 1, at 10; Comm’n on Child Online Prot., Cong. Internet Caucus Advisory Comm., 106th Cong., Report to Cong. 41 (2000), <http://www.copacommission.org/report/COPAreport.pdf> [hereinafter COPA Comm’n Report] (“Acceptable use policies refer to stated parameters for use of online systems.”). The Commission on Child Online Protection—appointed by Congress to review various methods of preventing minors from accessing harmful material while using online systems—recommended that all public institutions offering Internet access implement AUPs that establish guidelines for appropriate Internet use and inform parents about the measures taken to protect their children from inappropriate online material. *Id.* Such policies have been widely adopted by public schools. In 2001, among schools that had some procedure in place for preventing student exposure to harmful material on the Internet (96% of all public schools), 80% made parents sign a written contract before

concerns. One scholar summarized Congressional efforts, stating, “Congress has addressed the problem of child access to Internet pornography in two ways—by regulating transmission of pornographic material over the Internet and by regulating receipt of that information.”³⁸ Two early statutes targeted the first goal, regulating the transmission of pornographic material: the Communications Decency Act (“CDA”), and the Child Online Protection Act (“COPA”).³⁹ A more recent statute, CIPA, addresses the second goal, regulating the receipt of Internet information.⁴⁰

1. Earlier Statutes—CDA and COPA

The CDA was passed in 1996, making it a crime knowingly to transmit obscene or indecent communications to minors (under 18 years old),⁴¹ and knowingly to use an interactive computer system to communicate with minors in a manner “patently offensive as measured by contemporary community standards.”⁴² The act imposed fines and up to two years imprisonment for violations,⁴³ and provided four affirmative defenses.⁴⁴ In *Reno v. ACLU*, however, the United States Supreme Court declared the CDA unconstitutional because it violated the First Amendment.⁴⁵ The Court examined the CDA under strict scrutiny because the statute regulated speech content,⁴⁶ and found that the law abridged First Amendment rights for two primary reasons. First, the statute failed to define the terms “indecent” and “patently offensive.”⁴⁷ The Court concluded this ambiguity would “chill” speech because speakers might withhold

their children could go online at school, and 75% also required students’ signatures. Internet Access in U.S. Pub. Sch., *supra* note 1, at 10. In addition to AUPs, other protection methods voluntarily instituted by schools include monitoring by teachers or staff, software designed to block or filter inappropriate material, monitoring software, and honor codes. *Id.*

38. Covell, *supra* note 9, at 781.

39. *Id.* at 781 n.28.

40. *Id.* at 794.

41. Communications Decency Act, 47 U.S.C. § 223(a) (2000) (amended).

42. *Id.* § 223(d).

43. *Id.* § 223(a), (d).

44. *Id.* § 223(e) (exempting service providers who were not involved with transmitting the communications and were not the owners or controllers of the facility, employers who were not aware of (and did not recklessly disregard) employee activity in violation of the act, and those individuals who made good faith efforts to restrict minors’ access to communications prohibited by the act, or restricted access by requiring account/credit authorization or access codes).

45. *Reno v. ACLU*, 521 U.S. 844, 870-71 (1997).

46. *Id.* at 871, 874 (explaining that because the CDA regulated the content of speech, it raised special First Amendment concerns). To withstand judicial scrutiny, statutes regulating speech content must be the least restrictive alternative, addressing a compelling government interest. *Id.*

47. *Id.* at 870-71.

communications rather than risk violating the statute.⁴⁸ Second, the Court was concerned about the broad scope of the statute⁴⁹ and the overbreadth of its language.⁵⁰ The court feared that adult access to constitutionally protected speech would also be restricted,⁵¹ and that the “community standards” criterion for judging communications would force all speakers to conform to the standards of the most conservative community.⁵² Therefore, the Court concluded that the statute was neither narrowly tailored nor the least restrictive alternative available, and thus violated First Amendment rights.⁵³

COPA was Congress’s second attempt to regulate the transmission of pornographic information over the Internet. Passed in 1998, this statute criminalized providing to any minor commercial communication deemed “harmful to minors,”⁵⁴ and mandated that website designers implement barriers requiring proof of age for access to sites publishing such information.⁵⁵ Penalties included fines and up to six months imprisonment.⁵⁶ In an effort to avoid the problems inherent in the CDA, COPA’s drafters attempted to tailor the statute’s language to comply with the requirements articulated by the Supreme Court in *Reno v. ACLU*.⁵⁷ COPA targeted speech deemed “harmful to minors” according to a three-prong test,⁵⁸ and only

48. *Id.* at 871-72.

49. The CDA applied to all individuals posting information on the Internet, not just commercial speakers (which would have been a narrower, more acceptable range of speech to regulate). *Id.* at 877.

50. *Id.* at 874-78.

51. *Id.* at 874.

52. *Id.* at 877-79.

53. *Id.*

54. Child Online Protection Act, 47 U.S.C. § 231(a) (2000) (currently enjoined due to ongoing litigation).

55. *Id.* § 231(c).

56. *Id.* § 231(a).

57. 521 U.S. 844 (1997) (invalidating the CDA because of several First Amendment problems stemming from the statute’s language); see *supra* notes 45-53 and accompanying text.

58. Child Online Protection Act § 231(e)(6).

The term “material that is harmful to minors” means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—

(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

Id.; see Covell, *supra* note 9, at 786-87. This three-prong test is a constitutionally acceptable definition of obscenity. *Id.* at 787 (citing *Ginsberg v. New York*, 390 U.S. 629 (1968)); see also *Miller v. California*, 413 U.S. 15, 24 (1973). By contrast, the CDA did not properly define the speech it regulated, and therefore, was

applied to commercial providers who published material on the World Wide Web.⁵⁹ Furthermore, Congress maintained parents' ability to provide their children with materials targeted by the statute, if they chose to do so.⁶⁰ However, the ACLU once again objected to Congress's attempt to regulate the Internet, and consequently filed a lawsuit challenging COPA.⁶¹

In *ACLU v. Reno*, COPA was criticized for placing an undue burden on protected adult speech because of the expense of implementing age verification mechanisms.⁶² The Court of Appeals for the Third Circuit found the statute unconstitutional because, although the government had a sufficiently compelling interest in limiting the transmission of sexually explicit material, the statute was, once again, not the least restrictive means to do so.⁶³ The court also concluded that COPA's community standard definition of "harmful to minors" (in the first prong of the test)⁶⁴ was unconstitutionally overbroad because the geographical structure of the Internet would force speakers to comply with the standards of the most conservative community.⁶⁵ The Supreme Court later ruled on COPA, with a narrow majority finding that the statute's use of a community standard provision did not "by itself render the statute" unconstitutional.⁶⁶ The Court, however, concluded that COPA may "suffer[] from substantial overbreadth for other reasons," and therefore maintained the injunction against the statute, remanding for further consideration.⁶⁷

unconstitutionally vague. *See supra* notes 47-48 and accompanying text (explaining the insufficiencies of the CDA's language, therefore suggesting that by including in COPA a three-prong test defining "harmful to minors," Congress was attempting to overcome some of the CDA's problems).

59. Child Online Protection Act § 231(a). The CDA had a much broader scope—applying to *all* speakers, in *all* realms of the Internet—which was one of the reasons the Court invalidated the statute. *See supra* note 49.

60. Under COPA, commercial speakers were not entirely precluded from transmitting sexually explicit material. The material would still be available to adults who provided age verification. *See* Child Online Protection Act § 231(a), (c). This flexibility was not available under the CDA, which was problematic. In reviewing the statute, the Court was concerned that application of the CDA potentially would have resulted in an outright prohibition of transmitting sexually explicit information. *See supra* notes 50-53 and accompanying text.

61. *ACLU v. Reno*, 217 F.3d 162 (3d Cir. 2000).

62. *Id.* at 171-72.

63. *Id.* (basing this conclusion on the fact that credit card authorization methods are ineffective, the law did not apply to foreign websites, the statute's language was overinclusive, and other alternatives such as parental regulation were available).

64. *See supra* note 58.

65. *ACLU v. Reno*, 217 F.3d at 175.

66. *Ashcroft v. ACLU*, 122 S. Ct. 1700, 1713 (2002).

67. *Id.* at 1713-14.

2. CIPA

Having faced two defeats, Congress redirected its attention to regulating children's access to sexually explicit information, rather than attempting to regulate the transmission of such material. CIPA is the manifestation of these efforts,⁶⁸ and the focus of this Note. CIPA mandates that public schools and public libraries⁶⁹ that accept federal funding for Internet access⁷⁰ must adopt protection measures as a condition of receiving these funds.⁷¹ Specifically, the "technology protection measure" must "protect[] against access . . . to visual depictions that are—(I) obscene; (II) child pornography; or (III)

68. Covell, *supra* note 9, at 794 ("CIPA does not attempt to limit what people say; rather, it limits reception of certain materials in limited situations.").

