MAINSTREAM LOUDOUN V. BOARD OF TRUSTEES OF THE LOUDOUN COUNTY LIBRARY

By Matthew Thomas Kline

The Internet transmits first amendment values worldwide, and it enhances those values at home.[1] It allows information providers to publish and permit access to various resources; and it allows viewers to "find, retrieve and link information ... in graphical, audio and video form."[2] This new technology creates a "more democratic and diverse" speech environment because the "[c]heap speech" it allows "mean[s] that far more speakers—rich and poor, popular and not, banal and avant garde—will be able to make their work available to all."[3] As such, it "provides an outlet for a cacophony of ideas with virtually no geographic, economic, social, or political restraints, giving a voice to the People in a way the Constitution's Framers could have only dreamed possible."[4]

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1. *See* Greg Y. Sato, Note, *Should Congress Regulate Cyberspace?*, 20 HASTINGS COMM. & ENT. L.J. 699, 702 (1998) (citation omitted) ("[L]ike an 'enormous spider web made up of thousands of smaller webs,'" the Internet "spans the globe ... .").

2. Russell B. Stevenson, Jr., *Internet Payment Systems and the Cybercash Approach*, 452 PLI/Pat 123, 126 (1996).

3. Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1807 (1995). Volokh also argues that "during the print age, the Supreme Court created a First Amendment for the electronic age." *Id.* at 1847. The good news about the Internet, Volokh argues, is that the fictions upon which first amendment doctrine relies—that there exists a free marketplace of ideas, that good speech cures bad speech, and that people can avoid offensive speech by averting their eyes—are turning, in part, into fact. *See id.* at 1846-47. *Cf.* Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869, 906-09 & n.111 (1996) (arguing that while courts have done well translating 200 year-old constitutional values to respond to gaps in the law created by technological change, cyberspace is such a shock to the system that courts should wait for cyberspace practices to develop before making any broad pronouncements).

4. Stephen C. Jacques, Comment, Reno v. ACLU: *Insulating the Internet, The First Amendment, and the Marketplace of Ideas*, 46 AM. U. L. REV. 1945, 1947 (1997). Indeed, in defending the postal system and newspaper dissemination, Madison wrote, "In such [a government] as ours, where members are so far removed from the eye of their constituents, an easy and prompt circulation of public proceedings is particularly essential." Letter from James Madison to Edmund Pendelton (Dec. 6, 1792), *quoted in* RICHARD B. KIELBOWICZ, NEWS IN THE MAIL 35 (1989). One can imagine no greater realization of this ideal than C-Span's live coverage of the proceedings in Congress.

Given the proliferation of explicit sexual content on the Internet,[5] however, Congress, several states, and many local units of government have sought to regulate the transmission of such objectionable materials.[6] While courts have struck down a number of such laws,[7] the struggle continues between those advocating a seamless first amendment free market and those concerned with the Internet's graphic content.[8] Major Internet regulation, originating in Congress and several state legislatures, revives prohibitions against "transmitting sexual material"[9] and provides that public schools and libraries must "block," or "filter," the Internet's sexual content.[10]

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5. *See* Lesli C. Esposito, Note, *Regulating the Internet: The New Battle Against Child Pornography*, 30 CASE W. RES. J. INT'L L. 541, 541-42 (1998).

6. In the most infamous instance of Congressional Internet regulation, Congress enacted the Communications Decency Act of 1996 (CDA), Pub. L. 104-104, 110 Stat. 56. The CDA included provisions both governing "indecent" transmissions, *see* 47 U.S.C. § 223(a) (Supp. 1997), and "patently offensive" displays, *see* 47 U.S.C. § 223(d) (Supp. 1997). The Supreme Court invalidated the CDA as vague and overbroad. *See* Reno v. ACLU, 117 S. Ct. 2329, 2346-48 (1997). An ACLU Web site lists over twenty existing and pending state laws that regulate the Internet. *See* ACLU, *Online Censorship in the States*, (visited Nov. 4, 1998) <http://aclu.org/issues/cyber/censor/censor.html#georgia>. Lastly, the Kern County Library in California briefly had a policy requiring that Internet content on all its computers be filtered. *See Filter Internet Legislation*, BAKERSFIELD CALIFORNIAN, *reprinted in Editorial Roundup*, L.A. DAILY J., May 1, 1998, at 6.

7. *See Reno*, 117 S. Ct. 2346-48 (striking down portions of the CDA, Pub. L. 104-104, 110, 110 Stat. 56, because facially overbroad and, thus, violative of the First Amendment); Urofsky v. Allen, 995 F. Supp. 634, 644 (E.D. Va. 1998) (Brinkema, J.) (holding that Virginia law prohibiting any government employee from using state-owned computer systems to send or access sexually explicit material both over- and underinclusive and, thus, violative of the First Amendment); American Libraries Ass'n v. Pataki, 969 F. Supp. 160, 183-84 (S.D.N.Y. 1997) (striking down New York penal law similar to CDA on Dormant Commerce Clause grounds); People v. Barrows, 1998 WL 481800, at *12 (N.Y. Sup. Ct. June 9, 1998) (striking down New York penal law that prohibited attempted dissemination of indecent materials to minors as vague and overbroad).

8. *See* Kim L. Rappaport, *In the Wake of* ACLU v. Reno: *The Continued Struggle in Western Constitutional Democracies with Internet Access and Freedom of Speech Online*, 13 AM. U. INT'L L. REV. 765 (1998).

9. See, for example, Senate Bill 1482, 105th Cong. (1997), which is Congress' response to the Supreme Court's decision in *Reno* to strike down portions of CDA. *See* S. Rep. No. 105-225 (1998). Senate Bill 1482, proposed by Senator Coats and reported by Senator McCain, "amend[s] section 223 of the Communications Act of 1934 to establish a prohibition on commercial distribution on the World Wide Web of material that is harmful to minors, and for other purposes." S. 1482, 105th Cong., preamble (1997). For resurrections of CDA pending in state legislatures, see ACLU, *supra* note 6.

10. *See, e.g.*, Safe Schools Internet Act of 1998, H.R. 3177, 105th Cong. (1998); S. 1619, 105th Cong. § 1 (1998) ("No Universal Service For Schools Or Libraries That Fail To Implement A Filtering Or Blocking System For Computers With Internet Access.");

A paucity of case law in this area unfortunately provides legislators and courts with little guidance as they draft and review Internet legislation. This comment focuses on a recent district court decision reviewing a public library's Internet-blocking policy, *Mainstream Loudoun v. Board of Trustees*.[11] One hopes this decision will add to the diversity of views concerning the Internet; and in turn, "generate an understanding sufficient for the courts to judge upon" and to help legislators rethink "what is at issue" as they regulate.[12] To help further that endeavor, this comment explores this budding area of law where the Internet, public libraries, and the First Amendment intersect. It focuses on the first amendment questions implicated in *Mainstream Loudoun*, particularly the court's correct decision to apply strict scrutiny to the library regulation. This comment also examines the court's brief discussion of why Internet-blocking software would potentially fail strict scrutiny's narrow tailoring requirement. In conclusion, this comment uses lessons learned from analyzing *Mainstream Loudoun* to scrutinize an Internet-blocking bill pending in the Senate.[13]

I. CASE SUMMARY

Virginia's Loudoun County public library system (the Library) provides its patrons with access to the Internet and the World Wide Web.[14]

S. 670, 77th Leg., 1998 Reg. Sess. (Kan. 1998) (requiring the mandatory use of blocking software by all users on Internet terminals at state-funded public libraries, school districts, and state and local educational institutions, colleges and universities); *see also* ACLU, *supra* note 6 (listing similar state bills and laws); Katie Hafner, *Library Grapples With Internet Freedom*, N.Y. TIMES, Oct. 15, 1998, at D1, D6 (describing controversy surrounding Internet filtering policy adopted by Austin, Texas Public Library branches). Harry Hochheiser, a board member of Computer Professionals for Social Responsibility, asks rhetorically, "Why do so many people want filtering?" Harry Hochheiser, *Filtering FAQ*, COMPUTER PROFESSIONALS FOR SOCIAL RESPONSIBILITY ¶ 1.2 (last modified July 23, 1998) <http://www.cpsr.org/~harryh/faq.html>. He responds,

> Unlike traditional media, the Internet does not have any obvious tools for segregating material based on content. While pornographic magazines can be placed behind the counter of a store, and strip-tease joints restricted to certain parts of town, the Internet provides everything through the same medium. Filters and rating systems are seen as tools that would provide the cyberspace equivalent of the physical separations that are used to limit access to "adult" materials.

