9-1-1992

The Regulation of Indecent Telephonic Communication: Helms Amendment Slights First Amendment to Silence Dial-a-Porn

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THE REGULATION OF INDECENT TELEPHONIC COMMUNICATION: HELMS AMENDMENT SLIGHTS FIRST AMENDMENT TO SILENCE DIAL-A-PORN

I. INTRODUCTION

The First Amendment of the Constitution states that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[1] Although the plain language of the First Amendment appears to create an absolute protection for free speech, the United States Supreme Court "has consistently held that 'abridging' and 'the freedom of speech' require interpretation and that restraints on free expression may be 'permitted for appropriate reasons.'"[2] Thus, the Court has analyzed restraints on free expression by drawing distinctions between content-based restrictions and content-neutral restrictions,[3] and by drawing further distinctions between "high" and "low" value expression within the realm of content-based restrictions.[4] Through this process, the Court has defined many categories of expression which are either unprotected or only marginally protected by the First Amendment.[5]

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1. U.S. CONST. amend. I.

2. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1011 (2d ed. 1991) (citing Elrod v. Burns, 427 U.S. 347, 360 (1976)).

3. *Id.* at 1024. "Content-based restrictions restrict communication because of the message conveyed . . . . Content-neutral restrictions, on the other hand, restrict communication without regard to the message conveyed." *Id.*

4. *Id.* "The Court has long adhered to the view that there are certain categories of expression that do not appreciably further the values underlying the first amendment." *Id.*

5. STONE, *supra* note 2, at 1024. In addition to focusing upon the type of expression which the government may restrict, the Court has often focused on the means of suppression. *Id.* at 1120. Thus, courts have relied upon the doctrines of overbreadth, vagueness, and prior restraint to "invalidate restrictions on expression because the means of suppression are impermissible even though the particular speech at issue might constitutionally be restricted by some other means." *Id.* at 1120-21. A statute is unconstitutionally overbroad if it "'does not aim specifically at evils within the allowable area of [government] control, but . . . sweeps within its ambit other activities that constitute an exercise' of protected expressive or associational rights." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1022 (2d ed. 1988) (alteration in original) (quoting Thornhill v. Alabama, 310 U.S. 88, 97 (1940)). Furthermore, a statute will be held void for vagueness "if it is so vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Id.* at 1033 (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)). Finally, the prior restraint doctrine "imposes a special bar on attempts to suppress speech prior to [expression], a bar that is distinct from the scope of constitutional protection accorded the material *after* [expression]." *Id.* at 1040. Thus, "any 'system of prior restraints . . . bear[s] a heavy presumption against its constitutional validity.'" *Id.* at 1041 (quoting Bantam

Accordingly, the Supreme Court determined long ago that "obscenity" is not included within the bounds of constitutionally protected speech.[6] However, in *Cohen v. California*,[7] the Court recognized that profane, offensive language which does not rise to the level of "obscene" is worthy of receiving First Amendment protection.[8] Furthermore, in *FCC v. Pacifica Foundation*,[9] the Court defined a category of speech which is "indecent" but not "obscene," but clearly determined that "indecent" speech was to receive only limited First Amendment protection.[10]

Since these decisions, determining the amount of protection to extend to various forms and mediums of communication has been an ongoing challenge for the legal system.[11] With the development of the dial-a-porn industry,[12] the legal system has been challenged with questions concerning the amount of First Amendment protection to extend to indecent telephonic communication.[13] Thus, the dial-a-porn industry, armed with limited First Amendment protection for indecent speech, has been defending itself against repeated Congressional attempts to regulate the industry for the past

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Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)).

6. Roth v. United States, 354 U.S. 476, 485 (1957). Later, in Miller v. California, 413 U.S. 15 (1973), the Court established the following test for obscenity:

> (a) [W]hether '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 (citation omitted).

7. 403 U.S. 15 (1971).

8. *Id.* at 20, 24-26 (reversing the criminal conviction of a man for wearing a jacket bearing the words "Fuck the Draft" in a courthouse).

9. 438 U.S. 726 (1978).

10. *Id.* at 744-48 (upholding the FCC's sanctions against a radio station for the afternoon broadcast of George Carlin's "Filthy Words" monologue). The Court adopted the following test for indecency: "[L]anguage that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." *Id.* at 732 (citing In re Citizen's Complaint Against Pacifica Found. Station WBAI (FM), 56 F.C.C.2d 94, 98 (1975)).

11. John C. Cleary, *Telephone Pornography: First Amendment Constraints on Shielding Children from Dial-A-Porn*, 22 HARV. J. ON LEGIS. 503, 503 (1985).

12. "'Dial-a-porn' is the colloquial name for telephone services that provide sexually explicit recorded messages to callers." Elizabeth J. Mann, Comment, *Telephones, Sex, and the First Amendment*, 33 UCLA L. REV. 1221, 1221 (1986).

13. Jeffrey L. Reed, Note, *Constitutional Law—First Amendment Protected for Indecent Speech—Dial-A-Porn*, 57 TENN. L. REV. 339, 342 (1990).

decade.[14]

During the 1980's, the dial-a-porn industry successfully thwarted four successive attempts to regulate its use of indecent telephonic communication.[15] However, the latest regulation, the Helms Amendment to the Communications Act of 1934,[16] was recently found constitutional in decisions by the Second Circuit Court of Appeals in *Dial Information Services v. Thornburgh*[17] and by the Ninth Circuit Court of Appeals in *Information Providers' Coalition v. FCC*.[18] Many people involved with the dial-a-porn industry believe that these decisions will seriously damage, if not destroy, the dial-a-porn industry.[19] Moreover, the United States Supreme Court denied certiorari to the Second Circuit decision,[20] thereby leaving the finding of constitutionality intact.

This Note discusses the historical development of dial-a-porn regulations and the cases interpreting those regulations.[21] This Note then discusses the recent Second and Ninth Circuit decisions declaring the Helms Amendment constitutional,[22] analyzes these decisions, and finds that both decisions are inconsistent with well-established precedent.[23] This Note contends that, although the Helms Amendment may appear reasonable at first glance, it does not pass constitutional muster in light of precedent. Therefore, this Note concludes that both courts should have declared the Helms Amendment unconstitutional.[24]

II. BACKGROUND

In 1980, the Federal Communications Commission ("FCC") ordered

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14. Cindy L. Petersen, Note, *The Congressional Response to the Supreme Court's Treatment of Dial-A-Porn*, 78 GEO. L.J. 2025, 2026 (1990).

15. *See* discussion *infra* part II.

16. Pub. L. No. 101-166, title V, § 521(1), 103 Stat. 1192 (1989) (codified as amended at 47 U.S.C.A. § 223 (West 1991)); *see* discussion *infra* part III.

17. 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 966 (1992); *see also* discussion *infra* part III.A.

18. 928 F.2d 866 (9th Cir. 1991); *see also* discussion *infra* part III.B.

19. Nick Selby, a lawyer representing the dial-a-porn companies, stated that "'[a]s a practical matter, the industry is history, a thing of the past.'" David S. Savage, *'Dial-a-Porn' Dealt High Court Setback*, L.A. TIMES, Jan. 28, 1992, at A13; *see also infra* notes 169-74 and accompanying text.

20. Dial Info. Servs. v. Barr, 112 S. Ct. 966 (1992).

21. *See* discussion *infra* part II.

22. *See* discussion *infra* part III.

23. *See* discussion *infra* part IV.

24. *See* discussion *infra* part V.

