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United States v. American Library Association: The Choice Between Cash and Constitutional Rights

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***UNITED STATES V. AMERICAN LIBRARY ASSOCIATION:*¹
THE CHOICE BETWEEN CASH AND CONSTITUTIONAL
RIGHTS**

I. INTRODUCTION

For public libraries, it's a tough choice – one that pits the First Amendment against the need for cold cash; either way, library patrons will be the ones who feel the impact.² Of the 143 million Americans who use the Internet regularly, ten percent rely solely on access at a public library.³ This Note addresses the recent U. S. Supreme Court case of *United States v. American Library Association* in which the Court upheld the Children's Internet Protection Act (CIPA),⁴ which mandates that libraries receiving any federal funding install filters on every computer in the library.⁵ CIPA is Congress's response to a perceived problem of patrons using federally-funded Internet access at public libraries to access pornography and obscene materials.⁶ Through CIPA, Congress decided it could restrict children's access to such unsavory material by denying federal funding unless libraries installed

1. *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003).

2. Charity Vogel, *Internet Filter Ruling Puts Libraries in the Hot Seat*, BUFFALO NEWS, June 24, 2003, at B1 (discussing the impact of the Supreme Court's ruling in *United States v. Am. Library Ass'n* on library patrons in Western New York).

3. Charles Lane, *Ruling Backs Porn Filters in Libraries*, WASHINGTON POST, June 24, 2003, at A01. Some 95 percent of all U.S. public libraries offer Internet access, and federal aid has been a crucial factor in this expansion. *Id.* See also *Am. Library Ass'n*, 539 U.S. at 199-200 (acknowledging that the subsidies and discounts at issue in the case have succeeded greatly in bringing Internet access to public libraries).

4. Children's Internet Protection Act of 2001, Pub. L. No. 106-554, §§ 1701-1741, 114 Stat. 2763 (2000) (codified at 20 USC 9134 (2001) and 47 U.S.C. 254(h) (2001)).

5. See *infra* notes 56-60 and accompanying text. CIPA's provisions also apply to libraries in public schools, but only public libraries were challenged in this case. *Id.*

6. S. REP. NO. 106-141, at 2-6 (1999) (discussing at length the problems of intentional and accidental access to sexually explicit material on the Internet, the harm to children of exposure, and increasing incidents related to on-line pedophiles). *But see* 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, 235-36 (2003) (stating that the scope of the problem of children accessing or accidentally viewing Internet pornography varies widely depending on which study is consulted).

the filters.⁷ If the Internet filters worked effectively, no constitutional problem would arise, as the materials targeted for blocking are not constitutionally protected.⁸ However, due to limitations on technology, filters cannot block only the targeted materials.⁹ In fact, the filters “over-block” – keeping adult patrons from accessing constitutionally protected material.¹⁰

This Note discusses the possibility that the Court, in its eagerness to protect children, twisted established First Amendment doctrines to uphold CIPA and declined to address other legal issues that weaken CIPA’s constitutionality. Part II provides a historical background of previous legislation attempting to protect children accessing the Internet, explains what CIPA is and compares it to previous legislation, and also discusses current filtering technology and its limitations.¹¹ Part III provides a statement of the facts, including the procedural history of the case.¹² Part IV analyzes the Court’s confusing and inconsistent application of firmly established rules dealing with Congress’ spending power, First Amendment forum analysis, and the unconstitutional conditions doctrine.¹³ In addition, this section presents flaws not addressed by the Court, including Congress’s attempted usurpation of States’ rights through CIPA¹⁴ and libraries’ inability to comply with CIPA’s requirements.¹⁵ Part IV concludes with the potential aftermath of the Court’s ruling as it affects both the average library patron and the legal community attempting to rely on Supreme Court precedent.¹⁶

II. BACKGROUND

A. Congress v. Judiciary: Defining the Line Between Free Speech & Obscenity on the Internet

Prior to Congress enacting laws specifically dealing with the

7. See S. REP. NO. 106-141, at 6-7 (observing that Internet filtering can provide an effective means of protecting children from harmful materials). See also *infra* notes 46-58 and accompanying text regarding CIPA’s implementation.

8. See, e.g., *Ashcroft v. ACLU*, 535 U.S. 564 (2002) (observing that obscene speech has long been held to fall outside of the purview of the First Amendment).

9. See *infra* notes 62-69 and accompanying text discussing filtering and its limitations.

10. See *infra* notes 65-69.

11. See *infra* notes 62-69 and accompanying text.

12. See *infra* notes 70-113 and accompanying text.

13. See *infra* notes 114-50 and accompanying text.

14. See *infra* notes 151-68 and accompanying text.

15. See *infra* notes 169-76 and accompanying text.

16. See *infra* notes 177-92 and accompanying text.

Internet, statutes already existed that prohibited the transmission of obscenity and pornography,¹⁷ neither of which is protected by the First Amendment.¹⁸ Legislators responded to the growing public concern over Internet pornography by enacting the Communications Decency Act (CDA).¹⁹ CDA criminalized the knowing transmission of obscene or offensive material to a person under 18 years of age and imposed a fine or imprisonment as a penalty.²⁰ In *ACLU v. Reno*,²¹ a variety of organizations²² immediately challenged the CDA on constitutional grounds.²³ After a three-judge panel agreed with the plaintiffs and enjoined enforcement,²⁴ the government appealed as a matter of right to

17. 18 U.S.C. §§ 1464-1465 (2003) (criminalizing the transmission of obscenity); 18 U.S.C. §§ 2251-2252 (2003) (criminalizing the transmission of pornography).

18. See *Miller v. California*, 413 U.S. 15, 24 (1973) (holding that First Amendment protection does not extend to obscene material). The Court concluded that the regulation of obscenity must be specifically defined and is limited to works which depict or describe sexual conduct. Further, the *Miller* test limited obscenity “to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value” and is to be evaluated based on “contemporary community standards.” *Id.* See also *New York v. Ferber*, 458 U.S. 747, 764 (1982) (holding that child pornography is not protected by the First Amendment). The Court found that child pornography “bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment.” *Miller*, 413 U.S. at 24.

19. Communications Decency Act of 1996, Pub. L. No. 104-104, 501-561, 110 Stat. 52, 133-143 (1996) (codified at 47 U.S.C. § 223 (Supp. II 1996)) (repealed 1997). See Steven D. Hincley, *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, 1032-39 (2002) and Marc C. Alexander, *The First Amendment and Problems of Political Viability: The Case of Internet Pornography*, 25 HARV. J.L. & PUB. POL’Y 977, 983-89 (2002) for a detailed discussion of the CDA and related litigation.

20. *Id.* The “indecent transmission” provision criminalized the knowing transmission of obscene or indecent messages to any recipient under 18 years of age. See 47 U.S.C. § 223(a)(1)(B). The “patently offensive display” provision, criminalized the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age. See 47 U.S.C. § 223(d). The prohibition specifically extended to “any comment, request, suggestion, proposal, image or other communication” that, in context, depicted or described obscenity or child pornography. 47 U.S.C. § 223(d)(1). The penalty for conviction under the statute is a fine under Title 18, or imprisonment for not more than two years. 47 U.S.C. § 223(d)(2003).

21. *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), *aff’d*, 521 U.S. 844 (1997). Plaintiffs sued Janet Reno in her capacity as Attorney General of the United States of America. *Id.*

22. *Id.* The ACLU, Plaintiffs included the American Library Association, as well as dozens of Internet service providers, online publishers, and other interested parties. For a complete list of plaintiffs, see *Reno v. ACLU*, 521 U.S. 844, 861 (1997).

23. *ACLU*, 929 F. Supp. at 827. The plaintiffs filed suit on the day that the Act was signed, focusing their challenge on two provisions of the CDA: the “indecent” clause in §223(a)(1) and the “patently offensive” clause in §223(d)(1). *Id.* at 828. Plaintiffs contended that the provisions were unconstitutionally vague, “infringing upon rights protected by the First Amendment and Due Process Clause of the Fifth Amendment.” *Id.* at 827.

24. *ACLU*, 929 F. Supp. at 883.

the United States Supreme Court.²⁵ In an almost unanimous opinion,²⁶ the Supreme Court upheld the decision of the panel, finding numerous constitutional defects.²⁷

In response, Congress enacted the Child Online Protection Act (COPA).²⁸ COPA imposed civil and/or criminal sanctions on commercial web publishers who knowingly make “material harmful to minors” available to children under seventeen.²⁹ In an effort to correct the constitutional infirmities of the CDA, Congress narrowed the

25. 47 U.S.C. § 223 (1998). Special expedited review provisions were included in the CDA which provided that if any provision of the Act would be held unconstitutional by a three-judge panel in federal court, the matter shall be reviewable as a matter of right by direct appeal to the United States Supreme Court:

Expedited review. Act Feb. 8, 1996, P.L. 104-104, Title V, Subtitle C, § 561, 110 Stat. 142, provides:

(a) Three-judge district court hearing. Notwithstanding any other provision of law, any civil action challenging the constitutionality, on its face, of this title or any amendment made by this title, or any provision thereof [for full classification, consult USCS Tables volumes], shall be heard by a district court of 3 judges convened pursuant to the provisions of section 2284 of title 28, United States Code.

(b) Appellate review. Notwithstanding any other provision of law, an interlocutory or final judgment, decree, or order of the court of 3 judges in an action under subsection (a) holding this title or an amendment made by this title, or any provision thereof [for full classification, consult USCS Tables volumes], unconstitutional shall be reviewable as a matter of right by direct appeal to the Supreme Court. Any such appeal shall be filed not more than 20 days after entry of such judgment, decree, or order.