Id. In fact, one parent has sued a Livermore, California library for "failing to restrict minors' access to pornographic Net content." Hafner, *supra*, at D1.

11. 2 F. Supp. 2d 783 (E.D. Va. 1998) (Brinkema, J.).
12. Lessig, *supra* note 3, at 908.
13. *See* S. 437, 105th Cong. (1998).
14. *See Mainstream Loudoun*, 2 F. Supp. 2d at 787.

State legislation vests power to control and manage the Library in a Board of Trustees.[15] Acting pursuant to this authority, the board adopted a "Policy on Internet Sexual Harassment."[16] The policy provided that "'[s]ite-blocking software ... be installed on all [Library] computers'" that would: "'a. block child pornography and obscene material;' and 'b. block material deemed Harmful to Juveniles under applicable Virginia statutes and legal precedents.'"[17] The Library employed commercial software known as "X-Stop" to effectuate its policy.[18]

In response, the Mainstream Loudoun association and its individual members (plaintiffs) brought a claim against the library board, five of its members, and the Director of Library Services.[19] Plaintiffs claimed that Mainstream Loudoun members attempted to access Internet sites at the Library, only to discover that access to these sites had been blocked.[20] Plaintiffs therefore alleged that the Library's site-blocking policy infringed on their access to constitutionally protected speech; that there were no clear criteria for blocking decisions; and that defendants' "unblocking" policy chilled plaintiffs' receipt of constitutionally protected materials.[21]

The Library moved for summary judgment. The court first addressed several immunity and standing defenses the Library advanced.[22] These defenses not dispositive, the court turned its attention to the first amendment defense asserted. The Library argued that the "'First Amendment [did] not in any way limit the decisions of a public library on whether to provide access to information on the Internet.'"[23] This assertion implicated the yet unanswered question central to the resolution of this case:

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15. *See* VA. CODE. ANN. § 42.1-35 (Michie 1998).

16. *Mainstream Loudoun*, 2 F. Supp. 2d at 787 (quoting the Library Board Policy).

17. *Id.* (quoting the Library Board Policy). Virginia Code section 18.2-390, which the library board policy referenced, *see Mainstream Loudoun*, 2 F. Supp. 2d at 796, defines material "Harmful to Juveniles" as material with sexual content that

> (a) predominantly appeals to the prurient, shameful or morbid interest of juveniles, (b) is patently offensive to prevailing standards in the adult community as a whole with respect to that what is suitable material for juveniles, and (c) is, when taken as a whole, lacking in serious literary, artistic, political or scientific value for juveniles.

VA. CODE. ANN. § 18.2-390 (Michie 1998).

18. *See Mainstream Loudoun*, 2 F. Supp. 2d at 787.

19. *See id.* at 787.

20. *See id.* at 791.

21. *See id.* at 794-97.

22. The court's resolution of these jurisdictional defenses exceeds the scope of this comment and is not relevant to the first amendment analysis. The court's discussion of these jurisdictional issues is essentially uncontroversial, and can be found *id.* at 788-92.

23. *Id.* (quoting Defendants' Brief at 2).

"[W]hether a public library may, without violating the First Amendment, enforce content-based restrictions on access to Internet speech."[24]

The court first decided which level of judicial scrutiny to apply to the Library's policy. Without clear guidance in precedent, the district court looked to analogous Supreme Court cases involving public high school libraries (*Board of Education v. Pico*),[25] post office regulations restricting access to speech deemed communist propaganda (*Lamont v. Postmaster General*),[26] and Congressional efforts to regulate speech on the Internet (*Reno v. ACLU*).[27] From the first two cases, *Pico* and *Lamont*, the district court gleaned the principle that once the Library acquired access to all the publications immediately available on the Internet, the Library's policy of effectively removing Internet publications, by blocking them, implicated the First Amendment.[28] Removing such publications involved discretion unjustified by, for example, a public high school library's educational mission, as was the case in *Pico*.[29] Therefore, the court found that the Library's content-driven policy of regulating access to speech on the Internet was subject to unqualified first amendment scrutiny—that is, the strict scrutiny the Supreme Court applied to Internet regulation in *Reno*.[30]

The district court next turned its attention to the three types of speech actually regulated: obscenity, child pornography, and materials deemed harmful to juveniles.[31] To these three classes of content regulation, the

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24. *Id.* (characterizing this case as "a case of first impression").

25. 457 U.S. 853 (1982).

26. 381 U.S. 301 (1943).

27. 117 S. Ct. 2329, 2343-48 (1997).

28. *See Mainstream Loudoun*, 2 F. Supp. 2d at 794-96. By analogy, while a library is not required to subscribe to magazines like *Hustler*, if it had done so in the past, the decision to remove past issues from its collection would trigger first amendment scrutiny.

29. *See id.* at 795. *Cf. Pico*, 457 U.S. at 888 (Burger, J., dissenting) (arguing that high school library's inculcative mission justifies its removing texts based on content).

30. *See id.* at 795-96 (citing *Reno*, 117 S. Ct. at 2343-48). In *Reno*, the Court found that the Internet is more akin to newspapers or books than it is to radio or television. *See* 117 S. Ct. at 2341-44. Therefore, *unlike* the over-the-air broadcast media, and *like* the print media, the Internet is a medium deserving of the utmost freedom from content regulation. *See id.*; *see also* David K. Djavaherian, Comment, Reno v. ACLU, 13 BERKELEY TECH. L.J. 371, 376-77 (1998) (discussing the Court's media-specific first amendment jurisprudence and the Internet's place in that analysis); *cf.* Jacques, *supra* note 4, at 1949, (arguing that with the advent of Internet, all forms of speech, regardless of the medium through which they are communicated, deserve the highest level of constitutional protection).

31. *See Mainstream Loudoun*, 2 F. Supp. 2d at 796. The Supreme Court has ruled that obscenity and child pornography are not protected by the First Amendment. *See* New York v. Ferber, 458 U.S. 747 (1982) (child pornography); Miller v. California, 413 U.S. 15 (1973) (obscenity). Materials "harmful to juveniles" are protected for adults, but not

court applied "the First Amendment's central tenet that content-based restrictions on speech must be justified by a compelling governmental interest and must be narrowly tailored to achieve that end."[32] The court first found that an issue of fact remained as to whether the means employed to block access to obscenity and child pornography were narrowly tailored.[33] The court took seriously plaintiffs' allegation that the material the X-Stop software blocked depended not on library board policy that the court could examine, but on criteria known only to the corporation that sold the X-Stop software.[34] Without access to those criteria, the court found it impossible to determine whether the blocking measures were narrowly tailored.

Next, the court held that plaintiffs adequately alleged that the Library's means of precluding access to material deemed harmful to juveniles was potentially unreasonable.[35] Borrowing from *Reno v. ACLU*, the court concluded that the library policy may have impermissibly restricted adults' access to speech on the Internet to that which is fit for children.[36] If it had, the policy would be potentially unconstitutional.