American Telephone and Telegraph to divest itself of "information access services."[25] In 1982, the FCC allowed private companies to offer these services competitively.[26] These events led to the creation of many privately owned information access services offering a variety of services, including services colloquially known as "dial-a-porn."[27] In 1983, dial-a-porn first became available on a national basis through a New York information access service called High Society.[28]

Peter F. Cohalan, the County Executive for Suffolk County, New York, instigated efforts to regulate dial-a-porn by bringing an action against Carlin Communications, Inc. ("Carlin") and the FCC in a New York State court.[29] However, the action was dismissed, so Cohalan joined efforts with Congressman Thomas J. Bliley (R-Va.) to attack Carlin with administrative action.[30] This effort also failed when the FCC determined that existing legislation did not restrict dial-a-porn.[31] Thereafter, Congress has attempted to regulate dial-a-porn through section 223 of the Communications Act of 1934 ("the Communications Act").[32]

A. Carlin I

In response to the FCC's decision, Congressman Bliley proposed an

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25. Ellen L. Nagel, Comment, *First Amendment Constraints on the Regulation of Telephone Pornography*, 55 U. CIN. L. REV. 237, 238 (1986) (citing Computer II, 84 F.C.C.2d 50, 71 (1980), *aff'd*, Computer & Communications Indus. Ass'n v. FCC, 693 F.2d 198, 218 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983). "Information access services are services such as dial-a-porn, dial-the-time, and dial-the-weather." *Id.* at 238 n.10.

26. Mann, *supra* note 12, at 1221.

27. *See supra* note 12.

28. Petersen, *supra* note 14, at 2026.

29. Cohalan v. High Soc'y Magazine, Inc., No. 3490/1983 (N.Y. Sup. Ct. 1983), *dismissed for lack of jurisdiction on removal*, No. CV 83-603 (E.D.N.Y. Mar. 16, 1983), *cited in* Carlin Communications v. FCC, 749 F.2d 113, 115 n.4 (2d Cir. 1984). Carlin, a dial-a-porn provider, was the largest information service provider in the nation at the time. Nagel, *supra* note 25, at 238.

30. *In re* Application for Review of Complaint Filed by Peter F. Cohalan, FCC File No. E-83-14 (May 13, 1983, and March 5, 1984), *cited in* Carlin Communications v. FCC, 749 F.2d at 115 n.5.

31. Carlin Communications v. FCC, 749 F.2d at 115. The legislation existing at the time prohibited the knowing use of a telephone under one's control to make "any comment, request, suggestion or proposal which is lewd, lascivious, filthy, or indecent." 47 U.S.C. § 223 (1982) (amended 1983, 1988, & 1989), *cited in* Nagel, *supra* note 25, at 240.

32. Communications Act of 1934, 47 U.S.C.A. §§ 151-613 (West 1991).

amendment to section 223 of the Communications Act.[33] The legislation, as amended and passed by Congress,[34] created section 223(b), which explicitly prohibited both obscene and indecent telephonic communication to minors and authorized the FCC to promulgate defenses to prosecution.[35] The FCC subsequently established that providers of obscene or indecent messages had a defense to prosecution if they either (1) operated only between the hours of 9:00 p.m. and 8:00 a.m. Eastern Time, or (2) required payment by credit card before transmission of the message.[36] The time channeling provision was intended to regulate dial-a-porn services, and the credit card provision was intended to regulate live telephone services.[37]

Carlin challenged the constitutionality of the FCC regulations in *Carlin Communications v. FCC*[38] (*"Carlin I"*). As a preliminary step, the court determined that the regulations were content-based; therefore, in order to be valid, the regulations had to be the least restrictive means to further a compelling government interest.[39] The court easily found that protecting minors from salacious matter was a compelling government interest.[40] However, the court also determined that time channeling was "both overinclusive and underinclusive [because it] denie[d] access to adults

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33. H.R. 2755, 98th Cong., 1st Sess. (1983); *see also* 129 CONG. REC. H10,209 (daily ed. Nov. 17, 1983).

34. The statute provided in pertinent part:

> (b)(1) Whoever knowingly—
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> (A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person under eighteen years of age or to any other person without that person's consent, regardless of whether the maker of such communication placed the call; or
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> (B) permits any telephone facility under such person's control to be used for any activity prohibited by subparagraph (A),
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> shall be fined not more than $50,000 or imprisoned not more than six months, or both.
>
> (2) It is a defense to a prosecution under this subsection that the defendant restricted access to the prohibited communication to persons eighteen years of age or older in accordance with procedures which the Commission shall prescribe by regulation.

47 U.S.C. § 223(b) (1983) (amended 1988 & 1989), *cited in* Carlin Communications v. FCC, 749 F.2d 113, 115 n.6 (2d Cir. 1984).

35. 47 U.S.C. § 223(b) (1983) (amended 1988 & 1989); *see also* Carlin Communications v. FCC, 749 F.2d at 115-16.

36. 49 Fed. Reg. 24,996 (1984).

37. Carlin Communications v. FCC, 749 F.2d at 117.

38. 749 F.2d 113 (2d Cir. 1984) [hereinafter *Carlin I*].

39. *Id.* at 121.

40. *Id.*

between certain hours, but not to youths . . . during the remaining hours."[41] The court also found that time channeling was not the least restrictive means because the FCC rulemaking record did not sufficiently explain why various alternatives would not be both more effective with respect to minors and less restrictive with respect to adults.[42] Therefore, the court found the FCC regulations to be unconstitutional without reaching the issue of the constitutionality of the underlying statute.[43]

B. Carlin II

In response to *Carlin I*, the FCC renewed their efforts to develop appropriate defenses as mandated by Congress. Their second effort established that providers of obscene or indecent messages had a defense to prosecution if they either (1) required an access or identification code before transmission of the message, or (2) required payment by credit card before transmission of the message.[44] Once again, Carlin challenged the constitutionality of the regulations in *Carlin Communications v. FCC*[45] (*"Carlin II"*).

During the rulemaking process, the FCC rejected the alternative of customer premises blocking[46] because it "did not restrict minors' access to dial-a-porn services from telephones not so equipped" and because "the cost for such devices should not be imposed upon parents."[47] However, the court stated, "As the [FCC] did not consider the alternative of cost-shifting of customer blocking devices to the service providers, . . . the record is barren as to why the service providers would not equally have incentives to implement a customer blocking system, which surely is less cumbersome . . . ."[48] Accordingly, the court determined that "the record [did] not support the FCC's conclusion that the access code requirement [was] the least restrictive means to regulate dial-a-porn."[49] Therefore, the court again found the FCC regulations to be unconstitutional without

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41. *Id.*
42. *Id.* at 122.
43. *Carlin I*, 749 F.2d at 123.
44. 50 Fed. Reg. 42,699 (1985).
45. 787 F.2d 846 (2d Cir. 1986) [hereinafter *Carlin II*].
46. "Customer premises blocking" is a term encompassing any "blocking device installed at the calling customer's premises." *Id.* at 849.
47. *Id.* at 854.
48. *Id.* at 856.
49. *Id.* at 855.

reaching the issue of the constitutionality of the underlying statute.[50]

In reaching this decision, the court also emphasized that the New York Telephone ("NYT") Mass Announcement Service relied on by Carlin was a one-way distribution system, thus making the two-way communication required for access codes technically infeasible.[51] The court stated, "In short, the FCC regulations would put Carlin out of business in New York, [which] comports neither with this court's prior ruling, nor with overall constitutional or statutory considerations."[52] Therefore, the court limited its decision to the NYT system, without considering the validity of the access code regulation as applied to dial-a-porn providers outside the NYT system.[53]

C. Carlin III

Following *Carlin II*, the FCC again analyzed various alternatives to restrict children's access to dial-a-porn in an effort to meet the congressional mandate. Their third effort established that providers of obscene or indecent messages had a defense to prosecution if they (1) required payment by credit card before transmission of the message, (2) required an access code before transmission of the message, or (3) scrambled their messages so that a descrambling device was necessary to receive the messages.[54] For the third time, Carlin challenged the constitutionality of the regulations in *Carlin Communications v. FCC*[55] (*"Carlin III"*).