69. Although the statute applies to both schools and libraries, this Note only discusses CIPA in the context of public schools. This segregated analysis is possible because the statute provides that if any part of the requirements for either schools or libraries is deemed invalid, the other sections should remain unaffected. Act of Dec. 21, 2000, Pub. L. No. 106-554, 114 Stat. 2763A-350. There are several reasons for limiting the focus of this Note. First, the implications of CIPA in public schools is a largely unexplored topic, particularly with regard to parents' rights. CIPA's application in public libraries, however, has been addressed by scholars, *see, e.g.*, Adam Goldstein, Note, *Like a Sieve: The Child Internet Protection Act and Ineffective Filters in Libraries*, 12 Fordham Intell. Prop. Media & Ent. L.J. 1187 (2002), and by a federal court. *See Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2002) (invalidating CIPA as applied to public libraries as a violation of the First Amendment). The Supreme Court will also review this issue. *See Am. Library Ass'n v. United States*, No. 02-361, 2002 WL 31060372 (U.S. Nov. 12, 2002) (noting probable jurisdiction). Second, because of the depth and intricacies of the notion of parental liberty, the legal analysis of CIPA in the school context is extremely intriguing. The issue raises broad, important concerns extending beyond the circumstances of the statute itself. These include parental rights in public schools generally, and the constitutionally permissible scope of state regulation over students.

70. These funds are available under the E-rate or Universal Service Fund program, and may be used to pay for both Internet service itself, as well as internal connections necessary to network access. *See supra* notes 5-8 and accompanying text.

71. Children's Internet Protection Act, 47 U.S.C. § 254(h) (2000). It should be noted that CIPA is not an absolute regulation, but a form of conditional funding. This distinction raises questions about the constitutionality of the federal government conditioning money it gives to the states. While these questions are important, such analysis is beyond the scope of this Note. However, it is important to point out that, aside from overcoming other criticisms articulated in this Note, CIPA must also satisfy the four prong test to determine the constitutionality of conditional funding, as established in *South Dakota v. Dole*, 483 U.S. 203 (1987) (examining a federal law conditioning highway funds on states setting the legal drinking age at twenty-one). By conditioning money it gives to the states, the federal government does not exceed its spending power as long as: 1) the law is for the general good; 2) the condition is unambiguous; 3) the law relates to a larger federal interest; and 4) the condition is not barred by other constitutional provisions. *Id.* at 207-08. This last requirement prohibits conditions that would require states to "engage in activities that would themselves be unconstitutional." *Id.* at 210. If filtering students' Internet use is constitutional, CIPA presumably complies with all four standards, and therefore would likely survive a conditional spending challenge. Whether the condition is constitutional, however, remains unresolved.

harmful to minors.”⁷² The statute also requires that schools implement Internet safety policies,⁷³ and the law prohibits the federal government from interfering with the determinations about specifically what information must be filtered.⁷⁴

Like its predecessors, CIPA has met several criticisms. In response to CIPA’s enactment, one skeptic wrote, “While Congress seemed to be taking a step in the right direction by changing its focus from federal regulation to empowering local communities, the reality is that Congress has failed the people by passing another politically appealing, yet unconstitutional law.”⁷⁵ Immediately after CIPA’s passage, the American Library Association (“ALA”), in conjunction with a group of libraries, library patrons, and web site publishers, filed a suit in the Eastern District of Pennsylvania challenging CIPA in the context of public libraries.⁷⁶ The court ruled in favor of the ALA, invalidating CIPA’s application to public libraries as a violation of the First Amendment.⁷⁷ The government appealed directly to the Supreme Court, which recently decided to review the case.⁷⁸ Although no suit has been filed challenging CIPA in the context of public schools, growing concerns may give rise to legal action in this context as well. Specifically, these concerns include a possible violation of students’ First Amendment right to receive information, Equal Protection issues, and a perceived encroachment on parents’ constitutional right to make decisions about their children’s education.

72. Children’s Internet Protection Act § 254(h)(5)(B)(i), (6)(B)(i). The statute defines “harmful to minors” as

any picture, image, graphic image file, or other visual depiction that—

(i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;

(ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and

(iii) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.

Id. § 254(h)(7)(G).

73. *Id.* § 254(h)(5). Such policies must address issues associated with access to inappropriate material, the safety and privacy of students’ electronic communications, unauthorized access, and unauthorized disclosure of students’ personal information. *Id.* The school must also provide reasonable public notice of the proposed policy. *Id.*

74. *Id.* § 254(l)(2).

75. Alexander, *supra* note 9, at 1016.

76. *Am. Library Ass’n v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2002).

77. *Id.* at 490 (“In view of the severe limitations of filtering technology and the existence of . . . less restrictive alternatives, we conclude that it is not possible for a public library to comply with CIPA without blocking a very substantial amount of constitutionally protected speech, in violation of the First Amendment.”).

78. *Am. Library Ass’n v. United States*, No. 02-361, 2002 WL 31060372 (U.S. Nov. 12, 2002) (noting probable jurisdiction). The case was not heard by a federal court of appeals because the act provides the right of direct appeal to the Supreme Court. Act of Dec. 21, 2000, Pub. L. No. 106-554, 114 Stat. 2763A-352.

a. *Students' Right To Receive Information*

Although minors do not enjoy exactly the same constitutional rights as adults,⁷⁹ children do have some First Amendment rights, and retain several of these even while at school.⁸⁰ One of these rights includes the right to receive information.⁸¹ Schools have the authority to restrict student access to certain types of information “in furtherance of the school’s educational goals,”⁸² but such actions must be balanced against students’ constitutional right to receive information.⁸³ CIPA must comply with this standard. Additionally, because CIPA is a content-based restriction on speech, in order to survive a constitutional challenge on the basis that CIPA violates students’ right to receive information, the statute must be the least restrictive means possible, serving a compelling government interest.⁸⁴

Although the state has a compelling interest in protecting minors from exposure to sexually explicit material,⁸⁵ critics argue that CIPA infringes on students’ First Amendment right to receive information because filtering technology is unreliable and inefficient,⁸⁶ and

79. See, e.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) (noting that particular language deemed acceptable for adult audiences is not necessarily appropriate for children at school).

80. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”).

81. See *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982) (recognizing students’ right to receive information in the context of book banning). Note, however, that the existence of a right to receive information has been questioned, particularly because *Pico*’s holding was issued from a plurality. *Id.* (Justice Brennan wrote the opinion, joined by Justices Marshall and Stevens; Justice Blackmun concurred in part and concurred in the judgment; Justice White concurred in the judgment; and Justices Burger, Rehnquist, Powell, and O’Connor dissented). Furthermore, one of the concurring Justices himself argued that there is no such recognizable right. *Id.* at 878 (Blackmun, J., concurring).

82. Kubota, *supra* note 34, at 707.

83. See *Pico*, 457 U.S. at 866-67. Discretion regarding what information is provided in schools “may not be exercised in a narrowly partisan or political manner.” *Id.* at 870.

84. See *Am. Library Ass’n v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2002); Conn, *supra* note 12, at 481 (“Since CIPA regulates Internet access to specific kinds of information, based on the direct, purportedly harmful effect of that expression on children, courts will likely find that CIPA’s regulations are content-based and apply strict scrutiny review to its provisions.”).

85. See *supra* notes 22-36 and accompanying text (discussing the extent of inappropriate information on the Internet and reasons why the state has an interest in shielding students from this).

86. See COPA Comm’n Report, *supra* note 37, at 19-22. The Commission researched the effectiveness of various filtering mechanisms, weighing such factors as availability, cost, First Amendment values, privacy, and law enforcement. It found server-side blocking—where online service providers voluntarily use software that identifies URLs with inappropriate content and blocks them—to be the most effective blocking technology, but only earning a grade of 7.4 out of 10. *Id.* at 19. The Commission noted significant First Amendment concerns that server-side filtering is

therefore is not the least restrictive means available.⁸⁷ Filtering systems deny access to constitutionally protected web sites, while simultaneously permitting access to web sites that contain harmful material and should be blocked.⁸⁸ The Court's decision in *Board of Education v. Pico*⁸⁹ may defend CIPA against this criticism. This case established the doctrine that schools may remove books from their library, as long as removal decisions are based "solely upon the 'educational suitability' of the [materials] in question."⁹⁰ CIPA seems to comply with this standard.⁹¹ However, it is questionable whether *Pico* is persuasive authority for this situation. The case dealt solely with removal decisions,⁹² and exclusively with the removal of materials in school libraries, to be viewed by students voluntarily (as opposed to materials used as a part of schools' mandatory classroom curriculum).⁹³ By contrast, CIPA's mandate might be more appropriately characterized as "selective acquisition" rather than removal of materials, and (unlike the removal decisions at issue in *Pico*) the statute applies to both school library terminals as well as Internet use as a part of mandatory classroom work.⁹⁴ Furthermore, *Pico*'s holding issued from a plurality, and thus its persuasiveness as authoritative precedent is questionable.⁹⁵

overinclusive and blocks too much information, which is particularly troublesome when it is used in libraries and schools. *Id.* at 20. Client-side filtering—where end-users voluntarily implement software that prevents downloading content from specified sources—was deemed even less effective, with a grade of 6.5, and also raised apprehensions about overinclusiveness. *Id.* at 21. Finally, server and client combined filtering using text-based analysis was considered the least effective, with a grade of 5.4, and elicited similar First Amendment concerns. *Id.* at 22; *see also* Alexander, *supra* note 9, at 1017-20; Adam Horowitz, *The Constitutionality of the Children's Internet Protection Act*, 13 St. Thomas L. Rev. 425, 427 (2000).