Lastly, the court rejected defendants' argument that the Library's "unblocking" policy saved its blocking policy. The court held that the unblocking procedure constituted an unconstitutional burden on plaintiffs' unfettered right to access protected speech.[37] The court concluded the unblocking procedure, which relied on the "standardless discretion" of the library staff, was more onerous than the unconstitutional regulation in *Lamont*.[38] The regulation in *Lamont* provided that the post office would not deliver a publication deemed "communist political propaganda," but that it would do so automatically upon written request from the addressee.[39] The Library's "unblocking" policy was not so automatic. It required that patrons "submit a written request which must include their name, telephone number, and a detailed explanation of why they desire access to the

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for minors. *See* Denver Ed. Telecommunications Consortium v. FCC, 116 S. Ct. 2374, 2393 (1996). *See also* Lawrence Lessig & Paul Resnick, The Architecture of Mandated Access Controls (Sept. 3, 1998) (manuscript at 1, on file with author), *information regarding latest version of paper available at* <http://www.si.umich.edu/~presnick/papers/lessig98/>.

32. *Mainstream Loudoun*, 2 F. Supp. 2d at 795.
33. *See id.* at 796-97.
34. *See id.* at 796.
35. *See id.* at 797
36. *See id.*
37. *See Mainstream Loudoun*, 2 F. Supp. 2d at 797.
38. *See id.*
39. *See* Lamont v. Postmaster General, 381 U.S. 301, 302-03 (1943).

blocked site."[40] Thus, the Library's unblocking policy chilled access to speech even more so than did the unconstitutional regulation in *Lamont*.

II. DISCUSSION

This comment focuses on two points in the district court's opinion: the decision to apply strict scrutiny to the Library's blocking policy and the intimation that blocking software could not meet strict scrutiny's narrow tailoring requirement. In focusing on these two issues, this comment takes it as beyond contention that the Library may not limit speech accessible to adults to that which is suitable for minors.[41] Such regulation would truly "'burn the [global village] to roast the pig.'"[42] Moreover, this comment finds sound the conclusion that the Library's unblocking policy did not save the blocking policy from constitutional scrutiny. *Lamont* seems controlling authority, and the policy in this case is more onerous than the post-office regulation invalidated in *Lamont*.[43]

A. Discerning the Appropriate Level of Judicial Scrutiny

1. The Problem

Conceptually, the most difficult determination the *Mainstream Loudoun* court had to make was deciding which level of scrutiny it should apply to the Library's blocking policy. Existing precedent provided no clear guidance. In *Reno v. ACLU*,[44] the Supreme Court applied strict scrutiny to an act of Congress, the Communication Decency Act (CDA),[45] which had prohibited transmission of obscene or indecent communications by means of a telecommunication device to persons under the age of eighteen. As the CDA potentially applied to Internet discussions about birth control

40. *Mainstream Loudoun*, 2 F. Supp. 2d at 797.

41. *See* Reno v. ACLU, 117 S. Ct. 2329, 2346 (1997) ("'[R]egardless of the strength of the government's interest' in protecting children, '[t]he level of discourse reaching a mailbox cannot be limited to that which would be suitable for a sandbox.") (citations omitted, alteration in original). *See also* Lessig & Resnick, *supra* note 31, at 1

42. *Id.* at 2350 (borrowing the "'burn[ing] the house to roast the pig'" metaphor).

43. Unlike the post office regulation in *Lamont*, the Library's unblocking policy places standardless discretion to "unblock" Internet materials in the hands of government officials. *Cf.* Forsyth County v. Nationalist Movement, 505 U.S. 123, 133 (1992) (holding parade license permit ordinance that provided administrator with "no articulated standards" with which to issue and charge fees unconstitutional, in part, because "[t]he First Amendment prohibits the vesting of such unbridled discretion in a government official").

44. *See* 117 S. Ct. 2329, 2343-44 (1997).

45. 47 U.S.C. §§ 223(a), (d) (1996).

practices, homosexuality, and prison rape,[46] the statute clearly regulated speech that could be described as contributing to the public discourse that the First Amendment was intended to protect.[47]

In *Board of Education v. Pico*, in contrast, the Supreme Court held that consistent with a public high school's inculcative mission, the school could make content-based textbook removal decisions subject to certain limitations.[48] Although the Court's decision was fractured—in terms of the amount of discretion public high schools should be permitted when making removal decisions, and whether students had a right to receive certain information—all nine Justices agreed that public schools were entitled to "broad discretion" to "'establish and apply their curriculum in such a way as to transmit community values.'"[49] Therefore, if the books in question had been removed for reasons of educational suitability rather than "simply because [the board members] dislike[d] the ideas contained in those books," the Court would defer to the school board's judgment.[50] In *Pico*,

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46. *See* 117 S. Ct. at 2344.

47. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 389-90 (1969) (defining "the ends and purposes of the First Amendment" as the necessity to "preserve an uninhibited marketplace of ideas" and to ensure that the public "receive suitable access to social, political, esthetic, moral, and other ideas and experiences").

48. *See* 457 U.S. 853, 863-64 (Brennan, J., plurality op.) (1982).

49. *Id.* at 863, 864 (citation omitted). Justice Brennan aptly recognized the tensions in this case. He recognized that a "'the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge,'" *id.* at 866 (citation omitted), and that a school's library plays a special role as a locus for free and independent inquiry, *see id.* at 869. He also recognized that the "'comprehensive authority of the States and of school officials ... to prescribe and control conduct in the schools,'" as well as their inculcative role in "'the preparation of individuals for participation as citizens,'" justified reviewing school board decisions with great deference. *Id.* at 864 (citation omitted). Thus, Justice Brennan fashioned what could be considered a rational basis test to review school board book removal decisions. As long as the removal decisions served an instrumental purpose, e.g., getting rid of books with pervasive vulgarity, the Court would defer to the school board's managerial judgment. *See id.* at 872-74. If the decisions were irrational, *e.g.*, contrary to "'the advice of literary experts'" and ignoring "the views of 'librarians and teachers within the [school] system,'" the Court would not defer to the school board's judgment. *Id.* at 874 (citation omitted).
Justice Blackmun agreed the school board's decision should normally be granted deference. *See id.* at 879 (Blackmun, J., concurring). He did not justify judicial review of the school board's decision on Brennan's right to receive information rationale, however, but on the constitutional prohibition against viewpoint discrimination. *See id.* at 876-79. Chief Justice Burger, and three other Justices dissenting, would have deferred completely to the school board's judgment because nothing required the public school to act as a conduit for any particular speech. *See id.* at 886 (Burger, C.J., dissenting).

50. *Id.* at 872 (Brennan, J., plurality op.).

in contrast to *Reno*, the school board's mission and its authority over its students clearly made the crucial difference.

