ARTICLES

FILTERS AND FEDERALISM: PUBLIC LIBRARY INTERNET ACCESS, LOCAL CONTROL, AND THE FEDERAL SPENDING POWER

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 This Article has been vastly improved because of comments on earlier drafts made by Matt Adler, Ann Althouse, Greg Magarian, Sarah Maguire, and Victoria Nourse. I presented a preliminary version of this paper to a University of Wisconsin Law School faculty working paper colloquium, as well as a University of Wisconsin-Madison School of Library and Information Studies (UW-SLIS) Colloquium Series, and comments made at those colloquia helped shape some of my ideas. I have had discussions with many people about some of the ideas in the paper, including Bob Drechsel, Len Kaplan, Neil Komesar, John Ohnesorge, and Linda Smith. Bob Bocher helped me better understand some of the finer points of CIPA and the e-Rate program. University of Wisconsin law students Sarah Maguire, Mioko Tajika, and Patrice Duecker, and UW-SLIS student Maryse Curie all provided superb research assistance, as did many librarians at the University of Wisconsin Law Library, including especially Bill Ebbott and Bonnie Shucha. As usual, Mike Morgalla and Cheryl O'Connor at the Law Library helped me track down the extensive list of sources that fill the Article's inordinate number of footnotes. This research was funded in part by grants from the University of Wisconsin Graduate School.

INTRODUCTION

Congress loves to regulate the Internet. From spam to copyright, from the domain name system to the telecommunications infrastructure, Congress has tried its hand at a whole host of "problems" caused by the Internet. But, when it comes to regulating the Internet, little has been more important to Congress than protecting children from objectionable[1] sexually explicit content. Congress has now passed laws three times in the past decade. Its first attempt, the Communications Decency Act ("CDA"), was struck down on First Amendment grounds in the United States Supreme Court's seminal 1997 decision, *Reno v. ACLU*.[2] Congress's second effort, the Child Online Protection Act ("COPA"), was an attempt to respond directly to the Court's decision in *Reno*. COPA is currently subject to an injunction in a case that the Court recently remanded for the second time.[3] Both the CDA and COPA were broad attempts to prohibit certain forms of expression on the Internet.

The third federal law to regulate sexually explicit material on the Internet, the Children's Internet Protection Act ("CIPA"), took a different tack altogether. Rather than imposing a broad prohibition on the material that Congress considered inappropriate, CIPA requires public libraries and public schools, as a condition of receiving certain federal benefits, to use "technological protection measures" (for example, filtering software) to prevent library patrons and public school students from accessing objectionable sexually explicit material over the Internet. The Court upheld CIPA against a constitutional challenge in June 2003 in *United States v. American Library Association*.[4]

All three statutes were challenged on First Amendment grounds, and, as different courts and commentators have discussed in great detail, all three raise significant First Amendment questions. In this Article, I argue that the third statute, CIPA, implicates not just the First Amendment, but another fundamental constitutional issue as well: federalism. CIPA, a federal law, imposes conditions on public librar-

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[1] I use the term "objectionable" because almost any other term I could use has become a term of art, laden with legal meaning. By using the phrase, I do not mean to imply a personal condemnation of the material, but using the phrase "allegedly objectionable" (or "allegedly" anything) is far too cumbersome.

[2] 521 U.S. 844 (1997), *aff'g* 929 F. Supp. 824 (E.D. Pa. 1996). The district court's decision is ordinarily referred to as *Reno I*, while the Supreme Court's decision is referred to as *Reno II*. As we will see, there are several more relevant "*Reno*" cases. I will maintain these conventional references.

[3] *See* Ashcroft v. ACLU, 124 S. Ct. 2783 (2004) ("*Ashcroft II*").

[4] 539 U.S. 194 (2003). For reasons that will be clear below, I refer to this case as *ALA II*.

ies, which are themselves municipal government entities and, thus, creatures of state governments. The constitutional challenge to CIPA was thus a battle between the federal and state governments, something that the parties, courts, and other commentators have all ignored. In this Article, I will argue that this fact should have mattered and will explore some ramifications of thinking about the statute through a federalism lens.

By framing the debate about CIPA in terms of the First Amendment, the parties effectively forced the Supreme Court to create rigid constitutional doctrine when what may be needed is system-wide flexibility to accommodate ever-changing technology. In contrast to a First Amendment approach, focusing on the underlying principles of constitutional federalism would have given the Court the opportunity to invalidate an overbroad regulation such as CIPA and yet would have permitted a wide variety of regulatory approaches to vexing problems such as sexually explicit speech on library Internet terminals. In short, I will argue that federalism helps us view CIPA in a new and important light and simultaneously helps facilitate a process of lawmaking that is more likely to lead to better policymaking in the long run. If the Court had considered these principles, it could have avoided the all-or-nothing approach to the problem that CIPA and the First Amendment challenge to it necessitated.

I will proceed in five Parts. Parts I and II set the stage for the discussion that follows. Part I describes Congress's first two attempts to regulate sexually explicit material on the Internet, the CDA and COPA, as well as the First Amendment challenges to those two laws. In Part II, I address the question of Internet filters in public libraries and then describe CIPA and the case challenging its constitutionality, *United States v. American Library Association* ("*ALA II*").[5] Among the five opinions in the case, I look particularly at Justice Stevens's dissent, which was the only opinion that would have invalidated CIPA while simultaneously preserving the ability of local libraries to install filters on their Internet access if they so chose.

In Part III, I look at the question of filters in public libraries through the lens of federalism. I conclude that the decision as to whether a public library ought to install filters is one that should be made at the local, rather than at the federal, level. I conclude further that both the federal government and the challengers to the law missed these important principles. I argue that some—though not all—of these principles were reflected in Justice Stevens's dissent in *ALA II*, notwithstanding the fact that none of the parties were arguing for the result he reached. Justice Stevens's "compromise" result,

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[5] *Id.*

when viewed through the lens of the principles of constitutional federalism, makes a great deal of sense, particularly in situations involving the regulation of fast-changing technology.

In Parts IV and V, I explore the way in which doctrine might have reflected these federalism concerns. In Part IV, I look at the federal spending power, the power Congress exercised when promulgating CIPA. After giving a jurisprudential history of the federal spending power, I describe *South Dakota v. Dole*, the case that consolidates the Court's current doctrine for conditional grants to states.[6] Current spending power doctrine required the court to analyze CIPA under what is known as the "independent constitutional bar" rule.[7] Doing so, however, forced the Court to ignore the fact that CIPA is a federal law with structural federalism implications, and not simply an imposition on individual rights. Thus, while the "independent constitutional bar" rule might feel intuitively uncontroversial, it fails to reflect the complexity of the law to which it was applied.

Finally, in Part V, I explore recent spending power scholarship in light of the "new federalism." In particular, I focus on the work of constitutional scholar Lynn Baker, who has proposed doctrinal changes to the spending power.[8] I apply her proposal to CIPA and explore the ways in which her proposal reflects the constitutional policy concerns that CIPA raises. I conclude that CIPA might well have been declared unconstitutional on federalism grounds under Baker's proposal and that the change in doctrine she suggests might thus have led to a result that comports with the principles of constitutional federalism that I outlined in Part III. Nonetheless, I conclude that the analysis her proposal requires does not reflect the full extent of CIPA's complexity. As Justice Stevens may have recognized—though there were no doctrinal tools to help him articulate this fact—CIPA raises both structural and rights-based constitutional concerns. In this sense, CIPA tells us something about the difficulty of fashioning constitutional doctrine to the increasing complexity of federal lawmaking in the modern era.

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[6] 483 U.S. 203 (1987).

[7] *See id.* at 209–12.

[8] *See, e.g.*, Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911 (1995) (arguing that the Court should more strictly interpret the Spending Clause in cases involving conditional funding to states).

I. BACKGROUND: PRE-CIPA FEDERAL RESTRICTIONS ON SEXUALLY EXPLICIT CONTENT ON THE INTERNET

A. Communications Decency Act

Congress's first attempt to regulate sexually explicit content on the Internet was the Communications Decency Act of 1996 ("CDA").[9] The CDA was part of the Telecommunications Act of 1996, but the relevant portions were, in stark contrast to most of the Telecommunications Act, hastily drafted and only briefly debated.[10] The CDA contained two provisions that were challenged immediately upon the statute's passage. The first, referred to by the Court as the "indecent transmission" provision,[11] prohibited the knowing transmission, by means of a telecommunications device, of "obscene or indecent" communications to any recipient under the age of eighteen.[12] The second provision, referred to by the Court as the "patently offensive display" provision,[13] prohibited the use of "an interactive computer service" to send or display "patently offensive" communications "in a manner available to a person under eighteen years of age."[14]

In *Reno v. ACLU,* the Supreme Court invalidated both provisions on First Amendment grounds. The Court's principal holding was that the statute unduly restricted "a large amount of speech that adults have a constitutional right to receive and to address to one another."[15] Although the Court recognized the importance of "the governmental interest in protecting children from harmful materials,"[16] it relied on earlier cases holding that the government cannot limit adults to "only what is fit for children"[17] as long as "less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve."[18] This formulation of

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[9] Pub. L. No. 104-104, tit. V, 110 Stat. 56, 133–143 (1996) (codified as amended in scattered sections of 47 U.S.C.).

[10] *See* Reno v. ACLU, 521 U.S. 844, 858–59 (1997) ("*Reno II*") (noting that, in contrast to the other six titles of the Telecommunications Act of 1996, "[the CDA] contains provisions that were either added in executive committee after the hearings were conducted or as amendments offered during floor debate on the legislation."). The Court seemed less willing to give Congress deference because of this fact. *See id.*; *see also* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 808, 822 (2000) (invalidating another provision in the Telecommunications Act, and also noting that the provision had been added as a floor amendment).

[11] *Reno II,* 521 U.S. at 859.

[12] 47 U.S.C. § 223(a) (2002).

[13] 521 U.S. at 859.

[14] 47U.S.C. § 223(d).

[15] 521 U.S. at 874.

[16] *Id.* at 875.

[17] *Id.* (citations and internal quotation marks omitted). *Butler v. Michigan,* 352 U.S. 380, 383 (1957), appears to be the Court's first formulation of this well-known phrase.

[18] 521 U.S. at 874.

the question necessitates a factual inquiry: are there any "less restrictive alternatives" that would be "*at least* as effective" as the CDA at protecting children from harmful materials? As Eugene Volokh has pointed out, it is difficult to imagine any alternatives as effective as the CDA's nearly total ban on dissemination of the harmful speech,[19] and certainly neither the Court nor the statute's challengers provided any.[20]

One thing the Court did do, however, was refer specifically to filters, contrasting the CDA's provisions with "currently available *user-based* software" which, according to the stipulated facts, "suggest[ed] 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 widely available."[21] While the Court did not explicitly rely on the existence of filters as the "less restrictive alternative," the Court clearly viewed filters as a way in which the solution to the problem of unwanted speech would shift from speaker to recipients. Although doctrinally this reference to filters appears to be little more than unnecessary dicta, it is clear from some of the challengers' briefs and the lower court opinions that the efficacy of filters was argued at great length.[22] Though the Court did emphasize that filters were "user-

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[19] Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141, 149 (1997).

[20] *Id.* at 149–56 (discussing the Court's proposed alternatives in order to show that they are not equally effective); *cf.* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 840–45 (2000) (Breyer, J., dissenting) (arguing that a federal law aimed at preventing signal bleed in cable television programming should be upheld because proposed alternatives were not as effective). Indeed, in *Reno II*, the Court specifically noted that "at the time of trial existing technology did not include any effective method for a sender to prevent minors from obtaining access to its communications on the Internet without also denying access to adults." 521 U.S. at 876. If no such technology exists, this would seem to buttress rather than undermine the government's defense of the statute as the "least restrictive alternative" to serving the compelling interest of protecting children from harmful materials. Interestingly, more than a year had passed between the trial and the Court's opinion, and the phrase "at the time of trial" was thus not irrelevant to the Court's conclusion. Stuart Benjamin has written on the problem of appellate courts relying on lower court fact-finding when facts can change, both in general and with the fast pace of technological change in particular. *See* Stuart Minor Benjamin, *Stepping Into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269 (1999).

[21] *Reno II*, 521 U.S. at 877 (quoting ACLU v. Reno, 929 F. Supp. 824, 842 (E.D. Pa. 1996) ("*Reno I*")) (emphases in original).

[22] *See Reno I*, 929 F. Supp. at 842 (discussing the advantages and limitations of filtering software); *see also* Shea v. Reno, 930 F. Supp. 916, 931–35, 944–46 (S.D.N.Y. 1996) (same); United States Supreme Court Appellant Brief at 40, *Reno II* (No. 96-511) (arguing that less restrictive alternatives to filtering software are not equally effective), *available at* 1997 WL 32931; United States Supreme Court Reply Brief at 13, *Reno II* (No. 96-511) (arguing that filtering software is too restrictive), *available at* 1997 WL 106544; United States Supreme Court Appellee (ACLU) Brief at 36, *Reno II* (No. 96-511) (arguing the benefits of filtering software), *available at* 1997 WL 74378; United States Supreme Court Appellee (American Library Association) Brief at 34–35, *Reno II* (No. 96-511) (noting that filters were as effective as CDA), *available at* 1997 WL 74380;

based" and that this gave control to parents rather than to the government, it is clear in retrospect that the plaintiffs' attempt to say that the problem could be solved with technological rather than legal restrictions has now returned to haunt those who made that argument,[23] since it is filters that CIPA attempts to rely upon.[24] Indeed, discussion of the question of whether filters should be mandated in public schools and libraries began soon after *Reno II*.[25]

B. Child Online Protection Act

Congress returned to the drawing board soon after *Reno II* and passed the Child Online Protection Act of 1998 ("COPA").[26] COPA provided for civil and criminal penalties for anyone who "in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors."[27] Like the CDA, therefore, COPA broadly criminalized the distribution over the Internet of sexually explicit material that adults have a constitutional right to view, but did so for the purpose of protecting children.

From the standpoint of COPA's supporters in Congress, however, what was key to COPA were not the similarities between it and the CDA, but rather the differences. COPA's drafters clearly considered

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Brief of Amici Curiae Family Life Project of the American Center for Law and Justice at 19, *Reno II* (No. 96-511) (discussing the limited effectiveness of filtering software), *available at* 1997 WL 22917; Brief of Amici Curiae Members of Congress at 22–23, *Reno II* (No. 96-511) (arguing that the reach of filtering software is limited), *available at* 1997 WL 22918; Brief of Amici Curiae Morality in Media, Inc. at 25, *Reno II* (No. 96-511) (same), *available at* 1997 WL 22908; Brief of Amici Curiae Enough is Enough et al. at 20, *Reno II* (No. 96-511) (same), *available at* 1997 WL 22958.

[23] Lawrence Lessig, *What Things Regulate Speech: CDA 2.0 v. Filtering*, 38 JURIMETRICS J. 629, 632 n.15 (1998) (noting the ACLU's opposition to filters after *Reno II*, notwithstanding its reliance on filters as a less-restrictive alternative in that case).

[24] *See* United States v. Playboy Entm't Group, 529 U.S. 803, 814 (2000) (noting that "the mere possibility that user-based Internet screening software would 'soon be widely available' was relevant to our rejection of an overbroad restriction of indecent cyberspeech [in *Reno II*]"). *See generally* Tom W. Bell, *Free Speech, Strict Scrutiny, and Self-Help: How Technology Upgrades Constitutional Jurisprudence*, 87 MINN. L. REV. 743, 763–65 (2003) (using *Reno II* as an example of the Court considering the opportunities for individual "self-help" in analyzing the "least restrictive means" prong in strict scrutiny).

[25] *See* Robert Corn-Revere, United States v. American Library Association*: A Missed Opportunity for the Supreme Court to Clarify Application of First Amendment Law to Publicly Funded Expressive Institutions*, *in* CATO SUPREME COURT REVIEW 2002–2003, at 105, 106–07 (James L. Swanson ed., 2003) ("Almost immediately [after the Supreme Court's decision in *Reno II*], the debate over Internet filtering software centered on whether such filters should be required at the principal public institutions that provide Internet access—public libraries and schools.").

[26] 47 U.S.C. § 231 (2002) (enforcement preliminarily enjoined by *ACLU v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003), *aff'd*, 124 S. Ct. 2783 (2004)).

[27] *Id.* § 231(a)(1).

Reno II carefully.[28] Indeed, Congress seems to have viewed *Reno II* as a road map to passing a constitutional statute aimed at protecting children from sexually explicit material on the Internet, rather than as the ringing victory for free speech rights that the ACLU and other plaintiffs claimed it to be.[29]

The ACLU and a number of other plaintiffs brought a First Amendment challenge to COPA. The district court granted a preliminary injunction against enforcement of the law.[30] In determining that the plaintiffs had shown a substantial likelihood of success on the merits, the court concluded that COPA was a content-based regulation of speech and was thus subject to strict scrutiny. The court's focus was again on the question of whether the statute was the least restrictive means of accomplishing that goal, and again the plaintiffs argued that filtering technology was less restrictive. The district court agreed, stating that "blocking or filtering technology may be at least as successful as COPA would be in restricting minors' access to harmful material online without imposing the burden on constitutionally protected speech that COPA imposes on adult users or Web site operators."[31] Due to the procedural posture of the case—deciding the question on a motion for a preliminary injunction, rather than after a full trial—the court did not conclusively decide that the statute was not the least restrictive means. Nonetheless, the court found the existence of filtering technology to provide "at least some evidence that COPA does not employ the least restrictive means."[32] While the court stated in a footnote that the plaintiffs were "not argu[ing] that Con-

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[28] *See* Ashcroft v. ACLU, 535 U.S. 564, 591 (2002) ("*Ashcroft I*") (Kennedy, J., concurring in the judgment) ("Congress and the President were aware of our decision [in *Reno II*], and we should assume that in seeking to comply with it they have given careful consideration to the constitutionality of the new enactment."); *see also Ashcroft II*, 124 S. Ct. at 2805 (Breyer, J., dissenting) ("Congress read *Reno* with care. It dedicated itself to the task of drafting a statute that would meet each and every criticism of the predecessor statute that this Court set forth in *Reno*."); H.R. REP. NO. 105-775, at 5 (1998) ("H.R. 3783 has been carefully drafted to respond to the Supreme Court's decision in [*Reno II*] and the Committee believes that the bill strikes the appropriate balance between preserving the First Amendment rights of adults and protecting children from harmful material on the World Wide Web."); *id.* at 12–15 (detailing how COPA differs from CDA in ways that *Reno II* deemed constitutionally relevant); Yochai Benkler, *Net Regulation: Taking Stock and Looking Forward*, 71 U. COLO. L. REV. 1203, 1249 (2000) (noting that the drafters of COPA "attempted to [ban or burden the introduction of sexual material at its source] while crossing every 't' and dotting every 'i' required by [*Reno II*]").

[29] *See* JOSEPH RUSSOMANNO, SPEAKING OUR MINDS 442–44 (2002) (documenting a roundtable discussion with lawyers for *Reno II* plaintiffs describing their reactions to the decision).

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

[31] *Id.* at 497.

[32] *Id.* The plaintiffs also argued that Congress could have made the statute less restrictive by limiting it to "pictures, images, or graphic image files," or by not imposing such serious criminal penalties, or by incorporating the substance of the affirmative defenses into the actual elements of the crime (which would have shifted the burden of proof on those issues from the defendant to the prosecutor). *Id.*

gress should statutorily require the use of such technology to shield minors from such materials,"[33] filters once again featured prominently in the court's conclusion that a congressional attempt to regulate sexually explicit materials was not sufficiently tailored to the goal of protecting minors.

After the government appealed the district court's grant of a preliminary injunction, the case went up and down twice between the Third Circuit and the Supreme Court.[34] More than five years after the district court's decision, the Supreme Court affirmed largely for the same reasons. Indeed, the Court even went so far as to say that filters "may well be *more* effective than COPA."[35] The government argued that filters could not constitute an "alternative" for purposes of the constitutional analysis "because Congress may not require [filters] to be used."[36] Relying on *United States v. Playboy Entertainment Group*,[37] the Court rejected that argument on the grounds that Congress could *encourage* parents' use of filters.[38] In *Playboy Entertainment*, the Court invalidated a federal law requiring cable operators who provide sexually explicit channels either to scramble or block those channels or to limit their availability to the hours between 10 p.m. and 6 a.m. Part of the Court's rationale for striking the statute down was that an "opt-out" provision in the same law—one that required cable companies to block or scramble the sexually explicit channels upon a cable subscriber's request—was a less restrictive alternative.[39]

The Court thus concluded that government encouragement of filters could be a less restrictive alternative to COPA.[40] However, because the case was originally on appeal from the grant of a preliminary injunction and because there had been a five-year delay between the district court's fact-finding and the Court's opinion—a delay made even more acute by the fact that the technology had changed dramatically during that period[41]—the Court remanded the case for a full trial. Based on the Court's opinion, however, it is highly unlikely that the statute will be upheld on remand.

While COPA was in the midst of being challenged, Congress tried a third approach to regulating sexually explicit content on the Inter-

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[33] *Id.* at 497 n.6.

[34] *See* ACLU v. Ashcroft, 322 F.3d 240 (3d Cir. 2003), *aff'd*, 124 S. Ct. 2783 (2004); ACLU v. Reno, 217 F.3d 162 (3d Cir. 2000), *vacated sub nom. Ashcroft I*, 535 U.S. 564 (2002).

[35] *Ashcroft II*, 124 S. Ct. at 2792 (emphasis added).

[36] *Id.* at 2793.

[37] 529 U.S. 803 (2000).

[38] *Ashcroft II*, 124 S. Ct. at 2793–94.

[39] *Playboy Entm't*, 529 U.S. at 840–43.

[40] *See generally* Bell, *supra* note 24 (discussing ways in which courts treat self-help remedies as less restrictive alternatives under First Amendment strict scrutiny analysis).

[41] *See generally* Benjamin, *supra* note 20 (discussing the problem of appellate courts relying on lower courts' fact-finding when facts can change).

net, this time involving its power of the purse and Internet access at public libraries. I address this third statute, CIPA, in the next Part.

II. FILTERS IN PUBLIC LIBRARIES

In this Part, I turn to the question of the installation of filtering technology on public library Internet access. In Section A, I address the constitutional challenge to a local library board's decision to install Internet filters prior to passage of CIPA. In Section B, I describe CIPA, and, finally, in Section C, I describe the constitutional challenge to the law. I focus in Section C on the way in which the Court's doctrinal analysis ignored important aspects of the statute and how Justice Stevens's opinion incorporated some of those concerns, notwithstanding the clear flaws in his analysis of the doctrine. His opinion, I argue, incorporates federalism concerns, which, as I argue in Part III, properly belonged in the case.

A. Constitutional Challenges to Local Filtering Decisions

As the Internet became more widespread through the 1990s, more and more public libraries began to offer patron Internet access. From 1994 to 2000, the percentage of public libraries with some form of public Internet access increased from approximately twenty-one percent to ninety-six percent.[42] The Telecommunications Act of 1996, which I discuss in more detail below,[43] was indispensable in increasing library access to the Internet.[44]

Internet access at public libraries naturally brought with it much of what is available through the Internet, including sexually explicit content. In response, a number of libraries began experimenting with a variety of ways to prevent patrons from accessing such content.

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[42] *Compare* John Carlo Bertot & Charles R. McClure, *Public Libraries and the Internet 2000 Summary Findings and Data Tables* 3, 10 fig.3 (Nat'l Comm'n on Libraries and Info. Sci. 2000) (noting an increase in library Internet access from 83.6% to 95.7% between 1998 and 2000, and offering additional statistics based on metropolitan status and poverty), *with* John Carlo Bertot, Charles R. McClure & Douglass L. Zweizig, *The 1996 National Survey of Public Libraries and the Internet: Progress and Issues* fig.5 (1996) (reporting public libraries connected to the Internet by population of legal services area and region), *available at* http://slis-two.lis.fsu.edu/~cmcclure/nspl96/Figures.gif.

[43] As noted above, the Communications Decency Act was also part of the Telecommunications Act of 1996. *See supra* text accompanying note 10 (noting that the CDA was part of the Telecommunications Act). The CDA was distinct from the portions of the Telecommunications Act that I discuss below.

[44] *See* Corn-Revere, *supra* note 25, at 107 ("[The] increase in Internet access was promoted in part by Section 254(h) of the Telecommunications Act of 1996."); *cf.* AUSTAN GOOLSBEE & JONATHAN GURYAN, THE IMPACT OF INTERNET SUBSIDIES FOR PUBLIC SCHOOLS (NBER Working Paper No. W9090, 2002) (arguing that E-rate subsidies did, in fact, induce Internet investment in high-poverty and low-Internet schools).

Many libraries instituted "acceptable use" policies to prohibit use of the Internet for illegal activity, including viewing illegal sexually explicit materials. It is now the case that virtually all public libraries have such a policy.[45] In addition to having "acceptable use" policies, a number of libraries and library systems also began to install blocking and filtering technology on Internet terminals.[46]

One such library system was the Loudoun County Library in Loudoun County, Virginia. In 1997, the library's board of trustees adopted what they referred to as a "Policy on Internet Sexual Harassment," which required, among other things, that all library computers be equipped with software that blocked "(a) child pornography and obscene material; and (b) material deemed harmful to juveniles."[47] A group of library patrons formed a nonprofit organization, "Mainstream Loudoun," and then challenged the constitutionality of the policy.

In *Mainstream Loudoun v. Board of Trustees of Loudoun County*,[48] a federal district court addressed the question of whether mandatory blocking of materials on a library's Internet terminals violated the First Amendment. The crux of the court's opinion turned on a choice between two different characterizations of Internet filtering in a public library: is Internet filtering analogous to a book "selection" decision or a book "removal" decision? The plaintiffs argued that the decision to make the Internet available in the library was analogous to the purchase of a set of encyclopedias, and that the library board's filtering policy was analogous to "a decision to 'black out' selected articles considered inappropriate."[49] The library board, in contrast, likened the Internet to "a vast Interlibrary Loan system and con-

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[45] *See, e.g.*, MADISON PUBLIC LIBRARY, INTERNET USE POLICY AND GUIDELINES (2002) (listing "legal and acceptable" uses), *available at* http://www.madisonpubliclibrary.org/useplcy.html.

[46] A slew of law review articles have detailed the ways in which filtering or blocking technologies work. *See, e.g.*, R. Polk Wagner, *Filters and the First Amendment*, 83 MINN. L. REV. 755, 759–69 (1999) (describing filtering and blocking technology); *see also* Mark S. Nadel, *The First Amendment's Limitations on the Use of Internet Filtering in Public and School Libraries: What Content Can Librarians Exclude?*, 78 TEX. L. REV. 1117, 1120–21 (2000) (same); Richard J. Peltz, *Use 'The Filter You Were Born With': The Unconstitutionality of Mandatory Internet Filtering for the Adult Patrons of Public Libraries*, 77 WASH. L. REV. 397, 401–02 (2002) (same). One of the best lay descriptions of the technology is the expert report submitted by Benjamin Edelman on behalf of the plaintiffs in *American Library Association v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2002) ("*ALA I*"). *See* Expert Report of Benjamin Edelman at 14–23, *ALA I* (No. 01-1332), *available at* http://cyber.law.harvard.edu/people/edelman/pubs/aclu-101501.pdf. Since I do not intend to enter the debate about the inadequacies of the technology to make determinations about whether particular content is constitutionally protected, I will spare the reader another recitation of the details of the technology.

[47] *See* Mainstream Loudoun v. Bd. of Trs. of the Loudoun County Library, 24 F. Supp. 2d 552, 556 (E.D. Va. 1998) ("*Mainstream Loudoun II*") (footnote omitted).

[48] 2 F. Supp. 2d 783 (E.D. Va. 1998) ("*Mainstream Loudoun I*").

[49] *Id.* at 793.

tend[ed] that restricting Internet access to selected materials [was] merely a decision not to acquire such materials rather than a decision to remove them from a library's collection."[50]

The reason the characterization of the policy as either a "removal" decision or as a "selection" decision mattered was that, under the Supreme Court's decision in *Board of Education, Island Trees Union Free District, No. 26 v. Pico*,[51] the First Amendment limits the discretion libraries have to make a "removal" decision. According to *Pico*, "selection" decisions are to be given great deference by courts,[52] notwithstanding the fact that they are essentially "content-based" determinations made by government officials and would thus ordinarily be subject to "strict scrutiny." In contrast, a "removal" decision raises the specter of censorship in ways that a "selection" decision does not and, according to *Pico*, is to be treated with suspicion and is thus subject to strict scrutiny.[53]

The *Mainstream Loudoun* court held that the plaintiffs' analogy made more sense, relying on the fact that, in contrast to "an Interlibrary loan or outright book purchase, no appreciable expenditure of library time or resources is required to make a particular Internet publication available to a library patron."[54] The court also pointed out that "it costs a library more to restrict the content of its collection by means of blocking software than it does for the library to offer unrestricted access to all Internet publications."[55] As I discuss in greater detail below, the *Mainstream Loudoun* court's conclusion was by no means the last word on this question, as the same choice of analogies was the crux of the question in the constitutional challenge to CIPA.

Having chosen to analogize Internet filtering to a "removal" decision, the *Mainstream Loudoun* court then looked to the "public forum" doctrine, the First Amendment doctrine that applies to speech restrictions on government property. The court concluded that a public library is a "limited public forum" and that government restrictions on Internet access in a public library are thus subject to strict scrutiny.[56]

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[50] *Id.*

[51] 457 U.S. 853 (1982). The *Pico* decision was highly splintered, with most lower courts and commentators relying on an opinion authored by Justice Brennan as representing the "Court's" reasoning. The Brennan opinion represents three Justices at times and four Justices at others.

[52] *Id.* at 871–72 (plurality opinion).

[53] *Id.*

[54] *Mainstream Loudoun I*, 2 F. Supp. 2d at 793; *see also id.* at 795 (noting that "considerations of cost or physical resources cannot justify a public library's decision to restrict access to Internet materials").

[55] *Id.* at 795.

[56] *Mainstream Loudoun II*, 24 F. Supp. 2d 552, 561–63 (E.D. Va. 1998).

The court then concluded that the policy was not narrowly tailored because (1) there were less restrictive alternatives than installing Internet filters; and (2) the filtering policy effectively restricted adult access to constitutionally protected materials.[57]

Since *Mainstream Loudoun*, scholars have commented on the case and the broader question of the constitutionality of Internet filters in public libraries.[58] Some scholars have defended the court's reason-

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[57] *Id.* at 567–68.

[58] *See, e.g.*, Nadel, *supra* note 46 (discussing generally the constitutionality of filtering controversial content in public libraries); *see also, e.g.*, FILTERS & FREEDOM (Elec. Privacy Info. Ctr. ed., 1999) (compiling papers discussing free speech issues related to Internet controls); Bernard W. Bell, *Filth, Filtering, and the First Amendment: Ruminations on Public Libraries' Use of Internet Filtering Software*, 53 FED. COMM. L.J. 191, 221–25 (2001) (describing four instrumentalist justifications for filters in public libraries that might be used to sustain their constitutionality); Gregory K. Laughlin, *Sex, Lies, and Library Cards: The First Amendment Implications of the Use of Software Filters to Control Access to Internet Pornography in Public Libraries*, 51 DRAKE L. REV. 213 (2003) (exploring the history of censorship in public libraries and the nature of the Internet access problem, and arguing that individual responsibility is the best way to deal with Internet access in public libraries); Peltz, *supra* note 46 (discussing the constitutionality of filtering Internet access in public libraries); Matthew Thomas Kline, Note, Mainstream Loudoun v. Board of Trustees of the Loudoun County Library, 14 BERKELEY TECH. L.J. 347 (1999) (focusing on First Amendment questions implicated by *Mainstream Loudoun*); Kiera Mehan, Note, *Installation of Internet Filters in Public Libraries: Protection of Children and Staff vs. The First Amendment*, 12 B.U. PUB. INT. L.J. 483, 492–503 (2003) (agreeing with *Mainstream Loudoun*'s analysis and considering its implications for the future); Junichi P. Semitsu, Note, *Burning Cyberbooks in Public Libraries: Internet Filtering Software vs. The First Amendment*, 52 STAN. L. REV. 509 (2000) (same); J. Adam Skaggs, Note, *Burning the Library to Roast the Pig? Online Pornography and Internet Filtering in the Free Public Library*, 68 BROOKLYN L. REV. 809 (2003) (arguing that *Mainstream Loudoun* was correctly decided); Jeannette Allis Bastian, *Filtering the Internet in American Public Libraries: Sliding Down the Slippery Slope*, 1 FIRST MONDAY No. 10 (1997) (discussing library Internet access in light of constitutional issues and the realities of the public library), *at* http://firstmonday.dk/issues/issue2_10/bastian/; *cf.* Wagner, *supra* note 46, at 773–77 (noting that the First Amendment analysis depends upon that accuracy and precision with which filters can match unprotected categories of speech).

ALA II, 539 U.S. 194 (2003) ("*ALA II*"), *rev'g* 201 F. Supp. 2d 401 (E.D. Pa. 2002), which I discuss in great detail in Part II.C, has triggered even more commentary. *See, e.g.*, Corn-Revere, *supra* note 25; Steven D. Hinckley, *Your Money or Your Speech: The Children's Internet Protection Act and the Congressional Assault on the First Amendment in Public Libraries*, 80 WASH. U. L.Q. 1025 (2002) (arguing that CIPA should receive strict First Amendment scrutiny and should, thereby, be held impermissible); Susan Hanley Kosse, *Try, Try Again: Will Congress Ever Get it Right? A Summary of Internet Pornography Laws Protecting Children and Possible Solutions*, 38 U. RICH. L. REV. 721, 738–59 (2004) (discussing the history of CIPA and the constitutional challenge to it); Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 78–83 (2003) (arguing that the disagreement between the plurality and Justice Souter turned on different cultural conceptions of the public library); *The Supreme Court 2002 Term Leading Cases*, 117 HARV. L. REV. 349 (2003) (describing CIPA and concluding that the Court "missed an opportunity to provide broader guidance on the thorny problem of government funding of private speech in public cultural institutions"); Susannah J. Malen, Note, *Protecting Children in the Digital Age: A Comparison of Constitutional Challenges to CIPA and COPA*, 26 COLUM. J.L. & ARTS 217, 245–48 (2003) (arguing that the Supreme Court should uphold CIPA); Felix Wu, Note, United States v. American Library Association: *The Children's Internet Protection Act, Library Filtering, and Institutional Role*, 19 BERK. TECH. L.J. 555

ing,[59] while others have questioned it.[60] I do not intend to enter that debate, except to note that all commentators that I have found have argued within the paradigm defined by the *Mainstream Loudoun* court: all see the issue solely in terms of the First Amendment, and some have, in fact, explicitly grafted that approach onto the question of the constitutionality of CIPA.[61] While there are many different approaches—from questioning the applicability of the public forum doctrine to the public library[62] to arguing that filtering amounts to a government delegation of power to private entities, i.e., the filtering software companies[63]—no one has inquired seriously about the ways in which a federal statute might differ from a local library or library board deciding to require filters on Internet access.[64] I turn now to describing the federal law, before looking into ways in which it raises additional constitutional questions beyond those raised by the *Mainstream Loudoun* case.

B. The Federal Children's Internet Protection Act

1. *Statutory and Regulatory Background Prior to CIPA*

CIPA conditioned funding from two different programs, one known as the "E-Rate" discount program and the other under the Li-

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(2004) (considering the First Amendment issues raised by Internet access in public libraries in light of *ALA II* and concluding that CIPA fails strict scrutiny).

[59] *See, e.g.*, Peltz, *supra* note 46, at 453–78 (arguing that *Mainstream Loudoun* was correctly decided).

[60] *See, e.g.*, Nadel, *supra* note 46, at 1119 (arguing that "contrary to . . . *Loudoun* . . . there is no constitutionally significant difference between the library's discretion to manage its bookshelves and its discretion to manage its Internet terminals").

[61] *See, e.g.*, Peltz, *supra* note 46, at 478 (arguing that *Mainstream Loudoun* was correctly decided and that the "court's reasoning . . . should compel the same result in the case of CIPA, the federal statute"); *see also, e.g.*, Skaggs, *supra* note 58, at 847 (arguing that CIPA "fails the narrow-tailoring prong of the strict scrutiny test").

[62] *See, e.g.*, Bell, *supra* note 58, at 195 (arguing that "conventional approaches to analyzing the constitutional issues raised by public libraries' increasing use of Internet filtering software are flawed, because they focus on the interests of speakers rather than the interests of their audiences").

[63] *See* Nadel, *supra* note 46, at 1146–51 (arguing that decisions about library materials should belong to schools, libraries, or governmental bodies).

[64] In a symposium held at Fordham Law School during the pendency of *ALA II*, Charles Sims, one of the lawyers for the plaintiffs, wondered aloud about the federalism implications of the Court treating CIPA as if it were exactly the same as a challenge to a single library installing filters on its Internet terminals. *See* Symposium, *www.TheGovernmentHasDecidedItIsInYour (Read:Our)BestInterestsNotToViewThis.com: Should the First Amendment Ever Come Second?*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 831, 878 (2003) [hereinafter *www.TheGovernmentHasDecided*]; *cf.* Skaggs, *supra* note 58, at 851 (recognizing, though not analyzing, federalism concerns of proposed federal law that would mandate location of computer terminals in public libraries).

brary Services and Technology Act. In this subsection, I describe these two federal funding programs.

a. *The E-rate Discount*

United States telecommunications policy includes a system of redistributing the costs of telecommunications services, a policy known as "universal service." Codified at section 254 of the Telecommunications Act of 1996, "universal service" provides subsidies for several different types of consumers of telecommunications services, including those in high-cost areas, low-income individuals, schools and libraries, and rural health care providers.[65] The provision that subsidizes such services for schools and libraries, section 254(h), is known as the Schools and Libraries Discount, or the "E-rate".[66]

Under Federal Communications Commission ("FCC") regulations, most providers of telecommunications services must contribute a portion of their revenues to what is known as the Universal Service Fund. The Fund then distributes this money to eligible carriers who provide telecommunications services to the groups eligible for universal service. In short, those not eligible for the benefits of section 254 pay a tax (one collected by telecommunications companies)[67] that is used to subsidize the cost of telecommunications services for those that are eligible. The universal service program, including the E-rate component, are administered by a private corporation, the Universal Service Administrative Company, under the supervision of the FCC.[68]

In order for a library to be eligible for the E-rate discounts, a library must satisfy three requirements: (1) the library must be eligible for assistance from a state administrative agency under the Library Services and Technology Act;[69] (2) the library must be funded as an independent entity separate from any schools; and (3) the library may not be a for-profit business.[70] The E-rate discounts range from 20% to 90% and both eligibility and the amount of the discount generally depend upon the economic need of the library.[71] The E-rate program provides discounts for a variety of telecommunications ser-

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[65] 47 U.S.C. § 254 (2002).

[66] *Id.* § 254(h).

[67] Anyone with a landline telephone is likely familiar with universal service, since most of the nation's major telecommunications providers itemize the tax on phone bills.

[68] 47 C.F.R. § 54.701(a) (2002).

[69] *See* Pub. L. No. 104-208, 110 Stat. 3009–295 (1996) (codified at 20 U.S.C. §§ 9121–23, 9131–34, 9141, 9151, 9161–63). *See also infra* Section II.B.1.b (describing the Act).

[70] 47 C.F.R. § 54.501(c).

[71] 47 C.F.R. § 54.505. A library's economic need is generally tied to the school district in which the library is situated and is determined by the number of students in the district eligible for the National School Lunch Program. *Id.*

vices, including Internet access, although the Internet discounts apply only to basic conduit access to the Internet and not for any specific online content.[72] As I noted earlier, the E-rate discounts made the Internet accessible to a number of libraries and library systems that otherwise would have been unable to afford access.

b. *Library Services and Technology Act*

The Library Services and Technology Act ("LSTA") of 1996, Subchapter II of the Museum and Library Services Act,[73] provides a number of grant programs for libraries,[74] among which is the Grants to States program. Under the Grants to States program, the Director of the Institute of Museum and Library Services, a federal agency established as part of the National Foundation on the Arts and the Humanities, provides funds to "State library administrative agenc[ies],"[75] official agencies of the states charged by the law of the state with the extension and development of public library services throughout the state.[76] States are generally permitted to use their federal funds for any purpose related to the use of information technology in libraries,[77] although each state must match the federal funds it receives[78] and must achieve a minimum "maintenance of effort" to ensure that the federal grants do not replace state funds.[79]

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[72] *See In re* Federal-State Joint Bd. on Unv'l Serv., 12 F.C.C.R. 8776, 9009, 9011–12, 9014 (1997).

[73] 20 U.S.C. § 9101 *et seq.* (2002).

[74] The broad purposes of the Act are set forth in the Act itself. At the time LSTA was promulgated, the Act listed its purposes as:

(1) to consolidate Federal library service programs;
(2) to stimulate excellence and promote access to learning and information resources in all types of libraries for individuals of all ages;
(3) to promote library services that provide all users access to information through State, regional, national and international electronic networks;
(4) to provide linkages among and between libraries; and
(5) to promote targeted library services to people of diverse geographic, cultural, and socioeconomic backgrounds, to individuals with disabilities, and to people with limited functional literacy or information skills.

Id. § 9121 (2002) (prior to 2003 amendments). Though it is this earlier version of the statute that is relevant to this Article, it should be noted that these purposes were amended by the Museum and Library Services Act of 2003, Pub. L. No. 108-81, § 201, 117 Stat. 997 (2003) (amending § 9121). In the current version of the Act, the previous prongs (2) through (5) have been struck and new paragraphs were inserted at (2) through (4).

[75] *Id.* § 9133(a).

[76] *Id.* § 9122(5).

[77] *See id.* § 9141(a) (listing ways in which funds can be used). Other than the fact that the money must be spent on technology and electronic networks, the primary constraint is that no more than four percent of the federal grant be spent on administrative costs. *Id.* § 9132(a).

[78] *Id.* § 9133(b).

[79] *Id.* § 9133(c)(2).

2. *Children's Internet Protection Act*

CIPA was passed in 2001,[80] five years after the Telecommunications Act and the LSTA, and it imposes conditions both on discounts under the E-rate program and on LSTA grants under the Grants to States program.[81] After the CDA and COPA, CIPA was the third in the federal government's attempts to regulate sexually explicit material on the Internet. While its name suggests that it was aimed at protecting children,[82] a review of its operation clearly indicates a broader purpose. Moreover, Congress was clear that it was using the power of its purse to enlist local authorities in its goal.[83]

a. *Section 1721(b) of CIPA: Amendments to the E-rate Program*

Section 1721(b) of CIPA requires libraries enjoying E-rate discounts to install filters on all computers with Internet access. More precisely, CIPA requires all libraries who want the E-rate discounts to make two certifications. First, "with respect to minors," the library must certify that it has and is enforcing "a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are (I) obscene; (II) child pornography; or (III) harmful to minors."[84] Second, it must certify that it has, and is enforcing a broader Internet safety policy for *all* patrons (whether children or adults) "that in-

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[80] Like most federal legislation, there was a whole host of bills in earlier Congresses. Some of those bills are listed in Yochai Benkler, *Net Regulation: Taking Stock and Looking Forward*, 71 U. COLO. L. REV. 1203, 1250 n.213 (2000). I discuss some of the legislative background below. *See infra* Part II.B.2.c (discussing concerns raised during CIPA's consideration).