87. *See Conn, supra* note 12, at 478-79, 481 (noting that although the government has more leeway when regulating speech with respect to minors, such regulation still "must be narrowly tailored").

88. *See Goldstein, supra* note 69, at 1192; *see also supra* note 86 (discussing the COPA Commission's report detailing some of the inefficiencies of filtering mechanisms).

89. 457 U.S. 853 (1982).

90. *Id.* at 871. This presumably would result in the unintentional removal of some constitutionally protected materials, while some harmful materials would remain on the shelves, similar to what might result from application of CIPA's regulations.

91. CIPA requires schools to filter information that is pornographic, obscene, or harmful to minors—a standard implicitly based on what is appropriate for minors to access in an educational setting.

92. *See Pico*, 457 U.S. at 862, 871 (noting that "nothing in our decision today affects in any way the discretion of a local school board to choose books to *add* to the libraries of their schools").

93. *See id.* at 861-62; Kubota, *supra* note 34, at 711.

94. Kubota, *supra* note 34, at 711 (citing *Pico*, 457 U.S. at 862, 869).

95. This consideration is especially true given the questions surrounding the notion of a constitutional right to receive information. *See supra* note 81.

b. *Fourteenth Amendment/Equal Protection Issues*

CIPA may also be criticized as having a disparate impact on low-income families, thus violating the Fourteenth Amendment's guarantee of Equal Protection.⁹⁶ Indigents typically cannot afford Internet access at home, so they rely on schools and libraries to provide this service.⁹⁷ In addition, public schools in low-income districts presumably depend more on federal funding of online services than do wealthier districts.⁹⁸ Therefore, poorer school districts and the families residing within them may argue that they are more directly affected by CIPA than wealthier districts that can either afford Internet access in schools without relying on federal funding (and thus are not required to implement filtering technology), or have the means to provide unfettered Internet access at home.

Recognizing that an Equal Protection challenge against CIPA would likely receive less scrutinizing judicial review,⁹⁹ proponents of this viewpoint may argue that CIPA fails even the lowest level of judicial scrutiny, thus rendering it incapable of surviving a constitutional challenge.¹⁰⁰ Because the ineffectiveness of filtering technology allows some inappropriate web sites to slip through blocks, while simultaneously banning some constitutionally protected material,¹⁰¹ CIPA may be criticized as not being a rational means to

96. See Goldstein, *supra* note 69, at 1195-96 (making this argument in the context of public libraries); cf. Geraldine P. Rosales, Comment, *Mainstream Loudoun and the Future of Internet Filtering For America's Public Libraries*, 26 Rutgers Computer & Tech. L.J. 357, 383 (2000) (noting that an important question surrounding Internet filtering is "whether it is a violation of equal protection to let affluent children, who likely have computers at home and in school, search the entire Internet while less fortunate children can only access the (poorly) filtered version in libraries").

97. See *U.S. Census Bureau Report*, *supra* note 1 (reporting that among families with incomes below \$25,000, less than 30% had a computer at home, and only about 20% had Internet access at home).

98. With a higher tax base, wealthier school districts may be able to afford Internet access without relying on federal funding at all.

99. The courts do not consider wealth a suspect classification and therefore, unless a fundamental right is at issue or the discriminated class is deprived of access to justice, wealth discrimination claims are reviewed under traditional, not strict scrutiny. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973) (applying traditional, rather than strict, judicial scrutiny in a case where the class suffering discrimination was based on wealth—and therefore was not suspect—and the right at issue was the right to education—which is not a fundamental right for purposes of Equal Protection, and does not constitute a denial of access to justice). Similarly, an Equal Protection challenge against CIPA would rely on a type of wealth discrimination that neither violates a fundamental right, nor restricts indigents' access to justice, and therefore would receive traditional low tier judicial review.

100. Low tier scrutiny (the traditional standard of review) is the lowest level of judicial analysis, requiring only that a law be rational, serving a legitimate state purpose, to survive a constitutional challenge of deprivation based on a wealth classification. See, e.g., *id.*

101. See Goldstein, *supra* note 69, at 1192.

achieve the state's purpose.¹⁰² If CIPA fails to meet this threshold standard, then the law violates the Equal Protection Clause.

Whether CIPA violates Equal Protection guarantees remains an "open question."¹⁰³ In defense of CIPA, the state would likely argue that filters are not so ineffective that the statute is irrational. On the other hand, the government itself has recognized the inefficiencies of filtering mechanisms,¹⁰⁴ thus suggesting that perhaps CIPA violates the Equal Protection Clause of the Fourteenth Amendment. Low tier judicial scrutiny, however, is a very minimal benchmark, and laws rarely fail to meet this requirement.¹⁰⁵ Therefore, CIPA likely would overcome an Equal Protection challenge.

c. Parental Rights

This Note focuses on the criticism that, by imposing federally mandated filters, CIPA violates parents' constitutional right to rear their children.¹⁰⁶ In response to this challenge, proponents of CIPA argue that the statute does not violate parents' rights because the state has a substantial interest in filtering students' Internet use, it enjoys constitutional authority to do so, and, furthermore, the law does not restrict parents' freedom to instruct their children outside of the school setting.¹⁰⁷ Thus, there is an emerging tension between the right of parents to raise their children according to their own ideals, and the government's power to control what information is made accessible to students in public schools.

II. THE CONTROVERSY BETWEEN CIPA AND PARENTS' RIGHTS

Part II examines both sides of this controversy—pro-parents versus pro-state—by explaining parental liberty as opposed to the competing interests of the state in the context of mandated filtering of Internet

102. See *id.* at 1196 ("While in theory there is a rational basis for installing flawed but occasionally effective filtering software and protecting children, in practice, if enough of the Web sites that should be blocked manage to get through, the requirement ceases to be rational.").

103. *Id.* at 1195-98. Although CIPA has been challenged on other bases, see *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2002) (reviewing whether CIPA violates the First Amendment), the courts have yet to hear Equal Protection claims against the statute.

104. See *supra* note 86 (discussing the results of the filtering technology report provided by the COPA Commission, a congressionally-sponsored committee).

105. See Erwin Chemerinsky, *Constitutional Law Principles and Policies* 529-30 (1997) ("Rational basis review is the minimum level of scrutiny that all laws challenged under equal protection must meet. . . . [R]arely have laws been declared unconstitutional for failing to meet this level of review.").

106. See *infra* Part II.A. This right is referred to interchangeably throughout this Note as "parental liberty," "parents' right to educate their children," "parents' right to educate and raise their children," "parents' right to rear their children," etc.

107. See *infra* Part II.B.

access in public schools. Section A outlines parents' potential arguments that CIPA interferes with their constitutional right to raise their children. Section B examines the state's potential defense of CIPA against this challenge.

A. *Pro-parent*

The Supreme Court has recognized, under the Fourteenth Amendment, parents' constitutional right to rear and educate their children.¹⁰⁸ This right is well established, and has been referred to as "an enduring American tradition."¹⁰⁹ As Justice McReynolds famously noted in *Pierce v. Society of Sisters*, "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."¹¹⁰ Accordingly, when the state attempts to regulate aspects of children's lives, questions arise as to whether parental liberty is infringed as a result.¹¹¹

Cases upholding parental rights over state action are built on the conclusion that the state action was so pervasive that it encroached on parental liberty entirely, in both public and private realms.¹¹²

108. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) ("Without doubt, [the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the individual to . . . establish a home and bring up children . . ."). The Court in this decision further defined this right, explaining that it coincides with "the natural duty of the parent to give his children education suitable to their station in life," and warning that any government interference with this liberty may not be "arbitrary or without reasonable relation to some purpose within the competency of the State to effect." *Id.* at 400. In deciding this case—where plaintiffs challenged an ordinance prohibiting the teaching of German—the Court found that the prohibition "materially interfered" with parental control over children's education, and was therefore unconstitutional. *Id.* at 401; see also *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972) (upholding parents' right to decision-making authority over their children's religious beliefs); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (invalidating legislation requiring students to attend public, rather than parochial, schools because it violated parents' fundamental liberty to control their children's education).

109. *Doe v. Irwin*, 615 F.2d 1162, 1167 (6th Cir. 1980) (reviewing a parental rights violation challenge against a public family planning center that was distributing contraceptives to minors).

110. *Pierce*, 268 U.S. at 535.

111. See, e.g., *Yoder*, 406 U.S. at 214 ("[A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as . . . the traditional interest of parents with respect to the religious upbringing of their children . . .").

