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## **YOUR MONEY OR YOUR SPEECH: THE CHILDREN'S INTERNET PROTECTION ACT AND THE CONGRESSIONAL ASSAULT ON THE FIRST AMENDMENT IN PUBLIC LIBRARIES**

**STEVEN D. HINCKLEY\***

### I. INTRODUCTION

The federal government is painfully conflicted about the Internet. Faced with compelling evidence of a growing “digital divide” in our society that threatens to leave those without the personal means to obtain computer and Internet access unprepared to compete in the emerging global information age,<sup>1</sup> Congress enacted a sweeping change to the

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\* © Steven D. Hinckley. Associate Dean for Library and Information Technology and Professor of Law, University of South Carolina. I would like to thank the members of the University of South Carolina School of Law faculty for their support and encouragement. Special thanks go to David Owen, James Underwood, Patrick Hubbard, and Philip Lacy for their invaluable review and comment on drafts of this Article, and to John Montgomery, Marie Reilly, and John Lopatka for their advice and counsel. In addition, I thank the faculty and staff of the University of South Carolina School of Law's Coleman Karesh Law Library for their patience and support, and Julie Flaming and Amanda Adler for their thorough and thoughtful research assistance. Finally, I thank Sara Elliott Krome, without whose assistance and guidance this project could not have been completed.

1. In a 1995 study of Americans' computer ownership and usage, the U.S. Department of Commerce found a direct correlation between household income and ethnicity on the one hand, and the rate of household computer ownership and Internet access on the other. The study concluded that the nation's poorest families, those with household incomes of less than \$10,000 per year, particularly those living in rural locations, were as much as ten times less likely to have either a computer in their homes or to have any personal means to connect to the Internet than families living in the same regions with household incomes of more than \$50,000 per year. The study also found that Blacks and Hispanics, regardless of income, were three to four times less likely to own a computer or to have home access to the Internet than Caucasians. See United States Dep't of Commerce, Nat'l Telecomms. & Info. Admin., *Falling Through the Net: A Survey of the "Have Nots" in Rural and Urban America* (1995), Tables 2 & 5, available at <http://www.ntia.doc.gov/ntiahome/fallingthru.html>. The Department

nation's telecommunications policy in 1996 intended to begin closing that gap. With its creation of the Universal Service Fund for schools and libraries<sup>2</sup>—the so-called “E-Rate fund”—Congress moved toward making a national commitment to affordable and ubiquitous Internet access as it had done over sixty years earlier when, in support of universal telephone service, Congress mandated discounted service for those unable to afford it and devised a funding source from which telephone companies could be reimbursed for the discounts provided.<sup>3</sup> Since the E-rate program's inception, over \$10 billion has been distributed to support requests for telecommunications services, Internet access, and internal network connections in schools and libraries, with the emphasis on institutions in the nation's most economically disadvantaged communities.<sup>4</sup> Studies of

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of Commerce tracked changes in the digital divide in four subsequent reports released between 1998 and 2002. While these reports show that the per capita rate of computer ownership and Internet access among the nation's poor and minorities has gradually improved since 1995, the percentage gap between the information “haves” and “have-nots” has actually widened during those years. See United States Dep't of Commerce, Nat'l Telecomms. & Info. Admin., *Falling Through the Net II: New Data on the Digital Divide* (1997), available at <http://www.ntia.doc.gov/ntiahome/net2/falling.html>; United States Dep't of Commerce, Nat'l Telecomms. & Info. Admin., *Falling Through the Net: Defining the Digital Divide* (1999), available at <http://www.ntia.doc.gov/ntiahome/ftn99/ftn.pdf>; United States Dep't of Commerce, Nat'l Telecomms. & Info. Admin., *Falling Through the Net: Toward Digital Inclusion* (2000), available at <http://search.ntia.doc.gov/pdf/ftn00.pdf>; United State Dep't of Commerce, Nat'l Telecomms. & Info. Admin., *A Nation Online: How Americans Are Expanding Their Use of the Internet* (2002), available at <http://www.ntia.doc.gov/ntiahome/dn/anationonline2.pdf>. But see Stephen Labaton, *New F.C.C. Chief Would Curb Agency Reach*, N.Y. TIMES, Feb. 7, 2001, at C1 (reporting on the inaugural press conference of President Bush's F.C.C. Chairman Michael K. Powell in which he disputed use of the phrase “digital divide,” calling it instead a “Mercedes divide” because it is being perpetuated by people who would like to have something that they cannot afford).

2. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (amending, *inter alia*, 47 U.S.C. § 254).

3. The federal government introduced its Universal Service Program (Universal Service) with the passage of the Communications Act of 1934, ch. 652, Title I, § 1, 48 Stat. 1064 (codified at 47 U.S.C. § 151 (2002)). Originally enacted to ensure affordable phone service to all Americans, it is a natural extension of the original legislation's goal of universal access to telecommunications media that the Communication Act of 1934 is now being invoked to provide the same assurance of access to the Internet for all. Universal Service has garnered a great deal of criticism from those who would reform or eliminate the program. See generally James Alleman et al., *Universal Service: The Poverty of Policy*, 71 U. COLO. L. REV. 849 (2000) (calling for reforms in the current Universal Service model that the author suggests is now outdated and incapable of functioning in the current telecommunications market); Robert M. Frieden, *Universal Service: When Technologies Converge and Regulatory Models Diverge*, 13 HARV. J.L. & TECH. 395 (2000) (same); Gregory L. Rosston & Bradley S. Wimmer, *The ABC's of Universal Service: Arbitrage, Big Bucks, and Competition*, 50 HASTINGS L.J. 1585 (1999) (same).

4. Universal Service Administrative Company, *2000 Annual Report 4*, available at <http://www.universalservice.org/reports/2000/>. Funds collected and distributed to support universal service requests are administered by The Universal Service Administrative Company, an independent, not-for-profit organization created in 1997 under regulations promulgated by the Federal Communication Commission. As of August 7, 2002, \$724,133,884 had been committed for that year's

the program's impact confirm that, by making Internet access possible at schools and libraries, particularly in high-poverty and high-minority districts, E-rate universal service discounts are meeting congressional objectives by helping close the gap between those who can afford private online access and those who cannot.<sup>5</sup> Having set in motion a program that is succeeding in bringing equality of Internet access to all Americans, many in Congress seem now to regret what they have unleashed. As online activity has increased, a perception has arisen in Congress that the Internet is a dangerous place, full of objectionable content that the government must control at all costs, ostensibly because uncontrolled Internet access, particularly to sexual material, is "harmful" to children.<sup>6</sup> Despite the near total absence of any credible research drawing an absolute correlation between exposure of children to controversial media images and resulting lasting harm,<sup>7</sup> the image of the Internet as a "red light district" actively corrupting minors has been carefully nurtured by those who would censor it.<sup>8</sup>

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E-rate discounts, 5.31% of which (\$35,432,764) was in response to requests from libraries and library consortia. The vast majority of the 2002 commitments (81% or \$584,798,041) were targeted for school districts. See Universal Service Administrative Company, *Funding Commitments: Cumulative National Data—Funding Year 2002*, at <http://www.sl.universalservice.org/funding/y5/national.asp> (last visited Oct. 1, 2002).

5. See Michael J. Puma et al., E-Rate and the Digital Divide: A Preliminary Analysis From the Integrated Studies of Educational Technology 98-100, THE URBAN INSTITUTE AND U.S. DEPARTMENT OF EDUCATION, OFFICE OF THE UNDER SECRETARY, PLANNING AND EDUCATION SERVICE, ELEMENTARY AND SECONDARY EDUCATION DIVISION, available at [http://www.ed.gov/offices/OUS/PES/erate\\_fr.pdf](http://www.ed.gov/offices/OUS/PES/erate_fr.pdf) (last visited Oct. 1, 2002).

6. A search of the Congressional Record since 1996 yields numerous comments by House and Senate members tempering their enthusiasm for the Internet as an information source with their concern that the Internet is a dangerous place for children. See, e.g., 142 CONG. REC. S1646 (daily ed. Mar. 7, 1996) (statement by Sen. James Exon) ("[T]here are, indeed, real dangers on the Internet, especially for children and especially with the interactive computer services that are available . . ."); 144 CONG. REC. H9909 (daily ed. Oct. 7, 1998) (statement of Rep. Sheila Jackson-Lee) ("Although the Web can be a fantastic vehicle for enriching our lives, we must also keep unwanted sexual imagery and pornography from invading our children's lives."); 146 CONG. REC. S5647 (daily ed. June 22, 2000) (statement by Sen. John McCain) ("[S]tatistics . . . represent both the tremendous promise and the exponential danger that wiring America's children to the Internet poses."); 146 CONG. REC. H9535 (daily ed. Oct. 10, 2000) (statement by Rep. Virgil Goode) ("As more and more Americans are utilizing the Internet and many children in this country have access to the Internet, it is important that we raise awareness to the dangers that the Internet can pose, especially to children.")

7. See Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427, 504 (2000) ("Although it is nearly impossible to find an iota of evidence that controversial speech about sex harms children, speech concerned with sexuality is the content most commonly subject to regulation on their behalf . . ."). See also MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: "INDECENCY," CENSORSHIP, AND THE INNOCENCE OF YOUTH 243-53 (2001) (summarizing contemporary social science research questioning any lasting harm to children exposed to sexual or violent media images).

8. This lurid description of the Internet has often been repeated in remarks by members of Congress since the mid-1990s. See, e.g., 144 CONG. REC. H9907 (daily ed. Oct. 7, 1998) (statement of

As a result, virtually every pro-Internet initiative enacted by Congress since the mid-1990s has been checked by even more aggressive legislative efforts to reduce the perceived dangers of the online world. Initially, those efforts took the form of direct statutory proscriptions, not just of Internet content that legislative sponsors described as “obscene,” but also of content that is merely “indecent” or “patently offensive.” Informed quickly and forcefully by the courts that direct regulation of Internet speech could not withstand constitutional scrutiny,<sup>9</sup> Congress creatively turned to indirect methods to make the Internet “safe for children.”

The vehicle they chose was the Children’s Internet Protection Act<sup>10</sup> (CIPA), a statute that places conditions on distribution of the very federal funds earmarked under the E-rate program and similar programs to make the Internet accessible in schools and libraries. To receive those funds, institutions must agree to place, on *all* their computers capable of accessing the Internet, software filters that block access to visual depictions that are obscene, are child pornography, or are harmful to minors (when accessed by a minor).<sup>11</sup> Proponents of the law see the contingency placed on funds offered to schools and libraries as a routine use of the congressional spending power; they maintain that the legislation is a means rationally related to the government’s legitimate purpose of ensuring that funds used to connect children to the Internet cannot be used to expose minors to harmful online materials.<sup>12</sup>

As compelling and intuitively persuasive as that may sound, CIPA is, in fact, one of the most sweeping restrictions on constitutionally protected

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Rep. Michael G. Oxley) (“Children cannot safely learn in a virtual red light district.”); 143 CONG. REC. S12148 (daily ed. Nov. 8, 1997) (statement of Sen. Daniel Coats) (“Internet Access Providers are pulling in the big bucks, providing access to the red light district.”); 142 CONG. REC. 2030 (1996) (statement of Sen. Daniel Coats) (“[F]oul material on the internet . . . takes the worst excesses of [a] red-light district and places it directly into a child’s bedroom, on the computer their parents bought them to help them with their homework.”); 141 CONG. REC. 3203 (1995) (statement of Sen. James Exon) (“[T]he information superhighway should not become a red light district.”).

9. For discussion of Congress’s direct restrictions on availability of “indecent” or “offensive” material on the Internet, and their failure to pass constitutional scrutiny, see *infra* Part II.A regarding the Communications Decency Act of 1996 and Part II.B regarding the Child Online Protection Act.

10. Children’s Internet Protection Act (CIPA), 47 U.S.C.A. § 254(h) (Supp. 2001); 20 U.S.C. § 9134 (Supp. 2001).

11. See *infra* Part III.B for statutory requirements of CIPA.

12. 146 CONG. REC. S5646 (daily ed. June 22, 2000) (statement by Sen. John McCain) (“I am not advocating censorship. The fact is that when Federal dollars are used to wire schools and libraries in America, then it seems to me the schools and libraries have an obligation to provide Internet filters and use them according to community standards . . . .”); 144 CONG. REC. S519 (daily ed. Feb. 9, 1998) (statement by Sen. McCain) (“Once a school or library certifies that it will use a filtering system, they will be eligible to receive universal service fund subsidies for Internet access. If schools and libraries do not so certify, they will not be eligible to receive universal service fund–subsidized discounts.”).

speech ever invoked by the United States government disingenuously presented as an uncontroversial funding decision. By mandating the use of technology that cannot effectively eliminate obscenity and child pornography without compromising a great deal of protected speech,<sup>13</sup> and by attempting to achieve indirectly content restrictions that the courts have held Congress cannot accomplish through direct statutory proscriptions,<sup>14</sup> CIPA offends the First Amendment as surely as any prior failed attempt by the legislature to restrict Internet speech. Despite the great latitude granted to Congress under the spending power to make federal fund allocation decisions,<sup>15</sup> that power is significantly limited when it is used to control the content of speech. This is particularly true in environments such as public libraries, where adults have a right to engage in speech that is constitutionally protected for them, but that in the hands of minors would have no such protections.<sup>16</sup>

It is in the public library context that CIPA has faced its initial First Amendment challenge. A month before the new law's April 2001 implementation date, a group of public libraries and their patrons, library associations, and Internet publishers filed suit,<sup>17</sup> pursuant to CIPA's provisions for expedited judicial review,<sup>18</sup> in the United States District Court for the Eastern District of Pennsylvania.<sup>19</sup> The plaintiffs alleged that the conditions placed on federal funding under CIPA are facially unconstitutional because they compel public libraries to violate the First Amendment rights of their patrons, and because CIPA unconstitutionally

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13. See *infra* notes 420-33 and accompanying text for a discussion regarding the ineffectiveness of filters.

14. See *infra* Part II.A-B.

15. See *infra* Part IV.A for a discussion of judicial deference to congressional spending power.

16. See *infra* text accompanying notes 43-51 for a discussion of variable obscenity standards for adults and minors.

17. *Am. Library Ass'n, Inc. v. United States*, 201 F. Supp. 2d 401, 414-16 (E.D. Pa. 2002) (listing the plaintiffs in each category). Although schools receive funds from two of the federal funding sources made conditional by CIPA, the current constitutional challenge of the statute covers only its impact on public libraries. As a result, this Article, like the current case, does not consider CIPA's constitutionality as applied to schools. Filtering Internet content in schools raises its own unique and troublesome constitutional difficulties. For a discussion of some of these issues, see generally Kelley Baker, *Public Schools and the Internet*, 79 NEB. L. REV. 929 (2000), and Kathleen Conn, *Protecting Children From Internet Harm (Again): Will the Children's Internet Protection Act Survive Judicial Scrutiny?* 153 WEST'S EDUC. L. REP. 469 (2001) (each analyzing the constitutionality of the Children's Internet Protection Act with emphasis placed on CIPA's application in public schools).

18. Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, Appendix D § 1741, 114 Stat. 2763A—351-52 (2000). The statute calls for any constitutional challenge to be heard "by a district court of three judges." *Id.* § 1741(a).

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

conditions receipt of federal funds on the relinquishment of libraries' own First Amendment rights.<sup>20</sup> On May 31, 2002, a three-judge panel held, in *American Library Association v. United States*,<sup>21</sup> that CIPA is facially invalid because no public library complying with the statute's Internet filtering requirement could do so without blocking a substantial amount of speech that its patrons have a First Amendment right to receive.<sup>22</sup> The district court issued an order permanently enjoining the federal government from withholding funds from public libraries for failure to comply with CIPA conditions,<sup>23</sup> but this order is surely not the final chapter concerning the constitutionality of the law. Perhaps anticipating rough sledding at the district court level and not wishing to waste time with an intermediate appeal, Congress conveniently built into CIPA a provision for direct review by the Supreme Court of any district court finding that the statute is unconstitutional.<sup>24</sup> Revealingly, Congress made any findings adverse to its position reviewable "as a matter of right," leaving the Supreme Court little option but to accept the case in the October 2002 term.<sup>25</sup>

A full understanding of the issues likely to guide the Supreme Court when it ultimately decides CIPA's fate requires a review of the history of Congress's attempts to restrict content on the Internet, the judicial reaction to each of those efforts before CIPA's enactment, and Congress's rationale and support for CIPA. Part II of this Article places CIPA in context by reviewing Congress's early attempts to directly control Internet speech content through the passage of the Communications Decency Act (CDA)<sup>26</sup> and the Child Online Protection Act (COPA)<sup>27</sup> and the judicial reaction

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20. *Id.* at 407 (enumerating plaintiffs' constitutional claims).

21. *Id.*

22. *Id.* at 496.

23. *Id.* (explaining that school libraries are still compelled to use filtering or lose their E-rate and LSTA funds). See discussion of E-rate and LSTA funds *infra* Part III.B.

24. The Consolidated Appropriations Act of 2001, *supra* note 18, reads, in pertinent part:

Appellate Review.—Notwithstanding any other provision of law, an interlocutory or final judgment, decree, or order of the court of three judges . . . holding this title or an amendment made by this title, or any provision thereof, unconstitutional shall be reviewable *as a matter of right* by direct appeal to the Supreme Court.

*Id.* (emphasis added).

25. Had the three-judge panel in the CIPA challenge ruled that the statute was constitutional, the library community and other challengers of the Act would not have had a similar appeal as a matter of right to the Supreme Court. Rather, it appears that they, unlike the government, would have had to apply for *certiorari* and take their chances that the Supreme Court would grant their request for review.

26. Communications Decency Act (CDA) of 1996, § 502. 47 U.S.C. § 223 (Supp. V 1999).

27. Pub. L. No. 105-277, 112 Stat. 2681 (1998) (codified at 47 U.S.C. § 231).

that greeted attempts to enforce each of those Acts. Whether through constitutional naivete or legislative hubris, Congress seriously underestimated the difficulty it would have controlling this new medium; the courts met congressional attempts to regulate the Internet with the development of a line of First Amendment cases that have firmly placed online communications within the ambit of protected speech.

Part III examines Congress's strategic shift away from direct proscriptions of online content and toward an attempt to control Internet speech indirectly through its spending power. This section reviews the resulting legislative development and implementation of CIPA and analyzes Congress's attempts to portray CIPA as a routine use of its spending power.

Part IV explores Congress's use of its spending power as a regulatory tool. It reviews lines of cases addressing limits on the congressional spending power, conditional funding, and the intersection of the spending power and the First Amendment. It concludes that Congress's attempt to recast CIPA's central purpose as a routine use of its spending power rather than as a direct regulation of speech content must fail because the ultimate effect on protected speech content is no less profound than if it had been included in a direct statutory mandate to filter. Part IV further concludes that the proper standard of review of CIPA's conditions is strict scrutiny.

Finally, Part V applies strict First Amendment scrutiny to the conditions imposed by CIPA on public libraries.<sup>28</sup> Part V and this Article conclude that the method chosen by the government in CIPA to regulate content on the Internet impermissibly undermines the essential nature and purpose of libraries as providers of multiple points of view and thus contravenes the First Amendment rights of both public libraries and their users.

## II. CONGRESS'S ATTEMPTS TO CONTROL INTERNET SPEECH DIRECTLY

Congress's initial attempts to control Internet content came in the form of two assaults proscribing broad categories of online speech through direct statutory measures. Both pieces of legislation were greeted with a level of constitutional scrutiny that proved to be their undoing. The following review of the rise and fall of the CDA and COPA shows why Congress was left searching for less vulnerable means of applying existing

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28. Because the purpose of schools and school libraries is substantially different than the purpose of public libraries and libraries in institutions of higher education, this Article does not address the constitutional implications of CIPA relative to schools.



obscenity law to the Internet, a communications medium that, by virtue of its unique qualities and characteristics, resists the application of traditional speech content controls developed for other media.

### A. *The Communications Decency Act of 1996*

In its first effort to directly control Internet content, Congress enacted the CDA.<sup>29</sup> Not satisfied with a statute prohibiting the online transmission of obscenity and child pornography,<sup>30</sup> neither of which have First Amendment protection regardless of the transmission medium used,<sup>31</sup> Congress embarked on a far higher-risk constitutional strategy that it hoped would shield minors from all online speech that it deemed harmful to them, regardless of its First Amendment status relative to adults. Specifically, Congress sought to extend the reach of the CDA to the transmission of two types of speech protected for adults by making it a criminal offense for anyone<sup>32</sup> to knowingly transmit “indecent” materials to anyone under eighteen years of age,<sup>33</sup> or to transmit any type of

29. See *supra* note 26.

30. Transmitting obscenity and child pornography is already prohibited by federal law. See 18 U.S.C. §§ 1464-1465 (criminalizing transmission of obscenity); 18 U.S.C. §§ 2251-2252 (criminalizing transmission of child pornography).

31. Obscene material is not protected by the First Amendment. See *Miller v. California*, 413 U.S. 15, 24 (1973) (ruling that a work may be subject to state regulation when (a) “the ‘average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to prurient” sexual interests; (b) the work portrays sexual conduct in a “patently offensive way” as defined by applicable state law; and (c) the work, taken as a whole, has no serious literary, artistic, political, or scientific value).

Similarly, child pornography is not protected by the First Amendment. See *New York v. Ferber*, 458 U.S. 747, 764 (1982) (modifying the *Miller* standard in the case where a minor is visually depicted as engaged in lewd sexual acts, as defined by applicable state law). In such cases, the material need not be found to appeal to the prurient interests of the average person; the sexual conduct depicted need not be portrayed in a patently offensive manner; and the material at issue need not be considered as a whole. *Id.* at 764. See also *Osborne v. Ohio*, 495 U.S. 103, 111 (1990) (holding that states have such a strong interest in protecting children from the abuse that can stem from mere possession of child pornography that they can “constitutionally proscribe the possession and viewing” of such material). *But cf.* *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S. Ct. 1389 (2002) (refusing to extend the definition of child pornography to sexually explicit images that appear to depict actual children but are, in fact, virtual (computer generated) images).

32. Congress clearly intended that the statute apply to all online transmissions, not just those by commercial purveyors of pornography. See 141 CONG. REC. S8089 (daily ed. June 9, 1995). Unlike other obscenity statutes and Congress’s attempt to control “dial-a-porn” enacted or under consideration at the time, CDA sponsor Senator James Exon assured his colleagues that “there would be no noncommercial loophole in the new provisions.”). 141 CONG. REC. 15503 (1995).

33. 47 U.S.C. § 223(a) (2001) states in pertinent part that:

Whoever—

(1) in interstate or foreign communications—

....

communication, in a manner that is available to a person under eighteen years of age, that depicts sexual content in a manner that is “patently offensive as measured by contemporary community standards.”<sup>34</sup> Apparently anticipating difficulty in gaining judicial approval of this approach, Congress attempted to insulate the statute from constitutional challenge by including affirmative defenses for those who restricted minors’ access to the proscribed materials by requiring that recipients of such offensive content verify their age through the use of a credit card or other adult identification information.<sup>35</sup> Congress also provided an affirmative defense for those content providers who imposed other “good faith” access restrictions.<sup>36</sup>

The American Civil Liberties Union (ACLU) and the American Library Association (ALA) mounted an immediate challenge to the CDA in *ACLU v. Reno (Reno I)*,<sup>37</sup> contending that the “indecency” clause in § 223(a)(1) and the “patently offensive” clause in § 223(d) could not withstand First Amendment scrutiny, as they were too vague regarding the categories of speech regulated and were subject to overly broad application.<sup>38</sup> Agreeing with the plaintiffs, a three-judge panel of the United States District Court for the Eastern District of Pennsylvania preliminarily enjoined enforcement of the CDA.<sup>39</sup> In response, the

(B) by means of a telecommunications device knowingly—

(i) makes, creates, or solicits, and

(ii) initiates the transmission of,

any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication;

....

(2) [or] knowingly permits any telecommunications facility under his control to be used for any activity prohibited in paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18, or imprisoned not more than two years, or both.

*Id.* (emphasis added).

34. 47 U.S.C. § 233(d) (2001).

35. 47 U.S.C. § 223(e)(5)(B) (2001).