Mainstream Loudoun is not directly analogous to either of these cases; in fact, it falls somewhere in a gap between the two. On the one hand, in contrast to *Reno*, the Library's blocking policy did not regulate conduct by sanctioning those disseminating information. Rather than keeping new ideas from the marketplace, the Library's blocking policy interfered with the patrons' ability to receive information from that marketplace. In addition, because five Justices in *Pico* did not agree that libraries had a constitutional obligation to provide certain information,[51] it is not clear that *Reno*'s strict scrutiny standard should apply because neither a recognized constitutional right nor the growth of the marketplace of ideas is directly implicated. On the other hand, because public libraries do not have an inculcative mission or the ancillary authority over their patrons, it does not follow that *Pico*'s deferential standard of review should apply. Surely public library patrons have more autonomy in deciding which materials to access.[52] However, *Pico* avoided discussing book acquisition decisions, and explicitly limited its discussion to book removal decisions.[53] Deciding which Internet materials to block arguably involves acquisition decisions; further complicating matters if one concludes that an entirely different standard applies in acquisition cases.[54]

To add yet another wrinkle to this analysis, this past Term the Supreme Court held that the government could make decisions whether to subsidize speech based on content. In *National Endowment For The Arts v. Finley*,[55] the Court upheld a statute requiring the NEA to ensure artistic excellence and artistic merit when judging grant applications by taking into consideration general standards of "decency and respect" for diverse beliefs and values of the American public.[56] *Finley*'s subsidized speech analysis is relevant because units of government have the choice whether to provide Internet access or not, just as Congress has the choice whether or not to endow the arts.

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51. *See supra* note 49.

52. *See Pico*, 457 U.S. at 886 (Burger, C.J., dissenting) (assuming that books unavailable in the public high school library would be "available at public libraries and bookstores").

53. *See id.* at 861-63, 871-72 (Brennan, J., plurality op.).

54. See discussion *infra*, Section II.A.2.b., agreeing with the district court's determination in *Mainstream Loudoun* that the Library's Internet-blocking policy constituted a *removal*, not an *acquisition*. *See* Mainstream Loudoun v. Bd. of Trustees, 2 F. Supp. 2d 783, 793-94 (E.D. Va. 1998). *See also infra* note 114.

55. 118 S. Ct. 2168 (1998).

56. 20 U.S.C. § 954(d)(1) (1998).

Finley, like *Reno* and *Pico*, provides no clear answers, however. In reaching its holding, the *Finley* Court reasoned, "Any content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding. The NEA has limited resources and it must deny the majority of the grant applications that it receives, including many that propose 'artistically excellent' projects."[57] Moreover, so long as the funding is not calculated to "'drive certain ideas or viewpoints from the marketplace ...the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.'"[58] The Library's Internet-blocking policy arguably does the same thing. Like the NEA, the Library "selectively fund[s]" Internet access, appropriating resources to materials it has determined "serve the public purpose[]."[59] However, because one payment provides access to all materials freely available on the Internet—and Internet access actually saves the library money,[60] while blocking software costs money—the Library cannot argue that providing unfettered Internet access is cost-prohibitive the way that endowing all the arts is.

Thus, while *Reno*, *Pico*, and *Finley* are certainly instructive, none by its own terms, controls. The district court chose to adopt the "right to receive" rationale from *Pico* and the strict scrutiny standard from *Reno* (and of course, it did not have the benefit of the latter-decided *Finley*).[61] It also chose to distinguish *Pico*'s deference to public schools' educational authority rationale.[62] Before evaluating the wisdom of the district court's decision, it is important to first put these three relevant cases in context. To do so, attention is turned to an essay recently written by Professor Robert C. Post.[63]

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57. *Finley*, 118 S. Ct. at 2177-78.

58. *Id.* at 2179 (citations omitted).

59. *Id.*

60. *See* ACLU Brief In Support of Plaintiff-Intervenors' Motion For Summary Judgment, Mainstream Loudoun v. Board of Trustees, (visited Oct. 4, 1998) <http://www.aclu.org/court/loudounbrief.html>, ¶ 8 ("Loudoun County Library Director Douglas Henderson believes that providing Internet access is crucial because it provides 'the equivalent of $1 million or more of information that the library could not afford to buy.'") (quoting Statement of Undisputed Facts ¶ 479 (Henderson Decl.)).

61. *See* Mainstream Loudoun v. Bd. of Trustees, 2 F. Supp. 2d 783, 794-96 (E.D. Va. 1998).

62. *See id.* at 794-95.

63. *See* Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151 (1996).

2. *Taking a Step Back:* Reno, Pico, Finley, *and* Mainstream Loudoun *in Context*

Professor Post has developed an instructive two-part inquiry for determining whether and how the government can regulate subsidized speech.[64] The test is applicable in a number of cases,[65] particularly this one. The first inquiry involves characterizing the speech and determining whether it is part of the democratic social domain called "public discourse," or whether it is "located in a different kind of social formation, which may be termed the 'managerial domain.'"[66] The second inquiry focuses on the government regulation involved and distinguishes between two different types of such action: "'conduct rule[s]' for the government of citizens," which can be understood as limits on public discourse, and "'decision rules' for the internal direction of government officials,"[67] which can be understood as "a form of state participation in the marketplace of ideas."[68] The result of each inquiry has different implications for first amendment analysis.

a) The Public Discourse/Managerial Domain Distinction

The first half of Post's inquiry focuses on the type of speech involved. About public discourse, Post writes, "Ultimately, speech will be assigned to public discourse on the basis of normative and ascriptive judgments as to whether particular speakers in particular contexts should constitutionally be regarded as autonomous participants in the ongoing process of democratic self-governance."[69] Because the democratic legitimacy of the state depends on public discourse, "the First Amendment jealously safeguards public discourse from state censorship."[70] Thus, for example, even if the government has good reason to prevent the dissemination of certain information in the national press, the court strictly scrutinizes such at-

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64. *See id.*; *see also* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987).

65. *See, e.g.*, Post, *supra* note 64, at 1793-97.

66. Post, *supra* note 63, at 153; *see also* ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 4-10 (1995).

67. Post, *supra* note 63, at 178-79. Post borrows the conduct rule/decision rule terminology from Meir Dan-Cohen's influential discussion. *See id.* at 179 n.148 (citing Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984)).

68. Post, *supra* note 63, at 153.

69. *Id.* at 163.

70. *Id.* at 153.

tempts at censorship.[71] The democratic, first amendment value, which the speech promotes, trumps governmental will.

In contrast, "[w]ithin managerial domains, the state organizes its resources so as to achieve specified ends."[72] Content-based regulations of speech within those managerial domains do not violate the First Amendment, Post writes, "so long as they are necessary to accomplish legitimate managerial ends."[73] Thus, for example, a university's English Department may award scholarships only to English students—at the expense of Physics students, say—because funding its own students' education is instrumentally rational. If, however, the department refused to give scholarships to communists, the speech subsidy would bear no relationship to the department's mission; it would be irrational viewpoint discrimination, and thus, unconstitutional.[74] This distinction helps explain *Finley*'s holding that the NEA could constitutionally, and consistent with Congress' purposes for endowing the arts, make content-based distinctions based on artistic merit and general standards of "decency and respect."[75] Congress defined the organizational goal; it could also define the means by which to achieve it.

Reno and *Pico* can also be understood, in part, as falling on either side of the public discourse/managerial domain divide. In *Reno*, the CDA constrained an important "site for the forging of an independent public opinion to which democratic legitimacy demands that the state remain perennially responsive."[76] Thus, the regulation merited strict judicial scrutiny, and the Internet communication "jealous safeguard[ing] from state censorship."[77] In contrast, in *Pico*, the school board's legitimate managerial authority to inculcate our nation's children justified the board's instrumental decision to establish a curriculum and remove books that could undermine it.[78] However, as Justice Brennan warned, if the books were re-

71. *See* New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam) (holding that newspapers could publish secret Defense Department study even though the dissemination of such information might prolong the war in Vietnam).

72. *Id.* at 164; *see also* Post, *supra* note 64, at 1798 ("[T]he opposite of the 'public' is not the 'private,' but rather the specifically instrumental.").

73. Post, *supra* note 63, at 170.

74. *See id.* at 166-68.