112. See *id.* at 218, 232 (finding a compulsory-attendance law unconstitutional because it created a "severe" and "inescapable" burden, forcing students to act contrary to their religious beliefs, and would result in the state practically determining the children's religious futures, in opposition to their parents' right to make such decisions); *Pierce*, 268 U.S. at 532-35 (voiding a law requiring that students attend public schools because it abridged parents' right to send their children to either private or parochial schools); *Meyer*, 262 U.S. at 397, 401 (overruling a state prohibition on teaching foreign languages in all types of schools—private, denominational, parochial, or public). A rare exception to this premise is a New York

Similarly, cases validating state action—rejecting parents’ arguments that their liberty was violated—do so on the basis that the action in question does not prohibit parents from teaching their children as they choose in the privacy of the home, church, etc. As long as state action does not infringe on private domains of parental decision-making, courts find that parental rights are not unconstitutionally constrained.¹¹³ Therefore, viable arguments in favor of parental rights, against CIPA, must consider this premise and must be tailored accordingly. This might be accomplished in two ways. First, opponents to CIPA could reject legal precedent and argue that even though the state action does not directly extend beyond the school environment, parental liberty is still unconstitutionally infringed.¹¹⁴ Second, CIPA’s challengers could concede that parents’ rights are only violated when state action amounts to a total restriction on parental decision-making authority, but could argue that, because the statute also applies to public libraries and not all parents can afford Internet access in the home, for such parents the regulation is tantamount to an absolute restriction on parental control.¹¹⁵

1. Parental Rights Violated by State Action in School

The first argument—that parental rights are violated even if state action does not extend beyond the school—is supported by *Alfonso v. Fernandez*.¹¹⁶ In this case, parents of New York City students filed a complaint against the state for implementing a condom availability

state court case, *Alfonso v. Fernandez*, 606 N.Y.S.2d 259 (App. Div. 1993). See *infra* notes 122-28.

113. See *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (concluding that a regulation banning the sale of obscene magazines to minors did not overstep the rights of parents who wanted their children to view this material because parents could purchase the magazines for their children); *Doe*, 615 F.2d at 1168 (examining a publicly operated family planning center that was distributing contraceptives and medicine to minors, and finding no violation of parents’ rights because “[parents] remain[ed] free to exercise their traditional care, custody and control over their unemancipated children”); *Curtis v. Sch. Comm.*, 652 N.E.2d 580, 586 (Mass. 1995) (arguing that unless “governmental action is mandatory and provides no outlet for the parents,” there is no burden on parental liberties). In *Curtis*, an in-school condom availability program was upheld because participation in the program was voluntary, parents had a right to instruct their children not to participate, and no disciplinary actions or penalties ensued from not participating. *Id.* at 586-87; cf. *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987) (finding that free exercise of religion was not violated by a required reading text that offended some students’ religious beliefs). The court in *Mozert* noted that because Tennessee law permitted parents to either home school their children or send them to church or private schools, parents had options that allowed them to avoid exposing their children to the offensive reading material, and therefore the school’s use of this text was not unconstitutional. *Id.* at 1067.

114. See *infra* Part II.A.1.

115. See *infra* Part II.A.2.

116. 606 N.Y.S.2d 259 (App. Div. 1993).

program in the city's public high schools.¹¹⁷ The complaint alleged, among other things, that this initiative "violate[d] their due process rights to direct the upbringing of their children."¹¹⁸ In defense of the program, the respondents¹¹⁹ argued that because student participation was voluntary and without penalty for nonparticipation, parents retained the freedom to instruct their children about sexual matters according to their own viewpoints, and thus their parental rights were not violated.¹²⁰ The court rejected this argument.¹²¹

The *Alfonso* court's inquiry focused not on whether parents were free to instruct their children outside of school, but on whether important parental decisions were limited at all.¹²² The court found an intrusion on parental liberty because parents are compelled to educate their children, and because the parents in this case could not afford to send their children to private school, they were forced to send them to public school. Therefore, these parents had no choice but to subject their children to an environment where a condom availability program was in place.¹²³ The court concluded that this unconstitutionally limited parents' control over their children's knowledge about sexual matters.¹²⁴ Furthermore, the parents' complaint consisted of more than a mere concern that students were being exposed to ideas with which some of the parents disagreed.¹²⁵ Parents were upset that the schools were providing the *means* for engagement in activities that some parents deemed inappropriate.¹²⁶ The court thus noted that the issue was "not one of purpose but one of effect."¹²⁷ Even though the

117. *Id.* at 261.

118. *Id.*

119. The case was first heard in the New York Supreme Court, and was dismissed. *Alfonso v. Fernandez*, 584 N.Y.S.2d 406 (Sup. Ct. 1992). The decision discussed above is the parents' appeal to the New York Supreme Court, Appellate Division, Second Department.

120. *Alfonso*, 606 N.Y.S.2d at 265-66.

121. *Id.* at 266 ("[T]hese factors do not constitute proof that the petitioners are not being forced to surrender a parenting right . . .").

122. *Id.* The court did not address the issue of whether all realms of decision-making were affected. Rather, the court considered the fact that the parents were forced to send their children to school, where their children were exposed to material with which the parents disagreed. *Id.* (noting that "the policy . . . interfer[ed] with parental decision making in a particularly sensitive area").

123. *Id.* The court did not comment about the possibility of home schooling, an option that would weaken the court's argument that parents were forced to expose their children to the program. It may be surmised, however, that if the parents could not afford to send their children to private school, they also would not have the luxury of staying at home to educate their children. Therefore, even with the option of home schooling, the court could make the same argument that parents were thus compelled to send their children to public school and, consequently, they were required to submit to the condom distribution program.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

schools acted in the interest of protecting the students' health, the schools' means of accomplishing this interfered with important areas of parental decision-making, and therefore violated parents' rights.¹²⁸

Having found an intrusion on parental liberty, the *Alfonso* court then considered whether the state's interest was sufficiently compelling to justify this interference, and whether the state's action was a necessary means to accomplish this objective.¹²⁹ The court concluded that the state's interest was insufficiently compelling to override parents' rights in this case,¹³⁰ and furthermore, that the program was not a necessary means to address the state's concerns.¹³¹ Therefore, the court struck down the program.¹³²

Applying this analysis to CIPA, parents may argue that their rights are infringed, even though the statute still permits them to instruct their children as they please outside of the school setting. Using *Alfonso's* reasoning, parents may contend that they are compelled to send their children to public school,¹³³ and are therefore forced to acquiesce to mandated filtering of their children's Internet use, which interferes with their right to control the type and amount of information their children can access.¹³⁴ Parents may then claim that because the state's interest can be satisfied through other mechanisms, including (for example) direct parental control, monitoring, or AUPs,¹³⁵ CIPA is not a necessary means to achieve the state's objective at the expense of parents' rights.¹³⁶ Furthermore, parents

128. *Id.*

129. *Id.* ("Because we believe that the petitioner parents have demonstrated an intrusion on their constitutionally-protected right to rear their children as they see fit, we turn next to the issue: whether a compelling State interest is involved and whether this program is necessary to meet it.").

130. *Id.* (noting that although the court recognized that the condom distribution program was a well-intended effort to prevent the spread of sexually transmitted diseases, "the threat of AIDS cannot summarily obliterate this Nation's fundamental values" (quoting *Ware v. Valley Stream High Sch. Dist.*, 75 N.Y.2d 114, 129 (1989))).

131. *Id.* at 266-67. The court determined that there were other ways to serve the state's interest without implementing a condom availability program in the schools. Students could easily acquire condoms at drug stores at a minimal cost, or through publicly funded, non-school family planning programs. *Id.* at 267. The court also noted that the state could have instituted the same condom distribution program in a manner that did not interfere with parents' rights, by allowing parents to "opt out," thus preventing their children's participation without parental consent. *Id.*

132. The court prohibited distribution of condoms to minors in public schools unless they either obtained prior consent from students' parents or guardians, or provided parents with an opt-out provision. *Id.* at 268. The New York Court of Appeals denied motion for appeal. *Alfonso v. Fernandez*, 637 N.E.2d 279 (Table) (N.Y. 1994).

133. See *supra* notes 122-23 and accompanying text (describing the *Alfonso* court's analysis of the compulsion argument).

134. See *supra* notes 123-28 and accompanying text (outlining the court's reasoning in *Alfonso*).

135. See *supra* note 37.

136. See *supra* notes 129-32 and accompanying text (outlining the court's reasoning in *Alfonso*); see also Yvonne A. Tamayo, *Sex, Sectarians and Secularists: Condoms*

may also argue that filtering Internet access at schools is not justified because it is not a sufficiently comprehensive means to protect children from exposure to harmful material.¹³⁷

Parents' *Alfonso*-type argument against CIPA is also supported by policy arguments in favor of parental choice. Parents may claim that they, not the government, should be making decisions about the material to which their children are exposed.¹³⁸ The Internet is a vast resource, and parents may want their children to have access to information about sexuality, human anatomy, and other similar topics that potentially would be blocked by filtering technology. Some individuals feel these are sensitive topics, and therefore it is important to maintain meaningful choices for parents in this realm, and avoid risking overly burdensome state influence on students' beliefs and values.¹³⁹ The Supreme Court even has noted this: "Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us."¹⁴⁰ Scholars have argued that the capacity for individual choice should not be ignored because of the government's desire to "do the right thing," or in an attempt to advance political

and the Interests of Children, 29 Ind. L. Rev. 593, 600-01 (1996) (citing *Alfonso*, 606 N.Y.S.2d at 267).

137. For example, children are exposed to sexually explicit material on computers outside of the school, in movies, and in books and song lyrics.