36. 47 U.S.C. § 223(e)(5)(A) (2001). The CDA does not specify which measures taken to prevent minors’ access to the materials proscribed by the Act would give rise to an affirmative defense under this subsection. Instead, § 223(e)(5)(A) generally describes qualifying access control measures as those that are “taken, in good faith, reasonable, effective, and appropriate” to restrict minors’ access, including the use of “any method which is feasible under available technology.” *Id.*

37. *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), *aff’d*, 521 U.S. 844 (1997). The ACLU and the ALA were joined by dozens of Internet service providers, online publishers, and other parties interested in the future of online communications. *Id.* See 521 U.S. at 861 nn.27-28 for complete lists of plaintiffs joining the ACLU and the ALA.

38. 929 F. Supp. at 828-29.

39. *Id.* at 883.

government appealed to the Supreme Court under expedited review provisions in the Act.<sup>40</sup>

In *Reno v. ACLU (Reno II)*<sup>41</sup> the Supreme Court affirmed the district court's opinion, finding the CDA's constitutional infirmities to be numerous and the government's reliance on a number of the Court's obscenity precedents to be flawed.<sup>42</sup> In defending Congress's attempts to regulate indecent and patently offensive speech that it felt could be harmful to minors, the government argued that the Court's holdings in *Ginsberg v. New York*<sup>43</sup> and *FCC v. Pacifica Foundation*<sup>44</sup> provided ample constitutional support for the validity of the CDA.<sup>45</sup> In both cases, the Court had fashioned theories designed to give the state great latitude to protect minors from speech it deemed indecent and harmful to them, even if that same speech would be fully protected for adults by the First Amendment.<sup>46</sup>

*Ginsberg* upheld a New York statute making it illegal to sell to minors material that the state legislature had classified as obscene for minors, even if the same material would not be obscene for adults.<sup>47</sup> In so doing, the Court crafted a "variable obscenity" rule in which material that is fully protected for adults under the First Amendment can lose that protection when it is distributed to minors. The *Ginsberg* Court pointed to an "independent interest in the well-being of its youth" as the basis for a state's decision concerning what is obscene for minors<sup>48</sup> and required only that it be based on a legislature's rational belief that minors accessing the proscribed material would be harmed if exposed to it.<sup>49</sup>

In *Pacifica*, the Court had upheld sanctions that the Federal Communication Commission (FCC) levied against a radio station for

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40. The expedited review provisions in the Computer Decency Act were virtually identical with those used in the Children's Internet Protection Act. See *supra* notes 24-25.

41. 521 U.S. 844 (1997).

42. *Id.* See LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 174 (1999). Professor Lessig observed that the Communications Decency Act "practically impaled itself on the First Amendment." *Id.*

43. 390 U.S. 629 (1968).

44. 438 U.S. 726 (1978).

45. *Reno II*, 521 U.S. at 864-68.

46. *Ginsberg*, 390 U.S. at 636 ("Because of the state's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare, and morals of its community by barring the distribution to children of books recognized to be suitable for adults.") (quoting *Bookcase, Inc., v. Broderick*, 18 N.Y.2d 71, 75); *Pacifica*, 438 U.S. at 749 ("[T]he government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household' justified the regulation of otherwise protected expression.").

47. *Ginsberg*, 390 U.S. at 634.

48. *Id.* at 640.

49. *Id.* at 643.

broadcasting comedian George Carlin's "Filthy Words" monologue on the public airwaves at a time in the afternoon when its repeated use of words dealing with excretory functions, sexual activities and sexual organs would likely be heard by children in the audience.<sup>50</sup> The FCC had ruled that the broadcast's content was "patently offensive" at the time of day it was aired, and that the monologue was indecent "as broadcast."<sup>51</sup> The *Pacifica* Court held that, in limited, specialized contexts (such as broadcasting), the government could regulate the time, place, and manner in which even constitutionally protected sex-oriented speech content can be transmitted if it finds such action necessary to protect children from exposure to harmful materials.<sup>52</sup>

In *Reno II*, the Court rejected the government's reliance on *Ginsberg* and *Pacifica*. The government argued that the New York statute upheld in *Ginsberg* and the FCC order upheld in *Pacifica* were analogous to the CDA because they all seek to regulate and control minors' exposure to indecent, if not obscene, speech.<sup>53</sup> In fact, the statute upheld in *Ginsberg* was far narrower in scope than the CDA. Describing the breadth of the CDA's coverage as "wholly unprecedented,"<sup>54</sup> the Court excoriated Congress for failing to limit the statute's application to commercial speech<sup>55</sup> and for ignoring the right of parents to consent to their children gaining access to the speech in question, neither of which was omitted from the statute tested in *Ginsberg*.<sup>56</sup> The Court also recognized that, unlike the statute in *Ginsberg*, the CDA did not adequately define the standard to be used in determining what speech is indecent or patently offensive, and further expressed concern that Congress had made the CDA applicable to all under the age of eighteen rather than under the age of seventeen, as provided in the New York statute.<sup>57</sup>

Similarly, in rejecting the comparison between the CDA and the FCC order upheld in *Pacifica*, the *Reno II* Court pointed out the narrowness of the latter ruling, which applied to one particular program on a particular

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50. *Pacifica*, 438 U.S. at 751.

51. *Id.* at 731-32.

52. *Pacifica*, 438 U.S. at 749-50 ("[T]he government's interest in the "well-being of its youth" . . . justified the regulation of otherwise protected expression. The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting.").

53. 521 U.S. at 864.

54. *Reno II*, 521 U.S. at 877.

55. *Id.*

56. *Id.* at 865.

57. *Id.* at 865-67.

broadcast medium.<sup>58</sup> Unlike the Internet, where a “series of affirmative steps” is required to obtain specific online content, media broadcasts containing unwelcome content typically come without warning and are received, “even by those too young to read,” without any affirmative preliminary actions taken by the listener.<sup>59</sup> Despite the attractiveness of the *Ginsberg* and *Pacifica* holdings to the government in *Reno II*, the Court utterly rejected their applicability and utility as bases for saving the CDA.<sup>60</sup>

In its attempt to cast the widest possible net over speech that it believed to be “indecent” and “patently offensive,” Congress failed to define explicitly the term “indecent” within the statute, leaving potential conflicts between those terms unresolved. The government argued that the CDA was no more vague than the Court’s obscenity standard developed in *Miller v. California*<sup>61</sup> because both regulate works that present sexual material in a “patently offensive” manner.<sup>62</sup> This argument ignores that the *Miller* obscenity test contains two other prongs that interrelate with, and narrow, the “patently offensive” prong developed there.<sup>63</sup> Therefore, the government’s argument that *Miller* nullified the respondents’ vagueness argument was dismissed by the Court with the statement that “[j]ust because a definition including three limitations is not vague, it does not follow that one of those limitations, standing by itself, is not vague.”<sup>64</sup> Indeed, the Court’s discomfort with the prospect of speech restrictions based only on juries deciding that speech is “patently offensive” according to community standards, without also having that speech tested for lack of prurient interest and for some type of serious value as required under the

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58. *Id.* at 867.

59. *Pacifica*, 438 U.S. at 748-49.

60. *Reno II*, 521 U.S. at 875 (“It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials [citing *Ginsberg*, 390 U.S. at 639 and *Pacifica*, 438 U.S. at 749]. But that interest does not justify an unnecessarily broad suppression of speech to adults.”).

61. 413 U.S. 15 (1973). The *Miller* test for obscenity, which is still used today, rests on the following three prongs:

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

(b) whether the work depicts or describes, *in a patently offensive way*, sexual conduct specifically defined by the applicable state law; and

(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

*Id.* at 24 (internal citations omitted) (emphasis added).

62. 521 U.S. at 873.

63. *Id.*

64. *Id.*

*Miller* test, left the Court with the inescapable conclusion that the CDA's use of the terms "indecent" and "patently offensive" were impermissibly vague and overbroad to stand alone as a means of regulating speech.<sup>65</sup> Despite an acknowledged governmental interest in protecting children from exposure to harmful materials,<sup>66</sup> the CDA's attempted proscription of these vague categories of speech could not be applied without compromising a great deal of speech that adults have a constitutional right to receive and share with others.<sup>67</sup>

As a last line of defense against the claim that anything that could not be safely viewed by a child could be found illegal under the CDA, the government pointed to a number of affirmative defenses provided under the Act to shield from prosecution those attempting to direct indecent or patently offensive speech to adults.<sup>68</sup> Despite the government's unsubstantiated claims that content ratings, software filters, and age verification programs could be effectively used to restrict children from gaining access to the proscribed speech, the Court recognized that no technological measure had yet been developed that provided unerring perfection at shielding children from objectionable content while at the same time allowing adults to gain access to that same speech.<sup>69</sup> Taking note of the staggering number of Internet users worldwide,<sup>70</sup> the myriad online communications modalities available to those users regardless of

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65. *Id.* at 870-74. The Court recognized that Congress's attempt to create a "community standard" based on the terms "indecent" and "patently offensive" was so broad that it would have almost certainly encompassed "large amounts of non-pornographic material with serious educational or other value" (e.g., discussions about prison rape, sexual orientation, safe sex practices, artistic images that include nude subjects, and arguably the card catalog of the Carnegie Library). *Id.* at 877-78.

66. *See, e.g., Ginsberg*, 390 U.S. at 639; *Pacific*, 438 U.S. 726 (recognizing that "the government's interest in the 'well-being of its youth' . . . justified the regulation of otherwise protected expression").

67. *Reno II*, 521 U.S. at 874 ("[T]he CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another."). Here, the Court merely follows its long-standing rule that adults have the right, under the First Amendment, to access "[s]exual expression which is indecent but not obscene." *Id.* (quoting *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

68. 47 U.S.C. §§ 223(e)(5)(A)-(B) (2001).

69. *Reno II*, 521 U.S. at 876-77.

70. "The Government estimates that '[a]s many as 40 million people use the Internet today, and that figure is expected to grow to 200 million by 1999.'" *Id.* at 870. Despite the difficulty in measuring the number of Internet users at any given time, it is clear that these numbers are now significantly dated. As of September 2001, the Internet-use measurement firm of Nielsen/NetRatings placed the number of Americans who use the Internet at least once a month at 115.2 million and the number of Americans with Internet access, either at home or at work, at 176.5 million. *See Susan Stellan, More Americans Online*, N.Y. TIMES, Nov. 19, 2001, at C7.

their age,<sup>71</sup> and the absence of any truly effective online age verification method,<sup>72</sup> the Court concluded that the CDA could not be implemented without severely chilling the constitutionally protected speech of adults who would be required, under the CDA, to limit their online speech to that which could be safely shared with the children who might gain access to that speech.<sup>73</sup> Consequently, the CDA lacked the precision required by the First Amendment for a statute that regulates the content of speech.<sup>74</sup> In such cases, the statute must be narrowly tailored to achieve the government's compelling interest—in this case, the protection of minors from exposure to harmful materials online—without excessively burdening the First Amendment rights of adults.<sup>75</sup> The Court, noting that the government had failed to show that the CDA used the least restrictive alternative to achieve the government's interests, ruled that the statute could not be constitutionally applied.<sup>76</sup>

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

Undaunted by the spectacular failure of the Communications Decency Act, Congress attempted to cure the constitutional infirmities that had killed the CDA in its second statutory attempt to control Internet content directly—the Child Online Protection Act (COPA).<sup>77</sup> In fact, while Congress tried to make COPA somewhat more refined and narrowly

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71. *Reno II*, 521 U.S. at 879 (listing chat groups, newsgroups, and mail exploders as examples of the Internet's many "modalities").

72. *Id.* at 855-57. As pointed out in both *Reno I* and *Reno II*, there is no effective way to determine the age of a participant in the various forms of Internet communication. E-mail addresses reveal nothing about the age or true identity of the Internet speakers; broadcast mail exploders, such as listservs, send out communications to all subscribers' computers without regard for the age of the person who might be using the computer at the time the message is received; and no technology exists that can alleviate these realities of Internet architecture. The use of credit cards and adult identification passwords, while a step in the right direction, are also far from foolproof, both because they can fall into the hands of minors and because the monetary and personal privacy costs associated with the use of such systems is likely to deter some adults from participating in speech in which they are constitutionally entitled to engage.

73. *Id.* at 871-72.

Given the size of the potential audience for most messages, in the absence of a viable age verification process, the sender must be charged with knowing that one or more minors will likely view it. Knowledge that, for instance, one or more members of a 100-person chat group will be minor—and therefore that it would be a crime to send the group an indecent message—would surely burden communication among adults.

*Id.* at 876-77.

74. *Id.* at 874.

75. *Id.*

76. *Id.* at 879.

77. Pub. L. No. 105-277, *supra* note 27.

focused than the CDA, the statute has proved to be laden with flaws that have, thus far, prevented its implementation.

COPA imposes criminal sanctions on individuals or entities who, for commercial purposes, use the Internet to communicate or offer to communicate material that could be accessed by minors<sup>78</sup> and that contains content that is “harmful to minors.”<sup>79</sup> Unlike the CDA, communications by private parties are not regulated under COPA; instead, the statute targets only those “engaged in the business of making such communications.”<sup>80</sup> In addition, Congress refined COPA’s scope regarding material it was attempting to prevent minors from viewing, abandoning the CDA’s impossibly vague “indecent” and “patently offensive” categories that had failed to withstand constitutional scrutiny in *Reno II*. Instead, COPA uses what lawmakers hoped would be a more meaningful and constitutionally defensible category of prohibited online speech—speech that is “harmful to minors.”<sup>81</sup> Finally, COPA enumerates a series of age verification strategies that, if used by an online publisher, provide an affirmative defense to liability under the statute even if a minor does, in fact, gain access to the materials restricted by the statute.<sup>82</sup>

A month before the statute was to take effect at the end of November

78. A “minor” is defined in COPA as “any person under 17 years of age.” 47 U.S.C. § 231 (e)(7). Compare the Communications Decency Act, which defined a minor as “any person under 18 years of age.” 47 U.S.C. § 223(a)(1)(B)(ii).

79. 47 U.S.C. § 231(a)(1).

80. *Id.* § 231(e)(2)(A).

81. COPA states that online material will be considered “harmful to minors” only if each part of the following test is satisfied:

(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.* § 231(e)(6). Congress expressed its feeling that such a standard complied with the definition of “harmful to minors” upheld by the Supreme Court. See H.R. Rep. No. 105-775, at 11-13 (1998) (citing *Ginsberg v. New York*, 390 U.S. 629, 646 (1968), modified by *Miller v. California*, 413 U.S. 15 (1973)).

82. Specifically, COPA states that:

It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors—

(A) by requiring use of credit card, debit account, adult access code, or adult personal identification number;

(B) by accepting a digital certificate that verifies age; or

(C) by any other reasonable measures that are feasible under available technology.

47 U.S.C. § 231(c)(1).



1998, the ACLU and others<sup>83</sup> challenged COPA on First and Fifth Amendment grounds in the United States District Court for the Eastern District of Pennsylvania and sought injunctive relief preventing the statute from taking effect in *American Civil Liberties Union v. Reno (Reno III)*.<sup>84</sup> The plaintiffs argued that the statute was facially invalid under the First Amendment because it both impermissibly burdened protected adult speech and violated the speech rights of minors.<sup>85</sup> Additionally, the plaintiffs argued that the statute's definition of material that is "harmful to minors" was unconstitutionally vague under the First and Fifth Amendments.<sup>86</sup> The plaintiffs further contended that COPA was not the least restrictive alternative that the government could use to achieve its stated purpose of protecting minors from harmful Internet materials.<sup>87</sup> Finally, the plaintiffs argued that the affirmative defenses listed in COPA would be too expensive and technologically cumbersome to relieve the statute's impermissible burden on protected speech.<sup>88</sup>

As it had done in the earlier CDA challenge, the district court agreed that the plaintiffs were likely to succeed on the merits of their First Amendment claims and issued a temporary restraining order before the statute was implemented.<sup>89</sup> This order was followed several months later by the issuance of a preliminary injunction barring the government from enforcing or prosecuting matters under COPA.<sup>90</sup> The district court's injunction rested on classic principles of analysis for cases in which protected speech is jeopardized by government regulation. Under these principles, nonobscene sexual expression is protected by the First Amendment,<sup>91</sup> and content-based regulations of that expression, such as

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83. The ACLU was joined by a variety of online content providers, Web site operators and other online commercial entities as plaintiffs in this action.

84. *ACLU v. Reno*, 31 F. Supp. 2d 473 (E.D. Pa. 1999) [hereinafter *Reno III*].

85. *Id.* at 478-79.

86. *Id.* at 479.

87. *Id.* at 492. In particular, plaintiffs suggested that the use of software "blocking" or "filtering" technology by parents and by Internet service providers would be a far less restrictive means of achieving the government's goal and at least as effective as the proscriptions on "harmful" speech mandated in COPA. Interestingly, among its findings of fact, the court described as "undisputed" that blocking and filtering technology does not work perfectly. *Id.* Specifically, the court acknowledged that software filters frequently block sites that are completely appropriate for minors and also fail to block sites that might be deemed inappropriate for minors. *Id.* Further, the court recognized that minors with patience and sufficient computer skills would be able to circumvent software filters and blocking devices. *Id.*

88. *Id.* at 479.

89. *ACLU v. Reno*, Civ. No. 98-5591, 1998 WL 813423 (E.D. Pa. Nov. 23, 1998).

90. *Reno III*, 31 F. Supp. 2d at 473.

91. *See, e.g., Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

COPA, are presumptively invalid and subject to strict scrutiny.<sup>92</sup> The government may regulate protected speech content to fulfill a compelling state interest, but it is required to choose the least restrictive and most narrowly tailored means to satisfy the government's interest without unduly compromising First Amendment freedoms.<sup>93</sup> Although the district court simply assumed that COPA was based on Congress's compelling interest in protecting minors from indecent materials,<sup>94</sup> the court found that it was not apparent that the government could carry its burden of showing that the statute represented the least restrictive and most narrowly tailored means of achieving that goal, thereby leading to the issuance of a preliminary injunction.<sup>95</sup>

The government appealed the district court's decision to the Third Circuit Court of Appeals (*Reno IV*).<sup>96</sup> The court of appeals affirmed, but based its decision entirely on an issue that was not relied on below—that COPA's use of "contemporary community standards" to identify material that is "harmful to minors" rendered the statute substantially overbroad.<sup>97</sup> The court of appeals reasoned that because Web publishers have no technological means of limiting access to their sites based on the geographic location of particular Internet users, the safest reading of COPA requires Web publishers either to censor materials to a level acceptable in the most restrictive community in the nation, or to shield "any material that might be deemed harmful by the most puritan of communities in any state . . ." behind age or credit card verification systems.<sup>98</sup> Although the latter approach arguably protects Web publishers and prevents wholesale prophylactic content censorship, individuals over seventeen without the necessary age verification credentials would be denied access to protected materials, as would all minors under seventeen seeking access to materials not "deemed 'harmful' to them in their respective geographic communities."<sup>99</sup> Because of this resulting limitation

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92. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("The First Amendment generally prevents government from proscribing speech . . . because of disapproval of the ideas expressed."); *Sable*, 492 U.S. at 126.

93. *See, e.g., Sable*, 492 U.S. at 126.

94. *Reno III*, 31 F. Supp. 2d at 495 (citing *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968)).

95. 31 F. Supp. 2d at 496-97. While recognizing that final determinations on the First Amendment issues presented would have to await a trial on the merits, the court agreed with the plaintiffs that the categories of speech covered by COPA were excessively broad. *Id.*

96. *ACLU v. Reno*, 217 F.3d 162 (3d Cir. 2000), *cert. granted sub nom.*, *Ashcroft v. ACLU*, 532 U.S. 1037 (2001), and *vacated by* 535 U.S. 564, 122 S. Ct. 1700 (2002) [hereinafter *Reno IV*].

97. *Id.* at 173-74.

98. *Id.* at 175.

99. *Id.*

on free speech, the court of appeals held that “this aspect of COPA, without reference to its other provisions, must lead inexorably to a holding of a likelihood of unconstitutionality of the entire COPA statute.”<sup>100</sup>

The United States Supreme Court granted certiorari<sup>101</sup>—renaming the case *Ashcroft v. ACLU* after the change in administrations—to review the findings of the court of appeals and subsequently vacated the Third Circuit’s judgment.<sup>102</sup> The Supreme Court held that the use of “community standards” to identify “material that is harmful to minors” under COPA does not *by itself* render the statute facially unconstitutional.<sup>103</sup> Beyond this core point, however, the Justices of the Supreme Court displayed deep philosophical divisions regarding exactly what “community standards” should mean in the context of the Internet, as demonstrated by the five opinions written to address this issue.<sup>104</sup> Arguably, most philosophically troubling for future First Amendment protection of Internet content is the opinion written by Justice Thomas and joined by Justices Rehnquist and Scalia. In it, Justice Thomas endorsed the constitutionality of COPA’s requirement subjecting Internet content to local community standards as a means of determining what Internet content is harmful to minors.<sup>105</sup> Seemingly ignoring the *Reno II* rejection of a *Miller*-like community standard criterion as applied to Internet content,<sup>106</sup> Justice Thomas opined that “any variance caused by the statute’s reliance on community standards

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100. *Id.* at 174. The court itself raised the issue of the inappropriateness of COPA’s reliance on “contemporary community standards” as the test of online content during oral argument. The court based its opinion on the apparent unconstitutionality of that clause alone, and did very little to address the numerous other constitutional issues raised by the district court. *Id.* at 173-74.

101. *ACLU v. Reno*, 217 F.3d 162 (3d Cir. 2000), *cert. granted sub nom.*, *Ashcroft v. ACLU*, 532 U.S. 1037 (2001), and *vacated by* 535 U.S. 564, 122 S. Ct. 1700 (2002).

102. *Ashcroft v. ACLU*, 535 U.S. 564, 122 S. Ct. 1700 (2002).

103. *Id.* at 1713. The Court stressed that the scope of its decision was “quite limited,” and clearly did not intend this holding to go beyond the facts and procedural posture of the current litigation testing the constitutionality of COPA. *Id.* Although the Court rejected the argument that COPA’s use of community standards to identify material that is harmful to minors, by itself, rendered the statute unconstitutional on its face, neither did a majority of the Court endorse any particular definition of community standards that it would hold, conclusively, to pass constitutional muster when used to judge whether or not Internet transmissions are, in fact, harmful to minors. “The fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional.” *Id.* at 1711 (quoting *Hamling v. United States*, 418 U.S. 87, 106 (1974)) (internal quotations omitted).

104. *See infra* notes 107-15 and accompanying text.

105. *Ashcroft v. ACLU*, 122 S. Ct. at 1703-14.

106. *See Reno II*, 521 U.S. at 877-78 (rejecting the “community standards criterion” as applied to the Internet because “any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message”).

is not substantial enough to violate the First Amendment.”<sup>107</sup> Believing that there is no constitutional barrier to prohibiting communications that are obscene according to some communities’ standards even though they would not be obscene according to the standards in others, Justice Thomas concluded that the ultimate burden is on the Internet publisher to comply with all possible local prohibitions on obscene messages.<sup>108</sup>

If a publisher chooses to send its material into a particular community, this Court’s jurisprudence teaches that it is the publisher’s responsibility to abide by that community’s standards. The publisher’s burden does not change simply because it decides to distribute its material to every community in the Nation . . . . If a publisher wishes for its material to be judged only by the standards of particular communities, then it need only take the simple step of utilizing a medium that enables it to target the release of its material into those communities.<sup>109</sup>

In separate opinions, Justices O’Connor<sup>110</sup> and Breyer<sup>111</sup> called for the development of national community standards for evaluating the constitutional status of sexual material on the Internet. Justice Kennedy

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107. *Ashcroft v. ACLU*, 122 S. Ct. at 1713. See generally Dennis W. Chiu, Comment, *Obscenity on the Internet: Local Community Standards for Obscenity are Unworkable on the Information Superhighway*, 36 SANTA CLARA L. REV. 185 (1995); William D. Deane, Comment, *COPA and Community Standards on the Internet: Should the People of Maine and Mississippi Dictate the Obscenity Standards in Las Vegas and New York?* 51 CATH. U. L. REV. 245 (2001); Erik G. Swenson, Comment, *Redefining Community Standards in Light of the Geographic Limitlessness of the Internet: A Critique of United States v. Thomas*, 82 MINN. L. REV. 855 (1998).