In support of their regulations, the FCC provided a very thorough report concerning the various possible alternatives.[56] Also, NYT stated that it planned to install a new system which would permit an access code procedure.[57] Based on these factors, the court determined that the FCC's regulations were "a feasible and effective way to serve [the] compelling state interest" of protecting minors from obscene speech.[58] The court also determined that the regulations did not unreasonably restrict adults' access to dial-a-porn.[59]

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50. *Carlin II*, 787 F.2d at 855.
51. *Id.* at 848.
52. *Id.*
53. *Id.*
54. 52 Fed. Reg. 17,760 (1987).
55. 837 F.2d 546 (2d Cir. 1988), *cert. denied*, 488 U.S. 924 (1988) [hereinafter *Carlin III*].
56. *See id.* at 550-55.
57. *Id.* at 550.
58. *Id.* at 555.
59. *Id.* at 557.

Having found the FCC regulations to be valid, the court next considered the constitutionality of the underlying statute. In response to Carlin's vagueness challenge, the court stated that "[t]he use of 'indecent' was clearly made with *FCC v. Pacifica Foundation*[60] in mind."[61] In *Pacifica*, the Supreme Court determined that a radio broadcast was indecent but not obscene, defining indecency as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience."[62]

However, the *Carlin III* court analogized telephonic communications to cable television, noting that several "courts have struck down legislation limiting adult access to indecent speech on cable television."[63] In *Cruz v. Ferre*,[64] cable television was distinguished from radio broadcasting because "subscribers must affirmatively subscribe to the service and because technology exists to enable parents to prevent children's access to objectionable cable programs."[65] Accordingly, the *Carlin III* court concluded that because "telephone calls made by an individual over a private line differ significantly from the public broadcast in *Pacifica*, . . . the *Pacifica* decision does not justify the regulation of indecent telephone messages."[66] Therefore, the court struck the term "indecent" from the statute but otherwise upheld the statute as constitutional, thus limiting the statute's application only to obscene speech.[67]

D. Sable Communications v. FCC

Unsatisfied with the Second Circuit's conclusion, Congress again amended section 223(b) of the Communications Act.[68] The amended

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60. 438 U.S. 726 (1978).

61. *Carlin III*, 837 F.2d at 558.

62. *Pacifica*, 438 U.S. at 732.

63. *Carlin III*, 837 F.2d at 560.

64. 755 F.2d 1415 (11th Cir. 1985).

65. *Carlin III*, 837 F.2d at 560 (summarizing *Cruz*, 755 F.2d at 1420).

66. *Id.*

67. *Id.* at 560-61. The court stated, "Were the term 'indecent' to be given meaning other than *Miller* obscenity, we believe the statute would be unconstitutional." *Id.* at 560.

68. The statute provided in pertinent part:

(b)(1) Whoever knowingly—

(A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene or

statute prohibited both indecent and obscene telephone communications directed to any person, including adults.[69] Additionally, the amended statute did not require the FCC to promulgate any defenses to prosecution since a total ban was imposed on dial-a-porn.[70]

The revised statute was challenged in *Sable Communications v. FCC*.[71] The Supreme Court found no problem with the statute as it applied to obscene speech, stating, "We have repeatedly held that the protection of the First Amendment does not extend to obscene speech."[72] In response to Sable's argument that the statute created a national standard of obscenity, the Court determined that "[t]here is no constitutional barrier under *Miller [v. California*[73]*]* to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others."[74]

However, the Court had a different view of the statute as it applied to indecent speech. The Court stated that "[s]exual expression which is indecent but not obscene is protected by the First Amendment."[75] The Court further explained that "[t]he Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."[76] Applying this test, the Court determined that the congressional

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> indecent communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or
> (B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A),
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> shall be fined not more than $50,000 or imprisoned not more than six months, or both.

47 U.S.C. § 223(b) (1988) (amended 1989), *cited in* Sable Communications v. FCC, 492 U.S. 115, 123 n.4 (1989).

69. 47 U.S.C. § 223(b) (1988) (amended 1989); *see also Sable*, 492 U.S. at 122.

70. *Sable*, 492 U.S. at 122-23.

71. 492 U.S. 115 (1989).

72. *Id.* at 124.

73. 413 U.S. 15 (1973).

74. *Sable*, 492 U.S. at 125-26. In Miller v. California, 413 U.S. 15 (1973), the Court established the following test for obscenity:

> (a) [W]hether '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 (citation omitted).

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

76. *Id.*

record did not justify the conclusion that there were no less restrictive means, short of a total ban, to achieve the government's interest in protecting minors.[77] The Court concluded that the statute's regulation of indecent speech was unconstitutional because it "ha[d] the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear."[78] Accordingly, the Court upheld the prohibition against obscene speech, but enjoined its enforcement as applied to indecent speech.[79]

III. THE HELMS AMENDMENT

After the *Sable* decision, Congress amended the Communications Act to its current form by changing section 223(b) and adding section 223(c).[80]

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77. *Id.* at 129.

78. *Id.* at 131.

79. *Id.* at 124, 126.

80. The statute provides in pertinent part:

(b)(1) Whoever knowingly—

(A) within the United States, by means of telephone, makes (directly or by recording device) any obscene communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or

(B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A),

shall be fined in accordance with Title 18, or imprisoned not more than two years, or both.

(2) Whoever knowingly—

(A) within the United States, by means of telephone, makes (directly or by recording device) any indecent communication for commercial purposes which is available to any person under 18 years of age or to any other person without that person's consent, regardless of whether the maker of such communication placed the call; or

(B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A),

shall be fined not more than $50,000 or imprisoned not more than six months, or both.

(3) It is a defense to prosecution under paragraph (2) of this subsection that the defendant restrict access to the prohibited communication to persons 18 years of age or older in accordance with subsection (c) of this section and with such procedures as the Commission may prescribe by regulation.

. . . .

(c)(1) A common carrier within the District of Columbia or within any State, or in interstate or foreign commerce, shall not, to the extent technically feasible, provide access to a communication specified in subsection (b) of this section from the telephone of any subscriber who has not previously requested in writing the carrier

The amendment, known as the Helms Amendment,[81] absolutely prohibits obscene telephonic communication, but regulates indecent telephonic communication so that the message providers have "safe harbor" defenses to prosecution if they take certain steps to restrict access to minors.[82] The amendment provides for both statutory and regulatory "safe harbor" defenses.[83]

The statutory "safe harbor" defense is the reverse blocking requirement established by section 223(c)(1) of the Communications Act.[84] Reverse blocking automatically blocks access to indecent dial-a-porn services from all telephone lines unless a telephone subscriber affirmatively requests access to these services in writing.[85] Telephone companies must implement reverse blocking if it is technically feasible and if they collect charges from dial-a-porn subscribers for the dial-a-porn services.[86]

The regulatory "safe harbor" defenses are those promulgated by the FCC in response to the mandate of section 223(b)(3) of the Communications Act.[87] The FCC regulations establish that providers of indecent messages have a defense to prosecution if they give written notice to the telephone company that they are providing covered communications.[88] In addition, to complete the defense, providers must either (1) require payment by credit card before the message is transmitted, (2) require an authorized access or identification code before the message is transmitted, or (3) scramble the message so that it requires a descrambler to be comprehensible.[89]

> to provide access to such communication if the carrier collects from the subscriber an identifiable charge for such communication that the carrier remits, in whole or in part, to the provider of such communication.