75. National Endowment For The Arts v. Finley, 118 S. Ct. 2168, 2177-78 (1998).

76. Post, *supra* note 63, at 153.

77. *Id.*

78. *Id.* at 165-67 & 165 n.92; Board of Education v. Pico, 457 U.S. 853, 862-75 (1982) (Brennan, J., plurality op.); *see also id.* at 921 (O'Connor, J., dissenting) (reasoning that because the "school board can set the curriculum, select teachers, and determine initially what books to purchase for the school library," as long as the school does not

moved to impose upon the students the school board's view of the "political orthodoxy," the school board would have exceeded the bounds of its authority.[79] Such a regulation would not be instrumentally rational.

Where does this leave the Library's Internet-blocking policy? Understanding unfettered access to the Internet, which "'it is no exaggeration to conclude'" provides access to discourse "'as diverse as human thought,'" surely militates in favor of understanding such access as situated in the social space of public discourse, and thus deserving of special protection.[80] However, given that public libraries constantly make acquisition and removal decisions, libraries and their trained librarians surely play a managerial role in determining the types of materials to which their patrons are exposed. Thus, their decisions should be afforded some deference. On their surface, the above cases fail to answer the public discourse/managerial domain question. Only an examination of our shared understandings about the role public libraries play in our democracy seems to do so.[81]

Beginning with the Court, all nine Justices in *Pico* seemed to describe public libraries as a place for public discourse, rather than managerial control. The dissenters—who argued the school board should be granted broad deference—were first to recognize that public libraries play a different social role than do public high school libraries. Both Chief Justice Burger and then-Justice Rehnquist "justified giving public schools broad discretion to remove books in part by noting that such materials remained available in public libraries."[82] Moreover, Justice Rehnquist distinguished between public school libraries, which must "winnow[]" information to serve the school's inculcative mission, and public libraries and universities, which are designed for "freewheeling inquiry."[83] Those in the plural-

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interfere with the students ability to read and discuss the material, the Court should defer to school board's decision, "acting in its special role as educator," to remove books from the school library).

79. *Id.* at 870-72, 875 (Brennan, J., plurality op.).

80. Reno v. ACLU, 117 S. Ct. 2329, 2335 (1997) (citation omitted).

81. *See* Post, *supra* note 63, at 171 (describing this inquiry as a "question of normative characterization").

82. Mainstream Loudoun v. Bd. of Trustees, 2 F. Supp. 2d 783, 794 (E.D. Va. 1998) (citing *Pico*, 457 U.S. at 892 (Burger, C.J., dissenting); *id.* at 915 (Rehnquist, J., dissenting)). In fact, in *Pico*, the local public library displayed the nine books removed by the school board so that anyone, including students, could read them. *See Pico*, 457 U.S. at 915 (Rehnquist, J., dissenting).

83. *Pico*, 457 U.S. at 914, 915 (Rehnquist, J., dissenting). The government's managerial authority, Rehnquist continued, "d[id] not seek to reach beyond the confines of the school." *Id.* at 915. Justice O'Connor's dissent assumed the same—that students, as well

ity in *Pico* agreed. They noted that public libraries were a locus of free-wheeling independent inquiry "especially appropriate for the recognition of the First Amendment rights...."[84]

As the court in *Mainstream Loudoun* recognized, the Justices in *Pico* would likely also agree that adult patrons in public libraries have already been inculcated by public schools.[85] In venturing into public libraries, they "come to the library to pursue their personal intellectual interests rather than the curriculum of a high school classroom."[86] It follows that the managerial authority that justified winnowing the scope of information available in the high school library would not obtain in this different setting.[87]

Politicians and librarians similarly have recognized the democratic and libertarian significance of information freely available in public libraries. They have rejected what can be characterized as the government's managerial authority in this domain.[88] Given the "cheap" nature of speech

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other citizens, could expose themselves to controversial ideas in public libraries. *See supra* note 78.

84. *Pico*, 457 U.S. at 868 (Brennan, J., plurality op.). In contrast to those in dissent, they would also recognize public high school libraries as another "principal locus of such freedom." *Id.* at 868-69; *see also id.* at 868 ("A school library, *no less than any other public library*, is 'a place dedicated to quiet, to knowledge, and to beauty.'") (quoting Brown v. Louisiana, 383 U.S. 131, 142 (1966) (Fortas, J.) (emphasis added)).

85. *See* Mainstream Loudoun v. Bd. of Trustees, 2 F. Supp. 2d 783, 795 (E.D. Va. 1998).

86. *Id.*

87. *See id.*

88. For example, then-Senator John F. Kennedy said the following:

> If this nation is to be wise as well as strong, if we are to achieve our destiny, then we need more new ideas for more wise men reading more good books in more public libraries. These libraries should be open to all—except the censor. We must know all the facts and hear all the alternatives and listen to all the criticisms. Let us welcome controversial books and controversial authors. For the Bill of Rights is the guardian of our security as well as our liberty.

Senator John F. Kennedy, *Response to Questionnaire*, SATURDAY REV., Oct. 29, 1960, at 44, *reprinted in* RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS FROM THE LIBRARY OF CONGRESS 29 (Suzy Platt ed., 1992).

Librarians express similar sentiments. Even though she decided to implement blocking policies in her library, Brenda Branch, the Director of the Austin Library, "[l]ike many other librarians, ... has always considered the defense of free speech to be part of her job description." Hafner, *supra* note 10, at D6. Branch says, "'Upholding freedom of speech becomes so second nature to librarians that unrestricted access was our natural fallback position.'" *Id.* Branch's decision to restrict unfettered Internet access to those over eighteen years of age has fractured the local library community and drawn criticism from the

available to adults in public libraries, particularly that available on the Internet, the nation's poor and wealthy alike can use public libraries to participate in and learn from the ongoing public discourse.[89]

Because public libraries serve the social function they do, characterizing them as a managerial domain, in which the government can regulate speech to further some greater end, would be a mistake. These libraries, like the Internet, are a crucible for public discourse and democracy. Thus, on this first Postian inquiry, the district court was correct to conclude that access to the type of speech occurring in public libraries needs to be jealously safeguarded.

b) The Conduct Rule/Decision Rule Distinction

Post's second inquiry, which focuses on the regulation involved—distinguishing between *conduct* rules and *decision* rules—also helps analyze the district court's decision to apply strict scrutiny. Post argues that the distinction between these two types of government action explains the Supreme Court's first amendment doctrine in cases involving subsidized speech.[90] Internet access in public libraries can be understood as subsidized speech, because like Congress' decision to endow the arts, libraries choose to spend public money to pay for computers and Internet access.[91]

Post describes conduct rules as regulations that effectively proscribe individual participation in public discourse; decision rules are criteria that guide subsidy decision-making procedures within a preexisting unit of government.[92] Conduct rules are more constitutionally suspect because they directly interfere with public discourse; whereas when the government acts pursuant to decision rules, it can be understood as rightfully participating in public discourse.[93] To elucidate this distinction, this sec-

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American Library Association, which strongly favors parental control instead of libraries utilizing Internet filtering software. *See id.*

89. *See supra* note 3 and accompanying text.

90. Post argues that while courts invoke doctrines such as overbreadth, vagueness, and viewpoint discrimination to dispense with subsidized speech cases, the best way to understand these cases is along the decision/conduct rule divide. *See* Post, *supra* note 63, at 180-84, 188-94. This sort of move is not a first for Post. *See, e.g.*, Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1252 (1995) (arguing that the Supreme Court's test for determining whether speech deserves first amendment protection—as articulated in *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)—"is transparently and manifestly false," and in need of recuperation principally because it ignores social context).

91. *See supra* notes 55-69 and accompanying text.

92. *See* Post, *supra* note 63, at 176-79.