Id.

26. *Reno*, 521 U.S. at 886. Justice O’Connor wrote a separate opinion concurring in part and dissenting in part, in which Chief Justice Rehnquist joined.

27. *Id.* at 885. The U.S. Supreme Court found that the CDA was constitutionally impermissible because it “is a content-based blanket restriction on speech, and, as such, cannot be properly analyzed as a form of time, place, and manner regulation.” *Id.* at 868. Further, the vagueness of the CDA “raises special First Amendment concerns because of its obvious chilling effect on free speech” particularly because it is a criminal statute, which “may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images.” *Id.* at 871-72. Calling the breadth of the CDA “wholly unprecedented,” the Court deemed that “the CDA is not narrowly tailored if that requirement has any meaning at all,” and struck down the statute as unconstitutional. *Id.* at 877, 879. The vagueness doctrine requires that a criminal statute state explicitly and definitely what acts are prohibited, so as to provide fair warning and preclude arbitrary enforcement. BLACK’S LAW DICTIONARY 1584 (7th ed. 1999).

28. Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681-736 (1998) (codified at 47 U.S.C. § 231 (1999)). See Hinckley, *supra* note 19, at 1039-45 and Alexander, *supra* note 19, at 989-93 for a detailed analysis of COPA and related litigation.

29. 47 U.S.C. § 231(a)(1) (2000). COPA prohibits any person from “knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the world wide web, making any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors.” *Id.* A civil penalty of up to \$50,000 may be imposed for each violation of the statute. 42 U.S.C. § 231(a). Criminal penalties consist of up to six months imprisonment and/or a maximum fine of \$50,000. *Id.* An additional \$50,000 fine may be imposed for any intentional violation of the statute. *Id.*

statute's application and more explicitly defined its terms.³⁰ A month before the statute was to take effect, a group of plaintiffs³¹ filed suit in federal court alleging that the COPA was constitutionally deficient.³² The district court agreed and issued a preliminary injunction barring the government from enforcing COPA.³³ The government appealed the decision, and the U.S. Court of Appeals for the Third Circuit affirmed.³⁴

30. 47 U.S.C. § 231 (2000). While CDA applied to the Internet as a whole, including, for example, e-mail messages, COPA applies only to the "World Wide Web." 47 U.S.C. § 231(e)(1). Unlike CDA, COPA does not apply to private parties, but instead targets only those "engaged in the business of making such communications." 47 U.S.C. § 231(e)(2)(A). Third, while CDA prohibited "indecent" and "patently offensive" communications, COPA restricts only speech that is "harmful to minors" and defined it as material which meets each part of the following test:

- A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
- B) depicts, describes or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sex act, or a lewd exhibition of the genitals or post-pubescent female breast; and
- C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

47 U.S.C. § 231(e)(6).

31. *ACLU v. Reno*, 31 F. Supp. 2d 473 (E.D. Pa. 1999). The ACLU was again joined by a variety of online content providers, Website operators, and other interested online commercial entities. *Id.*

32. *Id.* at 478-79. Plaintiffs argued that the statute was invalid under the First and Fifth Amendments because it impermissibly burdened protected speech, the "harmful to minors" definition was unconstitutionally vague, and the statute was not the least restrictive means that the government could use to achieve its purpose of protecting minors. *Id.* The "least restrictive means" test requires that a law, even when based on a legitimate governmental interest, should be crafted in a way that will protect individual civil liberties as much as possible, and should only be as restrictive as necessary to accomplish a legitimate governmental purpose. BLACK'S LAW DICTIONARY 901 (7th ed. 1999).

33. *ACLU*, 31 F. Supp. at 477. The district court based its injunction on the principle that content-based regulations of constitutionally protected speech are presumptively invalid and subject to strict scrutiny. *Id.* at 493. Under strict scrutiny, the government may regulate protected speech content to achieve a compelling government interest, if it chooses the least restrictive means of achieving that interest. *Id.* Because it was not apparent to the court that the government could show that the statute met that standard, it issued the injunction. *Id.* at 497.

34. *ACLU v. Reno*, 217 F.3d 162 (3d Cir. 2000) *cert. granted sub nom. Ashcroft v. ACLU*, 532 U.S. 1037 (2001), and vacated by 535 U.S. 564, 122 S.Ct. 1700 (2002). The name of the case was changed as a result of John Ashcroft being appointed to Attorney General. The Court of Appeals, pointedly distinguishing its analysis from that of the District Court, found COPA constitutionally lacking based entirely on "the overbreadth of COPA's definition of 'harmful to minors' applying a 'contemporary community standards' clause." *Id.* at 173-74. The court noted that this issue was virtually ignored by the parties, although it was raised by the court itself at oral argument. *Id.* The court's concern was the adoption of a "community standard" in the context of the Internet "because no technology currently exists by which Web publishers may avoid liability," and, therefore, "such publishers would necessarily be compelled to abide by the standards of the community most likely to be offended by the message." *Id.* at 177. The court concluded that

The government then appealed to the Supreme Court, which ruled narrowly and remanded.³⁵

Congress's third attempt at regulating online speech resulted in the Children's Internet Protection Act (CIPA).³⁶ CIPA, unlike CDA³⁷ and COPA,³⁸ does not regulate speakers (private or commercial website publishers), but instead through Internet filtering, limits the receipt of information by listeners (patrons of the public libraries).³⁹ In addition, CIPA attaches no criminal or civil penalty, but rather requires a public library receiving federal funding to install internet filters.⁴⁰ Because it is tied to the government's spending power,⁴¹ CIPA's proponents maintain that it can withstand constitutional scrutiny.⁴² However, CIPA presents

applying the standard in this way violated the rights of adults by restricting their access to constitutionally protected speech. *Id.*

35. The Court granted *certiorari* to decide only the limited question presented -- whether "the use of 'community standards' to identify 'material that is harmful to minors' violates the First Amendment." *Id.* at 566. The Court expressed no view regarding other analysis based on vagueness or strict scrutiny, specifically holding "only that COPA's reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment." *Id.* at 585 (emphasis in original). The Court, deeply divided over proper legal analysis, wrote five separate opinions, with eight justices voting to remand. Notably, Justices O'Connor and Breyer, in their separate concurrences, advocated a "national standard" in evaluating obscenity. *Id.* at 586-91.

36. Children's Internet Protection Act of 2001, Pub. L. No. 106-554, §§ 1701-1741, 114 Stat. 2763 (2000) (codified at 20 USC § 9134 (2001) (amending LSTA) and 47 U.S.C. § 254(h) (2001) (amending E-rate).

37. *See supra* notes 19-27 and accompanying text.

38. *See supra* notes 28-35 and accompanying text.

39. S. REP. NO. 105-226, at 2 (1998) (noting the distinction between CIPA and previous legislation designed for protecting children from harmful material on the Internet). "Filtering or blocking what comes out of the Internet is an alternative method of protecting children from harmful material. Filtering or blocking systems restrict what the user may receive over the Internet, rather than what a speaker may put on to the Internet." *Id.*

40. 47 U.S.C. § 254(h); 20 U.S.C. § 9134. *See* S. REP. NO. 106-141, at 7 (1999) (opining that "[a] school or library by accepting Federal dollars through the Universal Service fund, becomes a partner with the federal government in pursuing this compelling interest [in protecting children from sexually explicit material].")

41. U. S. CONST. art. I, § 8, cl. 1. "The Congress shall have 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." *Id.*

42. Hinckley, *supra* note 19, at 1053 (stating that advocates of on-line censorship believed they found a constitutional approach to Internet regulation in 'Congress' power of the purse'). One of the relevant Senate reports stated that the proposed bill attempts "to balance the right of States to administer their schools and libraries with the power of Congress to see that federal funds are appropriately used" and continues that "[t]he committee has good reason to believe that the filtering or blocking conditions set on the receipt of universal service assistance . . . are constitutional." S. REP. NO. 105-226, at 3 (1998). *But see* Alexander, *supra* note 19, at 993-1002 (asserting that legislators reacted to Internet pornography in enacting CDA, COPA, and CIPA for political reasons, creating 'symbolic legislation' that they knew was unconstitutional and would be struck down by the Court).

another unique set of constitutional problems related to the established doctrines regarding forum analysis,⁴³ spending power limits,⁴⁴ and unconstitutional conditions.⁴⁵

43. The Supreme Court has identified three different types of fora for purposes of identifying the level of First Amendment scrutiny applicable to content-based restrictions on speech on government property: traditional public fora, designated public fora, and nonpublic fora. *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401, 454 (E.D. Penn. 2002), *rev'd*, 539 U.S. 194 (2003). Traditional public fora are those places which “by long tradition or by government fiat have been devoted to assembly and debate” and include “streets and parks.” *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 45 (1983). “In these quintessential public forums . . . for the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. *Id.* Designated public fora “consists of public property which the State has opened for use by the public as a place for expressive activity.” *Id.* As long as the government retains the open character of the facility, “it is bound by the same standards as apply in traditional public forum.” *Id.* Nonpublic fora consists of the remaining public property. *Am. Library Ass'n*, 201 F. Supp. 2d. at 455. In nonpublic fora, a regulation on speech is permitted as long as it “is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.” *Perry*, 460 U.S. at 46. *See, e.g.*, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (deciding that establishment of a municipal auditorium and city leased theatre designed for and dedicated to expressive activities created a public forum); *Madison Joint Sch. Dist. v. Wis. Employment Relations Comm'n*, 429 U.S. 167 (1976) (holding that a forum for citizen involvement was created by a state statute providing for open board meetings); *Widmar v. Vincent*, 454 U.S. 263 (1981) (establishing that a state university that had an express policy of making its meeting facilities available to registered student groups had created a public forum for their use). *But see, e.g.*, *Cornelius v. NAACP Legal Def. & Ed. Fund*, 473 U.S. 788 (1985) (holding that the federal workplace is a nonpublic fora); *Perry*, 460 U.S. 37 (1983) (deciding that a school district’s internal mail system was not a public forum); *Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992) (determining that an airport terminal is a nonpublic fora). *See also* Daniel E. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984) (opining that use of public forum analysis confuses First Amendment principles and offering alternative methods of evaluation).