47 U.S.C.A. § 223(b)-(c) (West 1991).

81. Pub. L. No. 101-166, title V, § 521(1), 103 Stat. 1192 (1989) (codified as amended at 47 U.S.C.A. § 223 (West 1991)). The amendment is named after its sponsor—Senator Jesse Helms (R-N.C.).

82. 47 U.S.C.A. § 223(b)-(c) (West 1991); *see also* Dial Info. Servs. v. Thornburgh, 938 F.2d 1535, 1539 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 966 (1992).

83. Information Providers' Coalition v. FCC, 928 F.2d 866, 871 (9th Cir. 1991).

84. *See supra* note 80; *see also Information Providers*, 928 F.2d at 871.

85. Petersen, *supra* note 14, at 2046-47.

86. *Dial Info.*, 938 F.2d at 1539.

87. *See supra* note 80; *see also Information Providers*, 928 F.2d at 871-72.

88. 47 C.F.R. § 64.201(a) (1991).

89. *Id.*

A. Second Circuit Decision: Dial Information Services v. Thornburgh

The regulations were first challenged in the Southern District of New York in *American Information Enterprises v. Thornburgh.*[90] However, the court could not address the regulatory "safe harbor" defenses because district courts do not have jurisdiction to review the constitutionality of FCC regulations.[91] Thus, the court limited its review to the Helms Amendment itself, including the statutory "safe harbor" defense of reverse blocking.[92] The court found that the Helms Amendment was unconstitutional for the following reasons: (1) it failed to employ the least restrictive means to effect a compelling government interest, (2) it contained a prior restraint unaccompanied by adequate procedural safeguards, and (3) the term "indecent" rendered the statute void for vagueness.[93]

On July 15, 1991, the Second Circuit Court of Appeals reversed the district court's decision, finding the Helms Amendment to be constitutional in *Dial Information Services v. Thornburgh.*[94] Regarding the vagueness challenge, the Second Circuit determined that the district court did not accord enough weight to the FCC's interpretation of the term "indecency."[95] The FCC, tracking the definition developed in *Pacifica*, had "define[d] indecency as the description or depiction of sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the telephone medium."[96] Thus, the court determined that "the term 'indecent' as used in the Helms Amendment [was not vague because it was] sufficiently defined to provide guidance to 'the person of ordinary intelligence' in the conduct of his affairs."[97]

The court next addressed whether reverse blocking was the least restrictive means to regulate dial-a-porn. The district court had determined

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90. 742 F. Supp. 1255 (S.D.N.Y. 1990), *rev'd sub nom.* Dial Info. Servs. v. Thornburgh, 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 966 (1992).

91. *Id.* at 1259. Circuit courts have "exclusive jurisdiction 'to enjoin . . . or to determine the validity of' final regulations ordered by the FCC." *Id.* (citing 28 U.S.C. § 2342(1) (1988)).

92. *Id.*

93. *Id.* at 1275.

94. 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 966 (1992).

95. *Id.* at 1541.

96. *In re* Regulations Concerning Indecent Communications by Telephone, 5 F.C.C.R. 4926, ¶ 12 (1990).

97. *Dial Info.*, 938 F.2d at 1541 (quoting Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)).

that reverse blocking was not the least restrictive means because voluntary blocking[98] was less restrictive on adults, yet sufficiently effective at restricting access by minors.[99] However, the Second Circuit stated that the statute would be unconstitutional only if there were "other approaches less restrictive than the Helms Amendment *but just as effective* in achieving its goal of denying access by minors to indecent dial-a-porn messages."[100] After determining that voluntary blocking was less restrictive than, but not nearly as effective as, reverse blocking, the court determined that "[t]he error of the district court lies in focusing on means, when the focus should be on goals as well as means."[101]

Finally, regarding the prior restraint issue, the Second Circuit stated that "the dial-a-porn provider must inform the telephone company that the message is indecent . . . in order to activate the presubscription provision."[102] Thus, the court reasoned that "[t]he Helms Amendment requires no one except dial-a-porn providers to classify their messages."[103] Therefore, the court concluded that "[t]he district court erred in concluding that the statute requires [telephone companies] to classify which messages are indecent."[104] Accordingly, the court found that the Helms Amendment did not operate as a prior restraint on speech because a prior restraint exists only "where the government imposes a requirement of advance approval or seeks to enjoin speech."[105] The court declared the statute constitutional,[106] and the United States Supreme Court denied certiorari,[107] thus leaving the finding of constitutionality intact.

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98. "Under voluntary blocking . . . any subscriber can have sexually explicit telephone communications centrally blocked by contacting the telephone company and requesting such a service, which is free of charge." *Id.*

99. *American Info.*, 742 F. Supp. at 1264-66.

100. *Dial Info.*, 938 F.2d at 1541 (emphasis added).

101. *Id.* at 1542.

102. *Id.* at 1543.

103. *Id.*

104. *Id.*

105. *Dial Info.*, 938 F.2d at 1543. "The schemes that have been invalidated by the Supreme Court as prior restraints on speech 'had this in common: they gave public officials the power to deny use of a forum in advance of actual expression.'" *Id.* (quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975)).

106. *Id.* at 1537, 1544.

107. Dial Info. Servs. v. Barr, 112 S. Ct. 966 (1992).

B. Ninth Circuit Decision: Information Providers' Coalition v. FCC

In a similar case decided on March 21, 1991, the Ninth Circuit Court of Appeals determined that the Helms Amendment was constitutional in *Information Providers' Coalition v. FCC*.[108] Because petition for review was filed directly with the circuit court, the court reviewed both the statutory reverse blocking defense and the FCC-promulgated defenses.[109] In finding the Helms Amendment constitutional, the court first addressed the question "whether reverse . . . blocking qualifie[d] as a 'carefully' or 'narrowly tailored effort' as required by *Sable*."[110] The court emphasized the fact that "no blocking whatsoever takes place where the dial-a-porn provider (1) bills directly the user of its services, and (2) accepts payment directly by a credit card or requires an access code or descrambler."[111] Also, the court accepted the FCC's findings that "voluntary blocking [was not] an effective means of limiting minors' access to dial-a-porn services" and that "reverse blocking was 'technically feasible.'"[112] Thus, the court determined that the least restrictive means test was satisfied.[113]

In response to the argument that the term "indecent" was unconstitutionally vague, the court relied on the FCC's definition derived from *Pacifica*.[114] The court determined that the term "indecency" as defined by the FCC was "sufficiently precise to survive constitutional scrutiny."[115] The court also found that factual distinctions between *Pacifica* and the case at hand were not material.[116] Therefore, the court concluded that the statute was not void for vagueness.[117]

Turning to the prior restraint issue, the court first determined that telephone companies are private entities, not state actors, and thus are "free under the Constitution to terminate service to dial-a-porn operators

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108. 928 F.2d 866 (9th Cir. 1991).

109. *Id.* at 868; *see also supra* note 91.

110. *Information Providers*, 928 F.2d at 872.

111. *Id.*

112. *Id.* at 873-74.

113. *Id.*

114. *See supra* note 96 and accompanying text.

115. *Information Providers*, 928 F.2d at 874.