108. *Ashcroft*, 122 S. Ct. at 1711 (citing *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 125-26 (1989)).

109. *Id.* at 1712. Justice Thomas argued that this approach is virtually identical with Court precedent in *Hamling v. United States*, 418 U.S. 87 (1974), and *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989). In *Hamling*, a case challenging a statute prohibiting the mailing of obscene material, the Court held that “[t]he fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional . . . .” *Hamling*, 418 U.S. at 106. In *Sable*, a case in which a statutory provision prohibited commercial “dial-a-porn” operators from using telephones to engage in obscene or indecent communications, the Court stated that “if [a dial-a-porn business’s] audience is comprised of different communities with different local standards, [the business] ultimately bears the burden of complying with the [local] prohibition on obscene messages.” *Sable*, 492 U.S. at 106. In his dissent in *Ashcroft v. ACLU*, Justice Stevens strongly criticized Justice Thomas’ reliance on *Hamling* and *Sable*, arguing that characteristics of mail and telephone communications allow distributors using those media to prevent transmissions into communities where content is likely to be viewed as obscene or indecent. Stevens pointed out that there is currently no way to effect this same type of geographic control for the transmission of Internet content. See *Ashcroft v. ACLU*, 122 S. Ct. at 1722-28.

110. *Id.* at 1714-15 (O’Connor, J., concurring in part, and concurring in the judgment).

111. *Id.* at 1715-16 (Breyer, J., concurring in part, and concurring in the judgment).

(joined by Justices Souter and Ginsburg) cited the *Reno III* court's concerns that COPA was overbroad, and that the question of community standards could not be evaluated without the court of appeals analyzing that issue on remand.<sup>112</sup> Finally, Justice Stevens, in dissent, would have affirmed the *Reno IV* court's opinion that the use of local community standards to evaluate Internet content renders COPA unconstitutional on its face.<sup>113</sup>

Although *Ashcroft v. ACLU* provides a fascinating glimpse of the thinking of individual Supreme Court justices concerning the constitutional status of Internet speech, the opinion certainly does not provide a final determination concerning the constitutionality of COPA. The Court simply vacated and remanded the case to the court of appeals because it did not agree that the statute's use of community standards as a means of identifying material that is "harmful to minors" is, by itself, fatal.<sup>114</sup> Leaving in place the lower court's injunction against enforcement of the statute, the Court reserved judgment on "whether COPA suffers from substantial overbreadth for other reasons, whether the statute is unconstitutionally vague, or whether the District Court correctly concluded that the statute likely will not survive strict scrutiny analysis once adjudication of the case is completed below."<sup>115</sup> Once fact-finding has been completed and the court of appeals has ruled on the case on its merits, it is very likely that the Supreme Court will again be given the chance to decide the ultimate fate of COPA.

### *C. First Amendment Principles Emerging from the CDA and COPA Challenges*

The litigation surrounding the CDA and COPA challenges proved to be the battleground where First Amendment principles were first applied to the realm of online speech. Emerging from these decisions are a number of legal rulings and factual determinations that form the jurisprudential standards against which statutes similar to the CDA and COPA will be analyzed. Perhaps as importantly, these principles served as a reality check to Congress's would-be Internet censors, providing notice that the courts and the Constitution would not allow Congress to run roughshod over Internet speech.

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112. *Id.* at 1716-22 (Kennedy, J., concurring in the judgment).

113. *Id.* at 1722-28 (Stevens, J., dissenting).

114. *Id.* at 1713-14.

115. *Id.* at 1713.

### *I. Standard of Review*

Both the CDA and COPA were adjudged to be government-imposed, content-based restrictions on speech that was characterized by Congress, almost interchangeably, as “indecent,” “patently offensive,” or “harmful to minors.”<sup>116</sup> In analyzing the constitutionality of both statutes’ regulatory schemes, the courts called upon a number of core First Amendment principles as the foundation for their decisions.<sup>117</sup>

Even when it may be distasteful and offensive to some, speech that is neither obscene nor child pornography is constitutionally protected for adults.<sup>118</sup> Because of this protection, governmental content-based regulations of protected speech are presumed to violate the First Amendment<sup>119</sup> and are upheld only when found to promote a compelling state interest.<sup>120</sup> Even then, most of these regulations will be strictly scrutinized under the First Amendment,<sup>121</sup> not only to determine whether the stated interest is sufficiently “compelling” in the constitutional sense, but also to assure that the government chooses the least restrictive and most narrowly tailored means of achieving its regulatory interests without unnecessarily burdening First Amendment rights.<sup>122</sup> In evaluating government regulations of protected expression, the courts require that the benefits gained by enforcement of the challenged statute outweigh the burden imposed on speech for the regulation to stand a chance of being validated.<sup>123</sup>

In limited situations, the courts have endorsed less than strict scrutiny review of government regulations of indecent speech. Most noteworthy is the area of broadcasting where, in *FCC v. Pacifica Foundation*,<sup>124</sup> the Supreme Court endorsed extremely broad Federal Communications Commission administrative sanctions against a radio broadcaster for airing George Carlin’s now infamous “Filthy Words” monologue<sup>125</sup> at a time

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116. *Reno III*, 31 F. Supp. 2d at 492-93; *Reno I*, 929 F. Supp. at 857.

117. *Reno III*, 31 F. Supp. 2d at 492-93; *Reno I*, 929 F. Supp. at 857.

118. *Sable*, 492 U.S. at 126 (holding that adults’ access to indecent speech is protected by the First Amendment). See also *Pacifica*, 438 U.S. at 747-48.

119. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992); *Sable*, 492 U.S. at 126.

120. *Sable*, 492 U.S. at 126.

121. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994), *vacated by*, 512 U.S. 1230 (1994) (“Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.”) (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)).

122. *Sable*, 492 U.S. at 126.

123. *Elrod v. Burns*, 427 U.S. 347, 363 (1976).

124. 438 U.S. 726 (1978).

125. See *Pacifica*, 438 U.S. at 751-755 (appendix containing transcript of monologue).

likely to be heard by children.<sup>126</sup> In *Reno I* and *Reno II*, the government argued that Congress's interest in shielding minors from exposure to indecent Internet content was at least as compelling as the FCC's control of broadcast content and that the CDA should be reviewed under the same reduced level of constitutional scrutiny as that endorsed for broadcast regulations in *Pacifica*.<sup>127</sup> The courts, however, rejected the comparison, holding that the unique characteristics of broadcasting that allow government regulation to survive a reduced level of First Amendment scrutiny do not exist for the Internet.<sup>128</sup> Whereas the availability of, and access to, broadcast signals is a scarce, expensive commodity in need of government regulation to assure that it is used in the public interest,<sup>129</sup> the Internet has been described as a "vast democratic forum[]" used by over one hundred million people in the United States alone to access content "as diverse as human thought."<sup>130</sup> In addition, while broadcast media have been described as "uniquely pervasive" in their ability to enter homes and deliver unwelcome content without warning,<sup>131</sup> Internet communications require affirmative steps to be taken before information is delivered to one's computer.<sup>132</sup> Finally, the courts recognize that there is a history of extensive government regulation of broadcasting that they can rely on when scrutinizing regulations of related media.<sup>133</sup> By contrast, the Internet's phenomenal public growth has occurred devoid of government regulation.<sup>134</sup>

Having rejected the comparison to broadcast media, the Supreme Court has concluded that the proper level of First Amendment review for

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126. *Id.* at 750-51. The Court emphasized the narrowness of its ruling, stopping far short of granting a categorical government prohibition of offensive speech. Rather, the Court endorsed the F.C.C.'s authority to regulate broadcasts of speech that, though not inherently offensive if aired at times unlikely to be heard by children, is unsuitable for broadcast when children are likely to hear them. *Id.* at 750.

127. See *Reno II*, 521 U.S. at 866-67; *Reno I*, 929 F. Supp. at 850.

128. *Reno II*, 521 U.S. at 866-67 ("[T]he Court concluded that the ease with which children may obtain access to broadcasts . . . justified special treatment of indecent broadcasting."); *Reno I*, 929 F. Supp. at 862 ("[T]he Court [in *Pacifica*] emphasized that its narrow holding applied only to broadcasting which is 'uniquely accessible to children, even those too young to read.'").

129. *Reno II*, 521 U.S. at 868 (citing *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 637-38 (1994)).

130. *Reno II*, 521 U.S. at 868-70 (quoting *Reno I*, 929 F. Supp. at 842).

131. *Pacifica*, 438 U.S. at 748-49.

132. *Reno II*, 521 U.S. at 869 ("[C]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.'") (quoting *Reno I*, 929 F. Supp. at 844).

133. *Reno II*, 521 U.S. at 868 (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 399-400).

134. *Id.*

government regulation of Internet content is strict scrutiny.<sup>135</sup> The threshold question in any strict scrutiny analysis must be whether the government can demonstrate that it does, in fact, have a constitutionally compelling state interest in regulating speech.<sup>136</sup> Absent a constitutionally sufficient compelling state interest, the remaining elements of strict scrutiny analysis need not be examined.<sup>137</sup> In theory, this demonstration requires more than an unsupported claim by the government designed to elicit visceral public reaction and stir public support. First Amendment jurisprudence requires the government to meet exacting standards when it moves to regulate protected speech. As the strict scrutiny standard has developed in First Amendment cases, “compelling” does not mean simply that the government’s interest is legitimate or important; rather, the government must demonstrate that its interest in regulating speech aims at avoiding harms that are “real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”<sup>138</sup>

Application of these principles means that the mere existence of indecent material on the Internet and government concern over its possible effects on children should not be ruled sufficient to satisfy the test for compelling state interest; the government should be required to prove actual harm to children from exposure to indecent materials online and that its proposed regulation of certain online speech can, in fact, alleviate that harm. However, touching the hot button of “child protection” has long

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135. In rejecting the reduced level of First Amendment scrutiny afforded to regulation of broadcast content, the Court chose to allow this new medium to develop unburdened by heavy-handed federal regulation. *See Reno II*, 521 U.S. at 870 (“We agree with [the district court’s] conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.”). Commentators have recognized the importance of the Court’s determination that regulations of Internet speech would be subjected to the highest level of constitutional scrutiny. *See, e.g.,* Jesse H. Choper, *Uri and Caroline Bauer Memorial Lecture: On the Difference in Importance Between Supreme Court Doctrine and Actual Consequences: A Review of the Supreme Court’s 1996-97 Term*, 19 CARDOZO L. REV. 2259 (1998).

In analyzing [*Reno II*], the doctrinal significance of according speech on the Internet the strongest degree of First Amendment protection should not be minimized. Underscoring the Internet’s importance for free expression by referring to its “vast democratic fora,” and observing that the medium allows its users to “become a town crier with a voice that resonates farther than it could from any soapbox,” the Court declined the Government’s invitation to allow the kind of regulatory leeway that had been granted to Congress over the broadcast media.

*Id.* at 2283.

136. Ross, *supra* note 7, at 460 (“The state must both articulate and demonstrate a compelling interest based on a real harm in order to justify any government regulation on the content of speech.”).

137. *Id.* (“According to First Amendment doctrine, courts may not even evaluate whether a given regulation is narrowly tailored until the state establishes its compelling interest.”).

138. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994).



been used to win political support for censorship of various media,<sup>139</sup> and the courts have demonstrated a willingness to allow the government a “free pass” by presuming that any governmental regulation promulgated in the name of protecting children is constitutionally compelling.<sup>140</sup>

Even if Congress’s interest in protecting children is found by the courts to be sufficiently compelling to pass the initial hurdle of First Amendment analysis, the government carries an extremely heavy burden of proving that the method chosen to restrict speech is the least restrictive means available to satisfy the governmental interest and, further, that the restriction is narrowly tailored to avoid unduly compromising the fundamental right of free speech.<sup>141</sup> In *Reno II*, the Court concluded that the extraordinary breadth of online communications made even serious adult online speech about sexual matters subject to criminal prosecution under the CDA if it were intercepted by a minor.<sup>142</sup> The Court recognized that, by forcing adults to modify otherwise protected speech in order to make it acceptable for minors who might be listening, the CDA was not narrowly tailored to avoid a chilling effect on protected adult speech.<sup>143</sup> COPA fared no better on this point in *Reno III*, where the district court stated that it was unlikely that the government could meet its burden to

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139. Ross, *supra* note 7, at 467 (“[T]he implicit promise of judicial deference invites legislators and advocates of censorship to abridge speech with relative abandon.”).

140. *Reno II*, 521 U.S. at 875 (“It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials.”) (citing *Ginsberg*, 390 U.S. at 639; *Pacifica*, 438 U.S. at 749)). This governmental interest has been extended to include “shielding [minors] from materials that are not obscene by adult standards.” *Reno III*, 31 F. Supp. 2d at 495 (citing *Sable*, 492 U.S. at 126; *Ginsberg*, 390 U.S. at 639-40). *See also* Am. Library Ass’n v. United States, 201 F. Supp. 2d 401, 471 (stating that “[t]he government’s interest in preventing the dissemination of obscenity, child pornography, or, in the case of minors, material harmful to minors, is well-established.”). But see *Reno I*, 929 F. Supp. at 853, where Chief Circuit Judge Sloviter provided a rare example of judicial skepticism about whether the government had done enough to show that its interest in regulating the “vast range of online material covered or potentially covered by the CDA” was compelling. Ultimately, and without elaboration, Judge Sloviter agreed that “there is certainly a compelling government interest to shield a substantial number of minors from some of the online material that motivated Congress to enact the CDA.” *Id.* But cf. Ross, *supra* note 7, at 429 (“Confronted with the incantation that the state aims to safeguard children, courts at every level, including the Supreme Court, have regularly failed to scrutinize the interest alleged by the government.”).

141. *Reno II*, 521 U.S. at 879.

142. *Id.* at 871. Absent a clear definition of the terms “indecent” and “patently offensive” in the CDA, the Court wondered if a speaker could “confidently assume that a serious discussion about birth control practices, homosexuality, the First Amendment issues raised by the Appendix to our *Pacifica* opinion, or the consequences of prison rape would not violate the CDA.” *Id.* The Court concluded that “[t]his uncertainty undermines the likelihood that the CDA has been carefully tailored to the congressional goal of protecting minors from potentially harmful materials.” *Id.*

143. *Reno II*, 521 U.S. at 874-75 (“‘[R]egardless of the strength of the government’s interest’ in protecting children, ‘[t]he level of discourse . . . cannot be limited to that which would be suitable for a sandbox.’”) (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74-75 (1983)).

show that the statute used the least restrictive and most narrowly tailored means to protect minors from gaining online access to commercial pornography.<sup>144</sup> Specifically, the court observed that there is no effective way to ensure that commercial pornography will not show up on foreign Websites, on noncommercial Websites, or through other direct peer-to-peer exchanges, none of which were within the scope of COPA coverage.<sup>145</sup> In a manner similar to the CDA, leaving commercial and noncommercial Website operators vulnerable to criminal prosecution for distribution of protected adult speech that, through no fault of their own, is distributed somewhere on the Internet and accessed by a minor has a chilling effect on that protected speech.<sup>146</sup>

In stripping the government of its claim to the high moral ground and forcing it to justify its actions under the harsh lamp of strict scrutiny, the *Reno* decisions revealed both the CDA and COPA to be ill-disguised attempts to censor Internet content broadly—not just protecting children from accessing constitutionally unprotected material, but making an entire category of offensive, although fully protected, speech inaccessible for everyone, adults and children, alike.

## *2. Inability and Impracticality of Using Current Technology to Regulate Online Speech within Constitutional Bounds*

A hallmark of the government's defense of its statutory attempts to regulate online speech is the apparent underlying assumption that effective technological solutions exist that can limit children's exposure to harmful material on the Internet without compromising adults' First Amendment rights. The government's arguments in defense of the CDA and COPA included claims that online age verification, adult identification techniques, and content ratings could be used to shield transmitters of indecent material from liability under the statutes.<sup>147</sup> However, the courts have shown an unexpected level of appreciation for the limitations of these technologies, and these limitations have been consistently noted in the

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144. *Reno III*, 31 F. Supp. 2d at 497.

145. *Id.* at 496 (“[T]his Court's finding that minors may be able to gain access to harmful to minors materials on foreign Web sites, non-commercial sites, and online via protocols other than http demonstrates the problems this statute has with efficaciously meeting its goal.”).

146. *Id.*

147. *Reno III*, 31 F. Supp. 2d at 487 (listing the affirmative defenses available under COPA); *Reno II*, 521 U.S. at 860 (“[T]he CDA provided two affirmative defenses to prosecution: (1) the use of a credit card or other age verification system, and (2) any good faith effort to restrict access by minors.”).

developing body of First Amendment law dealing with online speech.<sup>148</sup>

The courts are aware that age verification using credit cards and adult identification numbers is not only technically possible, but is, in fact, actually used by providers of adult content on the Internet.<sup>149</sup> The courts also realize, however, that maintenance of an age verification process is not without costs<sup>150</sup> and that, for noncommercial online speakers, these processes may be “economically and practically unavailable.”<sup>151</sup>

Even where Congress attempted to ameliorate this problem in COPA by limiting the scope of online speech regulation to commercial speakers, the courts recognized the dilemma that such speakers face if they are required to use technologies that all agree cannot possibly verify the identity, age, or physical location of everyone who might possibly gain access to their sites.<sup>152</sup> Commercial speakers faced with high costs of age verification systems are likely to avoid the problem by refusing to publish controversial speech.<sup>153</sup> Further, with no way to be sure that minors will

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148. See, e.g., *Reno III*, 31 F. Supp. 2d at 487-92 (presenting extensive findings of fact concerning technological flaws in the use of credit cards, adult-access numbers, and filtering software that limit their effectiveness to verify age of Internet users); *Reno II*, 521 U.S. at 882 (agreeing with the *Reno I* court that the “Government failed to adduce any evidence that these verification techniques [online use of credit cards and adult identification numbers] actually preclude minors from posing as adults”); *Reno I*, 929 F. Supp. at 846-48 (findings of fact detailing the technological impracticalities of three potential affirmative defenses under the CDA: credit card verification, use of adult identification numbers or passwords to verify age, and tagging of online content to label it as containing indecent or patently offensive speech).

149. *Reno III*, 31 F. Supp. 2d at 488; *Reno II*, 521 U.S. at 856, 876.

150. *Reno III*, 31 F. Supp. 2d at 488. Testimony received during the Pennsylvania District Court’s examination of the motion to enjoin enforcement of COPA details the technical complexity and significant expense involved in using credit card verification on the Internet. The court heard testimony that initial start-up costs of approximately \$300 to “thousands of dollars” to set up one’s own secure server are typical, and that per transaction fees are borne by the online content provider thereafter. *Id.* Online content providers have the option of contracting with a third party to manage their online credit card verification processes, but, although unspecified in the accompanying testimony, the courts recognize that these services are not inexpensive to use. *Id.*

151. *Reno I*, 929 F. Supp. at 846.

152. *Reno III*, 31 F. Supp. 2d at 495; *Reno II*, 521 U.S. at 855, 876, 881-82. By its very nature, the Internet makes it virtually impossible to determine the age and physical location of those engaged in online communications. This difficulty is particularly present in the case of the most public of Internet forums—chat rooms, newsgroups, mail exploders, and the Web—which are openly accessible to all comers. See *Reno I*, 929 F. Supp. at 845.

In assessing the burden placed on protected speech by COPA, it is necessary to take into consideration the unique factors that affect communication in the new and technology-laden medium of the Web . . . [T]he plaintiffs have presented evidence that the nature of the Web and the Internet is such that Web site operators and content providers cannot know who is accessing their sites, or from where, or how old the users are, unless they take affirmative steps to gather information from the user and the user is willing to given [sic] them truthful responses.

*Reno III*, 31 F. Supp. 2d at 495.

153. See, e.g., *id.*; *Reno II*, 521 U.S. at 877.

not slip through the age verification safety net, online publishers and speakers are likely to aggressively self-censor materials that would result in criminal charges if accessed by minors, but that are fully protected adult speech.<sup>154</sup> Finally, commercial online publishers are unlikely to provide access to protected adult speech if their potential customers refuse to use their sites because they dislike having to endure cumbersome identity verification procedures.<sup>155</sup>

Although both the CDA and COPA suggest that parties making “good faith” efforts to apply technologies designed to keep minors from accessing indecent speech would be shielded from prosecution under those statutes, Congress was very careful not to specify what technology applications would be “good enough” to qualify as an affirmative defense under either Act.<sup>156</sup> Tagging or rating of Internet content was mentioned by the government in *Reno I* and *Reno II* as an example of what Congress must have meant when it added a catch-all “good faith” affirmative defense to prosecution under the CDA.<sup>157</sup> Specifically, the government suggested that Web content providers who embedded coded descriptions (so-called metatags) in Web pages containing indecent or patently offensive materials would have such a defense because end-users could install software filters on their computers set to screen out content containing those tags.<sup>158</sup> Although the *Reno I* and *Reno II* courts rejected the government’s argument that a content-tagging defense saved the CDA from its First Amendment fate because the technology described did not fully exist at that time, both courts presciently predicted the constitutional infirmities that content rating systems would exhibit once developed in the

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154. *Reno III*, 31 F. Supp. 2d at 494-95.

155. *Id.* at 495.

156. 47 U.S.C. § 223(e)(5)(A) states in pertinent part that:

(5) It is a defense to a prosecution [under the “indecentcy” and “patently offensive” provisions of the CDA] . . . that a person—

(A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified . . . which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology . . . .

47 U.S.C. § 223(e).

157. *Reno II*, 521 U.S. at 881 (“[R]elying on the ‘good faith, reasonable, effective, and appropriate actions’ provision, the Government suggests that ‘tagging’ provides a defense that saves the constitutionality of the CDA.”); *Reno I*, 929 F. Supp. at 878 n.20 (incorporating into its opinion a letter from the Department of Justice that expressed the position that “tagging by content providers coupled with evidence that the tag would be screened by the marketplace of browsers and blocking software” would satisfy the CDA’s good faith defense).

158. *Reno I*, 929 F. Supp. at 856.

years following the CDA litigation.<sup>159</sup> For content tagging to be truly effective at shielding Internet publishers from liability, ratings would have to be uniformly and accurately applied by content providers. Even then, as the Supreme Court pointed out, there would be no way for Internet publishers to be sure that all potential recipients were using screening software that would recognize the metatags and block indecent or patently offensive materials if they chose not to receive them.<sup>160</sup> Without this “impossible knowledge,” the Court recognized that a transmitter of CDA-proscribed materials could not be sure that content rating would be “effective” and would thereby be left vulnerable to prosecution under the statute.<sup>161</sup>

#### *D. Direct Congressional Regulation of Online Content Thwarted*

As First Amendment cases go, neither the CDA nor COPA presented the greatest constitutional challenges. Both statutes were drafted without the slightest sensitivity for classic First Amendment pitfalls and were essentially dead on arrival at the courthouse.<sup>162</sup> At least one commentator believes that a more carefully drafted statute than either the CDA or COPA could directly regulate Internet content and survive constitutional scrutiny,<sup>163</sup> but the resounding defeat of the CDA in *Reno I* and *Reno II* and the seemingly perpetual injunction against enforcement being endured by COPA certainly cast this opinion into doubt.

Clearly, advocates of online censorship needed to find a more sophisticated First Amendment approach to achieve significant regulation of Internet content. They believe that they have found it in Congress’s power of the purse.

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159. *Reno II*, 521 U.S. at 881 (recognizing the lack of any guarantees that online speakers will actually “tag” their materials and the absence of screening software that can interact with content tags to ensure that minors cannot receive transmission deemed harmful to them. Because the CDA requires that good faith actions be “effective,” the Court describes tagging as an “illusory” defense under the Act. *Id.*). *Reno I*, 929 F. Supp. at 878 (expressing doubt that tagging is a defense under the CDA).

160. *Reno II*, 521 U.S. at 881.