44. The Constitution’s Spending Clause provides Congress with largely unfettered discretion to define how public funds can best be used to promote the general welfare. *Hinckley, supra* note 19, at 1059. Over the last seventy years, Congress received a virtual *carte blanche* to control the activities of federal fund recipients. *Id.* The Supreme Court’s seminal decision regarding Congress’s conditional spending is *South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding the constitutionality of a federal statute requiring the withholding of federal highway funds from any state with a drinking age below 21). In its analysis, the *Dole* Court established four general constitutional limits on Congress’s exercise of the spending power. First, the exercise of the spending power must be in pursuit of the general welfare. *Id.* at 207. Second, any conditions set on the states’ receipt of funds must be sufficiently clear to enable the recipient “to exercise their choice knowingly.” *Id.* Third, the conditions on the receipt of federal funds must bear some relation to the purpose of the federal funding program. *Id.* Finally, “other constitutional provisions may provide an independent bar to the conditional grant of federal funds” *Id.* at 208. Most particularly, the spending power may not be used to induce the states to engage in activities that would themselves be unconstitutional. *Id.* at 210.

45. The doctrine of unconstitutional conditions holds that the government may not condition the receipt of its benefits upon the non-assertion of constitutional rights even if receipt of such benefits is in all other respects a “mere privilege” and theoretically allows individuals to challenge government action which indirectly inhibits or penalizes the exercise of constitutional rights.

B. Filter or Lose Funding – CIPA Forces the Choice for Libraries

Congress continued to be disturbed by the availability of pornography on the Internet⁴⁶ and became aware of a growing problem of patrons accidentally or intentionally accessing pornography on the Internet in public libraries.⁴⁷ To assist libraries in providing Internet access, the government offers two forms of federal subsidies, commonly referred to as “E-rate”⁴⁸ and “LSTA.”⁴⁹ Consequently, Congress became

LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 10-8, at 510 (2d ed. 1978); *see, e.g.*, *Perry v. Sinderman*, 408 U.S. 593 (1972) (holding that although a person has no right to a valuable governmental benefit, that benefit may not be denied to a person on a basis that infringes his constitutionally protected interests, especially his interest in freedom of speech); *Legal Serv. Corp. v. Velasquez*, 531 U.S. 533 (2001) (declaring unconstitutional a federal statute restricting the ability of legal services providers who receive federal funds to engage in activity protected by the First Amendment); *Rust v. Sullivan*, 500 U.S. 173 (1991) (rejecting a challenge to federal regulations prohibiting federally funded health care clinics from providing information regarding the use of abortion as a family planning alternative). *See also* David Cole, *Beyond Unconstitutional Conditions: Chartering Spheres of Neutrality in Government Funded Speech*, 67 N.Y.U. L. REV. 675 (1992) (offering a new “framework” for evaluating the constitutionality of Congress’s attempts to attach conditions upon the receipt of federal funds).

46. S. REP. NO. 105-226 at 1 (1998). The report states that “pornography and other material harmful to minors is widespread on the Internet” and notes the danger of “sexual predators using the Internet to entice and traumatize their victims.” *Id.* S. REP. NO. 106-141 (1999) discusses at length the problems of intentional and accidental access to sexually explicit material on the Internet, the harm to children of exposure, and increasing incidents related to on-line pedophiles. *Id.* at 2-5.

47. *Am. Library Ass’n v. United States*, 201 F. Supp. 2d 401, 406 (E.D. Penn. 2002), *rev’d*, 539 U.S. 194 (2003). According to the district court, the volume of pornography on the Internet is huge and public library patrons of all ages, including minors, regularly search for online pornography. *Id.* In addition, some patrons expose others to pornographic images by leaving them displayed on the terminals or at printers. *Id.* at 423. For a balanced analysis of the scope of the problem, see Laughlin, *supra* note 6, at 235-41 (giving both statistics supporting the theory that the problem is widespread and other statistics indicating that filtering is a “solution in search of a problem” and opining that such variance is a product of motives in conducting the studies).

48. 47 U.S.C. § 254 (1996). E-rate discounts are subsidies given under the Telecommunications Act of 1996 and serve the purpose of extending Internet access to schools and libraries in low-income communities. *Id.* According to a 1999 Senate report, E-rate is a \$2.25 million annual subsidy aimed at connecting schools and libraries to the Internet. S. REP. 106-141 at 2. At the conclusion of the first program year of the E-rate, the Schools and Libraries Corporation, responsible for administration of the E-rate subsidy program, had processed 30,120 applications and funded 25,785. *Id.*

49. 20 U.S.C. § 9134 (2000). LSTA is a grant given under the Library Service and Technology Act, 20 U.S.C. § 9141, awarded in order to: 1) assist libraries in accessing information through electronic networks, and 2) to provide targeted library and information services to persons having difficulty using a library and to underserved and rural communities, including children from families with incomes below the poverty line. *Id.* It is the purpose of LSTA to stimulate excellence and promote access to learning and information resources in all types of libraries for persons of all ages. S. CONF. REP. NO. 104-230, at 132 (1996). Put simply, LSTA provides grants for acquiring computers or telecommunications technology in low-income neighborhoods. *See also* John W. Borkowski, Alexander E. Dreier & Maya R. Kobersy, *The 2002-2003 Term of the United States Supreme Court and its Impact on Public Schools*, 181 ED. LAW REP. 1, 16 (2003) (explaining the

concerned that E-rate and LSTA programs were facilitating access to illegal and harmful pornography and explored ways in which to prevent such use.⁵⁰

Through hearings and reports, the legislature determined that filtering software could block access to pornographic websites, providing a reasonably effective way to prevent illegal or harmful uses of Internet access at the library.⁵¹ In early 1998, Senator John McCain introduced a bill that eventually became CIPA.⁵² While Congress considered CIPA, a federal district court struck down a library's use of filtering software as unconstitutional in *Mainstream Loudon v. Board of Trustees of Loudon County Library*.⁵³ The provisions of CIPA,

Court's holding in *CIPA*).

50. S. REP. NO. 105-226, at 5 (1998). Also, Marvin Johnson, Legislative Counsel for the ACLU testified:

In October 1998, Congress appointed the Child On-Line Protection Act Commission, or COPA Commission, and charged it with identifying technological or other methods that would help reduce access by minors to materials that is harmful to minors on the Internet. In October of 2000, the Commission reported that blocking technology raises First Amendment Concerns because of its potential to be over-inclusive in blocking content, concerns are increased because the extent of blocking is often unclear and not disclosed, and may not be based on parental choices. The Commission specifically did not recommend any mandatory blocking technologies.

E-Rate and Filtering: A Review of the Children's Internet Protection Act: Hearing before the Subcomm. on Telecomm. and the Internet of the Comm. on Energy and Commerce, 107th Cong. 1 (2001) (testimony of Marvin J. Johnson, Legislative counsel for ACLU) available at www.access.gpo.gov/congress/house.

51. S. REP. NO. 105-226 at 20-26.

52. S. 1619, 105th Cong. (1998). The purpose of the proposed bill, entitled "A Bill to direct the Federal Communications Commission to study systems for filtering or blocking matter on the Internet, to require the installation of such a system on computers in schools and libraries with Internet access, and for other purposes" had the proposed purpose to "protect American children from exposure to harmful material while accessing the Internet from a school or library." S. REP. NO. 105-226 at 1 (1998). Limiting the scope of the bill, the report stated that "S. 1619 seeks to protect children from harmful material in a way that is least intrusive on the self-governance of schools and libraries, and on the rights of adults to engage in constitutionally protected speech." *Id.* at 3. The report concludes that S. 1619 does not prevent adults from engaging in constitutionally protected material in public libraries because the bill requires "only one computer with Internet access in a library to employ a filtering or blocking system." *Id.* at 5. A later bill, 106 S. 97, reflected changes and developments in 105 S. 1619. S. 97 was defined as "a bill to require the installation and use by schools and libraries of a technology for filtering or blocking material on the internet on computers with internet access to be eligible to receive or retain universal service assistance." S. REP. 106-141, at 1 (1999). The purpose of S. 97 was to "protect America's children from exposure to obscene material, child pornography, or other material deemed inappropriate for minors while accessing the Internet from a school or library receiving Federal Universal Service assistance for provisions of Internet access, Internet service or Internet connection." *Id.*

53. *Mainstream Loudon v. Bd. of Tr. of Loudon County Library*, 24 F. Supp. 2d 552 (E.D. Va. 1998) (holding that because the library is a limited public forum, strict scrutiny is applicable and the filtering policy at issue was not narrowly tailored, but acted as a prior restraint on speech).

however, as originally proposed, appeared to correct the infirmities assessed by the district court.⁵⁴ CIPA was finally enacted into law as part of the Consolidated Appropriations Act of 2001.⁵⁵ In its final form, CIPA allows a library to receive E-rate or LSTA assistance only if it installs a “technology protection measure”⁵⁶ that protects against access through computers to visual depictions that are obscene, child pornography, or, for minors, harmful to minors.⁵⁷ The purpose of the

54. S. REP. NO. 106-141 at 6. The senate report distinguishes S. 97 from the *Mainstream Loudon* situation by noting “distinct differences”:

A major distinction is that this bill is an incentive subsidy and not a police power statute that is binding on the public. Another critical distinction is that filters were used on all computers in the *Loudon* case (both computers used by adults and by children), whereas under S. 97 blocking or filtering is required only while a computer is in use by a minor. Further, under S. 97, content which is specifically required to be blocked, child pornography and obscene material, enjoys no protection under the First Amendment. On the other hand, in the *Loudon* case, the libraries were required to block material that was ‘harmful to minors,’ speech that is not traditionally considered to lie outside of First Amendment protection.

