Richmond Journal of Law and Technology

Volume 12 | Issue 2 Article 5

2005

House Bill 2797 Committee Hearing: A Bill to Add Internet Technological Protection in Virginia Libraries

Douglas Henderson

Colby M. May

Rodney Smolla

Follow this and additional works at: http://scholarship.richmond.edu/jolt

Part of the Internet Law Commons

Recommended Citation

Douglas Henderson, Colby M. May & Rodney Smolla, *House Bill 2797 Committee Hearing: A Bill to Add Internet Technological Protection in Virginia Libraries*, 12 Rich. J.L. & Tech 8 (2005).
Available at: http://scholarship.richmond.edu/jolt/vol12/iss2/5

This Speech is brought to you for free and open access by UR Scholarship Repository. It has been accepted for inclusion in Richmond Journal of Law and Technology by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

HOUSE BILL 2797
COMMITTEE HEARING

A BILL TO ADD INTERNET TECHNOLOGICAL PROTECTION IN VIRGINIA LIBRARIES

An Academic Presentation
By the John Marshall Scholars

* * *

Speakers:

Douglas Henderson

Colby M. May

Dean Rodney Smolla

* * *

February 28, 2005
University of Richmond
Richmond, Virginia

HALASZ REPORTING & VIDEO
P.O. Box 1644
Richmond, VA 23218-1644
(804) 741-5215
Transcribed by: George M. Halasz, RDR
Edited by: The Richmond Journal of Law & Technology

[1] THE CHAIRMAN: House Bill 2797 is a bill to amend the Code of Virginia relating to technology protection measures in libraries, and Mr. Douglas Henderson will be our first witness. Mr. Henderson, we will be pleased to hear from you.

[2] MR. HENDERSON: Thank you very much for the opportunity to testify today. Like I was saying earlier, I am glad you don't select the days for picnics for your faculty with the weather we've been having. My name is Douglas Henderson and I am the Director of the Loudoun County Public Library. I'm a member of the American Library Association, the Public Library Association, and the Virginia Library Association. I am past Chair of the Intellectual Freedom Committee for the Virginia Library Association. I'm an award winner for the Paul Howard Courage Award from the American Library Association, and the V.L.A. Series of Intellectual Freedom Award. I am past Chair of the Metropolitan Washington Council of Governments Commission of Libraries.

[3] And I am here today speaking actually in three roles: One is as a librarian, and as a professional librarian; the second is as a library director; and the third is as a practitioner. And I hope not to take too much of your time, and I'd be glad to answer any of your questions obviously afterwards.

[4] I've been a librarian for 28 years and I am a member of the American Library Association. The American Library Association believes in the Library Bill of Rights. The library should challenge censorship in a fulfillment of the responsibility to provide information and enlightenment. A person's right to use the library should not be denied or abridged because of origin, age, background or views. Libraries should provide material and information presenting all points of view on current and historical issues. Materials should not be prescribed or removed because of partisan or doctrinal disapproval.

[5] That might not sound like something that's important to you, but it is something that is indeed endorsed by the Commonwealth of Virginia. They have done that in their code by saying to be a certified librarian in the State of Virginia you have to have graduated from an American Librarian Association accredited school. They have recognized the fact

that the American Library Association is the authority in the field of libraries and in the practice of librarianship.

[6] Second, I'd like to talk to you as a Library Director. As Library Director, I serve the Library Board, again, another organization set up by Code. The Library Board is charged with the management and control of the free public library system and is vested to take care of the responsibilities, regulations for their own guidance and for the governance of free public library systems. This group is appointed by an elected board of supervisors through our local jurisdiction. They set policy and expend the funds for the library. Any attempt by the state to remove that proper authority in my mind would be a violation of the ideas of the code in which the library board is set to use the community standard to set library policy. And that's something that we strongly support and we hope that it would allow to continue.

[7] The second part of that as Library Director is that we are responsible for funding of the library. This particular bill attaches to it the funding of state aid to libraries. The federal government through the Children's Internet Protection Act has said the libraries that accept E-Rate funds and those funds are used to make the Internet accessible would have to provide filtering if they wish to continue to get their E-Rate funds. In other words, the funds are tied directly to those libraries who use those funds for Internet access. This particular bill doesn't do that. It just says if you get state funding, you are going to filter period, whether or not that money is used for the Internet. My library does not get E-Rate funds, does not have to comply with the federal code for Children's Internet Protection Act, and we don't believe that since we use all local funding for Internet access that the state should withhold any funds from us for not filtering.

[8] My library has done something slightly different than any library, and it might be something you consider as an alternative to this. In 1997 the Loudoun County Public Library had a policy that all Internet stations had to be filtered for both adults and children. That was challenged by Mainstream Loudoun, a local advocacy group, and went before a federal court. The court decided at that time that adults could not be filtered and would have the right to have access to all the information available through the Internet. They also made it very clear at that point in time that any site that was blocked could rightfully have judicial review before it

should be blocked. In other words, you can't just have a third party come out and say, “We're making a list of sites and we're blocking this list of sites without a court having a judicial review of those sites to determine whether or not they are obscene, whether or not they are harmful to a minor or whether or not they could be considered pornographic.” A third party making that decision is not the way that decision should be made.