[81] *See* Children's Internet Protection Act (CIPA), Pub. L. No. 106-554, § 1721(b), 114 Stat. 2763, 2763A-335 to 2763A-352 (2000) (amending 47 U.S.C. § 254(h)) (E-Rate Program); *id.* § 1712 (amending 20 U.S.C. § 9134) (LSTA grants). In addition, CIPA conditions funding to elementary and secondary schools under both the Elementary and Secondary Education Act of 1965 and the E-rate program. *See id.* § 1711 (enacting 20 U.S.C. § 3601); *id.* § 1721(a) (amending § 254(h)). I do not directly discuss the aspect of CIPA that applies to funding of elementary and secondary schools because its constitutionality was not challenged.

[82] *See* S. REP. NO. 106-141, at 7 (describing CIPA as enacted to further the "compelling interest of the government in protecting children from exposure to sexually explicit material"); *see also id.* at 3 (noting that the "Internet presents a unique threat to normal sexual development in children by playing upon common elements that contribute generally to antisocial behavior in children").

[83] *See id.* ("[B]y accepting Federal dollars through the Universal Service fund, [a library] becomes a partner with the Federal government in pursuing [the] compelling interest [of protecting children from harm caused by exposure to easily accessible sexually explicit materials on the Internet].")

[84] CIPA, § 1721(b) (codified at 47 U.S.C. § 254(h)(6)(B)). Strictly speaking, a "technology protection measure" is not necessarily a filter. Other measures may, arguably, satisfy the statutory definition of a "technology protection measure." Nonetheless, I will use the terms synonymously for convenience.

cludes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are—(I) obscene; or (II) child pornography."[85] In effect, if a library has computer terminals used only by adults, the required filters need only block visual depictions that are obscene or child pornography. All other terminals must have filters that also block visual depictions that are "harmful to minors."

CIPA does permit libraries to override the filters: "[a]n administrator, supervisor, or other person authorized by the certifying authority . . . may disable the technology protection measure concerned, during use by an adult, to enable access for bona fide research or other lawful purpose."[86] This aspect of CIPA, referred to as the Disabling Provision, was central to the government's defense of the statute. The phrase "technology protection measure" is defined as "a specific technology that blocks or filters access to visual depictions that are—(A) obscene . . . ; (B) child pornography . . . ; or (C) harmful to minors."[87]

Notwithstanding its clear tying of the E-rate funds to the use of filters, CIPA specifically prohibits federal interference in local determinations "regarding what matter is appropriate for minors."[88]

b. *Section 1712 of CIPA—Amendments to LSTA Programs*

Section 1712 of CIPA does for the LSTA programs what section 1721(b) does for the E-rate discounts, limiting grants to states funding to libraries that certify that they have and are enforcing "Internet safety" policies similar to those required for E-rate discounts.[89]

c. *Federalism Concerns Raised During CIPA's Consideration*

A federal law that affected the daily lives of thousands of local government entities was bound to raise federalism issues—or, at least, the local control issue at the heart of many of the underlying ration-

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[85] 47 U.S.C. § 254(h)(6)(C).

[86] *Id.* § 254(h)(6)(D).

[87] *Id.* § 1703(b) (codified at 20 U.S.C. § 9134(f)(1) (2003)).

[88] *Id.* § 1732 (codified at 47 U.S.C. § 254(l)(2)).

[89] *Id.* § 1712 (amending 20 U.S.C. § 9134, adding 20 U.S.C. § 9134(f)). One distinction between the two, possibly the result of a drafting error, was that the disabling provision for the E-rate program permits disabling of the filters only for adults, whereas the disabling provision for the LSTA programs allows disabling for anyone, thus presumably for minors as well. *Compare* 20 U.S.C. § 9134(f)(3) (disabling provision for E-Rate Program), *with* 47 U.S.C. § 254(h)(6)(D) (disabling provision for LSTA program).

ales for the principles of federalism.[90] And, indeed, it did. Opponents of the law drew on the local control argument as a rhetorical matter, and supporters clearly understood the possible problems and tried to do something about them.

Congressional proponents of the legislation were themselves clearly aware of the prickly issue of local control. Indeed, right from the very beginning, proponents in Congress recognized that a federal filtering law had implications for decision making by local libraries and sought to mollify any such concerns. When Senator McCain (R-Ariz.) introduced the first version of what became CIPA (then known as the Internet School Filtering Act) in 1998, the bill explicitly stated that only the local authority (i.e., "school, school board, library" or other certifying authority) would determine what matter is "inappropriate for minors" and explicitly prohibited any "agency or instrumentality of the United States Government" from (1) "establish[ing] criteria for making such determination"; (2) "review[ing] the determination made by [the local entity]"; or (3) "consider[ing] the criteria employed by [the local entity]."[91] This language is identical to that found in the final legislation.[92]

In public comments, legislative supporters of the McCain bill emphasized this aspect of it and went even further in calling it legislation that would facilitate local control. For example, Internet School Filtering Act cosponsor Senator Patty Murray (D-Wash.) noted that "[t]he filtering device is a local control device. The school district—the schools—will determine which filtering device and how to use it at their own school. The same with the libraries."[93] A week later,

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[90] I discuss the rationales of federalism and the relationship between federalism and localism, *infra*, in Part III.

[91] Internet School Filtering Act, S. 1619, 105th Cong. (1998). *See* 144 CONG. REC. S519 (1998) (debating and discussing the Act); *see also* S. REP. NO. 105-226, at 7 (1998) ("S. 1619 places the determination of what material is inappropriate for minors in the hands of the local school or library authorities, which are best equipped to make that determination based on their knowledge of the local community and their traditional role of acting in loco parentis."). A number of different bills were introduced and debated in both Houses of Congress throughout the 105th and 106th Congresses. With the exception of a few of the House bills, nearly all bills had some form of this language.

[92] *See* CIPA, § 1732 (amending 47 U.S.C. § 254). When promulgating the implementing regulations, the FCC clearly understood its role in this regard. In *In re Federal-State Joint Board on Universal Service*, 16 F.C.C.R. 8182 (2001), the FCC stated:

> We decline to promulgate rules mandating how entities should implement [the Disabling Provisions]. Federally-imposed rules directing school and library staff when to disable technology protection measures would likely be overbroad and imprecise, potentially chilling speech, or otherwise confusing schools and libraries about the requirements of the statute. We leave such determinations to the local communities, whom we believe to be most knowledgeable about the varying circumstances of schools or libraries within those communities.

Id. at 8204.

[93] 144 CONG. REC. S8162 (daily ed. July 15, 1998).

when the bill was reintroduced as an amendment to an appropriations bill, Senator Murray again emphasized local control: "What is great about our bill is that it gives power to local school districts and libraries to determine which filtering device to use and what constitutes inappropriate material. Decisions must remain at the local level with those who best know their students."[94] Vice President Gore likewise emphasized local control in his statement supporting the McCain bill.[95]

Even Bruce Taylor, a well-known antipornography advocate,[96] talked of the McCain bill as an "act of 'federal partnership'" that "leaves the determination of what constitutes material deemed 'harmful to minors' exclusively to the States to decide and seeks to severely limit federal review of state decisions in this regard."[97] In fact, Taylor even went further in promoting local control by arguing that the bill should have been amended to "preserve exclusive state court adjudication of all matters connected to the determination of what constitutes material 'harmful to minors' or 'inappropriate for

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[94] *Id.* at S8611 (daily ed. July 21, 1998); *see also id.* at S8612 (noting that the bill "allows local school districts to make important decisions about Internet content"). Indeed, when Senator McCain initially introduced the first version of the bill in the 105th Congress, he noted that "the bill prohibits the federal government from prescribing any particular filtering system . . . . It thus places the prerogative for determining which filtering system best reflects the community standards precisely where it should be: on the community itself." *Id.* at S519 (Feb. 9, 1998); *see also S. Comm. on Commerce, Sci., and Transp.: Full Committee Hearing on Internet Indecency*, 105th Cong. 910 (1998) (Statement of Sen. McCain, Chairman) (same), *available at* http://commerce.senate.gov/hearings/210mcc.htm; 145 CONG. REC. S531 (daily ed. Jan. 19, 1999) (same comments after introduction of CIPA in 106th Congress).

[95] *See* Statement of Al Gore, Safe Schools Internet Act (Mar. 23, 1998), *at* http://www.techlawjournal.com/censor/80324blo.htm. Gore said:

> This legislation is not a "one-size-fits-all-approach" that mandates government values in our schools. Instead, our plan will empower schools to make decisions based on local values . . . . We must bring the combined power of parents, teachers, and technology together if we are going to protect our students in a way that will work in every community and reflect the values of each community.

Id. As I note below, President Clinton ultimately opposed CIPA. *See infra* text accompanying note 117 (noting Clinton's opposition to CIPA, even though he signed the bill for other reasons).

[96] Taylor was head of the National Law Center for Children and Families at the time and is currently serving as special counsel to Attorney General Ashcroft for obscenity prosecutions.

[97] *NLC Comments on S. 97: The Children's Internet Protection Act: Hearing on S. 97 Before the S. Comm. on Commerce, Sci. and Transp.*, 106th Cong. 8–10 (1999) (statement of Bruce A. Taylor, President and Chief Counsel, The National Law Center for Children and Families) [hereinafter Taylor], *available at* http://commerce.senate.gov/hearings/0304tay.pdf. Taylor also noted:

> The Bill does not seek to create a 'federal definition' of proscribed matter, but is directed at supporting decisions under state law, which come within permissible federal Constitutional parameters for school and library administrators. The choice of 'technology' is to be implemented as a state administrative decision, through an interpretation by state officials, who have been vested under state law with regulatory decision making power over the respective schools or libraries affected by this funding program, as part of the normal course of their official duties.

Id. at 10–11.

minors,' . . . . and of clearly removing subject matter jurisdiction from the lower federal courts over the same issues."[98]

Nor were these comments about local control limited to the nicely scrubbed Congressional Record and prepared statements. Senator McCain was even quoted in *The New York Times* emphasizing this fact: what to block, he said, "is only up to the school board and the library board . . . . It's not up to anybody else."[99] Likewise, an aide to Representative Ernest Istook (R-Okla.), a proponent of CIPA, was quoted in *The New York Times* as saying that the law was "designed for local determination of content."[100]

Opponents of the bill also understood the local control implications of the law and sought to use them to oppose the bill. So, for example, several national education groups voiced concerns about the bills on the basis that they subverted local control.[101] Likewise, the ACLU, which represented some of the challengers to the law, raised similar concerns, even though, as I discuss in great detail below,[102] their legal arguments in court virtually ignored those concerns. Immediately after Congress adopted CIPA, Chris Hansen, a Senior Staff Attorney at the ACLU and attorney of record for the Multnomah County Public Library,[103] one of the lead plaintiffs in the constitutional challenge to CIPA, was quoted as saying, "[t]his is the first time since the development of the local, free public library in the 19th century that the federal government has sought to require censorship

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[98] *Id.* at 12–14.

[99] John Schwartz, *Support is Growing in Congress for Internet Filters in Schools*, N.Y. TIMES, Oct. 20, 2000, at A28 (quoting Senator McCain).

[100] Rebecca S. Weiner, *Federal Meddling or Local Empowerment? Congress and Educators Disagree*, N.Y. TIMES, Aug. 2, 2000, *at* http://www.nytimes.com/library/tech/00/08/cyber/education/02education.html.

[101] *See, e.g., id.* (quoting Dan Fuller, Director of Federal Programs for the National School Boards Association, as saying, "Many schools have already developed policies. This is members of Congress dictating local policy."); *see also Internet Filtering in Schools and Libraries: Hearing on S. 97 Before the S. Comm. on Commerce, Sci., and Transp.*, 106th Cong. (1999) (statement of the National Education Association) ("The NEA is very concerned that S. 97 represents a serious encroachment on local decision making prerogatives. The NEA maintains that it is the school district and not the federal government that is best positioned to decide whether or not to filter."). Senator Leahy quoted the National Association of Independent Schools as stating:

> [I]t is an individual school's decision to determine how best to address this issue in a way that is commensurate with its mission and philosophy . . . . It is certainly not the role of the federal government to proscribe a course of action that interferes with what is decidedly a local matter.

146 CONG. REC. S5844 (daily ed. Jun. 27, 2000).

[102] *See infra* Part I.C (describing and discussing the challenge to CIPA).

[103] *See* Brief of Appellees Multnomah County Public Library, et al., *ALA II*, 539 U.S. 194 (2003) (No. 02-361), *available at* 2003 WL 367640 (listing Chris Hanson as attorney of record).

in every single town and hamlet in America . . . . More than 100 years of local control of libraries . . . is being casually set aside."[104]

The American Library Association ("ALA"), another plaintiff in the case and a steadfast opponent of filters in public libraries,[105] also drew on the local control argument. Interestingly enough, at one point early in the process, one ALA representative went so far on the local control theme as to say that different libraries could respond to the issue in different ways, effectively acknowledging the propriety of a local library choosing to install filters.[106] The ALA's later actions, however, clearly—and understandably—belied its emphasis on local autonomy.

Another librarian, Candace Morgan, speaking on behalf only of her own local library system, gave congressional testimony that perhaps best speaks to the issue. She made clear that she did not oppose filters—her library system was in fact on the verge of installing filters on their Internet terminals—but that she nonetheless opposed CIPA's filtering requirement:

> In my experience, the role of the community in helping to inform and shape a solution is critical. My concern with the proposed legislation is that, while it permits some discretion to local officials to determine what material is "deemed to be harmful to minors" and what software to use to block that content, it denies local communities the opportunity to determine what approach will best serve children in these communities in dealing with challenging content. It is not just that one solution doesn't fit all communities. It is also that a federal mandate on a matter so closely tied to local norms and values is, in my view, counterproductive and even harmful. The legislation may not only discourage communities

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[104] *See* Press Release, American Civil Liberties Union, ACLU Promises Legal Challenge as Congress Adopts Bill Imposing Internet Blocking in Libraries (Dec. 18, 2000), *available at* http://archive.aclu.org/news/2000/n121800a.html.

[105] *See generally* Statement by the American Library Association Intellectual Freedom Committee on Library Use of Filtering Software (July 1, 1997, rev. Nov. 17, 2000), *at* http://www.ala.org/alaorg/oif/filt_stm.html (opposing filtering software as unconstitutional); Resolution of the American Library Association on the Use of Filtering Software in Libraries (July 2, 1997), *available at* http://www.ala.org/ala/oif/statementspols/ifresolutions/filteringresolution.pdf (resolving that "the use of filtering software to block access to constitutionally protected speech violates the *Library Bill of Rights*").

[106] *See Inappropriate Materials on the Internet: Hearing on Legislative Proposals to Protect Children from Inappropriate Materials on the Internet Before the House Subcomm. on Telecomm., Trade, and Consumer Protection,* 105th Cong. (1998) (testimony of Agnes M. Griffen, Dir. of the Tucson-Pima Public Library, on behalf of the ALA), *available at* 1998 WL 18088393. Griffen testified:

> Notwithstanding many librarians' concerns about the use of filters, some libraries have made the judgment to install blocking or filtering software . . . . Each community in its own way[] has to address these complex issues in conjunction with local library boards, with library users, with local government officials, as well as with the general community. This process of developing local use policies is in and of itself[] an important educational process for a community to conduct . . . . Congress should not interfere with local community decision making by mandating a single approach to a multifaceted problem.

Id.

> from doing the hard work to reach their own solutions; it also lacks the legitimacy necessary to foster broad community support.
>
> While no one approach to Internet safety will satisfy everyone in the community, I believe it is possible to work with the community to fashion a "bottom up" approach that respects community values, addresses core concerns and provides useful solutions. Not surprisingly, local decision-making processes vary significantly and the solutions are extremely diverse. But what they have in common is involvement of the community, understanding of local norms and values, knowledge of practices that take into account the information needs of children and teens, and a general good faith desire to find a solution that respects the diverse perspectives in the community.[107]

Opponents in Congress likewise sounded the theme of local control. During discussion of the Internet School Filtering Act on the Senate floor, Senator Patrick Leahy (D-Vt.) stated that "Internet filtering issues should be discussed and implemented locally, not nationally."[108] After noting that "[t]he intention of the amendment is good," Senator Leahy claimed that "[t]he primary problem with this amendment is that it usurps local authority on whether to use filtering technologies."[109] He went on to say that he "would support efforts to address these issues that allow more flexibility at the local level."[110] Senator Burns (R-Mont.) made similar comments.[111]

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[107] *The Children's Internet Protection Act: Hearing on S. 97 Before the S. Comm. on Commerce, Sci., and Transp.*, 106th Cong. (1999) (testimony of Candace Morgan, Assoc. Dir., Ft. Vancouver Regional Library) [hereinafter Morgan Testimony], *available at* http://commerce.senate.gov/hearings/0304mor.pdf.

[108] 144 CONG. REC. S8612 (daily ed. July 21, 1998); *see also* 146 CONG. REC. S5865 (daily ed. June 27, 2000) (documenting Senator Leahy's "serious concerns with the McCain proposal to require schools and libraries to send certifications to the FCC about their installation of certain blocking software and the risk that the FCC will become a national censorship office, with the responsibility of . . . policing local enforcement of the Internet access policy").

[109] 144 CONG. REC. S8613. Senator Leahy further elaborated:

> Wresting control of educational and informational access from the local communities that are best equipped to make these decisions is not going to solve the problem of inappropriate material on the Internet . . . . Local school boards, administrators, and librarians more familiar with their own systems and culture are the proper people to decide how best to implement any programs restricting access to information.

Id.

[110] *Id.*

[111] *Id.* at S8614 (noting his "serious reservations about the federal government mandating the use of specific technologies to solve the problem of schoolchildren's access to inappropriate material on the Internet" and stating that "school boards are much more effective in making decisions about appropriate policy or technology when dealing with Internet access for students than Washington"). Senator Burns concluded:

> I remain steadfastly opposed to big government mandates on the filtering issue . . . . I continue to believe that local communities acting through their school and library boards, rather than . . . the federal government, are in the best position to make decisions on this critical issue.

Id.

In contrast to groups like the ACLU and ALA, however, congressional opponents rarely opposed the McCain bill explicitly.[112] Rather, they sought to introduce amendments aimed at the same problem, but ones that did not impose a filtering requirement. Some of these substitute amendments afforded local decision makers greater flexibility, and this fact was of significant importance during debate about the various proposals. Senator Santorum (R-Pa.), for example, introduced legislation that would have given schools and libraries the option of either installing filters or developing an Internet use policy with community involvement.[113] He made clear that he viewed his amendment as premised on

> a philosophical argument [that] says: Should we have Washington come down and hammer you and say here is what you have to do, or should we have a program that says: Here is the problem. *Local parents and teachers and community, you go out and bring the community together and do the hard work of democracy*, which is to work together to come up with a solution to the problem.[114]

It is not hard to see echoes of librarian Candace Morgan's point that a uniform federal filtering requirement "discourages communities from doing the hard work to reach their own solutions" and "lacks the legitimacy necessary to foster broad community support,"[115] and,

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[112] Indeed, the Senate passed CIPA by a vote of 95 to 3.

[113] 146 CONG. REC. S3266 (daily ed. May 2, 2000) (proposed amendment); *id.* at S5842-43 (daily ed. June 27, 2000) (proposed amendment). Santorum's bill was called the "Neighborhood Children's Internet Protection Act," presumably to distinguish it from the McCain proposal on the basis of its emphasis on "neighborhoods." *See* S. 1545, 106th Cong. (1999) (Santorum's bill); *see also* 145 CONG. REC. S10390 (daily ed. Aug. 5, 1999) (statement of Senator Santorum introducing S. 1545 in Congress). When CIPA became law, so too did a version of the Neighborhood CIPA. However, the version of Neighborhood CIPA that became law simply required an Internet use policy rather than giving schools and libraries the option of creating such a policy in lieu of filtering. *See* 47 U.S.C. § 254(l) (2002).

Senator Burns (R-Mont.) considered introducing an amendment during the 105th Congress that would have required only an Internet use policy but not filters. *See* CENTER FOR DEMOCRACY & TECHNOLOGY, AMENDMENT TO S. 1619 INTENDED TO BE PROPOSED BY MR. BURNS, *at* http://www.cdt.org/speech/burns.html (last visited Aug. 25, 2004). As noted above, Senator Burns had also expressed concerns about federal intrusion into local decision making. *See supra* note 111 (quoting Senator Burns's comments on CIPA).

[114] 146 CONG. REC. S5843 (emphasis added).

[115] *See supra* text accompanying note 107 (quoting Candace Morgan's congressional testimony opposing CIPA's filtering requirement). The debate between Senators McCain and Santorum that followed the introduction of the Santorum amendment revolved primarily around the local control issue. *Compare, e.g.*, 146 CONG. REC. S5867 (daily ed. June 27, 2000) (statement of Sen. McCain "describ[ing] what [his] bill does as far as local control is concerned" and noting that "local authorities are given complete authority" and that "the Federal Government is expressly prohibited from interfering in the process of local control"), *with id.* at S5868 (statement of Sen. Santorum that "we have an honest philosophical disagreement on whether we should have a one-size-fits-all Federal mandate that you have to buy filtering software").

indeed, the American Library Association supported the Santorum Amendment.[116]

Finally, even when President Clinton signed the bill, he expressed his opposition, drawing on the local control theme. Although he did not veto CIPA because it was part of an omnibus spending bill with hundreds of other provisions, President Clinton clearly agreed to CIPA reluctantly. His statement upon signing the bill explicitly stated that he was "disappointed" with CIPA and emphasized that he was "a strong supporter of locally driven efforts" to combat the problem of protecting children from inappropriate material online: "I believe that local development and implementation of an Internet-acceptable use plan is a more effective, appropriate solution than mandatory filtering for ensuring comprehensive protection while meeting the diverse needs of local schools and libraries."[117]

I do not mean to overstate the impact of the local control issue on the actual support for, or opposition to, the legislation. Indeed, I suspect the issue was used by many (but certainly not all) of the participants largely for rhetorical purposes. On the one hand, surely Senator Murray did not really believe that the legislation was *increasing* local choice when the whole point of the law was to add a condition to money that localities had already been receiving without that condition. At some level, it seems likely that Senator Murray understood this, but simply felt that, by framing the law in a way that emphasized what it was not—a single national rule specifying content in all public libraries—she could mute criticism that the law was a federal interference with local decision making.

On the other hand, many opponents were likely doing the same. The ALA and ACLU had been so vociferous in their opposition to filters in public libraries on First Amendment grounds[118]—notwithstanding the ACLU's arguments in *Reno v. ACLU*[119] and

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[116] *See* 146 CONG. REC. S5843 (daily ed. June 27, 2000) (statement of Sen. Santorum) (noting the endorsement of the ALA). An amendment to the McCain bill, introduced by Senators Leahy (D-Vt.) and Hatch (R-Utah), was likewise defended as preferable to the original McCain bill partly on the grounds that it "leaves the solution on how best to protect children from inappropriate online materials accessible on computers in schools and libraries to the local school boards and communities." 146 CONG. REC. S5865 (daily ed. June 27, 2000) (statement of Sen. Leahy). Yet, the amendment was a proposal to require Internet service providers to provide their customers with filtering software and, thus, had literally nothing to do with computers in schools and libraries (though, of course, by the fact that it did nothing with respect to the issue, the amendment did in fact "leave[] the solution . . . to the local school boards and communities"). *Id. See generally id.* at S5865–66 (discussing the benefits of the Hatch-Leahy amendment).

[117] President's Statement on Signing the Consolidated Appropriations Act, FY 2001, 36 WEEKLY COMP. PRES. DOC. 3167, 3171–72 (Dec. 21, 2000).

[118] *See supra* note 105 (citing statements by the ALA and the ACLU opposing filters on First Amendment grounds).

[119] 521 U.S. 844 (1997).

Ashcroft v. ACLU[120] that filters (in the home, at least) were a less restrictive alternative to protecting minors from sexually explicit content than the criminal prohibitions in the CDA and COPA—that it is hard to imagine either group seriously believing their own rhetoric about local control.[121]

Here, I do not mean to imply bad faith on their part, but it is important to understand the role of groups such as the ALA, a national organization, in the broader debate about filters in public libraries. The *national* ALA (and its Office of Intellectual Freedom) clearly opposed filters on the grounds that they constitute a form of censorship and thus contradict fundamental principles of intellectual freedom, principles that are part of the librarians' professional responsibilities.[122] And, yet, there is an intense debate within the community of librarians about the role of Internet filters, with many librarians (including members of the ALA) fervently opposing the ALA's stance.[123] Thus, while it is clear that the ALA opposed CIPA, the passage of CIPA did give the ALA an opportunity to challenge a single law on First Amendment grounds in a way that could have, had the ALA prevailed in the case, amounted to imposing the ALA's view of filters on dissenting local librarians who otherwise wanted to filter. In effect, then, the ALA's opposition to local libraries that want to filter on their own belies their reliance on the local-control argument.

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[120] 124 S. Ct. 2783 (2004).

[121] *But cf. supra* note 106 and accompanying text (noting an ALA representative's local control argument and quoting her testimony before a House subcommittee). In addition, it is worth noting that one state, Texas, even filed an amicus brief in *ALA II* urging the Supreme Court to reverse the district court's decision to strike the statute down on First Amendment grounds, but specifically "tak[ing] no position on Congress's ability, through its spending power, to command the use of Internet filters in public libraries or require their use by State or local governmental entities." Brief of State of Texas as Amicus Curiae at 2, *ALA II*, 539 U.S. 194 (2003) (No. 02-361), *available at* 2002 WL 32157243.

[122] *See* Statement of the ALA Intellectual Freedom Committee on Library Use of Filtering Software (July 1, 1997, rev. Nov. 17, 2000) (opposing filters on public library computers), *at* http://www.ala.org/alaorg/oif/filt_stm.html; *see also* Resolution of the American Library Association on the Use of Filtering Software in Libraries (July 2, 1997) (resolving that filters on public library computers violate the Library Bill of Rights), *available at* http://www.ala.org/ala/oif/statementspols/ifresolutions/filteringresolution.pdf.

[123] *See, e.g., E-Rate and Filtering: A Review of the Children's Internet Protection Act: Hearing Before the House Subcomm. on Telecom. and the Internet, Comm. on Energy and Commerce*, 107th Cong. (2001) (testimony of Laura Morgan, Librarian, Chicago Public Library) (arguing in favor of filtering), *available at* http://energycommerce.house.gov/107/hearings/04042001Hearing155/Morgan252.htm; Joyce Howard Price, *Librarians Win EEOC Protection from Pornography*, WASH. TIMES, May 26, 2001, at A2 (describing a case in which the EEOC found that a failure to install filters, among other things, contributed to a hostile workplace environment for librarians); *see also, e.g., infra* note 294 (quoting a public librarian in Virginia who both supports use of filters and opposes CIPA for local control reasons); *cf.* Kim Houghton, Note, *Internet Pornography in the Library: Can the Public Library Employer Be Liable for Third-Party Sexual Harassment When a Client Displays Internet Pornography to Staff?*, 65 BROOK. L. REV. 827 (1999) (discussing the possibility of library liability based on staff exposure to sexual Internet content).

C. American Library Association v. United States[124]

As with the CDA and COPA, a broad array of parties brought suit in the Eastern District of Pennsylvania seeking to enjoin implementation of CIPA soon after its passage. The list of plaintiffs included the ALA (a national organization of librarians, libraries, and others "interested in libraries and librarianship"); several of the ALA's state and regional chapters; the South Central Library System of Wisconsin (an organization whose membership consists solely of public libraries themselves); the Multnomah County (Oregon) Public Library (as its name implies, an actual library and department of Multnomah County, Oregon, and thus an arm of local government, making it ultimately a creature of the State of Oregon); patrons of public libraries, both adults and minors; as well as a number of online content providers whose sites had been blocked by filters.[125]

I list these plaintiffs partly to aid in understanding the variety of different parties involved in the case but also to point out that the plaintiffs included both governmental and non-governmental actors, at the local, state, and national levels. As I will discuss in greater detail below, the nature of the different plaintiffs sheds some light not only on the types of claims the plaintiffs brought, but also on the nature of the law itself. For now, it is worth emphasizing what may be obvious, that local government entities were among the plaintiffs suing the federal government.

The plaintiffs made two separate arguments: first, that CIPA violated the First Amendment; and, second, that it violated the unconstitutional conditions doctrine.[126] The Complaints made no reference to the Tenth Amendment or principles of state sovereignty, notwithstanding the fact that the law conditioned funds from the federal government to state government entities.[127] The United States' defense of the statute, in contrast, initially sought to treat the law as a straightforward exercise of the federal spending power and to argue

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[124] 201 F. Supp. 2d 401 (E.D. Pa. 2002) ("*ALA I*"), *rev'd*, 539 U.S. 194 (2003) ("*ALA II*").

[125] *See ALA I*, 201 F. Supp. 2d at 414–16. This last group encompassed both those that provide sexually explicit content and some that did not, including a Republican candidate for Congress who had advocated in favor of filters but whose web site was blocked by filters.

[126] *See* Complaint for Declaratory and Injunctive Relief, *ALA I* (No. 01-CV-1303); *see also* Multnomah County Public Library's Complaint for Declaratory and Injunctive Relief, *ALA I* (No. 01-CV-1322). The complaints also referenced the Fifth Amendment's Due Process Clause because of allegations that the law was vague and granted librarians too much discretion. These claims, however, were tied directly to the First Amendment claims.

[127] *See* sources cited *supra* note 126.

that it should be upheld under the broad latitude that Congress has to attach conditions to its spending.[128]

It turns out, though, that doctrinally the defendants' claim that the law was a simple exercise of the spending power devolved into a pure First Amendment question. Under *South Dakota v. Dole*,[129] conditional federal funding to states is subject to four limitations, one of which is known as the "independent constitutional bar" rule.[130] Under this rule, Congress may not grant funds to states on the condition that "the recipient 'engage in activities that would themselves be unconstitutional.'"[131] Because the relevant recipients of CIPA funding are the public libraries, the spending power question then becomes "whether libraries would violate the First Amendment by employing the filtering software that CIPA requires."[132] If the answer to that question is "yes," CIPA would be an unconstitutional exercise of the spending power, whereas if the answer is "no," it would be upheld. This was thus the first question the courts needed to answer.

I turn then to this question, after which I discuss the plaintiffs' second argument, that CIPA violated the unconstitutional conditions doctrine.

1. *First Amendment Analysis*

A three-judge district court panel granted judgment for the plaintiffs, declaring CIPA unconstitutional and enjoining the federal government from enforcing its conditions on recipients of LSTA funds and E-rate discounts. The district court spent the bulk of its opinion analyzing the question of whether public libraries violate the First Amendment by installing filters on their Internet access. While the court went into far more detail about both the nature of the filtering technology and the First Amendment doctrine, the court's analysis closely parallels that of the court in *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*.[133]

The federal government argued, as had the library defendant in *Mainstream Loudoun*, that a public library's decision to install filters should be treated precisely like its decision to choose books for its

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[128] *See* Defendant's Memorandum of Law in Support of Their Motion to Dismiss Plaintiff's Complaints at 15–34, *ALA I* (No. 01-CV-1303) (arguing that the statute should be upheld under the federal spending power, as the spending power should be broadly construed).

[129] 483 U.S. 203 (1987).

[130] I describe the *Dole* test in greater detail below. *See infra* Part IV.B.

[131] *ALA II*, 539 U.S. 194, 203 (2003) (quoting *Dole*, 483 U.S. at 210 (1987)).

[132] *Id.*

[133] 24 F. Supp. 2d 552 (E.D. Va. 1998). See *supra* Part II.A (describing *Mainstream Loudoun* and commentary on the case).

print collection.[134] As in *Mainstream Loudoun*, the district court rejected this argument, concluding instead that the installing of filters constituted an *exclusion* of particular speech rather than an affirmative selection decision, and in particular, a selective exclusion from the Internet, which the Supreme Court in *Reno v. ACLU* had referred to as a "vast democratic forum."[135] When choosing books for a library's collection, the *ALA I* court said, the library's collection development staff make editorial judgments by

> evaluat[ing] the book's quality by reference to a variety of criteria such as its accuracy, the title's niche in relation to the rest of the collection, the authority of the author, the publisher, the work's presentation, and how it compares with other material available in the same genre or on the same subject.[136]

In contrast, offering Internet access, whether filtered or not, involves the providing of a vast amount of content, "almost none of which either the library's collection development staff or even the filtering companies have ever reviewed."[137]

The district court concluded that a library providing public Internet access creates a public forum, and a decision to filter would thus be subject to strict scrutiny.[138] The court's focus was the "narrow tailoring" prong of the strict scrutiny test. Determining that all available filters blocked far more than constitutionally proscribable speech, the court concluded that this overblocking meant "that any public library's use of a filtering product mandated by CIPA will necessarily fail to be narrowly tailored to address the library's legitimate interests."[139] Finally, the court rejected the argument that the Disabling Provisions cured the statute's constitutional defect.[140]

In sum, the court concluded that CIPA was unconstitutional under the "independent constitutional bar" rule because any library that installed filters would violate the First Amendment. The key here is not in the details of the various prongs of the strict scrutiny test, but

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[134] *See ALA I*, 201 F. Supp. 2d at 457. The court described the government's argument:

> [T]he government forcefully argues that a public library's decision to limit the content of its digital offerings on the Internet should be subject to no stricter scrutiny than its decisions about what content to make available to its patrons through the library's print collection. According to the [United States], just as a public library may choose to acquire books about gardening but not golf, without having to show that this content-based restriction on patrons' access to speech [satisfies strict scrutiny], so may a public library make content-based decisions about which speech to make available on the Internet, without having to show that such a restriction satisfies strict scrutiny.

Id.

[135] 521 U.S. 844, 868 (1997).

[136] 201 F. Supp. 2d at 463.

[137] *Id.* at 464.

[138] *Id.* at 470–71 (discussing the application of strict scrutiny).

[139] *Id.* at 479.

[140] *Id.* at 484–89 (explaining why disabling provisions do not cure the defect).

rather in the overall methodology, which was to go through a doctrinal First Amendment analysis, step by step, treating the question as one about the relationship between the library, as a governmental entity, and the public (both the web site owners whose sites were blocked and the patrons whose access to those sites would be chilled). The result was a tightly reasoned and, indeed, logically unassailable opinion that read like a straightforward application of the public forum jurisprudence. Yet, the result is clearly lacking in one important respect: the court was asked to decide the constitutionality of a federal statute that conditioned funds to public libraries, but its analysis resulted in a legal decision that not only invalidated the federal statute, but also amounted to a holding that the use of filters on Internet terminals in every public library in the country—including those not receiving federal money—was unconstitutional. This is a startling result for a case challenging the exercise of the federal spending power, notwithstanding the unassailable logic of the court's reasoning. I return to this point in further detail below.[141]

The Supreme Court reversed the district court's judgment and vacated the injunction.[142] There were five opinions. Chief Justice Rehnquist announced the judgment and wrote an opinion for a four-Justice plurality (Justices O'Connor, Scalia, and Thomas in addition to himself). Justices Kennedy and Breyer wrote separate opinions, each concurring in the judgment, and Justices Stevens and Souter wrote separate dissents, with Justice Ginsburg joining Justice Souter.[143] I begin with the plurality opinion and Justice Souter's dissent, as these two framed the question as the district court did: under *Dole*'s "independent constitutional bar" rule, does a public library violate the First Amendment by placing filters on its Internet access?

For the plurality, the answer was easy. Rejecting the argument that library Internet access is a public forum, the plurality agreed with the United States' argument that a library that provides Internet access is simply making a "collection decision." According to the plurality, "[p]ublic library staffs necessarily consider content in making collection decisions and enjoy broad discretion in making them."[144] Such decisions are part of "a public library's exercise of judgment in selecting the material it provides to its patrons"[145] and are thus not subject to the heightened scrutiny applied to restrictions on public fora. Rather, the plurality concluded, content decisions are part of

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[141] *See infra* text following note 440 (discussing the odd pairing of a spending power case with the "independent constitutional bar" rule).

[142] *ALA II*, 539 U.S. 194 (2003).

[143] *Id.*

[144] *Id.* at 204.

[145] *Id.* at 205.

the library's "mission[] of facilitating learning and cultural enrichment."[146] Once the plurality decided that offering Internet access constituted a collection decision rather than a restraint on private speech in a public forum, it concluded that substantial deference must be given to a library to make such decisions even though they are obviously content based.

For Justice Souter, the question was the same, though the answer was different.[147] Though he did not explicitly apply the public forum doctrine, he nevertheless concluded that the decision of a public library to install filters should be subject to "conventional strict scrutiny."[148] In particular, Justice Souter rejected the plurality's claim that blocking material on the Internet should be treated as analogous to a collection decision, calling such filtering "censorship."[149] According to Justice Souter, "The proper analogy . . . is not to passing up a book that might have been bought; it is either to buying a book and then keeping it from adults lacking an acceptable 'purpose,' or to buying an encyclopedia and then cutting out pages with anything thought to be unsuitable for all adults."[150] In short, Justice Souter treated a filtering or blocking decision as a removal decision, rather than as a collection decision, and thereby concluded that a library that installs filters violates the First Amendment.

Much can be said about the attempt to analogize filters on library Internet terminals to either a collection decision or, as Justice Souter put it, to "cutting pages out of an encyclopedia."[151] Much has been said and much more, no doubt, will be.[152] I am not interested here in probing the merits of the analogy, however. Rather, I wish to emphasize that, like the district court, both the plurality and Justice Souter took the "independent constitutional bar" rule as their starting point and, thus, treated the constitutionality of CIPA as wholly unconnected to the fact that the law being challenged was a federal law. In both opinions, the constitutionality of the statute depended solely on the role played by the local public library.

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[146] *Id.* at 195.

[147] *Id.* at 231–43 (Souter, J., dissenting).

[148] *Id.* at 242.

[149] *Id.* at 235, 241.

[150] *Id.* at 237.

[151] *Id.*

[152] *See supra* Part II.A (discussing *Mainstream Loudoun* and commentary on the case). A more subtle criticism of Justice Souter's analogy is the argument that access to the Internet is not in fact access to content at all, but is instead access to a conduit such as, for example, the postal service: "to say that libraries must accept all that may be accessed via the unfiltered Internet is somewhat, though not perfectly, analogous to saying that a library must retain in its collection all unsolicited submissions of free books, recordings, and other media which it receives via the mail." Laughlin, *supra* note 58, at 262.

So, consider as an example this statement from the plurality opinion: "To create [a public] forum, the government must make an affirmative choice to open up its property for use as a public forum."[153] While there is little doctrinally objectionable about the statement, it ignores the fact that, with CIPA, it is the *federal* government that is getting to decide whether to "open up" a *local* government's property.[154] The doctrine requires the Court to ignore the different levels of government completely.

The plurality does allude to the spending power aspect of the case at one point in the midst of its First Amendment analysis. Responding to the dissenters' claim that "overblocking will 'reduce the adult population . . . to reading only what is fit for children,'"[155] the plurality argues that the cases on which the dissenters rely "are inapposite because they addressed Congress's direct regulation of private conduct, not exercises of its Spending Power."[156] But, of course, whether the law is an exercise of the Spending Power is doctrinally irrelevant when the issue is whether the spending condition satisfies the "independent constitutional bar" rule. The relevant question at that point in the analysis is instead simply whether the local or state government recipient of the funds would violate the First Amendment by complying with the condition. Thus, the cases prohibiting the government from "reduc[ing] the adult population . . . to reading only what is fit for children" *are* directly applicable because the issue is simply whether a library that installs filters violates the First Amendment.

Justice Breyer's opinion concurring in the judgment likewise heads straight to the First Amendment issue, treating the spending power aspect of the law as doctrinally irrelevant. As he has done in the past when new technologies are at issue,[157] Justice Breyer concluded that CIPA should be analyzed under a "heightened scrutiny" that was neither "strict scrutiny" nor "rational basis."[158] Under Breyer's analysis, the "key question" is typically "one of proper fit,"[159]

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[153] *ALA II*, 539 U.S. at 206.

[154] Notice also the awkwardness of the plurality's use of the term "government" when referring to the *federal* government. Many of the challengers to the statute were, of course, "governments" as well.

[155] *ALA II*, 539 U.S. at 222 n.2 (Stevens, J., dissenting) (quoting Butler v. Michigan, 352 U.S. 380, 383 (1957)).

[156] *Id.* at 209 n.4 (plurality opinion).

[157] *See* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 227 (1997) (Breyer, J., concurring in part) (using heightened, but not strict, scrutiny to evaluate cable broadcast statute); Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 740–47 (1996) (plurality opinion written by Justice Breyer) (same); *see also* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 846 (2000) (Breyer, J., dissenting) (noting that statute is "proportionate" to the government's compelling interest).

[158] *ALA II*, 539 U.S. at 217 (Breyer, J., concurring in the judgment).

[159] *Id.*

but the question is not, as in strict scrutiny, whether the law is "narrowly tailored" and the "least restrictive means" but rather "whether the harm to speech-related interests is disproportionate in light of both the justifications and the potential alternatives."[160] Relying on the intermediate level of scrutiny given to restrictions on commercial speech and content-neutral laws,[161] Breyer concluded that CIPA should be upheld because the Disabling Provisions resulted in a burden that was no "more onerous than traditional library practices associated with segregating library materials in, say, closed stacks, or with interlibrary lending practices that require patrons to make requests that are not anonymous and to wait while the librarian obtains the desired materials from elsewhere."[162]

In a similar vein, Justice Kennedy relied on the Disabling Provisions and, in particular, on the United States' interpretation of the statute that "a librarian will unblock filtered material or disable the Internet software filter without significant delay" for any adult who so requests.[163] If this was the case, something which Justice Kennedy would be willing to accept for purposes of the facial challenge to the statute, he concluded that "there is little to this case."[164] Both he and Justice Breyer invited as-applied challenges to the statute if a particular library failed to adhere to the United States' representation.

If we stop for a moment, it will be easy to see that something is not quite right here. The doctrine of facial challenges creates a certain awkwardness. Justices Kennedy and Breyer are stating that an as-applied challenge could be brought to a *federal* statute if the actions of a *local* government entity, the public library, fail to comport with a representation made by the federal executive branch during the Supreme Court argument. This situation contrasts sharply with the paradigm of the "application" of a statute for purposes of facial constitutional challenges: a situation in which the government making a representation about the operation of the statute is the one that in fact implements it.

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[160] *Id.*

[161] *See id.* at 218 (citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980) (commercial speech), and United States v. O'Brien, 391 U.S. 367 (1968) (content-neutral laws)).

[162] *Id.* at 219.

[163] *Id.* at 214 (Kennedy, J., concurring in the judgment). The ALA clearly saw Justice Kennedy's reliance on the United States' interpretation of the disabling provision as a chance to make lemonade out of lemons. Soon after the Court issued its decision, the director of the ALA's Office of Intellectual Freedom was reported to have said, "[w]e're going to suggest to libraries that they post a sign that says 'Filters are required, but if you want unfiltered access, just ask us and we will turn off the filter.'" *See Supreme Court Upholds CIPA*, LIBR. J. (June 24, 2003), *available at* http://libraryjournal.com/article/CA306553.

[164] 539 U.S. at 214 (Kennedy, J., concurring in the judgment).

Finally, let me turn to Justice Stevens's dissent because, for my purposes, it is the most interesting opinion. The first portion of the opinion reads like a paean to several of the principles of constitutional federalism. This is of course surprising since it is Justice Stevens who has so vigorously dissented from the Court's federalism "revolution" at every opportunity.[165] Justice Stevens begins his opinion by stating that he agrees with the plurality "that it is neither inappropriate nor unconstitutional for a local library to experiment with filtering software as a means of curtailing children's access to Internet Web sites displaying sexually explicit images"; he further agrees "that the 7% of public libraries that decided to use such software on *all* of their Internet terminals in 2000 did not act unlawfully."[166] For purposes of the "independent constitutional bar" rule, then, Justice Stevens has effectively conceded the whole game. Because doctrinally the question under the "independent constitutional bar" rule is whether the state government recipient of the federal funds would violate the Constitution by accepting the funding condition, Justice Stevens's concession that a library that accepts the funds would not necessarily be violating the Constitution effectively renders the statute constitutional under the independent constitutional bar rule. Were he to have followed that doctrine, that would have been the end of the issue, and he would have been forced to join the plurality's opinion.