138. See Gretchen Witte, Comment, *Internet Indecency and Impressionable Minds*, 44 Vill. L. Rev. 745, 775-76 (1999).

Absent a conclusive demonstration of harm from exposure to sexually explicit materials, parents should not be pre-empted from determining what is most suitable for their children and can be charged with determining the fine line between what is to be considered a legitimate educational, artistic or other objective, and what should be screened from children's experience. *Id.* (citing *Ginsberg v. New York*, 390 U.S. 629, 639 (1967)). Parents may desire either no filtering at all, or some mechanism enabling per-parent control over the information their children have access to while using the Internet at school. While the latter suggestion is more feasible, it presents administrative problems that would have to be resolved. See *infra* notes 169-70 and accompanying text.

139. See Andrew A. Cheng, *The Inherent Hostility of Secular Public Education Toward Religion: Why Parental Choice Best Serves the Core Values of the Religion Clauses*, 19 U. Haw. L. Rev. 697, 702 (1997) ("The public classroom has a powerful ability to influence the beliefs of young children in their formative years; and the result is something like a state monopoly on children's minds."). One such "monopoly" would directly conflict with the rationale behind constitutionally protected parental rights, as defined in *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (noting that the purpose of upholding parents' right to rear and educate their children is to limit the state's power and recognize that "[t]he child is not the mere creature of the State"). But see Abner S. Greene, *Why Vouchers Are Unconstitutional, and Why They're Not*, 13 Notre Dame J.L. Ethics & Pub. Pol'y 397, 406-08 (1999) (suggesting that by creating a parental right to choose where to send children to school, *Pierce* takes authority away from the state and, in turn, creates a *parental* monopoly).

140. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000) (invalidating a law requiring cable operators to either completely scramble sexually explicit television channels or limit such programming to certain hours).

interests by advocating children's interests merely as popular political slogans.¹⁴¹ Nor (parents may argue) should the state be permitted to justify supplanting parental decisions in this area with the assumption that state action is necessary to compensate for a lack of parental custody.¹⁴² Additionally, CIPA's opponents may argue that deferring to parental regulation avoids broader constitutional problems, such as First Amendment concerns, that arise when the federal government attempts to regulate speech.¹⁴³

2. CIPA's Effect Is Tantamount to an Absolute Restriction

The second avenue of contention that parents could pursue against CIPA would be to concede, in line with parental rights case law, that a violation of parental liberty only occurs when all opportunities for control are constrained by the state's action, but then argue that because CIPA applies to both schools and libraries,¹⁴⁴ and not every parent can afford Internet access at home, the regulation's effect is tantamount to an absolute restriction on what some parents can teach their children outside of school. This argument is similar to a claim posed by proponents of school vouchers, who maintain that without state-sponsored vouchers, the right to make choices about where to send children to school is only a right for wealthy parents.¹⁴⁵ This proposition is gleaned from Equal Protection cases recognizing unconstitutional wealth discrimination in situations where opportunities were completely denied to those without the ability to pay for them.¹⁴⁶ Under this analysis, parents against CIPA may argue

141. Tamayo, *supra* note 136, at 617.

142. The government may rebut parents' challenges by claiming that, if given control, parents will fail to properly instruct or supervise their children's Internet usage. Parents presumably would disagree with this argument and may be capable of finding legal support for their position. See *Playboy Entm't Group*, 529 U.S. at 824-26 (holding that "a court should not presume parents, given full information, will fail to act," particularly when the government has not proved that informing parents and supporting their right to control would not adequately address the problem).

143. See Alexander, *supra* note 9, at 1021-24.

144. Children's Internet Protection Act, 47 U.S.C. § 254(h)(1)(B) (2000).

145. See Cheng, *supra* note 139, at 702 ("This right [to choose alternate schooling] is illusory for many Americans who do not have the financial means to pay for private schooling [T]he practical effect of compulsory education laws is compulsory public education." (emphasis omitted)); cf. *Zelman v. Simmons-Harris*, 122 S. Ct. 2460, 2473 (2002).

[The voucher program] provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice.

Id.

146. See *M.L.B. v. S.L.J.*, 519 U.S. 102, 127-28 (1996) (finding an Equal Protection violation in state civil actions to terminate parental status where parents were unable to appeal because they could not afford required document preparation fees); *Little v. Streater*, 452 U.S. 1, 16-17 (1981) (holding that a state statute forcing requesting

that because some parents cannot afford Internet access and both public schools and libraries will have only filtered access, in effect CIPA prevents some parents from dictating the range of material their children view on the Internet, and thus the statute unconstitutionally infringes parental rights.¹⁴⁷ Parents may also point out that CIPA's restrictive character is further evidenced by the fact that (as in cases upholding parents' rights over state action) the state is not merely teaching children something that parents disagree with, but is affirmatively prohibiting parents from doing something and limiting the information to which their children have access.¹⁴⁸

parties to pay for paternity tests violated the Fourteenth Amendment because parties were denied an opportunity to be heard merely because they could not afford to sponsor these tests); *Bullock v. Carter*, 405 U.S. 134, 143-44, 149 (1972) (finding an Equal Protection violation where an election filing fee barred many candidates who could not afford to run for election); *Williams v. Illinois*, 399 U.S. 235, 241-45 (1970) (striking down an Illinois law that extended prison terms beyond the statutory maximum for prisoners who could not afford to pay fines); *Douglas v. California*, 372 U.S. 353, 355-58 (1963) (criticizing California's appeal process as denying poor defendants meaningful appellate opportunities because these defendants could not afford appellate counsel and therefore appellate courts reviewed their cases purely on the record); *Griffin v. Illinois*, 351 U.S. 12, 17-20 (1956) (invalidating state fees for trial transcripts because they prevented poor defendants from acquiring such transcripts—or even adequate substitutes—for use during the trial and appeals).

147. Essentially, parents would claim that under CIPA their opportunity for parental control (and ability to counteract state action) is denied because they are poor, and therefore, CIPA constitutes an absolute restriction on parents' rights. Such claims would parallel Equal Protection arguments, and to succeed the Court would have to accept parents' complaint of wealth discrimination as worthy of strict judicial scrutiny. As previously discussed, if the Court applied low level scrutiny, the law would likely stand. *See supra* note 105 and accompanying text (explaining that most contested statutes meet the minimal threshold for low tier scrutiny). Although the Supreme Court has not applied strict scrutiny to arguments of wealth discrimination beyond cases dealing with fundamental rights and access to justice, *see supra* note 99, there are policy arguments in favor of extending this protection. These arguments might be based on the strength of parents' interest, a desire to prevent the state from making determinations about regulating children's access to information, the importance of upholding parental rights, the severe deprivation experienced as a result of the statute, or a desire to provide equal education opportunities to all students. *Cf.* Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7 (1969) (suggesting the need for a change in perspective when considering wealth discrimination and opportunity deprivation).

148. *See Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 533-34 (1st Cir. 1995) (noting the distinction between the state limiting parents' ability to educate their children—which is generally improper state action—and schools teaching things to students that some parents may disagree with—which is not necessarily problematic).

We think it is fundamentally different for the state to say to a parent, "You can't teach your child German or send him to a parochial school," than for the parent to say to the state, "You can't teach my child subjects that are morally offensive to me." The first instance involves the state proscribing parents from educating their children, while the second involves parents proscribing what the state shall teach their children.

Id.

B. *Pro-state*

Although parents have a constitutional right to control the education and development of their children, this liberty must be considered in light of countervailing state interests in protecting children from exposure to harmful material.¹⁴⁹ Parents' rights are not unlimited.¹⁵⁰ This is especially true in the context of public schools, where state authority generally,¹⁵¹ in conjunction with public schools' duty to inculcate values in students,¹⁵² suggest that parents' constitutional right to raise their children does not grant parents absolute authority over what information their children are exposed to while at school.¹⁵³ Moreover, state action only unreasonably interferes with parental liberty when the action "causes a coercive or compulsory effect on [parents'] rights,"¹⁵⁴ that prevents them from having *any* choice or control over the matter targeted by the state's

149. See Covell, *supra* note 9 at 779-80 n.21 ("We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors." (citing *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989))).

150. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (noting that the state has the right to limit parental control, particularly when children's welfare is at issue).

151. See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925).

No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

Id.; *Meyer v. Nebraska*, 262 U.S. 390, 398 (1923) ("The obvious purpose of this statute [banning teaching foreign languages] was that the English language should be and become the mother tongue of all children reared in this state. The enactment of such a statute comes reasonably within the police power of the state." (citations omitted)).

152. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) ("Public education must prepare pupils for citizenship in the Republic . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." (omission in original) (quoting C. Beard & M. Beard, *New Basic History of the United States* 228 (1968))); *Bd. of Educ. v. Pico*, 457 U.S. 853, 864 (1982) ("[P]ublic schools are vitally important 'in the preparation of individuals for participation as citizens,' and as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system.'" (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979))); see also *supra* notes 34-35 and accompanying text (discussing *Fraser*).

153. See *Hot, Sexy & Safer Prods.*, 68 F.3d at 533 (distinguishing *Meyer*, 262 U.S. 390, and noting, "We do not think . . . that this freedom [to choose a different path of education] encompasses a fundamental constitutional right to dictate the curriculum at the public school").