Id.

55. Children’s Internet Protection Act of 2001, 20 USC § 9134 (2001) and 47 U.S.C. § 254(h) (2001). As implemented, CIPA amended portions of the Museum and Library Services Act, 20 U.S.C. § 9134 (regarding LSTA subsidies) and portions of the Communications Act of 1934, 47 U.S.C. § 254(h) (regarding E-rate). See *Hinckley, supra* note 19, at 1054 (stating that the bill languished in Congress for two years until it was finally included as an eleventh-hour rider to the Consolidated Appropriations Act of 2001). Hon. Gene Green, a House Representative from Texas opined that:

last year’s decision by our colleague in the Senate to include this legislation in the Consolidated Appropriations Act of 2001 was ill-timed and unwise. This legislation was enacted without any significant hearings or public input and has now placed our schools and public libraries in a delicate legal position. Once again Congress, in its rush to protect children from online smut, has over regulated the issue.

E-rate and Filtering: A Review of the Children’s Internet Protection Act, Hearing before the Subcomm. on Telecomm. and the Internet of the Comm. on Energy and Commerce, 107th Cong. 1 (2001) (comments of Rep. Gene Green) available at www.access.gpo.gov/congress/house. In its final form, CIPA incorporates the infirmities noted by the *Loudon* court and Congress – filtering is required on all computers and material harmful to minors is included in the blocking. See CIPA, 20 USC § 9134 (2001) and 47 U.S.C. § 254(h) (2001).

56. 47 U.S.C. § 254(h)(7)(I). CIPA defines a “technology protection measure” as a “specific technology that blocks or filters Internet access to material covered by” the Act. *Id.*

57. 47 U.S.C. § 254(h)(6)(B)-(C); 20 U.S.C. § 9134(f)(1)(A). For minors, the technology protection measure must protect against visual depictions that are obscene, child pornography or harmful to minors. 47 U.S.C. § 254(h)(6)(B)(i)-(ii) (regarding E-rate); 20 U.S.C. § 9134(f)(1)(A)(i)-(ii) (regarding LSTA). With respect to adults, the technology protection measure must protect against visual depictions that are obscene or child pornography. 47 U.S.C. § 254(h)(6)(B)(i)-(ii) (regarding E-rate); 20 U.S.C. § 9134(f)(1)(B)(i)-(ii) (regarding LSTA). CIPA defines a “minor” as “any individual who has not attained the age of 17 years.” 47 U.S.C. § 254(h)(7)(D). Under CIPA, “obscene” has the meaning given in 18 U.S.C. § 1460, and “child pornography” has the meaning given in 18 U.S.C. § 2256. 47 U.S.C. § 254(h)(7)(E) & (F). Under 18 U.S.C. § 2256:

‘[C]hild pornography’ means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or

legislation is to protect children from being exposed to harmful materials at a school or library.⁵⁸ To receive any federal funding through LSTA or E-rate,⁵⁹ the technology protection measure must be installed on *all* computers in the library with Internet access.⁶⁰ CIPA also provides that the Internet filter may be disabled to enable access for bona fide research or other lawful purposes.⁶¹

produced by electronic, mechanical, or other means, of sexually explicit conduct, where—

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

18 USCS § 2256 (8) (2004). Further, CIPA defines material that is harmful to minors as:

[A]ny picture, image, graphic image file, or other visual depiction that (i) taken as a whole and with respect to minors, appeals to the prurient interest in nudity, sex, or excretion; (ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and (iii) taken as a whole, lacks serious literary, artistic, political or scientific value as to minors.

47 U.S.C. § 254(h)(7)(G)(regarding E-rate). 20 U.S.C. § 9134(f)(7) (regarding LSTA).

58. See S. Rep. 106-141 (1999). The stated purpose of the Act is “to protect America’s children from the harm of exposure to obscene material, child pornography or other material deemed inappropriate for minors.” *Id.* at 1.

59. With regard to E-rate, “Any library that fails to comply with the application guidelines regarding the annual submission of certification required by this paragraph shall not be eligible for services at discount rates. . . .” 47 U.S.C. § 254(h)(5)(F)(i). In addition, “Any library that knowingly fails to ensure the use of its computers in accordance with a certification under subsection (B) and (C) shall reimburse for all funds and discounts received under this subsection for the period covered by such certification.” 47 U.S.C. § 254(h)(5)(F)(ii). With regard to LSTA, “Whenever the Director of the Institute of Museum and Library Services has reason to believe that any recipient of funds under this chapter is failing to comply substantially with the requirements of this subsection, the Director may withhold further payments to the recipient under this subchapter.” 20 U.S.C. § 9134(f)(5)(A).

60. 47 U.S.C. § 254(h)(6)(B)(i)-(C)(i) (regarding E-rate); 20 U.S.C. § 9134(f)(1)(A)-(B) (regarding LSTA). A library may not receive discount rates (through E-rate) or funding (under LSTA) unless the library certifies that it “is enforcing a policy of internet safety which includes the operation of a technology protection measure with respect to *any* of its computers with internet access. . . .” *Id.* (emphasis added).

61. 47 U.S.C. § 254(h)(6)(D) (regarding E-rate); 20 U.S.C. § 9134(f)(3) (regarding LSTA). Under CIPA’s revisions to the E-rate program, disabling is permitted only during adult use. 47 U.S.C. § 254(h)(6)(D). However, the LSTA provisions permit disabling for both adults and minors. 20 U.S.C. § 9134(f)(3).

C. *The Limitations of Internet Filtering*

In a library setting, a filter is typically run on a server computer which connects all of the computers in a library and intervenes between users and the Internet.⁶² Filters operate by restricting access to the Internet on either a “white list” or a “black list” basis.⁶³ “Black list” filters, the type most commonly used in libraries, block access based on a pre-screening of unacceptable sites, screening for pre-selected keywords and/or based on a rating (similar to PG or R moving ratings) given to a site by its producer.⁶⁴ Current filtering technology, however, has serious limitations resulting in over-blocking of constitutionally protected sites and under-blocking of restricted sites.⁶⁵ Several factors account for Internet filters’ inaccuracy, most significantly the sheer size

62. 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 (2002) (setting forth the history of computer filtering in libraries, describing the filtering process, and explaining limitations of filtering technology).

63. *Id.* at 402. “Black list filters,” also called “blocking filters,” presume that the user is entitled to full access to the Internet, but revoke access when the user seeks content that matches the filter’s blocking criteria, otherwise termed the “black list.” “White list filters,” conversely, only grant access to parts of the Internet that are selected as appropriate. *Id.* Some libraries use white-list filters for areas such as a children’s section, but for the most part, the type of filtering at issue in library use is the black list variety. *Id.* at 403.

64. *Id.* at 404-08. This article will not fully discuss the distinctions and technology of each type of filtering. For the purposes of this analysis, it is sufficient to understand the general ways in which filtering operates. A 1999 Senate report described the situation most clearly: “There are two basic categories of such technology, blocking and filtering Blocking software prevents access to Websites or E-mail addresses preprogrammed into the software Filtering software screens sites based on keywords and rating systems.” S. REP. NO. 106-141, at 6. *See* Am. Library Ass’n v. United States, 201 F. Supp. 2d 401, 416-20 (E.D. Penn. 2002) (giving a detailed analysis of filtering technology), *rev’d*, 539 U.S. 194 (2003). *See generally* Peltz, *supra* note 62, at 401-07 (giving a detailed technical description of filtering technology).