Why, then, is this portion of the opinion a dissent rather than a concurrence? Because, Justice Stevens continues, the relevant question is not simply whether a library that installs filters violates the First Amendment. Rather, for him, it is a "vastly different question" to ask "[w]hether it is constitutional for the Congress of the United States to impose [a filtering requirement] on the . . . 93% [of libraries who are not, on their own, filtering Internet access on all their terminals]."[167] Now, why should this be so? The answer appears to be based on the rationales of constitutional federalism. Justice Stevens tells us that

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[165] One example is *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), in which Justice Stevens dissented:

> Given the absence of precedent for the Court's dramatic application of the sovereign immunity doctrine today, it is nevertheless appropriate to identify the questionable heritage of the doctrine and to suggest that there are valid reasons for limiting, or even rejecting that doctrine altogether, rather than expanding it. Except insofar as it has been incorporated into the text of the Eleventh Amendment, the doctrine is entirely the product of judge-made law.

Id. at 95 (Stevens, J., dissenting). Indeed, he is the only sitting Justice to reject *Hans v. Louisiana*, 134 U.S. 1 (1890), the case that interprets the Eleventh Amendment as broadly conferring sovereign immunity on states. *See* 517 U.S. at 84–93 (Stevens, J., dissenting) (explaining that *Hans* does not mandate sovereign immunity in suits not mentioned in the Eleventh Amendment).

[166] *ALA II*, 539 U.S. at 220 (Stevens, J., dissenting) (emphasis in original).

[167] *Id.*

CIPA fails to "allow[] local decision makers to tailor their responses to local problems," but instead "operates as a blunt nationwide restraint on adult access to an enormous amount of valuable information that individual librarians cannot possibly review."[168]

After discussing the statute's overblocking, Justice Stevens then explains further that "CIPA does not permit any experimentation" and, yet, "the District Court expressly found that a variety of alternatives less restrictive are available *at the local level*."[169] He then continues by stating that "[t]hose findings are consistent with scholarly comment on the issue arguing that local decisions tailored to local circumstances are more appropriate than a mandate from Congress."[170] Rather than simply taking the district court's less restrictive alternatives and discussing them in the context of the public forum doctrine and/or a "strict scrutiny" analysis, Justice Stevens says that what is important about these less restrictive alternatives is that they are available at the *local level*. Now, it is true that the district court had likewise discussed them as alternatives for local libraries, but that was because, at that point in its analysis, the district court's focus under the independent constitutional bar rule was on the constitutionality of a local library installing filters, not on the federal statute per se. In contrast, Justice Stevens's point was that CIPA, a *federal* law, "does not permit any experimentation."[171]

In short, Justice Stevens seems to be pushing for an awkward result: the federal law should be declared unconstitutional under the First Amendment, but a local restriction that effects the same policy should be upheld. It appears, therefore, that Justice Stevens seeks to incorporate the principles of constitutional federalism into First Amendment jurisprudence. To be sure, he focuses on the local library rather than the states themselves, and he certainly does not say that a *state* law that either requires library filtering or ties funding to libraries on the condition that they install filters, would be constitutional.[172] Nonetheless, it seems odd to think of the First Amendment as prohibiting Congress from doing something that local government officials may do.

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[168] *Id.* (citations and internal quotation marks omitted).

[169] *Id.* at 223 (Stevens, J., dissenting) (emphasis added).

[170] *Id.* Stevens follows that statement with a footnote quoting extensively from Gregory Laughlin's *Sex, Lies, and Library Cards: The First Amendment Implications of the Use of Software Filters to Control Access to Internet Pornography in Public Libraries. Id.* at 224 n.3 (quoting Laughlin, *supra* note 58, at 279).

[171] *Id.* at 223.

[172] Justice Stevens's unconstitutional conditions analysis focuses on the local library's discretion, and so, I suspect he would probably have found a state law similar to CIPA to be unconstitutional as well. *See infra* text accompanying notes 211–21 (describing Justice Stevens's approach to the unconstitutional conditions question).

Treating Congress differently from state and local governments with respect to the First Amendment (and the Bill of Rights in general) has, however, an obvious textual and historical pedigree. Indeed, Justice Stevens's approach appears logically flawed partly because our modern conception of the Fourteenth Amendment's Due Process Clause is that it "incorporates" the provisions of the First Amendment's Speech Clause.[173] We thus treat the states and municipalities as equivalent to the federal government for purposes of analyzing the constitutionality of a measure under the Free Speech Clause of the First Amendment, and this assumption is embedded in our thinking about that clause. The interesting thing about Justice Stevens's approach, however, is that, perhaps unbeknownst to him, he is harkening back to the best-known proponent of the view that the Fourteenth Amendment's Due Process Clause does *not* incorporate the First Amendment: the second Justice John Marshall Harlan.

In a series of opinions starting with *Roth v. United States*[174] and its companion case, *Alberts v. California*,[175] Justice Harlan staked out a position that the First Amendment imposed more stringent restrictions on the federal government passing laws related to the suppression of sexually explicit expression than did the Fourteenth Amendment's Due Process Clause on state laws regulating the same material.[176]

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[173] *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) ("For present purposes we . . . assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."); *see also* Hamling v. United States, 418 U.S. 87, 104–07 (1974) (using the same First Amendment standards in assessing the constitutionality of both state and federal obscenity prosecutions).

[174] 354 U.S. 476 (1957).

[175] *Id.*

[176] *See id.* at 496–508 (Harlan, J., concurring in *Alberts* and dissenting in *Roth*); *see also* Ginzburg v. United States, 383 U.S. 463, 493–97 (1966) (Harlan, J., dissenting) (adhering to the views he had expressed in *Roth* and *Alberts*); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass., 383 U.S. 413, 456–58 (1966) ("*Memoirs*") (Harlan, J., dissenting) (same); Jacobellis v. Ohio, 378 U.S. 184, 203–04 (1964) (Harlan, J., dissenting) (arguing that "in permitting the States wide, but not federally unrestricted, scope in this field, while holding the Federal Government with a tight rein, lies the best promise for achieving a sensible accommodation between the public interest sought to be served by obscenity laws . . . and protection of genuine rights of free expression"). *See generally* Norman Dorsen, *John Marshall Harlan, Civil Liberties, and the Warren Court*, 36 N.Y.L. SCH. L. REV. 81, 84–85 (1991) (discussing Harlan's *Roth* opinion in the context of his views about federalism); Norman Dorsen, *The Second Mr. Justice Harlan: A Constitutional Conservative*, 44 N.Y.U. L. REV. 249, 262–63 (1969) (discussing Harlan's approach); Daniel A. Farber & John E. Nowak, *Justice Harlan and the First Amendment*, 2 CONST. COMMENT. 425, 431–32 (1985) (same); J. Harvie Wilkinson III, *Justice John M. Harlan and the Values of Federalism*, 57 VA. L. REV. 1185, 1216–17 (1971) (same).

Justice Harlan's view about "incorporation" was consonant with the Justice he replaced on the Court, Justice Jackson, whose dissent in *Beauharnais v. Illinois*, 343 U.S. 250, 287–95 (1952) (Jackson, J., dissenting), makes the historical case against "incorporation." *See Roth*, 354 U.S. at 503 (Harlan, J., dissenting) (Harlan citing Jackson's *Beauharnais* dissent and stating his agreement with Jackson's views about "incorporation"). Interestingly, early in his career on the

In *Roth* and *Alberts*, the Court upheld the constitutionality of both a federal obscenity statute (one criminalizing the mailing of obscene materials) and a California obscenity statute (one criminalizing, among other things, the writing, drawing, or distribution of obscene materials). While Justices Douglas and Black dissented in both cases on First Amendment grounds, Justice Harlan would have upheld the California statute but invalidated the federal law. Starting from the view that the Court had failed to distinguish between the different factors "involved in the constitutional adjudication of state and federal obscenity cases,"[177] Justice Harlan concluded that a federal law criminalizing obscenity should be given less deference than a state law doing the same because (1) the federal interest in regulating sexually explicit expression, based as it was on the power to "establish Post Offices and post Roads,"[178] is "attenuated," and (2) "the dangers of federal censorship in this field are far greater than anything the states may do."[179] He then notes the importance of the states as "experimental social laboratories"[180] and concludes that "no overwhelming danger to our freedom to experiment . . . is likely to result from the suppression of a borderline book in one of the States, so long as . . . other States are free to experiment with the same or bolder books."[181]

Justice Stevens certainly seems to share Justice Harlan's view, at least with respect to the greater dangers posed by federal restrictions on expression. As Justice Stevens put it, the dangers of the federal government imposing a "nationwide restraint"[182] on library Internet

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Court, then Associate-Justice Rehnquist, who replaced Justice Harlan, likewise believed the First Amendment applied less stringently on the states than the federal government. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 823 (1978) (Rehnquist, J., dissenting); Buckley v. Valeo, 424 U.S. 1, 291 (1976) (Rehnquist, J., concurring in part and dissenting in part). Rehnquist served as a law clerk to Justice Jackson when the Court decided *Beauharnais*. *See* Laura K. Ray, *A Law Clerk and His Justice: What William Rehnquist Did Not Learn From Robert Jackson*, 29 IND. L. REV. 535, 578 (1996) (comparing Justice Rehnquist's and Justice Jackson's approaches to the law).

[177] *Roth*, 354 U.S. at 496 (Harlan, J., dissenting).

[178] U.S. CONST. art. I, § 8, cl. 7.

[179] *Roth*, 354 U.S. at 505 (Harlan, J., dissenting).

[180] *Id.*

[181] *Id.* at 506 (Harlan, J., dissenting); *see also Memoirs*, 383 U.S. at 460 (Harlan, J., dissenting) (concluding that "it is the part of wisdom . . . to leave room for [state] experimentation [in regulation of obscenity], which indeed is the underlying genius of our federal system"); Randolph Stuart Sergent, *The "Hamlet" Fallacy: Computer Networks and the Geographic Roots of Obscenity Regulation*, 23 HASTINGS CONST. L.Q. 671, 696 (1996). Sergent noted that Justice Harlan

> relied heavily on the assumption that the consequences of one state's suppression of sexual speech would be small enough that no great harm to freedom of speech in general could result from balancing the state's interest in the moral welfare of its citizens against the right of individual citizens to engage in sexually oriented speech.

Id.

[182] *ALA II*, 539 U.S. 194, 220 (2003) (Stevens, J., dissenting).

access are greater than when a single library filters because federal regulation "does not permit any experimentation."[183] In short, Justice Stevens's First Amendment analysis can be seen as embracing the principles of federalism.[184]

2. *Unconstitutional Conditions Analysis*

In addition to the direct First Amendment claim under the *South Dakota v. Dole* "independent constitutional bar" rule, the challengers also argued that CIPA violated the "unconstitutional conditions" doctrine. The "unconstitutional conditions" doctrine "holds that the government may not deny a benefit to a person on a basis that infringes *his* constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit."[185] Notice how the "unconstitutional conditions" doctrine contrasts with the "independent constitutional bar" rule. The relationship that the "unconstitutional conditions" doctrine probes is the relationship between the government funder and the recipient of the funds, and it assumes that the recipient of funds has constitutional rights that he, she, or it must relinquish in order to receive those funds. So, while the *Dole* "independent constitutional bar" rule analysis discussed in the previous section requires that we forget about the relationship between the federal and state governments (i.e., the local libraries) and focus entirely on whether the local libraries are violating the Constitution, the "unconstitutional conditions" analysis focuses on the relationship between the government and the recipient of the funds and asks us to forget that, here, the recipient is a public library, an arm of a local, and thus state, government.

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[183] *Id.* at 223 (Stevens, J., dissenting). It is worth noting, at this point, that under *Salerno v. United States*, 481 U.S. 739 (1987), the facial challenge required the plaintiffs to show that *no* library could comply with CIPA's conditions in a constitutional manner. *Salerno*, 481 U.S. at 745 ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."). *See ALA I*, 201 F. Supp. 2d at 401, 451 (citing *Salerno*); *see also ALA II*, 539 U.S. at 202–03 (discussing the district court's interpretation of *Salerno*); *id.* at 2309–10 (Kennedy, J., concurring) (same). It was under that standard that the district court held, and that Justice Souter would have held, CIPA unconstitutional.

[184] *Cf.* Cal. Democratic Party v. Jones, 530 U.S. 567, 591–92 (2000) (Stevens, J., dissenting) (disagreeing with majority opinion invalidating a state open primary law under the First Amendment and noting that under "principles of federalism," the Court should have "respect[ed] the policy choice made by the State's voters"); *see also* Gregory P. Magarian, *Toward Political Safeguards of Self-Determination*, 46 VILL. L. REV. 1219, 1256–57 (2001) (noting Stevens's invocation of federalism principles in First Amendment determinations).

[185] Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 674 (1996) (internal quotation marks and citations omitted) (emphasis added).

At the end of its opinion, the district court turned to the "unconstitutional conditions" argument in a four-page footnote.[186] The court explicitly addressed the question of whether libraries, as municipal entities, could claim First Amendment rights. Most courts that have addressed the issue have concluded that municipal entities do not have First Amendment rights.[187] In so holding, these courts have relied largely on a comment made by Justice Stewart in his concurrence in *Columbia Broadcasting System v. Democratic National Committee*,[188] that "[t]he First Amendment protects the press *from* governmental interference; it confers no analogous protection *on* the Government."[189] These cases, however, focus primarily on whether a municipal entity has rights against its own state, and as Judge Posner once put it, there might be good reasons to create a distinction between a municipal entity claiming rights against "the state of which it is the creature" and its doing so against "the federal government or another state."[190]

Surveying the case law, the district court concluded that "the notion that public libraries may assert First Amendment rights for the purpose of making an unconstitutional conditions claim is clearly plausible, and may well be correct."[191] Even if public libraries did not

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[186] *ALA I*, 201 F. Supp. 2d at 490–94 n.36.

[187] *See* David Fagundes, Does the First Amendment Protect Government Speech? 3 (n.d.) (unpublished manuscript, on file with author) ("[T]he majority of courts have embraced . . . 'the well-settled principle of law that the First Amendment protects only citizens' speech rights from government regulation, and does not apply to government speech itself.'" (quoting Sons of Confed. Veterans, Inc. v. Holcomb, 129 F. Supp. 2d 941, 944–45 (W.D. Va. 2001))).

[188] 412 U.S. 94 (1973).

[189] *Id.* at 139 (Stewart, J., concurring). *CBS v. DNC* involved a group called Business Executives' Move for Vietnam Peace, which had filed a complaint with the FCC. The group argued that a radio station had violated the First Amendment because it had refused one of the group's paid editorials under a blanket policy of refusing to accept editorial advertisements. This portion of Justice Stewart's concurrence focused on the question of state action, and he concluded that the radio station is not a state actor for purposes of the First Amendment. *Id.* His comment about government not having First Amendment rights was made in response to the dissent, which would have held the broadcasters to be state actors because they had been granted government (i.e., FCC) licenses to broadcast. After noting that the First Amendment confers no protection for the government, he immediately thereafter states, "To hold that broadcaster action is governmental action would thus simply strip broadcasters of their own First Amendment rights," an untenable result. *Id.* His point, then, was made in a completely different context from that in which it has subsequently been used. As a side point, it is worth noting that policies similar to that at issue in *CBS v. DNC* continue to create controversy even today. *See, e.g.*, Eli Pariser, *One Thing That Won't Be Tackled on Sunday: Issues*, L.A. TIMES, Jan. 30, 2004, at B15 (describing CBS's refusal to air MoveOn.org advertisement about the budget deficit during the Super Bowl due to "controversial public policy issues").

[190] *ALA I*, 201 F. Supp. 2d at 492 n.36 (quoting Creek v. Village of Westhaven, 80 F.3d 186, 193 (7th Cir. 1996)).

[191] *Id.* Again, though, what neither the district court nor Judge Posner in *Creek* did, was to point out that there is also a federalism issue when either a municipality or a state seeks to assert First Amendment rights against the federal government.

have First Amendment rights, the court continued, "they could rely on their patrons' rights, even though their patrons are not the ones who are directly receiving the federal funding."[192] As the court recognized, this last point is analytically a little odd because it brings into the equation the patrons who are, of course, not receiving any funds; however, incorporating the patrons' First Amendment rights nicely brings into the equation at least one important component of the First Amendment question that would otherwise have been missing in the unconstitutional conditions analysis: the relationship between the library and its patrons.[193] In any event, the court concluded that it was at least "plausible" that the "unconstitutional conditions" doctrine could apply to CIPA.

Assuming that the libraries did have the right to make an unconstitutional conditions claim, the court then analyzed the statute under the relevant doctrine. Because the court had already held that the law violated *Dole*'s independent constitutional bar rule, it did not actually decide the unconstitutional conditions issue, instead simply concluding that the "plaintiffs have a good argument" that they would prevail.[194] In so concluding, the district court focused on "the role that public libraries have traditionally served in maintaining First Amendment values,"[195] drawing particularly on *Legal Services Corporation v. Velazquez*.[196]

In *Velazquez*, the Supreme Court invalidated a law that provided Legal Services Corporation funds to lawyers on the condition that, among other things, the lawyers refrain from all "effort[s] to amend or otherwise challenge existing law" when representing their clients.[197] The *Velazquez* Court concluded that the government could not condition funds in this manner. Among its rationales, the Court noted that the condition distorted the "usual functioning" of a medium of expression, in particular the legal profession and judicial system.[198] Relying particularly on *Velazquez*'s second rationale, the *ALA I* court concluded:

> CIPA arguably distorts the usual functioning of public libraries both by requiring libraries to: (1) deny patrons access to constitutionally protected speech that libraries would otherwise provide to patrons; and (2) delegate decision making to private software developers who closely

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[192] *Id.*

[193] Presumably, to the extent that speakers' rights are relevant as well, the court might also have mentioned the rights of web site operators.

[194] *ALA I*, 201 F. Supp.2d at 494 n.36.

[195] *Id.* at 493 n.36.

[196] 531 U.S. 533 (2001).

[197] *Id.* at 538 (quoting Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(16), 110 Stat. 1321-53 (1996)).

[198] *Id.* at 543.

> guard their selection criteria as trade secrets and who do not purport to make their decisions on the basis of whether the blocked Web sites are constitutionally protected or would add value to a public library's collection.[199]

When the case was appealed to the Supreme Court, only the plurality and Justice Stevens addressed the unconstitutional conditions issue.[200] The plurality sidestepped the question of whether the libraries, as government entities, could bring an unconstitutional conditions claim, stating that, even if they could assert such a claim, the claim "would fail on the merits."[201] The plurality contended that "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program."[202] The opinion effectively renders the "unconstitutional conditions" doctrine a nullity, devolving the issue down to the mere fact that Congress is spending money and that libraries may simply refuse the money:

> CIPA does not "penalize" libraries that choose not to install [filtering] software, or deny them the right to provide their patrons with unfiltered Internet access. Rather, CIPA simply reflects Congress' decision not to subsidize their doing so. To the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance. A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity. A legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.[203]

The plurality appears to have been prepared to revive the principle underlying Justice Holmes's famous statement that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman,"[204] which the Court has explicitly rejected in the modern era.[205]

The plurality then rejected the plaintiffs' argument that *Velazquez* controlled, describing *Velazquez* as dependent on the fact that "the role of lawyers who represent clients in welfare disputes is to advocate *against* the Government, and there was thus an assumption that counsel would be free of state control."[206] The plurality argued that, in contrast, "[p]ublic libraries . . . have no comparable role that pits them against the Government."[207]

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[199] *ALA I*, 201 F.Supp.2d at 494 n.36.

[200] Justice Souter also stated that he agreed "in the main" with Justice Stevens. *ALA II*, 539 U.S. 194, 230 (2003) (Souter, J., dissenting).

[201] *Id.* at 211.

[202] *Id.* (quoting Rust v. Sullivan, 500 U.S. 173, 194 (1991)).

[203] *Id.* at 212 (citations and internal quotation marks omitted).

[204] McAuliffe v. City of New Bedford, 29 N.E. 517, 517 (Mass. 1892).

[205] *See* Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 674 (1996) (rejecting *McAuliffe*).

[206] *ALA II*, 539 U.S. at 213.

[207] *Id.*

It is hard to deny that the *ALA II* plurality, all four of whom had dissented in *Velazquez*, sought to narrow significantly *Velazquez*'s central holding.[208] But, put that aside for a moment. Instead, let us accept the plurality's narrow reading of *Velazquez*. Even assuming the plurality correctly read *Velazquez*, there is a good argument that it should still have held for the plaintiffs in *ALA II*. One simple answer to the plurality on this is that, in fact, libraries are, in very real ways, "pit[ted] . . . against the Government" because of their role in promoting the principles of freedom of speech.[209] While the point is not made explicitly in terms of the unconstitutional conditions doctrine, Justice Souter touches on this role for libraries in his dissent.[210] A second response, however, is that libraries are *municipal* entities and thus creatures of state governments and that principles of constitutional federalism are specifically designed to "pit" state governments against the federal government to ensure liberty. I address the intersection of these two responses in more detail in Part III.

Finally, let me return to Justice Stevens's dissent. Justice Stevens's approach to the unconstitutional conditions question contrasted sharply with the plurality and goes so far as almost to conflate the distinction between a penalty and a benefit. He begins by drawing upon the portion of the plurality's opinion that discussed the independent constitutional bar rule, noting that "'libraries must have broad discretion to decide what material to provide to their patrons.'"[211] He then argued that, like a university,[212] "a library's exercise of judgment with respect to its collection is entitled to First Amendment protection."[213] Thus, "[a] federal statute penalizing a library for failing to install filtering software on every one of its Internet-accessible computers

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[208] *Cf.* Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts and Law*, 117 HARV. L. REV. 4, 78 n.351 (citing Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 176–80 (1996)) (noting that the plurality's characterization of the law as simply defining the government program "presupposes that we have already deemed the conditions contained in CIPA to be rules that government applies to itself to define the scope of its own programs").

[209] AM. LIBRARY ASS'N, LIBRARY BILL OF RIGHTS (adopted June 18, 1948; amended Feb. 2, 1961, and Jan. 23, 1980; inclusion of "age" reaffirmed Jan. 23, 1996) [hereinafter LIBRARY BILL OF RIGHTS] (listing promotion of free speech as a basic duty of libraries), *available at* http://www.ala.org/ala/oif/statementspols/statementsif/librarybillrights.htm.

[210] *ALA II*, 539 U.S. at 237–41 (Souter, J., dissenting) (describing the ways in which the library community has opposed government censorship throughout the twentieth century).

[211] *Id.* at 220 (Stevens, J., dissenting) (quoting *id.* at 204 (plurality opinion)).

[212] *Id.* at 226 (Stevens, J., dissenting) (citing for this analogy Justice Frankfurter's famous concurrence in *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result)).

[213] *Id.* (Stevens, J., dissenting). It could be that this principle, rather than the decentralization principles that Justice Stevens discussed in the first part of his opinion, is ultimately what animates Justice Stevens's conclusion that local libraries must have the discretion to decide whether to include filters as part of their Internet usage policies.

would unquestionably violate that Amendment."[214] Because "[a]n abridgment of speech by means of a threatened denial of benefits can be just as pernicious as an abridgment by means of a threatened penalty," Justice Stevens concluded that CIPA was equivalent to a law that "penaliz[ed]" libraries that refused to employ filters.[215] In response to the plurality's contention that CIPA was simply a "decision not to subsidize the exercise of a fundamental right,"[216] Justice Stevens noted that "CIPA requires libraries to install filtering software on *every* computer with Internet access if the library receives *any* discount from the E-rate program or *any* funds from the LSTA program."[217] The plaintiffs were thus challenging a restriction "that applies to property that they acquired without federal assistance."[218] I return to this point below when discussing Professor Baker's theory of the spending power because the distinction raised by Justice Stevens mirrors, to a certain extent, Professor Baker's proposal.

Justice Stevens then turned to the Court's unconstitutional conditions cases, relying on *Velazquez* in much the same way as the district court.[219] He also distinguished *National Endowment for the Arts v. Finley*,[220] a case in which the Court upheld a statute that set forth criteria, including "decency" and "respect," for federal grants funding arts. In contrast to CIPA, Justice Stevens argued, the statute at issue in *Finley* did not involve the "Federal Government . . . seeking to impose restrictions on the administration of a nonfederal program."[221]

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[214] *Id.* (Stevens, J., dissenting). Justice Stevens uses the descriptive adverb "unquestionably," but one might reasonably ask why this might be so. Certainly the plurality does not seem to agree. But, what might be more interesting here is the way in which this sentence might work just as well with the Tenth Amendment rather than the First. As I discuss below, the penalty/subsidy distinction is at the heart of the constitutionality of conditional federal grants of funds to states.

[215] *Id.* at 227 (Stevens, J., dissenting).

[216] *Id.* at 212 (plurality opinion) (quoting Rust v. Sullivan, 500 U.S. 173, 193 (1991) (quoting Regan v. Taxation With Representation, 461 U.S. 540, 549 (1983))).

[217] *Id.* at 230 (Stevens, J., dissenting) (citing 20 U.S.C. § 9134(f)(1) and 47 U.S.C. § 254(h)(6)(B), (C)).

[218] *Id.* at 230 n.7 (Stevens, J., dissenting).

[219] *Id.* at 227–28 (Stevens, J., dissenting) (citing *Velazquez* for the proposition that a "distorting restriction must be struck down under the First Amendment").

[220] 524 U.S. 569 (1998).

[221] *ALA II*, 539 U.S. at 230 (Stevens, J., dissenting). He also noted that *Finley* was not applicable because the case was not a challenge to a *library's* decision to install filters: "If this were a case in which library patrons had challenged a library's decision to install and use filtering software, it would be in the same posture as *Finley*. Because it is not, *Finley* does not control this case." *Id.* (Stevens, J., dissenting). Although Justice Stevens is not crystal clear here, he does not appear to be saying that *Finley* is inapplicable simply because the "posture" of the challenge to CIPA is not the same as *Finley*. Rather, what he appears to be saying is that *Finley* came out as it did, in part, because of the need for judicial deference to the discretion that resided with the federal "panel of experts" that decided upon the award of grants. In contrast, the discretion to decide what is in a library's collection should belong to the library itself, not to Congress. But, in so distinguishing *Finley*, what he elides is that *Finley* involved not simply a challenge to the

In the most literal sense, this distinction is easy to critique. Here, the programs being funded are the E-rate discounts and LSTA funding. Both programs are in fact federal programs. What Justice Stevens appears to be saying is that the "program" of relevance is the "program" of libraries providing Internet access to their patrons. In other words, the provider of the E-rate and LSTA funds, the federal government, was distinct from the ultimate administrator of the Internet access, the local public libraries.

Because Justice Stevens focused on the role of the library and *its* discretion, his result effectively splits the difference between the plurality and Justice Souter. In contrast to the plurality, he would have found the federal statute unconstitutional, and yet, in contrast to Justice Souter, he would have permitted local libraries to filter if they so chose. Notwithstanding the doctrinal difficulties with Justice Stevens's result, there is something intuitive about it, as it avoids the all-or-nothing result of both the plurality and Justice Souter. As I argue in the following Part, one reason why Justice Stevens's result may have an intuitive appeal is that the principles of constitutional federalism suggest that he understood aspects of the law, as a *federal* law, that eluded the rest of the Court.

III. A NORMATIVE ANALYSIS OF THE VALUES OF FEDERALISM AS APPLIED TO FILTERS IN PUBLIC LIBRARIES

In this Part, I take a step backwards and ask a broader question, in some sense a meta-question, with respect to CIPA: within our system of constitutional federalism, does it make sense for the decision about installing technological protection measures (i.e., filters) in public libraries to be made at the federal level? CIPA is a federal statute and the First Amendment is of course part of the Federal Constitution. Thus, as different as they are, the plaintiffs' position (as embodied largely in the district court's decision and Justice Souter's dissent) and the United States' defense of the statute have one important thing in common: they each result in a national decision, made at the national level. I will argue, in contrast, that the decision as to whether to install filters in any particular library should not be made at the federal level. I am not making a doctrinal claim here, but the implication of my conclusion in this Part is that there are good reasons to support Justice Stevens's "compromise" result,

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experts' discretion, but a challenge to congressional constraints on that discretion. That is precisely the same in *ALA*. The difference, however, as he alluded to earlier, is that the "panel of experts" that had the discretion was a *federal* panel administering a federal grant program, whereas libraries are local government agencies.

which would have invalidated CIPA while permitting those local libraries that install filters to continue doing so.

As I outline the various rationales in favor of federalism, let me be clear about what I am taking as a starting assumption. First, I am not questioning the value of federalism in general. Moreover, I am accepting the appropriateness of using the principles of constitutional federalism, rather than what Ed Rubin and Malcolm Feeley refer to as "administrative decentralization," to enforce those values.[222] In a related vein, I am also accepting, for purposes of this Article, the idea that states, rather than local governments, should be the place to operationalize the values of federalism.[223] If this is not the case, however, the fact that public libraries are local, rather than state, entities would strengthen the arguments in favor of the federalism values in this context.[224] I am also not questioning the underlying idea that some role for judicial enforcement of federalism principles is appropriate.[225] Finally, in this Part, I am not making an argument about

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[222] Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994). This recent scholarship harkens back to what Karl Llewellyn argued seventy years ago. *See* Karl Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 38 (1934) (noting that state lines do not correspond to the place where divisions of authority should be drawn). *But see* DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 122–23 (1995) (noting the absence of a "clean slate" and thus the need to understand principles within the context of the history of American federalism); Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483, 488–89 (1991) (noting that the argument that tyranny prevention in favor of federalism cannot be solved by "decentralization," as it requires there to be a separate locus of governmental power); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 381–83 (1997) (arguing that "[t]here are some very real difficulties with the argument advanced in *National Neurosis*"); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341, 388–91 (1985) (noting that only federalism, rather than administrative decentralization, can effect the anti-tyranny rationale of federalism).

[223] *See* Richard Briffault, *"What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1305 (1994) (noting that "the values said to be advanced by federalism . . . may be served better by local governments than by states").

[224] Let me emphasize this point. I do not mean to elide this important distinction between local control and state control. I agree with Briffault that many of the arguments for federalism are rooted in principles that are better promoted by local governments than state governments. However, with respect to CIPA, I can fully accept these criticisms and simultaneously apply federalism principles because the governmental objects I would here protect from federal control are in fact *local*, not state, entities.

[225] This is, of course, hotly contested. *See generally* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000) (arguing that judicial enforcement of federalism is particularly unnecessary today because political parties can protect federalism); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954) (arguing that aggressive judicial intervention to protect states from Congress is unnecessary). Jesse Choper has also written on a related issue, arguing that the courts should preserve their political capital for individual rights cases by rendering structural issues, including federalism, nonjusticiable. *See* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 193–205 (1980). *But see* Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez,

any specific provisions of the Constitution: CIPA was clearly an exercise of the spending power, and Parts IV and V will explore spending power doctrine and the impact that changes in that doctrine might have on the constitutionality of CIPA. Rather, at this point, I am simply attempting to apply the values of federalism in the context of the issue of filters in public libraries. My argument here focuses entirely on the functional aspects, or "consequentialist values,"[226] of constitutional federalism, not the specific ways in which to operationalize those principles through doctrine.

In short, for purposes of this Part, I am agnostic on a large number of important issues. My goal here is simply to articulate the values that underpin constitutional federalism and to make the case that those values ought to have played a part in the broader issue of the constitutionality of a federal law regulating Internet access in public libraries, assuming a role for judicial enforcement of federalism principles and a connection between enforcement of those values and the values themselves.

For the moment, I will also ignore the spending power issues and thus treat the law at issue as what I will call "Regulatory CIPA," a hy-

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94 MICH. L. REV. 752 (1995) (arguing that the courts are as needed in federalism cases as in cases involving the Bill of Rights); *but cf.* Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91 (2003) (responding to Choper and Kramer by arguing that express authority to invalidate federal statutes is found in Supremacy Clause). Ilya Somin has argued that judicial intervention is particularly appropriate in the context of conditional grants to states. *See* Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461, 495–97 (2002). I do briefly discuss judicial enforcement in the context of promoting political accountability. *See infra* text accompanying notes 252–55 (describing political accountability rationale as a rationale for judicial enforcement of federalism).

Ultimately, the broader question of which branch of government should appropriately incorporate the federalism concerns I raise in this Part may well be the deepest, most difficult, and most important of all. *See generally* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 158-59 (1994) (introducing the question of whether the judiciary or the legislature should be deciding federalism questions). I am, thus, purposely avoiding the broader question of the Court's role in the American constitutional scheme, a difficult and thorny question. Robert Post and Reva Siegel have argued, for example, that the Court's recent approach to constitutional adjudication, particularly in cases involving the scope of Section 5 of the Fourteenth Amendment, demonstrates a fundamental misconception of the Court's historical and appropriate role in American society. *See* Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003).

Although I am thus assuming here a role for the judiciary, one approach to answering the preliminary question of the appropriateness of that role is to engage in comparative institutional analysis. *See generally* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES 232–70 (1994) (discussing comparative institutional analysis as it applies to judicial review in general); *id.* at 230 n.64 (describing JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980), as an example of institutional analysis that argues that the Supreme Court should focus primarily on individual rights and let the political process resolve federalism issues).

[226] Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1074 (1995).

pothetical federal law that *mandates* that local public libraries install filters on their Internet access, rather than one that conditions funds on so doing. While at first blush this might seem problematic,[227] recall that the analyses adopted by both the *ALA II* plurality and Justice Souter's dissent, premised as they were on the *South Dakota v. Dole* "independent constitutional bar" rule, effectively treat the law as though it is a mandate, ignoring the fact that it is a conditional funding law. Doctrinally, as I explained above, there is nothing wrong with this. The "independent constitutional bar" rule effectively demands that a court ignore the fact that the law is an exercise of the spending power. For this reason, it makes sense for me to do the same thing for this Part, notwithstanding the fact that I will spend a great deal of time discussing the spending power issues in Parts IV and V.[228]

A. The Values of Federalism

The benefits of constitutional federalism can be divided into two broad categories:[229] (1) horizontal rationales, those that derive from the fact of a multiplicity of parallel jurisdictions (i.e., the fact that there are a number of different states) and, in a related vein, the fact that individual units of government are thus smaller;[230] and (2) vertical rationales, those that derive from the fact that each individual is

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[227] Or, at least, it should seem problematic if one does not adhere to the strong Madisonian view of the spending power. *See infra* text accompanying note 328 (describing Madison's view that all federal spending should be tied to a separate enumerated power).

[228] To be sure, the "independent constitutional bar" rule focuses on the relationship between the local library and the public, and my discussion of Regulatory CIPA below focuses instead on the federal government. By focusing on the relationship between the local library and the public, however, the "independent constitutional bar" rule analysis effectively conflates the federal and local governments. So, this distinction should not undermine my assumption.

[229] *See* Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 106–07 (2001) (describing "vertical" and "horizontal" concerns); *see also* Briffault, *supra* note 223, at 1313–14 (describing the "virtues" of federalism). I use the term "vertical" in the way Baker and Young do, notwithstanding the fact that, in a theoretical sense, constitutional federalism presumes the federal and state governments to be, in the words of *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991), "coordinate," rather than the state government to be subordinate to the federal. *See* Briffault, *supra* note 223, at 1308 (citing *Gregory*, 501 U.S. at 458, for the theory that "federal and state governments are on the same plane"). As Richard Briffault has put it, "[a] true federalist would, of course, deny that the federal-state relationship is a vertical one at all" because there is no hierarchy between the federal and state governments. *Id.* at 1313 n.36 (citing DANIEL J. ELAZAR, EXPLORING FEDERALISM 34–38 (1987)).

[230] *See* Briffault, *supra* note 223, at 1312 ("Underlying the claim that federalism will promote . . . political benefits . . . are assumptions concerning the small size of the states, relative to the nation, and the fact that the existence of states creates multiple centers of political power within the federal system.").

subject to two different levels of governing authority (the federal and the state).[231]

In the "horizontal" rationale category, federalism is perhaps most often justified in terms of geographic diversity. As Justice O'Connor put it in *Gregory v. Ashcroft*, federalism "assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society."[232] This rationale has both a static and a dynamic version.[233] Under the static version of this argument, geographic diversity is valued for its own sake because it allows different communities to choose different modes of governance and different substantive legal rules that reflect the diversity of citizen preferences, needs, or interests. Geographic constraints might, in some circumstances, also necessitate geographic diversity. For example, driving ninety miles per hour on I-90 in South Dakota might not be particularly dangerous, but doing so on the same highway between downtown Chicago and O'Hare Airport or between Boston and Newton, Massachusetts might be. Different jurisdictions might thus reasonably choose different speed limits on account of geographic differences. Dissimilar communities might also have different moral or ethical norms, what Susan Klein has referred to as "independent-norm federalism,"[234] norms that affect government policy. For example, Minnesota might wish to prohibit fornication,[235] whereas Tennessee might

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[231] *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) ("It was the genius of [the Framers'] idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.").

[232] 501 U.S. at 458; *see also* Friedman, *supra* note 222, at 401–02 (noting that "federalism enhances our lives by preserving and creating diversity"); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 222 (2000) (explaining that decentralized decision making promotes political and cultural diversity); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493–94 (1987) (reviewing RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987)) (same); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 8–9 (1988) (same).

[233] Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism:* New York, Printz, *and* Yeskey, 1998 SUP. CT. REV. 71, 78 (1998) (defining and describing "static" and "dynamic" versions of the geographic diversity rationale).

[234] Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CAL. L. REV. 1541, 1542 (2002) (describing independent-norm federalism as "foster[ing] a community's expression of morality," even where "a state's norm is independent of the federal norm").

[235] *See* MINN. STAT. ANN. § 609.34 (West 2003) (stating that "[w]hen any man and single woman have sexual intercourse with each other, each is guilty of fornication, which is a misdemeanor"); *see also* Cooper v. French, 460 N.W.2d 2 (Minn. 1990) (upholding landlord's right to refuse to rent to an unmarried couple because the couple intended to violate the fornication statute). Of course, in light of *Lawrence v. Texas*, 539 U.S. 558 (2003), which held that a state statute criminalizing sodomy was unconstitutional, fornication laws might be held unconstitutional.

not.[236] I turn to this issue shortly, as it undergirds my discussion of the issue of filters in public libraries.

The "geographic diversity" argument is usually put forth in its dynamic form, relying on the presumed right and ability of citizens to "vote with their feet."[237] Drawing on the highly developed (and arguably somewhat overstated) interpretation of Charles Tiebout's famous theory of interjurisdictional competition,[238] the argument is that the presence of a multiplicity of jurisdictions will promote competition among governments for citizens and corporations (and their related tax dollars), thereby maximizing choice and utility for everyone and resulting in an aggregate increase in social welfare.[239]

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[236] *See* RICHARD A. POSNER & KATHARINE B. SILBAUGH, A GUIDE TO AMERICA'S SEX LAWS 101 (1996) (noting that Tennessee has no statute prohibiting fornication).

[237] *See* William Van Alstyne, *Federalism, Congress, the States and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 DUKE L.J. 769, 777 (noting the "constraints imposed as an incident of federalism itself, namely that people can and will move, enter, or exit, if suitably attracted or repelled, as *each state has reason to bear in mind*"); *see also* THOMAS R. DYE, AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS (1990) (arguing that competitive federalism better reflects the Founders' original intent); Jesse H. Choper & John C. Yoo, *The Scope of the Commerce Clause After* Morrison, 25 OKLA. CITY U. L. REV. 843, 847 (2000) ("State governments seek to attract households and businesses by enacting competitive policies; this jurisdictional competition produces overall efficiency for the nation in the long run, much in the way a market forces corporations to adopt efficient business practices, which leads to overall increases in consumer welfare."); Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS. 147 (1992) (focusing on the individual's right to move to a different state as a strategy to counter government abuse); Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1574 (1994) (discussing the value of state governments in providing choice of living conditions); Rubin & Feeley, *supra* note 222, at 918 n.62 (citing economic literature that argues that people can choose where to live based on government services and costs). *But see* SHAPIRO, *supra* note 222, at 35–43, 81–82 (noting barriers to individuals' mobility, and externalities that cannot be compensated with a free market system); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 415–25 (1990) (arguing that decentralized power is meant to advance local decision making, not to facilitate movement between local governments); Rubin & Feeley, *supra* note 222, at 922–23, 944–50 (discussing the lack of regional variety in the United States). *See generally* Symposium, *The Allocation of Government Authority*, 83 VA. L. REV. 1275 (1997) (offering four papers addressing the economic analysis of federalism). The notion that citizens can move unencumbered from one state to another is also embodied in the constitutional right-to-travel cases such as *Shapiro v. Thompson*, 394 U.S. 618 (1969) (holding unconstitutional a state statutory provision denying welfare to state residents based on their not having resided in one state for long enough), and *Saenz v. Roe*, 526 U.S. 489 (1999) (holding unconstitutional a durational residency requirement for receipt of TANF benefits).

[238] *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (arguing that local governments compete for "voter-consumers"); *see also supra* Part V.A.1.a (discussing Baker's reliance on Tiebout's theory in articulating her proposed changes to spending power doctrine). One contemporary example suggesting the possibility that Tiebout's theory might well play out at the state level is the Free State Project, a movement of libertarians to recruit like-minded individuals to New Hampshire in order to help effect libertarian-leaning political change. *See* Pam Belluck, *Libertarians Pursue New Political Goal: State of Their Own*, N.Y. TIMES, Oct. 27, 2003, at A1 (reporting on Free State Project).

[239] Tiebout's theory rests on the view that "the consumer-voter moves to that community whose local government best satisfies [that consumer-voter's] set of preferences." Tiebout, *su-*

A second "horizontal" rationale for federalism derives from the benefits that inhere in "experimentation."[240] As Justice Brandeis famously put it in his dissent in *New State Ice Co. v. Liebmann*, "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[241] Under this rationale, individual states can try different solutions to policy problems, and a comparative analysis can assist in determining how a particular policy problem can best be solved. The overall benefit to the national community is made even more significant, moreover, because the costs of failure will be limited to a par-

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pra note 238, at 418. Tiebout himself saw the theory as applicable primarily to local governments, but noted that the argument "also applies, with less force, to state governments." *Id. But cf.* Frank B. Cross, *The Folly of Federalism*, 24 CARDOZO L. REV. 1, 22 (2002) (arguing that Tiebout "never suggested that his model supported state-level government"). Many of the assumptions necessary to realize Tiebout's model have been empirically tested and challenged. *See* Tiebout, *supra* note 238, at 423 (urging the checking of his assumptions). *See generally* Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 514–18 (1991) (discussing and collecting variety of sources that offer evidence that local jurisdictions compete for residents, while recognizing that the evidence may not prove that the competition promotes efficiency); William E. Oates, *On Local Finance and the Tiebout Model*, 71 AM. ECON. REV. 93, 93 (1981) (referring to Tiebout's assumptions as "so patently unrealistic as to verge on the outrageous"). Notwithstanding these criticisms of Tiebout's model, "Tiebout's core observation—that local jurisdictions compete for residents—enjoys wide acceptance." Been, *supra* at 517.