[9] In fact, the State Code of Virginia requires that if something is considered to be obscene or questioned to be obscene, that it go through judicial review. In fact, the proceedings shall be instituted by filing with a court petition directed against the book by name or description. In other words, if you want to make a site and take this to the Internet and say that this site is obscene, that site has to be named. Afterwards, you have to allege the obscene nature of that particular site. You have to list the name, address, if known, of the publisher, and upon filing of petition pursuant to this article the court, in term or on vacation, shall forthwith examine the site in this case alleged to be obscene and determine if it is. The order to show cause shall be directed against the particular site.

[10] So if you have a third party that's making a list of sites that should be blocked in their mind, under who knows what criteria, and they decide to block those sites without judicial review, I would question the validity of that being done.

[11] So my question to you then as a practitioner is very simple. I am a librarian, not a police officer. A librarian's job is to provide access to information and materials for people to come into my library. Now all of a sudden you are asking me to determine whether somebody is using a site; has a right to use a site; or if a site is harmful to a minor; or such a site is obscene; or if a site might be pornographic.

[12] Let me give you an example. A 15 year old girl comes into my library asking me to find the site that explains the proper use of a condom, and that site offers a six-frame set of photos depicting a male with an erection showing the steps necessary for the proper use of a condom, I am now being asked to determine whether that site is obscene or harmful.

[13] COMMITTEE MEMBER: But Mr. Henderson, don't librarians make acquisition decisions all the time? They decide what books and magazines they will put on their shelves. How is this different?

[14] MR. HENDERSON: But we don't buy an encyclopedia and tear the page out. So if I am buying the Internet and I'm buying a collection of material for one price and I'm getting that entire set, I don't take out a chapter, I don't take out a page, I don't take out a picture. I make that whole thing available. If I am making an acquisition based on funding, and that's basically what an acquisition is made on, then I have to make a determination of which sources to get. Once I buy that source I'm not taking a part of that source out. I'm not going to buy a 20 volume encyclopedia and say, I'm sorry, but Volume S is sex and you can't have that. You are going to get the entire encyclopedia. When I buy the Internet I am buying access to it.

[15] Now, there's options that can be done. My point of view is that government should not be the one making that decision, but that it is a parental decision. At our library what we have done is we have said the Internet is available. An adult will decide whether or not their minor child should have filtered or unfiltered access, and that adult can decide for themselves whether they want filtered or unfiltered access. It is their choice. It is not our choice. It is not government's choice.

[16] I can filter my children at home all I want. That's easy to do in the private sector, that you can do at a private school, but you can't do that as government, and I am a government actor and a state actor in my role as a library director or as a librarian working for a government.

[17] COMMITTEE MEMBER: I guess the difference I see between you filtering your child, what they see at home and the public library is that a child might walk by a monitor and see obscene material. It is a public library, so—

[18] MR. HENDERSON: It is not determined to be obscene until a court has decided that it is. So you are making a supposition that something that might be obscene to you might—is also obscene to everyone else who sees it, or is perceived to be obscene, I should say, and I don't think that's necessarily the case. And it's hard to tell.

[19] A good example might be, even in the child pornography laws in the State of Virginia there's exceptions to being able to view child pornography. You can use it for research, medical purposes, any number of reasons. You walking by and you see something do you know that person's intention—what they are using it for? Or are you upset by it but they might be having a perfectly legitimate reason to be looking at what they are looking at?

[20] Libraries are a level—they help level the playing field. A good example of that is I live in a county right now where the median income is about $97,000. It is a very wealthy community, it is highly technologically oriented. I would venture to say 80 percent of the people in my area have access to the Internet from their home. However, I have 36,000 people who have signed up to use the Internet and over 10 percent of those people have chosen to filter themselves. What this shows you, in the first nine months of this year alone, I have 87,000 sessions of people coming in to use the Internet at the library because that's the only place they might have to access it within our community. And if I wish for them to participate in our society, and I wish for them to have the same level of access as a person who can afford it in their home or might be going to a university where they might be able to get access to certain things, if I wish them to be able to participate in our society at the sale level, then I have to be able to give them access at the same level that they could if they could afford it at their home.

[21] COMMITTEE MEMBER: Mr. Henderson, let me come back to this distinction between the actual: your example was the encyclopedia, getting an actual physical material in and you wouldn't tear out a page with the word "sex" on it. You are paying a fee for the Internet, and wouldn't you agree that for the fee that you pay, access to the Internet is very different from acquiring a particular set, say a set of encyclopedias, versus the Internet, which is this huge, amorphous, it's this – ever exponentially expanding, so shouldn't there be some sort of way to police that and prevent what are at least in my view reasonable dangers? Say a child is walking past a computer and does see a pornographic site, say the person is using it for research materials, isn't there some sort of interest there that we should consider?