154. *Curtis v. Sch. Comm.*, 652 N.E.2d 580, 585 (Mass. 1995). This decision recognizes that no court has explicitly stated that "coercion" is the requisite standard for finding a violation of parental liberty, but notes that in cases examining this same issue, courts have only given credence to such claims if the state's action had a coercive effect on parents' rights. *Id.* (citing *Doe v. Irwin*, 615 F.2d 1162, 1168 (6th Cir. 1980)).

action.¹⁵⁵

Based on this analysis, the state has two main grounds on which it could argue that CIPA does not unconstitutionally interfere with parents' right to raise their children. First, the state may argue that CIPA is justified because the school has a compelling interest in protecting children from exposure to inappropriate information, and the state has the authority to implement mechanisms to do this.¹⁵⁶ Second, the state may contend that because CIPA does not affect parents' ability to supplement their children's formal education, the statute is not an unconstitutional intrusion on parents' right to raise their children.¹⁵⁷

1. The State Has the Authority To Protect Children

The state may first defend CIPA by emphasizing the substantial interest the statute serves and the validity of the authority on which it relies. Schools function to prepare students for survival in a democratic world that is filled with various viewpoints.¹⁵⁸ Public schools also have the duty to inculcate values in students.¹⁵⁹ Thus, schools have an interest in protecting students from harmful or inappropriate material,¹⁶⁰ and parents expect—and to some extent rely on—schools to do this.¹⁶¹ In addition to having a strong interest in

155. See *supra* notes 112-13 and accompanying text.

156. See *infra* Part II.B.1.

157. See *infra* Part II.B.2.

158. *Hot, Sexy & Safer Prods.*, 68 F.3d at 534 & n.6 (emphasizing schools' duty to teach students about different points of view in society, to "[prepare] students for participation in a world replete with complex and controversial issues" (quoting *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 266 (App. Div. 1993))).

159. See *supra* notes 34-35, 152 and accompanying text; see also *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

Id. at 493.

160. See *supra* notes 34-36 and accompanying text.

161. See Covell, *supra* note 9, at 779.

When children are at school, most parents are not in a position to supervise their children's Internet access, and are thus forced to rely on school officials to do so. The Supreme Court acknowledges that parents have a legitimate expectation that schools will protect their children from exposure to sexually explicit material.

Id. (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986); *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1539-46 (7th Cir. 1996)). At the very least, parents depend on the government generally to help them protect their children's welfare. See *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) ("[P]arents and others,

instilling proper values in students and protecting them from harm, schools possess sufficient authority to accomplish these goals. The Supreme Court has recognized this, noting, "Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies."¹⁶² Thus, schools have the authority to regulate various aspects of education.¹⁶³ By contrast, parents' rights and the resulting degree of control they have over schools are limited.¹⁶⁴ Therefore, given public schools' responsibilities, coupled with the limitations of parents' rights, the state may argue that CIPA complies with constitutional standards because it serves an important objective that is within the state's recognized authority.¹⁶⁵

From a policy standpoint, the state may emphasize that it is best equipped to shield students from accessing inappropriate material on the Internet, and that mandated filtering is the most effective solution to achieve this end. Moreover, the state may argue that parents, left to their own resolve, would fail to successfully manage the task of supervising their children's Internet usage.¹⁶⁶ This is particularly true

teachers for example, who have . . . primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility.").

162. *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985) (explaining that schools are subject to the limits imposed by the Fourth Amendment because schools act as agents of the state).

163. *See, e.g., Fraser*, 478 U.S. at 683-84 (noting that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse," particularly when the speech is sexually explicit and the audience includes minors); *Ambach v. Norwick*, 441 U.S. 68, 76-78, 80-81 (1979) (validating a law requiring United States citizenship to teach in New York public schools, based on public schools' responsibility to inculcate democratic values in students and the need to have teachers capable of fulfilling this duty).

164. *See Hot, Sexy & Safer Prods.*, 68 F.3d at 534.

If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems.

Id. One scholar has argued that in some situations, parental intervention infringes minors' rights. Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. Pa. J. Const. L. 223 (1999).

165. *See Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) ("[R]ights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State."). Here, the state's purpose for instituting CIPA is to prevent students from accessing sexually explicit information on the Internet while using school computers. The state derives its authority from its responsibility to protect children and teach them appropriate values.

166. *See COPA Comm'n Report, supra* note 37, at 14.

[M]any families feel unfamiliar with the Internet, and find it harder to protect their children online than they do in the real world. Differences in language or culture and resource limitations may challenge families' ability to protect their children online. Further, children may access the Internet in

given the fact that a significant amount of children's Internet use occurs at school, not in the home.¹⁶⁷ The Supreme Court has held that in situations where parental control is insufficient, the state is justified in acting to compensate for the lack of parental custody.¹⁶⁸ Furthermore, from a practical standpoint, if CIPA was struck down as an unconstitutional violation of parents' rights, it is unclear what could serve as a feasible alternative. From the government's perspective, having no filters at all would be an extreme and undesirable measure.¹⁶⁹ On the other hand, the alternative—individualized, per-parent filtering systems—presents administrative problems that may prove unsolvable.¹⁷⁰

2. CIPA Does Not Interfere with Parental Supervision Outside School

Aside from having the authority and responsibility to implement regulations to protect children from exposure to inappropriate material on the Internet, the state may also defend CIPA against parents' claims by emphasizing that the regulation does not prohibit parents from making decisions about their children's Internet use, or access to information, outside of school. As long as parents remain free to teach their children according to their own views in private

places other than their own home—at school, at libraries and at the home of friends, relatives and caregivers, where the direct supervision of parents may not be possible.

Id.

167. *See id.*; *supra* notes 15-16 and accompanying text.

168. *See, e.g.,* *Ginsberg v. New York*, 390 U.S. 629, 640 (1968) (Fuld, J., concurring) (“While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them.” (quoting *People v. Kahan*, 206 N.E.2d 333, 334 (N.Y. 1965))).

169. *See supra* notes 22-36 and accompanying text (describing the extent of sexually explicit information available on the Internet and why schools have an interest in preventing students from accessing this material).

170. A per-parent filtering system in public schools would be time consuming, financially burdensome, and extremely complex. Schools would be forced to develop individualized software programs, or assign students to particular computer terminals that have a level of filtration approved by their parents. If each parent was allowed to individually tailor the extent of information their child could access online, each student would likely require their own personal filtering system. This could result in schools being forced to buy and install as many different filtering software programs as there are students attending the school. Furthermore, it would be difficult for schools to keep track of which materials each child is permitted to view, and even more problematic to monitor and enforce these policies. *Cf. Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1071-73 (6th Cir. 1987) (Kennedy, J., concurring) (concluding that the text challenged in the case should remain part of the curriculum because removal would result in administrative problems such as classroom disruption, alteration of teaching methods, and interference with curriculum cohesion).

realms, courts will not find a deprivation of parental liberty stemming from a particular state action.¹⁷¹ The state may argue that such is the case with CIPA, where parents maintain many options for controlling their children's access to information.¹⁷² CIPA's provisions limit the information students can access at school, in an effort to protect them from harmful material.¹⁷³ If parents disagree with this censorship and want their children to have access to this material, nothing in CIPA prevents them from doing so outside of public schools and libraries.¹⁷⁴ The fact that school attendance is compulsory is insufficient in and of itself to constitute the requisite "compulsion" necessary to support claims of parental rights infringement in this case.¹⁷⁵ Furthermore, parents may pose wealth discrimination arguments as evidence that CIPA amounts to an absolute restriction on parental rights, but the state would have several grounds to rebut this claim.

First, the state may point out that it is questionable whether CIPA's application in public libraries will survive Supreme Court review.¹⁷⁶ Should the Court find CIPA unconstitutional in this forum, parents' wealth argument against CIPA collapses.¹⁷⁷ Second, even if the schools and libraries block access for minors, *and* parents cannot

171. See *supra* notes 112-13 and accompanying text.

172. If parents want their children to have access to material that is blocked by the filtering technology implemented in schools, they may provide unfiltered Internet access at home, use a friend's or family member's computer, or use other media (such as videos or books) to inform the child. On the other hand, if parents want to restrict their children's Internet access even more than schools are already doing with mandated filters, nothing in CIPA prohibits such requests.

173. CIPA mandates filtered Internet service—limiting the amount of information students access at school—to prevent exposure to obscenity, child pornography, and sexually explicit material deemed harmful to minors. Children's Internet Protection Act, 47 U.S.C. § 254 (h)(5), (6) (2000).

174. Public schools and libraries are the only environments that, under CIPA, must have filtered Internet access, and CIPA only applies to those schools and libraries that accept federal funding for Internet service. *Id.*

175. See *Curtis v. Sch. Comm.*, 652 N.E.2d 580, 587 (Mass. 1995) ("With the exception of the *Alfonso* case, it appears that cases requiring an opt-out or 'excusal system' have involved school programs which would otherwise be compulsory." (citing *Citizens for Parental Rights v. San Mateo County Bd. of Educ.*, 124 Cal. Rptr. 68 (Ct. App. 1975); *Medeiros v. Keyosaki*, 478 P.2d 314 (Haw. 1970)); see also *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 273-74 (App. Div. 1993) (Eiber, J., dissenting).

176. The Federal District Court in the Eastern District of Pennsylvania concluded that in the context of public libraries CIPA violates the First Amendment. *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2002). The Supreme Court recently has decided to review this case. *Am. Library Ass'n v. United States*, No. 02-361, 2002 WL 31060372 (U.S. Nov. 12, 2002) (noting probable jurisdiction).