[240] *See* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("[T]he federalist structure of joint sovereigns . . . allows for more innovation and experimentation in government."); SHAPIRO, *supra* note 237, at 87–90, 138–39; *see also* Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 528–30 (1995) (describing the promotion of the experimentation argument in support of federalism); Charles Fried, *Federalism—Why Should We Care?*, 6 HARV. J.L. & PUB. POL'Y 1 (1982) (discussing the positive and negative aspects of using states for experimentation); Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 853–55 (1979) (offering examples of state experimentation); McConnell, *supra* note 232, at 1498 ("Elementary statistical theory holds that a greater number of independent observations will produce more instances of deviation from the mean. If innovation is desirable, it follows that decentralization is desirable."); Merritt, *supra* note 237, at 1575 ("[S]tates offer the laboratories for social experimentation immortalized by Justice Brandeis's quotable words."). *But cf.* Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 593–94 (1980) (arguing that "[i]n a multiple government system the overall incentive to take risks is reduced if [a] politician hopes to free ride on the activities of other governments").

[241] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see also id.* ("There must be power in the states and the nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs."). *New State Ice* invalidated, on substantive due process grounds, a law that both required a license to sell ice and required the denial of such licenses once the relevant government commission determined that the public's need for ice had been met. The case thus did not explicitly involve judicial enforcement of federalism principles, but Justice Brandeis's language has taken on a life of its own and is now used to support the "experimentation" rationale of federalism. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (citing Brandeis's *New State Ice* dissent for an "experimentation" rationale).

ticular region, while the benefits of success can be spread throughout the country.[242]

Like the "geographic diversity" rationale, the experimentation/innovation rationale for federalism has a dynamic version, again premised on the right and ability of individuals to emigrate. If some states create better policy, those "states will induce immigration (with concomitant benefits, such as tax dollars) by the residents or firms of less successful states."[243] These first two rationales (diversity and experimentation/innovation), at least in their dynamic form, are premised largely on the competitive benefits to be gained by a multiplicity of parallel jurisdictions.

A third "horizontal" rationale, derived from the smaller size of the governmental unit, rather than the fact of a multiplicity of jurisdictions, is that federalism is said to facilitate the conditions necessary for a more just society. As Michael McConnell has put it, "the natural sentiment of benevolence, which lies at the heart of public spiritedness, is weaker as the distance grows between the individual and the objects of benevolence."[244] Whether towards the end of republican virtue[245] or some other goal,[246] a smaller political unit fosters a sense of community.

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[242] In some sense, this rationale depends on exactly the opposite factual presumption that the "geographic diversity" argument depends upon. For an "experiment" in one state to be most helpful for understanding the implications of applying the policy elsewhere, there must be some relevant similarity of conditions. Whether federalism is any better at furthering the goal of "experimentation" than, say, an international comparative analysis of policy problems seems to be premised on the basic similarities of the states. It requires a presumption that Minnesota's "experiment" will be more helpful to the analysis than Canada's because Minnesota's experience with a particular policy is a better indication of how such a policy would work in, say, Wisconsin, or even the United States overall.

[243] Adler & Kreimer, *supra* note 233, at 79; *see also* Rubin & Feeley, *supra* note 222, at 920–21 nn.68–69 (citing sources for and against the view that interstate competition is beneficial).

[244] McConnell, *supra* note 232, at 1510 (citing ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (D.D. Rapheal & A. L. Macfie eds., 1976)). To be fair, I wonder whether "benevolence" is helpful to the decentralization argument at all when it is the state versus federal government at issue. I would guess that, in this day and age, most citizens of the United States find their benevolence running towards the nation before it runs to the state, though, of course, it might be more likely to run towards a local unit. Moreover, I would think that this statement is more likely to be true if the word "distance" is not limited to geographical distance, but refers more to those personal connections that make up the various concentric rings of intimacy that describe most people's lives. *See* Rubin & Feeley, *supra* note 222, at 944–45, 948 (noting that state lines do not coincide with group affiliations that people relate to, e.g., local, such as family and neighborhood, or trans-state, such as race, religion, and ethnicity). *But see* SHAPIRO, *supra* note 222, at 123–24 (arguing that existing state boundaries should be respected because they "represent the accumulated efforts and wisdom of generations of our predecessors"); Mark C. Gordon, *Differing Paradigms, Similar Flaws: Constructing A New Approach to Federalism in Congress and the Court*, 14 YALE L. & POL'Y REV. 187, 217–18 (1996) (arguing that there are benefits from states' lack of cohesiveness).

[245] *See* McConnell, *supra* note 232, at 1510 (discussing how the federal government is too distant to foster a sense of community and "republican virtue").

A related rationale, also dependent upon the small size of the political unit, is the increased opportunities for political participation federalism is said to promote.[247] When the political unit is smaller, it enables the exchange of information and ideas and, hence, the deliberation necessary for increased political participation by citizens.[248]

This "political participation" argument can be made in terms of both the "horizontal" and the "vertical" nature of federalism; it can be based not only on the smaller political units that a decentralized system provides, but also on the fact that in a federal system, each individual is a member of two separate polities, the state and the national. As Richard Briffault has put it, "With two governments, there are more offices to run for and more candidates to campaign for, contribute to, and vote for than would be the case if there were only one government, thus multiplying the opportunities for citizen participation."[249] Promoting political participation would, thus, fall under both a "horizontal" and a "vertical" rationale for federalism.

Finally, in the "vertical" category, I put what might be described as "tyranny prevention." As the Court put it in *New York v. United States,*

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[246] In a slightly different vein, Mark Tushnet argues that even though he believes that it is difficult to sustain a federalist system over the long term, the gradual process of moving from a federalist system to a centralized one could effect a Rawlsian, morally pluralist society. *See* Mark Tushnet, *Federalism and Liberalism,* 4 CARDOZO J. INT'L & COMP. L. 329, 343–44 (1996).

[247] *See* Merritt, *supra* note 237, at 1574 ("[S]tate governments help diversify participants in the political process."); *see also* Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 789–90 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part) (arguing that federalism increases citizen participation in government); SHAPIRO, *supra* note 222, at 139 ("[S]tate courts and other state institutions may serve as effective participants in a dialogue about the best and most effective means of protecting *federal* rights."); Friedman, *supra* note 222, at 389–94 (discussing the significance of citizen participation in federalism); Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?,* 111 HARV. L. REV. 2180, 2221 (1998) (same); McConnell, *supra* note 232, at 1507–11 (same); Meritt, *The Guarantee Clause, supra* note 232, at 7–8 (same). *See generally* Akhil Reed Amar, *Of Sovereignty and Federalism,* 96 YALE L.J. 1425 (1987) (discussing citizens' role in government in the context of challenging government sovereignty); S. Candice Hoke, *Preemption Pathologies and Civic Republican Values,* 71 B.U. L. REV. 685, 701–14 (1991) (arguing in favor of a "republican" theory of federalism).

[248] *See* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (noting that federalism "makes government more responsive by putting the States in competition for a mobile citizenry"); Merritt, *The Guarantee Clause, supra* note 232, at 9–10 ("State and local governments increase the opportunities for citizens to participate actively in the democratic process . . . ."). *But see* Gregory P. Magarian, *Toward Political Safeguards of Self-Determination,* 46 VILL. L. REV. 1219, 1238 (2001) (rejecting the notion that states are somehow "closer" to the citizenry).

A related advantage of this "political participation" argument is the increased compliance with the law that might accompany lawmaking at a local level. As Cass Sunstein has put it, people are especially likely to "comply with law that has been enacted at the most local level [because if] the law comes from your neighbors or from people in your town, you are more likely to think that the law reflects the views of those you care about." CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 42 (2003).

[249] Briffault, *supra* note 223, at 1313. *See also* Magarian, *supra* note 248, at 1237 (noting that states serve the "participation value" by "replicating and multiplying the opportunities the federal government provides for political participation").

"[f]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power . . . . [A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."[250] The United States constitutional system divides powers, both through separation-of-powers principles and federalism principles. Like separation-of-powers principles, then, decentralization furthers the ultimate goal of individual liberty.[251]

Related to the anti-tyranny rationale is the political accountability rationale that underpins the anti-commandeering cases, *Printz v. United States*,[252] and *New York v. United States*.[253] I view this primarily as

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[250] 505 U.S. 144, 181 (1992) (internal quotation marks and citations omitted); *see also* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("Perhaps the principal benefit of the federalist system is a check on abuses of government power."); Printz v. United States, 521 U.S. 898, 921 (1997) ("This separation of [the state and federal] spheres is one of the Constitution's structural protections of liberty."); THE FEDERALIST NO. 51 (James Madison) (noting that federalism and separation of power work together as a "double security" for "the rights of the people"); Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483, 497–503 (1991) (arguing that the best rationalization of federalism is protection from tyranny); Amar, *supra* note 247, at 1513–17 (discussing the possibility that states can prevent federal tyranny by enacting state versions of 42 USC § 1983 to target unconstitutional federal action); Amar, *supra* note 247, at 1448–51 (arguing that dividing government powers gives the people more control); Friedman, *supra* note 222, at 402–04 (arguing that "diffusing power" protects liberty); Jackson, *supra* note 247, at 2219 n.178 (1998) (citing Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 787 (1995)) ("The existence of governments not controlled by the central government can help overcome collective action barriers to organized resistance against national abuse."); Kramer, *supra* note 247, at 1488 n.5 (noting that, in a federal system, "officials of the subordinate units are not appointed, and cannot be fired by an official of the central government"); Merritt, *supra* note 237, at 1573–74 (discussing the values of "autonomous state governments"); Rapaczynski, *supra* note 222, at 380–95 (discussing "tyranny prevention" as a value of federalism); *cf.* SHAPIRO, *supra* note 237, at 115 (discussing the value of separate states because they "have the political capacity to function as alternative sources of authority and to resist incursion from without"); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 798 (1996) (discussing the nature of constitutional constraints); Rex E. Lee, *Federalism, Separation of Powers, and the Legacy of* Garcia, 1996 BYU L. REV. 329, 330 (1996) ("[T]he constitutional division of authority can rightfully claim to protect the governed from governmental overreaching and arbitrariness."); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1313 (1997) (noting that the Framers set up states as "primary defenders of individual rights"). *But see, e.g.*, Magarian, *supra* note 248, at 1239 (arguing that existence of private concentrations of wealth is a greater threat to liberty, that only political institutions, including state governments, can check such power, and that "this insight . . . debunks the truism that the libertarian value of states depends on their opposition to the federal government").

[251] In a related vein, having multiple layers of government to which a citizen may appeal can also increase liberty. *See* Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 538 (1995) ("A key advantage of having multiple levels of government is the availability of alternative actors to solve important problems."); Martha Minow, *Putting Up and Putting Down: Tolerance Reconsidered, in* COMPARATIVE CONSTITUTIONAL FEDERALISM 77, 96–99 (Mark Tushnet ed., 1990).

[252] 521 U.S. 898 (1997) (holding a law requiring background checks on prospective handgun buyers to be unconstitutional because the law commandeered state officers to execute federal laws).

a rationale for the judicial enforcement of federalism rather than as a rationale for federalism itself. The basic idea is, as Larry Lessig has succinctly put it, that "[i]ndirection misdirects responsibility."[254] In circumstances in which federal law requires state government officials to enforce a federal constraint, the federal government "muddies the responsibility for that constraint and so undermines political accountability. If transparency is a value in constitutional government, indirection is its enemy."[255]

Now, it is all well and good to articulate the benefits of federalism, but of course decentralized power also has costs, and it is important to consider these as well. Otherwise, the ledger seems woefully incomplete when attempting to assess the role that applying federalism principles might have on social welfare. For purposes of this Part, I am ignoring specific doctrinal or historical arguments in favor of a strong central government and am focused primarily on the functional arguments that might counter the federalism benefits I have just raised.

First, and probably foremost, is the argument that permitting states to regulate in certain ways can impose significant negative externalities on the rest of the country.[256] Environmental regulation will perhaps come first to mind as the quintessential example of this problem.[257] One state may try to attract a particular business (with, say, looser environmental regulations), deciding that the benefits to it

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[253] 505 U.S. 144 (1992) (holding the "take title" provisions of the Low-Level Radioactive Waste Act unconstitutional because the law was viewed as giving state governments a "choice" between two options: (1) a forced transfer of the waste (along with the accompanying liability), and (2) a mandate to regulate the disposal of the waste according to the instructions of Congress, neither of which Congress could independently mandate). Justice Kennedy's concurrence in *Cook v. Gralike*, 531 U.S. 510, 527–30 (2001) (Kennedy, J., concurring) also sounds the theme of political accountability. In *Gralike*, the Court struck down a provision in the Missouri Constitution that would have required ballots in federal elections to state explicitly when a federal candidate opposed term limits. In his concurrence, Justice Kennedy noted, "[i]f state enactments were allowed to condition or control certain actions of federal legislators, accountability would be blurred." *Id.* at 528 (Kennedy, J., concurring). In contrast to *New York* and *Printz*, *Gralike* involved the state rather than the federal government acting in a way that arguably undermined political accountability, but the basic idea is the same: citizens need to know which government is responsible for what, and neither government (i.e., neither the state, nor the federal government) can interfere with a citizen's direct relationship with the other government, as this would undermine political accountability.

[254] LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 96 (1999).

[255] *Id.*; *see also* Magarian, *supra* note 248, at 1225 n.30 (noting that anti-commandeering cases rely on this rationale, and citing case law and scholarly commentary both for and against the rationale); *cf.* Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L.J. 557 (2000) (arguing that cooperative federalism programs undermine accountability).

[256] SHAPIRO, *supra* note 222, at 39–41.

[257] Tushnet, *supra* note 246, at 332 (noting that "[s]ome obvious examples of spill-overs between two or more subnational units are the economic spill-overs that characterize many environmental issues").

outweigh the costs. And, yet, the environmental damage from the business might well be felt in other states (for example, downstream or downwind). Without national coordination (and thus, the argument goes, without national power), there is little to stop states from causing such externalities. Conversely, environmental clean-up may be expensive, and, though its full benefits might exceed its costs, many of those benefits might be felt beyond a particular state's boundaries. In such a circumstance, no single state will find its overall welfare increased by engaging in the clean-up, but a national response spreading the costs could result in an aggregate increase in social welfare.[258]

A similar argument is based on the fear that the interstate competition for which federalism is so glorified[259] will lead to a "race to the bottom."[260] The argument here is that, regardless of whether a particular policy might result in negative externalities, when a state competes to attract businesses, it might rationally decide that its overall welfare will increase if it reduces its regulatory standards (again, environmental regulation might be a good example). Yet, because other states might likewise decide to relax those same standards, overall welfare might drop: both states will reduce their standards on the same rationale, but only one will gain the benefits. In contrast, national standards that preempt such competition may be able to prevent this "race to the bottom."[261]

Third, federalism can lead to inefficiencies, particularly in this day and age in which individuals and businesses engage in multijurisdictional activities. One example might be sales taxes. Because much of what states might wish to tax involves cross-border transactions, states

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[258] *See generally* Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1211–19 (1977) (discussing rationales for centralization, including the tragedy of the commons, national economies of scale, disparities in effective representation, and spillovers).

[259] *See supra* text accompanying notes 237–39 (describing Tiebout's argument that interjurisdictional competition will result in an aggregate increase in social welfare).

[260] *See generally* Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1210–11 n.1 (1992) (discussing the "race-to-the-bottom" arguments for federal environmental regulation and listing literature addressing this issue); *see also* McConnell, *supra* note 232, at 1494–98 (referring to the race-to-the-bottom as the "destructive competition for the benefits of government").

[261] A similar claim might of course be made with respect to tax rates. One jurisdiction might lower its corporate tax rate or provide tax subsides with the express purpose of attracting economic development. As jurisdictions compete for that development, the resultant spiraling reduction in tax rates might lead to a reduction in overall welfare. Of course, it is not always the case that an individual jurisdiction's assessment of the gains to be had from, for example, granting certain tax subsides is accurate. *See, e.g.*, Bobbi Murray, *Money for Nothing*, NATION, Sept. 1, 2003, at 25 (describing various situations in which local governments provided tax subsides that far exceeded the public benefits, including one Minnesota town's $275,000 tax subsidy to a Dairy Queen franchise that created only one job, at $4.50 an hour).

have a notoriously difficult time collecting those taxes. Likewise, businesses can have a difficult time collecting taxes for the multiplicity of jurisdictions in which they transact.[262] This problem is of course even more acute in an era in which much more commercial activity takes place on the Internet. A national process for collecting sales tax might be far more efficient in raising revenue. In some circumstances, then, permitting a diversity or multiplicity of rules can lead to inefficiencies that national uniformity can reduce, if not eliminate.

B. Public Library Internet Access and the Values of Federalism

With these rationales and counter-concerns in mind, let us look at Regulatory CIPA—my hypothetical federal law that mandates filters—and, more generally, the issue of filters in public libraries.

1. *Geographic Diversity and Experimentation*

Framed in terms of federalism, both the geographic diversity and experimentation/innovation rationales spring to mind as particularly relevant. First, both prior to and since the passage of CIPA, a wide variety of states and local governments, including local library boards and individual libraries themselves, have been experimenting with filters and other techniques as part of policies designed to solve the problems Congress sought to address when promulgating CIPA—i.e., (1) the problem of constitutionally proscribable content on the Internet; and (2) the "unwilling viewer" problem associated with protected, but otherwise offensive, content. One state has initiated a pilot program to assess the feasibility of filters in public libraries;[263] some have laws that require filters, but only in school libraries, not public libraries;[264] one has a law that requires either filters "or other

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[262] This difficulty is of course part of the basis of the dormant Commerce Clause limitation on states' exercise of their taxing power. *See* Quill Corp. v. North Dakota, 504 U.S. 298 (1992) (holding that the dormant Commerce Clause prevents a state from taxing entities that have no physical presence in the state).

[263] *See* S.C. CODE ANN. § 10-1-206 (Law. Co-op. 2002) (establishing an experimental program to monitor filtering software in selected schools and libraries); *see also* S.C. STATE BUDGET & CONTROL BD., A REPORT TO THE LEGISLATURE: EVALUATION OF THE PILOT PROGRAMS TO ASSESS THE FEASIBILITY OF INSTALLING INTERNET FILTERING SOFTWARE IN PUBLIC SCHOOLS, PUBLIC LIBRARIES OR INSTITUTIONS (Dec. 1, 2001) (describing the pilot study), *available at* http://www.scstatehouse.net/reports/OIRFilter.doc.

[264] *See, e.g.*, ARK. CODE ANN. § 6-21-111(b) (Michie 1999) (requiring schools to use technology to prevent access to "harmful to minors" materials); KY. REV. STAT. ANN. § 156.675 (Michie 2001) (requiring schools to use the "latest available filtering technology" to prevent access to "sexually explicit material"); LA. REV. STAT. ANN. § 17:100.7 (West 2001) (requiring that elementary and secondary schools have Internet access policies that include "the use of computer-related technology or the use of Internet service provider technology" that blocks access to an array of disfavored content); VA. CODE ANN. § 22.1-70.2 (Michie 2003) (elementary and secon-

effective methods" of preventing access to illegal content on public library Internet terminals;[265] some have laws requiring either an Internet usage policy or filters;[266] some have laws that require libraries to have Internet usage policies, but do not require filters;[267] one requires public libraries to either create separate terminals for adults and minors or "utiliz[e] a system or method" for preventing minors from accessing obscene or sexually explicit material;[268] some have laws that tie the filtering requirement to state funding;[269] one state has a law that provides specific grants that may be used to purchase filters for schools but does not explicitly require them;[270] one state house of representatives passed a resolution "urg[ing]" public schools to install filters.[271] Moreover, at the local level, there are ordinances and decisions by local library boards to install filters.[272] Some libraries filter

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dary schools must "select a technology . . . to filter or block Internet access" to child pornography and obscenity). It is worth further noting that, even among states that required filtering in both the school and the public library contexts, some specifically recognized the distinction between Internet access in schools, "which serve unique educational purposes," and Internet access in public libraries, "which are designed for public inquiry." MINN. STAT. ANN. § 125B.15 (West 2000); *see also id.* § 134.50 (using the same language to distinguish between public schools and public libraries). Moreover, at least one state provided that local school boards could exempt themselves from the filtering requirement if they so chose. *See* ARK. CODE ANN. § 6-21-111(c) (Michie 1999) (authorizing a school board to exempt its schools).

[265] MINN. STAT. ANN. § 134.50 (West 2000); *id.* § 125B.15.

[266] ARIZ. REV. STAT. ANN. § 34-502 (West 2000); MO. ANN. STAT. § 182.827 (West 2000). These laws are thus similar to Senator Santorum's bill that competed with CIPA in the 106th Congress. *See supra* text accompanying notes 113–16 (describing Senator Santorum's proposed amendment).

[267] *See, e.g.*, ARK. CODE ANN. § 13-2-104 (Michie 2003); CAL. EDUC. CODE § 18030.5 (West 2000); IND. CODE ANN. § 20-14-1-7 (West 2002).

[268] MICH. COMP. LAWS ANN. § 397.606 (West 1997). The Michigan statute also provides that minors may use adult terminals with their parents' authorization. *Id.*

[269] COLO. REV. STAT. ANN. § 24-90-404 (West 2003) (conditioning grant money on filtering public computers).

[270] CONN. GEN. STAT. ANN. § 10-262n (West 2002).

[271] H.R. Res. 359 (Ill. 2001).

[272] *See, e.g.*, Keith Bradsher, *Town Rejects Bid to Curb Library's Internet Access*, N.Y. TIMES, Feb. 24, 2000, at A12 (noting that one Michigan township installed filters on all their Internet terminals); Richard J. Peltz, *Use "the Filter You Were Born With": The Unconstitutionality of Mandatory Internet Filtering for the Adult Patrons of Public Libraries*, 77 WASH. L. REV. 397, 434 & n.274 (2002) (noting "the untold number of localities that have imposed filtering by ordinance or regulation"). One of these policies has been challenged in federal court, *see* Mainstream Loudoun v. Bd. of Teachers of the Loudoun County Library, 24 F. Supp.2d 552 (E.D. Va. 1998), discussed *supra* in Part II.A, but most have not. One survey, administered in 2000, found that nearly all (94.7% of) public libraries providing public Internet access claimed to have a written policy "regulat[ing] public use of the Internet." *See* THE LIBRARY RESEARCH CENTER, UNIVERSITY OF ILLINOIS, SURVEY OF INTERNET ACCESS MANAGEMENT IN PUBLIC LIBRARIES 4 (2000) [hereinafter UNIV. ILL. SURVEY], *at* http://alexia.lis.uiuc.edu/gslis/research/internet.pdf. About 16.8% claimed to have filters on some or all of their Internet terminals. *Id.* at 8; *see also* JOHN CARLO BERTOT & CHARLES R. MCCLURE, NAT'L COMM'N ON LIBRARIES & INFO. SCI., PUBLIC LIBRARIES AND THE INTERNET 2000: SUMMARY FINDINGS AND DATA TABLES 18 (2000) (9.6% of libraries block Internet access on all public access Internet terminals), *at* http://www.nclis.gov/

access at some, but not all terminals.[273] Perhaps, most importantly, some jurisdictions have affirmatively rejected filters.[274] And, finally, a quick look at the countless bills of nearly unending variation that have been introduced in state legislatures makes it clear that the variety of laws, regulations, policies, etc. that have actually been passed are just the tip of the iceberg.[275]

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statsurv/2000plo.pdf. A more recent survey, but one with a slightly more limited sample size, found that 50.5% of libraries had filters on some or all public access Internet terminals. *See* Michael R. McCluskey, Internet Filtering Decisions in Public Libraries: Making Policy Choices in a Volatile Legal and Social Climate 13 (Nov. 22-23, 2002) (unpublished manuscript, on file with author).

[273] The University of Illinois survey found that, of those libraries that installed filters, 40.2% claimed to have filters on all of their Internet public access terminals (i.e., those not limited to staff use), for a total of approximately 7% of all libraries. UNIV. ILL. SURVEY, *supra* note 272, at 9; *see also* BERTOT & MCCLURE, *supra* note 272, at 18 (approximately 9.6% of libraries filter all public access terminals).

[274] *See* Bradsher, *supra* note 272, at A12 (noting that residents of Holland, Michigan defeated a ballot measure that would have tied funding to libraries on the condition that they install filters); *see also* Norman Oder, *Michigan Town Rejects Filters*, 125 LIBR. J. 12, 12–13 (2001) (same). *But cf.* Brian J. Bowe, *Library OKs Filters for Kids*, HOLLAND SENTINEL, Sept. 29, 2000 (noting that the library board eventually segregated terminals for minors from those for adults and installed filters in the former), *available at* http://www.thehollandsentinel.net/stories/092900/new_3.html (posted Sept. 29, 2000).

[275] Some of these bills were introduced in the wake of CIPA and attempt to mirror CIPA's approach. *See, e.g.*, S. 52, 147th Gen. Assem., Reg. Sess. (Ga. 2003) (conditioning funding to schools and public libraries for computers and Internet access on the condition that they install filters). Like the laws discussed in the text, however, most of the bills, including those introduced since the passage of CIPA, demonstrate a wide variety of approaches to the problem of protecting children from inappropriate material on public Internet terminals. *See* S. 151, 2001-02 Assem., Reg. Sess. (Cal. 2001) (requiring, as a condition of state funding, that public libraries filter Internet access, and appropriating additional funds to cover costs of filters); S. 392, 104th Leg., Reg. Sess. (Fla. 2002) (requiring filters on any public library computer available to minors); S. 404, 104th Leg., Reg. Sess. (Fla. 2002) (combined with S. 392 on Feb. 5, 2002) (same); H.R. 415, 105th Leg., Reg. Sess. (Fla. 2003) (same); H.R. 1215, 92nd Gen. Assem., 2001-02 Sess. (Ill. 2002) (requiring filters in public libraries); S. 698, 92nd Gen. Assem., 2001-02 Sess. (Ill. 2002) (requiring public libraries to adopt policy to prevent minors from accessing harmful materials and requiring libraries to "consider" filters); H.R. 806, 92nd Gen. Assem., 2001-02 Sess. (Ill. 2001) (filtering required in schools); H.R. 1831, 113th Gen Assem., 1st Reg. Sess. (Ind. 2003) (requiring filters in schools and public libraries); H.R. 393, 2001 Leg., Reg. Sess. (Miss. 2001) (requiring filters in schools and public libraries); S. 42, 91st Gen Assem., 1st Reg. Sess. (Mo. 2001) (requiring filters in schools and public libraries); S. 214, 91st Gen. Assem., 1st Reg. Sess. (Mo. 2001) (same); H.R. 478, 2001 Gen. Assem., 2001 Sess. (N.C. 2001) (proposing to create a new section 125-27 to the North Carolina General Statutes that would require filters in schools and public libraries but permit disabling of filters for "serious literary, artistic, political or scientific purpose"); S. 599, 2001 Gen. Assem., 2001 Sess. (N.C. 2001) (same); H.R. 94, 124th Gen Assem., 2001-02 Sess. (Ohio 2001) (requiring Internet usage policy and permitting filters); H.R. 10, 185th Gen. Assem., Reg. Sess. (Pa. 2001) (requiring filters in both schools and public libraries); S. 483, 185th Gen. Assem., Reg. Sess. (Pa. 2001) (same); H.R. 2713, 77th Leg., 2001-02 Sess. (Tex. 2001) (tying certain funding for schools and libraries to their installing filters); H.R. 2824, 77th Leg., 2001-02 Sess. (Tex. 2001) (same); S. 1310, 77th Leg., 2001-02 Sess. (Tex. 2001) (requiring that regional educational centers "adopt appropriate measures" to prevent access to materials that "do not have a legitimate educational purpose").

In short, the very experimentation that underlies constitutional federalism is taking place. It is hard to imagine a better example of the states and local governments serving as "laboratories" for social policy.

Likewise, the survey above of state and local library Internet policies also supports the "geographic diversity" rationale for federalism. While I doubt anyone would move from one locality to another specifically because library Internet access was different, a willingness to mandate filters might correlate with a more restrictive attitude towards sexually explicit content in general.[276] Thus, while the issue of filters in public libraries might not, by itself, be a great example to support Tiebout's thesis that individuals can "vote with their feet," it could certainly be part and parcel of a broader array of choices available to individuals when deciding where to live. Even without the dynamic version of the geographic diversity argument, however, the array of ways in which state and local governments have begun addressing the issue of inappropriate material on library Internet terminals—including the fact that many libraries have chosen policies that eschew filters altogether—provides at least some support for the notion that a diversity of responses is a good thing.[277]

Yet, both CIPA and the First Amendment challenge to it could have the effect of stifling that innovation. Let us start with Justice Souter's dissent.[278] Had Justice Souter's view prevailed, this would have been the end of mandatory filters throughout the country. Some forms of experimentation would have survived, but mandatory filters in libraries (even if they could be disabled upon the request of an adult) would have been deemed to violate the First Amendment.

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[276] The University of Illinois Survey found that filters were "more common in Rocky Mountain and Pacific states (24.3% of libraries) and in the South (23.1%) . . . [and] least common in the Northeast (16.1%) and Midwest (11.4%)." UNIV. ILL. SURVEY, *supra* note 272, at 9.

[277] This might be a good example supporting some of the criticisms of the application of Tiebout's thesis to federalism rather than localism. Surveys have suggested that size of service area population is a better predictor of whether a library installs filters than region of the country. *See id.* at 8 (noting that the incidence of filters "rang[ed] from 36.1% of libraries serving over 100,000 persons, to 25.9% of those serving 25,000 to 100,000, to 12.7% of those serving under 25,000"); *see also* McCluskey, *supra* note 272, at 13 (noting that "[a]nalysis showed a linear relationship among the six population groups, with the largest group being the most likely to install filters and the smallest group the least likely" and also that "among libraries serving a population of 500,000 of more, 72% had installed filters, while just 28% of those serving less than 10,000 population had installed filters"); *cf.* BERTOT & MCCLURE, *supra* note 272, at 18 (finding that 29.2% of urban libraries and 30.2% of suburban libraries, but only 19.6% of rural libraries, had filters on some or all terminals). In general, central libraries in urban areas are those with the largest service area populations, and these can, of course, be in many different states. Nonetheless, as I noted above, see *supra* note 276, one survey found that filters were "more common in Rocky Mountain and Pacific states (24.3% of libraries) and in the South (23.1%) . . . [and] least common in the Northeast (16.1%) and Midwest (11.4%)." UNIV. ILL. SURVEY, *supra* note 272, at 9.

[278] *ALA II*, 539 U.S. 194, 231–43 (2003) (Souter, J., dissenting).

Such categorical prohibition is, of course, the natural result of doing a "strict scrutiny" analysis, and there are good reasons for the Court to do this in certain circumstances.[279] But, my point here is simply that Justice Souter's approach ignored the benefits of experimentation and would have prevented it from continuing.

From the standpoint of stifling innovation, the Court's judgment hardly does any better. By upholding the law, the Court has instead forced *all* local government recipients of Universal Service Fund and LSTA funding to place filters on *all* of their Internet access, irrespective of whether a particular locality is having trouble with access to inappropriate materials on local library terminals. In particular, those libraries that offer both filtered and unfiltered access[280] can no longer choose that option if they want federal funding. By constitutionalizing the question in terms of the First Amendment, *South Dakota v. Dole*'s "independent constitutional bar" rule left the Court with an all-or-nothing solution. In contrast, if the Court had viewed the constitutional question through the lens of federalism and had invalidated it on that ground, a variety of approaches—some including filters, some not—would have remained available.

More than this, moreover, a federalism solution would have permitted continued dialogue in the courts on the meaning of the First Amendment in the context of filters in public libraries.[281] Such an approach would have permitted the legal system more time to discuss and debate the important question of the merits of filters in public libraries, an approach that would have allowed the legal structure to exhibit a system-wide humility in the context of ever-changing technology.[282]

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[279] *See* Anuj C. Desai, *Attacking* Brandenburg *with History*, 55 FED. COMM. L. J. 353, 385 (2003) (book review) (arguing that the *Brandenburg* "imminent likelihood of harm" test should be viewed as a prophylactic rule to prevent suppression of views based on the government's notion of truth).

[280] According to the University of Illinois study, this was approximately 10% of libraries. UNIV. ILL. SURVEY, *supra* note 272, at 8–9.

[281] *See* Ann Althouse, *Federalism, Untamed*, 47 VAND. L. REV. 1207, 1220–23 (1994); *cf. also* MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 132–33 (2000) (noting that the "federal system and the pre-Civil War idea that the federal government had no broad power to suppress abolitionist ideas meant that the issue of suppression was decided state by state" and, thus, "[f]or the nation that at large, piecemeal suppression meant that discussion of the legitimacy of slavery continued").

[282] *See* Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1744–45 (1995) (discussing the common law's value for determining the rules of cyberspace because what defines common law is "small change, upon which much large change gets built"); *cf.* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 891 (1996) ("[T]he traditionalism that is central to common law constitutionalism is based on humility and, related, a distrust of the capacity of people to make abstract judgments not grounded in experience.").

Indeed, it is here that we see the advantage federalism provides over the categorical approach to the First Amendment taken by the challengers to the law, the district court, and Justice Souter. A federalism solution to CIPA would have permitted the type of inter-court dialogue that we often associate with the common law[283] by leaving the First Amendment question undecided, thereby permitting not only continued experimentation, but also more cases challenging local library filtering policies.[284] Such a result is thus a "compromise," not simply in the sense of giving each side a part of what it wanted, but also in the sense of promoting further dialogue on—and possibly refinement of—the question on which the parties disagreed. This is important here because the disagreement on this question is not only, as the challengers sought to portray it, a fight between the plaintiffs and the federal government but also an internal struggle within the institutional library community.[285]

To be sure, the First Amendment argument is powerful. My point does not directly question the logic of Justice Souter's "strict scrutiny" analysis. I am merely suggesting that federalism would have permitted the courts to continue, over time, to mediate between the two conflicting visions of library Internet access (i.e., those articulated by the plurality and Justice Souter). Federalism would have allowed the legal system to admit implicitly that a filter on Internet access is fundamentally different from both a traditional collection decision and a *Pico*-like removal decision, and that there is a kernel of truth in each of the analogies raised by the plurality and Justice Souter.

Arguably, what the Court in fact did—allow as-applied challenges to libraries implementing CIPA—amounted to the same thing.[286] But, five members of the Court (the plurality and Justice Stevens) have already effectively staked out their position on the constitutionality of individual library filtering policies, and, even taking Justice Stevens

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[283] *See generally* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 23 (1921) (referring to common law courts as "those great laboratories of the law") (quoting MUNROE SMITH, JURISPRUDENCE 21 (1909)); EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1948) (describing generally the process of common law reasoning). The idea of inter-court dialogue is also embodied in the principle that the Court should ordinarily wait for splits in the lower courts before granting certiorari. *See* SUP. CT. R. 10 (making conflicts between decisions of lower courts a consideration governing petitions for certiorari). Since the *ALA* case was a mandatory appeal, however, denial of certiorari was not an option for the Court.

[284] *See supra* Part II.A (discussing constitutional challenges to local decisions to filter internet access in public libraries).

[285] *See supra* text accompanying note 123 (noting that there is an intense debate within the library community about the role of Internet filters).

[286] *ALA II*, 539 U.S. 194, 214–15 (2003) (Kennedy, J., concurring) (noting that if an adult user's election to view constitutionally protected material is substantially burdened, it would be grounds for an as-applied challenge); *id.* at 219 (Breyer, J., concurring) (noting that the case involved only a facial challenge); *id.* at 232 n.1 (Souter, J., dissenting) (stating that *ALA II* "would not foreclose an as-applied challenge").

out of the mix, Justice Breyer's intimation that the burden of requesting unblocking is no "more onerous than traditional library practices associated with segregating library materials in, say, closed stacks, or with interlibrary lending practices,"[287] suggests that he too would be skeptical of an as-applied challenge. Moreover, even accepting the possibility of an as-applied challenge, a huge number of libraries will, in the meantime, feel compelled to comply with the filtering condition because of the large amount of money at stake.[288]

Perhaps the most potent argument in favor of the statute's approach (and, thus, the Court's upholding of it) is the possibility that the increase in the number of libraries using filters because of CIPA will spur further improvements in filtering technology and lead to the development of filters designed specifically for public libraries.[289] Of course, no matter how good the technology, it will almost by definition be either under-inclusive or overbroad under the theory advanced by the plaintiffs.[290]

In sum, an approach rooted in federalism would have permitted the state and local experimentation to continue, including experimenting with policies that include filters, and yet would have precluded the federal government from forcing a one-size-fits-all solution to a problem.

Second, the *definition* of illegal sexually explicit content has traditionally been treated as dependent on location. The definitions of "obscenity" and "harmful to minors" materials have traditionally included a component that incorporates "community standards,"[291] and

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[287] *Id.* at 219 (Breyer, J., concurring).

[288] *But see* Anne Marie Timmins, *Libraries Pass Up Computer Money: Local Officials Reject Internet Filtering*, CONCORD MONITOR, June 13, 2004, *available at* http://www.concordmonitor.com.

[289] This argument was made early on by, among others, Bruce Taylor (currently senior counsel on obscenity issues for the United States Justice Department's criminal division): "S. 97 represents federal encouragement of the continued improvement and perfection of optimum blocking and filtering devices. . . . [F]ederal encouragement and incentives for the development and utilization of blocking and filtering technologies, serves the ultimate goal of U.S. Communication policy and benefits *all* U.S. market segments, because it ultimately will result in the realization of better technological devices." Taylor, *supra* note 97, at 9. Joel Reidenberg mentioned a similar point briefly during a Fordham Law School symposium held in between the district court and Supreme Court decisions in the *ALA* case. *See www.TheGovernmentHas Decided*, *supra* note 64, at 871 (noting that, under CIPA, "presumably a marketplace would emerge with a substantially greater number of companies out there offering products for sale to libraries"). Other than these slight exceptions, however, this argument was not important in the debate about the merits of CIPA.

[290] Indeed, events following the Court's decision have demonstrated the difficulty that plaintiffs have had resigning themselves to the Court's decision. *See ALA Cancels Discussion on Filtering Pornography*, USA TODAY, July 18, 2003 (noting that after the Court's decision, ALA representatives originally agreed to meet with software companies but later decided to cancel the meeting), *available at* http://www.usatoday.com/tech/news/techpolicy/2003-07-18-filtering_x.htm.

[291] *Ashcroft I*, 535 U.S. 564, 574–75 (2002) (discussing the Court's history of using "community standards" for assessing sexually-explicit material); Miller v. California, 413 U.S. 15, 24

the "community standards" limitation is even part of federal law.[292] While Justices O'Connor and Breyer have indicated a desire to "nationalize" the relevant definition of "community standards" for the Internet,[293] there seems little reason to do so for purposes of *library access* to the Internet. Whether one thinks of providing Internet access as a collection decision or as an exclusion decision, those decisions appropriately belong at the local level[294] because part of what they involve is deciding what content is appropriate for a local audience.

Third, the *regulation* of sexually explicit content has traditionally been treated as within the purview of state and local governments as well. More important than this, however, is the fact that even the question of *whether* to regulate sexually explicit content has been thought to be within a state's autonomy. So, for example, the question of whether to criminalize the possession or distribution of "obscenity" is a question of state, not federal, law.[295] Although states *may*, consistently with the First Amendment, prohibit the possession, receipt or dissemination of obscene materials,[296] they need not do so. Indeed, "[m]ost states do not prohibit the possession of obscenity that depicts adults."[297] Moreover, some do not even prohibit possession of obscenity that depicts children.[298] A federal law prohibiting

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(1973) (establishing use of "community standards" test for obscenity prosecutions); *see also* Ginsberg v. New York, 390 U.S. 629, 639 (1968) (assessing a New York statute that prohibits selling minors materials considered "harmful to minors" and noting that the statute recognizes the parental role in assessing materials "based on community standards").

[292] *See supra* Part I.B (discussing COPA and *Ashcroft v. ACLU*).

[293] *See supra* Part I.B (discussing COPA and *Ashcroft v. ACLU*).

[294] *See* Laughlin, *supra* note 58, at 279 (noting that local decision makers are in the best position to judge local community standards). A prominent public librarian in Chesterfield, Virginia, both supports the use of filters and opposes CIPA: "I hope CIPA will be overturned (and have contributed to ALA's CIPA legal fund) because libraries do not need the intrusion of federal (or state) mandates on how to operate. We've generally been doing quite well managing this great new Internet service over the past decade." Posting of Skip Auld, auldh@co.chesterfield.va.us, to Chesterfield County Public Library, Web4Lib@sunsite.berkeley.edu (May 7, 2003), *available at* http://legalminds.lp.findlaw.com/list/ifrt/msg01126.html.

[295] The federal government does criminalize obscenity where it claims the constitutional power to do so. *See* 18 U.S.C. §§ 1462, 1465 (2002) (criminalizing importation or interstate transportation of obscene materials); *id.* §§ 1461, 1463 (outlawing use of mails to distribute obscene materials); *cf.* Pamela J. Stevens, Note, *Community Standards and Federal Obscenity Prosecutions*, 55 S. CAL. L. REV. 693, 715–16 (1982) (arguing in favor of limitations on exercise of federal postal power to criminalize obscenity because "regulation of obscenity serves purely local purposes").

[296] Possession of obscene materials *within the home* is constitutionally protected. *See* Stanley v. Georgia, 394 U.S. 557 (1969). The *Stanley* protection is extremely limited, however. It does not extend to carrying obscene materials across state lines, see United States v. Orito, 413 U.S. 139 (1973), or to viewing obscene materials in a movie theatre. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

[297] POSNER & SILBAUGH, *supra* note 236, at 188.

[298] *See id.* at 188–206 (listing Alaska, Connecticut, the District of Columbia, Hawaii, Maine, Massachusetts, Michigan, New Mexico, New York, Rhode Island, Vermont, and Wyoming as

the possession of obscenity would almost certainly fall outside Congress's enumerated powers.[299] So, too, would a federal law that prohibited a local library from including such materials in its collection. To be sure, CIPA does not do either of these things, but my point is simply that regulation of such materials traditionally falls within a state's police powers and that CIPA seriously erodes state decision making in this area.

CIPA's federalism problem arises particularly in the case of a state like Oregon—admittedly unique in this respect[300]—whose state constitution provides protection for obscenity.[301] Because the state constitution protects obscenity, an Oregon state court might find that a public library that installs filters, even for the purpose of blocking obscenity, would violate the state constitution. An Oregon library would thus in effect be unable to accept E-rate or LSTA funding because, by accepting the conditions, it would be violating its own state constitution. Of course, because CIPA was a spending law, rather than a direct mandate, there would be no direct conflict between CIPA and the state constitution (i.e., CIPA would not preempt the state constitution). Nonetheless, CIPA would amount to an attempt to pressure the state of Oregon to alter its constitution.[302] On first blush this might seem unproblematic since, after all, the Supremacy Clause requires state law to bow to federal law. The problem, though, is that the federal government is restricting rather than expanding rights, and, more importantly for my purposes, doing so in an area that, ab-

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states with no laws regulating the personal possession of obscene materials, whether of adults or children); *cf. id.* at 188 (noting that "[*m*]*any* states prohibit possession of obscenity depicting children" (emphasis added), thereby implying that not all do).

[299] Of course, Congress would likely "solve" the problem merely by adding a "moved in interstate commerce" jurisdictional element to the statute. *Cf.* 18 U.S.C. § 1465 (criminalizing transportation of obscene materials across state lines with intent to distribute).

[300] *See* County of Kenosha v. C & S Mgmt., Inc., 588 N.W.2d 236, 245 n.6 (Wis. 1999) (listing states that have refused to apply Oregon's approach to their own constitutions). *But see* Robert M. O'Neil, *Federalism and Obscenity*, 9 U. TOL. L. REV. 731, 734 & n.24 (1978) (noting that, during the 1970s, Iowa and other states decriminalized the dissemination of obscene materials to adults).

[301] *See* State v. Henry, 732 P.2d 9, 17 (Or. 1987) ("We hold that characterizing expression as 'obscenity' under any definition be it *Roth*, *Miller*, or otherwise, does not deprive it of protection under [article I, section 8 of] the Oregon Constitution."). It is perhaps no coincidence that one of the lead plaintiffs in the *ALA* case was the Multnomah County Public Library, a local library system in Oregon.