[22] MR. HENDERSON: No more than you would consider whether or not you would outlaw a swimming pool simply because a kid drown rather than a parent teaching them how to swim. We are saying to you that you should be teaching your child how to use the Internet. You should teach your child how to cross the street. You should teach your child how to swim. And so what you are saying is now it is the government's responsibility to teach that child or to protect that child from a perceived danger when in fact the parent can teach them to do exactly what it is they might need to do or what they wish for them to do. I don't think an analogy that we as a government should be protecting someone against information, ideas or thoughts simply because they are not ours is a proper course of action.

[23] You are a lawyer, aren't you?

[24] COMMITTEE MEMBER: Yes, sir.

[25] MR. HENDERSON: Are you in favor of murder? I would ask you a very simple question. If this young lady went out on the street in front of 250 people and shot someone in the head, and they all held her down until the police came and arrested her, and if that day she was totally Mirandized, given all of her rights, everything was done according to the book, and she confessed, and she showed up in court, and when she's in court she tells the judge, I'm sorry, I can't afford to get a lawyer. And the court says to her, well, you know what, we're going to appoint you a lawyer because the constitution says we're supposed to appoint you a lawyer. The American Bar Association supports that. Doesn't mean that they support murder. Doesn't mean a librarian supports pornography, obscenity or things that are considered harmful to minors simply because we support the Constitution. The Constitution in my mind is a very black and white document. Those things that are changed or those things that are amended are amended through law. Our laws are already in place on what is obscenity if it can be identified, what is pornography if it can be identified and what is harmful to a minor if it can be identified through judicial review. There is a process in place to do what you are suggesting should be done. You have got to go through that process.

[26] Many of the things that we do in our country today which are considered mainstream came alive at the far right or came from even the

far left. They were extremes. They have been modified and readjusted and changed and recreated so they have become mainstream thought. Look at television. Look at books. Look at movies. Things that maybe 25 years ago you thought were racy are now commonplace. Libraries jobs are not to tell you what it is you are to look at, what it is you are to read and how it is you are supposed to take those ideas and use them. We are neutral. Our job is to make sure that you have the right to come in and access information and ideas and in your mind know how to use them or try to develop your ideas based on all the information that's out there. It is not my job to tell you something is good, bad or indifferent. That's your job as you read something or as you look at something or you absorb something to determine the value of that piece of information. It's not government's place to do that.

[27] COMMITTEE MEMBER: Mr. Henderson, I was wondering if you could elaborate a little bit more on the judicial process you are talking about, namely, how long it takes, and if you think it is effective considering the size of the Internet and the fact that these web sites can, you know, pop up and—

[28] MR. HENDERSON: But that's not a question for me to answer. That's not a question for me to try to decide how long a court is going to take to go over a particular piece of information. What I'm saying to you is there are laws set already in process for these types of things, and have been found, especially in the Brinkerman case, *Mainstream Loudoun v. the Board of Trustees*,[1] that affects sites that were said to be pornographic had to go through judicial review before they could actually be determined to be pornographic.

[29] If you are a publisher, and you publish something for the Internet, you are a web publisher, a third party has blocked your site without your knowledge, without any judicial review, who is that person to go to for recourse? Who is that publisher supposed to ask to unblock his site? Is it the publisher? Does he go to the software publisher? Does he go to the library? Or does he go to the state and ask them to take his site and unblock it? If he's had financial damages done to him because maybe that's how he made his living was from whatever he advertised using that

[1] Mainstream Loudon v. Bd. of Trs. of Library, 24 F. Supp. 2d 552 (E.D. Va. 1998).

site, who then is responsible for that? Is it the state? Is it the software publisher or is it the library? Because judicial review wasn't done prior to putting that site on a blocked list. And we don't know what sites are blocked because that's all proprietary information. They don't give us the list of what's been blocked.

[30] I can tell you right now if this law was put into effect, do you think that there's any evaluative tool that can be used right now by anyone to determine what is the best filter? What is the best piece of technology out there? Or would you as a practitioner say to yourself you should go buy the cheapest one that's out there, stick it on there because that's all they are requiring me to do. They can't prove one way or the other, I can't prove one way or another because I don't know what sites have been blocked. I don't have that list. I don't know what criteria they use to make that list.

[31] Where as the practitioner, I don't know. I will just take the cheapest one. I don't think you have solved anything. And any one of them will tell you, and they will tell you the same thing, none of them are going to be a hundred percent right. They are going to let sites through. As you say, it changes every day. It warps every day. Domain names change every day. Whitehouse.com is a very interesting site that you might want to go look at. They change every single day.

[32] So something is going to come through. If someone sees something, then who is responsible? Is it the software publisher, is it the library or is it the state?

[33] COMMITTEE MEMBER: Mr. Henderson, I appreciate your murder example that you used with them, but do we have a constitutional right to Internet access—

[34] MR. HENDERSON: No.

[35] COMMITTEE MEMBER: —or is this just something that libraries are going to provide?

[36] MR. HENDERSON: Oh, no. No. No. We do not have a constitutional right to the Internet. However, if you offer the Internet, you

offer the Internet. If you don't offer it, you don't offer it. You don't have a constitutional right to a public library. Only if there's money to fund it.