93. Post borrows from and elaborates upon Justice Rehnquist's opinion in *Regan v. Taxation with Representation*, 461 U.S. 540, 549 (1983), to conclude that "*when the gov-*

tion refashions an example from Post and reconsiders *Reno*, *Pico*, and *Finley*.

In *Reno*,[94] the CDA clearly regulated the conduct of citizens. By its own terms, the Act made it a crime to transmit constitutionally protected "indecent materials" to minors.[95] Because it chilled public discourse, the Supreme Court applied strict scrutiny to this conduct rule and struck down portions of the statute that interfered with free speech.[96]

Now imagine a post-office regulation that denied the second-class postage rate afforded magazines to magazines containing political propaganda. This regulation would not regulate conduct *per se,* because it merely denies publishers a subsidy. However, because historical practice has rendered this rate-privilege something of an entitlement, magazine propagandists forced to pay the first-class rate are not only placed at a competitive political disadvantage, but the deprivation appears almost punitive. It singles out a particular brand of speech and denies it a broadly dispensed subsidy relied upon by all magazine publishers.[97] Thus, while on its face the internal post-office rule merely denies a subsidy, in effect, it regulates *conduct* of a particular type and stymies the significant public discourse disseminated in magazines. Therefore, the Court would likely subject the post office rule to strict scrutiny and hold it unconstitutional insofar as it interferes with conduct furthering public political discourse.

Now consider another "easy" case like *Reno*, but on the *decision* rule side of the divide. Post argues that Congress' decision to devote the Kennedy Center to the arts, and not political speech, is unproblematic.[98] Unlike the post office rule that infringes upon an important conduit for public discourse,[99] Congress' decision to fund only the arts at the Kennedy Center has little impact on political speech.[100] Congress' internal-decision rule in the Kennedy Center context is uncontroversial because when choosing to promote the arts rather than another type of speech, Congress is not singling out a particular type of speech for punishment. It merely chooses where to spend its constituents' limited resources.

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ernment is authorized to act in its own name as a representative of the community, its decision to promote one value cannot by itself carry an internal constitutional compulsion simultaneously to support other values." Post, *supra* note 63, at 184 (emphasis in original); *see also id.* at 182-83.

94. Reno v. ACLU, 117 S. Ct. 2329 (1997).

95. *See* 47 U.S.C. §§ 223(a)(1), (d) (1994).

96. *Reno*, 117 S. Ct. at 2346-47.

97. *See* Post, *supra* note 63, at 178-80.

98. *See id.* at 179.

99. See Madison quote, *supra* note 4.

100. *See* Post, *supra* note 63, at 179.

The unresolved "acquisition decision" question in *Pico* can be understood similarly.[101] School boards making curriculum decisions cannot help but choose certain books rather than others. If the school board's decisions are based on their managerial authority to educate children, these decisions are similarly uncontroversial.[102] *Finley* answered the question whether in making such acquisition decisions, a unit of government, could use criteria that might exclude certain political or social perspectives.

While critics[103] and the courts below[104] understood the NEA's decency standard as singling out "indecent" artists and effectively regulating their conduct—in a manner consistent with the unconstitutional post office rule above—the Supreme Court in a near-unanimous decision held otherwise.[105] In vindicating Congress' ability to establish internal decision-making rules for determining who should receive artistic subsidies from the national government, Justice O'Connor wrote that as long as Congress and the NEA do not suppress certain disfavored viewpoints,

> Congress has wide latitude to set spending priorities.... [As we have held,] Congress may "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program."... In doing so, "the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other."[106]

Post cautiously predicted this result using his two-part inquiry.[107] He argued that the NEA's decency clause is better understood as a decision rule than as a conduct rule. The clause did not "impos[e] community norms on public discourse," (as argued above, the CDA did in *Reno*).[108] Instead, it could "be constitutionally legitimized, if we [were] to view the clause as merely encouraging a shared and important community value," (as the acquisition decisions in *Pico* could have been).[109] Justice O'Connor tracked this distinction in *Finley*. She wrote, "[W]hen the Government is

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101. *See supra* note 53 and accompanying text.

102. *See supra* notes 49-50 and accompanying text.

103. *See* Post, *supra* note 63, at 176 n.135 (collecting list of critics and supporters).

104. *See* Finley v. NEA, 795 F. Supp. 1457, 1476 (C.D. Cal. 1992), *aff'd*, 100 F.3d 671 (9th Cir. 1996), *en banc reh'g denied*, 112 F.3d 1015 (9th Cir. 1997), *rev'd*, 118 S. Ct. 2168 (1998).

105. *See* NEA v. Finley, 118 S. Ct. 2168 (1998) (8 to 1 decision).

106. *Id.* at 2179 (citations omitted).

107. *See* Post, *supra* note 63, at 193-94.

108. *Id.* at 193.

109. *Id.*

acting as patron," deciding what art deserves funding, "rather than as sovereign," censoring art, "the consequences of imprecision are not constitutionally severe."[110] Thus, in *Finley*, and in contrast to *Reno*, Congress' decision rules were not second-guessed with strict scrutiny.

Again, where does this leave Loudoun County Library's Internet-blocking policy? Is it a conduct rule or a decision rule and how does that drive the appropriate judicial scrutiny analysis? On the one hand, unlike the conduct rule in *Reno*, the regulated conduct at issue here is not disseminating speech, but library patrons receiving it. Moreover, libraries can choose whether or not to subsidize Internet access. Thus, filtering methods employed after Internet access has been achieved are arguably best understood as an internal decision rule about what to provide patrons.

On the other hand, as in the post office hypothetical, the subsidy that public libraries provide—access to information—can be understood as so ingrained in the American way of life, that to deny part of the already obtained subsidy would effectively constitute regulating public discourse. The Library would respond, arguing that it acts as the quintessential *Finley* "patron" and *Pico* "curriculum creator," and not the *Reno* "sovereign," when it makes decisions about which materials it should make available to its patrons. However, unlike in *Finley* or *Pico*, in which resources were scarce and funding decisions rivalrous, blocking Internet content—all of which is instantly available upon purchasing Internet access—may actually cost more money than leaving content unblocked.[111] Moreover, one can argue, in removing content from the Internet, the Library actually regulates speech and does not participate as a connoisseur, because connoisseurs, unlike censors, generally do not "laboriously redact[]" portions of an immediately available encyclopedic index of knowledge.[112] If one

110. *Finley*, 118 S. Ct. at 2179.

111. *See* Mainstream Loudoun v. Bd. of Trustees, 2 F. Supp. 2d 783, 793-94 (E.D. Va. 1998). Post argued in the NEA context that characterizing the NEA's decency clause as a conduct rule, subject to strict rules of content neutrality, would disable efforts to fund the arts. *See* Post, *supra* note 63, at 194. If Congress and the NEA, like the school board in *Pico*, could not distinguish between artistic, or pedagogical, excellence, how could they ever hope to expend scarce resources to fund the arts, or buy text- and library-books? This pragmatic argument for granting the Congress and the NEA deference by characterizing the decency clause as decision rule does not obtain in the Internet-blocking context. Unless one envisions libraries as so incensed by the inability to block Internet-content that they would rather not provide access altogether than provide unfiltered access, it would seem libraries would accept strict scrutiny of blocking procedures and attempt to use alternative means to get around strict scrutiny's narrowly tailored test. *See infra* Section II.B and Part III (discussing alternative means to wholesale blocking).