161. *Id.* In theory, the problems of voluntary Web content ratings could be resolved through the application of a government-mandated standard rating system and distribution of compatible screening software. Such a mandate is rife with constitutional problems and, as Professor Lawrence Lessig has observed, would likely lead to far more speech being filtered than is within the legitimate interest of the government. Lawrence Lessig, *What Things Regulate Speech: CDA 2.0 vs. Filtering*, 38 JURIMETRICS J. 629, 665 (1998).

162. COPA retains a pulse, albeit weak, at the time of this writing. Enforcement of COPA having been enjoined from the outset, it has endured three judicial hearings, none of which has reached the merits of the case. See discussion *supra* Part II.B.

163. See Lessig, *supra* note 161.

### III. CONGRESS'S REGULATION OF SPEECH INDIRECTLY THROUGH ITS SPENDING POWER: THE CHILDREN'S INTERNET PROTECTION ACT

#### A. Congress's Enactment of the Children's Internet Protection Act

Stung by the debacle of the CDA and COPA challenges, and recognizing just how difficult it would be to directly control Internet content, those members of Congress bent on bringing governmental control to online speech devised what they believe is an ingenious and constitutionally invulnerable strategy to accomplish this goal through indirect means. That strategy, based on contingent offers of federal funds rather than statutory proscription to accomplish regulation of Internet content, is embodied in the Children's Internet Protection Act<sup>164</sup> (CIPA).

Like the failed statutory attempts to regulate Internet content before it, CIPA's ultimate goal is the regulation of online speech that Congress finds objectionable, particularly when viewed by minors. However, Congress hopes that the critical difference that will make CIPA immune from constitutional attack lies in the mechanism used to effect Internet regulation. CIPA, unlike the CDA and COPA, does not directly proscribe general categories of Internet content.<sup>165</sup> Instead, CIPA seeks to regulate online speech indirectly by pressuring, rather than mandating, schools and public libraries to adopt software filters and other specific steps to reduce minors' access to illegal and harmful materials on their Internet-accessible computers.<sup>166</sup> The law applies that pressure to adopt filtering, not directly through threat of criminal or civil penalties, but indirectly by declaring that any school or library that refuses to apply filters is ineligible to

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164. Children's Internet Protection Act, 47 U.S.C.A. § 254(h) (Supp. 2001); 20 U.S.C.A. § 9134 (Supp. 2001).

165. *E-Rate and Filtering: A Review of the Children's Internet Protection Act: Hearing before the House Subcommittee on Telecommunications and the Internet of the Committee on Energy and Commerce*, 107th Cong. 8 (2001) (statement of Rep. W. J. "Billy" Tauzin, Chairman) ("[CIPA] is designed as a condition on receiving federal funds. This is unlike past attempts by Congress to address the availability of such material, which enacted straight bans or imposed access requirements.").

166. For its proponents, the supposed constitutional cleverness of CIPA's approach to filtering is that it does not actually mandate the application of this technology at every school and library; rather, it makes federal universal service funding contingent upon a school or library's certification that they are filtering their Internet accessible computers. *See, e.g.*, Rep. Charles W. Pickering, *TalkBack Live: Filtering the Internet for Children: Censorship or Protection* (CNN television broadcast, Oct. 20, 2000) (transcript available at <http://www.cnn.com/TRANSCRIPTS/0010/20/tl.00.html>)

[W]e need to remember this is not a mandate: It is only saying that if [schools and libraries] accept federal funds, [they] should use these technologies as a tool to protect our children. If they decide not to use these funds, then they do not have to—to use the filter technologies or block it out.

*Id.*

receive critically needed federal technology funding despite being eligible for these funds in all other respects.<sup>167</sup> Rather than being compelled by statute to filter, these institutions are given the choice, albeit a Hobson's choice, of installing filters or continuing to provide unfiltered access to the Internet, realizing all too well that, under CIPA, they will lose their eligibility for federal technology funds if they choose not to comply with the statute's filtering mandate.<sup>168</sup>

Hardly an instant success, the legislation languished for two years in Congress due to its sponsors' inability to gain consensus support in both chambers.<sup>169</sup> Despite failing to win passage on its own merits, CIPA was finally enacted into law when its supporters were able to include it as an eleventh-hour rider to the Consolidated Appropriations Act of 2001.<sup>170</sup> Although President Clinton expressed public misgivings at the wisdom (and constitutionality) of this law, he was left with little alternative but to accept CIPA in order to avoid a politically damaging year-end battle over the federal budget.<sup>171</sup>

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167. See Lowell A. Reid, Jr., *Symposium: Napster & Beyond: Protecting Copyright in the Digital Millennium: Tending the Virtual Village Green: The Internet, the First Amendment, and the Federal Judge*, 20 TEMP. ENV'T'L. L. & TECH. J. 1, 5 (2001) (noting that, unlike the CDA and COPA, CIPA "has no criminal sanctions or civil fines; instead it imposes the sanction of withholding federal funding from violators.").

168. "CIPA requires libraries that participate in the LSTA and E-rate programs to certify that they are using software filters on their computers to protect against visual depictions that are obscene, child pornography, or in the case of minors, harmful to minors." *Am. Library Ass'n, Inc. v. United States*, 201 F. Supp. 2d at 412.

169. Senator John McCain, CIPA's first and biggest congressional booster, introduced versions of this legislation, beginning with S. 1619, 105th Cong. (1998) and S. 97, 106th Cong. (1999). Although both bills received strong Senate support, neither gained support of both chambers, and the entire effort garnered its share of critical press coverage. See, e.g., Christopher Hunter, *Don't Let McCain Censor the Net*, SALON.COM, Oct. 25, 2000, at [http://dir.salon.com/tech/log/2000/10/25/filter\\_legislation/index.html](http://dir.salon.com/tech/log/2000/10/25/filter_legislation/index.html) (taking the view that CIPA's requirement that public libraries filter Internet content is unnecessary and unconstitutional); Rico Gagliano, *Public E-Enemy No. 1?*, LA WEEKLY, Feb. 25, 2000, at 12.

170. Pub. L. No. 106-554, §§ 1701-41, 114 Stat. 2763 (2000).

171. At the December 22, 2000, signing of the budget bill containing CIPA, President Clinton stated that he was "very disappointed" that Congress had chosen to invoke a filtering mandate, stating that he preferred to leave it up to localities to develop policies to govern acceptable use of the Internet that meet their own diverse needs in schools and libraries. Further, he expressed skepticism that software filters could effectively, and constitutionally, be applied: "[B]ecause current technology may not be able to differentiate between harmful and non-harmful expression with precision, [CIPA's] provisions may have the effect of limiting access to valuable information in a manner that offends our tradition of freedom of speech." See Gordon Flagg, *Congress Mandates Internet Filters; Resistance on Court Expected on Freedom of Speech Issues*, AM. LIBRARIES, Feb. 1, 2001, at 14.

### B. CIPA Specifics

In making schools and public libraries its battleground for a fight against smut on the Internet, Congress placed significant limitations on a number of meritorious federal programs it had created less than a decade earlier—programs specifically implemented to help these same institutions gain access to the Internet.<sup>172</sup> All of the major technology funding programs directly affected by CIPA were established to ensure widespread exposure to the educational benefits of the Internet, and one was created specifically to address the disparity of Internet access between wealthy and poor school districts.

Specifically, CIPA amends three federal statutes that provide funding sources upon which many schools and libraries depend to meet various costs associated with gaining access to the Internet. Simply put, CIPA applies to any school or library that receives “universal service” (better known as “E-rate”) discounts for Internet access, Internet service, and internal network wiring and connections,<sup>173</sup> or that receives funds under either the Elementary and Secondary Education Act (ESEA)<sup>174</sup> or the Library Services and Technology Act (LSTA)<sup>175</sup> to pay for Internet access or to purchase computers. Under CIPA, schools and libraries are ineligible to receive funds from any of these programs unless they certify that on *every* computer capable of accessing the Internet they have adopted, and are enforcing, a “technology protection measure” designed to prevent those computers from being used to access visual depictions that are obscene or are child pornography.<sup>176</sup>

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172. CIPA’s supporters claim that the connection between federal programs supporting school and library Internet access and the government’s desire to keep harmful online materials out of the hands of minors is natural and justifiable. As public policy, however, cynics argue that CIPA is a thinly veiled attempt to compromise the results of a hard-fought and controversial congressional battle that had led to the commitment of public funds in 1996 to encourage universal access to the Internet. Never the darling of CIPA’s conservative sponsors, the E-rate program is caught in Congress’s crosshairs and is being smothered under a bureaucratic blanket completely unanticipated by Congress when it enacted the E-rate program and the other funding programs in question. *See, e.g., THE E-RATE IN AMERICA: A TALE OF FOUR CITIES* 7-15 (Benton Foundation, Andy Carvin ed., 2000).

173. *See* CIPA § 1721(a) & (b) (both amending the Communications Act of 1934, 47 U.S.C. § 254(h)).

174. Title III of the Elementary and Secondary Education Act of 1965, *see* CIPA § 1711 (amending Title 20 to add § 3601).

175. *See* CIPA § 1712 (amending the Museum and Library Services Act, 20 U.S.C. § 9134).

176. 47 U.S.C. §§ 254(h)(5)(C), 6(C) (establishing E-rate recipient certification requirements with respect to any adult users’ access to obscenity and child pornography); 20 U.S.C. § 6777(a)(2)(A) (enumerating ESEA recipient certification requirements with respect to any users’ access to obscenity and child pornography); 20 U.S.C. § 9134(f)(1)(B) (listing LSTA recipient certification requirements with respect to any users’ access to obscenity and child pornography). Under § 254(h)(7)(E), the term



Not satisfied targeting just those categories of speech that have no constitutional protection and are clearly illegal for use by anyone,<sup>177</sup> Congress stretched CIPA's reach into far more tenuous First Amendment grounds, requiring schools and libraries to certify that any technology protection measure installed also be capable of blocking or filtering materials that are "harmful to minors"<sup>178</sup> when computers are being used by individuals under the age of seventeen.<sup>179</sup> In addition, those schools and libraries seeking E-rate funds face the additional requirement of adopting what CIPA calls an "Internet safety policy."<sup>180</sup> By the terms of the Act, this policy must address a number of specific concerns related to minors' use of the Internet, including online access to "inappropriate matter,"<sup>181</sup> the safety and security of minors online; unauthorized access, hacking, and other unlawful activities by minors; unauthorized disclosure, use and dissemination of minors' personal identifying information; and the

"obscenity" is defined as having the meaning given such term in 18 U.S.C. § 1460; under § 254(h)(7)(F), the term "child pornography" is defined as having the meaning given such term in 18 U.S.C. § 2256.

177. *See, e.g.,* Roth v. United States, 354 U.S. 476, 485, *reh'g denied*, 355 U.S. 852 (1957) (holding that "obscenity is not within the area of constitutionally protected speech").

178. "Harmful to minors" is defined identically in all three statutes as follows:

The term "harmful to minors" means any picture, image, graphic image file, or visual depiction that—

(i) taken as a whole and with respect to minors, appeal 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.

47 U.S.C. § 254(h)(7)(G); 20 U.S.C. § 6777(e)(6); 20 U.S.C. § 9134(f)(7)(B). Essentially, this reduced standard of obscenity is patterned after the "obscene for minors" standards endorsed by the Court in *Ginsberg v. New York*, 390 U.S. 629 (1968), and *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

179. *See* 47 U.S.C. § 254(h)(5)(B), 6(B) (listing E-rate recipient certification requirements with respect to Internet access by minors); 20 U.S.C. § 6777(a)(1)(A) (enumerating ESEA recipient certification requirements with respect to Internet access by minors); 20 U.S.C. § 9134(f)(1)(A) (establishing LSTA recipient certification requirements with respect to Internet access by minors). A "minor," as defined by CIPA, is "any individual who has not attained the age of 17 years." 47 U.S.C. § 254(h)(7)(D).

180. 47 U.S.C. § 254(l). *See also* Am. Library Ass'n, Inc. v. United States, 201 F. Supp. 2d 401, 422 (E.D. Pa. 2002) (finding that "[a]pproximately 95% of libraries with public Internet access have some form of 'acceptable use' policy or 'Internet use' policy governing patrons' use of the Internet. These policies set forth the conditions under which patrons are permitted to access and use the library's Internet resources").

181. CIPA leaves the definition of "inappropriate matter" to local communities, specifically, to a "school board, local educational agency, library, or other authority responsible for making the determination." 47 U.S.C. § 254(l)(2). The determinations made by these local agencies are not reviewable by the federal government. *Id.*

identification and use of measures designed to keep minors from accessing harmful materials.<sup>182</sup> At least one public hearing, following adequate public notice, must be held by libraries and schools covered under this section to review their proposed Internet safety policies.<sup>183</sup>

Although CIPA amends all three affected technology funding programs to allow technology protection measures to be disabled by authorized authorities<sup>184</sup> “to enable access [for] bona fide research or other lawful purposes,”<sup>185</sup> institutions receiving E-rate funds are only allowed to do so for adult computer users.<sup>186</sup> Under no circumstances is a school or library receiving E-rate funds allowed to provide unfiltered Internet access for minors.<sup>187</sup> The statute leaves unexplained why the same requirement is not applied to ESEA and LSTA fund recipient schools and libraries, which are allowed to disable their technology protection measures for bona fide research and other lawful purposes without regard to the age of the user.<sup>188</sup>

### C. Government Rationale for CIPA

In CIPA, Congress believes that it has finally found an approach to regulate Internet content that can survive constitutional scrutiny. Indeed, unlike the CDA and COPA, CIPA does not directly proscribe speech of any kind. Nor does CIPA attempt to enforce criminal or even civil penalties for its violation as the flawed federal statutes that preceded it had

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182. *Id.* § 254(l)(1)(A).

183. *Id.* § 254(l)(B).

184. All three funding statutes affected by CIPA define a person who is allowed to disable technology protection measures as “an administrator, supervisor, or other person authorized by the certifying authority.” See 47 U.S.C. § 254(h)(5)(D) for schools and 47 U.S.C. § 254(h)(6)(D) for libraries receiving E-rate discounts; 20 U.S.C. § 6777(c) for schools receiving ESEA funds; and 20 U.S.C. § 9134 (f)(3) for libraries receiving LSTA funds.

185. None of the affected statutes’ disabling provisions define the terms “bona fide research” or “other lawful purpose.” See 47 U.S.C. § 254(h)(5)(D) for schools and 47 U.S.C. § 254(h)(6)(D) for libraries receiving E-rate discounts; 20 U.S.C. § 6777(c) for schools receiving ESEA funds; and, 20 U.S.C. § 9134 (f)(3) for libraries receiving LSTA funds. This lack of definition was a significant factor in *American Library Ass’n, Inc. v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2002). See discussion *infra*, Part V.C.3.

186. 47 U.S.C. §§ 254(h)(5)(D), (6)(D).

187. *Id.* Schools and libraries receiving E-rate funds cannot provide unfiltered access even to minors whose parents have specifically given them permission to gain such access. The court in *American Library Ass’n, Inc. v. United States*, 201 U.S. 401 noted that, unlike the variable obscenity law reviewed in *Ginsberg v. New York*, 390 U.S. 629 (1968), CIPA does not allow parents the authority to permit their children to access materials that would be otherwise proscribed by the statute. The court also noted that this omission from CIPA was shared by the Communications Decency Act, which the Supreme Court struck down as unconstitutional in *Reno II*. See *Am. Library Ass’n, Inc.*, 201 F. Supp. 2d at 482.

188. See 20 U.S.C. § 6777(c) and 20 U.S.C. § 9134(f)(3) for disabling technology protection measures for ESEA and LSTA recipients, respectively.

done. The law's proponents admit that they seek to impose conditions on federal funding in order to induce fund recipients to assist in governmental efforts to shield minors from online access to materials that they believe to be harmful.<sup>189</sup> Proponents describe this as an uncontroversial exercise of Congress's prerogative to distribute federal largess in any way that it feels is rationally related to the general welfare.<sup>190</sup> No unconstitutional impact is made on speech, the argument goes, because CIPA does not require schools and libraries to apply Internet filters to its computers but merely conditions the receipt of federal funds on the acceptance of that condition.<sup>191</sup> Any school or library that finds this condition coercive is free to reject it, understanding of course that this decision will come at a cost.<sup>192</sup> Even after refusing to filter and losing the funds made contingent by CIPA, schools and libraries need only change their minds and apply Internet filters to become eligible, again, to apply for those funds.<sup>193</sup> Using this approach, the government argues that CIPA's specific purpose is merely an exercise of its administrative prerogative—in this case, assuring that federal funds supplied for library and school technology are not used to facilitate access to online materials that have no connection to those institutions' educational missions.<sup>194</sup> It is clear, however, that as long as

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189. See, e.g., 146 CONG. REC. S5838 (daily ed. June 27, 2000) (statement of Sen. John McCain) ("When a school or library accepts federal dollars through the Universal Service fund, they become a partner with the federal government in pursuing the compelling interest of protecting children.").

190. Typical is the view of CIPA proponent Rep. Chip Pickering who, in a prepared statement to a House subcommittee reviewing the E-rate and filtering, concluded that:

CIPA is constitutional because the conditions imposed on public libraries for receiving federal funds for Internet access are 'reasonably calculated to promote the general welfare' and are 'related to a national concern.' Congress has the authority and responsibility to ensure that federal funds are not used by government agencies (public schools and libraries) to provide access to pornography that is illegal under federal law . . . .

See *E-Rate and Filtering: A Review of the Children's Internet Protection Act: Hearing before the House Subcommittee on Telecommunications and the Internet of the Committee on Energy and Commerce*, 107th Cong. 6 (2001) (prepared statement of Rep. Chip Pickering).

191. See discussion of use of conditional subsidies, *infra* Part IV.

192. 47 U.S.C. § 254(h)(5)(F)(I)-(ii).

193. 47 U.S.C. § 254(h) states in pertinent part:

A school that has failed to comply with a certification . . . may remedy the failure by ensuring the use of its computers in accordance with such certification. Upon submittal . . . of such remedy, the school shall be eligible for services at discount rates . . . .

47 U.S.C. § 254(h)(5)(F)(iii)(II). 47 U.S.C. § 254(h)(6)(F)(iii)(II) reads identically but is applied to libraries.

194. CIPA's most zealous legislative sponsors seem oblivious to the possibility that withholding federal technology funds from schools and libraries that refuse to filter Internet content could cause constitutional problems. See, e.g., *E-Rate and Filtering: A Review of the Children's Internet Protection Act: Hearing Before the Subcommittee on Telecommunications and the Internet of the Committee on Energy and Commerce*, 107th Cong. 6 (2001) (statement of Rep. Charles W. Pickering), available at <http://energycommerce.house.gov/107/action/107-33.pdf>.

the federal funds subject to sequester are sufficiently important to libraries and schools to ensure that most will be compelled to accede to CIPA's filtering prerequisite, Congress gains, as a secondary effect of its conditional funding decision, much of the broad Internet content control that it had tried and failed to achieve with the passage of the CDA and COPA.

#### IV. CONGRESS'S SPENDING POWER AS A REGULATORY TOOL

##### *A. Restrictions on the Spending Power*

In order to avoid the strict First Amendment scrutiny that proved fatal for the CDA and has rendered COPA unenforceable, the government must prevail in characterizing CIPA as a permissible exercise of its spending power rather than a direct regulation of speech. However, this characterization relies on a highly selective application of legal principles developed over the last seventy years that appear to give Congress virtual *carte blanche* to control the activities of federal fund recipients. Government confidence that spending power decisions will receive judicial deference may be unfounded, particularly when funding conditions compromise First Amendment rights.

Congress has at its disposal billions of dollars each year to fund various federal and state programs that it adjudges to be in the interest of the "general welfare."<sup>195</sup> It is safe to say that almost all of these funds come with some strings attached. Recipients typically have no constitutional claim to these funds; rather, the Constitution's Spending Clause<sup>196</sup> provides Congress with largely unfettered discretion, to which the courts

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[T]his [CIPA] is a common-sense mainstream constitutional way to protect our children from child predators, from obscenity, from child pornography, that which is already illegal. We believe that the language and the legislation was very well crafted, taking lessons from recent communications efforts to restrict this type of material, but that was unsuccessfully ruled against—or it was ruled that it was unconstitutional in the courts. We believe that we avoided those pitfalls and those problems by the way that we crafted the language. This is an issue of funding, and it is an issue of child safety. And just as we give incentives to have alcohol blood limits or seat belt restraints for safety of the public, we believe for the safety of our children as well as preventing that which is illegal, child pornography and obscenity, and having access through our schools and through our libraries with federal subsidies. And we believe that this is a very mainstream, common-sense approach, and that the agenda of the other side who opposes is out of the mainstream. It is extreme. It would put our children at risk.

*Id.*

195. U.S. CONST. art. I, § 8; *United States v. Butler*, 297 U.S. 1, 65 (1936).

196. U.S. CONST. art. I, § 8 ("The Congress shall have Power to . . . provide for the common Defence and general Welfare of the United States . . .").

typically defer, to define how public funds can best be used to promote the general welfare.<sup>197</sup> Recognizing that this judicial deference to federal spending decisions can provide a path of least resistance in troublesome regulatory matters, Congress, during the last half of the twentieth century, increasingly relied upon its power to place conditions upon the distribution of federal largess.<sup>198</sup> In fact, regulation through its spending power has become one of the primary tools Congress uses to control the activities of prospective funding recipients in ways that conform to its vision of contemporary federal policy because this frequently avoids many of the troublesome constitutional barriers that would make such control problematic, if not impossible, if they were attempted as direct statutory mandates.<sup>199</sup>

In describing CIPA as a routine use of broad spending powers granted to Congress under the Spending Clause, the government relied upon a series of Supreme Court decisions begun in the 1920s and developed during the 1930s that appear to provide ample justification for the view that Congress's ability to place conditions on the distribution of federal

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197. That judgment has specifically been ruled to be a matter of congressional, not judicial, discretion. *Helvering v. Davis*, 301 U.S. 619, 640 (1937). See also Erwin Chemerinsky, *Protecting the Spending Power*, 4 CHAP. L. REV. 89, 90-92 (2001) ("The Court [has] held that Congress has broad power to tax and spend for the general welfare so long as it does not violate other constitutional provisions."); Georges Nahitchevansky, Note, *Free Speech and Government Funding: Does the Government Have to Fund What it Doesn't Like?* 56 BROOK. L. REV. 213, 219 (1990) ("Because there is no entitlement to public funds, the government is generally free to determine how it should allocate its subsidies.").

198. See Brett D. Proctor, Note, *Using the Spending Power to Circumvent City of Boerne v. Flores: Why the Court Should Require Constitutional Consistency in its Unconstitutional Conditions Analysis*, 75 N.Y.U. L. REV. 469, 469 (2000) ("Congress's power to condition its discretionary allocations of funds is remarkably broad . . . . Because of this historical trend, the spending power has been invoked repeatedly in recent years as the clearest, and perhaps only, tool with which Congress might circumvent the Supreme Court's apparent willingness to enforce federalism-based constitutional norms.").

199. After more than fifty years of increasingly broad interpretations of the congressional spending power, the 1990s witnessed what some commentators have called a "new federalism" in which courts signaled a willingness to alter or abandon the *Butler* and *Dole* line of wide-open deference to congressional spending decisions. See, e.g., *United States v. Lopez*, 514 U.S. 549, 552 (1995) (quoting James Madison, who said that "[t]he powers delegated by the . . . Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."). See also Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1920 (1995) ("So long as the Commerce Clause is not interpreted to grant Congress plenary power to regulate the states directly, the Tenth Amendment's reservation to the states of all powers not delegated to the federal government has content and significance."). But see Chemerinsky, *supra* note 197, at 96-104 (arguing against using the Tenth Amendment to limit congressional spending power).

funds is virtually unlimited and immune from judicial challenge.<sup>200</sup> The Supreme Court has repeatedly recognized that the Spending Clause gives Congress an independent grant of legislative authority distinct from that which is specifically enumerated in Article I, Section 8 of the Constitution.<sup>201</sup> The spending power has been interpreted to be an independent legislative authority<sup>202</sup> that allows Congress to “further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.”<sup>203</sup>

Despite the seemingly unlimited reach of the power afforded to Congress in making spending decisions, a number of purported limitations on this power have emerged from the body of Supreme Court opinions interpreting its use. The contemporary opinion that most comprehensively summarizes the Court’s modern view of the parameters of Congress’s spending power is *South Dakota v. Dole*.<sup>204</sup> Despite *Dole*’s establishment of a set of possible limitations on Congress’s spending power, these limitations, as applied by the courts over the last sixty-five years, have proven to be more theoretical than real.