[37] THE CHAIRMAN: Thank you, Mr. Henderson. Our next witness will be Colby May. Mr. May, we will be pleased to hear from you.

[38] MR. MAY: Thank you, Mr. Chairman and Members of the Committee. I am Colby May and I am the Director of the Washington office of the American Center for Law and Justice. We have litigated numerous cases in this area of Internet pornography and child pornography and obscenity, and it is my honor to be here today to present views in support of House Bill 2797 involving acceptable Internet use policies for Virginia's public libraries.

[39] Public libraries were created to lend books, to provide research tools and to make available educational opportunities to the citizens of the Commonwealth of Virginia. The Supreme Court of the United States has described libraries as places dedicated to quiet, to knowledge and to beauty, with a mission of facilitating learning and in cultural enrichment. The Internet is obviously a very valuable educational resource, and many can benefit from access to the information resources that are free to the public at libraries.

[40] However, the vast majority of the pornography which saturates the web is neither educational nor beneficial, and in some situations illegal. Libraries should therefore adopt some form of Internet filtering to protect minors particularly. Such a process was recently sustained at the federal level when the United States Supreme Court in 2003 decided its *United States v. American Library Association* case[2] upholding the Children's Internet Protection Act which requires that public libraries receiving federal funding prohibit all patron access to images that constitute obscenity or child pornography and to prevent minors from obtaining access to material that is harmful to them and illegal under state law.

[41] In addition to preventing children from being exposed to pornography, Internet filtering allows libraries to provide Internet access without becoming a conduit for individuals to view illegal, obscene

[2] United States v. Am. Library Ass'n, 539 U.S. 194 (2003).

material and child pornography. The United States Supreme Court has repeatedly affirmed that states have a compelling interest in safeguarding the physical and the psychological well-being of children.

[42] Child pornography is not protected speech under the First Amendment because using children as subjective pornographic material is harmful to both the psychological, emotional as well as the mental health of children and society.

[43] COMMITTEE MEMBER: May be, Mr. Mays, but how would you address the legitimate web sites that still get blocked? And I guess the second question is, does it matter that some of these filtering programs over block or under block, and also getting back to what Mr. Henderson said, if it's the way the web is, maybe it is consistently going to under block.

[44] MR. MAY: Committeeman, the answer to that is no because simply because material is otherwise available on the Internet does not mean that as a matter of First Amendment principle it therefore must be provided. The logic of that would suggest that simply because a book is published the library must buy it, and there certainly is no constitutional right or obligation of the state to make such material available.

[45] Let's be clear. What the state does not buy, it is not censoring. That material is still available to anybody who would like it and to go seek it. You may simply not use the mechanism of the state to obtain that material which it has found to be inappropriate.

[46] I would remind the Committee that when the *Pico*[3] decision came out in the 1980s, a decision about whether books that were subsequently determined by a community to be inappropriate or indecent in some capacity, and therefore they wanted to take them away, I think the language was actually they were just plain filthy, is the language of it, it was determined at that point that once it was there it had gone through some form of an editorial process where the purchasing committee for the library had decided at least at some point in time it was appropriate and should be in the library's collection. That is very different than the

[3] Bd. of Educ. V. Pico, 457 U.S. 853 (1982).

circumstances here because nobody is seeking to buy access to this material simply because you buy access to the Internet. And I would with all due respect to Mr. Henderson's analogy to the idea that the Internet is an encyclopedia, if it is, it isn't much of an encyclopedia because it is like drinking from a fire hose. The kind of material that comes with it of course is going to be enormously controversial and in fact in many instances, frankly, illegal.

[47] While child pornography is illegal, it is nevertheless readily available on the Internet. And it is this prevalence that creates the continuing harm that the Supreme Court has recognized that states may seek to end. Given the court's emphatic and repeated affirmation of state and federal policies eradicating and criminalizing child pornography, a library policy instigated with similar intent and success is constitutional and, I would submit, prudent.

[48] COMMITTEE MEMBER: Well, Mr. May, I understand why a particular library might want to institute a filter but why does this have to be state sanctioned? I mean, isn't obscenity necessarily based on community standard? Why can't a library decide whether or not to have a filter or whether or not to use some other means to filter out obscene material?

[49] MR. MAY: Madam Committeewoman, it certainly may do so if it desires. This is simply a requirement that the Commonwealth would institute if that library wanted to maintain access to monies that are available. No community has a right under Virginia's Constitution or the Federal Constitution to monies for this purpose, but if they want it, then they take it with the exception. These kind of restrictions have been accepted by the courts for a very long time, and certainly in this context they are likewise permissible for the same rationale.

[50] Broadcasting restraints are permitted, and the reason they are permitted is because they are uniquely accessible to children, even those too young to read, so is the Internet. From a context of a library with unfiltered Internet access, it is apparent that children may be exposed to what an adult decides to view. In fact, even the American Library Association has found that patrons of all ages, including minors, regularly search for on-line pornography. The Internet contains material that is not

suitable for children and could be harmful to them if they would be allowed to view it. The argument that children can make choices concerning pornography is not only counterintuitive, but in most states it is illegal as it is in the Commonwealth.