65. *Am. Library Ass’n*, 201 F. Supp. 2d at 410-11. According to evidence presented by experts, the court found that “commercially available filtering programs erroneously block a huge amount of speech that is protected by the First Amendment.” *Id.* at 448. The court noted that the expert witness for the government found that between 6 percent and 15 percent of the blocked sites in public libraries did not contain restricted content. *Id.* This over-blocking results in “at least tens of thousands of pages” being blocked even though “no rational person could conclude [the content] matches the category definitions of pornography or sex.” *Id.* at 449. For an enlightening look at sites erroneously blocked, see examples given by the district court at 446-47. One author noted that filters screen by looking for consecutive letters and cited an instance in which a website on ‘Mars exploration’ was blocked because it contains the consecutive letters “s,” “e,” and “x”. Adam Horowitz, *The Constitutionality of the Children’s Internet Protection Act*, 13 ST. THOMAS L. REV. 425, 434 (2000). Although the government acknowledges that tens of thousands of sites may be erroneously blocked, it points out that because there are approximately two billion pages of material on the Internet, the rate of blocking is only one-two-hundredths of one percent even if 100,000 pages are blocked. United States Supreme Court Official Transcript, *United States v. Am. Library Ass’n*, 539 U.S. 194 (2003) (No. 02-361) (oral argument before the Supreme Court by Theodore Olson, Solicitor General, on behalf of Appellant United States) *available at* 2003 WL 1089390.

of the Internet⁶⁶ and its rate of change.⁶⁷ In addition to the problems of over-blocking and under-blocking, filters cannot evaluate images; thus, a website containing no words but only objectionable images would escape detection.⁶⁸ This is significant because CIPA specifically attempts to limit “visual depictions,” but does not mention limitations on text.⁶⁹

III. STATEMENT OF THE CASE

A. *Statement of the Facts and Procedural History*

Anticipating the potential infringement on First Amendment rights, various libraries, library associations, library patrons, web-site publishers, and the ACLU filed complaints against the United States government prior to CIPA’s April 2001 implementation date, challenging the Act’s constitutionality.⁷⁰ The suits were consolidated,

66. Peltz, *supra* note 62, at 414. The Court in *Am. Library Ass’n* noted that as many as two billion Websites are estimated to exist in the indexable Web. *Am. Library Ass’n*, 201 F. Supp. 2d at 445. Before a three-judge panel, Dr. Jeffrey Nunberg testified that by one estimate, a million and a half sites per day are added to the World Wide Web. Certified Record on Appeal at 134, *United States v. Am. Library Ass’n*, 539 U.S. 194 (2003) (testimony of Dr. Jeffrey Nunberg before the district court) available at <http://www.usdoj.gov/osg/briefs/2002/3mer/2mer/2002-0361.mer.ja.vol.1.pdf> (hereinafter referred to as “Nunberg testimony”).

67. Horowitz, *supra* note 65, at 432. For example, a website may contain obscene material on the day it is reviewed, but it may subsequently be removed; thus, maintaining a legally accurate database requires frequent re-evaluation of websites because of the constantly changing nature of the Internet. *Id.* Dr. Nunberg estimates that the average website has a half-life of about 90 days, meaning that most sites “just don’t last that long.” Nunberg testimony at 146.

68. Peltz, *supra* note 62, at 406. See also *Am. Library Ass’n*, 201 F. Supp. 2d at 431 (discussing the inability of filters to screen visual depictions). For an explanation of how image filtering works, see Nunberg testimony at 173-174.

69. 20 U.S.C. § 9134(f)(1)(A) (permitting libraries LSTA funding upon a certification that a technology protection measure is in place “that protects against access through such computers to visual depictions. . . .”); 47 U.S.C. §254(h)(6)(B)(permitting libraries to receive E-rate discounts based upon a certification that a technology protection measure is in place “that protects against access through such computers to visual depictions”).

70. Complaint for Declaratory and Injunctive Relief, *Am. Library Ass’n v. United States*, 201 F. Supp. 2d 401 (E.D. Penn. 2002); Complaint for Declaratory and Injunctive Relief, *Multnomah County Pub. Library v. United States*, 201 F. Supp. 2d 401 (E.D. Penn. 2002). For a complete listing of Plaintiffs, see *Am. Library Assoc. v. United States*, 201 F.Supp. 2d 401 (E.D. Penn. 2002), *rev’d* 539 U.S. 194 (2003). Plaintiffs alleged that CIPA was unconstitutional on its face because: 1) it induces public libraries to violate their patrons’ First Amendment rights in violation of the Spending Clause; and 2) it requires libraries to relinquish their First Amendment rights as a condition on the receipt of federal funds and is therefore impermissible under the doctrine of unconstitutional conditions. *Am. Library Ass’n*, 201 F. Supp. 2d at 407. *United States v. Am. Library Ass’n* also contends that CIPA requires libraries to impose content-based restrictions on patrons’ access to constitutionally protected speech. *Id.* *United States v. Am. Library Ass’n* further

with American Library Association (ALA) going forth as lead plaintiff.⁷¹ The basis of the ALA suit rests in the undisputed fact that CIPA blocks access to constitutionally protected speech, which they asserted violates a library's right to provide patrons with information and violates a patron's right to receive information.⁷² The Government responded that CIPA does not compel libraries to violate the First Amendment because the use of filtering programs is similar to a selection of a library's collection which has traditionally been left to a library's discretion.⁷³ Additionally, the Government relied on previous Supreme Court rulings establishing that Congress may restrict the use of subsidies to the purposes for which they were intended and is not obligated to fund protected speech.⁷⁴

Pursuant to the provisions of CIPA, a three-judge court convened to try the issues.⁷⁵ After an eight day trial, the district court held CIPA facially unconstitutional based on violations of the First Amendment⁷⁶ and the Spending Clause.⁷⁷ The court enjoined the government from

states that these content-based restrictions are subject to strict scrutiny under the public forum doctrine and are therefore only permissible only if they are narrowly tailored to further a compelling state interest and no less restrictive alternative would further that interest. *Id.*

71. *Am. Library Ass'n.*, 201 F. Supp. at 401.

72. *Id.* at 408. See also *supra* notes 62-69 and accompanying text (discussing filtering limitations) and *infra* notes 125-26 and accompanying text (discussing the right to receive information).

73. *Id.* at 407. The Government submitted that CIPA is facially invalid only if it is impossible for any public library to comply with its conditions without violating the First Amendment. *Id.* The government promoted the view that the decision to install filters is equivalent to a library's decisions in choosing its print collection. *Id.* at 408. Those collection decisions by a library are subject only to rational basis review, as opposed to strict scrutiny; thus, because filters are fairly effective, the library made a reasonable choice. *Id.* Additionally, the Government asserted that public libraries do not create a public forum, since public libraries may reserve the right to exclude certain speakers from availing themselves of the forum; thus, the restrictions on Internet access are subject only to rational basis review. *Id.* at 409.

74. *Rust v. Sullivan*, 500 U.S. 173 (1991) (holding that "a refusal to fund protected activity cannot be equated with an imposition of a penalty on that activity").

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

76. *Am. Library Ass'n.*, 201 F. Supp. 2d at 411. The district court found that in providing the Internet, public libraries create a public forum open to any speaker to communicate with library patrons; as such, it is subject to strict scrutiny. *Id.* at 409. Because Internet filtering overblocks a substantial amount of protected speech, the suppression of which serves no legitimate government interest, it is not narrowly tailored. *Id.* at 410.

77. *Id.* at 409. The court held that because a public library complying with CIPA will necessarily restrict patrons' access to a substantial amount of protected speech, compliance with CIPA results in violation of patrons' First Amendment rights. *Id.* Therefore, in promulgating CIPA, Congress exceeded its authority under the Spending Clause. *Id.* (citing *South Dakota v. Dole*, 483 U.S. 203 (1987) (finding that Congress is permitted to attach conditions on the receipt of

withholding federal assistance for non-compliance with CIPA.⁷⁸ The court's opinion discussed several less restrictive means, including installation of recessed monitors, enforcement of Internet use policies and parental monitoring of minors.⁷⁹ The district court went on to state that because CIPA failed under both First Amendment forum analysis and Congress's spending power, it was not necessary to examine arguments related to the unconstitutional conditions, prior restraint of speech, or vagueness theories.⁸⁰ Finally, the court held that the unblocking provisions of CIPA did not cure its constitutional deficiencies.⁸¹ Pursuant to the provisions of CIPA, the government filed for direct review by the United States Supreme Court.⁸²

federal funds, but is prohibited from using its spending power to induce the recipient to engage in activities that would violate the Constitution)). In its analysis, the court stated that whether CIPA violated Congress' power under the Spending Clause would turn on the level of scrutiny applicable to a public library's content-based restrictions on Internet access, which would in turn depend on public forum analysis. *Id.* The court determined that a public library is a limited public forum, and because CIPA's filtering requirements impermissibly constitute a content-based restriction on access to a public forum, the statute was therefore subject to strict scrutiny. *Id.* Further, although the Government has a legitimate interest in protecting children from obscenity, the use of software filters is not narrowly tailored to further that interest. *Id.* at 410.

78. *Am. Library Ass'n*, 201 F. Supp. 2d at 411.

79. *Id.* at 410.

80. *Id.* at 411. The district court, while not ruling upon the unconstitutional conditions claim, did discuss the application of the doctrine. *Id.* at 492-94. *See supra* note 45 (explaining the unconstitutional conditions doctrine). Under this theory, even if no First Amendment violation results from a public library using filtering software, a First Amendment violation occurs when the federal government requires public libraries to use filters as a condition of the receipt of federal funds. *Am. Library Ass'n* 201 F. Supp. 2d at 490. Two situations presented a possible constitutional violation based on CIPA's conditional spending: the restriction of the library from providing constitutionally protected material to the public, and, separately, a library patron's right to access the constitutionally protected speech. *Id.*

81. *Id.* at 411. The court noted that although the evidence reflects that libraries can and do unblock materials upon patron request, the requirement that a patron must request the unblocking will deter many patrons because they are embarrassed or desire to protect their privacy or remain anonymous. *Id.* Moreover, the unblocking may take days and may be entirely unavailable. *Id.*

82. The Consolidated Appropriations Act of 2001 reads in pertinent part:

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

Pub. L. No. 106-554, 114 Stat. 2763A-129 (2001).