[302] *See* William Van Alstyne, *"Thirty Pieces of Silver" for the Rights of Your People: Irresistible Offers Reconsidered as a Matter of State Constitutional Law*, 16 HARV. J.L. & PUB. POL'Y 303, 307 (1993) (arguing that state and local governments should not be able to accept federal funds when to do so would "put at risk such rights as they are forbidden by state constitutional law to abridge").

sent the spending power, is within the exclusive domain of the states.[303]

2. *Political Participation*

Political participation could also be increased by having the question of whether to install filters in public libraries decided at the state and local level. States and local communities were clearly addressing the issue in the absence of a federal mandate. Parents, librarians, and others throughout the country were engaged in a dialogue about the efficacy of filters. The fact that library patrons felt the impact at the most local level could be seen as one factor in increasing community involvement with the issue.

Indeed, as I noted earlier,[304] a close variant of this argument was made by some opponents of the bill that eventually became CIPA when it was being debated in Congress. One witness at congressional hearings noted that the law could be "counterproductive and even harmful" because it "may not only discourage communities from doing the hard work to reach their own solutions; it also lacks the legitimacy necessary to foster broad community support."[305] Senator Santorum, whose proposed legislation would have given schools and libraries the option of either installing filters or soliciting local public comment to create an Internet use policy, made similar comments in Congress.[306]

In short, allowing local communities to debate the merits of different approaches to regulating Internet content in local libraries could have promoted greater participation in the process of policy formation. In turn, this could have resulted in the policies having greater legitimacy in the eyes of those affected.

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[303] *Cf.* O'Neil, *supra* note 300 (noting the federalism issues raised where federal authorities prosecute the intrastate distribution of obscene materials in states that have decriminalized such distribution and discussing such a prosecution, Smith v. United States, 431 U.S. 291 (1977)).

[304] *See supra* text accompanying notes 107, 113–16 (describing the political participation arguments of librarian, Candace Morgan, and Senator Santorum, and noting the ALA's agreement).

[305] Morgan Testimony, *supra* note 107.

[306] *See supra* text accompanying notes 113–16 (discussing Santorum's proposed amendment). Senator Santorum described his own amendment, which was aimed at encouraging a local hearing and comment process to address sexually explicit Internet content, as being designed to tell local parents and teachers to "go out and bring the community together and do the hard work of democracy." 146 CONG. REC. S5843 (daily ed. June 27, 2000).

3. *Anti-Tyranny*

Beyond the geographic diversity, experimentation, and political participation rationales, however, one more aspect of federalism—and a surprising one—comes into play here: the anti-tyranny rationale. It is here that we see not only federalism, but also the First Amendment at play. If the existence of strong and independent state governments can in fact serve as a counterweight to prevent abuses of power by the national government, local governmental libraries can be one component of that resistance. Recall that the plurality in *ALA II* distinguished *Velazquez* on the grounds that, in contrast to the role of lawyers involved in suits against the government, "[p]ublic libraries . . . have no comparable role that pits them against the Government."[307] Of course, in the most literal sense, the plurality is correct. Public libraries are not pitted against the "government" because they *are* the "government." But, of course, public libraries are part of *local* government and are thus creatures of the states. In this sense, they are very much "pit[ted] against" the *federal* government and are so pitted by constitutional design.

Moreover, as I noted earlier, the plurality's conclusion contradicts the historical role that public libraries have played. From the ALA's Bill of Rights[308] and the library community's institutional opposition to censorship dating back to the early part of the twentieth century,[309] to the recent role of librarians in attempting to resist the USA PATRIOT Act's grant of authority to government officials to inquire about reading records,[310] librarians have played an active role both in promoting the values of the Free Speech Clause and in directly opposing the "government" when the government seeks to attack those values. In this sense, librarians do play much the same "antigovernment" role that lawyers receiving Legal Services Corporation funds play when challenging the constitutionality of government actions in

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[307] *ALA II*, 539 U.S. 194, 213 (2003); *see also* text accompanying notes 200–09 (discussing *ALA II*'s plurality discussion of the unconstitutional conditions doctrine, in which *Velazquez* is distinguished).

[308] *See* LIBRARY BILL OF RIGHTS, *supra* note 209.

[309] *See generally* EVELYN GELLER, FORBIDDEN BOOKS IN AMERICAN PUBLIC LIBRARIES, 1876–1939: A STUDY IN CULTURAL CHANGE (1984) (tracing the ideal of freedom to read and the emergence of the librarian's role as guardian of this freedom); LOUISE S. ROBBINS, CENSORSHIP AND THE AMERICAN LIBRARY: THE AMERICAN LIBRARY ASSOCIATION'S RESPONSE TO THREATS TO INTELLECTUAL FREEDOM, 1939–1969 (1996) (studying the American library profession's developing defense of intellectual freedom, dating back to 1939).

[310] *See* June Kronholz, *Reader Beware: Patriot Act Riles an Unlikely Group: Nation's Libraries*, WALL ST. J., Oct. 28, 2003, at A1; *see also*, Freedom to Read Protection Act of 2003, H.R. 1157, 108th Cong. (2003) (attempting to amend the Foreign Intelligence Surveillance Act to exempt bookstores and libraries from provision making it easier for government officials to obtain business records during investigations); Library, Bookseller, and Personal Records Privacy Act, S. 1507, 108th Cong. (2003) (same).

welfare disputes. For First Amendment purposes, then, one might think of librarians' role in some ways like the role Vince Blasi posits for the institutional press, a locus of power aimed at "checking" the government, notwithstanding the fact that libraries are an instrumentality of the government.[311] Indeed, to support this thesis, one probably needs little evidence beyond the fact that it was the libraries—the entities that would be violating the First Amendment under the analysis mandated by the "independent constitutional bar" rule—who were the principal challengers to CIPA.[312]

Unfortunately, then, because the case got framed solely in terms of the First Amendment, the plurality missed an opportunity to give meaning to the anti-tyranny principles that the Court had embraced so enthusiastically in *Gregory v. Ashcroft*, *New York v. United States*, and *Printz v. United States*. In short, if in fact we are to take the anti-tyranny principle of constitutional federalism seriously, the *ALA II* Court should have considered the fact that local public libraries are potential loci of power that stand in opposition to the federal government.

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[311] *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977) (discussing the checking value in First Amendment theory). Even if we put aside the federal-state dichotomy and treat libraries as simply part of "the government," the notion of an individual or entity being "the government" for some purposes, but not others, is not as unusual as it sounds. For example, we might say that a defense attorney, representing his client in a criminal prosecution, is the "government" for purposes of the state action doctrine, see Georgia v. McCollum, 505 U.S. 42 (1992) (holding that defendant's use of race in determining whom to strike from the petit jury with peremptory challenges constituted state action for purposes of the Equal Protection Clause). Yet, it is difficult to imagine a more important bulwark against tyranny than a defense attorney. This seeming paradox is no less present here. Although the analogy does not work perfectly, a librarian might likewise be deemed to serve as both a government employee for some purposes, and, yet, still be "pitted" against the government for purposes of understanding her role in furthering First Amendment values.

I mention the "checking" or watchdog function of the press here not because this is necessarily the best way to think about public libraries and possible analogies to the institutional press, nor even to imply that the press's role is limited to this function. C. Edwin Baker has explained how one's views about the role of the press—and the First Amendment's Press Clause—is shaped by one's normative view of democracy. *See* C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY 129–53 (2002) (discussing purposes of the press in promoting elitist, liberal-pluralist, republican, and complex democracy). A system of libraries can serve other goals both similar to, and different from, the press. Thinking of librarians as local government agents surely obscures their true role in promoting democracy. It is librarians' professional role, more than their status as local government officials, that gave rise to their challenge to CIPA. I raise the analogy simply to note the way in which the anti-tyranny function that the diffusion of power is said to promote is also promoted by libraries. I do not mean to say that libraries play an anti-tyranny function *because of* librarians' status as local government employees.

[312] One of the most striking things about the plurality opinion is that one can read much of it with the impression that the libraries are the defendants, seeking to uphold the statute, rather than the plaintiffs challenging it. This is a natural result of the focus on the "independent constitutional bar" rule, but it has the unfortunate side effect of obscuring the strong—almost ideologically driven—opposition the institutional library community has taken to filters.

It is worth further recalling at this point that the anti-tyranny rationale finds its modern judicial underpinnings in the anti-commandeering cases and can thus be seen as dovetailing with the political accountability rationale for judicial enforcement of federalism. Viewed in terms of political accountability, it is hard to imagine a place more likely to be viewed as a locus of local decision making independent of federal law constraints than a public library. Most library patrons are likely to view the imposition of filters, like other decisions about the availability of content at the library, as a local rather than a federal decision. On the other hand, this seems to be a situation in which notice, rather than judicial invalidation of the federal law, would be the more appropriate remedy. Surely it would be relatively trivial for a library to make it clear to its patrons that the filtering requirement has been imposed by the federal government.

4. *Arguments in Favor of Centralization*

In sum, several of the rationales for constitutional federalism suggest that a uniform answer to the question of whether to install filters in public libraries is a bad idea. But, what of the costs of divergent responses to the vexing problems CIPA was designed to address? Put simply, many of the concerns that can accompany devolution of decision making to the states and municipalities simply do not come into play. Take for example the potential for negative externalities impacting the rest of the country. Because filters installed on a local library limit access to materials only in the library itself, the negative externalities caused by a local library's decision to install filters would be trivial. It is true, of course, that, partly because of filters' overblocking, there will be web site publishers outside of the local library's jurisdiction who will not be able to "speak" to audiences in that library. Thus, in the literal sense, there will of course be externalities. But, these will be externalities due to the filter itself, not due to having the decision made at the local level. A uniform rule throughout the country would impose the same costs as would different rules in different jurisdictions. Nothing about having the federal government impose the requirement reduces that externality.

Similarly, the negative externalities associated with a library *failing* to install filters would also be trivial. With respect to the "unwilling viewer," the impact of a local library's failure to install filters would be limited to those who physically enter that library.[313] There would thus

[313] This situation contrasts with, for example, the FCC's regulation of a radio broadcast, which in many situations can even cross state lines. In the seminal "Seven Dirty Words" case, in which the FCC sanctioned a radio station for playing George Carlin's "Seven Dirty Words" monologue on the radio, *see* FCC v. Pacifica Found., 438 U.S. 726 (1978), the station at issue was

be little in the way of measurable extraterritorial impact. The same would be true with respect to the worry about protecting children from harmful materials or preventing adults from viewing obscenity: only those who enter the library (who it is probably safe to assume are likely to be residents of the area within the particular library's jurisdictional boundaries) are going to be affected.

As for child pornography, the argument might be a little trickier: the government's interest in regulating the demand for child pornography is largely viewed as aimed at reducing the supply in order to protect the children who are being exploited to produce the images.[314] These children can be anywhere, including outside of the library's local jurisdiction. Thus, one might argue that a national rule is necessary because a national rule imposing filters on public libraries will have a greater impact on reducing the demand for—and consequently, the supply of—child pornography.

Nonetheless, this argument does not militate in favor of a uniform federal rule. First, it is difficult to imagine that a federal rule imposing filters on public libraries would provide a sufficient enough gain in the fight against the suppliers of child pornography to be worth much in the calculus. Because requiring filters in libraries is rather limited in its "demand-side" impact, even a federal law that required them would be unlikely to place much of a dent in the overall supply of child pornography. Second, and more importantly, the comparison here is not filters versus no regulation of the Internet in libraries. Rather, it is between a uniform national rule imposing filters and a rule that permits a variety of modes of regulating. The argument for a national rule based on reducing demand for child pornography would not, then, be based on the virtues of, or need for, *uniformity*. Rather, it would be based on the assumption that filters would be a more efficacious method of achieving the result (i.e., a reduction in child pornography). But, it is not clear that a filter is the best method; whether Regulatory CIPA's mandate—a policy of mandatory filters on all library terminals, but one that permits unfettered requests to disable them—is in fact the best way to reduce the demand for child pornography on library Internet terminals is still open for debate. It is the increased opportunities to debate that issue that a federalism solution provides.

Finally, it could be that the benefits associated with geographic diversity could lead to the very destructive competitiveness that often

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WBAI, a New York City station whose broadcast would have, at the least, crossed into New Jersey, *see WBAI Ruling: Supreme Court Saves the Worst for the Last*, BROADCASTING, July 10, 1978, at 20 (noting that the *Pacifica* case involved WBAI).

[314] *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 254 (2002) (describing the rationale for permitting government to suppress child pornography).

accompanies such diversity. But, as I noted above,[315] it is unlikely that the dynamic version of the geographic diversity argument would play out in a literal sense; it seems improbable that many people would move from one locality to another, let alone from one state to another, solely because of whether a locality has filters in public libraries. The costs of avoiding the libraries altogether and perhaps purchasing one's own computer and Internet access, filtered or not by individual choice, are probably far lower than would be the "transaction costs" of any move. Those who are highly likely to be dependent on Internet access at a public library are probably even more unlikely to have the means to move. Instead, it is far more likely that a decision about filters will simply reflect the competing concerns of the community in which a particular library finds itself. As such, there will be little in the way of the "race to the bottom" problem[316] that can normally be associated with geographic diversity.

5. *Summary*

In sum, the principles of constitutional federalism provide a useful lens through which to view CIPA, as well as strong reasons to think that the law should have been invalidated on federalism grounds, rather than framed solely in terms of the First Amendment. The "independent constitutional bar" rule's insistence on a First Amendment analysis, in effect, prevented the Court from considering these concerns. It forced the Court to make a single decision for the entire country, notwithstanding my arguments in this Part of the Article. These arguments are of course based on rationales embedded in constitutional policy, rather than constitutional doctrine. In the following Part, I turn to doctrine. In particular, I focus on the federal spending power in order to explore in greater detail the ways in which the doctrine might change to help match the constitutional policy concerns I have raised in this Part.

IV. CIPA AND THE SPENDING POWER

CIPA can be viewed as a straightforward exercise of Congress's power under the so-called Spending Clause.[317] Congress is simply

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[315] *See supra* text accompanying note 276 (noting that, while a willingness to mandate filters might correlate with a state's more general policies, it is unlikely that people will move to or from a state due to its library Internet policies).

[316] The wonderful thing about this example is, of course, that it depends upon one's perspective whether the "bottom" means mandatory filters or none at all.

[317] U.S. CONST. art. I, § 8, cl. 1. The text of the provision is as follows: "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." (I use the adjective "so-

spending its tax revenues and attaching terms and conditions to receipt of those funds. From that standpoint, one way to view CIPA is as analogous to Congress offering public libraries a contract. Congress will provide federal funds if and only if the library accepts the conditions of that contract. Those conditions include the installation of filters. As I explained above, the government's initial defense of the Act largely mirrored the courts' broad construction of the spending power.[318]

Because the federal Spending Clause is the constitutional power Congress exercised when promulgating CIPA, I use this Part to explore the jurisprudence of the spending power. In Section A, I give a

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called" because, as the text makes clear, the Constitution "does not contain a 'spending clause' as such." Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1235 (1994). I will thus refer to the "spending power" rather than the "Spending Clause," unless I intend to make specific reference to Article I, Section 8, Clause 1 of the Constitution.) The spending power is viewed as complementary to the taxing power, such that the clause is in effect the power (i) "to lay and collect Taxes, Duties, Imposts and Excises" (the "taxing power") and (ii) to spend the money collected through "Taxes, Duties, Imposts and Excises" for the purpose of "pay[ing] the Debts and provid[ing] for the common Defence and general Welfare of the United States." The relevant portion of this Clause ("The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, *to . . . provide for the . . . general Welfare of the United States*," (emphasis added)), which I refer to as the "Spending Clause, is also sometimes referred to as the "General Welfare Clause." Recent scholarship has in fact questioned whether Congress's spending power derives from Article I, Section 8, Clause 1 or some other constitutional clause. *See* David E. Engdahl, *The Basis of the Spending Power*, 18 SEATTLE U. L. REV. 215 (1995) [hereinafter Engdahl, *Basis*] (arguing that the power to spend is more appropriately found in two provisions: (1) the power to spend for "carrying into Execution" any of Congress's enumerated powers is found in the Necessary and Proper Clause, Article I, Section 8, Clause 18; and, (2) the power to spend any money in the Treasury is found in Article IV, Section 3, Clause 2, which grants Congress the power to "dispose of . . . Property belonging to the United States"); David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 50–51 (1994) [hereinafter Engdahl, *Spending Power*] (same); Bradley A. Smith, *Hamilton at Wit's End: The Lost Discipline of the Spending Clause vs. the False Discipline of Campaign Finance Reform*, 4 CHAP. L. REV. 117, 121 (2001) (suggesting that the power to spend is implicit in the Appropriations Clause, Article I, Section 9, Clause 7, which provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."). *But cf.* Jeffrey T. Renz, *What Spending Clause? (or the President's Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article I, Section 8, Clause 1 of the United States Constitution*, 33 J. MARSHALL L. REV. 81, 140 (1999) (viewing the Appropriations Clause as implying that the spending power is technically an executive power under the President's duty to ensure that "the Laws be faithfully executed"). I leave the nuances of this debate to others, as the debate about the *scope* of the national government's power to spend revenues from taxation, as it has done in CIPA, would not be affected by the result of the debate as to which constitutional clause the spending power is found in. Moreover, since I am interested here simply in the power to appropriate funds, Renz's conclusion that spending is an executive rather than legislative power is of little import. Indeed, my exclusive focus is on how *federal* power to spend impacts the states and their subdivisions, and, thus, whether the power is executive or legislative makes little difference. *Cf.* Kate Stith, *Congress's Power of the Purse*, 97 YALE L.J. 1343 (1988) (discussing the appropriations power as a congressional power and a limitation on the executive branch).

[318] *See ALA I*, 201 F. Supp. 2d 401, 450 (2002) (discussing the framework established in *South Dakota v. Dole*). Indeed, even the plaintiffs agreed that the Supreme Court's Spending Clause jurisprudence was the proper lens through which to view the case. *See id.*

brief history of spending power jurisprudence. I focus on two particular aspects of that power that are of interest to me: First, I explain that the spending power must be seen as inextricably linked with the federal taxing power. By shedding light on this connection, I lay the groundwork for a fuller understanding of Professor Baker's proposal for the conditional spending power that I lay out in Part V. Second, I look closely at the history of the jurisprudence of conditional federal grants to the states (and state government entities), as this is of course what CIPA is. Then, in Section B, I describe the current doctrine of conditional federal grants to states. In particular, I look closely at the "independent constitutional bar" rule, which resulted in CIPA being analyzed solely as a First Amendment case.[319]

A. History of Spending Power Jurisprudence

1. *Spending Power in the Pre-1937 Era*

Understanding the spending power requires a brief history of the Spending Clause and its constitutional jurisprudence, as that history sheds light on the current doctrine and the possibility that that doctrine will change.[320] Since 1937, the spending power has been largely forgotten, and, indeed, until the Court's recent federalism decisions beginning with *Lopez*, most modern scholars had essentially ignored the power.[321] And for good reason. In a world in which Congress's regulatory powers under the Commerce Clause (and/or other powers, such as section 5 of the Fourteenth Amendment) were as broad as they had been interpreted to be between 1937 and 1995, Congress had little need to rely on its spending power.[322]

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[319] *See supra* text accompanying notes 129–32.

[320] I discuss here simply the constitutional history of the spending power. As I discuss in greater detail below, there are good policy reasons for imposing some kind of federalism-based constraints on Congress's spending power. *See infra* Part V; *see also* Michael McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1496–97 (1987) (reviewing RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987)) (citing James Buchanan's work to explain why "centralized decision making about projects of localized impact will result in excessive spending—excessive meaning more than any of the individual communities involved would freely choose").

[321] *See* Engdahl, *Spending Power*, *supra* note 317, at 2 ("The constitutional question of Congress' 'power' to spend . . . has received relatively little attention from legal scholars.")

[322] As Dean Rosenthal has put it, "[i]f the front door of the commerce power is open, it may not be worth worrying whether to keep the back door of the spending power tightly closed." Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1131 (1987); *see also* Baker, *supra* note 8, at 1918–19 (quoting Rosenthal); Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 50 (2001) (same). The phrase "little need" in the text does not mean "no need." Examples of Congress exercising its spending power beyond what might be permissible even under a broad pre-*Lopez* reading of the Commerce Clause include federal regulation of how doctors practice medicine.

The spending power did, however, raise significant constitutional questions prior to the New Deal for the simple reason that both Congress and the courts viewed Congress's other powers as much more circumscribed. And the importance of the spending power is resurfacing as the Court is again limiting Congress's other powers. This resurgence implies, however, a role for the spending power of even greater importance than the pre-1937 era because of the pervasive role that the national government now plays in nearly all aspects of American life.[323] All of a sudden, we have a national government with a desire to exercise the expansive powers it thought it had in the pre-1995 era, but one with an arguably curtailed Commerce Clause authority.[324] This has led to a skyrocketing of scholarly interest in the spending power.[325] Until 1936, the debate about the scope of the Spending Clause[326] revolved largely around two different possible in-

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See Smith, *supra* note 317, at 118 (citing Harris v. McRae, 448 U.S. 297 (1980); Bowen v. Am. Hosp. Ass'n, 476 U.S. 610 (1986)). For examples of how counselors advise patients, see Smith, *supra* note 317, at 118 (citing New York v. Schweiker, 557 F. Supp. 354 (1983)).

[323] There are perhaps two different aspects of that increased role: (1) the increased role that government in general plays in regulating; and (2) the increased *federal* role in law.

[324] *Cf.* Baker, *supra* note 8, at 1914 ("[P]revailing Spending Clause doctrine appears to vitiate much of the import of *Lopez* and any progeny it may have."); Mark Tushnet, *What Is the Supreme Court's New Federalism?*, 25 OKLA. CITY U. L. REV. 927, 936–37 (2000) ("The Court is unlikely to succeed in radically transforming the relative roles of the national and the state governments unless it changes its doctrine regarding Congress's power to require that states accepting federal grants comply with federally prescribed requirements.").

[325] In 2001, Chapman Law School had a conference devoted solely to the Spending Clause. *See generally* 4 CHAP. L. REV. 1 (2001). Prior to *Lopez*, very few legal scholars concerned themselves with the spending power, except in the context of the unconstitutional conditions doctrine. The scholarship on unconstitutional conditions is of course vast. *See* Berman, *supra* note 322, at 5 n.20 (listing sources); *see also* Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85 (analyzing unconstitutional conditions questions); Albert J. Rosenthal, *supra* note 322 (same); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989) (same). Unconstitutional conditions questions, however, involve what might be termed "external" limits on the spending power (i.e., those outside the power itself), usually constraints in the Bill of Rights such as the First Amendment. *See* Van Alstyne, *supra* note 302 (discussing the interaction between federal conditional spending and state constitutions). In contrast, post-*Lopez* scholarship has focused on limits that inhere in the language of the Constitution's grant of power to Congress. *See, e.g.*, Baker, *supra* note 8 (arguing that courts should enforce limits on the spending power more vigorously). There were a few exceptions to this understandable pre-*Lopez* neglect. *See, e.g.*, Engdahl, *Basis*, *supra* note 317 (analyzing federal spending power); Engdahl, *Spending Power* (same). *See also* Rosenthal, *supra* (discussing the development of conditional spending).

[326] As noted above, the language of the relevant provision states, "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." *See supra* text accompanying note 317. As a textual matter, one could interpret the "provide for . . . the general Welfare" language to exist as a free-standing grant of congressional power, untethered from the taxing power and thus unconnected to spending of funds collected—that is, Congress was given three separate powers in the clause: (1) the power to lay and collect Taxes, Duties, Imposts and Excises; (2) the power to pay the Debts; and (3) the power to provide for (a) the common defense and (b) the general Welfare. Such a reading would, however, effectively render the remaining

terpretations of its scope. Those interpretations date back to a debate between Madison and Hamilton. Madison viewed the Clause as merely an adjunct to the other enumerated powers in Article I, Section 8, while Hamilton viewed the Clause as providing a grant of power independent of any other enumerated power.[327] The upshot of the Madisonian approach was to require that all federal spending be tied to a separate enumerated power. Spending for any other purpose would, under this approach, be beyond Congress's authority.[328]

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clauses in Article I, Section 8 superfluous. *See* LAURENCE TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 833–34 (3d ed. 2000). As I discuss below, the Clause has been interpreted to treat the comma after the word "Excises" as though the words "in order" or "so as" or were there. So, the Clause could be viewed as containing only one power, the power to lay and collect Taxes, Duties, Imposts and Excises, and that power could be exercised for the purposes of (i) paying the Debts or (ii) providing for either the common defense or the general welfare. *See* Letter from Thomas Jefferson to George Washington on the Constitutionality of the National Bank (Feb. 15, 1791), 3 WRITINGS OF JEFFERSON 147–49 (Memorial Ed. 1903) (arguing that the power is the power "'to lay taxes *for the purpose* of providing for the general welfare.' For the laying of taxes is the *power*, and the general welfare the *purpose*, for which the power is to be exercised"); *see also* Edward S. Corwin, *The Spending Power of Congress—Apropos the Maternity Act*, 36 HARV. L. REV. 548 (1923) [hereinafter Corwin, *Spending Power*], *reprinted in* 1 EDWARD S. CORWIN, CORWIN ON THE CONSTITUTION 246, 248–49 & n.10 (Richard Loss, ed. 1981).

[327] What I describe in the text as the "Hamiltonian" view is based on what Professor Renz refers to as the "weak Hamiltonian" view (or "Story interpretation") of the Clause. Early in the nineteenth century, the Hamiltonian view of the Clause included an even broader interpretation, one Renz refers to as the "strong Hamiltonian" view. Under the "strong Hamiltonian" view, Article I, Section 8, Clause 1 had nothing to do with spending at all but rather was simply an independent grant of power to enact any law in furtherance of the general welfare of the United States. *See* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 907–08 n.1 (Melville M. Bigelow ed., 5th ed., 1891) (describing the Hamiltonian view of the Spending Clause); *see also supra* text accompanying note 326. Justice Story demonstrated the mistake of such a reading, as a textual matter, with the simple observation that such an interpretation would render the remainder of Article I, Section 8 superfluous. STORY, *supra* § 907; *see also* Renz, *supra* note 317, at 106–08 (discussing Story's conclusion and interpretation of the clause). Indeed, Madison himself had made much the same argument a decade before Story. Letter from James Madison to Andrew Stevenson (Nov. 17, 1830), *reprinted in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 483–90; *see also id.* at 486; Renz, *supra* note 317, at 105–06. The principle of avoiding interpretations that render language superfluous is of course common today. *See, e.g.*, Ratzlaf v. United States, 510 U.S. 135, 140–41 (1994) (holding that judges should refrain from interpreting statutes in such a way as to make other elements of the statute superfluous). The "strong Hamiltonian" view also suffers from a historical standpoint as well. *See* Renz, *supra* note 317, at 103–05 (recounting the history of the constitutional convention).

[328] THE FEDERALIST No. 41, at 275–76 (James Madison) (New York Heritage Press ed. 1945) (rejecting the argument that "the power 'to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defence and general welfare of the United States' amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defence or general welfare" on the grounds that "a specification of the objects alluded to by these general terms immediately follows" and that this specification is meant "to explain and qualify [the general power] by a recital of particulars"); *see also* Renz, *supra* note 317, at 108–23. Renz describes the historical background supporting Madison's interpretation:

> [The Clause] originally arose from the proposal that the new government assume the Revolutionary War debts of the States. This proposal made clear, however, that only

> those debts incurred for the common defense and general welfare were to be assumed by the federal government. The debt proposal was [then] made less specific to ensure that Revolutionary War *securities* could [also] be redeemed. The debt proposal was [then] merged with the power to levy taxes, to make clear that the new Congress could levy taxes for that purpose. That language, however, would have constricted the scope of Congress'[s] taxing power. Since the Confederation's inability to raise funds was one of the issues that triggered the Convention and because the taxing power was likely to be one of the more controversial, the members realized that some would try to construe the provision strictly. Thus, the Brearly Committee of Eleven added the familiar language, "to pay the debts and provide for the common defense and general welfare . . . ." Madison asserted until his death that this language was intended to do nothing more than enlarge the scope of the taxing power in order to avoid an inclusio unius exclusio alterius claim [that is, an argument that the taxing power was limited to taxing for the purpose of paying the revolutionary war debts] and that the power of Congress to spend was found only in the enumerated powers.

Renz, *supra* note 317, at 117 (citations omitted) (emphasis added). Madison's original theory of the Clause was thus based on a textual reading that, in effect, interpreted the Clause as though the words "in order" or "so as" were placed immediately after the word "Excises." So, the Clause would contain only one power, the power to lay and collect Taxes, Duties, Imposts and Excises, and that power could be exercised for the purposes of (i) paying the Debts or (ii) providing for either the common Defence or the general Welfare. Under this approach, Madison, like Hamilton, originally viewed the portion of the Clause after the word "Excises" as simply a *limitation* on the taxing power and was necessary simply to avoid the possibility that the taxing power would be broadly interpreted. Thus, Congress could tax only for those purposes listed after the word "Excises," but, based on such a reading, the Clause would contain no actual power to spend. By itself, this could easily be a plausible reading of the Clause. The problem with Madison's interpretation came later when Madison's theory of the Clause changed to include a spending power. He read the Clause as authorizing spending but only for purposes set forth in the other enumerated powers elsewhere in the Constitution. Once Madison made this concession, his textual reading became more difficult to sustain. Justice Story argued, for example, that spending for any of the other enumerated powers would safely fall within the Necessary and Proper Clause, rendering the "provide for . . . the general Welfare" language of Article I, Section 8, Clause 1, superfluous. *See* 1 STORY, *supra* note 327, §§ 915, 916 ("[The continental congress] construed [its] power on the subject of . . . taxation . . . as a power to make requisitions on the States for all expenses which they might deem proper to incur for the common defence and general welfare."); *see also* Renz, *supra* note 317, at 121 (discussing Story's position). Professor Engdahl argues that Story's argument is not quite right and that Hamilton himself understood the difference between what Engdahl refers to as the principles of extraneous means and extraneous ends. The principle of extraneous means is best exemplified by Chief Justice Marshall's famous interpretation of the Necessary and Proper Clause in *M'Culloch v. Maryland*, "Let the end be legitimate, let it be within the scope of the [C]onstitution, and all means which are appropriate, which are plainly adapted to that end, . . . are constitutional." M'Culloch v. Maryland, 17 U.S. 316, 421 (1819). In short, if the goal is legitimately within federal power, all appropriate means are too. The principle of extraneous ends, in contrast, is the principle that, "if Congress has a free hand in fashioning policy for those 'objects of government' [i.e., enumerated powers] entrusted to it, it may manipulate them even to promote objects of government (in the sense of aims or ends) that are not constitutionally enumerated for it." Engdahl, *Spending Power*, *supra* note 317, at 16. According to Engdahl, the Necessary and Proper Clause would, in Hamilton's view, permit spending on "matters extraneous to [Congress's] otherwise enumerated powers, but only in a telic manner—i.e., as a means to promote objects within the enumeration," what Engdahl refers to as the principle of extraneous means. *Id.* at 14–15 (citations omitted). It would not, however, cover spending on goals that "remain extraneous to the enumerated powers," even if Congress could use one of its enumerated powers for effecting the same ends. *See Id.* at 19–24 (describing the bounds of the spending power). Rather, Congress can exercise its spending power to promote "ends that are not constitutionally

In contrast, under the Hamiltonian view, the Clause provides a much broader power. First, the Clause provides a limitation on the taxing power, limiting it to taxation for the purposes of providing for the general welfare.[329] While the "general" welfare refers to "national" as opposed to local purposes,[330] only Congress can, under this view, determine what is in the national interest.[331] Second, and more important, the Hamiltonian view of the Clause also provides for an implied power to spend for the general welfare: the language after the word "Excises" impliedly provides for a power to appropriate and spend the revenues derived from taxation—that is, a power to "pay the Debts"[332] and to spend "for the common Defense and general Welfare."[333] So, the Hamiltonian view includes both a limitation on

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enumerated for it" only by exercising the spending power itself, not the Necessary and Proper Clause. One corollary of this would be that the states could simultaneously regulate the object of Congress's spending and could even do so in a way that would undermine the ultimate purpose of Congress's spending. *Id.* at 19–24.

[329] *See* 1 STORY, *supra* note 327, §§ 907, 911, 919–20 (discussing the taxing power); *see also* THE WORKS OF ALEXANDER HAMILTON 149, 150 (New York, Henry Cabot Lodge ed. 1885) (discussing "public welfare" and the use of public money); Renz, *supra* note 317, at 125 (analyzing both Story's and Hamilton's perspectives). As noted above, *see supra* text accompanying note 328, Madison agreed with this aspect of the Hamiltonian—i.e., "weak Hamiltonian"—view of the Clause.

[330] *See* Renz, *supra* note 317, at 127; John C. Eastman, *Restoring the "General" to the General Welfare Clause*, 4 CHAP. L. REV. 63 (2001).

[331] *See* 3 THE WORKS OF ALEXANDER HAMILTON, *supra* note 329, at 484–85 (stating that Congress's discretion is very broad); *see also* Helvering v. Davis, 301 U.S. 619, 640 (1937) (holding that the discretion to determine the national interest belongs to Congress); Renz, *supra* note 317, at 125 ("Congress . . . has the exclusive power to determine what is for the general welfare."). That Congress alone could determine what "national purposes" were was well accepted in the pre-1937 period as well. *See* 1 J.I.C. HARE, AMERICAN CONSTITUTIONAL LAW 241–42 (1889) ("A government authorized to provide for the common defence and general welfare is virtually absolute, because it must determine what means are requisite for the end in view, and its decision will necessarily be binding on the courts."); J.N. POMEROY, CONSTITUTIONAL LAW 228–29 (10th ed., 1888) ("What measures, what expenditures will promote the common defence or the general welfare, Congress can alone decide, and its decision is final."); Corwin, *Spending Power*, *supra* note 326, at 266 (describing Hare's and Pomeroy's view that Congress alone may determine what constitutes national purposes). *But cf.* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 199 (1824) (noting in dicta that "Congress is not empowered to tax for those purposes which are within the exclusive province of the states"); Corwin, *Spending Power*, *supra* note 326, at 266 n.76 (explaining that Chief Justice Marshall's *Gibbons* language is sometimes cited in support of the view that the Court might exercise some constraint on Congress if it spent for purposes that were not "national"); Eastman, *supra* note 330 (discussing the "general welfare" clause).

[332] The reference to "debts" referred to Revolutionary War debts and securities. *See* Renz, *supra* note 317, at 117.

[333] *See* 1 STORY, *supra* note 328, § 911 (explaining the phrase "for the common Defense and general Welfare"); *id.* § 923 (same); *see also* Renz, *supra* note 317, at 126–27 (discussing Story's position). Renz argues that the "weak Hamiltonian" view (i.e., a broad power to *spend* for the general welfare) suffers from the same flaws as the "strong Hamiltonian" view (i.e., a broad power to *provide* for the general welfare), since several of the limitations inherent in the remaining clauses of Article I, Section 8 lose their meaning under either view. I do not think Renz has

the taxing power (i.e., taxation for limited purposes only) and an enlargement of that power by inferring a power to spend.[354]

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this quite right. Renz argues that Clause 8 of Article I, Section 8, for example, which empowers Congress to "promote the Progress of Science and the useful Arts" by creating limited exclusive rights for authors and inventors (i.e., a system of copyrights and patents) would seem to imply that Congress could not use other means to further that goal. Under this reasoning, Congress could not use its spending power to provide grants to authors and inventors in lieu of establishing exclusive rights. *See* Renz, *supra* note 317, at 127–28 (arguing that limitations in several clauses of Article I, Section 8 lose their meaning under Story's interpretation). Renz's example strikes me as incorrect. Not only can Congress provide grants to authors and inventors "to promote the Progress of Science and the useful Arts," but it does. Vast sums of federal money from, for example, the National Science Foundation and National Institute of Health are spent on research that leads to patentable inventions, and the National Endowment for the Arts, for example, provides grants to artists who clearly qualify as authors in the constitutional sense. To my knowledge, no one has ever suggested that such spending is unconstitutional because the Promote Progress Clause (or Intellectual Property Clause) provides the only method by which Congress may "promote the Progress of Science and useful Arts." *See* Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119 (arguing that the Promote Progress Clause implies that Congress cannot use the Commerce Clause to pass a law that grants exclusive rights in a way that somehow circumvents the explicit "limited Times" language in the Promote Progress Clause); *cf.* Ry. Labor Executives' Ass'n v. Gibbons, 455 U.S. 457 (1982) (holding that Congress could not use the Commerce Clause to pass a bankruptcy law that was not "uniform" when the Bankruptcy Clause specifically authorizes Congress to pass bankruptcy laws but requires that they be "uniform"). Nonetheless, there might still be some validity to Renz's principle that the specific limitations in the remaining clauses of Article I, Section 8 could imply a limitation on the congressional spending power. A better example might be Clause 12 of Article I, Section 8, which empowers Congress to "raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years." *See* Renz, *supra* note 317, at 127–28 (discussing Article I, Section 8, Clause 12). Surely Congress could not skirt the two-year limitation by claiming that it was spending on the army pursuant to Clause 1, rather than Clause 12. Clause 12 does strike me as different from the other Clauses, however, because of the explicitness of the limitation on spending itself. In this sense, the language in Clause 12 is much more similar to the provisions in the Bill of Rights. One need not reject—as Renz does—the "weak Hamiltonian" view to accept the obvious fact that Congress simply may not appropriate money "to raise and support Armies . . . for a longer Term than two Years."

[354] As Engdahl points out, if Article I, Section 8, Clause 1 is in fact the basis of the spending power, the necessary implication would be that the federal government could only spend revenues derived from taxation pursuant to that Clause. This makes little sense, because the vast majority of spending, both today and during the early years of the country, is of money the United States borrows. *See* Engdahl, *Basis*, *supra* note 317, at 222–23 (discussing the Borrowing Clause and the Taxing Clause). Of course, since money is fungible, this only matters if spending for purposes beyond Congress's enumerated regulatory powers exceeds the amount the federal government collects in taxation. If that is in fact the case (and, of course, since there is no clear line as to so many of Congress's regulatory powers, it would be virtually impossible to determine what percentage of federal appropriations in any given year were for purposes that would not otherwise be within Congress's regulatory powers), it would not have been true until the 1980s, when regular large-scale deficits occurred.

In 1936, in *United States v. Butler*,[335] the Supreme Court first faced these two conflicting views of Article I, Section 8, Clause 1. *Butler* involved a constitutional challenge to the Agricultural Adjustment Act, a New Deal era law that gave the Secretary of Agriculture the power to levy a tax on the processors of certain agricultural goods and to use the money to pay farmers who were willing to reduce production of those crops. The reduction in supply of the crop, the theory went, would eventually result in an increase in the market prices of the crop. Once the market price rose to the desired level, the tax would then end. A cotton processor on whom the tax was imposed refused to pay the tax and then challenged the constitutionality of the statute.[336]

The *Butler* Court addressed three separate issues: (1) standing, (2) the spending power, and (3) the principle of "dual sovereignty" in the Tenth Amendment. First, *Butler* held that the cotton processor had standing to challenge the power of Congress to enact the statutory scheme—including, in particular, the payments made by the Secretary (i.e., the spending)—notwithstanding the fact that the cotton processor was merely a taxpayer. Holding that the taxation and spending embodied in the statute were integrally related, the Court held that the law was not merely a tax but rather was an "expropriation of money from one group for the benefit of another"[337] and that the rules prohibiting taxpayer standing did not preclude the challenge. While this aspect of the Court's holding has largely been ignored by commentators, one aspect of it is key: to determine the constitutionality of the statute, one must look at the taxing and spending together. Although the taxpayer wanted not to be taxed

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[335] 297 U.S. 1, 66 (1936). It is fair to say, however, that, posed in the stark terms of Madison versus Hamilton, Hamilton's view was widely accepted as the correct one throughout the nation's history, except, arguably during the fifteen years immediately preceding the Civil War. *See* Corwin, *Spending Power*, *supra* note 326, at 268 ("The only period when [Madison's view] was at all generally accepted was that between 1845 and 1860, when state's rights principles were dominant with all sections and parties."). As I note later, *see infra* note 377, the Court had dealt with issues related to federal spending prior to *Butler*. Arguably, the 1931 case *Arizona v. California*, 283 U.S. 423 (1931), which involved congressional expenditure to construct the Boulder Dam, could be viewed as involving the spending power, though the Court treated it as a case about the reach of the commerce power (the power to improve navigation on navigable rivers). *See* David P. Currie, *The Constitution in the Supreme Court: The New Deal, 1931–1940*, 54 U. CHI. L. REV. 504, 514 (1987) (discussing *Arizona v. California*).

[336] Strictly speaking, Butler, the party challenging the law, was the receiver of the cotton processor. He was also—and not irrelevantly for understanding the broader significance of the case—a prominent Republican businessman, who had briefly served as a United States Senator from Massachusetts and was the national manager for Calvin Coolidge's 1924 presidential campaign. *See* Aviam Soifer, *Truisms That Never Will Be True: The Tenth Amendment and the Spending Power*, 57 U. COLO. L. REV. 793, 821 (1986) (explaining who Butler was). For simplicity's sake, I will refer to the challenger of the law as the cotton processor itself.

[337] *Butler*, 297 U.S. at 61.

(and thus in the most literal sense sought to invalidate the tax rather than the spending), the taxpayer had standing to challenge the statute because the tax was specifically earmarked for the allegedly unconstitutional expenditure.

Having decided that the challenger did have standing, the Court turned to the spending power issue. After laying out the Madisonian and Hamiltonian views of the spending power, the Court concluded that Hamilton was correct and that the only constraint on the spending power was that "the purpose must be 'general, and not local.'"[338] This whole section of the opinion becomes dicta, however, when the Court states that it need not determine the meaning of the phrase "general welfare of the United States" because "another principle embedded in our Constitution prohibits the enforcement of the Agricultural Adjustment Act."[339]

That principle, the Court continued, was the principle of "dual sovereignty":[340] because the power to regulate agriculture was not among Congress's enumerated powers, the Act was unconstitutional. Having collapsed the taxing and spending aspect of the statute, the Court held that Congress was in effect "regulating," not simply taxing and spending. Because regulating agriculture was a power reserved exclusively to the states, the principle of "dual sovereignty," as embodied in the Tenth Amendment,[341] precluded Congress from "regu-

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[338] *Id.* at 67 (quoting Alexander Hamilton, Report on Manufactures, *in* 3 WORKS OF ALEXANDER HAMILTON 250).

[339] *Id.* at 68.

[340] The principle of "dual sovereignty" of course long predates Justice Roberts's invocation of it in *Butler*. Perhaps the quintessential example of the Court drawing a strict line between state and federal power is the 1922 dormant Commerce Clause case *Heisler v. Thomas Collier Co.*, 260 U.S. 245 (1922), in which the Court upheld a Pennsylvania tax on anthracite coal. The Court recognized that anthracite coal was "found in only nine counties in [Pennsylvania], and practically nowhere else in the United States" and that "80% of the total production is shipped to other States," *id.* at 258, and yet upheld the tax because the law simply taxed property that was within the state, *id.* at 261. In essence, the Court was able to discount the obvious interstate impact of the tax by, as Robert Post has put it, "imagining the boundary between intrastate and interstate commerce as a precise frontier." Robert C. Post, *Federalism in the Taft Court Era: Can It Be Revived?*, 51 DUKE L.J. 1513, 1610 (2002). The Court assumed that "'[t]here must be a point of time when [goods] cease to be governed exclusively by the domestic [i.e., state] law and begin to be governed and protected by the national law of commercial regulation,'" and the Court deemed "that moment" to be that at "'which [the goods] commence their final movement for transportation from the State of their origin to that of their destination.'" *Heisler*, 260 U.S. at 260–61 (quoting Coe v. Errol, 116 U.S. 517 (1886)) (first alteration in original).