[51] As the United States Supreme Court held in its 1979 *Bellotti v. Baird* decision[4] during the formative years of childhood and adolescence, minors often lack experience, perspective and judgment to recognize and avoid choices that could be detrimental to them.

[52] COMMITTEE MEMBER: But at what point, sir, do parents have to step in and take this role instead of the state?

[53] MR. MAY: Clearly, parents have a huge role to play, more particularly in the sanctity of their own home, but in those circumstances where children are outside the direct control of their parents we in Virginia assume that there is a *locus parentis* type of responsibility that goes with them to the public library and that just as we have adopted laws that make it illegal for much of this material to be made available to children, the parents and the Commonwealth have an interest in making sure that when children go to the public library that there is some form of protection that recognizes that they are at this vulnerable and formative age and need therefore to have an adult make some judgments for them in this context.

[54] Given these concerns the libraries should take responsible and reasonable steps to ensure that children do not access or become unwittingly exposed to indecent or pornographic material through the Internet. As the U.S. Supreme Court agreed in the *American Library Association* case,[5] the state has a compelling interest to provide minors with an Internet experience and to do so libraries must have broad discretion to decide what material is provided to their patrons. And it is the librarian's responsibility to separate out the gold from the garbage and to preserve – rather than to preserve everything. Supporting this position the court cites two other separate and unique analogous situations in which broad grants of discretion—excuse me—to make content-based judgments available have been upheld.

[4] Baird v. Bellotti, 467 U.S. 1227 (1984).
[5] *Am. Library Ass'n*, 539 U.S. 194.

[55] The first is *Arkansas Educational Television Commission v. Forbes*,[6] where the Court found that station managers of public television stations could exercise editorial control over the material that was otherwise being provided, and that to require otherwise where all would have access to the media would deny them the procedures and ability to fulfill their journalistic purpose and their statutory obligations.

[56] In other words, editors need to do what editors do, which is to edit, and likewise libraries need to do what they do, which is to make selections to advance the educational and cultural enrichment of the community.

[57] In another case, *National Endowment for the Arts v. Finley*,[7] the Court upheld content-based direction of the National Endowment for the Arts grant program based on a statutory factor of decency and respect. The court held that content-based considerations are a consequence of the nature of art and the nature of funding for the arts. In both cases the court held that content-based judgment discretion is necessary to the fulfillment of the respective public institution mission and purpose. In the same way a public library must be able to determine what content it will make available within its four walls ensuring that the resources made available will enhance its services to the public by providing a safe, friendly learning and cultural environment for all who go to the library.

[58] COMMITTEE MEMBER: Mr. May, is the library in fact making this decision? Aren't we in fact handing the discretion of the librarians over to the people who make the filters?

[59] MR. MAY: Certainly not in this context. There's nothing particularly troubling about the idea that the library would evaluate or make some procedure available for making choices as to what patrons would have access to. It does it every day in the stacks of its library books. It decides which books to buy and which ones not to buy, and many times they make judgments by going to publishers and saying, we want these materials and those materials, and those then are provided to them, and it is not at that point in time that the publisher does something

---

[6] Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998).
[7] Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998).

usurping the power and the responsibility of the library, but rather the library is simply fulfilling its own requirements to provide the kind of rich environment for learning and for culture the communities want.

[60] COMMITTEE MEMBER: Mr. May, then let me take that a step back. Why isn't the legislature usurping this right, or do we just do this to libraries by imposing that they use an Internet filtering mechanism? Why not have what the Loudoun County has right now, a parental-consent procedure?

[61] MR. MAY: The legislature has the power of the purse, and with the power of the purse comes the right and the ability to go ahead and limit qualifications for money. If this was a circumstance where you had an automatic constitutional right to access to the money to provide Internet access, the argument would hold true, but in this particular context, there is no such right. So the idea that the library then would in order to qualify put a filtering arrangement together in its library system it certainly is fully compliant with both Virginia law and the constitution.

[62] COMMITTEE MEMBER: Are librarians viewing individual web sites and then blocking them, or are they using words or phrases as a proxy in these filtering programs to filter web sites in general?

[63] MR. MAY: It is interesting. The technology itself is in a constant state of improvement and advancement. There was a time probably ten years ago, eight years ago, even six years ago in which there was generally word search. It was a fairly static thing, and you would look for it and there would be simple ways to trick it or to fool it, but as the years have gone by the sophistication of the software is quite nimble, and it's gotten to the place now where the marketplace is much more accommodating and accepting of the kind of judgments that these filtering software can make, and they are doing it with a far greater accuracy.

[64] Mr. Henderson made reference to the fact that they over block. The truth is nothing is perfect in this world. And there is going to be instances in which some, not many, but some sites are otherwise blocked. But the library has no obligation to provide anything and everything that's ever been produced on a particular topic and its failure to do so is somehow a constitutional impermissible First Amendment violation.