B. *United States Supreme Court Decision*

1. Plurality Opinion

The Supreme Court, in a plurality opinion,⁸³ reversed the ruling of the United States District Court for the Eastern District of Pennsylvania.⁸⁴ The opinion written by Chief Justice Rehnquist, joined by Justices O'Connor, Scalia, and Thomas, held that because public libraries' use of Internet filtering software does not violate their patrons' First Amendment rights, CIPA does not induce libraries to violate the Constitution, and is a valid exercise of Congress's spending power.⁸⁵ In reaching its decision, the Court analyzed CIPA's provisions against previous holdings related to the Spending Clause doctrine,⁸⁶ public forum doctrine,⁸⁷ and the unconstitutional conditions doctrine.⁸⁸

According to the plurality, to determine whether Congress exceeded its power under the Spending Clause in enacting CIPA, the pertinent analysis is whether the condition that Congress requires would

83. A plurality opinion lacks enough judges' votes to constitute a majority, but receives more votes than any other opinion. BLACK'S LAW DICTIONARY 1119 (7th ed. 1999). According to "Marks rule," when the Supreme Court issues a fractured, plurality opinion, the opinion of the Justices concurring in the judgment on the narrowest grounds – that is, the legal standard with which a majority of the Court would agree – is considered the Court's holding. BLACK'S LAW DICTIONARY 986 (7th ed. 1999). If a majority of the court agreed on a decision in the case, but less than a majority could agree on the reasoning for that decision, the decision has no stare decisis effect. 20 AM. JUR. 2D *Courts* § 159 (1984). See also Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127 (1981) (noting a trend in the increase in Supreme Court plurality opinions and that such decisions are "useless as guides to lower courts, to the Supreme Court in resolving future cases, and to legislatures trying to cope with incomprehensible pronouncements of the court").

84. *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003).

85. *Id.* at 214 (reversing the holding of the district court).

86. *Am. Library Ass'n* 539 U.S. at 202-09. See *South Dakota v. Dole*, 483 U.S. 203 (1987) (establishing the Spending Clause limitation that Congress is permitted to attach conditions on the receipt of federal funds, but is prohibited from using its spending power to induce the recipient to engage in activities that would violate the Constitution). See also *supra* note 44 (discussing the conditional spending doctrine).

87. *Am. Library Ass'n*, 539 U.S. at 205-09. The Court describes traditional public fora as those that have been "immemorially been held in trust for the use of the public, and time out of mind, have been used for purposes of assembly, communication of thoughts between citizens, and discussing public questions." *Id.* at 205-06. See *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788 (1985). See also *supra* note 43 (discussing public forum doctrine).

88. *Am. Library Ass'n*, 539 U.S. at 209-213. See *Perry v. Sinderman*, 408 U.S. 593 (1972) (establishing that the government may not "deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech," even if he has no entitlement to that benefit; to do so would impose an unconstitutional condition on receipt of the benefit). See *supra* note 45 (discussing the unconstitutional conditions doctrine).

be unconstitutional if performed by the library itself.⁸⁹ To begin the analysis of whether it would be unconstitutional for a library to install filters, the Court first examined the role of libraries in society.⁹⁰ The plurality described the traditional mission of a library as one of facilitating learning and cultural enrichment, and noted that in order to fulfill its mission, a library must have broad discretion to make content-based judgments in deciding what private speech to make available to the public.⁹¹ The Court rejected forum analysis in the context of this case,⁹² holding that Internet access is neither a traditional nor a designated public forum.⁹³ The Court further distinguished the purpose of library Internet access, which is not to provide a public forum for website publishers to express themselves, but rather is offered to facilitate learning.⁹⁴ Therefore, the plurality concluded that because Internet access in a library is not a public forum and libraries typically

89. *Am. Library Ass'n*, 539 U.S. at 203, n.2 (asserting that Justice Stevens misapprehends the analysis necessary under Spending Clause precedent when he “asks and answers whether it is unconstitutional for Congress to impose [CIPA’s filtering] requirement” on public libraries).

90. *Id.* at 203-04. To determine if a library could choose to install filters on its own, the plurality analogized the blocking of material as a ‘collection decision,’ traditionally left to the librarian’s discretion. *Id.* at 203-09. Thus, if blocking material on the Internet is seen as analogous to deciding not to add a book to the bookshelf, the library has the discretion to install filters without implicating public forum analysis and strict scrutiny. *Id.*

91. *Id.* at 203, n.2. A library’s goal has never been to provide universal coverage, but rather to provide materials that would be of greatest benefit or interest to the community. *Id.* at 204. A public library staff must necessarily consider content in making collection decisions and enjoy broad discretion in making them. *Id.* at 205. *But see* *Bd. of Educ. v. Pico*, 457 U.S. 853, 914 (1982) (Rehnquist, J., dissenting) (describing the public library as a place for “freewheeling inquiry”). *See also* Laughlin, *supra* note 6, at 219-26 (discussing at length public libraries’ historical mission and history of censorship).

92. *Am. Library Ass'n*, 539 U.S. at 205-06. The Court, referring to prior holdings in *Ark. Ed. Television Comm'n v. Forbes*, 532 U.S. 666 (1988), and *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), stated:

Just as forum analysis and heightened public scrutiny are incompatible with the role of public television stations and the role of the NEA, they are also incompatible with the discretion that public libraries must have to fulfill their traditional missions. . . . The public forum principles on which the District Court relied are out of place in the context of this case. Internet access in a public library is neither a traditional nor a designated public forum.

Am. Library Ass'n, 539 U.S. at 204.

93. *Id.* at 205. In evaluating the public forum argument, the Court found that Internet access in a library is not a traditional public forum because such status does not extend beyond the historic confines of places such as parks and streets. *Id.* at 205-06. Neither is library Internet access a designated public forum, because “in order to create such a forum, government must make the affirmative choice to open its property for use as a public forum; it isn’t created by inaction.” *Id.* at 206. The plurality concluded that the government made no such choice. *Id.*

94. *Id.* at 206-07. The opinion quotes Congress as stating that the Internet is simply another method for making information available in a school or library—“it is no more than a ‘technological extension of a book stack.’” *Id.* at 207.

make content-based judgments in selecting materials, a library's decision to use filtering software must be viewed as a collection decision, not a restraint on private speech.⁹⁵ Any concerns over filtering software's tendency to "over-block" constitutionally protected speech are remedied by the ability of patrons to request that the filter be disabled.⁹⁶

The Court next rejected ALA's "unconstitutional condition" claim.⁹⁷ The plurality concluded that, assuming public libraries had constitutional rights, ALA's claim fails on the merits because the government is entitled to broadly define a program for which it has appropriated public funds and has the right to insist that public funds be spent for the purposes for which they were intended.⁹⁸ In granting funds through LSTA and E-rate, the government's mission was to make the Internet available in libraries for education.⁹⁹ Because using filtering software helps to carry out the library's mission of obtaining appropriate material for educational and informational purposes, the plurality concluded that it is a permissible condition.¹⁰⁰

95. *Id.* at 208. The Court also stated that the fact that a library reviews and affirmatively chooses to acquire every book in its collection is not a constitutionally relevant distinction. *Id.* Because of the vast amount of quickly changing material on the Internet, for the library to do so in this context would be impossible; therefore, the use of filtering software is a reasonable alternative. *Id.*

96. *Id.* at 208-09. Although the district court viewed unblocking as an inadequate remedy because of reluctance or embarrassment, the Supreme Court replied that "the Constitution doesn't guarantee acquiring information at a public library without embarrassment." *Id.* at 209.

97. *Id.* at 210-11. See *Perry v. Sinderman*, *supra* note 45. *Am. Library Ass'n* alleged that CIPA imposes an unconstitutional condition on libraries that receive federal subsidies by requiring them as a condition upon receipt to surrender a First Amendment right to provide the public with access to constitutionally protected speech. *Am. Library Ass'n*, 539 U.S. at 209. The government countered that government entities do not have First Amendment rights. *Id.*

98. *Id.* at 211 (quoting *Rust v. Sullivan*, 500 U.S. 173, 194 (2003)). In *Rust*, the Court held that a statute allocating funds for family planning, but forbidding its use for abortion counseling, did not deny a benefit to anyone, but instead mandated that funds were spent on purposes for which they were authorized. See *Rust*, 500 U.S. at 194.

99. 47 U.S.C. § 254(h)(1) (regarding E-rate); 20 U.S.C. § 9121, *et seq.* (regarding LSTA). The plurality quotes the intended purposes of the programs: "It is the purpose of LSTA to stimulate excellence and promote access to learning and information resources in all types of libraries for individuals of all ages" and "[t]he E-rate program 'will help open new worlds of knowledge, learning and education to all Americans . . .'" *Am. Library Ass'n*, 539 U.S. at 212 n.5.

100. *Am. Library Ass'n*, 539 U.S. at 210-12. 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 at their own expense. *Id.* Rather, CIPA simply reflects Congress' decision not to subsidize doing so. *Id.* at 212. See *Rust*, 500 U.S. at 193 (holding that "a refusal to fund protected activity, without more, cannot be equated with an imposition of a penalty on that activity"). See also *Hinckley*, *supra* note 19, at 1072-80 (discussing the implications of *Rust* at length and examining post-*Rust* funding of private speech).