177. If the district court's ruling is affirmed, and CIPA becomes inapplicable in public libraries, the argument that CIPA's provisions are tantamount to a restriction on all realms of parental control necessarily fails. The state would argue that if parents want their children to have open access to the Internet (beyond what is provided in schools), even if they cannot afford Internet access at home, they can bring their children to the local public library, where access would be free and not subject to state-mandated filtering.

afford access at home, it is difficult to imagine that children would still be completely prohibited from ever having the opportunity to access unblocked Internet service, or at least otherwise obtain the prohibited information through some other means.¹⁷⁸ Finally, the state may emphasize the limited persuasiveness of wealth arguments beyond the small class of cases toward which the Court is sympathetic. The Court validates wealth arguments only in a few specific contexts,¹⁷⁹ and even in these cases, successful claims must identify a class of individuals who, because of their impecunity, experienced an absolute deprivation of liberty resulting from a particular state action.¹⁸⁰ The state may thus contend that parents' claims against CIPA neither fit into the narrow category of accepted wealth arguments, nor constitute an absolute deprivation, and therefore parents' potential challenge against CIPA fails.

III. CIPA DOES NOT UNCONSTITUTIONALLY INFRINGE PARENTAL LIBERTY

One basis for possible future lawsuits challenging CIPA in the context of public schools may be the allegation that CIPA violates parental liberty. However, the state would likely prevail against this challenge and, at least with reference to a claim of parental liberty infringement, CIPA as it applies in public schools would survive judicial scrutiny. This conclusion rests on several factors. First, the state has a strong interest in protecting students from exposure to sexually explicit information and the state possesses the authority to implement laws to achieve this goal.¹⁸¹ Second, because parents maintain the right to make decisions about this issue in private realms, CIPA's restrictions are too narrow to constitute an unconstitutional

178. Relatives, friends, and cyber cafés are some examples of additional sources that may provide Internet access that would not be regulated by the statute. Cyber cafés do charge for Internet usage, but this fee is presumably less than the cost of Internet access in the home. Also, there are alternative resources—i.e. books, videos, or magazines—that could provide the same information.

179. See *supra* note 99.

180. Cf. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20 (1973) (reviewing a class action claim that a Texas school-financing system deprived students in low-income districts of equal education). The *Rodriguez* Court concluded that because the system did not *entirely* deprive students of an education—but provided minimally “adequate” education—the law did not unconstitutionally discriminate against low-income families. *Id.* at 23-25. Aside from the limitations of parents' potential wealth argument itself, the state may also argue that parents mistakenly rely on the Supreme Court's recent decision in the voucher case, *Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002), to support their discrimination claim. This decision focused primarily on whether the Establishment Clause is violated by school voucher programs, and thus should not be cited as authority extending the application of wealth arguments. The fact that voucher programs do not violate the Establishment Clause by no means suggests that the Equal Protection Clause requires them.

181. See *infra* Part III.A.

interference with parents' rights.¹⁸² Additionally, parents' claims against the law rely on misplaced and unconvincing analysis.¹⁸³ Finally, examination of the broader implications of CIPA confirms that the statute should be upheld.¹⁸⁴

A. *CIPA Is Based on a Substantial State Interest and Valid State Authority*

State action that potentially infringes parents' rights is constitutional if it is with "reasonable relation to some purpose within the competency of the State to effect."¹⁸⁵ Accordingly, the state's defense of CIPA against a potential accusation of a parental liberty violation is convincing. The state has a substantial interest in preventing students from accessing sexually explicit material in school, and the state has recognized authority to implement restrictions to achieve this objective.

Given the overwhelming amount of sexually explicit material students may access online,¹⁸⁶ coupled with public schools' duty to instill values in students,¹⁸⁷ the state must restrict student Internet use in school. Aside from acting on the desire to protect children, schools must take preemptive action to prevent potential liability from parents upset about the information their children view at school.¹⁸⁸ One scholar has predicted, "If a student is exposed to inappropriate material on the Internet while at school . . . legal action is certainly possible."¹⁸⁹

In the past, different situations have raised similar concerns about children's exposure to inappropriate material, and remedial responses to these concerns have been upheld.¹⁹⁰ The state is in the best position

182. See *infra* Part III.B.

183. See *infra* Part III.C.

184. See *infra* Part III.D.

185. *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) ("The established doctrine is that [due process] may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect.").

186. See *supra* notes 22-33 and accompanying text.

187. See *supra* notes 34-35, 152 and accompanying text.

188. See *supra* note 36 and accompanying text.

189. Rutherford, *supra* note 9, at 429. Parents have already filed suits against state institutions for failing to protect their children from exposure to inappropriate material on the Internet. See, e.g., *Baker*, *supra* note 1, at 950 (discussing *Kathleen R. v. City of Livermore*, 104 Cal. Rptr. 2d 772 (Ct. App. 2001), a case where a mother sued the local public library for allowing her son to download sexually explicit images on the library's computers).

190. See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (upholding a school's restrictions on inappropriate student speech in the school newspaper); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (upholding a school's disciplinary action against a student who used lewd and indecent speech during a school-wide assembly); *Ginsberg v. New York*, 390 U.S. 629 (1968) (banning the sale of obscene magazines to minors).

to implement mechanisms to protect children from accessing harmful material on school computers. Although some alternatives to CIPA may be proposed,¹⁹¹ none are sufficient to address the problem. Specifically, parental control is neither an adequate nor practical means to limit children's Internet use in school. Many parents do not have the resources or ability to monitor their children's Internet use,¹⁹² and even if the schools implemented regulations at parents' direction—i.e., through opt out programs or per-parent filtering systems—this would present severe administrative problems that may not be surmountable.¹⁹³ It is important to remember that parental liberty is limited and does not entail free reign over the public school system.¹⁹⁴ Public schools must make determinations about what information is appropriate for students to view, as well as how to regulate student activities to comply with these determinations.¹⁹⁵ CIPA is an example of the state exercising precisely this authority, in pursuit of a compelling state interest, and therefore the statute is constitutional.

B. *CIPA Does Not Usurp All Parental Decision-Making Authority*

Even if the state has sufficient authority to create legislation targeting a recognized interest, the state cannot do so at the expense of individuals' constitutional rights; namely, parents' right to raise their children. CIPA complies with this proviso. Although parents' constitutional right to rear their children is a well-established liberty,¹⁹⁶ it is not one without limits. The defined constitutional parameters of parents' rights must be taken into account when deciding whether state action unconstitutionally intrudes on them.¹⁹⁷ The existence of parental liberty does not imply that the government cannot interfere with parental control *at all*.¹⁹⁸ Instead, parents' ability to make decisions about a particular area cannot be restricted *completely*. As long as state regulation does not dominate all domains of parental decision-making, it is constitutional.¹⁹⁹

CIPA does not apply to all realms of parental decision-making, and therefore it does not overstep the designated margins of parents' rights. Under CIPA, parents maintain the freedom to instruct their

191. Two main propositions parents might suggest include either no regulation of student Internet use or parental control.

192. *See supra* notes 166-67.

193. *See supra* note 170 and accompanying text.

194. *See supra* notes 150-55 and accompanying text.

195. *See supra* notes 34-35, 152 and accompanying text.

196. *See supra* notes 108-11 and accompanying text.

197. *See supra* notes 112-13, 150-55 and accompanying text (discussing these parameters).

198. *See supra* notes 150-55 and accompanying text.

199. *See supra* notes 112-13 and accompanying text.

children in realms outside of the school—i.e. the home, church, etc.²⁰⁰ Therefore, CIPA is distinguishable from the legislation invalidated in cases upholding parental rights,²⁰¹ and is closer to statutes upheld in situations where courts have found no violation of parental liberty.²⁰²

Parents' position that for low-income families CIPA is tantamount to a total restriction²⁰³ is unpersuasive both because the Court is not overly sympathetic to most wealth arguments,²⁰⁴ and even if the Court were to give credence to this assertion, the deprivation experienced by low-income families as a result of CIPA is not absolute. Indigent families who wish to expose their children to information that is unavailable on school computers have many alternative ways to achieve this exposure.²⁰⁵ Additionally, if CIPA is invalidated in the context of public libraries,²⁰⁶ parents' argument that CIPA is tantamount to an outright restriction automatically fails because in addition to other avenues of resources, children will have access to unrestricted, free Internet service at public libraries.²⁰⁷

C. Parents' Claims Against CIPA Rely on Unconvincing Analyses

CIPA would likely trump potential challenges that it violates parental liberty not only because of the strength of the state's defense of the statute, but also because parents' prospective arguments against CIPA are unconvincing. First, policy-based propositions that parents, not the government, should regulate what children are exposed to while using the Internet at school are misplaced. Successful arguments that the government is overstepping its bounds by

200. See *supra* note 172 and accompanying text (noting CIPA's limited application).

201. For example, unlike *Meyer v. Nebraska*, 262 U.S. 390 (1923), where the invalidated statute prohibited teaching foreign languages at all, under CIPA, parents who want their children exposed to sexually explicit material (assuming it is not otherwise illegal) are still able to do so outside the school environment. CIPA is similarly distinguishable from *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), which overruled a law forcing children to attend public schools.