112. *Mainstream Loudoun*, 2 F. Supp. 2d at 794.

accepts that library officials must go out of their way to censor the Internet, the Library's blocking policy thus seems analogous to a public library unconstitutionally removing indecent books from its collection,[113] or to Congress unconstitutionally criminalizing either the production of indecent artwork or transmission of indecent communications over the Internet.[114]

Thus, because the Library's policy constitutes a conduct rule that affects public discourse, Post's twin doctrinal inquiry and analogous case law seem to justify the district court's decision in *Mainstream Loudoun* to apply strict scrutiny to the Library's Internet-blocking policy.[115] Given the historical significance of libraries as freewheeling loci of inquiry, it strains reason to characterize the Library's policy as an internal decision rule justified by managerial authority that deserves great deference on judicial review. The policy clearly affects the behavior of those seeking unfettered Internet access to public discourse. The Library's supervision is, moreover, unwelcome by those adults engaging in such freewheeling inquiry. Thus, strict scrutiny seems the appropriate standard of review whenever public libraries attempt to block, or filter, Internet content.

B. Strict Scrutiny's Narrow Tailoring Requirement As It Applies to Internet-Blocking Software

Technologically, the most difficult determination the district court and all legislatures and courts will have to make, is whether Internet-blocking software is advanced enough to be narrowly tailored.[116] The district court

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113. *See id.*

114. If technology allowed libraries to buy pre-filtered Internet access, a decision to buy such access rather than comparably priced normal access would arguably be an acquisition decision, rather than a removal decision subject to strict scrutiny. *See* text accompanying notes 98-102. However, one of the advantages of the Internet as a resource is that it grows daily without any cost to consumers. Unless content on pre-filtered Internet access was fixed at the time of purchase such that *all* new materials were filtered, it would seem that the filtering technology that was "removing" new materials as they were introduced would warrant strict scrutiny.

115. *See Mainstream Loudoun*, 2 F. Supp. 2d at 795.

116. This comment assumes *arguendo* that the Library can meet strict scrutiny's compelling state interest requirement. The Library's interest in regulating obscenity and child pornography is without doubt a legitimate, compelling state interest—both types of expression are criminal and "are not entitled to the protections of the First Amendment." *Mainstream Loudoun*, 2 F. Supp. 2d at 796 (citing New York v. Ferber, 458 U.S. 747 (1982) (holding that child pornography is not protected by the First Amendment); Miller v. California, 413 U.S. 15 (1973) (holding that obscenity is not protected)). Regulating speech "harmful to juveniles"—the third category of expression the Library policy attempted to block, *see Mainstream Loudoun*, 2 F. Supp. 2d at 787; *supra* note 17 and accompanying text—has also been held a constitutionally valid, compelling state interest,

left this question unresolved.[117] However, in deciding whether plaintiffs had alleged facts sufficient to survive summary judgment, the court intimated that it might ultimately find that the blocking policy was not narrowly tailored to root out obscenity and child pornography.[118]

Plaintiffs were able to allege two principal facts to show that the policy was not narrowly tailored. First, the blocking software, X-Stop, allegedly blocked many publications that were not obscene or pornographic.[119] Second, and most importantly for the court, plaintiffs alleged "that the decision as to which materials to block [was] made ... based on secret criteria not disclosed even to defendants, criteria which may or may not bear any relation to legal definitions of obscenity or child pornography."[120] If these two allegations proved true, the court noted, X-Stop would impermissibly regulate speech using means not "'reasonab[ly] respons[ive] to the threat' which will alleviate the harm 'in a direct and material way.'"[121]

As for plaintiffs' first factual allegation, opinion is divided as to whether blocking software is sophisticated enough to block only unprotected speech. The Supreme Court in *Reno* seemed to assume or predict that such technology would one day exist.[122] Pending legislation that has *Reno* in mind also seems to assume that filtering policies can survive judi-

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see Ginsberg v. New York, 390 U.S. 629 (1968). However, because the government cannot regulate speech from the "sandbox," *see supra* notes 41-42 and accompanying text, the district court was right to conclude that the Library's content-based restriction on speech "harmful to juveniles" was not narrowly tailored if it restricted adult access to speech. *See Mainstream Loudoun*, 2 F. Supp. 2d at 796-97.

117. *See Mainstream Loudoun*, 2 F. Supp. 2d at 797.

118. *See id.* at 796-97. The Library's attempt to block material "harmful to juveniles" suffered from the same and additional narrow tailoring objections. *See id.*; *see also supra* note 116.

119. *See Mainstream Loudoun*, 2 F. Supp. 2d at 796.

120. *Id.*

121. *Id.* at 797 (quoting Turner Broadcasting v. FCC, 512 U.S. 622, 624 (1994)). The instrumental reasoning exemplified by the quoted language in the text hearkens back to the discussion of the public discourse/managerial authority dichotomy. *See supra* notes 66-89 and accompanying text. Under even the more deferential review afforded "managerial" speech regulation, censorship bearing no rational relationship to the end that the government body is charged with furthering is unconstitutional. *See supra* notes 72-74, 79 and accompanying text. Thus, if X-Stop is irrational to the extent it does not achieve the end it is directed to effectuate, it may be unconstitutional under a lesser form of scrutiny. *See supra* note 40, 73-74, 79 and accompanying text.

122. *See* 117 S. Ct. at 2336 ("[T]he evidence indicates that 'a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be available.'") (citation omitted).

cial scrutiny.[123] Nonetheless, several groups interested in unfettered freedom of speech on the Internet argue that filtering is a crude tool that sloppily blocks protected speech and leaves unprotected speech untouched.[124] If these groups are correct, blocking software can be understood, in the language of narrow tailoring, as both "over- and under-inclusive," and thus unconstitutional.[125] Recognizing the crude nature of blocking, both policymakers and commentators,[126] believe that the government should not regulate the Internet at all,[127] should be very hesitant to do so,[128] or

123. *See* sources collected *supra* note 10.

124. *See* ACLU, Fahrenheit 451.2: *Is Cyberspace Burning?: How Rating and Blocking Proposals May Torch Free Speech on the Internet* (visited Oct. 4, 1998) <http://aclu.org/issues/cyber/burning.html>; Hochheiser, *supra* note 10, ¶¶ 4.1-4.4; *see also* Hafner, *supra* note 10, at D6.

125. *See* Urofsky v. Allen, 995 F. Supp. 634, 644 (E.D. Va. 1998) (holding that Virginia law prohibiting any government employee from using state-owned computer systems to send or access sexually explicit material both over- and underinclusive and, thus, violative of the First Amendment). The over- and underinclusive analysis is helpful in understanding why Internet-blocking measures cannot only be understood as unconstitutionally overbroad (overinclusive), but as not actually directed at the speech it purports to target in furthering a compelling government objective (underinclusive).

126. The European Union, for example, decided not to enact ineffective filtering legislation because obscenity comes in many languages, and filtering software directed at specific terms such as "sex" does not filter for "sex's" linguistic equivalent in the world's many languages. *See* Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Action Plan on promoting safe use of the Internet* ¶3.2 (visited Oct. 17, 1998) <http://www2.echo.lu/legal/en/internet/actpl-cp.html#1> (The "level of sophistication" of filtering technologies "is still low an[d] [sic] they are not very suitable to deal with European cultural and linguistic diversity."). Commentators note that term-specific filtering incorrectly filters for the term "breast" in a chicken soup recipe, but fails to filter for sexually explicit graphics not appearing on a website that includes one of the filtered terms. *See* Hafner, *supra* note 10, at D8; Hochheiser, *supra* note 10, ¶2.5.
Courts and commentators also point out that blocking legislation that depends on server self-identification will not control servers operating in jurisdictions beyond the control of the legislating state. Such an extra-jurisdictional regulation was enacted by the State of New York, and was struck down, in part, because "New York Has Overreached by Enacting a Law That Seeks To Regulate Conduct Occurring Outside Its Borders." American Libraries Ass'n v. Pataki, 969 F. Supp. 160, 173 (S.D.N.Y. 1997) (striking down New York penal law similar to CDA on dormant commerce clause grounds). *Cf.* Lessig & Resnick, *supra* note 31, at 7-11 (discussing the multi-jurisdiction problem if information senders are required to control user access, but cannot determine the norms of decency in the jurisdiction in which the person accessing the information resides).