116. *Id.* at 875. The court stated, "If the indecency definition passes the void-for-vagueness test for persons of ordinary intelligence who broadcast radio communications, it certainly must pass the same test for those persons who offer indecent communications over the telephone line." *Id.*

117. *Id.* at 876.

altogether."[118] The court then determined that requiring adults to request access to dial-a-porn did not constitute "restraint" because there is no "suppression, prohibition, inhibition, hindrance or constraint of speech by government action or rule."[119] The court also stated that requiring dial-a-porn services to identify their communication as indecent and to notify the telephone company of this fact is not prior restraint because "labeling matter as indecent under the statute or regulation does not inhibit its dissemination one iota."[120] Accordingly, the Ninth Circuit found that no prior restraint on speech existed.[121]

The final issue involved the standard of review for agency rulemaking under the Administrative Procedure Act. The court summarily dismissed as repetitive the argument that the FCC's rules were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[122] The court concluded that, in formulating the rules, the FCC had provided a reasonable analysis of the options.[123] Therefore, the court declared the statute constitutional.[124]

IV. ANALYSIS

A. Insufficient Congressional Record

In the cases leading to *Dial Information* and *Information Providers*, great weight was placed on the sufficiency of the explanations given by Congress and the FCC for including or excluding various regulatory alternatives. In *Carlin I*, the Second Circuit found the regulations to be unconstitutional partially because the FCC failed to explain sufficiently why various alternatives would not be more effective with respect to minors or less restrictive with respect to adults.[125] In *Carlin II*, the primary basis for the court's decision was the FCC's failure to consider adequately the

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118. *Id.* at 877; *see also supra* note 105 and accompanying text.

119. *Information Providers*, 928 F.2d at 878.

120. *Id.*

121. *Id.* at 877. The court stated, "In prior restraint cases, the government typically brings an action to enjoin speech or imposes a requirement of advance approval, censorship or licensing of speech. None of this typical action is present here." *Id.* (citations omitted).

122. 5 U.S.C. § 706(2)(A) (1988).

123. *Information Providers*, 928 F.2d at 879.

124. *Id.*

125. *Carlin I*, 749 F.2d 113, 121-23 (2d Cir. 1984); *see also supra* note 42 and accompanying text.

feasibility of customer premises blocking[126] as an alternative.[127] In *Sable*, the Court stated, "[T]he congressional record contains no legislative findings that would justify us in concluding that there is no constitutionally acceptable less restrictive means . . . to achieve the Government's interest in protecting minors."[128] The Court further explained that the record, consisting of conclusory statements by proponents of the bill, was insufficient because it "contain[ed] no evidence as to *how* effective or ineffective the FCC's most recent regulations were or might prove to be."[129]

Like the statute in *Sable* and the FCC regulations in *Carlin I* and *Carlin II*, the Helms Amendment suffers from an insufficient congressional record. No committee reviewed the bill, and the Senate only considered the proposed bill for a few minutes without hearings or presentations of reports.[130] Although Senators Arlen Spector (R-Pa.) and Jesse Helms (R-N.C.) provided speeches in support of the Amendment, neither provided evidence concerning the effectiveness or ineffectiveness of various regulatory options.[131] These speeches and similar conclusory statements made by proponents of the bill "failed to provide the concrete findings on different regulatory options that the *Sable* Court mandated."[132] Therefore, the Helms Amendment should have been found unconstitutional because Congress did not provide a thorough analysis of all possible alternatives in concluding that the Helms Amendment utilized the least restrictive means of regulating dial-a-porn.

B. Least Restrictive Means of Regulation Not Utilized

It is a well-established rule that "[t]he Government bears the heavy burden of demonstrating that the compelling state interest could not be served by restrictions that are less intrusive on protected forms of expres-

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126. *See supra* note 46.

127. *Carlin II*, 787 F.2d 846, 855-57 (2d Cir. 1986); *see also supra* notes 46-49 and accompanying text.

128. Sable Communications v. FCC, 492 U.S. 115, 129 (1989).

129. *Id.* at 129-30.

130. American Info. Enters. v. Thornburgh, 742 F. Supp. 1255, 1262-63 (S.D.N.Y. 1990), *rev'd sub nom.* Dial Info. Servs. v. Thornburgh, 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 966 (1992).

131. *See* 135 CONG. REC. S15,800 (daily ed. Nov. 16, 1989).

132. *American Info.*, 742 F. Supp. at 1263.

sion."[133] Assuming Congress sufficiently analyzed all possible alternatives, the Helms Amendment is still unconstitutional because it does not rely on the least restrictive means of regulating speech to protect minors from the adverse effects of dial-a-porn. The Helms Amendment regulates dial-a-porn by utilizing the statutory defense to prosecution of reverse blocking and the FCC-promulgated defenses of payment by credit card, use of an access code, or use of a scrambling device.[134]

In *Dial Information*, the district court from which appeal was taken "was without jurisdiction to review the constitutionality of the FCC regulations."[135] Thus, the district court only reviewed the constitutionality of the statutory reverse blocking defense.[136] Accordingly, on appeal, the Second Circuit reviewed the constitutionality of reverse blocking alone, not the combination of reverse blocking and the FCC-promulgated defenses.[137] Therefore, the Second Circuit did not consider the effect of the entire regulatory scheme as a whole in finding that the Helms Amendment utilized the least restrictive means of regulating dial-a-porn.

On the other hand, in *Information Providers*, petition for review was filed directly with the circuit court.[138] Therefore, the Ninth Circuit reviewed both the statutory reverse blocking defense and the FCC-promulgated defenses.[139] In analyzing this regulatory scheme, the court emphasized "that no blocking whatsoever takes place where the dial-a-porn provider (1) bills directly the user of its services, and (2) accepts payment directly by a credit card or requires an access code or descrambler."[140] Thus, in reaching the conclusion that the Helms Amendment utilized the least restrictive means of regulation, the court relied heavily on the fact that reverse blocking is activated only when "the provider and the telephone

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133. *Carlin I*, 749 F.2d 113, 121 (2d Cir. 1984) (citing Schad v. Borough of Mount Ephraim, 452 U.S. 61, 74 (1981).

134. Information Providers' Coalition v. FCC, 928 F.2d 866, 871 (9th Cir. 1991).

135. Dial Info. Servs. v. Thornburgh, 938 F.2d 1535, 1540 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 966 (1992); *see also supra* note 91 and accompanying text.

136. *American Info.*, 742 F. Supp. at 1259.

137. *Dial Info.*, 938 F.2d at 1540-43.

138. *Information Providers*, 928 F.2d at 868.

139. *Id.*; *see also supra* note 109 and accompanying text.

140. *Information Providers*, 928 F.2d at 872. Part (1) of this conclusion is based upon the statement in the Helms Amendment which provides that reverse blocking must be utilized only "if the carrier collects from subscribers an identifiable charge for such communication that the carrier remits, in whole or in part, to the provider of such communication." 47 U.S.C. § 223(c)(1) (1989). Part (2) of this conclusion is based upon the three alternative defenses prescribed by the FCC: accepting payments by credit card, use of access codes, or use of descramblers. 47 C.F.R. § 64.201(a) (1991).

carrier arrange to add the charge to the telephone bill."[141]

Although the above interpretation of the applicability of reverse blocking is correct, the weight accorded to it by the court is misplaced. The Helms Amendment states that a dial-a-porn provider has a defense to prosecution if it utilizes reverse blocking *and* one of the FCC-promulgated defenses, not reverse blocking *or* one of the FCC-promulgated defenses.[142] Consequently, if a dial-a-porn provider relies upon a telephone carrier for billing, it must utilize *both* reverse blocking *and* one of the three FCC-promulgated defenses in order to establish a defense to prosecution.[143] However, either reverse blocking alone or one of the FCC-promulgated defenses alone each sufficiently protects children from the adverse affects of dial-a-porn. Therefore, two levels of regulations exist where only one level is necessary to restrict minors' access to dial-a-porn. Because the Helms Amendment creates an extraneous second level of regulation, it cannot be the least restrictive means to regulate dial-a-porn.