[65] It is for all of these reasons that I do support the proposition presented under H.B. 2729, and I encourage this Committee to move forward and promptly approve the legislation.

[66] I would ask upon my departure that the full text of my written remarks be included into the record. Thank you very much, Mr. Chairman.

[67] THE CHAIRMAN: So ordered. Thank you. Now we'll hear from Dean Rodney Smolla. Mr. Smolla.

[68] DEAN SMOLLA: Mr. Chairman, Members of the Committee: Thank you. I am Rod Smolla. I'm a professor of constitutional law at the University of Richmond Law School and the Dean of the Law School. I want to thank the Committee for this opportunity to testify. I've been asked by the Committee to testify not as a partisan either in favor of or against the adoption of the bill that you are currently considering, but for what objective testimony I can attempt to offer to eliminate some of the First Amendment issues that exist in the background here.

[69] I want to briefly talk to you about four themes, a number of which have been suggested by both of the very capable witnesses that the Committee has already heard. I want to talk a bit about a body of First Amendment doctrine known as public-forum law which has been invoked a number of times by analogy by courts and by scholars and those who have written about the topic to try to make sense of the library filtering issue.

[70] I want to talk secondly about another difficult area of First Amendment law known as the doctrine of unconstitutional conditions, which deals with the very difficult question of the extent to which the government has the power to attach strings to the receipt of public monies and public benefits, obviously something implicated by the bill that you are considering.

[71] I want to talk thirdly about the tensions that exist in First Amendment law when one is regulating the speech of both adults and children and the problem that is posed by the fact that First Amendment

doctrine tends to be much more permissive in giving the government latitude to regulate speech involving children than it does with regard to speech involving adults. Obviously, in the context of library filtering where you have both children and adults using the library, there is arguably a need to make adjustments with regard to those two different categories of users.

[72] And then finally I want to talk a bit about a case that you have heard both witnesses mention, the *American Library Association* decision[8] from the United States Supreme Court in the year 2003, and offer some observations as to the issues that are resolved, at least from a First Amendment perspective, by that decision and the issues that are arguably not yet resolved, that remain somewhat ambiguous even in the wake of that decision.

[73] Let me first talk about the first two topics, the public-forum issue and the unconstitutional conditions issue and they converge to some degree in this context, they are somewhat—they are cousins, if you will, from the perspective of constitutional doctrine.

[74] Generally speaking, when the government opens up a facility or a program or some piece of property to indiscriminate expression it creates a place like a public park where anyone who wants to speak, can speak subject just to rules of time and place and manner. It is impermissible for the government to pick sides, to favor one form of speech over another, to attach certain hoops that one kind of speech would have to go through that another kind of speech would not.

[75] Similarly, when the government is engaged in the funding of speech there is a similar tension, and the tension normally goes something like this: It is impermissible for the government to engage in viewpoint discrimination and most forms of content regulation as to the speech of individual speakers out in the marketplace. So if you or I go out and want to picket the General Assembly Building with signs, the government cannot take sides with regard to what it is we're saying. But when the government is the funder of the speech, there has always been an argument that it is the people's money, it's the government's money, why

[8] *Am. Library Ass'n*, 539 U.S. 194.

can't we attach whatever conditions we want and say we choose to fund this kind of speech activity but not fund that speech activity.

[76] In the context of libraries and in the broader context of these two doctrines, here's what appears to have emerged. It is probably useful to start with one of the cases that was just mentioned by Mr. May, the *Pico* case,[9] which goes back to a school library decision by the Long Island Trees School District in New York almost two decades ago in which the school board voted to remove certain books from the school collection, and it appeared that they voted to remove those books because of some community unrest about the content of some of the books.

[77] In that case, which was decided only by a plurality of four justices, so it doesn't come to us with the full authority of a majority opinion, in that case the four justice plurality said that while it might well be that there would be no serious First Amendment scrutiny that would attach to a decision to buy a book because of the vast discretion that the government has as to how it's going to spend its resources, and because librarians have to figure out how they are going to use their precious monies, and which books are worth buying and which books are not worth buying, the court suggested that a different balance exists under the First Amendment when you are kicking a book out, when you are getting rid of a book, because you have already decided to spend the money, and now there's a much greater fear of government discrimination with regard to the marketplace of ideas. And the Court said that at least if you could prove that the decision was based on some disagreement or discomfiture with regard to the content of the book that that would be a First Amendment violation. Four justices suggested that.

[78] Now, the headache is how you apply a concept such as that to Internet filtering, because one of the difficulties in cyberspace is that the traditional notions of building, and a physical book, and knowing whether you have bought it, or you whether you haven't bought it, or whether it's inside the building or outside the building somewhat break down. You could think of an Internet site as something like a book that is yet to be purchased and those who favor filtering are likely to think of it in those

[9] *Pico*, 457 U.S. 853.

terms so that all you are doing is exercising your discretion not to allow the book in.