In *Dole*, South Dakota challenged a federal statute authorizing the Secretary of Transportation to withhold highway funds from states that refused to raise their minimum drinking age to twenty-one, ostensibly to

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200. See Baker, *supra* note 199, at 1924-31 (reviewing the line of opinions between 1923 and 1993 in which the Supreme Court uniformly deferred to Congress’s authority and discretion to place conditions on the distribution of federal funds).

201. See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (citing *United States v. Butler*, 297 U.S. 1, 65).

202. The first Supreme Court case to state this proposition, *United States v. Butler*, 297 U.S. 1 (1936), has been cited regularly in support of the concept that “the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.” *Id.* at 66. See also *Helvering v. Davis*, 301 U.S. 619, 640-41 (1937) (holding that Congress, and not the courts, has discretion to determine what constitutes the “general welfare”); *Dole*, 483 U.S. at 207 (reaffirming that “objectives not thought to be within Article I’s ‘enumerated legislative fields’ may nevertheless be attained through the use of the spending power and the conditional grant of federal funds”) (citing *Butler*, 297 U.S. at 65-66).

203. *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980). See also *Lau v. Nichols*, 414 U.S. 563, 569 (1974) (“The Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed.”); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958) (stating that the constitutionality of the federal government imposing “reasonable conditions on the use of federal funds, federal property, and federal privileges” is “beyond challenge”); *Oklahoma v. Civil Serv. Comm’n*, 330 U.S. 127, 144 (1947) (“The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual.”); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 612 (1937) (finding no encroachment on state authority when conditions are placed on federal aid “which the state, without surrendering any of its powers may accept or not as it chooses”).

204. 483 U.S. 203 (1987).

promote Congress's interest in "safe interstate travel."<sup>205</sup> Although the Court upheld the statute as a "valid use of the spending power,"<sup>206</sup> it made clear that Congress's spending power is "not unlimited."<sup>207</sup> The Court identified four restrictions on use of the spending power.<sup>208</sup>

The first general restriction comes from the language of the Spending Clause itself, which states that Congress may use its spending power to provide for "the general welfare" of the United States.<sup>209</sup> In considering the definition of that phrase, the Court has chosen to interpret it broadly,<sup>210</sup> deferring almost entirely to Congress's judgment and discretion in determining when a particular spending decision appropriately supports the "general welfare."<sup>211</sup> The Court has said that it is not proper for the judiciary to substitute its judgment for that of Congress in making this determination unless the choice made is "clearly wrong, a display of arbitrary power, [or] not an exercise of judgment."<sup>212</sup> Although the cases do not define these terms with specificity, the Court has stated that the burden rests with the party claiming that Congress has abused its spending power to show that "by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress."<sup>213</sup> In *Dole*, the Court ruled that Congress had surmounted the "general welfare" restriction simply by declaring drinking drivers under the age of twenty-one to be a "dangerous situation" in need of a "national solution."<sup>214</sup>

The second general restriction discussed in *Dole* requires that, when

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205. *Id.* at 208.

206. *Id.* at 212.

207. *Id.* at 207 (citing *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 & n.13 (1981)).

208. *Id.* at 207-08.

209. *Id.* at 207 (quoting *Helvering v. Davis*, 301 U.S. 619, 640-41 (1937)).

210. *Butler*, 297 U.S. at 65-66. In *Butler*, the Court analyzed the competing interpretations ascribed to the phrase "to provide for the general welfare of the United States" by founding fathers James Madison and Alexander Hamilton. As between Madison's view that the phrase was confined to the powers directly granted to Congress in Article I and Hamilton's view that the clause conferred upon Congress powers independent of those specifically enumerated, the *Butler* court held that Hamilton's is the "true construction" of the phrase. *Id.* at 66.

211. *Dole*, 483 U.S. at 207 (citing *Helvering*, 301 U.S. at 640-41).

212. *Helvering*, 301 U.S. at 640.

213. *Id.* at 641 (quoting *Butler*, 297 U.S. at 67).

214. *Dole*, 483 U.S. at 208. The Court took recognition of a Presidential Commission report of which, ostensibly, Congress was aware when passing the legislation in question; the report supports the view that the lack of uniform drinking ages among the states creates an incentive to drink and drive in states where drinking age is lower. *Id.* at 209. Regardless of one's intuitive agreement or disagreement with that general finding, it can hardly be said that the Court required Congress to provide anything beyond the barest justification that the purpose of the conditional funding statute was within the nation's general welfare.

Congress places conditions on funding, it must do so “unambiguously” so that recipients may “exercise their choice knowingly, cognizant of the consequences of their participation.”<sup>215</sup> This is because legislation invoking Congress’s spending power is “much in the nature of a contract”<sup>216</sup> and is only legitimate when the recipient “voluntarily and knowingly accepts the terms of the ‘contract.’”<sup>217</sup> This requirement was met in *Dole*, where states that permitted those under age twenty-one to drink could not receive federal highway funds. The Court found that “[t]he conditions upon which States receive the funds . . . could not be more clearly stated by Congress.”<sup>218</sup>

*Dole*’s third restriction on funding conditions requires that the restrictions relate “to the federal interest in particular national projects or programs.”<sup>219</sup> Because South Dakota did not challenge Congress’s argument that the conditions it had placed on highway funds were directly related to concerns about safe interstate travel, the Court found no reason to declare that these conditions had run afoul of the germaneness restriction.<sup>220</sup>

As its fourth general restriction, the *Dole* Court observed that “other constitutional provisions may provide an independent bar to the conditional grant of federal funds.”<sup>221</sup> South Dakota argued that this restriction should apply on the theory that the Twenty-first Amendment prohibited a direct mandate of a national minimum drinking age and that any use by Congress of its spending power to achieve that end indirectly would be equally barred.<sup>222</sup> The Court stated that this restriction in no way

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215. *Id.* at 207 (quoting *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

216. *Pennhurst*, 451 U.S. at 17.

217. *Id.* (“There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it.”).

218. *Dole*, 483 U.S. at 208.

219. *Id.* at 207-08 (citing *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)).

220. *Id.* at 208. *But see* *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (holding that “the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.”). In *Dolan*, the Court required an “essential nexus” between protected speech and the imposed restriction. *Id.* at 386. *See also* Angel D. Mitchell, Comment, *Conditional Federal Funding to the States: The New Federalism Demands a Close Examination for Unconstitutional Conditions*, 48 U. KAN. L. REV. 161, 176-77 (1999) (observing that since the late 1980s, the Court has “indulged in a more meaningful germaneness inquiry for unconstitutional conditions under the Takings Clause”).

221. *Dole*, 483 U.S. at 208 (citing *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 269-70 (1985); *Buckley v. Valeo*, 424 U.S. 1, 91 (1976) (per curiam); *King v. Smith*, 392 U.S. 309, 333 n.34 (1968)).

222. *Id.* at 209-10.



limited the general proposition that Congress can use its spending power to achieve policy objectives that it could not achieve through direct statutory mandates; rather, it simply bars Congress from using that power “to induce the States to engage in activities that would themselves be unconstitutional.”<sup>223</sup> The Court ruled that although the Twenty-first Amendment prohibits Congress from mandating a national minimum drinking age, there is no constitutional bar against using “blandishments offered by Congress”<sup>224</sup> to induce a state to raise its own minimum drinking age to twenty-one.<sup>225</sup>

*Dole* also recognized that excessive coercion could affect the permissibility of federal spending conditions.<sup>226</sup> For as long as the Court has reviewed challenges of the congressional spending power, it has recognized the potential for federal economic pressure on both the states and individual funding recipients that “pass[es] the point at which ‘pressure turns into compulsion.’”<sup>227</sup> In *United States v. Butler*, the Court’s earliest examination of this subject, it spoke of “[t]he power to confer or withhold unlimited benefits [as] the power to coerce or destroy”<sup>228</sup> and suggested that economic pressure can become so extreme that the supposed choice offered to funding recipients is, in fact, illusory.<sup>229</sup> In the case of conditional funding offers to the states, the Court has suggested that the line between permissible pressure and impermissible coercion is crossed where conditions offered effectively destroy or impair state autonomy to decide between accepting or declining.<sup>230</sup>

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223. *Id.* at 210. As examples of spending conditions that would be barred under this restriction, the Court lists conditional funding offers that require states to engage in “invidiously discriminatory” actions or the “infliction of cruel and unusual punishment.” *Id.*

224. *Id.* at 211.

225. *Id.*

226. *Id.*

227. *Id.* (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)). Although many courts pay “lip service” to the theory that excessive coercion could limit the use of Congress’s spending power, they have been unwilling to apply this theory in practice. See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1428-42 (1989) (reviewing the “coercion debate” in cases).

228. 297 U.S. 1, 71 (1936).

229. *Id.*

230. *Steward Mach. Co. v. Davis*, 301 U.S. 548, 586 (1937). In both *Butler* and *New York v. United States*, 505 U.S. 144 (1992), the Court found that the federal government’s conditional offers encroached on powers reserved for the states in violation of the Tenth Amendment. Each Court, however, arrived at that result from different perspectives. In *Butler*, the Court held that the government’s attempt to regulate local agricultural production simply was not within any express or implied power of the federal government. In *New York* a federal condition requiring the state to “take title” to, and responsibility for, damages from low-level radioactive waste ran afoul of the Tenth Amendment, as well, not because the federal government had encroached on reserved powers of the states, but because the funding “options” presented “[a] choice between two constitutionally coercive

### B. Conditional Funding in the First Amendment Context

Although the courts have displayed an almost pristine record of deference to Congress concerning the conditions placed on recipients of federal funds in most contexts,<sup>231</sup> the judiciary has been far less reluctant to examine critically congressional attempts to implement funding conditions affecting First Amendment rights. Freedom of speech is one of our most cherished fundamental rights, and the First Amendment is designed to ensure that no laws are made that will directly interfere with that right. Nevertheless, the First Amendment itself places no affirmative obligation on the federal government to fund speech. To say that the government may not directly impinge on a citizen's *right* of free speech is not to say that the state has the obligation to *fund* the exercise of speech-related activity.<sup>232</sup> Certainly, "[r]efusing to fund speech . . . is not identical to prohibiting it."<sup>233</sup> As discussed in the previous section, Congress's distribution of federal funds is discretionary; no one is entitled, by right, to receive a government subsidy to facilitate her First Amendment expressions.<sup>234</sup>

Frequently, however, Congress does subsidize speech that either conveys the government's own message or facilitates private, nongovernmental expression. While, as with other decisions concerning federal spending, Congress has broad discretion to decide what speech it will subsidize and under what conditions, the fundamental nature of First Amendment rights and the possibility that conditional funding discretion

regulatory techniques," each beyond the authority of Congress. 505 U.S. at 176. The Court held that by presenting the state with no alternative but to follow one of two federal regulatory paths, "the Act commandeered the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." 505 U.S. at 176 (citing *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)). *But see Dole*, 483 U.S. at 210 (holding that the Tenth Amendment's limitation on congressional regulation of state affairs does not concomitantly limit the range of conditions legitimately placed on federal grants).

231. See Rebecca E. Zietlow, *Federalism's Paradox: The Spending Power and Waiver of Sovereign Immunity*, 37 WAKE FOREST L. REV. 141, 182 (2002) (questioning why, in the light of *Dole*, the courts have been so reluctant to apply these restrictions "to [limit] Congress's ability to effect policy . . ."). The author goes on to state that judicial deference for federal spending conditions has been so complete that the courts impose no "meaningful limitations" on Congress's spending power. *Id.*

232. The government is under no obligation to subsidize speech rights. See *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 546 (1983) (citing *Cammarano v. United States*, 358 U.S. 498, 513 (1959) (holding that Congress is not obligated to subsidize lobbying)).

233. David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 681 (1992).

234. See, e.g., *Regan*, 461 U.S. at 546 ("We again reject the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.'") (quoting *Cammarano v. United States*, 358 U.S. 498, 515 (1959)).

could be abused to effect government viewpoint censorship on expression has led the Supreme Court to consider the parameters of Congress's spending power when funding of speech is involved.<sup>235</sup> Because the line between legitimate government discretion and impermissible viewpoint restriction is not easily discerned,<sup>236</sup> Supreme Court consideration of particular funding challenges has been contradictory and confused.

### *1. Constitutional Parameters on Conditional Funding of Speech*

Between June 1958 and February 1959, the Supreme Court embarked on two lines of decisions that have since been applied to challenges of governmental conditions on funding of speech and other fundamental rights. The first line of cases, initiated with the Court's holding in *Speiser v. Randall*,<sup>237</sup> applies the venerable doctrine of "unconstitutional conditions" to strike down funding conditions that require beneficiaries to forego "preferred constitutional rights"<sup>238</sup> with which the government could not directly interfere. The second line of cases, begun just eight months after *Speiser* with the Court's opinion in *Cammarano v. United States*,<sup>239</sup> has been applied to uphold funding conditions in which the Court supported the government's discretion to restrict activities, even if constitutionally protected, that it has chosen not to subsidize.

Because these doctrines will likely be considered in a future Supreme Court review of CIPA's constitutionality, a brief analysis of the Court's development of each is essential to gain some perspective on the philosophical conflicts and doctrinal complexity that the Court will face.<sup>240</sup> Inherent in this analysis is a tension between the deference typically

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235. "[T]he more narrow the range of speech that the government chooses to subsidize (whether directly, through government grants or other funding, or indirectly, through the creation of a public forum) the more deference the First Amendment accords the government in drawing content-based distinctions." *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401, 458. Conversely, the Court has said "[t]he more broadly the government facilitates private speech, however, the less deference the First Amendment accords to the government's content-based restrictions on the speech that it facilitates." *Id.* at 460.

236. Nahitchevansky, *supra* note 197, at 224.

237. 357 U.S. 513 (1958).

238. Sullivan, *supra* note 227.

Not all constitutional rights are implicated in unconstitutional conditions cases. By its very nature, the doctrine serves to protect only those rights that depend on some sort of exercise of autonomous choice by the rightholder, such as individual rights to speech, exercise of religion or privacy, corporate rights to do interstate business or invoke federal diversity jurisdiction, or state rights to self-government.

*Id.* at 1426.

239. 358 U.S. 498 (1959).

240. See generally Baker, *supra* note 199; Cole, *supra* note 233; Sullivan, *supra* note 227.

afforded Congress when making routine benefit allocations and the strict constitutional scrutiny that the courts have applied when Congress attaches conditions to those benefits that impinge on fundamental constitutional rights.<sup>241</sup> Whereas the Court has traditionally reviewed government spending decisions with great deference, statutes that unconstitutionally condition the receipt of federal benefits on the relinquishment of a fundamental right are typically subjected to strict scrutiny.

In *Speiser*, the Court struck down a California constitutional provision requiring that World War II veterans submit a loyalty oath as a condition of eligibility for a state property tax exemption specifically limited to veterans.<sup>242</sup> In striking down this law, the Court stated that the denial of a benefit based on claimants' refusal to surrender their right of free speech effectively "penalize[s] them for such speech"<sup>243</sup> and equated the deterrent effect of such a penalty to be "the same as if the State were to fine them for this speech."<sup>244</sup> The Court rejected California's contention that the tax exemption in question was merely a "privilege" or a "bounty" that it could freely deny without First Amendment implications,<sup>245</sup> describing the state's primary motivation to be the impermissible suppression of unpopular or "dangerous" ideas.<sup>246</sup> Although the state had no obligation to confer a tax exemption on veterans at all, the Court concluded that, once the exemption was established, the state could not coercively use its spending power to effect speech restrictions that "if directly attempted would be unconstitutional."<sup>247</sup>

More than a decade after its decision in *Speiser*, the Court virtually repeated that holding in *Perry v. Sindermann*.<sup>248</sup> In *Perry*, the Court held that a state junior college teacher could not be denied renewal of his employment contract merely because he had publicly criticized the school's administration.<sup>249</sup> Again, as in *Speiser*, the Court held that while no one has a right to receive a government benefit, it is not permissible for the government to deny such benefits in a way that "infringes his constitutionally protected interests—especially, his interest in freedom of

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241. Sullivan, *supra* note 227, at 1422.

242. *Speiser*, 357 U.S. at 528-29.

243. *Id.* at 518.

244. *Id.*

245. *Id.*

246. *Id.* at 519.

247. *Id.* at 518.

248. 408 U.S. 593 (1972).

249. *Id.* at 598.

speech.”<sup>250</sup> To do so would be to “penalize[] and inhibit[]”<sup>251</sup> a fundamental right and would “produce a result which [the government] could not command directly.”<sup>252</sup>

Taken together, *Speiser* and *Perry* are textbook examples of the unconstitutional conditions doctrine in its purest form. Under this doctrine, originated in the early 1900s in *Lochner v. New York*<sup>253</sup> and frequently, if inconsistently, applied by courts and First Amendment scholars since then, the doctrine’s basic premise is that the “government may not condition benefits on the forfeiture of constitutional rights.”<sup>254</sup> Used at its inception to protect economic liberties of “foreign corporations and private truckers,”<sup>255</sup> the Supreme Court gradually shifted the doctrine’s focus to the protection of personal liberties and has applied it many times to invalidate governmental restrictions that made receipt of benefits conditional upon surrender of First Amendment rights.<sup>256</sup> But, as a doctrine built on such subjective concepts as coercion and penalty, it has been inconsistently and, at times, inexplicably implemented.<sup>257</sup> As applied in *Speiser* and *Perry*, the Court has at its disposal a tool that can be, and has been, used to invalidate government attempts to force recipients to surrender constitutional rights in return for government benefits.<sup>258</sup>

However, within months of its holding in *Speiser*, the Court developed a competing approach in *Cammarano v. United States*,<sup>259</sup> upholding the constitutionality of offers of conditional benefits that affect recipients’ constitutional rights. In *Cammarano*, the Court upheld Internal Revenue Service regulations that denied tax deductions for expenditures associated with political lobbying.<sup>260</sup> The regulations were challenged on First Amendment grounds by individuals who claimed that the deductions had been unconstitutionally conditioned on their willingness to surrender their right to engage in political speech in direct conflict with the doctrine espoused in *Speiser*.<sup>261</sup> In a neat bit of conceptual legerdemain, the Court

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250. *Id.* at 597.

251. *Id.*

252. *Id.* (quoting *Speiser*, 357 U.S. at 526).

253. 198 U.S. 45 (1905).

254. *Cole*, *supra* note 233, at 679.

255. Sullivan, *supra* note 227, at 1416.

256. *Id.*

257. *Id.* at 1434-36.

258. *See generally* Mitchell, *supra* note 220, at 172-76 (providing a detailed discussion of the coercion, penalty, and nonsubsidy theories emerging from *Speiser*, *Perry*, and related opinions).

259. 358 U.S. 498 (1959).

260. *Id.* at 513.

261. *Id.* at 512-13.

distinguished the two cases, ruling that the claimants in *Cammarano* were denied a tax exemption not because they refused to surrender their protected lobbying activities, but because the government had simply decided that they should bear the cost of those activities themselves.<sup>262</sup> Because the regulations applied this denial of benefits to everyone in a nondiscriminatory way, were not “aimed at the suppression of dangerous ideas,”<sup>263</sup> and did not extinguish all avenues for the claimants to exercise their constitutionally protected activity (albeit, not at government expense), the Court was unwilling to disrupt Congress’s discretionary decision not to subsidize political lobbying with tax benefits.<sup>264</sup>

The Court subsequently extended its holding in *Cammarano* to protected constitutional rights in *Maher v. Roe*<sup>265</sup> and *Harris v. McRae*.<sup>266</sup> At issue in each case were Medicaid policies that called for coverage of medical expenses related to childbirth, but excluded similar expenses related to abortion.<sup>267</sup> Clarifying a key point in *Cammarano*, the Court held that the unconstitutional conditions challenges to the policies in question were inappropriate because the government had not totally foreclosed the claimants’ rights to abortions on their own time and with their own funds.<sup>268</sup> The policies in question merely defined the scope of the benefit and did not attempt to proscribe abortions outside the Medicaid program; the Court concluded that the government was under no obligation to subsidize activity that it did not favor.<sup>269</sup> Because there is no

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262. *Id.* at 513 (“Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the . . . Internal Revenue Code.”).

263. *Speiser v. Randall*, 357 U.S. 513, 519 (quoting *American Communications Ass’n v. Douds*, 339 U.S. 382, 402 (1950)).

264. See Amy E. Moody, Comment, *Conditional Federal Grants: Can the Government Undercut Lobbying by Nonprofits Through Conditions Placed on Federal Grants?*, 24 B.C. ENVTL. AFF. L. REV. 113, 129 (1996).

265. 432 U.S. 464 (1977).

266. 448 U.S. 297 (1980).

267. See *Maher*, 432 U.S. at 464 (1977) (reviewing a three-judge district court holding that “the Equal Protection Clause of the Fourteenth Amendment forbids the exclusion of nontherapeutic abortions from a state welfare program that generally subsidizes the medical expenses incident to pregnancy and childbirth”); *Harris*, 448 U.S. at 303 (1980) (alleging that a federal Medicaid rule limiting the funding of abortions to those necessary to save the life of the mother while permitting the funding of costs associated with childbirth violates affected claimants’ First, Fourth, Fifth and Ninth Amendment rights).

268. See *Maher*, 432 U.S. at 474 (“The Connecticut regulation places no obstacles absolute or otherwise in the pregnant woman’s path to an abortion.”); *Harris*, 448 U.S. at 315-18 (holding that there is “no governmental obstacle in the path of a woman who chooses to terminate her pregnancy”).

269. *Id.* The Court in *Maher* spoke of the latitude given the state in its use of spending to encourage particular activities:

affirmative duty for the government to fund even fundamental rights, a refusal to subsidize those rights does not effect an unconstitutional condition on those who are refused federal benefits.<sup>270</sup>

Having set the foundation for its unconstitutional conditions and nonsubsidy lines of conditional benefit analyses, the Court continued to refine each over the next two decades, often drawing inexplicably fine distinctions in choosing the application of one doctrine over the other in strikingly similar scenarios. Typically, the Court's choice depends upon its characterization of how coercion imposed by the government ultimately affects funding recipients' ability to engage in constitutionally protected activities.<sup>271</sup> In cases where the Court concludes that funding conditions are so coercive that they leave recipients with no choice but to forego constitutionally protected activity, the Court is able to declare this condition to be a penalty and invoke the unconstitutional conditions doctrine to reject it.<sup>272</sup> Invoking unconstitutional conditions subjects the challenged funding conditions to strict scrutiny and obliges the government to justify its actions against the most rigorous standard of constitutional review.<sup>273</sup> In contrast, when the Court finds that a funding condition merely structures a program to support federally encouraged activities without precluding recipients' exercise of constitutionally protected activity on their own time and with their own money, the Court can uphold the challenged conditions as a mere nonsubsidy.<sup>274</sup> A characterization of a condition as a nonsubsidy requires only that it be shown to be "rationally related" to government's interests to survive constitutional scrutiny.<sup>275</sup> It appears that the Court has given itself two

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There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader.

432 U.S. at 475-76. *See also Harris*, 448 U.S. at 316 ("[I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.").

270. *See Maher*, 432 U.S. at 474-75; *Harris*, 448 U.S. at 316-18.

271. *Sullivan*, *supra* note 227, at 1434-36.

272. *See Shapiro v. Thompson*, 394 U.S. 618 (1969) (denying welfare benefits to residents residing in a state for less than one year penalizes the fundamental right of interstate travel); *Sherbert v. Verner*, 374 U.S. 398 (1963) (ruling that a condition on receipt of unemployment benefits tied to an agreement to choose between work and religious observance has the effect of coercing the recipient to refrain from protected speech); *Speiser v. Randall*, 357 U.S. 513 (1958) (invalidating a state requirement that conditioned World War II veterans' receipt of veterans' property tax exemptions on taking a loyalty oath).

273. *See supra* text accompanying notes 237-58.