Furthermore, the two levels of regulation cannot be reconciled with *Carlin III*, where the Second Circuit found that FCC-promulgated defenses which required payment by credit card, use of access codes, or use of descrambling devices were not valid means of regulation as applied to indecent dial-a-porn.[144] The Helms Amendment merely supplements these same three defenses to prosecution with the statutory defense of reverse blocking.[145] Under the invalid *Carlin III* regulations, a dial-a-porn provider only had to utilize one of the three statutory defenses, regardless of whether the telephone carrier handled the billing.[146] However, under the Helms Amendment, reverse blocking must be utilized *in addition to* one of the three statutory defenses when the telephone carrier handles the billing.[147] Since the three statutory defenses standing alone

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141. *Information Providers*, 928 F.2d at 872.

142. The Helms Amendment provides: "It is a defense to prosecution . . . that the defendant restrict access to the prohibited communication to persons 18 years of age or older [with reverse blocking] *and* with such procedures as the [FCC] may prescribe by regulation." 47 U.S.C. § 223(b)(3) (1989) (emphasis added).

143. However, reverse blocking need only be utilized if it is technically feasible for the telephone carrier. 47 U.S.C. § 223(c)(1) (1989) ("A common carrier . . . shall not *to the extent technically feasible*, provide access to [indecent telephonic communication] from the telephone of any subscriber who has not previously requested in writing the carrier to provide access to such communication . . . .") (emphasis added).

144. *Carlin III*, 837 F.2d 546, 560-61 (2d Cir. 1988), *cert. denied*, 488 U.S. 924 (1988); *see also supra* notes 54, 63-67.

145. *Information Providers*, 928 F.2d at 871.

146. *Carlin III*, 837 F.2d at 548-49.

147. *See supra* note 142 and accompanying text.

were found to be invalid as applied to indecent dial-a-porn in *Carlin III*, the Helms Amendment also should have been found invalid as applied to indecent dial-a-porn because it merely attaches an additional requirement to the same three statutory defenses.

C. *Unreasonable Means of Regulation*

Assuming that the Helms Amendment does provide the least restrictive means of regulation, the Helms Amendment is still unconstitutional because "[t]he State may not regulate at all if it turns out that even the least restrictive means of regulation is still unreasonable when its limitations on freedom of speech are balanced against the benefits gained from those limitations."[148] Judicial precedent warrants that reverse blocking imposes an undue burden on adults[149] and the dial-a-porn industry.[150] Furthermore, the nature of dial-a-porn does not justify its strict regulation because it does not involve a captive audience[151] and it generally takes place in the privacy of the home.[152] Finally, data suggests that the general population does not desire strict government regulation of dial-a-porn.[153] Rather, parents should bear the responsibility for restricting their children's access to dial-a-porn through the use of voluntary blocking[154] technology.[155]

1. Undue Burden Imposed on Adults

In *Butler v. Michigan*,[156] the Supreme Court established the long-standing rule that the government may not "reduce the adult population . . . to reading only what is fit for children."[157] The *Sable* Court applied this rule to telephonic communications, stating that regulations cannot have the "invalid effect of limiting the content of adult telephone conversations

148. *Carlin I*, 749 F.2d 113, 121 (2d Cir. 1984).
149. *See* discussion *infra* part IV.C.1.
150. *See* discussion *infra* part IV.C.2.
151. *See* discussion *infra* part IV.C.3.
152. *See* discussion *infra* part IV.C.4.
153. *See* discussion *infra* part IV.C.5.
154. *See supra* note 98.
155. *See* discussion *infra* part IV.C.6.
156. 352 U.S. 380 (1957).
157. *Id.* at 383. This rule was restated by the Court in Bolger v. Youngs Drug Prods., 463 U.S. 60, 73 (1983).

to that which is suitable for children to hear."[158] However, the Helms Amendment has such an invalid effect.

The Second Circuit has stated that regulations on dial-a-porn must "'permit adult access while limiting children's access, [but if] no such regulations are feasible, then less restrictive measures rather than broader restrictions will have to suffice to avoid constitutional infirmity.'"[159] However, adult access to dial-a-porn is restricted by the Helms Amendment because of the written application process required before access can be obtained. This application process denies adults immediate access to protected speech. Many adults will be inconvenienced because they must wait for several days or weeks for the written application process to be completed. As stated by Harvard Law School professor Laurence Tribe, "It is one thing to protect children; it is quite another to say adults have to ask for this kind of speech in advance."[160]

Furthermore, adult customers may object to having their names placed on a list of persons interested in access to dial-a-porn. In fact, this concern may deter many adults from seeking access to dial-a-porn. Courts have addressed similar written application procedures several times in the context of access code systems. In *Carlin II*, the Second Circuit expressed concern "over the potential chilling effect of a written application and identification procedure."[161] However, in *Carlin III* the Second Circuit dismissed this concern, stating that "[t]he possibility that at some point the Government might obtain the names of the recipients of obscene telephone messages by subpoena is not sufficiently substantial."[162]

Nevertheless, in the Tenth Circuit case of *United States v. Carlin Communications*,[163] a U.S. Attorney attempted to subpoena records from both Carlin and Mountain Bell regarding the identity of persons who had accessed Carlin's dial-a-porn service.[164] This case demonstrates that having one's name placed on a list of persons interested in access to dial-a-porn is a valid concern. The deterrent effect of this concern coupled with

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158. Sable Communications v. FCC, 492 U.S. 115, 131 (1989).

159. *Carlin II*, 787 F.2d 846, 847 (2d Cir. 1986) (quoting 105 CONG. REC. E5,966 (daily ed. Dec. 14, 1983)).

160. Henry Weinstein, *Federal 'Dial-A-Porn' Limits Upheld*, L.A. TIMES, Mar. 22, 1991, at A3.

161. *Carlin II*, 787 F.2d at 856 n.7.

162. *Carlin III*, 837 F.2d 546, 557 (2d Cir. 1988), *cert. denied*, 488 U.S. 924 (1988).

163. 815 F.2d 1367 (10th Cir. 1987).

164. Leah Murphy, Note, *The Second Circuit and Dial-A-Porn: An Unsuccessful Balance Between Restricting Minors' Access and Protecting Adults' Rights*, 55 BROOK. L. REV. 685, 711 (1989).

the burden of the written application process will reduce the number of adults who access dial-a-porn, thereby reducing the content of many adults' telephonic communications to that which is suitable for children.[165] Therefore, the Helms Amendment should have been found unconstitutional because it places an undue burden on adults.

2. Undue Burden Imposed on Dial-A-Porn Industry

The court in *Carlin I* first addressed the issue of burden on the dial-a-porn provider. During the rulemaking process for the regulations at issue in *Carlin I*, the FCC rejected an access code system because it "would place substantial economic and administrative burdens on recorded service providers."[166] Referring to a written application process, the *Carlin I* court and the FCC both recognized "that the inconvenience associated with this practice might discourage many adults from using [dial-a-porn services], and thereby conceivably place [the] financial viability [of the services] in jeopardy."[167] Furthermore, the court and the FCC both acknowledged that "any regulation that drives [a dial-a-porn provider] out of business would seem to fall under *Butler v. Michigan*"[168] (*i.e.*, limiting the adult population to only that communication which is suitable for children). These concerns voiced by both the FCC and the Second Circuit exist today with the Helms Amendment.