2. Concurring Opinions

Justices Kennedy and Breyer each wrote an opinion concurring in the judgment.¹⁰¹ Justice Kennedy focused his concurrence on the fact that, on request of an adult user, a librarian can disable the Internet blocking software without significant delay.¹⁰² Because of this provision, he contended, an adult library user's access is not significantly burdened, saving CIPA from being facially unconstitutional.¹⁰³ By contrast, Justice Breyer agreed with the plurality that forum analysis is inapplicable.¹⁰⁴ He also agreed that CIPA is constitutional, but would reach it through applying a "heightened scrutiny" analysis.¹⁰⁵ In his analysis, the small burden that the Act places on the library patron seeking protected speech is not disproportionate when considered against the government's legitimate interests in protecting children, and is therefore constitutional.¹⁰⁶

101. *Am. Library Ass'n*, 539 U.S. at 214-20.

102. *Id.* at 214 (citing the district court opinion at 485-86, which states that "the disabling provisions permit public libraries to allow a patron access to any speech that is constitutionally protected with respect to that patron") (Kennedy, J., concurring in the judgment). Justice Kennedy also relied on the testimony of Theodore Olson that the library must disable the filter upon a patron's request. United States Supreme Court Official Transcript, *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003) (No. 02-361) (oral argument before the Supreme Court by Theodore Olson, Solicitor General, on behalf of Appellant United States), *available at* 2003 WL 1089390.

103. *Am. Library Ass'n*, 539 U.S. at 215. However, if libraries do not have the ability to unblock the filter, the statute may be subject to an "as-applied challenge." *Id.* A "facial challenge" is a claim that a statute is unconstitutional on its face – that is, it always operates unconstitutionally. BLACK'S LAW DICTIONARY 223 (7th ed. 1999). In contrast, an "as-applied challenge" reflects the idea that although the law appears constitutional on its face, it is unconstitutional as applied based on the facts of a particular case or to a particular party. *Id.*

104. *Am. Library Ass'n*, 539 U.S. at 215-16 (Breyer, J., concurring in the judgment).

105. *Id.* at 216-17. Justice Breyer asserted that in this context, where competing constitutional interests are potentially at issue or speech-related harm is potentially justified by unusually strong governmental interests, the key question is one of proper fit. *Id.* at 218. In such cases, the Court has asked whether the harm to speech-related interests is disproportionate in light of both the justifications and alternatives. *Id.* "Heightened scrutiny" is also described as "intermediate scrutiny" and is defined as "a standard lying between the extremes of rational-basis review and strict scrutiny; under the standard, if a statute contains a quasi-suspect classification, the classification must be substantially related to the achievement of a legitimate governmental objective." BLACK'S LAW DICTIONARY 820 (7th ed. 1999). The most stringent form of judicial scrutiny, "strict scrutiny," is applied to potential infringement upon fundamental rights and requires the state to establish that it has a compelling interest that justifies and necessitates the law in question. *Id.* at 1435. By contrast, the most lenient test is "rational basis," which requires only that a law bear a reasonable relationship to the attainment of some legitimate governmental objective. *Id.* at 1269.

106. *Am. Library Ass'n*, 539 U.S. at 219-20. The Act (CIPA) seeks to restrict access to obscenity, child pornography, and, in respect to access by minors, material that is comparably harmful; these objectives are legitimate and often compelling. *Id.* at 218. Although present technology both under-blocks and over-blocks that access, no one has come up with a better fitting alternative. *Id.* at 219. Finally, Justice Breyer noted that the Act allows an adult access to a

3. Dissenting Opinions

Justices Stevens, Souter and Ginsburg dissented, judging CIPA unconstitutional on its face.¹⁰⁷ Justice Stevens focused his dissent on the over-blocking and under-blocking deficiencies inherent in current internet filtering software.¹⁰⁸ After describing the over-blocking as “an overly broad restriction on adult access to protected speech,” he opined that the government interest cannot justify such a restriction.¹⁰⁹ In addition, he noted that a variety of less restrictive alternatives are available.¹¹⁰ Finally, in his opinion, the ability of an adult patron to disable the software does not cure the Act’s infirmities.¹¹¹ Justice Souter also authored a dissenting opinion, in which Justice Ginsburg joined, reasoning that CIPA is invalid under Congress’s spending power because CIPA forces action that would violate the First Amendment if libraries took that action entirely on their own.¹¹² Finally, Justices

wrongly blocked site, and opined that “it is difficult to see how that burden could prove more onerous than traditional library practices of segregating materials or waiting for interlibrary loan.” *Id.*

107. *Id.* at 220-43.

108. *Id.* at 220-25 (Stevens, J., dissenting). *But see* Peltz, *supra* note 62, at 410-417 (reviewing Internet filters, their capabilities and limitations, and concluding that the over-blocking problem is not as pervasive as commonly believed).

109. *Am. Library Ass’n*, 539 U.S. at 222. “The government may not suppress lawful speech as the means to suppress unlawful speech.” *Id.* (citing *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002) (holding that speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it)).

110. *Id.* at 223-24. Alternatives listed include enforcement of Internet use policies, parental monitoring of minors, installation of privacy screens and/or recessed monitors, and placement of unfiltered monitors out of sight-lines. *Id.*

111. *Id.* at 224. In discussing that the statute creates a prior restraint on speech, Justice Stevens stated that “a law that prohibits reading without official consent, like a law that prohibits speaking without consent, constitutes a dramatic departure from our national heritage and constitutional tradition.” *Id.* at 225 (quoting *Watchtower Bible & Tract Soc’y of N.Y. v. Vill. of Stratton*, 536 U.S. 150, 166, (2002) (holding that in evaluating a statute’s impingement on First Amendment rights, the Court must examine the amount of speech covered by the ordinance and whether there is an appropriate balance between the affected speech and the governmental interests the statute purports to serve)).

112. *Am. Library Ass’n*, 539 U.S. at 231-43 (Souter, J., dissenting). A library that chose to block an adult’s Internet access to “material harmful to children” would be imposing a content-based restriction on communication of material that an adult could otherwise see—this would simply be censorship. *Id.* at 234-35. “The policy of the First Amendment favors dissemination of information and opinion. . . .” *Id.* at 235 (quoting *Bigelow v. Va.*, 421 U.S. 809, 829 (1975) (discussing that the policy of the First Amendment favors dissemination of information and opinion and is designed to prevent any action of the government which might prevent such free and general discussion of public matters as seems absolutely essential)). In his discussion of censoring, Justice Souter also stated, “. . . [W]e should recognize the right of a library’s adult Internet users, who may be among the 10 percent of American Internet users whose access comes solely through library terminals. There should therefore be no question that censorship by blocking produces real injury.

Souter and Ginsburg opined that the Act cannot be saved by its unblocking provisions because such is subject to the discretion and approval of library staff.¹¹³

IV. ANALYSIS

The Supreme Court's decision in *United States v. American Library Association* is based upon analysis of well-established constitutional law, but as applied to a new medium – the Internet.¹¹⁴ The difficulty in application is self-evident from the fact that the Court entered such a badly splintered opinion.¹¹⁵ This portion of the Note will analyze the Court's approach to the constitutional issues it addressed, identify issues the Court ignored, and discuss the future effect of both the opinion itself and its implementation.

A. Internet Access in a Library Should Properly Be Considered a Designated Public Forum

In holding that forum analysis was not applicable to Internet access in a library, the Court relied heavily on two lines of reasoning: its characterization of the “traditional” role of a library¹¹⁶ and two prior

...” *Am. Library Ass’n*, 539 U.S. at 242 n.8.

113. *Am. Library Ass’n*, 539 U.S. at 232-34. The unblocking provision cannot be construed to say that a library must unblock upon adult request, but instead that unblocking may be permitted only for “bona fide research or other lawful purposes.” *Id.* at 233 (citing CIPA, 20 U.S.C. § 9134(f)(3)).

114. “Just as the development of new media presents unique problems, which inform our assessment of the interests at stake, and which may justify restrictions that would be unacceptable in other contexts, the development of new media such as the Internet, also presents unique possibilities for promoting First Amendment values.” *Am. Library Ass’n v. United States*, 201 F. Supp. 2d 401, 470 (E.D. Penn. 2002), *rev’d*, 539 U.S. 194 (2003). See Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501 (1999) (discussing a developing area of law based on the intersection of cyberspace and free speech). Lessig notes that many believe that cyberspace simply cannot be regulated – that its anonymity and multi-jurisdictionality makes control by the government impossible. *Id.* at 505. He asserts, however, that behavior in cyberspace can be regulated and we as a society must choose whether the values embedded there will be values we want. *Id.* at 548. See also Alexander, *supra* note 19 (reviewing the various attempts at regulating Internet pornography and observing that “while the law develops slowly, the Internet has exploded rapidly, and comparisons to prior legal precedent thus prove unhelpful”); Eileen Candida, Comment, *The Information Superhighway – Caution – Roadblocks Ahead: Is the Use of Filtering Technology to Prevent Access to “Harmful” Internet Sites Constitutional?*, 9 TEMP. POL. & CIV. RTS. L. REV. 85 (1999) (discussing the history of Internet related legislation and asserting that traditional application of First Amendment analysis will not work in an Internet context).

115. See *supra* notes 75-113 and accompanying text discussing the plurality, concurring and dissenting opinions by the Justices.