274. *Sullivan*, *supra* note 227, at 1439 ("Penalties' coerce; 'nonsubsidies' do not.").

275. Having developed a theory allowing it to apply strict scrutiny to funding conditions viewed

result-oriented doctrines to call upon to resolve challenges to conditional benefit cases as it sees fit.<sup>276</sup> The Court's method of analysis has led commentators to conclude simply that "[i]f the Court wishes to strike down a condition, it declares it to be an unconstitutional condition; if the Court wishes to uphold a condition, it declares that the government is making a permissible choice to subsidize some activities and not others."<sup>277</sup>

The impending Supreme Court review of the constitutionality of CIPA is likely to depend, in part, on which of these competing doctrines the Court chooses to apply to this statute. If CIPA's challengers are able to convince the Court that the Act's requirement that public libraries install software filters on their Internet-accessible computers coerces them to choose between sacrificing First Amendment rights and accepting much needed technology funds, the challengers will have opened a line of First Amendment attack that would require CIPA to withstand strict scrutiny analysis. If, however, the government is able to convince the Court that it is not obligated to subsidize unrestricted access to the Internet in public libraries but, rather, is free to condition library technology funding to discourage access to particular kinds of speech with government funds,

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as coercing recipients into foregoing fundamental constitutional rights, the Court soon developed a counterbalancing theory that allowed it to provide greater constitutional deference in cases where it did not view Congress's funding conditions as coercion or penalties. For an extensive discussion of the Court's nonsubsidy analysis, see generally Gary A. Winters, Note, *Unconstitutional Conditions as "Nonsubsidies": When Is Deference Inappropriate?* 80 GEO. L.J. 131 (1991).

When taking the nonsubsidy view, the Court argues that differential subsidies affecting rights are allocative choices made by a government with virtually no affirmative responsibilities.

The subsidies need only pass the test of minimum rationality applicable to classifications that do not affect constitutional rights. Thus, the court *begins* from the assumption that the benefit scheme is constitutional, and demands that beneficiaries show why the scheme cannot pass the test.

*Id.* at 148.

276. A number of commentators have noted that the Court's categorization of a particular funding condition as either coercion/penalty or a mere nonsubsidy depends, almost entirely, on whether it wants the result of its opinion to strike those conditions or uphold them. See Sullivan, *supra* note 227, at 1420 ("Conclusory labels often take the place of analysis—for example, conditioned benefits are frequently deemed 'penalties' when struck down and 'nonsubsidies' when upheld."). See also Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 992 (1991) (observing that the Court tends "to approach the problem of selective funding by reasoning backward from a desired result"); Harold B. Walther, Note, *National Endowment for the Arts v. Finley: Sinking Deeper Into the Abyss of the Supreme Court's Unintelligible Modern Unconstitutional Conditions Doctrine*, 59 MD. L. REV. 225, 250-51 ("[The Court's] unconstitutional conditions decisions now amount to judicial policymaking, with the Court seemingly reaching decisions through a results oriented approach rather than through the application of a cognizable unconstitutional conditions doctrine.").

277. Mitchell, *supra* note 220, at 173 (quoting ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, 11.2.4.4 at 795 (1997)).



CIPA will be subjected to a greatly reduced standard of constitutional analysis and is likely to be upheld. Although the choice remains elusive, particularly after *American Library Association v. United States*,<sup>278</sup> a close examination of the latest unconstitutional conditions and nonsubsidy cases suggests both that the government has read the Supreme Court's nonsubsidy cases too broadly and that the selective subsidization of speech in public libraries violates the First Amendment.

## 2. *Rust v. Sullivan and the Nonsubsidy Doctrine in Ascendancy*

In *Rust v. Sullivan*, the Court authored its most comprehensive endorsement to date of the government's broad powers of choice in deciding what speech to subsidize with federal funds.<sup>279</sup> The Court upheld Health and Human Services regulations that restricted family planning clinics funded under Title X of the Public Health Services Act<sup>280</sup> from counseling clients about abortion<sup>281</sup> while placing no restrictions on other forms of family planning, including anti-abortion advocacy.<sup>282</sup> The plaintiffs claimed that placing conditions on Title X benefits that require recipients to forego constitutionally protected speech about abortion imposed an unconstitutional condition upon those funds.<sup>283</sup> The Court ruled, however, based upon an expansive interpretation of its nonsubsidy line of cases, that the conditions did not exceed the parameters of the government-funded program itself and in no way restricted fund recipients or their clients from either providing or seeking abortion counseling outside the auspices of the Title X-funded program.<sup>284</sup>

Drawing upon and extending earlier nonsubsidy decisions,<sup>285</sup> the Court concluded that the government is allowed to make value judgments and state preferences to encourage activities that it feels are in the public interest within the confines of programs that it funds.<sup>286</sup> Stating preferences does not effect viewpoint discrimination but merely represents a choice "to fund one activity to the exclusion of the other."<sup>287</sup> The mere

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278. *See supra* note 17.

279. 500 U.S. 173 (1991).

280. 42 U.S.C §§ 300-300a-6 (1994).

281. *Rust*, 500 U.S. at 179-80.

282. *Id.* at 192.

283. *Id.* at 196.

284. *Id.* at 198-99.

285. *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 549 (1983); *Cammarano v. United States*, 358 U.S. 598, 513 (1959).

286. *Rust*, 500 U.S. at 193.

287. *Id.*

refusal to fund a protected activity does not impose the type of penalty on that activity sufficient to trigger the application of the unconstitutional conditions doctrine.<sup>288</sup>

The Court's ruling in *Rust* was seen by many as providing the government *carte blanche* to place speech content restrictions within the confines of federally funded programs.<sup>289</sup> Characterizing the government as the "financier" of such speech, then Solicitor General Kenneth W. Starr opined that the government could "take sides" and "have viewpoints" when making funding decisions in the wake of *Rust*.<sup>290</sup> Still others felt that a logical extension of the holding in *Rust* would classify any government-funded speech to be speech by the government itself, which the government could control as it saw fit.<sup>291</sup> At its most extreme, this approach led the Court, in *National Endowment for the Arts v. Finley*,<sup>292</sup> to validate a statute requiring the National Endowment for the Arts to ensure that "general standards of decency and respect for the diverse beliefs and values of the American public" are taken into consideration when reviewing grant applications.<sup>293</sup> Although the majority opinion in *Finley* glossed over the disturbing breadth of this quintessentially viewpoint-specific standard by stating there is no "realistic danger" that First Amendment rights will be compromised,<sup>294</sup> Justice Scalia's concurrence showed less reluctance to admit that the statute "unquestionably constitutes viewpoint discrimination."<sup>295</sup> Justice Scalia, however, agreed with the Court that it remains perfectly constitutional as a valid "congressional determination to favor decency and respect for beliefs and values over the opposite . . . ."<sup>296</sup>

It is upon this most expansive interpretation of *Rust* that the government now relies in defending the constitutionality of CIPA.<sup>297</sup> From its perspective, restrictions on Internet content in public libraries accepting federal funds are constitutional because the government has the discretion

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288. *Id.*

289. Cole, *supra* note 233, at 676-77.

290. *Id.* at 676 (citing Ruth Marcus, *Abortion-Advice Ban Upheld for Federally Funded Clinics*, WASH. POST, May 24, 1991, at A1, A18).

291. *Id.* (citing *Hearings on Implications of Rust v. Sullivan*, Before the Subcomm. on the Constitution of the Senate Judiciary Comm., 102d Cong., 1st Sess. 5 (1991) (statement of Leslie H. Southwick, Asst. Att'y Gen., Civil Div., Dep't. of Justice)).

292. 524 U.S. 569 (1998).

293. *Id.* at 572.

294. *Id.* at 583.

295. *Id.* at 593 (Scalia, J., concurring).

296. *Id.* at 598 (Scalia, J., concurring).

297. *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401, 465 (E.D. Pa. 2002) (citing *Rust v. Sullivan*, 500 U.S. 173 (1991)).

to make choices about the type of activities to which it wants to “allocate scarce resources.”<sup>298</sup> Additionally, by virtue of choosing to subsidize programs that feature speech, those who would rely on *Rust* believe that the government, either directly or through private entities enlisted to convey a governmental message, is in fact “the speaker” and thus is allowed to make content-based decisions regarding the speech that it funds.<sup>299</sup> Under this line of reasoning, there can be no unconstitutional condition applied by CIPA’s filtering requirement because it does not preclude recipients “from engaging in protected conduct outside the scope of the federally funded program.”<sup>300</sup> Recipients can choose to accept or reject the subsidy as they see fit.

Following this reasoning, the Court turned its own long-standing enmity toward government imposition of content-based restrictions on speech<sup>301</sup> on its head and threatened to make a mockery of its bedrock principle that the government may not place restrictions on expression simply because it finds the ideas expressed to be offensive or disagreeable.<sup>302</sup> With this most expansive reading of *Rust*, the unconstitutional conditions doctrine was eviscerated, and the likelihood that government funding conditions on speech content could be successfully challenged under traditional First Amendment strictures had virtually disappeared.

The Court, however, has significantly qualified the power of the government to control speech content through several landmark discretionary funding decisions since *Rust*. If applied, the logic of these decisions assures that the government will be unable to hide behind the nonsubsidy doctrine to avoid examination of the First Amendment implications of the CIPA filtering requirement. Although the holding in *Rust* strongly supports broad governmental power to place conditions on the speech of those organizations and individuals that it subsidizes, the opinion’s extensive dicta anticipates several possible scenarios where the

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298. *Widmar v. Vincent*, 454 U.S. 263, 276 (1981).

299. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995).

300. *Rust*, 500 U.S. at 197.

301. *See, e.g., Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (stating that government-imposed content restrictions on speech threaten to “effectively drive certain ideas or viewpoints from the marketplace. The First Amendment presumptively places this sort of discrimination beyond the power of the government”) (internal citations omitted).

302. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) (“Speech does not lose its protected character . . . simply because it may embarrass other or coerce them into action.”); *FCC v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978) (“[T]he fact that society may find speech offensive is not sufficient reason for suppressing it.”).

Court would likely rule that such government controls are not permissible. Most important among those is the Court's recognition that *Rust*-type control would not be appropriate when the government provides funds to encourage private, nongovernmental speech.

*Rust* suggests that the Court understands that not all speech in publicly funded forums can be classified as government speech, stating that even when the government funds a program and allows fund recipients to speak outside the confines of the government-funded program, this is not "invariably sufficient to justify Government control over the content of expression."<sup>303</sup> The Court cited public forums as areas that have "been traditionally open to the public for expressive activity"<sup>304</sup> or "expressly dedicated to speech activity,"<sup>305</sup> and universities as "traditional sphere[s] of free expression . . . fundamental to the functioning of . . . society."<sup>306</sup> The Court stated that both were examples of the type of government-funded programs in which the withholding or manipulation of subsidies to control the content of speech would not be appropriate, even where fund recipients are free to express themselves outside the confines of the subsidized program.<sup>307</sup>

### 3. *Post-Rust Government Funding of Private Speech*

It took the Court only four years after *Rust* to consider the question of government funding of private speech on its own merits. In *Rosenberger v. Rector & Visitors of the University of Virginia*,<sup>308</sup> the Court specifically recognized the difference in the level of government control that is permissible over private, as opposed to governmental, speech. In *Rosenberger*, the Court struck down a university policy that refused to fund student newspapers espousing a religious viewpoint despite providing funds for other student publications.<sup>309</sup> The Court rejected the university's arguments that it had the authority as a government-funded entity, under *Rust*, to decide how to "allocate scarce resources to accomplish its educational mission,"<sup>310</sup> and that in doing so, "content-

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303. *Rust*, 500 U.S. at 199.

304. *Id.* at 200 (quoting *United States v. Kokinda*, 497 U.S. 720, 726 (1990); *Hague v. CIO*, 307 U.S. 496, 515 (1939) (Roberts, J.)).

305. *Id.* (quoting *Kokinda*, 497 U.S. at 726; *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

306. *Id.*

307. *Id.*

308. 515 U.S. 819 (1995).

309. *Id.* at 837.

310. *Id.* at 832.

based funding decisions are both inevitable and lawful.”<sup>311</sup> The Court held that “viewpoint-based restrictions are [not] proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.”<sup>312</sup> With this holding, the Court specifically limited and clarified its holding in *Rust*, stating that the government is only permitted “to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.”<sup>313</sup> When, on the other hand, federal funds are disbursed to “encourage a diversity of views from private speakers,”<sup>314</sup> even in limited public forum[s] of the government’s own making,<sup>315</sup> viewpoint-based restrictions are constitutionally impermissible.<sup>316</sup> With this holding, the Court returned to its classic First Amendment principles that strenuously protect private speech from governmental viewpoint restrictions.

In *Legal Services Corp. v. Velazquez*,<sup>317</sup> the Court further limited *Rust*’s application to cases in which the government finances private speech. Here, the Court struck down a law that restricted attorneys employed by the federally funded Legal Services Corporation (LSC) from challenging the validity of existing welfare law.<sup>318</sup> Concluding that Congress had created the LSC specifically to assist clients in dealing with a wide range of legal needs,<sup>319</sup> including all aspects of welfare law,<sup>320</sup> the Court specifically stated that the factual setting of the LSC case was “distinguishable from *Rust*”<sup>321</sup> based on its conclusion that the advice given by LSC attorneys to their clients “cannot be classified as governmental speech even under a generous understanding of the

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311. *Id.* at 833.

312. *Id.* at 834.

313. *Id.* at 833.

314. *Id.* at 834.

315. *Id.* at 829.

316. *Id.* at 834. Despite a five-four split based on differing views about the holding’s import as an endorsement under the Establishment Clause of direct funding for religious activities, all nine Justices agreed with the basic finding that a distinction exists between government speech and private speech. *Id.* at 893 n.11.

317. 531 U.S. 533 (2001).

318. *Id.* at 549.

319. *Id.* at 536 (“LSC’s mission is to distribute funds appropriated by Congress . . . ‘for the purpose of providing . . . legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance.’”) (quoting the Legal Services Corporation Act, 42 U.S.C. § 2996b(a)).

320. *Id.* at 542 (“The Government has designed this program to use the legal profession and the established Judiciary of the United States and the Federal Government to accomplish its end of assisting welfare claimants in determination or receipt of their welfare benefits.”).

321. *Id.* at 543.

concept.”<sup>322</sup> The Court in *Velazquez* went further than *Rosenberger* in making its point about the consequences of the government using its funds to establish a forum for private speech. Drawing on its decision in *FCC v. League of Women Voters of California*,<sup>323</sup> the *Velazquez* Court stated that when the government used a particular medium or forum to control private expression, “[t]he First Amendment forbade the Government from using the forum in an unconventional way to suppress speech inherent in the nature of the medium.”<sup>324</sup> The Court reasoned that restricting attorneys from representing clients on particular issues found objectionable to the government “distorts the legal system by altering the traditional role of . . . attorneys.”<sup>325</sup>

The importance of these holdings cannot be overstated when assessing the constitutional challenge of CIPA. The federal courts have classified libraries as “limited public forums.”<sup>326</sup> Further, courts have recognized that libraries serve as the “quintessential locus of the receipt of information.”<sup>327</sup>

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322. *Id.* at 542-43.

323. 468 U.S. 364 (1984) (striking down a provision of the Public Broadcasting Act of 1967 that prohibited “editorializing” by any noncommercial educational broadcasting station receiving funds from the Corporation for Public Broadcasting). *Id.* at 402. The Court rejected the government’s argument that the prohibition reflected a proper exercise by Congress of its spending power, as a determination not to subsidize public broadcasting editorials, pointing out that the statute did not permit a station to use other funds to carry on this activity, and thus completely foreclosed this type of speech to any station receiving the public funds.) *Id.* at 399-400.

324. *Velazquez*, 531 U.S. at 543 (summarizing *FCC v. League of Women Voters of Cal.*, 468 U.S. at 396-97).

325. *Id.* at 544. Justice Scalia strongly criticized the majority for its forum “distortion” analysis, stating that it is “wrong on the law because there is utterly no precedent for the novel and facially implausible proposition that the First Amendment has anything to do with government funding that—though it does not abridge anyone’s speech—distorts an existing medium of expression.” *Id.* at 555 (Scalia, J., dissenting).

326. *See, e.g.*, *Armstrong v. Dist. of Columbia Pub. Library*, 154 F. Supp. 2d 67, 75 (D.D.C. 2001) (“The parties correctly assert that a public library is a limited public forum for purposes of constitutional analysis.”); *Sund v. City of Wichita Falls*, 121 F. Supp. 2d 530, 548 (N.D. Tex. 2000) (“In a limited public forum, the government’s ability to restrict patrons’ First Amendment rights is extremely narrow.”); *Mainstream Loudoun v. Bd. of Trs. of the Loudoun County Library*, 24 F. Supp. 2d 552, 563 (E.D. Va. 1998) (stating that because a public library is a limited public forum designed for the “receipt and communication of information,” any policy that “limits the receipt and communication of information through the Internet based on the content of that information, . . . is subject to a strict scrutiny analysis . . . .”); *Kreimer v. Bureau of Police for the Town of Morristown*, 958 F.2d 1242, 1262 (3d Cir. 1992) (“[A]s a limited public forum, the Library is obligated only to permit the public to exercise rights that are consistent with the nature of the Library and consistent with the government’s intent in designating the Library as a public forum.”).

327. *Kreimer*, 958 F.2d at 1255. *See also* *Am. Library Ass’n v. United States*, 201 F. Supp. 2d 401, 457 (E.D. Pa. 2002) (stating that “the purpose of a public library in general, and the provision of Internet access within a public library in particular, is ‘for use by the public . . . for expressive activity,’ namely, the dissemination and receipt by the public of a wide range of information”) (citations omitted)).

Chief Justice Rehnquist has characterized libraries as “designed for freewheeling inquiry.”<sup>328</sup> As such, libraries clearly have their place within the “traditional sphere[s] of free expression” where the Court has suggested that government subsidies must be administered with strict neutrality.<sup>329</sup> Public libraries are not intended to deliver governmental messages,<sup>330</sup> rather they serve as “mighty resource[s] in the free marketplace of ideas.”<sup>331</sup> The fact that government E-rate and LSTA subsidies assist libraries in offering the boundless resources of the Internet supports, rather than contradicts, the argument that federal funds encourage access to diverse private speech, just as the Court concluded the government had done with its support of student newspapers in *Rosenberger* and legal services in *Velazquez*.

In the final analysis, the Supreme Court must decide which of the divergent analytical paths it has developed to help resolve challenges to congressional spending conditions should apply to the CIPA restrictions on library funding. For CIPA to survive, it is crucial that the Court accept the position that the Act’s conditions on library funding fall within Congress’s broad spending power discretion and should be accorded full judicial deference. As a corollary, the government will attempt to deflect strict First Amendment scrutiny of CIPA by asking the Court to adopt the *Rust/Finley* position that Congress is free to apply spending conditions on libraries, as government funded entities, in order to make value judgments and choose among activities it seeks to encourage without violating individual First Amendment rights. If the government is successful in that effort, CIPA will be subjected to a greatly reduced level of constitutional scrutiny, requiring only that there be a minimally rational relationship between the perceived congressional objective (ostensibly to keep children from accessing harmful materials on the Internet) and the means chosen to achieve that objective (the application of software filters to public library

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328. *Bd. of Educ. v. Pico*, 457 U.S. 853, 915 (1982) (Rehnquist, J., dissenting).

329. Kristine M. Cunneane, Note, *Maintaining Viewpoint Neutrality for the NEA: National Endowment for the Arts v. Finley*, 31 CONN. L. REV. 1445, 1460 (1999) (citing *Rust*, 500 U.S. at 200).

330. Bernard W. Bell, *Filth, Filtering and the First Amendment: Ruminations on Public Libraries’ Use of Internet Filtering Software*, 53 FED. COMM. L.J. 191, 220 (2000).

Given the public library’s role as facilitator rather than channel for government speech, the government should not have the plenary control over the material it makes available to patrons of a public library in the same way that it may control fora in which the government seeks to communicate its own message.

*Id.* at 220.

331. *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 582-83 (6th Cir. 1976) (“A library is a mighty resource in the free marketplace of ideas . . . specially dedicated to broad dissemination of ideas.”).

computers).

As discussed in the next section, however, such a view totally mischaracterizes public libraries and fails to appreciate the manner in which their patrons use library collections and services to exercise their rights of private, nongovernmental speech. Because libraries show all indicia of limited public forums subsidized by the government for the express purpose of facilitating broad private expression, the Court must uphold the district court's rejection of a standard that does not acknowledge the burden on constitutional rights imposed by the conditions placed on funds in this case. The Court should instead follow *Rosenberger* and *Velazquez* and subject the government's restrictions on the content of speech in such forums to strict scrutiny. Under this standard of review, the Court will assess whether the funding restrictions applied to libraries are "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end."<sup>332</sup> To properly apply strict scrutiny to CIPA, the Court will necessarily have to examine the nature of public libraries, the character of Congress's interests in applying the CIPA funding conditions, the efficacy of the Internet filtering technology to address Congress's interests without offending the First Amendment, and the existence of more narrowly tailored and less restrictive alternatives for achieving Congress's goals.

## V. FIRST AMENDMENT ANALYSIS OF CIPA'S FILTERING REQUIREMENT

Two arguments can be made to support the government's view that Internet filtering in a public library used to limit selected online speech raises no First Amendment issues that are subject to strict scrutiny. First, it can be argued that the use of Internet filtering software to restrict selected online content from being available within the library is no different from the decisions routinely made by librarians when deciding what materials to add to their print collections. Second, it can be argued that government funding of public libraries does not create a forum in which it has an obligation to subsidize the exercise of First Amendment rights.

### A. *The Internet Filtering/Library Acquisitions Analogy*

One of the most important tasks for any library is using its finite financial resources to acquire books and other materials that both fit its

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332. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)).



educational and research mission and satisfy the intellectual needs of its users. The guiding principles of library collection development encourage librarians to “provide materials and information presenting all points of view,” and admonish them not to exclude materials “because of the origin, background, or views of those contributing to their creation.”<sup>333</sup> However, financial practicality dictates that a library cannot own everything. Professional discretion must be applied when deciding what materials to add or not to add to any library’s collection. These decisions are based on a variety of criteria including cost, compatibility with the rest of the library’s collection, authority of the author, and reputation of the publisher.<sup>334</sup> Most libraries are guided in this process by collection development policies that are developed by the individual institution to help define the types of materials that fit within its acquisitions profile.<sup>335</sup> Theoretically, every title a library adds to its collection has been reviewed by some member of the professional staff for consideration of its “fit” within the library’s collection plan.<sup>336</sup> Implicit in this process is the understanding that, as with any process involving human judgments, librarians undoubtedly make subjective judgments about the content of available library materials when deciding whether to select an item for purchase. While it is certainly possible that such subjectivity could lead to the imposition of personal viewpoint discrimination, such a result is contrary to the library profession’s ethical standards and practices.<sup>337</sup>

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333. AMERICAN LIBRARY ASSOCIATION, LIBRARY BILL OF RIGHTS, *available at* <http://www.ala.org/alaorg/oif/librarybillofrights.pdf> (last visited Oct. 1, 2002).

334. *Am. Library Ass’n, Inc. v. United States*, 201 F. Supp. 2d 401, 463 (E.D. Pa. 2002) (listing possible criteria for library selection decisions).

335. *Id.* at 421 (“Public libraries generally make material selection decisions and frame policies governing collection development at the local level . . . . In pursuing the goal of achieving a balanced collection . . . librarians generally have a fair amount of autonomy, but may also be guided by a library’s collection development policy.”).