People involved with the dial-a-porn industry generally believe that the pre-subscription requirement imposed by reverse blocking will seriously damage, if not destroy, the industry. Earl Nicholas Selby, the attorney for the dial-a-porn organization in *Information Providers*, stated that the statute "'will have the practical effect of destroying an industry.'"[169] He further explained, "'In practice, the FCC regulations are a ban. People won't pre-subscribe for these services because they don't want their names on a list.'"[170]

Similarly, the owner of the dial-a-porn organization in *American Information* and *Dial Information* testified that "'the greater majority of

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165. *See supra* note 156 and accompanying text.

166. 49 Fed. Reg. 25,000 (1984), *cited in Carlin I*, 749 F.2d 113, 123 (2d Cir. 1984).

167. *Carlin I*, 749 F.2d at 123.

168. *Id.* at 123 n.19. *See also supra* note 156 and accompanying text.

169. Weinstein, *supra* note 160, at A3.

170. *Id.*

people will be put out of business' by the pre-subscription requirement."[171] Matthew Spitzer, a communications law expert at the University of Southern California, believes that reverse blocking "will reduce the number of calls because it will eliminate the spontaneity often involved in utilizing 'adult' phone services,"[172] thereby causing "a negative impact on the revenues of dial-a-porn operators."[173] New York Telephone has estimated that reverse blocking will result in a reduction of over 7,000,000 calls annually.[174]

The potential for serious financial damage to the dial-a-porn industry is especially great since Congress expanded the applicability of the Helms Amendment to regulate both intrastate and interstate telephonic communications.[175] Previous versions of the statute applied only "in the District of Columbia or in interstate or foreign communication."[176] However, the Helms Amendment applies to any telephone communications "within the United States."[177] Consequently, the potential financial impact of the Helms Amendment is much greater than the potential financial impact of its predecessors. This financial burden may force dial-a-porn services out of business, thereby reducing the content of adult telephonic communica-

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171. American Info. Enters. v. Thornburgh, 742 F. Supp. 1255, 1264 (S.D.N.Y. 1990), *rev'd sub nom.* Dial Info. Servs. v. Thornburgh, 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 966 (1992).

172. Weinstein, *supra* note 160, at A3.

173. *Id.*

174. *American Info.*, 742 F. Supp. at 1264.

175. The expanded applicability of the Helms Amendment also raises a question of whether Congress overstepped its bounds in violation of the Commerce Clause of the Constitution. The Commerce Clause gives Congress the authority to "regulate Commerce with foreign Nations, and among the several states." U.S. CONST. art. I, § 8. However, the Court has long held that Congress may regulate intrastate commerce if it has a "substantial economic effect" upon interstate commerce. *See* NLRB v. Jones & Laughlin Steel, 301 U.S. 1, 41 (1937).

Accordingly, Congress gave the following grounds for its action: "The inextricable technological link between the intrastate and interstate communications networks make [sic] clear that the intrastate networks do strongly affect interstate commerce in communications." 135 CONG. REC. S15,802 (daily ed. Nov. 16, 1989). Consequently, any argument that Congress violated the Commerce Clause is rather weak, especially considering that "the Supreme Court has exercised little independent judgment, choosing instead to defer to the expressed or implied findings of Congress to the effect that regulated activities have the requisite 'substantial economic effect.' Such 'findings' have been upheld whenever they could be said to rest upon some rational basis." TRIBE, *supra* note 5, at 309 (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258-59 (1964); United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942)).

176. 47 U.S.C. § 223(b)(1)(A) (1983) (amended 1988 & 1989); 47 U.S.C. § 223(b)(1)(A) (1988) (amended 1989); *see also supra* notes 34, 68.

177. 47 U.S.C.A. § 223(b)(1)(A)-(2)(A) (West 1991); *see also supra* note 80.

tions to that which is suitable for children.[178] Accordingly, the Helms Amendment should have been found unconstitutional because it places an undue financial burden on the dial-a-porn industry.

3. Lack of Captive Audience

When analyzing regulations of sexually explicit communication, courts have placed great weight on whether the medium of communication creates a captive audience problem.[179] In *FCC v. Pacifica Foundation*,[180] the Supreme Court held that the regulation of indecent speech in radio broadcasting was constitutional when children were likely to be a part of the radio audience.[181] However, the Court stated that "context is all-important,"[182] noting that radio broadcasting is "uniquely pervasive" and "uniquely accessible to children."[183] Furthermore, the Court "emphasize[d] the narrowness of [its] holding," stating that "differences between radio, television, and perhaps closed-circuit transmissions" may be relevant in determining whether indecent communications may be constitutionally regulated.[184]

For example, *Bolger v. Youngs Drug Products*[185] involved a law which regulated mailings advertising birth control in order to protect children from exposure to sexually explicit material.[186] In striking down the law, the Supreme Court noted that "[t]he receipt of mail is far less intrusive and uncontrollable" than broadcasting.[187] Similarly, in *Cruz v. Ferre*,[188] the Eleventh Circuit struck down legislation limiting adult access to indecent speech on cable television.[189] The court distinguished cable television from radio broadcasting, noting that cable television viewers must affirmatively subscribe to the service and that technology

178. *See supra* note 156 and accompanying text.

179. A "captive audience" is defined as "[a]ny group subject to a speaker or to a performance and which is not free to depart without adverse consequences." BLACK'S LAW DICTIONARY 212 (6th ed. 1990).

180. 438 U.S. 726 (1978).

181. *Id.* at 744-51.

182. *Id.* at 750.

183. *Id.* at 748-49.

184. *Id.* at 750.

185. 463 U.S. 60 (1983).

186. *Id.* at 61-62, 71.

187. *Id.* at 74.

188. 755 F.2d 1415 (11th Cir. 1985).

189. *Id.* at 1422.

exists that enables parents to prevent children's access to objectionable programs.[190]

Analogizing these cases to the dial-a-porn context, the telephone medium bears a much stronger semblance to *Bolger's* receipt of mail and *Cruz's* cable television than to *Pacifica's* radio broadcasting. Voluntary blocking[191] technology exists that enables parents to prevent children's access to dial-a-porn. Furthermore, dial-a-porn is not intrusive because it requires an affirmative act by the person wishing to access the service.

In *Sable*, the Supreme Court addressed the application of *Pacifica* to the medium of telephone communication. The Court unequivocally stated,

> [P]rivate commercial telephone communications . . . are substantially different from the public radio broadcast at issue in *Pacifica*. In contrast to public displays, unsolicited mailings and other means of expression which the recipient has no meaningful opportunity to avoid, the dial-it medium requires the listener to take affirmative steps to receive the communication. There is no "captive audience" problem here; callers will generally not be unwilling listeners. The context of dial-in services, where a caller seeks and is willing to pay for the communication, is manifestly different from a situation in which a listener does not want the received message. Placing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message. Unlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it.[192]

Because dial-a-porn does not create a captive audience problem, an important justification for the regulation of indecent speech in some contexts does not exist with respect to telephonic communications. Therefore, indecent telephonic communication does not warrant the strict regulation imposed by the Helms Amendment.

4. Invasion of Privacy of the Home

Most dial-a-porn calls are made at home;[193] therefore, it is important

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190. *Id.* at 1420.

191. *See supra* note 98.