[341] The Court characterized this as based on the Tenth Amendment. I do not intend to enter the debate about whether the Tenth Amendment is "but a truism," *see* United States v. Darby, 312 U.S. 100, 124 (1941), or whether it should or can impose affirmative justiciable limits on federal power other than those internal limits found in some combination of the principle of enumerated powers and the text of the affirmative grants of power the Constitution gives to Congress in (primarily) Article I, Section 8. *See, e.g.*, Soifer, *supra* note 336 (discussing this debate). Though some, like the *Butler* Court, might characterize "dual sovereignty" as tied to the text of the Constitution by the Tenth Amendment, I find it more helpful to describe the

lating" through the use of its spending power what was otherwise reserved for regulation solely by the states. Because Congress was using its spending power to, in effect, regulate agricultural production, it was not really exercising its spending power at all. In terms of its holding, then, the Court used the principle of "dual sovereignty" to collapse the spending power question into the question of whether Congress had regulatory power over the relevant subject.

Thought of solely as a spending power case, *Butler* might seem to be the quintessential example of the application of inherently contradictory logic in constitutional law. The Court explicitly states that the Hamiltonian view of the spending power is the correct one but then proceeds, in effect, to apply the Madisonian interpretation by holding that Congress could not use its spending power so as to sidestep limits on its other Article I (i.e., regulatory) powers. Some commentators have criticized the Court's reasoning on this ground.[342] If we see the case jurisprudentially in terms of both the spending and the taxing powers, however, the case makes a little more sense. I thus turn, in the next subsection, to the Court's taxing power jurisprudence, which helps us better understand *Butler*, which I then return to in Part IV.A.3. As we will see, it is crucial to understand *Butler*, as this helps us better understand the underpinnings of Professor Baker's proposal for changing the spending power doctrine, which will in turn provide a lens through which to view CIPA.

2. *Taxing, Spending, and Regulating*

Prior to 1937, the Court had on several occasions faced claims that exercises of the taxing power[343] were end-runs around the principle of

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principle as "dual sovereignty" than as the Tenth Amendment. Here, while the Court characterized its holding as based on the Tenth Amendment, the Court's reasoning, based as it was on the principle of "dual sovereignty," would have theoretically permitted the same holding in the absence of the Tenth Amendment. In that sense, even if the Tenth Amendment is "but a truism," the principle of "dual sovereignty" could emanate from principles that derive from the federal structure of the United States (principles that predate the Tenth Amendment). The basic notion is that the Constitution has delegated power to the federal government sufficiently precisely that the federal and state governments have non-overlapping spheres of activity. *See* H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 655 (1993) (noting that many Federalists supporting the Constitution argued based on the assumption that "the Constitution's delegations of power to the federal government were sufficiently precise to demarcate distinct and separable spheres of activiety for the national and state governments").

[342] *See* Currie, *supra* note 335 (discussing the Court's New Deal jurisprudence); Engdahl, *Spending Power*, *supra* note 317, at 35–37 (discussing *Butler*); *see also* 1 TRIBE, *supra* note 326, § 5-6, at 836 n.14 (3d ed. 1999); Soifer, *supra* note 336, at 822–23.

[343] The taxing power is also found in Article I, Section 8, Clause 1. I do not discuss issues related to the Constitution's textual limitations on the taxing power, such as the admonition in Article I, Section 8, Clause 1 that "all Duties, Imposts and Excises shall be uniform throughout the United States" and the two limitations on "direct taxes." *See* U.S. CONST. art. I, § 2, cl. 3

enumerated powers. The idea behind these cases was that, if Congress uses its taxing power to, in effect, regulate in ways that it could not otherwise regulate,[344] the tax should be classified as a regulatory measure outside of Congress's enumerated powers. As the Court put it in the *Child Labor Tax Case*, "there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment."[345]

The 1922 *Child Labor Tax Case* is perhaps the paradigmatic example of this phenomenon. Four years earlier, in *Hammer v. Dagenhart*, the Court had invalidated a law prohibiting the interstate transportation of goods made with child labor on the grounds that the law exceeded Congress's Commerce Clause power.[346] The law prescribed in

("Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."); U.S. CONST. art. I, § 9, cl. 4 ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the census or Enumeration herein before directed to be taken."). *See* Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1 (1999) (discussing the constitutional history of taxation); Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334 (1997) (same); Calvin Johnson, *Apportionment of Direct Taxes: The Foul Up in the Core of the Constitution*, 7 WM. & MARY BILL RTS. J. 1 (1998) (same). My only concern is Congress's attempt to use the taxing power as an indirect regulatory device when it lacks regulatory power under any of its other enumerated powers.

[344] If Congress does have the authority to regulate certain activities under some other power, then taxing those activities, even if clearly regulatory in intent and effect, would be constitutional under the Necessary and Proper Clause, Article I, Section 8, Clause 18. *See, e.g.*, Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 393–94 (1940) (upholding exorbitant tax on coal producers who failed to comply with a complex regulatory regime because the regulatory scheme tied to the tax was within Congress's Commerce Clause power); Mulford v. Smith, 307 U.S. 38, 48 (1939) (upholding provisions in the Agricultural Adjustment Act of 1938 imposing penalty on farmers who produce tobacco in excess of established quotas as a constitutional exercise of the Commerce Clause); Edye v. Robertson, 112 U.S. 580, 595–96 (1884) ("Head Money Case") (upholding tax on shipowner for each alien who arrives on the shipowner's vessel as within Congress's power to regulate foreign commerce); Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 548–49 (1869) (upholding a federal tax on banknotes issued by state banks, notwithstanding the fact that the tax effectively resulted in an outright ban, because Article I, Section 8, Clause 5 gives Congress power to "coin money" and "regulate the value thereof"); *see also* 1 TRIBE, *supra* note 326, § 5-7 at 844; *cf.* Bailey v. Drexel Furniture Co., 259 U.S. 20, 38 (1922) ("Child Labor Tax Case") ("Where the sovereign enacting the law has power to impose both tax and penalty the difference between revenue production and mere regulation may be immaterial, but not so when one sovereign can impose a tax only, and the power of regulation rests in another.").

[345] *Bailey*, 259 U.S. at 38.

[346] Hammer v. Dagenhart, 247 U.S. 251 (1918). *Hammer* is one of eight cases decided in the pre-1937 era striking down a federal statute as exceeding Congress's power under the Commerce Clause. *See* 1 TRIBE, *supra* note 326, § 5-4 at 810 n.8. Justice Holmes, joined by Justices Brandeis, McKenna, and Clarke, dissented. The Court overruled *Hammer v. Dagenhart* in 1941. *See* United States v. Darby, 312 U.S. 100 (1941). *Hill v. Wallace*, 259 U.S. 44 (1922), decided the same day as the *Child Labor Tax Case*, also held a federal tax to be a regulation in disguise. In

detail the age at which children could start working at different types of jobs, as well as the number of hours they could work once they had reached the relevant age. A year after the Court invalidated the law, Congress passed the Child Labor Tax Law, which imposed a tax of ten percent of annual net profits on any employer that violated the precise conditions set forth in the earlier law regulating child labor. The "tax" was not dependent upon the extent to which the employer used child labor in violation of the conditions and was only payable if the employer knew the employee was under the age.[347] Moreover, the Department of Labor, and not just Treasury, was involved in enforcing the law.[348] When the case came to the Court in 1922, the Court had never invalidated an exercise of Congress's taxing power and had in fact rejected previous attempts to get the Court to look to Congress's regulatory intent and effect when addressing the constitutionality of an exercise of the taxing power.[349]

Nonetheless, the Court held the Child Labor Tax Law unconstitutional. Here, the Court said, Congress had gone too far. The Court looked at previous cases in which it had deferred to Congress and said:

> Out of a proper respect for the acts of a co-ordinate branch of the government, the court has gone far to sustain taxing acts as such, even though there has been ground for suspecting, from the weight of the tax, it was intended to destroy its subject. But in the act before us the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions.[350]

The Court concluded that the "elaborate" and "detailed" specifications,[351] the fact that the tax bore no relation to the extent of the

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Hill, the Court invalidated a tax that was imposed on all futures contracts except those that were traded through boards of trade that satisfied a complex set of regulations. The holding of *Hill* was rendered irrelevant when the Court held that Congress could effectively achieve the same result under the Commerce Clause by limiting the statute's scope to interstate commerce. *See* City of Chicago Bd. of Trade v. Olsen, 262 U.S. 1 (1923).

[347] *Bailey*, 259 U.S. at 36–37.

[348] *Id.* at 37.

[349] Prior to the 1922 *Child Labor Tax Case*, the Court had long held that it had no power to inquire into either the intent or the results that flowed from a valid exercise of Congress's taxing power. "[F]rom an early day the court has held that the fact that other motives may impel the exercise of federal taxing power does not authorize the courts to inquire into that subject." United States v. Doremus, 249 U.S. 86, 93 (1919) (upholding law that taxed sales of narcotics against challenge that the law "was not a revenue measure, and was an invasion of the police power reserved to the state"); *see also* McCray v. United States, 195 U.S. 27, 51–53, 59 (1904) (upholding a tax of 10% on yellow, but not white, oleomargarine against a Tenth Amendment challenge based on the arguments that: (1) the purpose of Congress's power to tax is limited to raising revenue; (2) the power to regulate oleomargarine belongs exclusively to the states; and (3) both the purpose and the effect of the tax was to destroy the yellow oleomargarine industry).

[350] *Bailey*, 259 U.S. at 37–38.

[351] *Id.* at 41.

activity being taxed, and, finally, the scienter requirement demonstrated that this was not a revenue-raising measure with an incidental regulatory effect. It was a regulation masquerading as a tax.

Of the dissenters in *Hammer*, the 1918 case invalidating the child labor regulations as exceeding Congress's Commerce Clause power, only Justice Clarke dissented in the *Child Labor Tax Case*. Both Justices Holmes and Brandeis (as well as Justice McKenna) voted with the majority to invalidate the Child Labor Tax Law. This, then, was not a simple case of the Court's 1920s "troglodytes" imposing a cramped view of Congress's powers on the "right-thinking minority." Eight of the nine justices, including Brandeis and Holmes, agreed that Congress could not end-run around the Commerce Clause limitations by this sort of exercise of the taxing power. Twice more, once in 1935 and then in 1936, the Court invalidated similar regulatory taxing provisions as impermissible attempts to use the taxing power to regulate in excess of Congress's regulatory powers.[352]

The last time the Court held that a federal tax was a "regulatory" tax exceeding Congress's taxing power was in 1936.[353] The following year, in *Sonzinsky v. United States*,[354] the Court upheld a license tax on firearms dealers. Commentators have largely treated *Sonzinsky* as a repudiation of the pre-1937 era.[355] Yet, it is worth noting that all "Four Horsemen" (the conservative Justices who generally opposed the New Deal) joined *Sonzinsky* and the Court's distinguishing of the

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[352] *See* Carter v. Carter Coal Co., 298 U.S. 238, 281–82, 289 (1936) (holding that a tax of 15% on coal produced by coal producers who would not "agree" to extensive regulations setting forth, among other things, wages, working conditions, and maximum hours of labor could not rest upon the taxing power); United States v. Constantine, 296 U.S. 287 (1935) (invalidating federal law imposing $1,000 tax on liquor sales that occur in violation of state law on the grounds that the law exceeded Congress's taxing power and invades the states' police power); *cf.* Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 549, 556 (1869) (Nelson, J., dissenting) (concluding that Congress violates states' sovereignty by using its power to tax state bank notes and drive state banks out of business). These cases arise exclusively between 1922 and 1936. After 1937, of course, the issue became largely irrelevant as the Court interpreted the Commerce Clause as covering nearly all of the "regulation" that those cases invalidated.

[353] The underlying purpose of a tax remains relevant for other doctrines, such as the Fifth Amendment's Double Jeopardy Clause, *see* Dep't of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767 (1994) (holding that a state tax on marijuana that was collected only from those who were convicted of marijuana possession in violation of criminal statutes was "the functional equivalent of a successive criminal prosecution," thereby violating the Fifth Amendment's Double Jeopardy Clause); United States v. La Franca, 282 U.S. 568 (1931) (holding the same for a tax on liquor sales that doubled when tied to violation of statute prohibiting unauthorized liquor sales); *but see* United States v. Ursery, 518 U.S. 267 (1996) (holding that a law imposing forfeiture of house used during drug crimes was not a penalty for Double Jeopardy purposes or the Eighth Amendment's Excessive Fines Clause), or the Eighth Amendment's Excessive Fines Clause, *see* United States v. Bajakajian, 524 U.S. 321 (1998) (holding that a law imposing forfeiture that was grossly disproportional to an offense was penal and thus violated the Eighth Amendment's Excessive Fines Clause).

[354] 300 U.S. 506 (1937).

[355] *See, e.g.*, Ackerman, *supra* note 343, at 47 (1999).

Child Labor Tax Cases and its progeny, based on the fact that the firearms licensing statute contained "no regulation other than the mere registration provisions," was plausible on its face.[356] The registration provisions alone, which the Court deemed to be "in aid of a revenue purpose," were nothing like the complex regulatory regime imposed by the *Child Labor Tax Cases* or the Bituminous Coal Act invalidated in *Carter*.[357] The Court made clear that, as long as the tax is "not attended by an offensive regulation,"[358] "[i]nquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts."[359] The Court reiterated, in crystal clear language, that the mere fact that a tax had a regulatory effect was insufficient, for "[e]very tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed. But a tax is not any the less a tax because it has a regulatory effect."[360]

Sixteen years later, the Court reaffirmed *Sonzinsky* in *United States v. Kahriger*,[361] a Tenth Amendment challenge to a tax on bookies based on the argument that Congress was attempting to regulate intrastate gambling, a subject beyond its regulatory powers.[362] The Court rejected the argument, concluding that "[u]nless there are provisions extraneous to any tax need, courts are without authority to limit the exercise of the taxing power."[363] This language is important because it illustrates a key distinction between a "regulatory" tax and a revenue measure for purposes of the taxing power: a tax will not be deemed "regulatory" simply because it appears to be designed to discourage (or even eliminate) the activity being taxed. Rather, it is only when there is a complex regulatory regime that is "extraneous to any tax need," as in the *Child Labor Tax Cases*, that a tax will be deemed "regulatory."

Calling a tax "regulatory" does not of course automatically render it unconstitutional, since a "regulatory" measure can be within Congress's powers if it regulates a subject that Congress has power to

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[356] *Sonzinsky*, 300 U.S. at 513.

[357] 298 U.S. 238 (1935).

[358] *Sonzinsky*, 300 U.S. at 514.

[359] *Id.* at 513–14.

[360] *Id.* at 513.

[361] 345 U.S. 22 (1953).

[362] *Kahriger* also involved a second issue: whether the requirement that a bookie not only pay the prescribed tax but also register with the tax authorities constituted a violation of the Fifth Amendment's prohibition on self-incrimination. While the Court rejected that argument in *Kahriger*, the case was overruled fifteen years later in *Marchetti v. United States*, 390 U.S. 39 (1968). *See* Hamilton v. United States, 309 F. Supp. 468, 473 (D.C.N.Y. 1969) (recognizing that *Kahriger* had been overruled).

[363] *Kahriger*, 345 U.S. at 31. As noted above, *see supra* note 353, the distinction is still relevant for other purposes.

regulate under an enumerated power other than the taxing power. It is for this reason that the distinction between a "regulatory" and a "revenue" tax has largely been ignored: in a world in which Congress's regulatory powers—particularly the Commerce Clause—can do all the heavy lifting, relying on an independent taxing power is unnecessary. The fact that *Kahriger*, decided in 1953, is the most recent Supreme Court case even addressing the extent of the federal government's taxing power is not a coincidence. Nonetheless, the distinction between a "regulatory" and a "revenue" tax may return to federalism jurisprudence for one simple reason: the Court's recent constraints on Congress's regulatory powers.[364]

3. United States v. Butler *and the Intersection Between the Taxing and Spending Powers*

This distinction between a "regulatory" measure and a "revenue" measure, which derives from cases addressing the scope of Congress's taxing power, also impacts the spending power, a fact that commentators have largely ignored. In this section, I further explain why *United States v. Butler*, which I described in Part IV.A.1, must be understood in the context of the taxing power, not simply the spending power. Doing so will lay the groundwork for understanding Professor Baker's proposed doctrinal changes to current spending power jurisprudence, which I argue have their roots in the taxing power cases I described in the previous subsection. Fully understanding Baker's proposal is important in its own right because of her prominence as a critic of the Court's spending power doctrine. More than this, however, it is important for me here because Baker's proposal gives us a lens through which to view CIPA, one that could lead to the statute being invalidated on federalism grounds.

Let us now turn back to *Butler* for a moment and focus on the taxing power aspect of the case. Consider the typical modern criticism of *Butler*. David Currie, for example, argues that Justice Roberts misunderstood the implications of his acceptance of the Hamiltonian view of the spending power. Currie states:

> Having assumed that promoting agriculture was a legitimate end of federal spending, [Justice] Roberts was in a poor position to argue that it was an unconstitutional one. Having held that the spending power was not limited by the enumeration of other congressional powers, he was hopelessly inconsistent in doing so on the ground that Congress had no independent authority to regulate agriculture. The Court's reliance on Marshall's warning against the pretextual use of federal powers and on such derivative precedents as the *Child Labor Tax Case* was therefore mis-

[364] *See* 1 TRIBE, *supra* note 326, § 5-7, at 845–46 & nn.16–19.

> placed, for under [Justice] Roberts's own test the law was not a pretext for the accomplishment of an illegitimate purpose.[365]

Currie is correct if one sees the "purpose" of the legislation as "promoting agriculture through federal spending." If the purpose, however, is simply "promoting agriculture," Justice Roberts looks a little less "hopelessly inconsistent": from Justice Roberts's vantage point, the spending and taxation are so integrally intertwined that he views the case as about taxation as much as about spending, and rightly so. Since the spending in *Butler* was integrally intertwined with the taxation and since the challenger to the law, though outwardly challenging the constitutionality of the spending as exceeding congressional power, was a taxpayer and thus concerned primarily with the taxation, then the Court's reliance on the pretextual use of federal powers cases makes a lot more sense. Spending for the general welfare may be okay, but not, the Court says, when Congress is so clearly engaged in redistribution from a limited group of taxpayers to a limited group of recipients. If *Butler* is seen, then, as a taxation power case, Justice Roberts's rationale makes more sense in light of the line of cases beginning with the *Child Labor Tax Case* that distinguish between taxation as a pretext for regulation and taxation for revenue purposes.

Taking the decision on its own terms, the conclusion rests not on a Madisonian view of the spending power, but rather on a realist's view of the statute. "Congress, we see what you're doing here," the Court seemed to be saying. "This statute is not simply an exercise of the spending power. Rather, the taxing and spending in this statute are integrally connected with each other, and the Act is thus a disguised attempt to 'regulate' rather than spend." Criticizing the Court for an alleged inconsistency on its view of the spending power thus ignores the fact that the Act was not the same as a law that simply appropriated funds to farmers who left their fields fallow or one that simply imposed a tax on the processing of agricultural goods with the proceeds placed directly into the Treasury. The Act did in fact, as the Court recognized, "expropriat[e] . . . money from one group for the benefit of another," and that was its intent.[366]

Lest I be misinterpreted, I am not arguing that the Court got it right. Indeed, I am not even arguing the Court would have in fact upheld either of the two halves of the law (i.e., the taxing half of the Act or the spending half) if they had been separated, but simply that

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[365] Currie, *supra* note 335, at 533 (citations omitted).

[366] United States v. Butler, 297 U.S. 1, 61 (1936). The Act's very purpose was to raise the level of prices that processors paid to farmers. *See id.* at 53–55 (quoting Agricultural Adjustment Act, Pub. L. No. 73-10, 48 Stat. 31, 34 (1933)).

there is a difference.[367] The Court's mistake in logic, then, was not that it applied the Madisonian view of the spending clause while claiming to adhere to the Hamiltonian approach, but was rather its reliance on a strict distinction between taxing and spending on the one hand and regulating on the other and its failure to acknowledge that all taxing and spending is in fact a form of regulation. As the Court divided the powers of the states and the national government in a strict way, it also distinguished spending and taxing from regulating in an equally strict way. Once one accepts, however, a distinction between taxing and spending on the one hand and regulating on the other, the Court's logic, based on the fact that the Act was regulation in disguise, seems unassailable: if there were such a line, surely the Court put the Act on the correct side of it.[368]

Given precedent at the time and given the clear connection between the Agricultural Adjustment Act's spending and taxation, this was not much of a stretch, particularly because the challenger was the taxpaying processor, not the recipient of the spending. Viewed this way, the case is not a spending power case or a Tenth Amendment case, but is rather simply one in a long line of *taxing* power cases.[369]

Butler does differ from the *Child Labor Tax Case* in one important respect. In *Butler*, the tax is an integral component of the regulatory regime, because the tax is part of how Congress is attempting to regulate the prices. In contrast, the tax imposed by the Child Labor Tax Law was extraneous to the regulatory regime. Nonetheless, in both statutes, if we hypothesize the law independent of the tax, it is fair to ask (as the majority in *Butler* did) whether Congress had the power to regulate. Under the logic of the *Child Labor Tax Case*, Congress did not have the power to regulate the prices of agricultural goods in the absence of the taxing power. In this sense, the Agricultural Adjustment Act's "spending" was inseparable from its "taxing."

One other aspect of the case supports this notion that the taxing and spending must be treated as inseparable for the purposes of the constitutional analysis: the Court's holding on the question of the

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[367] As I indicate below, two separate statutes could well have been upheld as a matter of doctrine at the time.

[368] *See* Van Alstyne, *supra* note 237 (arguing against "enumerated-power nominalism [as] the sole test of federalism judicial review"); *id.* at 793–95 (discussing pretextual taxation cases as the sort of inquiry he would use in assessing commerce clause challenges).

[369] *See Butler*, 297 U.S. at 69–71 (discussing the taxing power and pretext cases such as the *Child Labor Tax Case*); *cf.* Ackerman, *supra* note 344, at 47 (putting *Butler* in the same category as *Carter Coal* and noting that it follows the rationale of the *Child Labor Tax Case*). It is also worth noting that the processors also argued that the processing tax violated the taxing power requirement of uniformity, *see* U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises . . . ; but all Duties, Imposts and Excises shall be uniform through out the United States."); however, the Court declined to decide the issue. *See Butler*, 297 U.S. at 62 n.8.

cotton processor's standing. Recall that the Court held that the cotton processor had standing as a taxpayer to challenge the constitutionality of the *spending* because the taxing and spending were so integrally connected.[370] If we take the Currie criticism seriously and think of the law as simply promoting agriculture through spending, then the decision on standing would likewise have to be wrong. If the statute should have been upheld as a valid exercise of the spending power, then the cotton processor should have had no more right to challenge the law than any taxpayer has to challenge every federal appropriation. Accepting the modern criticism of the case necessarily undermines the case's holding on standing, a holding that no one questions.[371]

To be clear, I am not endorsing the *Butler* Court's conclusion that the statute is unconstitutional since I believe that a statutory regime that regulates the prices of agricultural goods falls within Congress's Commerce Clause power.[372] I am merely defending the Court's reliance on the pretext taxing power cases (such as the *Child Labor Tax Case*) against the claim of those like Currie who say that the opinion's "dual sovereignty"/Tenth Amendment holding is based on a misunderstanding of the logical implications of the Hamiltonian view of the spending power. The Hamiltonian view of the spending power does not necessarily preclude the holding in *Butler*.

Butler represents the high-water mark of the Court's adherence to the principles of "dual sovereignty." In little more than a year, with the backdrop of Roosevelt's landslide reelection and the failed court-packing scheme, the attitude of the Court had arguably changed drastically.[373] By the end of the 1936 Term, the Court had eliminated

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[370] *See supra* text accompanying note 337.

[371] Federal standing doctrine, both then and now, precludes taxpayer standing. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); Frothingham v. Mellon, 262 U.S. 447 (1923). These strictures are arguably relaxed for Establishment Clause cases. *See* Flast v. Cohen, 392 U.S. 83 (1968).

[372] Concededly, this is not a difficult position to take in retrospect, though there may well still be some who would disagree. *See, e.g.*, Morrison v. United States, 529 U.S. 598, 627 (2000) (Thomas, J., concurring) (arguing that the substantial effects test is inconsistent with the original understanding of the Commerce Clause); Printz v. United States, 521 U.S. 898, 936–37 (1997) (Thomas, J., concurring) (arguing that Congress does not have the authority under the Commerce Clause to regulate the intrastate transfer of firearms); Lopez v. United States, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (arguing that the substantial effects test is inconsistent with the original understanding of the Commerce Clause).

[373] This is of course the conventional wisdom of the "switch in time" that constituted the "constitutional revolution" of 1937. *See generally* BRUCE ACKERMAN, 2 WE THE PEOPLE (1998) (discussing the New Deal Court and the "switch in time that saved nine"); LAWRENCE FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY 160 (2002) (same); WILLIAM LEUCHTENBERG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1995) (same); Edward S. Corwin, *National-State Cooperation—Its Present Possibilities*, 8 AM. L. SCH. REV. 687, 698 (1937) (noting, in a speech given in December 1936 that, "The retreat has, to be sure, only just begun, but who, with the results of the recent election in mind, can seriously doubt

most of the federalism constraints on Congress's powers, including its spending power.

The companion cases *Steward Machine Co. v. Davis*[374] and *Helvering v. Davis*,[375] decided on the same day in 1937, are widely viewed as endorsing *Butler*'s dicta about the spending power.[376] Both *Steward Machine* and *Helvering* involved major portions of the Social Security Act of 1935, one of the cornerstones of New Deal legislation. *Helvering* upheld the part of the Act that we now colloquially refer to as "social security," a national pension benefit scheme for those over sixty-five, while *Steward Machine* upheld the establishment of a national unemployment insurance scheme. The two cases clearly applied the Hamiltonian vision of the spending power, and, in their wake, Madison's view of the spending power has effectively been relegated to an historical artifact.

Beyond the dichotomy between Hamilton and Madison, however, the New Deal era cases raised a new issue in spending power jurisprudence, one of importance when we look at CIPA: the constitutionality of a congressional attempt to use its spending power to induce states to act in certain ways, ways that arguably invade the core of the states' sovereign autonomy.[377] I turn to this issue in the following subsection.

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that it will be continued?"). *But see* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998) (arguing that the conventional wisdom of the "switch in time" is incorrect, or at least more nuanced than its legend suggests); G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2000) (same). Indeed, *Butler* is largely viewed as the case most responsible for Roosevelt's attempt to "pack" the Court. *See* Soifer, *supra* note 336 (noting *Butler*'s role in the New Deal Court).

[374] 301 U.S. 548 (1937).

[375] 301 U.S. 619 (1937).

[376] *See* Engdahl, *Spending Power*, *supra* note 317, at 3 (noting that the cases "typically are viewed as having corrected *Butler*'s error").

[377] The Court had been asked to face a similar issue before, but had never decided it. In 1923, in the twin cases of *Frothingham v. Mellon* and *Massachusetts v. Mellon*, 262 U.S. 447 (1923), the Court was faced with the constitutionality of the 1921 Sheppard-Towner Act (also known as the "Maternity Act"), which provided for grants to states conditioned on the states taking certain actions "to reduce maternal and infant mortality and protect the health of mothers and infants." *Id.* at 479. The statute was challenged as an unconstitutional inducement to the states "to yield a portion of their sovereign rights" in violation of the Tenth Amendment and principles of state sovereignty. *Id.* Rather than deciding the merits of the case, the Court held that it lacked jurisdiction over both suits. The case brought by Massachusetts, the Court ruled, constituted a political question not cognizable by the judiciary. *Id.* at 483–85. In what could only be considered a dictum in light of the Court's holding on jurisdiction, the Court did intimate that the mere offer of funds from Congress would not constitute any invasion of the state's rights. *Id.* at 480 ("Probably it would be sufficient to point out that the powers of the State are not invaded, since the statute imposes no obligation but simply extends an option which the State is free to accept or reject. But we do not rest here."); *see also id.* at 482–83. Arguably, the Court was in fact rejecting the argument that an offer of conditioned funds could in any way be seen as coercive. *See* Corwin, *supra* note 373, at 702 (noting that the Court's language "also meets the contention that this type of legislation is coercive with respect to the States, and rejects that con-

4. *Conditional Federal Spending to States—A Brief Jurisprudential History*[378]

Though *Steward Machine* and *Helvering*[379] were both decided the same day, only *Steward Machine* is of importance to me here, for it is

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tention"). In retrospect, and in light of *Steward Machine*, Corwin's view was certainly borne out. Nonetheless, the Court's holding in the *Massachusetts* case was, strictly speaking, based on the political question doctrine.

Four years later, in *Florida v. Mellon*, 273 U.S. 12 (1927), the Court was faced with the constitutionality of the federal statute that created the estate tax. Included in the statute was a provision that permitted a credit of up to eighty percent of the federal tax for any estate taxes paid pursuant to a state law. Florida's constitution prohibited the imposition of an estate tax, and Florida brought suit claiming that the law "constitute[d] an invasion of the sovereign rights of the state and a direct effort on the part of Congress to coerce the state into imposing an inheritance tax and to penalize it and its property and citizens for the failure to do so." *Id.* at 16. Although the case was decided on the merits, and, in many ways, strongly resembles *Steward Machine* because, in both cases, taxpayers were entitled to credits from federal taxes if the taxpayer's state passed legislation satisfying certain federally imposed conditions, *see infra* note 382 and accompanying text, the Court did not characterize the taxpayer credit in *Florida v. Mellon* as an exercise of the spending power. *Florida v. Mellon* is nonetheless the logical precursor to *Steward Machine*, and could be characterized as the first time the Court upheld an exercise of the spending power used as an inducement to states to act in certain ways. *See Steward Mach.*, 301 U.S. at 591–92 (citing *Florida v. Mellon*).

Although the Court did not address the constitutionality of conditional grants from Congress to state governments until *Florida v. Mellon*, conditional grants to states have a long history dating back to at least 1802 when Ohio was admitted as a state. In exchange for a grant of lands for public schools and a pledge by the national government to use five percent of the money raised from the sale of lands in the state to build roads from Ohio to the seaboard states, Ohio agreed not to tax the land that the federal government sold to settlers for five years. *See* Corwin, *supra* note 373, at 698; Corwin, *Spending Power*, *supra* note 326, at 252. Other states admitted to the union were offered the same deal. *Id.* at 262. These "contracts" between state and national governments were upheld in *Stearns v. Minnesota*, 179 U.S. 223, 244, 250 (1900). *See* Corwin, *supra* note 373, at 698. In the mid-nineteenth century, the Morrill Land Grant Act of 1862, ch. 130, 12 Stat. 503 (1862), provided land to states conditioned on the creation of public universities "to teach such branches of learning as are related to agriculture and the mechanic arts." *Id.* at 698–99; *see* Corwin, *Spending Power*, *supra* note 326, at 262–64. These conditional grants of land were based on Congress's power to "dispose" of the property of the United States under Article IV, Section 3, Clause 2 of the Constitution, *see* Corwin, *supra* note 373, at 699, although, as President Buchanan noted when vetoing an earlier version of the Morrill Act with similar provisions, much of the land was itself paid for out of money raised by taxation, *see* Corwin, *Spending Power*, *supra* note 326, at 263 (quoting Buchanan veto). Buchanan's point simply goes to the fungibility of money and the fact that any power to spend beyond Congress's regulatory powers can ultimately "expand" Congress's power, whether it is based on Article I or Article IV. Extensions of the Morrill Act later in the nineteenth century bore Buchanan's point out well, as Congress later appropriated the proceeds from land sales for the same purpose, postsecondary education. *See id.* at 264. In any event, the first serious attempts by Congress to claim that it was exercising its "spending" power (or its power to spend the proceeds of taxation) for conditional grants to states did not occur until early in the twentieth century. *See id.* at 264–65; Corwin, *supra* note 373, at 699–700.

[378] For a textual and historical argument that conditional federal grants to states are constitutionally impermissible under even the Hamiltonian and Story interpretation of the spending power, see Somin, *supra* note 225, at 489–94. Somin's argument focuses on the word "general" in the phrase "general Welfare," and his point is that any grant to a state is, by virtue of that fact alone, local or regional and thus not "general." While clever, this argument seems to ignore the fact that conditional grants to states are generally available to *all* states. Certainly if one thinks

the first spending power case in which state autonomy, and not simply the principle of enumerated powers, was at stake.[380] The case involved a challenge to a complex federal unemployment insurance scheme. All employers with eight or more employees were required to pay a tax. In contrast to the Agricultural Adjustment Act (at issue in *Butler*), whose accounting scheme involved an obvious redistribution of revenues, proceeds from the federal unemployment tax went to the Treasury "like internal revenue collections generally" and were "not earmarked in any way."[381]

Congress's *spending* power was at issue, however, because the law provided employers with credits for contributions made to a state unemployment fund that satisfied certain conditions set forth in the statute.[382] Thus, employers in states that established an unemployment fund meeting the federal conditions were largely saved from having to participate in two separate unemployment schemes. Several of the conditions imposed on participating states were aimed at ensuring that the state unemployment fund was an unemployment fund in substance as well as name. But, the one condition that raised serious questions involved a requirement that contributions to the state unemployment fund be "immediately upon . . . receipt be paid over to the United States Secretary of the Treasury to the credit of the Unemployment Trust Fund."[383] Each state's "deposits" in the federal Unemployment Trust Fund were maintained in a separate account, from which the state could draw to pay unemployment benefits.

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of the individual grants separately, Somin's argument sounds persuasive, but most conditional grants—CIPA being one example—consist of a single statutory provision that does in fact cover the entire country.

[379] A private company's shareholder initiated the *Helvering* case and did not involve any state as a party. The Court majority in *Helvering* consisted of the three dissenters from *Butler*, along with Chief Justice Hughes and Justices Roberts, Sutherland, and Van Devanter. That *Helvering* did not involve the same level of infringement of state sovereignty as the employment tax at issue in *Steward Machine* is also clear from the breakdown of the Justices. Justices Sutherland and Van Devanter, both of whom were in the *Butler* majority, joined the majority in *Helvering*, but not in *Steward Machine*. As I describe below, Justice Sutherland's dissent in *Steward Machine*, joined by Justice Van Devanter, addresses head on the state autonomy aspect of the case.

[380] Of course, before *Steward Machine* the Court had often held that the Tenth Amendment "preserves a field of autonomy" for the states such that, even if a particular law fell within an exercise of one of Congress's enumerated powers, it might nonetheless be inconsistent with principles of state sovereignty if the law regulated the states as "States." Indeed, the Court had so held with respect to Congress's Article I, Section 8, Clause 1 "taxing" power. *See* Collector v. Day, 78 U.S. (11 Wall.) 113 (1870) (holding that Congress cannot, under its constitutional authority to "lay and collect taxes," impose a tax upon the salary of a judicial officer of a state). *Steward Machine* is simply the first *spending* power case.

[381] *Steward Mach.*, 301 U.S. at 574.

[382] *Id.* at 574–75.

[383] Social Security Act, Pub. L. No. 74-271, 49 Stat. 620, Section 903(a)(3) (codified at 42 U.S.C. § 1103(a)(3)), *quoted in Steward Mach.*, 301 U.S. at 575 n.1.

For the first time, then, the spending power was being used not simply to further a goal that could be thought outside of Congress's enumerated powers, but rather as part of an attempt to induce the states to do something they might not have otherwise done. As we will see, Congress's current approach to tying spending to legislative action by the states is slightly different because the actual spending at issue in *Steward Machine* (i.e., the credit toward the amount due to the federal unemployment scheme) was not given directly to the states but instead to its residents. Nonetheless, the law was clearly an attempt to use federal spending to induce the states to establish their own fund by holding out the carrot (or stick, depending on one's view) of credits for a participating state's residents.

The law was challenged on a number of grounds. Of importance here are two arguments, the first based on the "Tenth Amendment or of restrictions implicit in our federal form of government"[384] and the second that the statute called "for a surrender by the states of powers essential to their quasi-sovereign existence."[385] Though related, the two were framed as separate arguments.

The thrust of the Tenth Amendment argument was that the statute's "dominant end and aim is to drive the state Legislatures under the whip of economic pressure into the enactment of unemployment compensation laws at the bidding of the central government."[386] The Court's response to that argument was based on the theoretical premise that continues to dominate discussion of the conditional spending power: not every exercise of the spending power conditioned on the state acting in a certain way constitutes "coercion." As the Court put it:

> The difficulty with the petitioner's contention is that it confuses motive with coercion. "Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed." In like manner every rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems.[387]

The party posture of the case also framed the Court's rejection of the "coercion" argument. The claim that the state legislature was being coerced was made not by the state itself but rather by a taxpaying

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[384] *Steward Mach.*, 301 U.S. at 585.

[385] *Id.* at 593.

[386] *Id.* at 587.

[387] *Id.* at 589–90 (quoting Sonzinsky v. United States, 300 U.S. 506, 555–56 (1937)).

employer. The employer's state had established an unemployment compensation scheme that satisfied the federal criteria, and the employer was in effect challenging the state law that had been "coerced" by the federal law.[388]

The second holding of importance here was that the state was not giving up any of its quasi-sovereign powers in passing a law complying with the conditions necessary for its employers to be eligible for the credit. Interestingly enough, the Court explicitly distinguished the conditional unemployment tax credit from a contract between the state and federal governments.[389] As we will see, the contract analogy pervades current thinking about the breadth of the conditional spending power. The Court's rejection of the taxpayer's argument was based on the fact that any alleged abdication of sovereignty was based entirely on the consent of the state and that the federal government had no power, financial or otherwise, to compel the state to act.[390]

Justice Butler dissented, concluding that the law violated the Tenth Amendment.[391] He continued to adhere to his view that the Constitution incorporated the principle of "dual sovereignty." According to Justice Butler, the unemployment insurance tax-and-credit scheme was simply regulation in disguise, and because Congress had no power to enact laws paying unemployment benefits, it likewise had no power to use the scheme to "persuade" states to do so.[392] Justice Butler argued:

> The provisions in question, if not amounting to coercion in a legal sense, are manifestly designed and intended directly to affect state action .... And, if valid as so employed, this "tax and credit" device may be made effective to enable federal authorities to induce, if not indeed to compel, state enactments for any purpose within the realm of state power, and generally to control state administration of state laws.[393]

Starting from the "dual sovereignty" premise, whereby every power belongs to either state or national government, the fact that the unemployment insurance scheme was an attempt to induce state action was unnecessary to Justice Butler's view that the statute was

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[388] *Id.* at 589 ("For all that appears, [the state] is satisfied with her choice, and would be sorely disappointed if it were now to be annulled.").

[389] *Id.* at 594–95.

[390] *Id.* at 594–98.

[391] Justice McReynolds also dissented. His dissent consists almost entirely of a verbatim quotation of President Franklin Pierce's 1854 statement vetoing a law that would have provided for a grant of public lands to the states "for the benefit of indigent insane persons." Pierce's statement, and thus McReynolds's view, was based on the Madisonian view of the spending power. *See id.* at 600–09 (McReynolds, J., dissenting).

[392] *Id.* at 618 (Butler, J., dissenting).

[393] *Id.* at 616–17 (Butler, J., dissenting).

unconstitutional. All that was relevant was that regulating in the field of unemployment insurance exceeded Congress's powers.

More interesting than Butler's dissent, however, was Justice Sutherland's dissent, joined by Justice Van Devanter. Both Sutherland and Van Devanter joined the majority in *Helvering*, voting to uphold the Social Security Act's creation of a federal pension benefit program,[394] and both agreed that Congress could use its power of the purse to induce states to adopt unemployment insurance legislation.[395] What they found offensive about the law, however, were the "administrative provisions" of the unemployment insurance scheme. By requiring that states deposit their funds in the U.S. Treasury "upon terms which make the deposit suspiciously like a forced loan to be repaid only in accordance with restrictions imposed by federal law,"[396] the law went too far in infringing on the states' autonomy. In Justice Sutherland's view, the statute effectively had the federal government sit "not only as a perpetual overseer, interpreter and censor of state legislation on the subject, but, as lord paramount, to determine whether the state is faithfully executing its own law—as though the state were a dependency under pupilage and not to be trusted."[397] Congress had conditioned the credit on a state's willingness to surrender to the national government the state's "*governmental power* to administer its own unemployment law or the state payroll-tax funds which it has collected for the purposes of that law."[398] The Act thereby authorized federal agencies "to supervise and hamper the administrative powers of the state to a degree which not only does not comport with the dignity of a quasi sovereign state . . . but which denies to it that supremacy and freedom from external interference in respect of its affairs which the Constitution contemplates."[399]

In contrast to Butler and McReynolds' view that the principle of enumerated powers simply precluded Congress from legislating in the field of unemployment insurance, Sutherland's dissent thus focused on the impact of the law on the states' governmental functions. For this reason, Sutherland's *Steward Machine* dissent might be seen in some ways as another of the intellectual forbearers of the *National*

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[394] Helvering v. Davis, 301 U.S. 619 (1937).

[395] *Steward Mach.*, 301 U.S. at 610 (Sutherland, J., dissenting) ("I agree that the states are not coerced by the federal legislation into adopting unemployment legislation. The provisions of the federal law may operate to induce the state to pass an employment law if it regards such action to be in its interest. But that is not coercion."); *see also id.* at 612 (stating that grants to states for "old-age assistance" conditioned on state adoption of an old-age assistance law is constitutional). This was not surprising, since it was Justice Sutherland who wrote for the Court in *Massachusetts v. Mellon*, 262 U.S. 447 (1923). *See supra* note 377.

[396] *Steward Mach.*, 301 U.S. at 612 (Sutherland, J., dissenting).

[397] *Id.* at 613 (Sutherland, J., dissenting).

[398] *Id.* at 611 (Sutherland, J., dissenting) (emphasis added).

[399] *Id.* at 613–14 (Sutherland, J., dissenting).

League of Cities v. Usery Court's emphasis on "traditional governmental functions"[400] (or what the pre-1937 Court often referred to as the "essential"[401] or "ordinary"[402] state governmental functions). However, what the Sutherland dissent in *Steward Machine* gives us that the many pre-1937 cases cited in *National League of Cities* does not is a case in which Congress is using the *spending power* (as opposed to one of Congress's other powers) to effect a supposed surrender of a state's "essential functions." There is a point, Sutherland concludes, at which even an exercise of the spending power interferes with, as one might put it in *National League of Cities* language, the "States Qua States."[403] For understanding the spending power in the era of the "new federalism," Sutherland thus gives us one hook.[404]

Although *Steward Machine* involved a challenge to an exercise of Congress's spending power that allegedly infringed on principles of state autonomy, the case did not address the more common situation today—a federal grant of funds *to the state itself* conditioned on the state complying with certain conditions.[405] Although that distinction is arguably of little import, it was not until 1947 that the Court squarely faced a challenge to a conditional grant to the states on the grounds that it infringed state autonomy. By that time, every single member of the 1937 Court had been replaced.

In that 1947 case, *Oklahoma v. United States Civil Service Commission*,[406] the Court upheld the constitutionality of a provision of the Hatch Act that prohibited all state and local employees financed "in whole or in part by loans or grants" from the national government from "tak[ing] any active part in political management or in political

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[400] Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 287–88 (1981); Nat'l League of Cities v. Usery, 426 U.S. 833, 852 (1976).

[401] Flint v. Stone Tracy Co., 220 U.S. 107, 172 (1911).