[79] On the other hand, because of the magic of cyberspace and the Internet you could also think of the whole content of the Internet as in effect virtually inside every library that exists. All you do is boot the computer and turn it on and in sort of an inchoate sense the whole Internet world is sitting there waiting. All you need is a search engine to bring it to life. So the traditional distinction gets fuzzy and begins to break down.

[80] So too under the doctrine of unconstitutional conditions, this is not an easy matter to puzzle out because it is certainly the case that the Commonwealth of Virginia, because it is expending monies on its libraries and giving libraries aid, has a certain amount of power to tell the officials who run those libraries that we only choose to use our tax dollars for certain uses that we think are most conducive to the mission of the library.

[81] But there is also a worry that if you select one particular type of speech content, such as sexually-based speech, and you single it out for some special treatment that no other kind of speech is engaged in, that you run afoul of this unconstitutional conditions doctrine problem.

[82] I will try to bring all this together for the Committee in just a minute or two.

[83] The third theme that is important to consider is that it is in fact the law and has almost always been the law that children do not possess the same quantum of First Amendment freedoms as adults, and that there is greater power, not only for school officials, but for the state generally exercising its *parens patriae* authority to pass regulations for the benefit of children, and it is also clearly the case that sheltering children from sexually explicit content has been recognized as a compelling governmental interest and there is undoubtedly a substantial amount of governmental authority to engage in the regulation of speech to that end.

[84] The difficulty, and this is not a modern difficulty posed only by the Internet, this is an age-old theme with regard to the regulation of sexual speech, much of the speech that exists on the Internet is obscene and could be entirely banned, but much of it is not legally obscene. It may be

sexually explicit. It may be indecent and offensive to a lot of people, but it's protected under the First Amendment and an adult has the right to view it.

[85] And there is this old First Amendment doctrine, going back to *Butler v. Michigan*,[10] that says you can't burn the barn to roast the pig. Right? You can't throw out the speech rights of adults in order to accomplish what you are trying to accomplish as to children. And so that is the tension that exists there.

[86] Lastly, and I'll conclude, what does the A.L.A. case[11] seem to teach us? What does it seem to resolve? Again, it is not as clear a picture as we might like because the plurality opinion consists of the opinion of four justices authored by Chief Justice Rehnquist but we don't have five justices that all coalesce around a majority opinion.

[87] There's a concurring opinion by Justice Kennedy, which is very short, and a brief opinion by Justice Breyer, and they form the six justices that comprise the overall ruling.

[88] One of the things that the A.L.A. case[12] clearly does seem to me to establish is that at least when the government funds are specifically tied to Internet use that there is a compelling governmental interest in sheltering children from sexually explicit material on the Internet.

[89] Now, it doesn't tell us whether the same rule would apply if the funds are just general library use funds, not specifically targeted to Internet activity, but you try to leverage that governmental aid into the specific Internet arena. And there are some prior cases involving government funding where the Supreme Court has objected to some narrow prohibition that was tied to some general omnibus funding so you are not funding the whole operation, but you are trying in fact to control a larger part of the operation. The court in a case involving radio broadcasting, public radio broadcasting had a problem with that disconnection. So that's a tension that I think you as members of the General Assembly have to be aware of.

[10] Butler v. Michigan, 352 U.S. 380 (1957).
[11] *Am. Library Ass'n*, 539 U.S. 194.
[12] *Id.*

[90] The other important things I think that come out of the A.L.A. case[13] are it was obviously critical to Justice Kennedy that there was an easy and a virtually automatic adult opt out so that as Justice Kennedy understood the facts in the case, any adult who wants to use the unfiltered computer terminal has the right to go to the librarian and say turn the filter off and instantly there was no filter applicable. And in Justice Kennedy's mind that made the case easy because you were only dealing with kids and no adults could possibly be hurt by it.

[91] It would seem to me if you were writing legislation and you wanted to ensure that you would fall within the rubric of the A.L.A. case[14] you would want to ensure that there was some sort of similar adult opt-out mechanism.

[92] Justice Breyer's opinion also seems to suggest that he would want to make sure that the law was narrowly tailored and that it would have some of the provisions would deal with some of this adult and child distinction, and perhaps have the restriction that the funds involved be funds that are more clearly targeted to the Internet.

[93] So I hope that's been of help to the Committee, and I want to thank you for this opportunity to testify.

[94] THE CHAIRMAN: Thank you, Dean Smolla. Well, this is the point in the proceedings where we pretending they are proceedings and step out of our roles. All right.

[95] MR. HENDERSON: I do want to comment. One is the Children's Internet Protection Act is not a filtering bill. It is a funding bill. I can't help but emphasize that. There is nothing in that bill that forces libraries to filter unless they wish to get federal funds and use those federal funds to provide Internet. So the federal government has determined themselves that if you don't want our money, you can do whatever you want in the public arena. But if you want this money, then you have to be looking at filtering the Internet.

---

[13] *Id.*
[14] *Id.*

[96] Many, and I don't have the case names with me, and I'm not a lawyer like the Dean, however, the courts will also tell you that a 17 year old has more rights than a four year old, and the four year old doesn't have the same amount of rights as a six year old when it comes to minors, and what might they might be able to see, use and evaluate is different.