202. CIPA presents a situation analogous to the one in *Ginsberg v. New York*, 390 U.S. 629 (1968), where a law banning the sale of obscene magazines to minors was upheld because it did not preclude parents from purchasing these magazines for their children. The circumstances resulting from CIPA are also similar to those described in *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058, 1067 (6th Cir. 1987), which upheld the use of particular texts in a public school partly because parents who disagreed with those texts could send their children to private or parochial schools, or home school them; and *Curtis v. School Committee*, 652 N.E.2d 580 (Mass. 1995), a case upholding an in-school condom availability program because students were not required to participate, and therefore parents maintained decision-making authority over their children's beliefs about contraceptives.

203. See *supra* Part II.A.2.

204. See *supra* note 99.

205. See *supra* note 178 and accompanying text.

206. See *supra* note 176.

207. If there were any filters on these computers, it would be a voluntary decision made by the library, not a result of a federally mandated regulation.

instituting particular regulations in public schools are grounded in a fear that the action in question may result in a “state monopoly,” in which children are molded and developed into “creatures of the state.”²⁰⁸ However, in the context of CIPA, this concern is unfounded. This is because CIPA does not affect those realms outside public schools (with the exception of public libraries); under this statute the state is not exercising exclusive control over children, and therefore the law does not create a state monopoly. Furthermore, by restricting Internet access, the state is not affirmatively providing children with information that might influence their beliefs according to the government’s point of view, but actually withholding information from students.²⁰⁹

Second, parents’ potential argument that CIPA is unnecessary— that because there are other mechanisms for restricting children’s Internet access, there is insufficient justification for CIPA²¹⁰—is misleading. Although there are alternative solutions to CIPA, the state’s interest cannot be adequately satisfied by these means because they are not as effective as CIPA’s measures.²¹¹ Therefore, mandated filtering is necessary to achieve the state’s goal.

Additionally, parents’ possible criticism of the comprehensiveness

208. See *Wisconsin v. Yoder*, 406 U.S. 205, 214-15 (1972) (noting that the state’s interest in a universal formal education for all children was insufficient to trump parents’ right to dictate the religious upbringing of their children); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (concluding that a law mandating public school education violated parents’ rights because “[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State”); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) (striking down a law banning the teaching of foreign languages, noting, “The desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. . . . But the means adopted, we think, exceed the limitations upon the power of the State”); *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 266 (App. Div. 1993) (invalidating a condom distribution program in public schools in part because the state was attempting to influence students’ beliefs about sexual matters, in conflict with parents’ rights). The *Alfonso* court explained, “Through its public schools the City of New York has made a judgment that minors should have unrestricted access to contraceptives, a decision which is clearly within the purview of [parents’] constitutionally protected right to rear their children, and then has forced that judgment on them.” *Id.*; see also Cheng, *supra* note 139, at 702.

209. Although it may be argued that an omission of information is still an act that may shape students’ beliefs, parents who are concerned about this can counteract the state by privately providing their children with this information. This situation is distinct from those where a state monopoly is created—effectively preventing opportunities for parental counteraction—or when the state exposes students to material that parents disagree with, who are then helpless to “undo” the exposure.

210. See *supra* text accompanying notes 135-36.

211. See *supra* notes 166-70 and accompanying text (emphasizing that the alternatives parents might argue for—either no filtering or complete parental control—are neither feasible nor effective).

of CIPA is an unconvincing basis for invalidating the statute.²¹² Just because children are exposed to sexually explicit material outside of school does not mean that schools should give up and allow them to view harmful material in school. Such reasoning is illogical and contrary to the state's interests.

Finally, an even less impressive challenge to CIPA that parents may offer would rely on *Alfonso v. Fernandez*²¹³ as an exception to the established doctrine that parental rights violations are premised on an absolute deprivation of parental control.²¹⁴ This argument is unpersuasive for several reasons. First, *Alfonso* is a New York State court decision, and thus has limited authority as a controlling precedent. Second, the case dealt with a situation where the school affirmatively provided students with information that contradicted many parents' beliefs.²¹⁵ The potential controversy surrounding CIPA, by contrast, centers on the fact that the school is *not providing* access to certain information, and is thus distinguishable from *Alfonso*.²¹⁶ Finally, the *Alfonso* decision is not very persuasive authority because some of its analysis is questionable. The *Alfonso* court identified a violation of parental rights partly based on the conclusion that parents are "compelled" to send their children to public school.²¹⁷ However, given viable options of home schooling, or attendance at private or parochial schools, it is difficult to accept this reasoning.²¹⁸

212. See *supra* note 137 and accompanying text (suggesting that because regulating Internet access at school is not comprehensive enough to entirely prevent children from viewing sexually explicit materials, mandated filtering is not justified as a necessary means to achieve the state's interest).

213. 606 N.Y.S.2d 259 (App. Div. 1993).

214. See *supra* Part II.A.1.

215. This case reviewed a condom distribution program, challenged by parents who were upset that the state was providing the means for students to engage in protected sex, thus interfering with parents' ability to "influence and guide the sexual activity of their children without State interference." *Alfonso*, 606 N.Y.S.2d at 266.

216. Mandated filters do not provide the means for engaging in activity, nor do they provide the means for accessing inappropriate material. The result of implementing Internet filters is exactly the opposite. Therefore, rather than usurping parental decision-making authority in a sensitive topic area—which was a concern expressed by the *Alfonso* court, *id.*—CIPA encourages parental control by not allowing children to access sexually explicit information at school, thus leaving it up to the parents to decide whether to expose their children to this material.

217. See *supra* note 123-24 and accompanying text.

218. The *Alfonso* court seemed to ignore the possibility of home schooling children, and dismissed private school as an option because some parents could not afford private school tuition. However, as previously noted, wealth arguments for potential constitutional infringements are not readily accepted. See *supra* note 99. Moreover, given the recent upholding of state-sponsored voucher systems, see *Zelman v. Simmon-Harris*, 122 S. Ct. 2460 (2002), parents' argument that they cannot afford private school and therefore are "compelled" to send their children to public schools is even less convincing, particularly if voucher programs become more prominent.

D. *CIPA Neither Threatens To Increase State Authority over Minors
Nor Decreases Parents' Control over Their Children*

Regulation of children's Internet use at school is necessary.²¹⁹ Students are increasingly accessing the Internet at school.²²⁰ Given the substantial amount of sexually explicit material published online,²²¹ student exposure to this information must be prevented.²²² Putting other potential challenges aside,²²³ CIPA is a constitutional means to achieve this goal and should be upheld. In addition to the solid legal arguments supporting CIPA, the statute's general implications also suggest that it does not unconstitutionally infringe parental rights and should trump such challenges. These broad implications include the fact that mandated filters do not threaten to impose overly burdensome state action or increase state control over schools, and they do not force parents to sacrifice parental liberty.

CIPA does not expand the government's authority to regulate. The government already enjoyed—and continues to enjoy—broad regulatory power, particularly in public schools, and especially when dealing with children's welfare.²²⁴ CIPA is merely an example of the state constitutionally exercising this authority. Moreover, given its limited scope, it is a small example of this authority.²²⁵ Allowing the state to filter Internet access does not therefore result in unconstitutional state influence over minors.²²⁶ By preventing sexually explicit material from being viewed in school, the state is actually taking a "hands off" approach, leaving it up to the students' parents to decide which material their children may access.

By allowing parents to maintain decision-making authority over this issue, parents' rights are not only preserved by the statute, but are arguably enhanced. CIPA does not contract parents' rights in the public school realm. Moreover, parents' rights have never been absolute;²²⁷ they have always been limited, particularly in this arena.²²⁸ Thus, CIPA does not threaten to extinguish parental control over children. In addition, although CIPA's provisions do not invite parents to exert influence in public schools, the statute still displays recognition of, and respect for, a necessary and constitutionally

219. See *supra* notes 22-36 and accompanying text.

220. See *supra* notes 15-19 and accompanying text.

221. See *supra* notes 22-33 and accompanying text.

222. See *supra* notes 34-36 and accompanying text.

223. See *supra* Part I.B.2.a., b.

224. See *supra* note 23 and accompanying text.

225. See *supra* note 173 and accompanying text.

226. Fear of excessive state influence is at the heart of parental rights claims and is the underlying justification for invalidating statutes as an infringement of parental liberty. See *supra* note 209 and accompanying text. Without this factor, parental rights challenges against a statute are *prima facie* unreasonable.

227. See *supra* notes 112-13, 150, 154 and accompanying text.

228. See *supra* notes 151-53 and accompanying text.

mandated degree of parental liberty. CIPA achieves this by addressing the state's interest in protecting minors, while leaving the door open for their parents to decide if there is additional information they want to make accessible to their children.²²⁹ Consequently, parental liberty is not infringed, but is at the very least maintained, and perhaps even expanded. Therefore, CIPA does not unconstitutionally intrude on parents' rights, and should be upheld against accusations stating otherwise.

229. Parental liberty is upheld by CIPA to the extent that the statute's regulations do not extend beyond public schools and libraries, and therefore do not interfere with parents' ability to make decisions about this topic in all other realms.

Notes & Observations