[402] South Carolina v. United States, 199 U.S. 437, 451 (1905).

[403] *Nat'l League of Cities*, 426 U.S. at 847.

[404] I am of course not saying that Justice Sutherland's view in *Steward Machine* is good law today. As I explain in greater detail below, *see infra* Part IV.B, the scope of the spending power is well-settled as a matter of current doctrine. As I further explain, however, that doctrine may be open to reinterpretation in light of the Court's recent federalism decisions. I focus my discussion of a possible change in spending power on Professor Baker's theory of the spending power and her proposed test for spending power doctrine. *See infra* Part V.A. Nonetheless, if the Court seeks to revive *National League of Cities*, then Justice Sutherland's partial dissent in *Steward Machine* strikes me as a more plausible approach to limiting the spending power than does Baker's. It seems to have a greater affinity to the Court's current focus on the "etiquette of federalism."

[405] Interestingly, Title III of the Social Security Act, which authorized appropriations to be made to states to assist in the administration of state unemployment insurance programs (i.e., unemployment insurance programs that satisfied the same federally imposed conditions) was also challenged in *Steward Machine*. The Court punted on the issue, ruling that the constitutional issue was not ripe since Congress had not actually appropriated any money pursuant to Title III. *See* Steward Mach. Co. v. Davis, 301 U.S. 548, 598 (1937).

[406] 330 U.S. 127 (1947).

campaigns."[407] The Court quickly rejected Oklahoma's Tenth Amendment argument, again relying on the conclusion that no coercion was involved when a state could, as Oklahoma had in fact done, adopt "the 'simple expedient' of not yielding to what she urges is federal coercion."[408] No infringement of sovereignty was involved, the Court held. Indeed, the basis of the Court's rejection of the Tenth Amendment argument is in fact a strict view of sovereignty in its classic sense. Under international law, a sovereign state has the power "to make contracts and give consents bearing upon the exertion of governmental power."[409] Starting from this standpoint, the structure of the Constitution in general and the Tenth Amendment in particular "protected, and did not destroy, [the states'] right to make contracts and give consents where that action would not contravene the provisions of the Federal Constitution."[410] Treating the state as a sovereign, therefore, strengthened, rather than weakened, the argument that a conditional grant to the states was constitutional.

B. Current Spending Power Doctrine: South Dakota v. Dole

In 1987, the Court consolidated its doctrine on conditional spending to states in *South Dakota v. Dole*.[411] *Dole* arose out of a challenge to the National Minimum Drinking Age Amendment, which required the Secretary of Transportation to withhold a portion of otherwise allocable federal highway funds from States "in which the purchase or public possession . . . of any alcoholic beverage by a person who is less than twenty-one years of age is lawful."[412] The statute was, in effect, a financial inducement to states to adopt a minimum drinking age of twenty-one, or, put another way, a financial penalty for states that failed to adopt such a minimum drinking age. The Amendment was passed in 1984, long before *Lopez*, and Congress's desire to connect its regulatory goals with the spending power was due to the open constitutional question whether the Twenty-first Amendment stripped Congress of the power to regulate the minimum age of liquor consumption, notwithstanding what otherwise would have been clear authority to regulate under the Commerce Clause.

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[407] *Id.* at 129 n.1. The same day, the Court sustained, in face of a First Amendment challenge, the constitutionality of the Hatch Act provision that prevented all *federal* employees from engaging in political management or political campaigns. *See* United Pub. Workers (C.I.O.) v. Mitchell, 330 U.S. 75 (1947).

[408] Oklahoma v. U.S. Civil Svc. Comm'n, 330 U.S. 127, 143–44 (1947).

[409] United States v. Bekins, 304 U.S. 27, 51–52 (1938); *see also U.S. Civil Svc. Comm'n*, 330 U.S. at 144 n.20 (citing *Bekins*).

[410] *Bekins*, 304 U.S. at 52.

[411] 483 U.S. 203 (1987).

[412] 23 U.S.C. § 158 (1998).

In assessing the constitutionality of the statute under the spending power, the Court first made clear that the power to impose conditions on the receipt of federal funds flows naturally from the power to spend. It then reaffirmed the Hamiltonian view of the Spending Clause as articulated by the *Butler* Court.[413]

Drawing upon and consolidating past case law on the spending power, the Court then set forth four limitations on the federal government conditioning funds to the states.[414] The first limitation, taken directly from the language of the Constitution, is that "the exercise of the spending power must be in pursuit of 'the general welfare.'"[415] The second limitation is, in effect, a clear statement rule: "[I]f Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'"[416] The third limitation is that the federal grant must be related "to the federal interest in particular national projects or programs."[417] Finally, the fourth limitation on Congress's spending power, which I mentioned briefly in describing the Court's opinion in *ALA v. United States*, is known as the "independent constitutional bar" rule. It states, quite simply, that "other constitutional provisions may provide an independent bar to the conditional grant of federal funds."[418]

In *Dole*, the Court quickly dispensed with the first three limitations. The Court first made clear that it considered the "general welfare" limitation to be almost nonjusticiable: "We can readily conclude," the Court stated, "that the provision is designed to serve the general welfare, especially in light of the fact that 'the concept of welfare or the opposite is shaped by Congress . . . .'"[419] The Court then noted that the statute was crystal clear as to the consequences a state

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[413] *Dole*, 483 U.S. at 206–07. *See supra* notes 335-38 and accompanying text.

[414] Beyond the four limitations, the Court also noted that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Dole*, 483 U.S. at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)). The Court gave little indication as to where that point might be.

[415] *Id.* at 207 (citations omitted).

[416] *Id.* (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)) (ellipsis and alteration in original).

[417] *Id.* (quoting Massachusetts v. United States, 453 U.S. 444, 461 (1978) (plurality opinion)).

[418] *Id.* at 208.

[419] *Id.* (quoting Helvering v. Davis, 301 U.S. 619, 645 (1937)) (ellipsis in original). In a recent article, Professor Eastman has argued that the Court has been wrong about the phrase "general welfare" since *Butler* and that the phrase was originally understood as a limitation on Congress's spending power. *See generally* John C. Eastman, *Restoring the "General" to the General Welfare Clause*, 4 CHAP. L. REV. 63 (2001). *But cf.* Erwin Chemerinsky, *Protecting the Spending Power*, 4 CHAP. L. REV. 89, 90 n.5 (2001) (noting that all of Eastman's examples involve the political branches of government and that none of them justify a judicial check on the spending power).

would suffer if the state failed to raise its minimum drinking age and then explained that the law was sufficiently germane to a federal interest, namely reducing alcohol-related accidents and fatalities on the nation's highway system.[420]

Because of the Twenty-first Amendment implications of the case, the Court discussed the fourth limitation more fully, but nonetheless concluded that the statute did not implicate the "independent constitutional bar" rule. South Dakota argued that Section 2 of the Twenty-first Amendment[421] precluded Congress from establishing a national minimum drinking age and that the "independent constitutional bar" rule should be interpreted so as to prevent Congress from doing with the spending power what it could not do directly with one of its other powers. Declining to decide whether Congress had the power to impose a national minimum drinking age, the Court made clear that the "independent constitutional bar" rule "is not . . . a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly."[422] It further stated that "a perceived Tenth Amendment limitation on congressional regulation of state affairs [does] not . . . limit the range of conditions legitimately placed on federal grants."[423] Rather, the "independent constitutional bar" rule simply

> stands for the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress's broad spending power.[424]

The Court concluded that if South Dakota were "to succumb to the blandishments offered by Congress and raise its drinking age to 21, the State's action in so doing would not violate the constitutional rights of anyone."[425] There was thus no "independent constitutional bar" to the National Minimum Drinking Age Amendment.

Justice O'Connor dissented.[426] While agreeing in principle with the Court's four limitations on the spending power, Justice O'Connor

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[420] *Dole*, 483 U.S. at 208.

[421] Section 2 of the Twenty-first Amendment provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

[422] *Dole*, 483 U.S. at 210.

[423] *Id.*

[424] *Id.* at 210–11. Given this characterization of the fourth prong, the Court seems to be making clear that the *federalism*-based limits on the spending power are to be found only in the first three prongs of the test.

[425] *Id.* at 211.

[426] *See id.* at 212 (O'Connor, J., dissenting). Justice Brennan also wrote a short dissent, essentially agreeing with Justice O'Connor. *See id.* at 212 (Brennan, J., dissenting).

would have required a tighter nexus under the "germaneness" requirement. In her view, a clear line could be drawn between permissible and impermissible conditions on federal grants to states:

> Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent. A requirement that is not such a specification is not a condition, but a regulation, which is valid only if it falls within one of Congress's delegated regulatory powers.[427]

Justice O'Connor drew her germaneness requirement from a distinction that the Court articulated in *Butler*, between "a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced."[428] Since the National Minimum Drinking Age Amendment was not aimed at specifying how the highway funds were to be spent, it could only be upheld if the law was a valid exercise of one of Congress's regulatory powers. Justice O'Connor then concluded that, notwithstanding the Commerce Clause, the Twenty-first Amendment effectively reserved to the States the exclusive power to regulate the age of the purchasers of liquor.[429] Thus, the law was not within Congress's regulatory powers, and Justice O'Connor would have invalidated it.

Though she does not articulate it in quite these terms, Justice O'Connor was proposing somewhat of a compromise between the Hamiltonian and Madisonian view of the Spending Clause. The spending power was not limited to the enumerated powers, but, when exercised in a manner not otherwise within the enumerated powers, the spending power was limited to "specifying how the money should

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[427] *Id.* at 216 (O'Connor, J., dissenting) (quoting the *amicus curiae* brief filed by the National Conference of State Legislatures).

[428] *Id.* (O'Connor, J., dissenting) (quoting United States v. Butler, 297 U.S. 1, 73 (1936)); *see also* Baker, *supra* note 8, at 1961 (analyzing O'Connor's dissent). The *Butler* Court did not make anything of this distinction in its holding. Rather, as noted above, see *supra* Part IV.A, the Court effectively ignored the spending power issue in the case altogether, holding that the statute violated the Tenth Amendment and principles of dual sovereignty, since the statute was an attempt to regulate in the guise of an exercise of the taxing and spending power.

[429] While this approach might seem similar to saying that the Twenty-first Amendment imposes an "independent constitutional bar"—even more so if one were to assume that a law imposing a national minimum drinking age would fall within Congress's Commerce Clause power in the absence of the Twenty-first Amendment, *see infra* note 431—Justice O'Connor intended it to be analytically distinct. *See Dole*, 483 U.S. at 213 (O'Connor, J., dissenting) ("I am also willing to assume, *arguendo*, that the Twenty-first Amendment does not constitute an 'independent constitutional bar' to a spending condition."). This makes sense, since the independent constitutional bar rule, at least as articulated by the Court in *Dole*, prohibits the federal government from using the spending power to "induce the States to engage in activities that would themselves be unconstitutional." *Id.* at 210. In the majority's characterization of the "independent constitutional bar" rule, the focus is on whether a state accepting the conditional funds would "violate the constitutional rights of anyone," *id.* at 211, not on whether the *State's* constitutional rights have somehow been violated by the federal government.

be spent."[430] In light of the Court's approach to the Commerce Clause at the time,[431] this compromise still would have left Congress with significant regulatory authority. But, given the Court's recent Commerce Clause jurisprudence and the fact that virtually all federal grants to states are conditional,[432] such an interpretation of the Spending Clause matters a lot more. In Part V, when I discuss Professor Baker's approach—an approach that derives from Justice O'Connor's view—I will elaborate on this theme further.

Since *South Dakota v. Dole*, the Court has addressed the spending power once more: in *New York v. United States*.[433] While the case is best known for being the first time the Court held a federal statute unconstitutional under the anti-commandeering principle,[434] *New York* was also an explicit reaffirmation that the Court would continue to defer to Congress on spending power matters. *New York* involved a constitutional challenge to the Low-Level Radioactive Waste Policy Amendments Act of 1985. Among the provisions at issue was a portion of the statute known as the "monetary incentives." These provisions permitted states with low-level radioactive disposal sites to impose a surcharge on radioactive waste received from other States, part of which the federal Secretary of Energy would place in an escrow account for payments to those states that complied with a series of deadlines set forth in the federal statute.[435]

In an opinion written by Justice O'Connor herself, the Court rejected the constitutional challenge to the "monetary incentives," concluding first that the federal authorization of the state tax and the collection of a portion of it by the federal government were valid under the commerce and taxing powers; and second, that transferring the money to states in exchange for compliance with federal deadlines for the safe disposal of radioactive waste satisfied the four *Dole* factors and was thus a constitutional exercise of the spending power. The State of New York, which challenged the provision, did not seriously contend that each step of the provision was not within Con-

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[430] *Dole*, 483 U.S. at 216.

[431] Note that this is 1987, between *Garcia* (1985) and *Lopez* (1995). As noted above, the Court did not address the question whether Congress would have had the power to pass a national minimum drinking age (i.e., a federal prohibition on drinking below the age of twenty-one as opposed to the National Minimum Drinking Age Amendment, which simply conditioned funds on states passing such a prohibition). But, putting aside the Twenty-first Amendment, there is a good chance that a national minimum drinking age would have been upheld as a constitutional exercise of the Commerce Clause at the time.

[432] *See* RONALD L. WATTS, THE SPENDING POWER IN FEDERAL SYSTEMS: A COMPARATIVE STUDY 13 (1999); *id.* at 56.

[433] New York v. United States, 505 U.S. 144 (1992).

[434] I discuss *New York* again in greater detail below when I discuss the anti-commandeering principle in Part V.

[435] *New York*, 505 U.S. at 152–53.

gress's power. Rather, New York argued that Congress was not exercising its spending power at all because of the way in which the money was disbursed. Because the money collected from the surcharge was placed in a special escrow account rather than in the U.S. Treasury, New York argued that the federal government was simply the trustee of the funds, not the owner of the funds. This fact, New York argued, meant that the expenditures could not be considered an exercise of the federal spending power.[436] The Court rejected this argument, stating simply that the spending power

> has never . . . been thought to mandate a particular form of accounting. A great deal of federal spending comes from segregated trust funds collected and spent for a particular purpose . . . . The Spending Clause has never been construed to deprive Congress of the power to structure federal spending in this manner.[437]

Now, if we recall *Butler*, we can see that the Court does not have this quite right. Surely, if *Butler* stands for anything, it stands for the proposition that, when taxing and spending are intimately interconnected in a single statutory scheme, the Court can inquire into whether Congress is using its taxing and spending powers to regulate in areas that would otherwise be outside federal power. Since there was little doubt that the federal government could regulate the disposal of low-level radioactive waste, the Court's overstatement here probably made little difference. In any event, the Court could be forgiven for omitting any mention of *Butler*, a case that was by then thought of as representing an expansive Hamiltonian view of the spending power (the case's dictum) rather than a cramped view of Congressional regulatory powers (the case's actual holding).

The *New York* Court's failure to consider *Butler* at this point is interesting for my purposes because most of the money affected by CIPA (the E-rate discounts, but not the LSTA grants) comes from "segregated trust funds collected and spent for a particular purpose."[438] In essence, the *New York* Court precluded CIPA's challengers

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[436] To be fair, the Court's characterization of this argument in the case ignored the fact that it was very weakly made. It was one minor point in New York's Reply Brief, see Reply Brief for Petitioner New York, 1992 WL 526750, at *5–7, New York v. United States, 505 U.S. 144 (1992) and barely touched upon at oral argument:

> And by the way, I should say that the Government somehow thinks in its brief that the Spending Clause is involved here because of the payments that go from the, some money is going from the generators and some of it goes in an escrow fund. But the statute makes it clear that's not Federal money. It's not appropriated, it's simply kept there. So I simply don't understand the argument that the Government has made that that is, the Spending Clause is involved here.

Transcript of Oral Argument, 1992 WL 687819, at *18–19.

[437] *New York*, 505 U.S. at 172–73.

[438] *Id.* at 172.

from arguing that CIPA, like the Agricultural Adjustment Act, was regulation in the guise of spending.[439]

At this point, let me return to *Dole* for a moment. As a matter of doctrine under *Dole*, there seems little question that CIPA satisfies the first three of the Court's limitations on the spending power. Indeed, even the plaintiffs challenging CIPA's constitutionality conceded as much.[440]

How the fourth part of the test, the independent constitutional bar rule, plays out in the context of CIPA, however, raises some interesting questions. As I noted above, both courts to address the constitutionality of CIPA treated the fourth prong of the *Dole* test as crystal clear. Because it states that Congress may not use its spending power to "induce States to engage in activities that would themselves be unconstitutional," one can treat their First Amendment challenge to CIPA as if the spending power were not at issue in the case at all, i.e., under the fourth part of the *Dole* test a court simply asks whether installing filters in a public library violates the First Amendment. If installing filters on public library Internet access violates the First Amendment, CIPA is itself unconstitutional. In short, the fourth prong of the *Dole* test simply turns the whole case into an ordinary First Amendment case. Given that I have been unable to find a single case in which a court has invalidated an exercise of the spending power under the "independent constitutional bar" rule, this is not an implausible reading of the language in *Dole*. Indeed, textually, it is almost unassailable. Nonetheless, the way the doctrine ends up working, a number of interesting things happen.

First, the rule is probably best seen as a rule embodying third-party standing.[441] While an ordinary First Amendment challenge could not be brought by the government body alleged to be violating individuals' First Amendment rights, the independent constitutional bar rule permits, as we see here, the libraries to challenge the constitutionality of, in effect, their own (proposed) unconstitutional action—i.e., installing the filters. In the context of the spending power, it makes sense that the libraries are bringing this case, of course, since they are the recipients of the conditional funds. It is not clear that anyone other than the funding recipient would have had standing to challenge the constitutionality of funding conditions (though, as I noted above, there were in fact many other plaintiffs in the case).

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[439] The Agricultural Adjustment Act, like the E-rate discount program, was a comprehensive law that included both taxing and spending. One interesting difference, however, is that the challengers in *Butler* did not want to be taxed, while the CIPA challengers were not complaining about the tax at all. In fact, they liked every aspect of the statute (including the spending itself) except the *condition* imposed on recipients of the funds.

[440] *ALA I*, 201 F. Supp. 2d 401, 450 (E.D. Pa. 2002).

[441] I am indebted to my colleagues Ann Althouse and David Schwartz for this insight.

Second, notice what the fourth prong of *Dole* does in terms of the nature of the constitutional challenge. It changes it from a case about federalism and the structure of government to a case about the relationship between the individual and her government. The structural aspects of the case are completely lost in the analysis. This should strike the reader as somewhat odd: the law being analyzed is a federal law conditioning funds to state entities, and the only question being asked is whether the *recipients* of the funds would violate the First Amendment by complying with the condition. In essence, then, an analysis under the independent constitutional bar rule requires courts to ignore the complexity of a federal law that conditions funds to states. This happens in a few different ways.

First, it takes the federal government out of the calculus altogether. The relationship being probed when addressing the constitutionality of the statute under the independent constitutional bar rule is the relationship between the library (as a governmental entity) and the individual. The federal government's role in the statute becomes irrelevant to the analysis. The constitutional analysis of CIPA is thus no different than if the libraries themselves were federal government instrumentalities—that is, no different from a law that required the Library of Congress[442] to install filters—or if the law being challenged were either a state law mandating that all public libraries in the state install Internet filters or even simply a decision by a local public library board to install filters as in *Mainstream Loudoun.*[443] In each situation, one would ask a straight First Amendment question: "Does a library that installs filters on its Internet terminals violate the First Amendment?" CIPA is being analyzed in exactly the same way, notwithstanding the fact that it is a *federal* law and the libraries are local (i.e., state) government entities.[444]

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[442] It is worth noting that the Library of Congress is different from other public libraries in that it makes no content selection decisions as to what materials it would have, since it obtains virtually all published materials. *See* LIBRARY OF CONGRESS, THE MISSION AND STRATEGIC PRIORITIES OF THE LIBRARY OF CONGRESS: FY 1997–2004 ("The Library of Congress is the only library in the world that collects universally."), *at* http://www.loc.gov/ndl/mission.html (last visited Sept. 17, 2004). The Library of Congress does exclude two categories of content, technical agriculture and clinical medicine, which are collected by the National Agricultural Library and National Library of Medicine respectively. *Id.* The question of selection criteria by the Library of Congress has arisen, however. In *American Council of the Blind v. Boorstin*, 644 F. Supp. 811 (D.D.C. 1986), a federal district court held that the Librarian of Congress had violated the First Amendment when he made a viewpoint-based decision to discontinue the production and distribution of Braille editions of *Playboy* magazine.

[443] 24 F. Supp. 2d 552 (D. Va. 1998).

[444] There is a slight complication because the case was brought as a facial challenge, and the question was thus whether *any* local library could implement the condition in a constitutional manner. *See* United States v. Salerno, 481 U.S. 739, 746 (1987) (discussing the Due Process Clause); *see generally* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994) (analyzing the Supreme Court's facial challenge doctrine). This issue would

Second, it takes the conditional spending power aspect of the law out of the analysis as well. That is, the analysis would be no different if the federal government passed a law mandating that all public libraries install filters, not just those that receive federal funding.[445] This is important because a number of commentators have argued that the spending power provides an easy end-run around the limits that a system of enumerated powers should impose upon federal power.[446] In short, the analysis mandated by the independent constitutional bar rule avoids the complexity of the federal law completely.

Finally, let me note one fact that arguably could have ended the inquiry before it even started: theoretically, some of the recipients of the money conditioned by CIPA are private, nongovernmental libraries.[447] Thus, analyzing the issue under ordinary principles of a facial challenge, one might argue that these private libraries could implement the condition in a constitutional manner (since they are not subject to the Constitution at all) and that the facial challenge would thus fail. The government never made this argument, and it may well be too clever by half, but it helps make clear my principal point here, that the independent constitutional bar rule, as a doctrinal tool, is a lousy match for analyzing CIPA.

At some level, of course, one can understand why the doctrine does this. The plaintiffs are challenging the statute not as exceeding Congress's enumerated powers (i.e., the internal limitations inherent in the scope of Congress's Article I, Section 8, Clause 1), but rather as an affirmative external limitation on the spending power found in the Bill of Rights. Yet, when the lead plaintiffs are local governmental entities (or an organization composed of such entities) suing the national government, surely something about the structure of government is relevant.

Beyond the broad principles of constitutional federalism that suggest, as I argued in Part III, that local governments should be deciding whether to install filters on local library Internet terminals, a law that brings the federal government into the business of regulating public libraries—institutions that have been local throughout American history—necessarily raises constitutional issues beyond the First Amendment questions that were addressed in the case. I explore

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still be of relevance in a challenge to a state law mandating filters statewide, but would otherwise not play into the analysis.

[445] Of course, Congress might lack the regulatory authority to pass such a law in the first place, which would render the First Amendment analysis unnecessary.

[446] *See, e.g.*, DAVID L. SHAPIRO, FEDERALISM: A NATIONAL DIALOGUE 33 ("[I]t is hard to imagine an intelligent drafter of federal legislation who could not achieve the desired goal by working around the Court's decision in the *New York* case (through resort to the power of the purse, for example)."); Baker, *supra* note 8, at 1950.

[447] I discuss this issue later. *See infra* text accompanying note 529.

those questions in the following section by looking at one way that spending power doctrine could be different and how that might have affected the *ALA* Court's analysis.

V. CIPA AND THE SPENDING CLAUSE: THE IMPACT OF THE "NEW FEDERALISM"

In the previous Part, I addressed the constitutionality of CIPA in light of current spending power doctrine. I concluded that applying *Dole v. South Dakota* to CIPA yields precisely the constitutional question that the *ALA II* plurality and Justice Souter's dissent asked. Doctrinally, both opinions clearly got *Dole* right. As I previously argued, however, because the doctrine leads to an analysis that ignores the federalism aspects of the law, the doctrine avoids consideration of much of the true impact of CIPA, and, more importantly, forces a one-size-fits-all answer on a question (whether a public library should filter Internet access) that would have been better addressed with more local autonomy. The unconstitutional conditions doctrine likewise ignores the federalism aspect of the case, though the district court's dictum that the libraries had standing to make a claim on behalf of their patrons (even though their patrons are not recipients of the funding) does at least incorporate some of the complexity of the relationships that CIPA implicates.

In this Part, I turn to the possibility that spending power doctrine might change and the impact such changes could have on the constitutionality of CIPA. In particular, I look at the work of the most prominent "new federalism" theorist of the spending power, constitutional scholar Lynn Baker. I analyze CIPA in light of Baker's proposed doctrinal changes to the spending power. I conclude that under Baker's proposal, there are good arguments that CIPA would be declared unconstitutional *on federalism grounds*—that is, in such a way that would have permitted local libraries to continue to filter. I further conclude, however, that the federalism concerns I raised in Part III are in some ways different from those that form the basis of Baker's theory and proposal.

A. *Professor Baker's Proposed Limitation on the Spending Clause*

If the Spending Clause is the next battle in the federalism war,[448] Lynn Baker is surely one of the key generals. Her 1995 article in the *Columbia Law Review*, *Conditional Federal Spending After* Lopez,[449] and her more recent work[450] have articulated a cogent vision of a limited spending power, one that she argues would be in keeping with the Court's recent foray into federalism-based limits on the federal government's power. In this Section, I describe both the theoretical underpinnings of her proposal to tighten judicial scrutiny of the federal spending power and the doctrinal changes she proposes. In Section B, I apply her proposal to CIPA, and in Section C, I look back at some of the federalism concerns CIPA raises and explore the match between those concerns and the way in which Baker's proposal would apply to CIPA.

1. *Theoretical Basis for Baker's Proposal*

Baker's approach to the spending power begins with the proposition that courts should "presume invalid those offers of federal funds to the states which, if accepted, regulate them in ways that Congress could not directly mandate."[451] In other words, when the federal government offers funds to the states with strings attached, such spending should be treated differently from other types of federal spending and should be presumed invalid unless Congress could otherwise require those conditions in the absence of the congressional spending power. Baker gives three interconnected reasons why conditional offers of funds to the states should be treated as distinct from other types of congressional spending. First, the fact that the federal government has a "monopoly power over the various sources of state

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[448] Having said this, Richard Garnett appears to be right that the Court does not appear particularly interested in restricting Congress's spending power. *See* Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 5 & n.23 (2003). As Garnett points out, in 2003, in *Pierce County v. Guillen*, 537 U.S. 129, 148 n.9 (2003), the Court dismissed in a footnote an argument that portions of the federal Hazard Elimination Program, 23 U.S.C. § 152, exceeded Congress's spending power, an argument that was accepted by the court below, *see* Guillen v. Pierce County, 31 P.3d 628, 651 (Wash. 2001).

[449] Baker, *supra* note 8.

[450] *See* Lynn A. Baker, *Conditional Federal Spending and States' Rights*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 104 (2000) [hereinafter Baker, *States' Rights*] (favoring a limited spending power); Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951 (2001) [hereinafter Baker, *Political Safeguards*] (same); Lynn A. Baker, *Should Liberals Fear Federalism?*, 70 U. CIN. L. REV. 433 (2002) [hereinafter Baker, *Liberals*] (same); Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195 (2001) [hereinafter Baker, *Spending Power*] (same).

[451] Baker, *supra* note 8, at 1935. As I explain in greater detail below, this presumption is rebuttable. *See infra* text accompanying note 476.

revenue . . . render[s] any offer of federal funds to the states presumptively coercive."[452] Second, many conditional offers of federal funds effectively provide a real choice to very few states, and "this minority cannot effectively protect themselves against the majority of states through the political process."[453] Finally, because federal regulatory spending will reduce the "diversity among the states in the package of taxes and services, including state constitutional rights and other laws, that each offers to its residents and potential residents," conditional federal spending is likely to reduce aggregate social welfare.[454]

Baker begins by noting that, when considering a conditional offer of funds from the federal government, states will implicitly fall into two categories: states that would otherwise comply with the condition even in the absence of the offer of federal money (including both those that already satisfy the condition and those that would happily do so without the condition) and those that would not otherwise comply with the condition (i.e., those that thereby face a real "choice" as to whether to forgo the federal funds).[455]

Starting from this categorization, Baker turns to her first point about the federal government's "monopoly" power over the sources of state revenues. For states in the first category, the federal money is a windfall, since, by presumption, the conditional offer of funds is not affecting their behavior. States in the second category, however, are effectively constrained in their decision making because there is no other equivalent, alternative source of revenue—that is, there is no "competitor" to the federal government's offer of funds. More importantly, since the adoption in 1913 of the Sixteenth Amendment, which granted Congress the power to tax income "from whatever source derived, [and] without apportionment among the several States,"[456] much of the money that the federal government has to offer to the states derives from sources within the state that the state would itself have been able to tap if the federal government did not have the broad power to tax. Therefore, "when the federal government offers a state money subject to unattractive conditions, it is often offering funds that the state readily could have obtained *without those conditions* through direct taxation—*if* the federal government did not also have the power to tax income directly."[457] Thus, Baker argues, one way to view federal offers of conditional spending to the

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[452] Baker, *supra* note 8, at 1935.

[453] *Id.*

[454] *Id.*

[455] *Id.* at 1935–36.

[456] U.S. CONST. amend. XVI.

[457] Baker, *supra* note 8, at 1937.

states is to view the federal government as "returning" money to the states with unattractive conditions, money that the state could otherwise get from its own populace without those conditions.[458]

By itself, this might not be problematic if the state could both refuse the conditional offer and, at the very least, get back its proportionate share of the tax revenues that the federal government has to "offer." But, of course, states that refuse a conditional offer of funds from the federal government get nothing and are not entitled to any rebate for their state's share of the tax revenues that the federal government is using to impose conditions on the state. In sum, federal conditions on funding to states are necessarily coercive, Baker argues, because at least some chunk of the revenues that the federal government is "offering" to a particular state in fact derives from that state's sources of revenues and is legitimately that state's right to have without the condition.[459]

Second, by itself, the fact that conditional spending is inherently coercive would not be worrisome if one believed that the states could effectively constrain the federal government's lawmaking power through the political process. This, of course, is the basis of the theory of the "political safeguards" of federalism made by, among others, Herbert Wechsler[460] and most recently Larry Kramer.[461] Baker argues,

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[458] *Id.*; *see also* RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 152 (1993) (analogizing conditional federal spending to states to "the thief who will resell stolen goods to [their] true owner"); Matthew Adler & Seth Kreimer, *The New Etiquette of Federalism:* New York, Printz, *and* Yeskey, 1998 SUP. CT. REV. 71, 107 ("Congress funds its conditional payments to the states through the taxation of resources that would otherwise be available for state taxation and for the (geographically variable) state programs that state taxation could fund."); Lino A. Graglia, *From Federal Union to National Monolith: Mileposts in the Demise of American Federalism*, 16 HARV. J.L. & PUB. POL'Y 129, 130–31 (1993) ("By extracting money from the now-defenseless states and offering to return it with strings attached, the national government is able to control by promises of reward—some would say bribery—whatever it might be unable or unwilling to control by threat of punishment."); Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85, 124 ("There is no immediate sense [among the average voters] that it is their own money being returned to them with strings attached and that the net effect of the money's round trip to Washington is simply to carry the regulatory strings with it back to the state."); *cf.* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 425 (1998) ("A state that decides to refuse federal funds essentially opts to subsidize the states that accept federal funds, because, of course, the state's refusal does not result in a diminished federal tax burden for its citizens. This is a steep price to pay.").

[459] Baker, *supra* note 8, at 1935–39; Baker, *States' Rights*, *supra* note 450, at 106–07.

[460] Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

[461] Kramer, *supra* note 225. Jesse Choper has of course also written on a related issue, arguing that the courts should preserve their political capital for individual rights cases by rendering structural issues, including federalism, nonjusticiable. JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980); *see also* Gregory P. Magarian, *Toward Political Safeguards of Self-Determination*, 46 VILL. L. REV. 1219 (2001) (discussing Choper's "statements on the political safeguards of federalism").

however, that the problems caused by a broad spending power are different from those that the "political safeguards" of federalism protect, and judicial review is thus necessary to police the spending power.[462] As I noted in Part III, concerns about protecting state autonomy from federal encroachment can be put into two broad categories: first, "vertical aggrandizement," which involves "efforts by the federal government to increase its own power at the expense of the states"[463]; and, second, "horizontal aggrandizement," which involves use of the federal lawmaking process to homogenize law across the country by threatening the policy preferences of outlier or minority states.[464] According to Baker, while the "political safeguards" of federalism might protect state interests against federal oppression of states (vertical aggrandizement), they do little to address the problem that arises from federal offers of conditional funds to the states, which is a problem of "horizontal aggrandizement," whereby some states harness "the federal lawmaking power to oppress *other states.*"[465] With respect to the problem of "horizontal aggrandizement," "[n]ot only can the state-based allocation of congressional representation not protect states against this use of the federal lawmaking power, it facilitates it."[466]

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[462] Others have criticized the "political safeguards" argument as well. *See* Marci Hamilton, *The Elusive Safeguards of Federalism*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 93, 98–99 (2001) (noting that state officials are more beholden to federal officials than the other way around); Robert F. Nagel, *Judicial Power and the Restoration of Federalism*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 52, 58 (2001) (noting that "political influence of state and local governments does not seem to have been generally effective in reversing the trend towards centralization of power"); William Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1724 n.64 (1985) ("[I]t is difficult to take the political science portion of the whole 'safeguards' argument as other than a good-hearted joke."); *cf.* Bradford A. Clark, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 80 TEX. L. REV. 327, 329 (2001) (arguing that political safeguards do not reduce the necessity of judicial review); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1472 (2001) (same).

[463] Baker, *Liberals*, *supra* note 450, at 435 n.8; *see also* Baker, *Political Safeguards*, *supra* note 450, at 955–56; Baker & Young, *supra* note 229, at 109–10.

[464] Baker, *Liberals*, *supra* note 450, at 435 n.8. *See generally* Baker & Young, *supra* note 229, at 109–10.

[465] Baker, *supra* note 8, at 1940.

[466] *Id.*; Baker, *Liberals*, *supra* note 450, at 439–41. Baker starts with the presumption that, in general, Congress will not likely enact a conditional offer of federal funds unless a majority of states would otherwise willingly comply with the stated condition (i.e., the states that fall into what I referred to above as the first category of states) because most congressional representatives would not wish to support a law that provides money to their own states with a condition that a majority of their own constituents would independently oppose. So, for example, according to Baker's theory, one would expect that South Dakota's representatives would have voted against the statute that was challenged in *South Dakota v. Dole*, but one would expect that a majority of states already had drinking ages of twenty-one or more.

Unfortunately for Baker's thesis, neither of these assumptions is in fact true in the example she considers the paradigm of this problem. First, both of South Dakota's senators voted in favor of the amendment that imposed this condition. *See* 130 CONG. REC. 18,680 (Senators

Baker's theory appears to rely on two very different arguments, one normative and the other empirical. The first argument is a normative claim premised on the Constitution's supposed dividing line between state and federal powers. So, consider Baker's first point, that the conditional spending power can be used to the advantage of a majority of states and to the detriment of a minority of states. Certainly one can make the same argument when Congress exercises any federal power: the majority acts to its benefit and to the detriment of the minority. Indeed, one might say that the spending power is less problematic than many exercises of Congressional power, because a federal mandate is more of an imposition than a conditional grant. There is at least the possibility of noncompliance with respect to the grant.[467] Thus, to make the case that the power to pass a conditional spending law is special we must assume that the federal government's "regulatory powers" (i.e., all Article I powers except the conditional spending power) properly limit the federal government's actual power of regulation, and any use of the spending power to in effect "regulate" the states is a normatively illegitimate exercise of the federal spending power.

There are two different reasons why this sort of "regulation" might be illegitimate, both of which dovetail with broader federalism concerns: (1) because a federal offer of funds to a state conditioned on the state acting in a certain way—in contrast to most exercises of the spending power—effectively "commandeers" state actors—either the state lawmaking process or its administrative or executive apparatus;[468]

Abdnor & Pressler both voting in favor of the relevant amendment). So too did both of the senators from New York and Connecticut, which were in many ways the primary states targeted by the legislation. *Id.* The relevant amendment was introduced by Senator Lautenberg of New Jersey, one of whose principal worries was the fact that youth from New Jersey could drive to New York and Connecticut, legally buy alcohol, and then drive home. *Id.* at 18,641–42 (quoting newspaper reports about cross-border issues affecting New Jersey, particularly in light of the New York assembly's rejection of a bill that would have raised the drinking age from 19 to 21). Second, at the time of passage of the law, only sixteen states had a minimum drinking age of twenty-one. *See Aggressive Driving: Hearing Before the Subcomm. on Surface Transp. of the House Comm. on Transp. and Infrastructure*, 105th Cong. (1997) (statement of David F. Snyder, Assistant Gen. Counsel, American Ins. Ass'n), *available at* 1997 WL 11235113.

[467] One response to this point might be that the majority is more likely to use the spending power, because it gets more of a benefit from a regulatory exercise of the spending power than from the equivalent regulation (i.e., the windfall for doing what it already was doing or would happily otherwise do). While this might be true, regulation can sometimes be essentially "cost-free" to legislators in ways that are not applicable to a conditional spending law. It is perhaps for this reason that the Gun Free Schools Act, see Lopez v. United States, 514 U.S. 549 (1995), and Violence Against Women Act, see United States v. Morrison, 529 U.S. 598 (2000), were not passed as conditional spending laws in the first instance. At some level, those legislators preferred to pass a criminal statute to an appropriation.

[468] *See* Printz v. United States, 521 U.S. 898, 926–27 (1997) (discussing the anti-commandeering doctrine); New York v. United States, 505 U.S. 144, 160–67 (1992) (noting that "Congress may not simply 'commandee[r] the legislative processes of the States by directly

and (2) such an offer effectively "regulates" a matter that, according to the federal Constitution, lies exclusively within the state's control. Of course, these two concerns are interrelated. The key, however, is that implicit in Baker's argument about the use of the spending power to condition grants to states is the view that such "regulation" somehow encroaches on the minority states more than would a federal mandate within Congress's other regulatory powers.

The second argument really boils down to an empirical claim that, in general, when majority states harness the federal lawmaking process to pass laws conditioning grants to states, this will lead to an overall decrease in aggregate social welfare, an empirical claim that Baker acknowledges involves assuming the answer to difficult, if not unanswerable, questions.[469] Without this assumption, however, one could make exactly the opposite argument from the one Baker makes. One could concede her point about "horizontal aggrandizement," that majority states use the federal lawmaking process to oppress minority states, but still conclude as a normative matter that this is a good thing.

To argue against "homogenization," therefore, Baker's assumption that "horizontal aggrandizement" leads to a decrease in aggregate social welfare is crucial. If it were otherwise, a good utilitarian might simply respond that "horizontal aggrandizement" is a good thing. One need not answer the question individually with respect to a particular policy, but it does strike me that one would need to answer it broadly with respect to exercises of the conditional spending power.[470] I suspect that Baker's answer would revert to the line drawn by the extent of Congress's regulatory powers and that she would argue that the ability of some states to use the spending power to extract a windfall for what they would otherwise do and to pressure other states to abandon their own preferences should make us think that this is the line where we want to maintain diversity. Depending on where the line of Congress's regulatory powers is drawn, that is probably a satisfactory answer, but whether that line is drawn in the right place is of course the $64,000 federalism question.

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compelling them to enact and enforce a federal regulatory program.'" (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981))). I discuss the anti-commandeering cases in detail below. *See infra* Part V.B.3.

[469] Baker, *Liberals*, *supra* note 450, at 439 n.21. One could of course consider goals other than maximizing aggregate social utility, but I suspect that Baker assumes, in the words of Hart & Sacks, that "[t]he Constitution of the United States and the various state constitutions commit American society, as a formal matter, to . . . the objective of maximizing the total satisfactions of valid human wants." HART & SACKS, *supra* note 225, at 105.

[470] *Cf.* Ann Althouse, *Why Talking About "States' Rights" Cannot Avoid the Need for Normative Federalism Analysis: A Response to Professors Baker and Young*, 51 DUKE L.J. 363, 372–73 (2001) (arguing that one needs a normative analysis about the costs and benefits that giving autonomy to states will produce).

If we return to the question of filters in public libraries for a moment, we can see how crucial these two normative assumptions are to Baker's theory. Recall that Oregon's state constitution protects sexually explicit content, including content that satisfies the *Miller* definition of "obscenity" and that CIPA might thus force Oregon to choose between the federal funds and changing what it deems to be a fundamental right of its citizens.[471] It strikes me that there is nothing wrong with this unless one assumes that (1) the federal government should not be regulating the intrastate viewing of obscenity and (2) interstate diversity on this question is normatively a good thing. The Supremacy Clause can of course override state constitutions in any number of circumstances,[472] and so, ultimately, Baker's theory depends on these normative underpinnings. In Part III, I explained why they are true for the question of filters on public library Internet access, and there may be good reasons to think Baker is correct as her theory applies to other circumstances, such as, for example, the question of state benefits for gay partners.[473] It is not obvious, however, that these assumptions hold true for all conditional federal grants to the states.

Having described Baker's theory, I turn now to Baker's proposed changes to spending power doctrine.

2. *Baker's Proposed Doctrinal Changes to the Spending Power*

Based on her argument about conditional funding to states, Baker proposes a substitute test. As I noted earlier,[474] she begins with the idea that courts should presume invalid any "offer[] of federal funds to the states which, if accepted, would regulate the states in ways that

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[471] *See supra* text accompanying notes 300–02.

[472] *Cf.* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 79–80 (1980) (treating a state constitutional provision as a "statute" for purposes of 28 U.S.C. § 1257, which gives U.S. Supreme Court review over the question of whether the state "statute" violates the Federal Constitution).

[473] One of the prime examples Baker uses to illustrate her theory is the "not-so-hypothetical state of affairs under which a majority of the states wishes to discourage homosexual relationships." Baker, *Liberals*, *supra* note 450, at 437–38; *see also* Baker, *States' Rights*, *supra* note 450, at 108–09 ("As part of its unique package [of taxes and services, including state constitutional rights and other laws], a state might choose . . . to permit same-sex civil unions."). The use of the example of gay rights is common among proponents of judicial enforcement of federalism. Professor Van Alstyne explains what is probably the obvious reason for this:

> I have chosen this example carefully, thinking that, by making California the experimental (and less criminally repressive) state, and by assigning to it the substantive rule that strikes me as that which is frankly the better rule—such that the reader will want to be skeptical of finding power in Congress to destroy it or effectively make it of no consequence—one may see the federalism value of our Constitution sympathetically even as I do.

Van Alstyne, *supra* note 237, at 781.

[474] *See supra* text accompanying note 451.

Congress could not directly mandate."[475] This presumption will be rebutted upon a determination that the offer of funds constitutes "reimbursement spending" rather than "regulatory spending." "Reimbursement spending" legislation specifies the purpose for which the states are to spend the offered federal funds and simply reimburses the states, in whole or in part, for their expenditures for that purpose. "Regulatory spending" involves the imposition of conditions other than specifying how the offered federal funds are to be spent.[476]

Although Baker's test certainly limits the power of Congress to impose "conditions" on federal spending, the distinction between reimbursement and regulatory spending does not appear to be tied directly to the functional arguments Baker makes about why the federal spending power should be limited. After all, *all* federal funds come from sources that would otherwise be available to the states to tax and thus all spending that would not otherwise fall under one of Congress's "regulatory" powers should be equally suspect. Thus, her proposed test, while certainly providing a significant limitation on the federal spending power, does not appear to provide a tight fit with her normative theory. Nonetheless, the natural response would have to be, "so, what?" After all, one suspects she would respond that the "fit" is less important than providing a serious limitation on the conditional spending power without reverting to the Madisonian view.