[97] So to tell me to put on one filter that would tell—that treats a 17 year old and a four year old the same, I'm sorry, I don't get it. It just doesn't make any sense to me.

[98] The other thing was *Pico*,[15] and I will describe what the Dean said. But *Pico*[16] was a school situation. It is implied that schools have some parental responsibility. They take your child in the morning and they keep them all afternoon and they are responsible for them until they get home. The public library does not have that same responsibility. It is more of a public forum where ideas can be expressed and shared. Every public library has recommended sites on the Internet that people come and use and find, and we do that to help people and help parents make the proper selection, but rely on the parent to be responsible for their child and to think the government should now become the babysitter for every latch-key child that is out after school, and the library has become the babysitters for those latch-key kids and has to be responsible for what they do, what they see, where they go and how they act is not a reasonable expectation. Thank you.

[99] THE CHAIRMAN: Mr. May, would you like to reply?

[100] MR. MAY: Thank you. Well, the only thing I would say is that, you know, there is a great effort for those that oppose filtering or the legislature from doing anything in this area to make sure they create as safe an environment as they can, there is a great effort to sort of segregate the reality of the real world and the virtual world, that somehow when we cross over into the world of electrons and images delivered by computers everything is changed and everything is different. And I would just simply remind the Committee that that is really not the case because a 14

[15] *Pico*, 457 U.S. at 853
[16] *Id.*

year old, a 17 year old or a 4 year old that would go and seek to acquire, get access to material through a book store, or a movie theater or a restaurant of some kind that has entertainment that is not appropriate for children, they could not simply get access to. And I think we need to make some common-sense application the way the real world works with the way libraries work and the way the Internet works and not adopt the idea that is being put forward by American Library Association that the mere subscription to a single Internet account enables you to have every single new piece of material ever available or whatever is otherwise available on the Internet because the real world doesn't provide materials that children are entitled to access without limitation at all, and likewise the library should not be such places. And to do so would turn on its head the history of hundreds of years of being able to make judgments and decisions as librarians as to what is appropriate in this community to advance the interests of both education, scholarly research and culture.

[101] THE CHAIRMAN: Do we have any questions from the audience for our witnesses? Any of our Committee Members want one last shot?

[102] COMMITTEE MEMBER: Yes. This is for—thank you, first of all. This is great. And really either Mr. Henderson, Mr. May or Dean Smolla even. I have a question about – in terms of reconciling the federal bill and the state bill. I—looking at the plain language of it, it looks like, in terms of our First Amendment issue, I think it is—definitely—there's definitely a First Amendment issue, and then the compelling state interest if there is one needs to be narrowly tailored. I mean, the state bill is—you know, it's any funding whatsoever. And I just—I am not convinced that that passes constitutional muster. Comments?

[103] MR. MAY: As the Dean, I think, appropriately pointed out there is clearly a difficult puzzling that must take place when you look at whether there is now an unconstitutional condition associated with the ability to receive money, but in the context here of libraries being able to maintain access to money that they are not otherwise constitutionally entitled to in the first place, I don't think it is quite as difficult to puzzle through. Libraries, again, in Virginia are designed to provide a wholesome and educational environment for everybody, and it may mean that as it has had since time out of mind sections that are for children, children's book sections, this is where children are to go, and other sections of the library

to apply that same kind of a real-world experience to the virtual world makes eminent common sense, and does not of itself create an unconstitutional conditioning of the access for money.

[104] The federal government has tooled through this in cases like *Russ v. Sullivan* and others in which the ability to have access to monies for adolescent family, health counseling and other things have been restricted in ways that the courts have recognized our constitutional, even though they involve some very difficult issues society is dealing with, and adolescent health care involving teen pregnancies, abortion and the most controversial issues our society deals with, and yet in virtually all of those instances the court has recognized that it is appropriate for government to remind those people receiving monies across the board that they have larger obligations. And so we're not as troubled by it, but we understand that clearly it must be puzzled through in this context.

[105] MR. HENDERSON: We look at it more as a bullying technique by government. In fact, a large library system like mine or Fairfax County doesn't need the money that the state would provide. They give me $200,000 out of an eleven million dollar budget. The smaller libraries who can't afford it, who couldn't supply the services they provide without state aid, the many libraries within the State of Virginia that rely 85 percent on the money they receive from the state to purchase books and even to pay for staffing, so these libraries have no option but to accept the ruling, and to say we're either going to filter and violate what we believe to be the principles of librarianship in the country or not have a library.

[106] Libraries in the United States are unique. We mirror our society. We don't create our society. It's not our responsibility to make our society a nice, wholesome environment. It is our job to make sure that the available—that the information sources that people want are available to them, that they have an easy, the least-restrictive way of accessing the information that they want, and anything that prohibits that in my mind is contrary to the public libraries of the United States.

[107] THE CHAIRMAN: All right. Well, thank you all for coming. Thanks for the students who participated in this particular—thanks for our witnesses for coming and lending their time and expertise to our little program tonight.