192. Sable Communications v. FCC, 492 U.S. 115, 127-28 (1989).

193. A study by New York Telephone Company found that only 1.72% of all calls to dial-a-porn services were placed from coin lines. *Carlin II*, 787 F.2d 846, 848 (2d Cir. 1986).

to acknowledge the weight courts place on the individual's privacy rights at home. In *Stanley v. Georgia*,[194] the Supreme Court upheld an individual's right to possess obscene films in his home, even though obscenity is generally unprotected by the First Amendment.[195] The Court balanced the individual's privacy interest against the state's power to regulate obscenity and concluded that the privacy interest prevailed.[196] The Court stated, "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."[197]

Because dial-a-porn calls almost always take place in the privacy of one's home, the *Stanley* reasoning should be extended to telephonic communications. The Florida Supreme Court undertook such an extension in *State v. Keaton*,[198] thereby striking down a statute prohibiting obscene telephone conversations.[199] The *Stanley* reasoning should be applied to the dial-a-porn context especially in light of the fact that *Stanley* involved obscenity, and dial-a-porn merely involves indecency. In addition, substantial privacy interests may also be violated when adults are forced to apply for dial-a-porn in writing and have their names included on a list by the telephone company.[200] For these reasons, the individual's privacy interests outweigh the state's power to impose the strict regulations upon telephonic indecency which are created by the Helms amendment.

5. Strict Government Regulation Not Justified by Popular Sentiment

Several studies indicate that American parents place minimal importance on utilizing technology to block their children's access to dial-a-porn. Ameritech Operating Companies conducted a survey in which they found only 3.3% to 5.4% of households would purchase a dial-a-porn blocking device if it cost only seventy-five cents per month, and only 2.2% to 4.5% of households would purchase a dial-a-porn blocking device at a one-time charge of twenty dollars.[201] Similarly, under a voluntary

194. 394 U.S. 557 (1969).
195. *Id.* at 568.
196. *Id.* at 564-65.
197. *Id.* at 565.
198. 371 So. 2d 86 (Fla. 1979).
199. *Id.* at 90-93.
200. Cleary, *supra* note 11, at 533.
201. *Carlin III*, 837 F.2d 546, 551 (2d Cir. 1988), *cert. denied*, 488 U.S. 924 (1988).

blocking[202] system utilized in New York, only 4.0% of the customers requested dial-a-porn services to be blocked when the blocking service was free of charge.[203] These statistics indicate that the Helms Amendment imposes strict regulations on an activity that the general population would rather regulate themselves.

6. Parents Bear the Responsibility for Restricting Children's Access to Dial-A-Porn

The Supreme Court and circuit courts have indicated that the responsibility for restricting access to protected speech in order to protect minors should be placed on the shoulders of parents.[204] On the other hand, in upholding a statute prohibiting the sale of nude magazines to minors, the Supreme Court in *Ginsberg v. New York*[205] stated that "parents and others . . . who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility."[206] With respect to the Helms Amendment, however, reverse blocking oversteps the bounds of *Ginsberg*. By blocking access to everybody, the Helms Amendment completely replaces parental responsibility, rather than aiding parents in the discharge of thier responsibility.

As stated by professor Laurence Tribe, "'[Reverse blocking] is a de facto assumption of negligent parenting . . . . Rather than trusting parents to take some affirmative step to block out messages they don't want their kids to get, the assumption is parents will be distracted or otherwise occupied and the message will get through.'"[207] Furthermore, reverse blocking not only replaces parental responsibility, but also impinges on the First Amendment rights of others. Therefore, rather than replacing parental responsibility, the government should aid parents in the discharge of their responsibility by passing legislation requiring the availability of voluntary

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202. *See supra* note 98.

203. Dial Info. Servs. v. Thornburgh, 938 F.2d 1535, 1542 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 966 (1992).

204. American Info. Enters. v. Thornburgh, 742 F. Supp. 1255, 1265 (S.D.N.Y 1990), *rev'd sub nom.* Dial Info. Servs. v. Thornburgh, 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 966 (1992) (citing Ginsberg v. New York, 390 U.S. 629, 639 (1968); Fabulous Assocs. v. Pennsylvania Pub. Util. Comm'n, 896 F.2d 780, 788 (3d Cir. 1990); FCC v. Pacifica Found., 438 U.S. 726, 758 (1978) (Powell, J., concurring)).

205. 390 U.S. 629 (1968).

206. *Id.* at 639.

207. Weinstein, *supra* note 160, at A3.

blocking.[208] Then, parents, with the aid of the government, would rightfully bear the responsibility for restricting their children's access to dial-a-porn by utilizing voluntary blocking if they so desire.

V. CONCLUSION

In the past two decades, the Court has established a category of limited First Amendment protection for indecent communication. In the past decade, through four successive regulations of indecent telephonic communication, Congress has attempted to push the boundaries of this protection in order to regulate the dial-a-porn industry. However, through the four successive cases striking down these regulations, the courts have clearly defined the requirements for a valid regulation in this area. The latest regulation of indecent telephonic communication, the Helms Amendment to the Communications Act of 1934,[209] was recently found constitutional by the Second and Ninth Circuit Courts of Appeals in *Dial Information Services v. Thornburgh*[210] and *Information Providers' Coalition v. FCC*.[211] However, both decisions are inconsistent with well-established precedent.

The Helms Amendment requires telephone companies collecting charges for dial-a-porn services to block access to these services from all telephone lines unless a telephone subscriber requests access in writing. The Helms Amendment further requires dial-a-porn customers to either pay by credit card, transmit an access code, or utilize a descrambling device in order to receive a dial-a-porn message. Although these requlations may appear reasonable at first glance, they do not pass constitutional muster in light of precedent. The prior cases involving regulation of indecent dial-a-porn clearly establish that regulations are constitutional only if the congressional record for the regulations addresses the effectiveness of all possible less-restrictive alternatives. However, the Helms Amendment record contains no concrete findings concerning possible less-restrictive alternatives.

Furthermore, the Helms Amendment regulations contain the same three FCC-promulgated defenses to prosecution found to be invalid as applied to indecent dial-a-porn in *Carlin III*, plus the additional requirement of reverse blocking. Thus, the Helms Amendment is more restrictive than a

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208. *See supra* note 98.

209. Pub. L. No. 101-166, title V, § 521(1), 103 Stat. 1192 (1989) (codified as amended at 47 U.S.C.A. § 223 (West 1991)).

210. 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 966 (1992).

211. 928 F.2d 866 (9th Cir. 1991).

regulatory scheme already found to be invalid. Also, because reverse blocking must be utilized in addition to one of the three FCC-promulgated defenses, the Helms Amendment creates two levels of regulations where only one level is necessary to restrict minors' access to dial-a-porn. Therefore, an extraneous second level of regulation is created which precludes the Helms Amendment from being the least restrictive means to regulate dial-a-porn.

Additionally, precedent establishes that even the least restrictive means of regulation cannot be utilized if it is unreasonably restrictive when weighed against its benefits. However, under the Helms Amendment, adults are overly burdened by the written application process. This process denies adults immediate access to protected speech and deters access by many adults who do not wish to have their names included on dial-a-porn subscriber lists. Also, the dial-a-porn industry is overly burdened by the reduction in revenue which will accompany the likely reduction in subscribership. This financial burden will likely force many dial-a-porn companies out of business. Moreover, the nature of dial-a-porn does not involve a captive audience and usually takes place in the privacy of one's home. Therefore, the Helms Amendment must fail because of the heavy burden imposed on both adults and the dial-a-porn industry when compared to the nature of dial-a-porn.

Finally, statistics indicate that the government is imposing strict regulations on dial-a-porn when parents would rather regulate their children's access to dial-a-porn themselves. Parents, not the government, bear the primary responsibility for restricting their children's access to dial-a-porn. Therefore, legislation requiring the availiability of voluntary blocking would sufficiently aid parents in carrying out this responsibility without impinging on the First Amendment rights of others. For these reasons, both the Second and Ninth Circuit Courts of Appeals should have declared the Helms Amendment unconstitutional.

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* The author dedicates this Note to Georgiana Rosenkranz, whose assistance, patience, and support made this Note possible.