336. *Id.* at 463. Libraries regularly use third-party vendors to help them identify materials that fit a profile of each subscribing institution’s interests. *Id.* Pursuant to what are known as “approval plans,” the vendors do send libraries selected materials based on their collection development plans, but they do so on approval. *Id.* Libraries are still responsible for reviewing selections sent to them on approval and are free to return titles that they feel do not fit their collection needs. *Id.* As a result, the principle that a librarian should review each title that a library adds to its collection holds true even when approval plans are used. *Id.*

337. Although not all librarians are members of the American Library Association, that organization’s Library Bill of Rights, Code of Ethics, and Policy Manual provide the guiding principles at the foundation of Masters of Library Science candidates’ training and form the standards against which professional librarian conduct is measured. Each of these documents includes extensive guidelines admonishing library professionals against the exclusion of materials because of viewpoint or controversial content. *See* American Library Association, LIBRARY BILL OF RIGHTS, adopted as amended by the ALA Council, Jan. 23, 1980, *available at* <http://www.ala.org/alaorg/oif/librarybillofrights.pdf> (“Materials should not be excluded because of origin, background, or views of

Regardless of the subjectivity involved in the library selection process, the courts have deferred to librarians' expertise in this matter and have subjected these decisions only to rational basis First Amendment review.<sup>338</sup>

In comparison, filtering advocates raise an interesting issue when they argue that a library's decision to exclude Internet materials from its "online collection" using software filters is no different than the process of deciding what print materials not to buy for the library's print collection. Contending that a public library's Internet filtering decisions are ministerial and discretionary in the same manner that library acquisitions decisions are, the argument continues that neither of these decisions implicate First Amendment review so long as they are viewpoint neutral.<sup>339</sup> The importance of this distinction in the eyes of filtering advocates lies in the Supreme Court's troublesome plurality decision in *Board of Education v. Pico*,<sup>340</sup> which held that local school board discretion was exceeded when its members ordered the removal from school libraries of books that they adjudged to be "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy."<sup>341</sup> Certainly, the government "may not remove books from . . . library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'"<sup>342</sup> However, the Court did not choose to expressly extend this same prohibition to a library's acquisitions decisions, stating that "nothing in our decision . . . affects in any way the discretion of a local school board to choose books to *add* to the libraries of

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those contributing to their creation."); American Library Association, *Code of Ethics*, adopted by the ALA Council, June 28, 1995, available at <http://www.ala.org/alaorg/oif/codeofethics.pdf> ("We [librarians] distinguish between our personal convictions and professional duties and do not allow our personal beliefs to interfere with fair representation of the aims of our institutions or the provision of access to their information resources."); American Library Association, *POLICY MANUAL*, § 53.1.11, available at <http://www.ala.org/alaorg/policymanual/intellect.html> ("Librarians have a professional responsibility to be inclusive, not exclusive, in collection development and in the provision of interlibrary loans. Access to all materials legally obtainable should be assured to the user and policies should not unjustly exclude materials even if offensive to the librarian or the user.").

338. *Id.* at 462 (citing Bell, *supra* note 330, at 225).

339. *Mainstream Loudoun v. Bd. of Trs. of the Loudoun County Library*, 24 F. Supp. 2d at 552, 562 (E.D. Va. 1998).

340. 457 U.S. 853 (1982) (plurality opinion).

341. *Id.* at 857 (quoting a school board press release explaining its actions in removing books from school libraries).

342. *Id.* at 872 (quoting *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). See also 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, 1122 (2000).

their schools.”<sup>343</sup> The Court went on to explain that its decision to restrict discriminatory book removals was necessary to prevent the “suppression of ideas,”<sup>344</sup> but it seemed not to recognize the possibility that the same sort of viewpoint suppression could result from discriminatory book selection decisions.

It is upon this logical disconnect that filtering proponents have landed with full force in search of a constitutional principle that exposes Internet filtering to reduced First Amendment scrutiny. Their argument is that, because the *Pico* Court limited its application of exacting constitutional standards to book removal decisions and chose not to address the constitutional implications of viewpoint-specific acquisitions decisions,<sup>345</sup> the Court’s silence on the issue justifies library viewpoint-neutral decisions concerning whether or not to acquire information content, be it books or Internet sites, without regard to First Amendment considerations.<sup>346</sup> If filters are viewed as a software tool to help librarians make decisions about what Internet content to “acquire” for the library, they argue, why not view the entire process, including the use of Internet filters, as an acquisitions decision subject only to minimal constitutional scrutiny?

This argument, however, assumes more about the theoretical inapplicability of *Pico* to library acquisitions decisions than the Court’s decision permits. While it is clear that the *Pico* plurality does place First Amendment limitations on the discretion of libraries to remove materials from their collections<sup>347</sup> and specifically refuses to extend this principle to acquisitions decisions, it would be a mistake to read the Court’s silence on the constitutional implications of a library’s selective *acquisition* of library materials as precluding a court from doing so in the future. Nothing in the *Pico* decision precludes a court from going beyond the bounds of that holding to review a library’s decision not to add materials because they espouse a particular political, moral, or social orthodoxy. In fact, in his dissent to the *Pico* holding, now Chief Justice Rehnquist criticized the logic of the Court’s distinction between selection and removal of materials, observing that “if ‘suppression of ideas’ is to be the talisman, one would think that a school board’s public announcement of its refusal

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343. *Pico*, 457 U.S. at 871 (emphasis in original).

344. *Id.*

345. *Id.* at 871-72.

346. *Mainstream Loudoun v. Bd. of Trs. of Loudoun County Library*, 2 F. Supp. 2d 783, 793 (E.D. Va. 1998).

347. *Pico*, 457 U.S. at 870-71. The Court stated that this discretion “may not be exercised in a narrowly partisan or political manner.” *Id.* at 870.

to acquire certain books would have every bit as much impact on public attention as would an equally publicized decision to remove the books.<sup>348</sup> By extending the *Pico* prohibition against viewpoint bias to acquisitions decisions as Rehnquist and commentators suggest,<sup>349</sup> both selection and removal decisions would be subject to the same constitutional analysis and would result in identical First Amendment sanctions when viewpoint discrimination is found. Moreover, there is no logical reason that such review could not extend to a policy that blocks access to Internet sites on the same content-based rationale.<sup>350</sup>

Although there is a logical purity to an extension of the *Pico* analysis to acquisitions decisions, regardless of whether the items being selected are in print or electronic format, this argument displays a fundamental misunderstanding of the basic impediments to its practical application. Perhaps most daunting is the evidentiary problem of evaluating the subjective intent of librarians who choose not to purchase a book for a library collection. As Professor Richard J. Peltz noted: “[I]f officials’ intentions were dispositive, a court would be hard pressed to look inside the minds of librarians to determine why they acquired one book as opposed to another.”<sup>351</sup> Although it is certainly true that removal decisions can be equally subjective, the actual removal of an item from a library’s collection is typically accompanied by some discoverable evidentiary trail, such as memoranda recommending removal, cataloging records, and withdrawal forms.<sup>352</sup> In contrast, it is rare, indeed, for individual decisions *not* to buy an item for a library collection to be accompanied by any kind of traceable evidentiary trail. Although there is anecdotal evidence of long standing that some librarians make selection decisions based on

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348. *Id.* at 916-17 (Rehnquist, J., dissenting).

349. See, e.g., Richard J. Peltz, *Use “The Filter You Were Born With:” The Unconstitutionality of Mandatory Internet Filtering for the Adult Patrons of Public Libraries*, 77 WASH. L. REV. 397, 447 (2002) (“Perhaps significantly, only three of the Justices then on the Court remain there today—Stevens, O’Connor, and now-Chief Justice Rehnquist—and the political balance has drifted toward favoring the *Pico* dissenters.”). See also Nadel, *supra* note 342, at 1123 (“As a matter of principle . . . as Justice Rehnquist’s dissent in *Pico* observed, the prohibition against viewpoint discrimination should apply as strongly to library purchase decisions as it does to removals.”) (citing *Pico*, 457 U.S. at 916 (Rehnquist, J., dissenting)).

350. This concept has, seemingly, never been tested judicially. See Nadel, *supra* note 342, at 1123-24 (“[N]either Westlaw nor the ALA’s Office of Intellectual Freedom could recall any court decision that even considered a First Amendment challenge to a library’s decision not to purchase a book or to accept one as a donation.”).

351. Peltz, *supra* note 349, at 447.

352. See Nadel, *supra* note 342, at 1124 (“Removing a book from a library generally requires an explanation usually generating a paper trail, which is normally discoverable evidence.”).

constitutionally impermissible viewpoint criteria,<sup>353</sup> hard evidence of such intent is almost impossible to find. Pragmatically, the courts recognize that the process of selection is inherently subjective and that they cannot prove what is going on in the mind of the librarian selector, so they have chosen to defer to librarians and trust their professional judgment in making acquisitions decisions.<sup>354</sup>

In addition to these practical considerations, it is clear that those who would analogize between the operation of Internet software filters and the judgment of a librarian making book selection decisions fail to appreciate the significant differences between the processes of book selection and Internet site blocking. As the two most comprehensive federal court examinations of library Internet filtering to date, *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*<sup>355</sup> and *American Library Association v. United States* (“*ALA v. United States*”)<sup>356</sup> concluded, much of that difference has to do with the nature of the Internet itself. As described above, librarians decide whether or not to add books to a library’s collection on a title-by-title basis. If, for any number of reasons enumerated in a library’s collection development plan, a book is judged not to be appropriate for purchase, at least there has been a professional review of the title and a conscious (and hopefully objective) evaluation

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353. Morris L. Ernst, the civil liberties lawyer who successfully defended the publishers of James Joyce’s *Ulysses* from charges of obscenity, said in 1928:

The subterranean censorship may appear in the public library as well . . . . Do public libraries attempt to supervise the tastes of their readers by making it a fixed policy not to buy “objectionable” books? It is a simple expedient and has often been applied. The public librarian often has the plausible excuse that as the funds of a library are limited, he must pick and choose, and naturally the more “wholesome” books are to be preferred. He insists that he is exercising not censorship but the prerogative of free selection. Nevertheless, the character of this choice is often suspicious.

MORRIS L. ERNST & WILLIAM SEAGLE, *TO THE PURE . . . A STUDY OF OBSCENITY AND THE CENSOR* 101 (1928).

354. Nadel observes that the courts steer away from delving too deeply into librarians’ discretionary selection decisions, both because they realize the “substantial judicial resources” that they would expend in trying to establish discriminatory intent and because they understand that the selection process is inherently subjective. Nadel, *supra* note 342, at 1125.

355. 2 F. Supp. 2d 783 (1998) (opinion accompanying order denying defendant’s motion to dismiss [hereinafter *Loudoun I*]; 24 F. Supp.2d 552 (1998) (granting summary judgment for plaintiffs) [hereinafter *Loudoun II*]. Both opinions deal with the same controversy in which a group of public library patrons challenged a Loudoun County, Virginia, library board regulation requiring the county’s libraries to install “site-blocking software” on all of their computers, ostensibly to “block child pornography and obscene materials (hard core pornography)” and to block material “deemed harmful to juveniles under applicable Virginia statutes and legal precedents (soft core pornography).” *Loudoun I*, at 787 (quoting the challenged Loudoun County Library Board filtering policy).

356. 201 F. Supp. 2d 401 (E.D. Pa. 2002) (three-judge panel convened under the expedited review provisions of CIPA to hear library plaintiffs’ suit challenging the statute’s constitutionality) [hereinafter *ALA v. United States*].

made.<sup>357</sup> No such comprehensive review of online content is possible because of the enormity and uncontrolled growth of the Internet.<sup>358</sup> When a library obtains Internet access, it provides its patrons with a worldwide collection of speech by default, much of which it would deem to be of “insufficient quality” to purchase if in printed form,<sup>359</sup> but which it has no independent ability to control, or even review, before it arrives. Sight unseen, a library offering Internet access makes available a single body of knowledge in a “single integrated system.”<sup>360</sup>

The differences between the traditional library collection and the Internet’s unique speech medium, which invites patrons to participate in “a vast democratic forum”<sup>361</sup> allowing them to speak on “subjects as diverse as human thought,”<sup>362</sup> could not be more stark. Library Internet access “indiscriminately facilitates” private speech,<sup>363</sup> and it cannot be said that the library can provide any meaningful editorial discretion if it uses a technology that blindly blocks patron access to materials that the library has never even seen, let alone evaluated.<sup>364</sup> Again, citing the unique characteristics of the Internet not applicable to a library’s traditional print collection, the *Loudoun* court thoroughly rejected the filtering proponents’ argument that selections made with filters are analogous to library selection decisions outside the digital environment:

[B]y purchasing one such publication, the library has purchased them all. The Internet therefore more closely resembles [the] analogy of a collection of encyclopedias from which [someone has]

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357. *Id.* at 463 (describing the typical process of book selection in libraries).

358. The court in *ALA v. United States* made findings of fact concerning the estimated size of the Internet as of late 2001. The court found that “[a]t least 400 million people use the Internet worldwide,” and that “approximately 143 million Americans were using the Internet.” *Id.* at 416. Although the court found it difficult to be sure about the exact number of Web sites in existence due to the decentralized nature of the Internet, it cited a 2000 study that put the total number of unique Web sites at 7.1 million and estimated that this number would grow to approximately 11 million by September 2001. *Id.* at 419. The number of Web pages reachable by Internet search engines (referred to as “indexable” pages) was estimated to be 2 billion, with the indexable Web growing at approximately 1.5 million pages per day. The court estimated that the size of the “un-indexable” Internet could range from two and ten times the size of the indexable Internet. *Id.* With size and growth estimates of these proportions, any prospect of effective human review of the content and quality of more than a minute fraction of the Internet’s available content is, at best, a fantasy.

359. *See ALA v. United States*, 201 F. Supp. 2d at 463 (“[W]hen public libraries provide their patrons with Internet access, they intentionally open their doors to vast amounts of speech that clearly lacks [sic] sufficient quality to ever be considered for the library’s print collection.”).

360. *Loudoun I*, 2 F. Supp. 2d at 793.

361. *ALA v. United States*, 201 F. Supp. 2d at 464-65 (quoting *Reno II*, 521 U.S. at 868).

362. *Id.* at 465 (quoting *Reno II*, 521 U.S. at 870).

363. *Id.* at 464.

364. *Id.*

laboriously redacted portions deemed unfit for library patrons. As such, the Library Board's action is more appropriately characterized as a removal decision.<sup>365</sup>

It has been pointed out that, in a world dominated by the instantaneous publications and accessibility of the Internet, the terms "selection" and "removal" have very little continuing meaning for libraries.<sup>366</sup> Filtering technology fits both functions at once, or not at all, depending on one's perspective. Indeed, filters could be used to help librarians find Internet resources that fit a particular patron's content profile. This is the filter used voluntarily by a professional librarian as a tool to refine information access for the benefit of his or her patron. Conversely, there is the filter mandated by the government to block entire categories of content without benefit of review or evaluation. Recognizing that filters could be used to bring government censorship of unprecedented proportions to the Internet, thereby robbing it of its great value as the most democratic means of exchanging ideas and information ever devised, it is thoroughly appropriate that the constitutional distinction between library selection and removal continue as a means of ensuring strict scrutiny of government attempts to improperly limit access to protected speech online.

### *B. The Forum Status of Public Libraries*

Supporters of government-mandated Internet filtering often argue that, even if strict scrutiny would otherwise apply to filtering decisions, a lesser standard of review is appropriate in libraries because they are "non-public forums," requiring the courts to use an intermediate scrutiny standard to determine if the filtering policy "is reasonably related to an important governmental interest."<sup>367</sup> In this argument, the government concedes that Internet filtering is "content-based," but it claims that strict scrutiny of such restrictions applies only to traditional and limited public forums and not to forums designed only for government speech.<sup>368</sup> The relevant question is straightforward—are public libraries limited public forums or nonpublic forums? Arriving at the right standard for public libraries is complicated, however, by the unique character and tradition of the public

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365. *Loudoun I*, 2 F. Supp. 2d at 793-94.

366. *Peltz*, *supra* note 349, at 474.

367. *Loudoun II*, 24 F. Supp. 2d at 561 (describing defendants' argument based in part on *Kreimer v. Bureau of Police*, 958 F.2d 1242 (3d Cir. 1992)).

368. See Part IV.B.3 (discussing the constitutional distinction between funding conditions applied to government speech and those applied to private speech).

library in the United States.

It is a fundamental First Amendment principle that the “government need not permit all forms of speech on property that it owns and controls.”<sup>369</sup> However, it is equally well settled that the government’s power to regulate speech, even on its own property, is not unlimited.<sup>370</sup> The amount of control over speech allowed to the government on its own property depends on the nature of the forum that the government has created.<sup>371</sup>

Although the origin of the public forum doctrine can be traced back to at least 1939,<sup>372</sup> the modern application of the doctrine is most frequently attributed to *Perry Education Association v. Perry Local Educators’ Association*,<sup>373</sup> a 1983 opinion in which the Supreme Court identified three categories of forums for the purpose of analyzing the degree of protection afforded to speech.<sup>374</sup> The first category is the “traditional forum,” such as sidewalks, streets, or public parks, which have traditionally been used for public assembly, communication among citizens, and discussion of public issues.<sup>375</sup> The second category is the “limited or designated forum,” such as a school board meeting or municipal theater, which are sites on “public property which the state has opened for use by the public as a place for expressive activity.”<sup>376</sup> The final category consists of “nonpublic forums,”<sup>377</sup> such as government office buildings,<sup>378</sup> jails,<sup>379</sup> federal military

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369. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (holding that an airport terminal is not a public forum for First Amendment purposes).

370. *ALA v. United States*, 201 F. Supp. 2d at 454.

371. *Id.* at 454 (citing *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788 (1985)).

372. The origin of the public forum doctrine is the subject of some scholarly dispute. Some attribute the term “public forum” to Professor Harry Kalven, Jr., who is said to have coined the phrase in his 1965 article, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1. See Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1718 (1987) (stating that the phrase “public forum” is “traditionally attributed” to Professor Kalven’s article). More typically, however, the concept of “public forum” is traced back to the Supreme Court’s decision in *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939), which endorsed the public’s historic and constitutional right to use public streets and parks as places for communication. In that opinion, Justice Roberts wrote that “streets and parks . . . have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Id.* at 515.

373. 460 U.S. 37 (1983).

374. *Id.* at 44-46.

375. *Id.* at 45 (citing *Hague v. Comm. for Indus. Org.*, 307 U.S. at 515).

376. *Id.*

377. *Id.* at 46.

378. *Id.*

379. *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966) (holding that the area around jails is not a public forum and that public demonstrations need not be allowed because they could compromise jail



bases,<sup>380</sup> or teachers' mailboxes,<sup>381</sup> which are not, by tradition or government fiat, places designated as forums for expressive activity or speech by the public.

The state is given wide latitude to invoke content-based regulations on speech in nonpublic forums if they are "reasonable" and not based on a speaker's viewpoint.<sup>382</sup> In such an environment, the government is seen as subsidizing its own message rather than providing funding to facilitate public speech.<sup>383</sup> For the state to enforce a content-based regulation in traditional or limited public forums, however, mere reasonableness does not suffice. In such forums, the regulation must be capable of surmounting the strict scrutiny standard.<sup>384</sup> Specifically, the state must be able to show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve the state's interests without unduly compromising fundamental constitutional rights.<sup>385</sup>

With the *Perry* forum distinctions in mind, it is clear that the level of constitutional scrutiny that any governmental regulation of expressive activity and speech within a public library will face depends on a judicial determination of the forum category in which public libraries are placed. This question has been litigated in the federal courts, and these courts have concluded that public libraries are, in fact, limited public forums.<sup>386</sup> In *Kreimer v. Bureau of Police*, the Third Circuit applied a three-part test in determining whether the public library constitutes a limited public

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security).

380. *Greer v. Spock*, 424 U.S. 828, 838 (1976) (holding that, unlike traditional public forums, such as streets and parks, military bases have not been traditionally used for public speech).

381. *Perry*, 460 U.S. at 46.

382. *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 131-32, *cert. denied*, 453 U.S. 917 (1981).

383. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 552, *cert. denied*, 532 U.S. 903 (2001) (Scalia, J., dissenting) (quoting *Speiser v. Randall*, 357 U.S. 513, 519 (1958)).

384. *See, e.g.*, G. Sidney Buchanan, *The Case of the Vanishing Public Forum*, 1991 U. ILL. L. REV. 949 (1991).

With respect to a traditional public forum, the Court has stated repeatedly that it will subject to strict scrutiny any governmental action that restricts speaker access to the forum on a content-selective basis. With respect to a designated public forum, the standard of review analysis is exactly the same as in the case of a traditional public forum.

*Id.* at 953.

385. *Perry*, 460 U.S. at 46; *Carey v. Brown*, 447 U.S. 455, 461, 462 (1980).

386. *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1258 (3d Cir. 1992) ("[A]n application of the Supreme Court's declarations concerning this issue . . . confirm[s] that the Library constitutes a limited public forum, a type of designated public fora."). *Loudoun II*, 24 F. Supp. 2d 552, 563 (concluding that the public libraries at issue were limited public forums in light of the government's intentions in establishing a county library system, their express grant of permission to the public to use the libraries, and the compatibility of public use in the libraries themselves).

forum.<sup>387</sup> That test, which was applied in *Loudoun*<sup>388</sup> and will almost certainly be applied in future cases in which regulation of expressive activity in a public library has occurred, requires that the following inquiries be made to determine a library's forum status:

a) Did the government intend to create a limited public forum when it authorized and established the public library system?<sup>389</sup>

b) To what extent has the government limited or restricted access to the library by the public or allowed the facility to be freely used by "the people?"<sup>390</sup>

c) Is the nature of the library compatible with the expressive activity and speech that the government's regulation restricts?<sup>391</sup>

As to the question of government intent in establishing the public library system, *Kreimer* and *Loudoun* recognize that public library systems are typically established by statutes and/or local resolutions that expressly declare that they exist to provide people with access to information and ideas.<sup>392</sup> Indeed, libraries have been described as "the archetypal traditional government-funded loci for acquiring knowledge."<sup>393</sup> An institution that the government expressly establishes and maintains to serve as a public forum for the limited purposes of receiving and communicating information is indicative of a limited public forum as defined by *Perry*.<sup>394</sup>

On the second question of extent of use by the public, *Kreimer* and *Loudoun* recognize that public libraries are typically established to serve the public with no restrictions on access based on age, race, religion, origin, background, or views.<sup>395</sup> By opening to the public at large and choosing not to retain unfettered discretion governing admission, the state greatly limits its own discretion to restrict access and the type of expressive activity that the public engages in when using a public library.<sup>396</sup> As to this second question, an institution which has been created

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387. 958 F.2d 1242, 1259-62 (3d Cir. 1992).

388. *Loudoun II*, 24 F. Supp. 2d at 562-63.

389. *Id.* (citing *Kreimer*, 958 F.2d at 1259).

390. *Id.* at 563 (citing *Kreimer*, 958 F.2d at 1260).

391. *Id.*

392. *Kreimer*, 958 F.2d at 1259; *Loudoun II*, 24 F. Supp. 2d at 562-63.

393. Bell, *supra* note 330, at 221 ("If public libraries should be viewed as settings for wide-ranging inquiry, the First Amendment should greatly restrain public libraries from blocking the availability of Internet sites.")

394. *Loudoun II*, 24 F. Supp. 2d at 562; *Kreimer*, 958 F.2d at 1259.

395. *Loudoun II*, 24 F. Supp. 2d at 563; *Kreimer*, 958 F.2d at 1260.

396. *Loudoun II*, 24 F. Supp. 2d at 563; *Kreimer*, 958 F.2d at 1260.

for extensive use by the public is indicative of a limited public forum.<sup>397</sup>

On the final question of the nature of the library's compatibility with the type of expressive activity that a filtering policy would restrict, *Kreimer* and *Loudoun* found that the receipt and communication of the wide variety of information made expressly available to the public by public libraries (e.g., print and computerized resources, including the Internet if the library offers it) is *exactly* the type of expressive activity expected of the public by the bodies that established those libraries.<sup>398</sup> Receiving and communicating information made available in various forms is completely compatible with the type of expressive activities anticipated in a public library and, as such, is indicative of activity protected within a limited public forum.<sup>399</sup>

The *Kreimer* and *Loudoun* conclusions that public libraries are limited public forums was recently adopted by the three-judge panel making the initial review of CIPA's constitutionality in *ALA v. United States*<sup>400</sup> and will be a primary point of contention during the impending Supreme Court consideration of the district court's opinion.<sup>401</sup> The more broadly the

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397. *Loudoun II*, 24 F. Supp. 2d at 563; *Kreimer*, 958 F.2d at 1260.