127. *See* ACLU, *supra* note 124.

128. *See* Hochheiser, *supra* note 10, ¶¶ 4.1-4.4.

should allow home-users, rather than the government, to choose whether to filter content on their own.[129]

Some public libraries recognize these concerns, and have adopted filtering policies that better balance first amendment concerns and the desire to block Internet content than does Loudoun County Library's decision to filter all computer terminals.[130] For example, in response to threatened litigation, the Kern County Library in California reversed its decision to filter all computers; instead it provides its adult and child patrons the opportunity to choose between filtered and unfiltered terminals.[131] The Austin, Texas Public Library has done the same; however, it restricts access to unfiltered terminals to those older than eighteen.[132]

These examples prove that the Loudoun County Library's blocking policy is not the "least restrictive means" available to filter content.[133] If plaintiffs in *Mainstream Loudoun* are also correct that Library's policy is both over- and underinclusive in the speech it regulates, the policy should be held unconstitutional because it is not narrowly tailored.

In addition, the Library's policy faces further problems because it relies on value judgments made by the makers of X-Stop.[134] The vast number of materials available on the Internet needing screening seems to dictate that all public libraries must rely, at least to some extent, on such

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129. *See, e.g.*, Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 YALE L.J. 1619, 1634-35 (1995); *supra* note 88 (discussing a similar American Library Association proposal, as reported in Hafner, *supra* note 10, at D6).

130. For a comprehensive approach to "sensitive" Internet regulation, see Lessig & Resnick, *supra* note 31.

131. *See* ACLU, *ACLU Hails Victory as California Library Agrees to Remove Internet Filters from Public Computers* (visited Oct. 4, 1998) <http://aclu.org/news/n012898d.html>. While the Kern County Library promised to provide its patrons with both filtered and unfiltered terminals, *see* Letter from Bernard C. Barmann, Sr., Kern County Counsel, to Ann Beeson, Staff Attorney, ACLU National Legal Department (Jan. 27, 1998), *reprinted in* ACLU, *supra*, ¶ 9, an impoverished library with only one terminal could employ blocking software that included a function allowing adult patrons to disable the software with a password.

132. *See* Hafner, *supra* note 10, at D8 (noting that unfiltered terminals are located "in specially built recessed tables that keep computer screens well out of public view").

133. In *Reno*, the Supreme Court reasoned that a requirement that indecent material be "tagged" so that parents could control information coming into their home over the Internet would be a less restrictive alternative to the CDA's criminalization of the transmission of indecent speech. *See* Reno v. ACLU, 117 S. Ct. 2329, 2348 (1997). Thus, the CDA was unconstitutional because it was not narrowly tailored. *See id.*

134. Mainstream Loudoun v. Bd. of Trustees, 2 F. Supp. 2d 783, 796 (E.D. Va. 1998).

third-party judgments.[135] Internet free speech advocates, such as Hochheiser, agree with the district court's observation that blocking software is driven by the criteria selected by the software provider, not the software user.[136] Because some providers screen not only for sexual content, but political content as well,[137] Hochheiser is correct to warn that those using blocking software should scrutinize software providers' screening criteria carefully to "insure that the values behind the ratings are compatible with their beliefs."[138]

Ceding such decision-making authority to a third party is arguably unconstitutional when, as in *Mainstream Loudoun*, all patrons must live with the Library's decision to adopt filtering criteria employed by the California corporation that sells X-Stop. As the discussion above illustrates, this need not be so. If the Library provided two terminals or one terminal with a password, its Virginia patrons would not be forced to live with X-Stop's or the Library's content restrictions.[139] Thus, the Library can employ less restrictive means to achieve the dual purpose of promoting freewheeling independent inquiry and protecting juveniles (and adults wanting filtered access). Under such a plan, the Library would also not have to expend prohibitive resources to develop its own rating system in order to avoid the objection that it cedes local control to third parties using unspecified speech-regulation criteria.[140]

III. CONCLUSION

The district court's thoughtful analysis in *Mainstream Loudoun* should provide courts and legislators reviewing and proposing Internet-blocking legislation with some much-needed guidance. For example, it helps predict judicial reception to legislation such as the McCain Bill.[141] The bill mandates that before receiving federal subsidies for access to "advanced

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135. For a library to generate its own ratings, Hochheiser observes,
> If we assume that workers could generate these ratings at a rate of 1/minute, or 480 over the course of an 8-hour day, it would take 8 people working 40-hour weeks roughly an entire year to rate one million web sites. Of course the Internet already has more than one million sites, and it will have grown significantly before those 8 people finish their year of ratings work.

Hochheiser, *supra* note 10, ¶ 3.12.

136. *Id.* ¶¶ 3.1, 3.6, 4.2, 5.0.

137. Interview with Professor Mark Lemley, U.C. Berkeley, (Oct. 15, 1998).

138. *See* Hochheiser, *supra* note 10, ¶ 4.2.

139. *See supra* notes 130-133 and accompanying text.

140. *See supra* note 135.

141. S. 437, 105th Cong. (1998).

telecommunications and information services,"[142] libraries must certify that "on one or more of its computers with Internet access, it employs a system to filter or block matter deemed inappropriate for minors."[143]

This provision undoubtedly will be challenged in court. Consistent with the observations in *Mainstream Loudoun* and this comment, a court reviewing the provision should apply strict scrutiny. Because the provision allows adults unfiltered Internet access, however, the provision adopts a means less restrictive than that employed in *Mainstream Loudoun*. Thus, absent less restrictive means still, the provision will likely meet strict scrutiny's narrowly tailored requirement. Moreover, in contrast to *Mainstream Loudoun*, the provision is directed toward the constitutionally recognized state interest in keeping material harmful to juveniles away from juveniles, and *not* adults.[144] Even if the filtering software employed is a crude tool, adults seeking access to constitutionally protected public discourse do not have to suffer for it. Thus, on quick glance, the McCain Bill seems a potentially constitutional step in the right direction towards sensible filtering policy.[145]

142. 47 U.S.C. § 254(h)(2) (1998).

143. S. 437, 105th Cong. § 1(a)(3) (1998). The bill also requires that before receiving the same subsidy, an elementary or secondary school must certify that it has "(A) selected a system for computers with Internet access to filter or block matter deemed inappropriate for minors; and (B) installed, or will install as soon as it obtains computers with Internet access, a system to filter or block such matter." *Id.* § 1(a)(2). Insofar as section 1(a)(1)(4) of the bill provides for local determination of content, it seems consistent with the Court's decision in *Pico*. It recognizes a school's managerial authority to make internal decision rules about what materials should be made available to students.

144. *See* Reno v. ACLU, 117 S. Ct. 2329, 2341 (1997) (citing Ginsberg v. New York, 390 U.S. 629 (1968), as "upholding the constitutionality of a New York statute that prohibited selling to minors under 17 years of age material that was considered obscene to them even if not obscene as to adults").

145. The same cannot be said for Congress' reenactment of the CDA. *See* S. 1482, 105th Cong. (1997). As Lemley and Lessig argue, CDA "Version 2.0" will likely be struck down. *See* Mark A. Lemley & Lawrence Lessig, Why CDA 2.0 Will Fail, Electronic Mail of Lemley's & Lessig's Draft Op-Ed from Mark Lemley to author (Oct. 15, 1998) (on file with author) (arguing Congress' second attempt to regulate indecent speech on the Internet will fail because it is, by far, not the least restrictive means available).