As I noted above,[477] Baker's proposed test is a variation of the proposed approach to the "germaneness" prong that Justice O'Connor articulated in her dissent in *South Dakota v. Dole*, which in turn derives from dicta in *United States v. Butler*. In addition to this direct connec-

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[475] Baker, *supra* note 8, at 1916.

[476] *Id.* at 1962–63. To explain the distinction between "reimbursement" and "regulatory" spending, Baker gives an example of the federal government providing funds to those states that make the death penalty available for first-degree murder. The first thing to note is that Congress could not directly mandate that states pass a law providing that the death penalty be available for first-degree murder. So, a federal grant of funds conditioned on a state doing so would be, under Baker's scheme, presumed to be invalid. To explain the distinction between "reimbursement" and "regulatory" spending, Baker posits two different laws: one that would provide what she refers to as "Death Penalty Funds" and another that would provide what she refers to as "Law Enforcement Funds." "Death Penalty Funds" would be "[f]unds in the amount of [participating states'] demonstrated costs of executing those sentenced to death for first-degree murder." Baker, *States' Rights*, *supra* note 450, at 112. "Death Penalty Funds" would be what Baker refers to as "reimbursement spending" because providing such funds would reimburse the state for the costs associated with passing the laws that the federal government wants passed. In contrast, "Law Enforcement Funds" would be "[f]unds in the amount of $1.00 per resident according to the most recent federal census" to be used "to provide beat cops who will daily patrol the state's urban neighborhoods on foot." *Id.* "Law Enforcement Funds" would be what Baker refers to as "regulatory spending," though it is pretty clearly just an example, since "regulatory spending" could be anything other than funds tied to the actual costs associated with the condition the law imposes, namely that the state make the death penalty available for first-degree murder.

[477] *See supra* note 432.

tion with *Butler*, Baker's proposed test may well share a deeper connection to *Butler* as well. As I argued earlier, the *Butler* Court saw the taxing and the spending aspects of the Agricultural Adjustment Act as inextricably intertwined, and saw the taxing-spending combination as simply "regulation" in disguise. The pre-1937 Court was far more willing to look into the question of whether congressional use of the taxing power was a pretext for regulation that would otherwise be outside of the federal government's power. Baker wants courts to do the same thing. The only difference is that she wants to do it with the spending power, not the taxing power. Yet, to the extent that one sees the spending power as inextricably intertwined with the taxing power[478]—and, there seems little doubt that, based on Baker's normative criticisms of the federal government's ability to condition funds based on revenues that would otherwise be free to the states to tax, she does—Baker is simply reviving the pre-1937 Court's notion that the Court must not permit Congress to regulate in the guise of the taxing power and expanding that principle to the spending power.[479]

B. Application of Professor Baker's Approach to CIPA

Having described Baker's proposed test, let me now turn to applying it to the Children's Internet Protection Act.

1. *Introduction*

There is a strong argument that CIPA would fail to pass muster under Baker's proposed two-part approach to the Spending Clause. First, as I explain below,[480] under current doctrine, Congress would likely not have authority to pass a law *mandating* that public libraries install filters on Internet access, as such a law would exceed Congress's power under the "state sovereignty principle" as embodied in the Court's recent "anti-commandeering" cases: *New York v. United States*[481] and *Printz v. United States*.[482] Second, CIPA's conditional offer of funds to libraries would be considered "regulatory spending" rather than "reimbursement spending."[483] Therefore, Baker's approach, if adopted by the Court, would result in CIPA's invalidation

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[478] And, recall, the prevailing view is that the spending power is implied from Article I, Section 8, Clause 1, which also gives Congress the "Power to lay and collect taxes." U.S. CONST. art. 1, § 8, cl. 1; *see supra* Part IV.A.

[479] *See* United States v. Kahriger, 345 U.S. 22, 38 (1953) (Frankfurter, J., dissenting); Van Alstyne, *supra* note 237, at 779–80.

[480] *See infra* Part V.B.2–V.B.3.

[481] 505 U.S. 144 (1992).

[482] 521 U.S. 898 (1997).

[483] *See infra* Part V.B.4.

under the Spending Clause without any consideration of the First Amendment at all.

In the next two subsections, then, I turn to the question of "whether the condition attached to the proffered federal funds would, if a state accepts the offer, have a regulatory effect that Congress could not directly mandate."[484] Analytically, the easiest way to do this is to imagine CIPA as a direct regulation rather than as a conditional funding program. So, for the next two subsections, I will refer again to "Regulatory CIPA," which I discussed in Part III. "Regulatory CIPA" is a hypothetical federal law that *requires* all public[485] libraries to install filters, rather than make filters conditional on receipt of the E-rate discounts and LSTA funding.

2. *"Regulatory CIPA" and the Commerce Clause*

The Court has "identified three broad categories of activity that Congress may regulate under its commerce power."[486] First, "Congress may regulate the use of the channels of interstate commerce."[487] Second, Congress may "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities."[488] Third, Congress may "regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce."[489]

I need not dwell too long on the Commerce Clause analysis. Most federal laws are premised on the third category, regulation of activities that "substantially affect" interstate commerce. Under this category, one could certainly argue that, with *Lopez* and *Morrison*, the Rehnquist Court has shifted its analysis away from the cumulative interstate effects of the activity being regulated and towards asking whether the nature of the intrastate activity being regulated is in fact "commercial" or "economic."[490] One might, on this theory, be able to

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[484] Baker, *supra* note 8, at 1983.

[485] Because the funding that CIPA conditions is available to nongovernmental libraries, this is, strictly speaking, not precisely the equivalent of a CIPA mandate. I explore this fact in more detail below. *See infra* text accompanying notes 529–30.

[486] United States v. Lopez, 514 U.S. 549, 558 (1995) (citations omitted).

[487] *Id.* (citations omitted).

[488] *Id.*

[489] *Id.* at 558–59.

[490] *See* LAURENCE TRIBE, CONSTITUTIONAL LAW § 5-4, at 819 (3d ed. 2000) (arguing that post-*Lopez* the focus of the Court's attention in "substantial effects" cases "will not be simply on whether the cumulative or aggregated *effects* on interstate commerce of an intrastate activity can be called substantial, but rather on whether there is a colorable claim that the intrastate activity itself is 'commercial' or 'economic'"); *see also Lopez*, 514 U.S. at 568–83 (Kennedy, J., concurring); United States v. Morrison, 529 U. S. 598, 609–11 (2000).

argue that the activities being regulated by Regulatory CIPA, the prevalence of obscenity, child pornography, and "harmful to minors" materials on public library Internet terminals, are not sufficiently "commercial" to permit the aggregation of their effects for purposes of the "substantial effects" test.[491] Even if one could make the argument, however, it seems very likely that the Internet would be viewed as a "channel" of interstate commerce,[492] and regulating it, even—as Regulatory CIPA does—at the endpoint, would arguably fall into the first category of permissible regulation under the Commerce Clause. The E-rate discounts are part of a federal program regulating interstate telecommunications and, in particular, regulating the conduit through which vast amounts of interstate commercial activity takes place. Let me assume, then, that Congress could pass Regulatory CIPA under the Commerce Clause. Doing this does not end the analysis, however, as the Court has made clear that the state sovereignty principle can invalidate federal laws even if they are within Congress's Article I powers.[493]

3. *"Regulatory CIPA" and Federal Commandeering of State Officers*

For the first time in 1992, in *New York v. United States*, the Court held a federal law unconstitutional under what is now colloquially referred to as the "anti-commandeering doctrine."[494] The law challenged in *New York*, the Low-Level Radioactive Waste Policy Amendments Act of 1985, arose out of the national shortage of disposal sites for low-level radioactive waste. Congress enacted a number of provi-

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[491] Given the number of commercial purveyors of sexually explicit materials, I suspect the argument would in any event be weak.

[492] *See, e.g.*, Am. Libraries Ass'n v. New York, 969 F. Supp. 160, 161 (S.D.N.Y. 1997) (analogizing the Internet to a highway or railroad system). By citing this case, I do not mean to say its *dormant* Commerce Clause analysis is correct, but simply that the analogy of the Internet to a highway or railroad is probably sufficient for purposes of Congress's Commerce Clause authority.

[493] *See* Printz v. United States, 521 U.S. 898, 923–24 (1997) ("When a 'La[w] . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty . . . it is not a 'La[w] . . . *proper* for carrying into Execution the Commerce Clause,' and is thus, in the words of the Federalist, 'merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such.'").

[494] 505 U.S. 144 (1992). *New York* is the first case to invalidate a federal statute on these grounds, though dicta in previous cases indicated the possibility of such a doctrine. *See* Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981); *see also* Bowen v. Am. Hosp. Ass'n, 476 U.S. 610, 642 (1986) (plurality opinion) (noting that "State child protective services agencies are not field offices of the HHS bureaucracy, and they may not be conscripted against their will as the foot soldiers in a federal crusade"); FERC v. Mississippi, 456 U.S. 742, 761–64 (1982); *id.* at 781 n.8 (O'Connor, J., concurring in the judgment and dissenting in part). *But see* South Carolina v. Baker, 485 U.S. 505, 513–15 (1988) (rejecting the theory of "commandeering" in case upholding, against a Tenth Amendment challenge, the constitutionality of law that requires state and local bonds to be registered to get federal income tax exemption for bond interest).

sions designed to encourage states, either alone or in "regional compacts" with other states, to increase the nation's low-level radioactive waste-disposal capacity.

The law included three different types of "incentives": monetary incentives, access incentives and the "take title" provision. The "monetary incentives" worked as follows: states with disposal sites (the "sited states") could impose a tax on waste received from other states (the "nonsited states"), a portion of which would be placed into a federal escrow account. Money from the escrow account would then be distributed to states that reached a series of milestones towards developing sites of their own. The "access incentives" consisted of congressional authorization for the sited states to increase the cost, over time, for nonsited states to dispose of the waste and, eventually, to deny "access" to the disposal site altogether. Finally, what the Court referred to as the "take title" provision set a specific date on which

> each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste.[495]

The Court upheld both the monetary and access incentives,[496] but invalidated the "take title" provision. The Court saw the "take title" provision as giving state governments a "choice" between two options: (1) a forced transfer of the waste (along with the accompanying liability), and (2) a mandate to regulate the disposal of the waste according to the instructions of Congress, neither of which Congress could independently mandate. A forced transfer "would 'commandeer' state governments into the service of federal regulatory purposes,"[497] as would an order from the federal government requiring a state to regulate in a particular fashion.[498] "A choice between two unconstitutionally coercive regulatory techniques is no choice at all. Either way, 'the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"[499]

Among the arguments the United States made was that, under the Supremacy Clause, state *courts* were required to enforce federal law; that this requirement amounted to federal "direction" of state courts;

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[495] 42 U.S.C. § 2021e(d)(2)(C) *quoted in New York*, 505 U.S. at 153–54.

[496] As I noted earlier, *see supra* Part IV.B, the Court's upholding of the "monetary incentives" was a reaffirmation of Congress's broad spending power under *Dole*.

[497] *New York*, 505 U.S. at 175.

[498] *Id.* at 176.

[499] *Id.* (quoting *Hodel*, 452 U.S. at 288).

and that such "direction" was comparable to the "commandeering" of state legislatures. The Court rejected that argument, noting that "[n]o . . . constitutional provision [comparable to the Supremacy Clause] authorizes Congress to command state legislatures to legislate."[500] Key to the decision, then, was a distinction between state courts and state legislatures. In the opinion's final paragraph, the Court reiterated its holding, but added a little twist, stating that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."[501] In the two words "or administer," the Court threw a dictum into the opinion that would have expanded its holding significantly. State courts could clearly be "commandeered," and after *New York*, state legislatures could not be. The open question was whether state executives or administrative agencies would likewise be subject to the anti-commandeering rule.

In *Printz*, the Court answered the question implicitly left open in *New York*, extending the *New York* rule to state executive branch officials. *Printz* involved what were known as the "interim provisions" of the Brady Handgun Violence Prevention Act. Passed in 1993, the Brady Act required the United States Attorney General to create a national instant background-check system in order to enforce the 1968 Gun Control Act's prohibition on the transfer of handguns to certain individuals (e.g., convicted felons, those under twenty-one, etc.). Congress gave the Attorney General approximately five years to create the system. As a stop-gap measure for the intervening period, the Brady Act also imposed certain interim provisions until the national instant background-check system was established.

Under these interim provisions, a firearms dealer who sought to sell a handgun had to, among other things, provide the "chief law enforcement officer" (CLEO) of the would-be purchaser's residence, a local government official such as a sheriff or police chief, with a copy of what was known as the "Brady Form." The Brady Form consisted of a sworn statement by the would-be purchaser that he did not fall into any of the categories of individuals prohibited from buying handguns under the Gun Control Act. The CLEO was then required to "make a reasonable effort to ascertain within 5 business days whether receipt or possession [of the handgun] would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General."[502] This "reasonable effort" to determine whether federal law was being violated was all the statute required the CLEO to do. Even if the CLEO were to determine that the proposed sale

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[500] *Id.* at 178–79.

[501] *Id.* at 188.

[502] Printz v. United States, 521 U.S. 898, 903 (1997) (quoting 18 U.S.C. § 922(s)(2) (2002)).

violated the Gun Control Act, the CLEO did not have to do anything further, though the CLEO was *permitted* to notify the gun dealer.

Extending *New York*, the Court held that the Brady Act's interim provisions violated the "state sovereignty principle."[503] According to the Court, the Constitution embodies a notion of "dual sovereignty" that prohibits the federal government from acting "upon and through the States." "The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States," the Court said, echoing its conclusion in *New York*.[504] That principle applies as much to Congress's attempt to force State *executive* officers to participate in the enforcement of federal law as it does when Congress seeks to force States, in their *legislative* capacity, to promulgate laws. As the Court put it, harkening back to the final paragraph of its opinion in *New York*, "[t]he Federal Government may not compel the States to enact *or administer* a federal regulatory program."[505]

The scholarly commentary has largely been critical of *Printz*, questioning the Court's formalistic approach to the case; its failure to link the reasoning with the policy reasons underlying the principles of constitutional federalism that it was purporting to embody;[506] and the

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[503] The Court also concluded that the Brady Act "would . . . have an effect upon . . . the separation . . . of powers between the three branches of the Federal Government itself" because it effectively transfers federal executive branch power to thousands of CLEOs in the 50 States, who are left to implement the program without meaningful Presidential control." *Id.* at 922. Then-Professor (now Judge) Jay Bybee has suggested that Justice Scalia, the author of the *Printz* majority opinion, essentially pulled the wool over the eyes of the rest of the Court with this section of the opinion by effectively incorporating the vision of a unitary executive that he outlined in his dissent in *Morrison v. Olson*, 487 U.S. 654, 727 (1988). *See generally* Jay Bybee, Printz, *The Unitary Executive, and the Fire in the Trash Can: Has Justice Scalia Picked the Court's Pocket?*, 77 NOTRE DAME L. REV. 269 (2001) ("Justice Scalia picked the Court's pocket clean on separation of powers.").

[504] *Printz*, 521 U.S. at 920 (quoting *New York*, 505 U.S. at 166).

[505] *Id.* at 933 (quoting *New York*, 505 U.S. at 188) (emphasis added).

[506] *See* David Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 411–14 (2001) (criticizing *Printz* as undermining local authority because the federal statute was protecting localities from the negative externalities of gun markets in neighboring jurisdictions and noting that the U.S. Conference of Mayors supported the law); Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 239–43 (criticizing the Court's reasoning in *Printz*). *But see New York*, 505 U.S. at 187–88 ("The result may appear 'formalistic' in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity."); Allison H. Eid, *Federalism and Formalism*, 11 WM. & MARY BILL RTS. J. 1191 (2003) (arguing that the Court's "New Federalism" decisions, including *New York* and *Printz*, are in fact a healthy mix of formalism and functionalism and that this mix better promotes federalism values than would an approach based solely on functionalism). In *New York*, Justice O'Connor explicitly stated that the supposed benefits of federalism "need not concern us here," citing *Butler* for the proposition that "'[t]he question is not what power the Federal Government ought to have but what powers have in fact been given by the people.'" 505 U.S. at 157 (quoting United States v. Butler, 297 U.S. 1, 63 (1936)); *see also* Michael C. Dorf, *Instrumental and Non-instrumental Federalism*, 28 RUTGERS L.J. 825, 829 (1997) (connecting Justice

historical basis on which the Court purported to rely.[507] Even those who support the Court's holding have done so on different grounds[508] or have supported it simply based on the broad principle that judicial review of federalism principles has salutary effects.[509]

Putting these criticisms aside for the moment, the more significant problem for my purposes is understanding the contours and implications of the anti-commandeering doctrine, particularly given the Court's arguable backtracking three years later in the unanimous opinion in *Reno v. Condon*.[510] What, if anything, do these cases really hold and where might Regulatory CIPA fit into the anti-commandeering principles the Court announced?

Matthew Adler and Seth Kreimer have given what is perhaps the most succinct articulation of the doctrinal boundaries of the Court's "anti-commandeering" cases. According to Adler and Kreimer, a federal law will be unconstitutional under the anti-commandeering principle if it satisfies all five of the following conditions:[511]

a. the law actually "commandeers" state officials (i.e., requires state executive officials to implement federal law or requires a state legislature to enact a law), rather than imposing a broad preemption of state law;[512]

b. the law imposes an affirmative requirement on state officials, rather than making the commandeering conditional on the acceptance of federal funds or on the nonpreemption of state law (i.e., condition-

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O'Connor's statement with non-instrumental approaches to federalism in the writings of other Justices).

[507] *See, e.g.*, Gene R. Nichol, *Justice Scalia and the* Printz *Case: The Trials of an Occasional Originalist*, 70 U. COLO. L. REV. 953 (1999) (criticizing the historical argument in *Printz*).

[508] *See generally* Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813 (1998) (defending the anti-commandeering doctrine, but criticizing the Court's sole reliance on the political accountability rationale).

[509] *See* Vicki C. Jackson, *supra* note 247, at 2215–17 (arguing in favor of judicial enforcement of federalism principles).

[510] 528 U.S. 141 (2000). *See infra* text accompanying notes 527–28.

[511] Adler & Kreimer, *supra* note 458, at 76–77.

[512] As do many other scholars, Adler and Kreimer view the commandeering/preemption distinction as "most plausibly and sympathetically fleshed out in terms of (some version of) the action/inaction distinction," *id.* at 89; that is, "commandeering" means imposing an affirmative duty on state officials while "preemption" amounts to imposing a negative duty. *See id.* at 89–95. Thus, another way to characterize this first requirement is to say that the law must impose an affirmative obligation on state officials, rather than simply requiring state officials to refrain from acting. Adler and Kreimer further argue that many of the principles of federalism do not justify this distinction. *See id.* at 95–101. I need not worry about this criticism at the moment as I am simply attempting to apply the doctrinal boundaries of the Court's anti-commandeering cases to Regulatory CIPA.

ally using the carrot of federal spending or the stick of preemption exempts a federal law from the anti-commandeering doctrine);[513]

c. the law is targeted at state officials and is not "generally applicable" to both state officials and private persons/organizations;[514]

d. the officials commandeered are exercising legislative or executive rather than judicial functions; and

e. the requirement is grounded in the Commerce Clause or Congress's other Article I powers, rather than in the grants of power to Congress in the Reconstruction Amendments.[515]

Analyzing these conditions, there is a good (though by no means unassailable) argument that Regulatory CIPA would violate the anti-commandeering doctrine. First, based on *Printz*, a court would likely conclude that Regulatory CIPA commandeers local officials. Public librarians are local government officials just like police officers, and Regulatory CIPA requires them to "implement" federal law by mandating that they install "technological protection measures" on their Internet access. Compared with the federal commandeering of the CLEOs under the Brady Act—which required merely that the CLEOs "make a reasonable effort"[516] to determine whether a particular sale of guns violated federal law—Regulatory CIPA's imposition on local librarians is significant. Not only does the law require libraries to install filters, but the libraries must also "adopt and implement an

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[513] *New York* explicitly made this distinction. *See* New York v. United States, 505 U.S. 144, 167–68 (1992). In addition, the majority in *Printz* did not contradict Justice Stevens's statement in dissent that conditional funding continued to be an example of the type of "cooperative federalism" that would be permitted under *New York*. Printz v. United States, 521 U.S. 898, 960 (1997) (Stevens, J., dissenting).

[514] This "intimat[ion]," as Adler and Kreimer put it, makes the most sense when footnote seventeen of the *Printz* majority's opinion is read in light of Justice Stevens's dissent making just this distinction. *See* Adler & Kreimer, *supra* note 458, at 110. In dissent, Justice Stevens argued that the opinion does not undermine "the three mechanisms for constructing [cooperative federalism] programs that *New York* expressly approved[,] . . . [including programs] that affect[] States and private parties alike." *Printz*, 521 U.S. at 960 (Stevens, J., dissenting). He continues on by claiming that the "Court does not disturb the conclusion that flows directly from our prior holdings that the burden on police officers would be permissible if a similar burden were also imposed on private parties with access to relevant data." *Id.* at 961. The Court's response, while rejecting Justice Stevens's premise by claiming that, in this context, a law that covered both private persons and state officials was "impossible" to conceive of, did explicitly accept Justice Stevens's claim that the holding preserved a line between laws that target states and those of general applicability. *Id.* at 932 n.17 (noting that "[i]t is undoubtedly true" that a law that placed a similar burden on both private parties and police officers would be permissible).

As a side point, let me emphasize that Adler and Kreimer, writing before the Court's decision in *Reno v. Condon*, 528 U.S. 141, 151 (1999), characterize that requirement—as with the others—as a necessary, but not sufficient, condition for a court to find a law unconstitutional under the anti-commandeering principles of *New York* and *Printz*. In *Condon*, South Carolina argued that, by itself, the fact that a law was targeted to the states was enough to render it unconstitutional. The Court rejected this argument. *See infra* text accompanying note 528.

[515] Adler & Kreimer, *supra* note 458, at 76–77.

[516] 18 U.S.C. § 922(s)(2) (2002).

Internet safety policy,"[517] one that addresses not only protecting minors from inappropriate or harmful content online, but also "'hacking' and other unlawful activities by minors online" and "unauthorized disclosure, use, and dissemination" of personal information about minors.[518] In any event, as both the explicit holding and the Court's language indicate, there does not appear to be a de minimis exception to the anti-commandeering principle.[519]

The second requirement, that the law not be a conditional spending or conditional preemption law, is easily met. Recall that, at the moment, we are assuming a world in which Professor Baker's view of the spending power has prevailed[520] and are analyzing Regulatory CIPA, rather than CIPA itself. Thus, at this level of analysis, I am explicitly ignoring, as Baker no doubt would, both the explicit holding in *New York* that conditional spending laws are not subject to the anti-commandeering principle[521] and the fact that *Printz*, though arguably more equivocal,[522] does not undermine that conclusion.

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[517] 47 U.S.C. § 254(l)(1)(A) (2002).

[518] *Id.*

[519] The Court did appear to create a distinction between laws that require state officials to participate in a federal program and those that require merely that the states provide information to the federal government, leaving open the question whether the latter were covered by the anti-commandeering principle. *See Printz*, 521 U.S. at 918 (noting that the Court was not deciding the constitutionality of laws that "require only the provision of information to the Federal Government"—in contrast to those that involve "the forced participation of the States' executive in the actual administration of a federal program"); *see also id.* at 935, 936 (O'Connor, J., concurring) (noting that "the Court . . . refrains from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers are similarly invalid"). However one might characterize Regulatory CIPA, it seems clearly no different in kind from the interim provisions of the Brady Act and could not reasonably be characterized as an "information reporting" requirement.

[520] Baker herself of course recognizes that her proposal is not law and is specifically precluded not only by *Dole* but also by *New York* and *Printz*.

[521] New York v. United States, 505 U.S. 144, 167–68 (1992).

[522] By "equivocal," I mean two things: first, the holding in *Printz* did not involve a spending power issue, whereas in *New York*, the Court not only distinguished between conditional spending and the "take title" provisions, but specifically upheld the former. *See* Adler & Kreimer, *supra* note 458, at 103 (noting that this "demarcation was integral to the holding of *New York*"). Second, Justice Scalia's opinion for the Court could be seen as leaving open the possibility that this distinction might not survive when he alluded to conditional spending and then said, "[w]e of course do not address these or other currently operative enactments that are not before us; it will be time enough to do so if and when their validity is challenged in a proper case." *Printz*, 521 U.S. at 918. *See* Baker, *States' Rights*, *supra* note 450, at 115–16 (describing this portion of Justice Scalia's opinion as support for the possibility that the Court would overrule *Dole*). *But see Printz*, 521 U.S. at 936 (O'Connor, J., concurring) (noting that the *Printz* holding permits Congress "to amend the interim program to provide for its continuance on a contractual basis with the States if it wishes, as it does with a number of other federal programs"); Adler & Kreimer, *supra* note 458, at 103 (noting that the distinction between commandeering on the one hand and conditional spending or conditional preemption on the other "was implicitly reaffirmed by the Court in *Printz*"); *supra* note 448 (noting that the Court seems singularly uninterested in changing spending power doctrine).

It is worth noting at this point that this assumption may not be as problematic as it first appears. As Adler and Kreimer note, the distinction between commandeering on the one hand and cooperative federalism laws (conditional funding and conditional preemption laws) on the other is both slippery and arguably unsupported by any of the principles of constitutional federalism on which it purports to rely.[523]

According to Adler and Kreimer, "the constitutional permissibility of conditional spending and conditional preemption threatens to make the anticommandeering rule of *Printz* and *New York* a practical nullity,"[524] because of the problem with "distinguishing between the impermissible threat of a 'sanction' and a permissible threat to terminate federal funding."[525] Naturally, to the extent that the second requirement is maintained in the case law, it does so because of *Dole*.[526]

The third requirement is that the law be targeted at state officials, rather than being generally applicable to state officials and private persons alike, and it is here that Regulatory CIPA may survive if the Court is serious about the broad interpretation of what it means to be a "generally applicable" law it gave in *Reno v. Condon*.[527] *Condon* was a constitutional challenge by South Carolina to the Driver's Privacy Protection Act ("DPPA"), a federal law that prevented the states from disclosing a driver's personal information without the driver's consent. In upholding the law, the Court rejected an argument that "Congress may only regulate the States by means of 'generally applicable' laws, or laws that apply to individuals as well as States."[528] While the Court refused to decide whether a law that regulates only the states renders the law, by virtue of that fact alone, unconstitutional, the Court clearly gave broad meaning to what constitutes a "generally applicable" law. Because the law applied not only to the states as the initial suppliers of the information but also to private resellers or redisclosers of that information, the Court considered the DPPA a "generally applicable" law.

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[523] Adler & Kreimer, *supra* note 458, at 104–05.

[524] *Id.* at 106; *see also Printz*, 521 U.S. at 917–18 (declaring the irrelevance of the government's claim that a number of other federal statutes "require the participation of state or local officials in implementing federal regulatory schemes," grouping together "conditional funding" grants with laws that "require only the provision of information to the Federal Government").

[525] Adler & Kreimer, *supra* note 458, at 103.

[526] In terms of at least one of the values of federalism, Professor Barron also sees conditional spending as indistinguishable from anti-commandeering. *See* Barron, *supra* note 506, at 415 n.118 (noting that if the concern of *Printz* is local autonomy rather than the regulatory costs of compliance with the law, an exercise of the spending power should be thought to be equally as offensive to the anti-commandeering principle).

[527] 528 U.S. 141 (1998).

[528] *Id.* at 151.

In this light, let us now consider CIPA. Although the vast majority of recipients of the funds are public libraries (and hence, state or local entities for purposes of the anti-commandeering principle) and most of the funds go to such libraries, non-governmental libraries could theoretically be constrained by CIPA.[529] Thus, treating *Reno v. Condon* as defining the notion of a "generally applicable" law, Regulatory CIPA might not be viewed as a law targeted at state entities, and it is thus not, as Justice Scalia put it in *Printz*, "posit[ing] the impossible"[530] to imagine the filtering requirement being imposed on private parties as well as the government.

This raises a couple of issues. First, it strengthens the argument of the critics of the anti-commandeering doctrine that the doctrine leaves so many holes as to be essentially toothless.[531] It may be, then, that *New York* and *Printz* really are, as critics such as Adler and Kreimer suggest, extremely limited in their application and that anti-commandeering is simply meant to maintain the "etiquette of feder-

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[529] For purposes of the E-rate, it is theoretically possible for a non-governmental library to be subject to CIPA. The relevant FCC regulations define "library" to include not only "public librar[ies]," but also "academic librar[ies]," "research librar[ies]," and "private librar[ies], but only if the state in which such private library is located determines that the library should be considered a library for the purposes of this definition." 47 C.F.R. § 54.500(c) (2002); *see also* 47 C.F.R. § 54.501(c)(1) (noting that only libraries that satisfy the definition of "library" in the LSTA can receive discounts under the E-rate program); *id.* (noting that the LSTA defines "library" just as broadly). Any of these types of libraries could be non-governmental. However, the FCC has made clear that E-rate discounts are not available unless the library is non-profit and its funding is completely independent of any other institution. *See* 47 C.F.R. § 54.501(c)(2)–(3); *see also* Report & Order in the Matter of Federal-State Joint Board on Universal Service, F.C.C. No. 97-157, ¶¶ 558–59 (May 7, 1997, amended June 4, 1997). Since virtually all academic and research libraries are affiliated with, and funded by, some other institution (e.g., a university), they would not be eligible for E-rate discounts. Thus, as a *practical* matter, the only type of libraries that actually receive E-rate discounts are public libraries.

With respect to the Library Services and Technology Act, no non-governmental libraries were subject to the portion of CIPA being challenged in the *ALA* case. The LSTA does define "library" just as broadly as the E-rate definition. *See* 20 U.S.C. § 9122(2) (2002) (defining "library" in exactly the same way). In practice, many different types of libraries can and do receive LSTA funding. *See, e.g.*, Press Release, Tabor College, Tabor College Library Receives Grant (Nov. 14, 2001) (on file with author) (noting that Tabor College, a "Christian liberal arts institution," received funding under the LSTA program). However, CIPA's restrictions on LSTA recipients apply only to "school libraries" and "public librar[ies]." *See* 20 U.S.C. § 9134(f)(1) (limiting restrictions to libraries described in sections 9122(2)(A) and (B)); *id.* § 9122(A) ("a public library"); *id.* § 9122(B) ("a public elementary school or secondary school library"). Since the portion of CIPA that applies to school libraries was not challenged in the *ALA* case, the fact that many elementary and secondary schools subject to CIPA are private would not affect the analysis.

[530] Printz v. United States, 521 U.S. 898, 932 n.17 (1997).

[531] *Cf. id.* at 961 (Stevens, J., dissenting) ("A structural problem that vanishes when the statute affects private individuals as well as public officials is not much of a structural problem.").

alism."[532] Public libraries have traditionally been local government entities, and the mere fact that it is theoretically possible for a private library to be a beneficiary of the funding that is being conditioned by CIPA seems little reason not to subject Regulatory CIPA to the anti-commandeering doctrine, at least if the purpose of the doctrine is to promote traditional federalism values.[533] The principal concern of the drafters of CIPA was protecting children in *public* libraries and yet the law literally applies to nongovernmental libraries as well.

Second, if we think about CIPA itself rather than what I have termed Regulatory CIPA, recall that the constitutional challenge to the law was analyzed as a "conditional funding to states" law (i.e., under the rubric of *South Dakota v. Dole*). Both sides of the case, government and challengers, agreed that CIPA is a law involving conditional funding to *states* notwithstanding the fact that, theoretically at least, some of the funding goes to nongovernmental entities. It may be, of course, that this agreement simply reflected a tactical decision on the part of both sides, the government because no exercise of the conditional spending power had ever been invalidated (whether under *Dole* or its predecessors), and the challengers because it simplified their case (and, indeed, arguably strengthened it) by effectively asking the court to do a straightforward First Amendment analysis rather than an unconstitutional conditions analysis, an analysis under which the challenge is less likely to prevail.[534]

In any event, if there is in fact a "targeting the states" requirement embedded in the anti-commandeering doctrine, one could make a plausible argument on both sides of the question as to whether Regulatory CIPA satisfies it. Notwithstanding *Reno v. Condon*, it seems at least possible to argue that Regulatory CIPA is a targeted law and for now, let me assume this.

Finally, Regulatory CIPA clearly satisfies what Adler and Kreimer refer to as the fourth and fifth requirements before a court can find a

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[532] The title of Adler & Kreimer's article is "The New Etiquette of Federalism." The phrase comes from Justice Kennedy's concurrence in *United States v. Lopez*, 514 U.S. 549, 583 (1995), in which he referred to *New York* as a case "where the etiquette of federalism ha[d] been violated."

[533] Adler & Kreimer, *supra* note 458, at 112–13.

[534] By this, I mean that it should be easier to prevail in a First Amendment challenge to a direct governmental mandate to engage (or not to engage) in certain behavior than to a law that links funds to the same behavior. *Cf. www.TheGovernmentHasDecided*, *supra* note 64, at 860 (noting that Congress is trying to use federal funding to do something they could not otherwise do—"that is, the Supreme Court would quickly strike down an effort to tell every library in the country that they had to employ one of these four companies to install filters."). Thus, it seems clear, for example, that a law like the conditional funding upheld in *Rust v. Sullivan* that did not involve funding at all, but instead was simply a mandate, would be unconstitutional. In fact, it seems fair to say that, if the federal government passed a regulation prohibiting all doctors from providing women with information about their constitutional right to an abortion, this would not even be a close case when analyzed under traditional First Amendment doctrines.

law unconstitutional under the anti-commandeering doctrine. Regulatory CIPA regulates non-adjudicatory functions (administrative or executive) and could not be premised on one of the Reconstruction Amendments.[535]

In sum, there is a good argument that Regulatory CIPA would be unconstitutional under the "state sovereignty principle" or the anti-commandeering doctrine embodied in *New York* and *Printz*.

4. *Reimbursement Versus Regulatory Spending*

Because I now will assume that Congress would not have the regulatory authority to mandate filters in public libraries, Professor Baker's proposal requires one to ask next whether the exercise of the spending power is "regulatory" or "reimbursement" spending. Here, the answer is quite simple. CIPA makes all federal funding under both the E-rate program and the Library Services and Technology Act contingent on a library installing filters on all of the library's Internet terminals. It does not provide funding merely for the filters themselves and any accompanying costs associated with installing and maintaining them.[536]

In fact, as Justice Stevens pointed out in his dissent,[537] CIPA goes even further than simply tying the E-rate subsidy or LSTA funding to installing filters on those terminals or Internet access that are subsidized by the federal funds. Rather, acceptance of even one penny of this money requires a library to install filters on *all* terminals accessible to the Internet, even if a particular terminal or Internet service was purchased entirely with state, local, or private funds.[538] Under Baker's approach, then, CIPA would be deemed impermissible "regulatory" spending.

In sum, if the Court were to adopt Baker's proposal, CIPA would likely be rendered an unconstitutional exercise of the spending power.

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[535] While one might argue as to which of the three bases for Commerce Clause authority Congress would have to rely on to pass a law such as Regulatory CIPA, regulation of the Internet (or far less plausibly, the libraries themselves) would clearly fall into the commerce power. *See infra* text accompanying notes 486–89.

[536] One can contrast CIPA with, for example, a Connecticut law that provides grants that schools may use to purchase filtering software. *See* CONN. GEN. STAT. § 10-262n (2002). I discuss state and local initiatives regarding Internet access in libraries above. *See supra* Part III.B.1.

[537] *ALA II*, 539 U.S. 194, 220 (2003) (Stevens, J., dissenting).

[538] *Id.* at 230–31 (Stevens, J., dissenting).

C. *Professor Baker's Approach and the Principles of Constitutional Federalism*

In this final section, I look at Baker's proposal and my application of it to CIPA in light of the federalism concerns I raised in Part III. I conclude that, though Baker's proposed doctrinal changes might lead to a result that comports with some of the principles of constitutional federalism I raised earlier, CIPA ultimately raises federalism concerns beyond those that worry Baker. Justice Stevens's opinion hints at those worries, though he did not explicitly express them as federalism concerns. What he did, however, was to incorporate those concerns into his First Amendment analysis, an approach that opens his opinion to criticism as being illogical.[539] It may be, however, that his logical flaw actually captures the reality of CIPA better than the approaches required by both *South Dakota v. Dole* and the unconstitutional conditions doctrine.

Turning back to Baker's theory for the moment, recall that her primary concern is the problem of homogenization, what she and Professor Young refer to as "horizontal aggrandizement," the fear that a majority of states will use the federal process to "impose their own policy preferences on a minority of states with different preferences."[540] Here, one can see that problem. One way to view CIPA is as a majoritarian attempt to force those in the minority to enact a policy favored by the majority.

The "majority" want to restrict access to sexually explicit content at the national level, and both tradition and policy concerns suggest that individual communities are in a better position to decide whether and, if so, to what extent and how to regulate such content within their communities.[541] One problem with viewing it this way is to note that the Senate vote on CIPA was 95–3, while surveys suggest that, without CIPA, only a minority of local public libraries were using filters in the way CIPA mandates. Moreover, both Senators from Oregon, whose state constitution arguably protects some of the material CIPA attempts to suppress,[542] voted in favor of CIPA as well.[543] Thought of in terms of Baker's theory, then, the evidence we have, suggests that the category of states that would otherwise comply with the conditions imposed by CIPA even in the absence of CIPA (i.e., those that already satisfy CIPA's conditions and those that would happily do so)[544] is in fact the minority notwithstanding the over-

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[539] *Cf., e.g., The Supreme Court, 2002 Term—Leading Cases*, 117 HARV. L. REV. 349, 357 (2003) (referring to Justice Stevens's dissent as exhibiting "significant conceptual disarray").

[540] Baker, *Liberals*, *supra* note 450, at 434–45 n.8.

[541] *See supra* Part III.

[542] *See supra* text accompanying notes 300–02.

[543] *See* 146 CONG. REC. S5869 (daily ed. June 27, 2000).

[544] *See supra* text accompanying note 455.

whelming support for the law in the federal legislature. Baker's theory, while arguably helpful as a theoretical construct, simply does not match the factual context of CIPA. In this sense, CIPA is similar to the National Minimum Drinking Age Amendment upheld in *Dole*.[545]

This does not mean, of course, that Baker's federalism concerns are of no importance. It does mean, however, that they are insufficient. As I noted earlier, what is really problematic about CIPA—at least from the standpoint of federalism principles—is vertical aggrandizement, the fear that the federal government is injecting itself into decisions about the content of local libraries. Congress was clearly somewhat sensitive to this concern—or at least, the local control issues—that CIPA was creating,[546] and sought to incorporate constraints on federal power into the substantive provisions of the statute. Nonetheless, the law is effectively creating a one-size-fits-all policy of filters throughout the country.[547]

In a recent article, Professor Somin argues that federal subsidies to states can not only decrease the diversity of policy choices available to state and local governments, as Baker argues, but also that they can reduce competition both among the states and between the federal and state governments.[548] In this final sense—as reducing competition between the federal and state governments[549]—Somin is touching upon at least a part of what CIPA is doing. At one level, Somin refers to competition in the sense of the two different levels of government offering citizens policy choices and thus being effectively equivalent to preemption.[550] But the seeds of the anti-tyranny function of federalism are certainly part of his argument. His references to state opposition to the Federal Fugitive Slave Act in the nineteenth century and his more recent examples of conditional funding being used to induce state officials to follow federal policy preferences in-

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[545] *See supra* note 466.

[546] *See supra* Part II.B.2.c.

[547] *But see Libraries Oppose Internet Filters, Turn Down Federal Funds,* CONCORD MONITOR, June 13, 2004 ("[M]any in New Hampshire are giving up the [federal] money without much regret.").

[548] *See* Somin, *supra* note 225, at 464–73 (2002) ("Federal subsidization of state governments undermines three of the most important advantages of the federal system of government relative to a unitary one—responsiveness to diverse local preferences, horizontal competition between states, and vertical competition between states and the federal government.").

[549] *See id.* at 471–73 (discussing the concept of "vertical competition between states and the federal government").

[550] In this aspect of his argument, Somin treats a federal conditional grant to states as involving the same suppression of competition as a federal law that preempts state laws, the only difference between the two being that a conditional grant to states can co-opt state officials into supporting the federal policy preference, whereas "coercive regulatory mandates without attached funding often attract state political opposition." *Id.* at 472–73. In the case of CIPA, of course, the fact that the law provided conditional funds was insufficient to preclude the state and local opposition to the law.

volving the rights of undocumented aliens and controlled substances hint at the emphasis I am placing here on the importance of independent loci of power.

Interestingly enough, however, the Court—a Court that has aggressively enforced its concerns about vertical aggrandizement in the recent past—had nothing to say about the issue. To be fair, the doctrine—and of course, both sides' characterization of the issues—effectively precluded the Court from doing so. But, as I noted, Justice Stevens seemed to recognize the threat to local autonomy that CIPA, as a federal statute, created.

In sum, Baker's proposed change to spending power doctrine might have led to a result in keeping with the federalism concerns CIPA raises, but her underlying theory does not incorporate all the federalism concerns that the federal spending power, using CIPA as an example, implicates.

CONCLUSION

Ultimately, the Children's Internet Protection Act raises both First Amendment and federalism concerns. I have focused on the latter primarily because the Court and other commentators have thoroughly addressed the First Amendment issues while effectively ignoring the federalism principles the statute implicates. More importantly, CIPA may simply be the first of a series of laws to reach the Court requiring application of *Dole*'s independent constitutional bar rule, the doctrinal means by which the Court turned the *ALA* case into a straightforward First Amendment case.

A recent spending law, the Consolidated Appropriations Act of 2004,[551] included a section that cuts off federal funds to any local transit authority involved "in any activity that promotes the legalization or medical use" of a controlled substance.[552] Known as the Istook Amendment (after the Congressman who added it to the bill), the provision was aimed primarily at transit agencies that were accepting bus advertisements advocating changes in criminal prohibitions on marijuana possession.[553] The ACLU and others have challenged the law, and it will most likely be analyzed under *Dole*'s independent constitutional bar rule. The constitutional issue will devolve to a question of whether the local government transit authorities would violate the First Amendment by complying with the condition.[554]

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[551] Pub. L. No. 108-199, 118 Stat. 3 (2004).

[552] *Id.* at Div. F § 177, 118 Stat. at 309.

[553] *See* H.R. REP. NO. 108-401, § 986 (2003).

[554] *See* Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction at 14, ACLU v. Mineta, 2004 U.S. Dist. LEXIS 9970 (D.D.C. 2004) (C.A. No. 04-262 (PLF)), *at* http://

Like CIPA, however, the Istook Amendment implicates federalism concerns. Many states and local governments have been at the forefront of opposition to the federal government's approach to regulating marijuana.[555] This is not to say that the First Amendment plays no role, but simply to point out that, as with CIPA, the constitutional doctrine will avoid the complexity of the law. Viewing the law through the lens of federalism gives us a way to understand more fully the reasons the law is constitutionally problematic. In this sense, the federalism lens demonstrates the inadequacy of constitutional doctrine such as the "independent constitutional bar" rule because the rule forces a law with both structural and rights-based implications to be analyzed without any consideration of the structure.

In this Article, I have not proposed any solution to this conundrum, but I hope to have raised it sufficiently to give courts and commentators the desire to look more searchingly at conditional funding laws that raise both structural and rights-based concerns.

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www.changetheclimate.org/campaigns/02_18_04/. The plaintiffs' brief also includes an argument that the law fails to satisfy *Dole*'s "germaneness" prong. *Id.* at 15–16.

[555] *See, e.g.*, CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A) (West 2004) (allowing "seriously ill Californians . . . the right to obtain and use marijuana for medical purposes"); *id.* div. 10, ch. 6, art. 2.5 (codification of Proposition 215 establishing program for medical use of marijuana).