398. See *Kreimer*, 958 F.2d at 1256 (recognizing that public libraries are "the 'quintessential' locus for the exercise of the right to receive information and ideas"); *Loudoun II*, 24 F. Supp. 2d at 563 ("While the nature of the public library would clearly not be compatible with many forms of expressive activity, such as giving speeches or holding rallies . . . it is compatible with . . . the receipt and communication of information through the Internet. Indeed, this expressive activity is explicitly offered by the library.")

399. *Kreimer*, 958 F.2d at 1260-62; *Loudoun II*, 24 F. Supp. 2d at 563.

400. 201 F. Supp. 2d 401, 457 (E.D. Pa. 2002), *probable jurisdiction noted* 123 S. Ct. 551 (2002) ("We are satisfied that when the government provides Internet access in a public library, it has created a designated public forum.") (citing *Loudoun II*, 24 F. Supp. 2d at 563).

401. At least two commentators have taken the position that the *Kreimer*, *Loudoun*, and *ALA v. United States* courts got it wrong when they pronounced public libraries to be limited public forums for all purposes. The chief proponent of this view, attorney Mark S. Nadel, suggests that the standard that better reflects the complexity of a "multidimensional medium" like a library is different depending on the activity being scrutinized. Nadel, *supra* note 342, at 1134-38. According to Nadel, libraries' decisions concerning who should be allowed physical access to the facility fall into the limited public forum category and, as such, should be reviewed under strict scrutiny because they are not allowed to be selective in their decision-making. *Id.* On the other hand, when making decisions about additions to the library collection over which librarians are granted great deference, Nadel would classify libraries as nonpublic forums where the government can invoke content restrictions as long as they are "reasonable" and are viewpoint-neutral. *Id.* Bernard Bell suggests a similar approach, saying that "[p]ublic libraries . . . are non-public fora, at least from the speaker's perspective . . . Librarians should be free to provide the content they believe is in the best interests of their patrons without the constraint of considering the interests of the creators of expressive materials." Bell, *supra*, note 330, at 206. Indeed, if this theory were adopted, it would provide filtering advocates with a back-door approach to get Internet filters into libraries without subjecting their use to strict scrutiny. In the end, even if Nadel and Bell's approach were adopted, a library would end up confronting the same nature of the Internet dilemmas that it now faces. Having invited the public to engage in virtually limitless speech by offering Internet access, the library has no tools, including filters, that can restrict patron

government provides access to speech in its facilities, the less deference the courts will give the government to control that speech,<sup>402</sup> for example, government use of content-based conditional funding to encourage “artistic excellence” in publicly funded institutions, such as an art museum,<sup>403</sup> receives reduced constitutional scrutiny because the government is not inviting the widest possible range of public speech. On the other hand, the same type of funding conditions will be subjected to strict scrutiny in limited public forums where the government is not the speaker, and where a wide variety of public speech has been invited.<sup>404</sup> Following this line of reasoning the district court in *ALA v. United States* found that by inviting virtually unlimited public access and financing an online forum in which patrons can speak on an unrestricted range of topics, government funding of public libraries creates a limited public forum in which content regulations on particular speech content are subject to strict scrutiny review.<sup>405</sup>

### C. CIPA Strictly Scrutinized

Assuming that the Supreme Court does not reverse the district court and defer to Congress’s spending power in setting CIPA funding conditions, let library filtering be granted equal deference as library book selection decisions, or allow public libraries to be described as nonpublic forums, the constitutionality of CIPA will rise or fall on the government’s ability to convince the Court that the statute can survive First Amendment strict scrutiny. Neither the federal government in *ALA v United States* nor the Loudoun County Virginia Library Board in *Loudoun I* and *Loudoun II* were able to carry this burden at the district court level. As a result, the statutes challenged in those cases were ruled unconstitutional and permanently enjoined.<sup>406</sup> Although the *Loudoun* case was never appealed,

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“access” to that part of the collection without compromising patrons’ constitutional right to receive information.

402. *ALA v. United States*, 201 F. Supp. 2d at 460.

403. *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 576 (1998) (validating a statute requiring the National Endowment for the Arts to ensure “general standards of decency and respect for the diverse beliefs and values of the American public”).

404. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (denying funding to student organization publishing a college newspaper with a Christian editorial slant amounts to viewpoint discrimination).

405. *ALA v. United States*, 201 F. Supp. 2d at 460.

406. *See ALA v. United States*, 201 F. Supp. 2d at 496 (holding that the Federal Communications Commission and the Institute of Museum and Library Services “are permanently enjoined from withholding federal funds from any public library for failure to comply with §§ 1712(a)(2) and 1721(b) of the Children’s Internet Protection Act, 20 U.S.C. § 9134(f) and 47 U.S.C. § 254(h)(6).”);

the Justice Department announced within weeks of the CIPA trial court decision that it had filed its notice of appeal with the Supreme Court.<sup>407</sup>

Although the exact wording of a strict scrutiny test varies slightly from court to court, the general elements remain constant. To survive strict scrutiny, CIPA's filtering restriction must be: (1) "necessary" and narrowly tailored to serve a compelling state interest, and (2) the least restrictive alternative available to serve the government's purpose.<sup>408</sup> An examination of each element and how government mandated library filtering fits them provides some interesting insights into the practical and constitutional difficulties facing government attempts to invoke such a program.

### *1. Is a Filtering Policy Necessary to Further a Compelling State Interest?*

To show that a restriction on speech is necessary to serve a compelling state interest, the required first step is to establish that the government's interest is compelling. That burden lies with the government; "the government interest cannot be taken for granted."<sup>409</sup> The compelling interest asserted cannot be speculative, but must be based upon a real and demonstrated harm.<sup>410</sup> Moreover, the government must show a connection between that harm and the speech it wishes to restrict.<sup>411</sup>

Although there can be little contest that the government has a compelling interest in protecting children, the government has done little to show that unfiltered access to the Internet poses a real harm to children sufficient to justify compromising First Amendment rights. No one argues that children should not be protected from harm, but when Congress acts to restrict speech, much of which is protected, and in the process compromises perhaps the most democratic communications medium in history by undercutting one of society's most First Amendment-friendly institutions, constitutional principles require that the government be compelled to prove that it is attacking an identifiable and remediable harm.

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*Loudoun II*, 24 F. Supp. 2d at 570 (holding that the Loudoun Country Library Board of Trustees is "permanently enjoined from enforcing its Policy on Internet Sexual Harassment").

407. Appellant's Jurisdictional Statement at 1, *United States v. ALA*, 123 S.Ct. 551 (U.S. 2002), available at <http://www.usdoj.gov/osg/briefs/2002/2pet/7pet/2002-0361.pet.aa.pdf> ("Notice of Appeal . . . was filed on June 20, 2002.").

408. *Loudoun II*, 24 F. Supp. 2d at 565-67; *ALA v. United States*, 201 F. Supp. 2d at 470-71.

409. Ross, *supra* note 7, at 461 (citing, *inter alia*, *Reno I*, 929 F. Supp. at 851).

410. *Id.* ("Fear of serious injury cannot alone justify suppression of free speech.") (quoting *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring)).

411. *Id.* at 460-61 & nn.154-55. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 387 (1994).

Regrettably, the development of First Amendment jurisprudence relative to children's speech rights does not reflect close examination by the courts of whether purported governmental interests are compelling. As evidenced in their review of major federal laws passed since the late 1980s restricting speech content in the name of "protecting children from harm,"<sup>412</sup> the courts' examination of the government's compelling interests has been superficial, at best.<sup>413</sup> This perfunctory review of the nature of the government's interest undermines a critical component of the strict scrutiny test. As described by Professor Catherine J. Ross:

First, it leads to the tacit assumption that the government's proclaimed interests are virtually immune from scrutiny once the state invokes the protection of children. Second, it suggests that the boundaries of the speech from which children must be protected are virtually limitless . . . . Third, when courts beg the question of the nature of the state's interest in regulating speech to shield the young, they inhibit the development of First Amendment jurisprudence and lead emerging doctrine astray. Because courts have not asked the threshold questions required under First Amendment doctrine, they have opened the door to using children as an excuse for the state to intrude upon protected speech . . . .<sup>414</sup>

In the case of CIPA, the government has asserted little more than a generalized interest in protecting children from harm assumed to arise from their viewing of pornography.<sup>415</sup> Because reputable research on the

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412. See Ross, *supra* note 7, at 430-31, for a review of the Supreme Court's actions in *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996); and *Reno II*, 521 U.S. 844 (1997). See also *Reno IV*, 217 F.3d at 173 (citing *Reno III*, 31 F. Supp. 2d at 495), in which the court paid scant attention to the issue, noting, "It is undisputed that the government has a compelling interest in protecting children from material that is harmful to them, even if not obscene by adult standards."

413. Ross, *supra* note 7, at 431 ("[R]emarkably, in each of these three cases, the Supreme Court ignored its own dictates by failing to analyze the state's asserted compelling interest. Instead, the Court readily accepted the asserted interest in passing.").

414. *Id.* at 433-34.

415. As in the Supreme Court's review of earlier statutes, the district court did not put the government to the test on this point. The court noted that "[o]n its face, CIPA is clearly intended to prevent public libraries' Internet terminals from being used to disseminate to library patrons visual depictions that are obscene, child pornography, or in the case of minors, harmful to minors." *ALA v. United States*, 201 F. Supp. 2d at 471. The court passed by the issue of actual harm resulting from minors' access to "harmful" materials on the Internet with the usual incantation that the interest of protecting minors is "well-established" and "beyond the need for elaboration." *Id.* at 471-72. It then went further, discussing two other potential compelling interests: the court discussed the government's interest in protecting library patrons from accidental viewing of offensive materials. *Id.* at 472-74. It also discussed the state's interest in preventing unlawful or inappropriate conduct. *Id.* at 474-75.

subject is limited, the task of proving that exposing children to unfiltered Internet content will cause them real harm is certainly not an easy proposition. As at least one court has recognized, what research has been done in the scientific literature is inconclusive, at best, on the correlation between exposure of children to sexual material and any resulting harm to them.<sup>416</sup>

The issue of children's safety while using the Internet has become the subject of national debate. Fueled by a near constant bombardment of popular press accounts warning parents of online "dangers,"<sup>417</sup> the image of the Internet as a playground for sexual predators waiting to entrap unsuspecting children has become something of a national obsession. Against this backdrop, rumors become fact, and genuine concerns by parents and individuals trying to understand the issues and assess actual dangers are obscured by symbolic gestures of political opportunism and demagoguery.<sup>418</sup> While the courts are not immune to political and social pressure, it is disturbing that they continue to allow the government's mere assertion of a compelling interest to satisfy the first element of the strict scrutiny standard without requiring evidence of actual harm.

Even assuming that the government could actually document and prove real harm to children resulting from exposure to harmful materials on library computers, the First Amendment's strict scrutiny standard still requires proof that filtering would, *in fact*, alleviate this problem in a direct and material way.<sup>419</sup> At this point, the technological limitations preventing filtering software from shielding minors from harmful material on the Internet while also protecting the First Amendment rights of adults

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416. *Playboy Entm't Group v. United States*, 30 F. Supp. 2d 702, 710, 715-16 (D. Del. 1998) (finding that the government was unable to present any clinical evidence linking exposure of children to pornography and psychological harms).

417. Evidence exists of a correlation between press reports that concentrate on negative aspects of the Internet and how parents feel about the safety of their children online. In a survey of twelve major newspapers mentioning the Internet and children between October 15, 1997, and October 15, 1998, the University of Pennsylvania's Annenberg Public Policy Center found that two of every three stories relating to the Internet and the family concentrated on a narrow range of online problems (most often sex crimes, pornography, and privacy invasion), while one of every four such stories concentrated on sexual predators, child pornographers, and other types of sex crimes directly involving children. Half the number of stories analyzed did portray positive aspects of the Internet, but rarely were those comments made in the articles reporting problems. The report concludes that often poorly documented stories stirring parents' alarm about their children's safety on the web help shape the nation's "conventional wisdom" on the issue. See Joseph Turow, The Annenberg Public Policy Ctr., *The Internet and the Family: The View From Parents, The View From the Press* 34-42, available at <http://www.appcpenn.org/internet/family/rep27.pdf> (last visited Oct. 1, 2002).

418. See HEINS, *supra* note 7, at 243-53.

419. See *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 664 (1994).

are well documented.<sup>420</sup> The most recent, and certainly the most comprehensive, examination of this technology's inability to operate within the constraints of the First Amendment was incorporated into the district court's opinion in *ALA v. United States*<sup>421</sup> and was based on extensive findings of fact gleaned from expert testimony presented by both the library plaintiffs and the government.<sup>422</sup>

The court first noted that, because of the enormous size of the Internet, it is very difficult to quantify the error level of filtering software.<sup>423</sup> Nonetheless, using testimony presented by the government's expert witness, the court found that, conservatively, 6% to 15% of the sites blocked in public libraries analyzed in preparation for trial did not contain sexually explicit content, as that term is defined in CIPA.<sup>424</sup> This finding is in line with the classic complaint regarding filtering products, that they are inflexible by their very nature and block sites with harmless content if they contain "keywords" such as "breast." An example frequently given is the inability to access a site with instructions for performing a breast self-examination. Despite manufacturers' claims that refinements in the technology have allowed more sophisticated filtering, the court still found multiple examples of inexplicable blocking. A California Jewish Community Center site, a guide to allergies, and a flyfishing outfitter's site were all blocked as "pornography," and a Louisiana cancer treatment facility's site was blocked as "sex."<sup>425</sup> The court observed that incidents of inappropriate blocking covered a wide range of subject matter, including

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420. See generally Christopher Stern, *X-Rated Files Finding Child Audience: Congressional Study Calls Filtering Software Ineffective*, WASH. POST, July 28, 2001, at E01; *Digital Chaperones for Kids*, CONSUMER REPORTS, Mar. 2001, at 20; Geoffrey Nunberg, *The Internet Filter Farce*, AMERICAN PROSPECT, Jan. 1, 2001, at 28; Joe Salkowski, *Web Filters Proving Ineffective But Politicians Effectively Milking Them*, CHI. TRIB., Oct. 30, 2000, at C7; American Civil Liberties Union, *Fahrenheit 451.2: Is Cyberspace Burning? How Rating and Blocking Proposals May Torch Free Speech on the Internet*, published at <http://www.aclu.org/issues/cyber/burning.html> (last visited Oct. 1, 2002); THE INTERNET FILTER ASSESSMENT PROJECT REPORT, published at <http://www.bluehighways.com/tifap/Learn.htm> (last visited Oct. 1, 2002).

421. *ALA v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2002).

422. The district court closely reviewed the testimony and research studies offered by a number of experts on filtering technology and actively questioned the methodologies used by both parties to illustrate the relative effectiveness of Internet filtering. See generally *ALA v. United States*, 201 F. Supp. 2d at 430-49 (concluding that "no presently conceivable technology can make the judgments necessary to determine whether a visual depiction fits the legal definitions of obscenity, child pornography, or harmful to minors").

423. *Id.* at 437-42 (criticizing the government witness's attempts to quantify the error rate of filtering programs).

424. *Id.* at 448.

425. *Id.* at 446-47.



religion, politics and government, health, careers, education, travel, and sports.<sup>426</sup>

The reverse problem, that of underblocking, arises in part because of the size of the Internet, and particularly the portion of the Internet which is not indexed.<sup>427</sup> With more than 50% of Internet content invisible to the tools used in filtering software to identify sites to be evaluated, the court recognized that perhaps as many as a billion Web pages, some undoubtedly containing content that would run afoul of CIPA, could slip through to viewers having never been filtered.<sup>428</sup> In addition, because most filtering programs are designed to search for suspect text as opposed to graphic images,<sup>429</sup> they cannot filter out the visual depictions that are the target of CIPA. While the court realized that image filtering programs exist, it found that the technology “is immature, ineffective, and unlikely to improve substantially in the near future.”<sup>430</sup> Finally, neither automated nor human review techniques allow sufficient accuracy to ensure that all Web pages fitting CIPA’s definitions of proscribed content will in fact be found and properly categorized.<sup>431</sup>

The *ALA* court’s ultimate finding regarding the effectiveness of filtering software was that “any filter that blocks enough speech to protect against access to visual depictions that are obscene, child pornography, and harmful to minors, will necessarily overblock substantial amounts of speech that does not fall within these categories.”<sup>432</sup> Because this technology cannot be used to comply with CIPA without preventing access to significant amounts of protected speech, the court held that the use of filters in public libraries “is not narrowly tailored to the government’s legitimate interest in preventing the dissemination of visual depictions that are obscene, child pornography, or in the case of minors, harmful to minors.”<sup>433</sup>

## 2. *Is Filtering the Least Restrictive Alternative?*

It is well established that the state bears the burden of proving that it has chosen the least restrictive means available to address a compelling

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426. *Id.* at 446.

427. See *supra* note 358 for discussion of the term “indexable” as it pertains to the Internet.

428. *ALA v. United States*, 201 F. Supp. 2d at 431.

429. *Id.*

430. *Id.*

431. *Id.* at 436.

432. *Id.* at 476-77.

433. *Id.* at 478.

state interest to regulate the content of constitutionally protected speech.<sup>434</sup> “Without evidence that less restrictive means had ‘been tested over time,’” the state cannot meet its burden of proving that other arguably less restrictive means would not be sufficiently effective.<sup>435</sup> There are, in fact, many alternatives less restrictive than filtering available and in use in libraries throughout the nation that greatly limit the likelihood that library patrons will use computers to access obscene materials.<sup>436</sup>

*Loudoun* handled this issue fully, discussing a number of approaches that could be tested before filtering could be assumed to be the least restrictive alternative.<sup>437</sup> In *ALA v. United States*, the court expanded on the list of possible options that could be as effective as filtering. Specifically, it suggested that any of the following less restrictive alternatives could serve the government’s interests and should be examined for effectiveness before filtering is mandated:<sup>438</sup> Internet use policies; tap-on-the-shoulder policies (in which librarians visually monitor Internet screens and alert users when they are viewing what appears to be unprotected material); requiring minors to use specific computers; placing computers used by minors in direct view of library staff; requiring minors to use filtered computers when unaccompanied by parents; offering patrons the option of using filters; segregating filtered and unfiltered computers; and use of privacy screens and recessed monitors.<sup>439</sup> Although both courts found that the alternatives they listed would be less restrictive than a comprehensive filtering policy, each declined to decide whether these alternatives would in fact survive constitutional scrutiny if implemented.<sup>440</sup>

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434. *Loudoun II*, 24 F. Supp. 2d at 564-65; *Perry*, 460 U.S. at 45.

435. *Loudoun II*, 24 F. Supp. 2d at 566-67 (quoting *Sable Comms. of Cal., Inc. v. F.C.C.*, 492 U.S. 489, 128-29 (1989)).

436. See *ALA v. United States*, 201 F. Supp. 2d at 480 (finding that “there are plausible, less restrictive alternatives to the use of software filters that would serve the government’s interest in preventing the dissemination of obscenity and child pornography to library patrons”); See also *Loudoun II*, 24 F. Supp. 2d at 567 (finding that Loudoun County’s filtering policy “is not narrowly tailored because less restrictive means are available to further defendant’s interests and . . . there is no evidence that defendant has tested any of these means over time”).

437. *Loudoun II*, 24 F. Supp. 2d at 567. Among the alternatives suggested were the installation of privacy screens around Internet workstations, library staff monitoring of patrons’ use of Internet workstations, the installation of filtering software on workstations placed in a “children only” area of the library, and the use of content-neutral time limits on Internet workstations. *Id.*

438. *ALA v. United States*, 201 F. Supp. 2d at 480 (citing *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000) (“If a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.”)).

439. *Id.* at 480-84.

440. *Id.* at 482 n.32; *Loudoun II*, 24 F. Supp. 2d at 567.

### 3. Do CIPA's Disabling Provisions Cure Other Defects?

Congress attempted to ameliorate the lack of narrow tailoring in CIPA by adding language that allows library officials to disable filters, upon request, for “bona fide research or other lawful purposes.”<sup>441</sup> The *ALA v. United States* court recognized that the lack of definitional clarity of the phrase “bona fide research or other lawful purposes” was a cause for constitutional concern.<sup>442</sup> It concluded, however, that even under the broadest interpretation of the phrase—allowing access to any speech that is constitutionally protected for that patron—the statute’s requirement that patrons ask the library for permission to access that speech is contrary to the First Amendment.<sup>443</sup> Like *Loudoun* before it, which had analyzed a similar provision permitting citizens to publicly petition for access to protected speech, the *ALA v. United States* court recognized that such a requirement has “an impermissible chilling effect” on First Amendment rights.<sup>444</sup> Library patrons’ reluctance to ask permission to engage in speech that covers a wide range of sensitive subjects, such as sexually related disease, sexual identity, and certain medical conditions, was likely to deter many from engaging in this protected speech at all. Even in cases where these requests could be made anonymously through the transmittal of an e-mail request or other means that would hide the requester’s identity, the court noted that the accompanying delay of this procedure serves as its own significant burden on patrons’ unfettered exercise of their First Amendment rights.<sup>445</sup> An additional concern noted in *Loudoun* and arguably applicable to *ALA v. United States* is that requiring individuals to seek permission from government agents with unfettered discretion to grant or deny access serves as a prior restraint to protected speech and is antithetical to the concepts of the First Amendment.<sup>446</sup>

In the final analysis, the *ALA v. United States* court found that the disabling provisions do not save the statute, as at best they lessen but do not eliminate its First Amendment infirmities.

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441. See discussion of disabling provisions *supra* at text accompanying notes 184-88.

442. *ALA v. United States*, 201 F. Supp. 2d at 485.

443. *Id.* at 485-86.

444. *Id.* at 486 (“The Supreme Court has made clear that content-based restrictions that require recipients to identify themselves before being granted access to disfavored speech are subject to no less scrutiny than outright bans on access to such speech.”). See also *Loudoun II*, 24 F. Supp. 2d at 569 n.22 (citing *Loudoun I*, 2 F. Supp. 2d at 797). Both the *ALA v. United States* and the *Loudoun* courts relied on *Lamont v. Postmaster General*, 381 U.S. 301 (1965), as the source for this principle. *ALA v. United States*, 201 F. Supp. 2d at 486-87; *Loudoun II*, 24 F. Supp. 2d at 569-70.

445. *ALA v. United States*, 201 F. Supp. 2d at 487-88.

446. *Loudoun I*, 2 F. Supp. 2d at 797.

## VI. CONCLUSION

Congress has made a transparent effort to present its latest attempt to restrict sexually explicit content on the Internet, the Children's Internet Protection Act, as a routine use of its broad spending power. Having been thwarted by the courts in its efforts to tame the Internet through the use of direct criminal sanctions on online distribution of obscenity and material that is harmful to minors, Congress attempted to end-run constitutional roadblocks, forcing libraries to accept government regulations on speech content or surrender their claim to critically needed federal technology funds.

When closely examined in the light of First Amendment doctrine, however, CIPA's funding conditions are revealed to be the Communications Decency Act and the Child Online Protection Act in disguise—yet another congressional attempt to eradicate sexual content from the Internet using technology that inevitably filters out a great deal of constitutionally protected speech. In CIPA, Congress has demonstrated an even greater zeal to censor online content. It is willing not only to compromise the application of the First Amendment's protections to the Internet, as it had tried to do with the failed CDA and COPA, but is now willing to achieve its goal by undercutting its own meritorious program to democratize Internet access by holding public libraries hostage to win its desired result.

Stripped of the facade of an innocent funding decision, CIPA is one of the most sweeping restrictions on constitutionally protected speech ever invoked by Congress. Having struck down the CDA and expressed concern about the COPA's eventual ability to withstand comprehensive strict scrutiny analysis, the Supreme Court has made clear that it intends to fully protect First Amendment rights on the Internet. With CIPA having lost its initial round of constitutional review, the government is asking the Court to rescue its latest effort to "protect our children" online. While that goal is laudable, CIPA's approach is fundamentally flawed. An assessment of the certain harm to First Amendment rights from enforcement of the statute's funding conditions, as well as an analysis of the many alternative ways to achieve the goal at far lower cost to free speech must lead the Court to reject this approach and send yet another message that the Constitution will not allow Congress to compromise First Amendment principles in the online world.