116. *U.S. v. Am. Library Ass’n*, 539 U.S. at 202-04 (2003). The plurality noted that while “public libraries pursue the worthy mission of facilitating learning and cultural enrichment,” to

cases involving federal funding in which the Court had determined forum analysis to be inapplicable.¹¹⁷ In so framing the library's mission, however, the Court came to a conclusion inconsistent with prior holdings,¹¹⁸ library history,¹¹⁹ and the ALA's own modern view of its mission.¹²⁰ The plurality's analysis that the facts *sub judice* were analogous to *Forbes* and *Finley* is centered on its premise of a library's mission; thus, valid conflicting views of a library's mission seriously undermine that analogy.¹²¹ If a library's mission is "to provide

fulfill their traditional missions they must "have broad discretion to decide what material to provide to their patrons." *Id.* at 203-04. The plurality states that the goal "has never been to provide universal coverage" but only to provide materials of "requisite and appropriate quality." *Id.* at 204.

117. *Ark. Ed. Television Comm'n v. Forbes*, 523 U.S. 666, 680 (1998) (holding that public forum principles do not generally apply to a public television station's editorial judgments regarding the private speech it presents to its viewers); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (finding that public forum analysis does not apply in the context of arts funding programs using content-based criteria in making funding decisions).

118. *See Bd. of Ed. v. Pico*, 457 U.S. 853, 915 (1982) (Rehnquist, J., dissenting) (describing a public library as a place "of freewheeling inquiry"); *Am. Library Ass'n*, 201 F. Supp. 2d at 420 (concluding that although public libraries operate in a wide variety of communities they share a common mission: "to provide patrons with a wide range of information and ideas"); *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1256 (1992) (describing a public library as the "quintessential locus for the right to receive information and ideas" and holding that a public library was a limited public forum).

119. *See* EVELYN GELLER, *FORBIDDEN BOOKS IN PUBLIC LIBRARIES 1876-1939: A STUDY IN CULTURAL CHANGE* (1984). Although the first libraries were partisan, even propagandistic in nature, as early as 1731 the role of the library began expanding to include education, and, thus, the support of democratic ideals. *Id.* at 3-4. Benjamin Franklin praised "social libraries for having . . . made the common tradesman and farmer as intelligent as most gentlemen from other countries, and perhaps contributed to the stand so generally made throughout the colonies in defense of their privileges." *Id.* Libraries were censored through a "neutrality" policy, so that those of "differing creeds" could meet together in peace. *Id.* at 8-9. As a result of Andrew Carnegie's philanthropy, public libraries greatly expanded from 1899 to 1917 and censorship issues followed. *Id.* at 54. Even as these debates brewed, librarians were urged to guarantee that "all people had access to all ideas." *Id.* at 156. As early as 1914, librarians already saw themselves as part of a community engaged in the cooperative pursuit of knowledge and the "free trade" of ideas. *Id.* In response to increased pressure to censor during World War I, librarians for the first time began resorting to the First Amendment to protect library collections. *Id.* At the 1934 conference of the American Library Association, Lyman Bryson urged librarians on professional grounds to exercise this clear public duty as part of their "responsibility as custodians of the public mind" and called libraries the "invention of modern democracy" which librarians had a duty to defend. *Id.* *See also* Laughlin, *supra* note 6, at 219-27 (reviewing the history of censorship in United States public libraries).

120. The American Library Association's "Library Bill of Rights" provides that "all libraries are forums for information and ideas" and that "libraries should challenge censorship in the fulfillment of their responsibility to provide information and enlightenment." *American Library Association Library Bill of Rights*, available at www.ala.org/work/freedom/lbr.html (last visited on Jan. 19, 2004). *See* Laughlin, *supra* note 6, at 227 (stating that as early as 1939, the American Library Association adopted the Library's Bill of Rights, which criticized the "growing intolerance, suppression of free speech, and censorship affecting the rights of minorities and individuals").

121. *Am. Library Ass'n*, 539 U.S. at 204-05. After describing the library's need to have broad

information and ideas,” if it is a “freewheeling place of inquiry,” and if, as the ALA proffers, “censorship should be challenged,” then the need for “broad discretion” in making “content-based decisions” is not central to achieving its mission, but rather a by-product of limited funding and shelf space; therefore the analogy fails.¹²²

Although the plurality states that forum analysis does not apply in this particular context, it then goes on to analyze and specifically reject the proposition that Internet access in the public library is a limited public forum.¹²³ In doing so, however, the plurality misframes the

discretion to further its mission, the plurality described “two analogous contexts” in which the Court held that “the government has broad discretion to make content-based judgments in deciding what private speech to make available to the public.” In pursuing its analogy, the plurality framed the situation in *Forbes* as one in which forum principles did not apply because of “the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligation.” *Id.* at 204 (quoting *Forbes*, 523 U.S. at 673). With regard to *Finley*, the plurality stated it declined to apply forum analysis because “any content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding” and because it would conflict with “NEA’s mandate . . . to make esthetic judgments, and the inherently content-based ‘excellence’ threshold for NEA support.” *Am. Library Ass’n*, 539 U.S. at 205 (quoting *Finley*, 524 U.S. at 585, 586). The plurality concluded that just as forum analysis and heightened scrutiny are incompatible in the *Forbes* and *Finley* cases, “they are also incompatible with the discretion that public libraries must have to fulfill their traditional missions.” *Id.* *But see* Laughlin, *supra* note 6, at 247 (“The [*Loudon*] court noted that unlike hard copy resources, restricting access to Internet publications neither saved money nor space. In fact, filtering increased library costs.”).

122. *See Am. Library Ass’n*, 539 U.S. at 235-37 (Souter, J., dissenting). *See also*, Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003) (opining that the U. S. Supreme Court decides cases as much on cultural judgments as on constitutional analysis). Post observes that the Court’s debate over whether a library would violate the First Amendment by installing filters:

[D]oes not turn on the text of the First Amendment, or on the intentions of the Framers . . . or even on the interpretation of legal materials. Instead, it turns on how the cultural practice of librarianship is to be understood, and also how the new technology of library filters should be regarded. Rehnquist and Souter seem to agree that if libraries are institutions that routinely exercise content-based discretion in deciding what material to make available to their patrons, CIPA does not violate the First Amendment. But if libraries follow a norm of providing material to patrons without exercising such discretion, at least in circumstances that are relevantly analogous to the installation of Internet filters, there is a strong argument that CIPA is unconstitutional. Resolving the constitutional inquiry depends upon how the Court characterizes the social meaning of libraries and Internet filters.

Id. at 79-80.

123. *Am. Library Ass’n*, 539 U.S. at 204-06. Public forum analysis was limited to the library’s provision of Internet access, rather than to the library as a whole, because the Court has held that the “relevant forum is defined not by the physical limits of the government property at issue, but rather by the specific access that the plaintiff seeks.” *Am. Library Ass’n v. United States*, 201 F. Supp. 2d 401, 455 (E.D. Penn. 2002), *rev’d*, 539 U.S. 194 (2003). *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985) (holding that where groups were seeking participation in the Combined Federal Campaign charity drive, the relevant forum was not the entire federal workplace,

argument by focusing on the Internet speakers' right to speak,¹²⁴ and ignoring the library patron's right to receive information.¹²⁵ The Supreme Court has, in a variety of contexts, referred to a First Amendment right to receive information and ideas.¹²⁶ Because a listener

but the charity drive itself); *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37 (1983) (defining the relevant forum as the school's mail system, not the public school as a whole, in deciding a union's right to accessing teachers mailboxes).

124. *Am. Library Ass'n*, 539 U.S. at 206-07. In distinguishing the facts from *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995), the Court stated a library provides Internet access "not to encourage a diversity of views from private speakers," not in order to "create a public forum for web publishers to express themselves," but for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality." *Id.* at 207. *But see Forbes*, 523 U.S. at 679-680 (observing that the government creates a designated public forum when it makes its property generally available to a certain class of speakers, but does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, "obtain permission").

125. Brief of Appellees American Library Association at 19, n.17, *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003) (No. 02-361) ("This case fundamentally involves the right of library patrons to receive information on the Internet. The First Amendment undoubtedly encompasses not only the right to speak but also the right to receive information."); *Am. Library Ass'n*, 201 F. Supp. 2d at 456 ("The right at issue in this case is the specific right of library patrons to access information on the Internet, and the specific right of Web publishers to provide library patrons with information via the Internet."). *See also Laughlin*, *supra* note 6 at 245 ("[I]f First Amendment protection applied only to the speaker and not to the recipient, it is doubtful that filtering would face any constitutional problems. Filtering does not prevent Web publishers from speaking, but only blocks the access of potential recipients."). Among all the varying opinions by the justices in the *American Library Association* decision, however, only Justice Breyer acknowledged a constitutional right to receive information; further, he concluded that the Act directly restricted that right. *Am. Library Ass'n*, 539 U.S. at 215-16 (Breyer, J., concurring).

126. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965) (observing that the right of freedom of speech includes the peripheral right to receive information); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (holding that it is well established that the Constitution protects the right to receive information and ideas); *Bd. of Ed. v. Pico*, 457 U.S. 853, 857-68 (1982) (plurality opinion) (stating that "[t]he right to receive ideas follows ineluctably from the senders First Amendment right to send them); *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (recognizing that the right to receive information applies to the Internet). *See generally*, Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505 (1974) (stating that although the right to receive information could be viewed as dependent on the exercise of another's right of speech, the Court has recognized it in situations in which the source of information has no right of expression). *See also TRIBE*, *supra* note 45, §§ 12-19, at 675-76:

A right to know at times means nothing more than a mirror of a right to speak, a listener's right that government not interfere with a willing speaker's liberty. But the right to know at times means more: it may include an individual's right to acquire desired information or ideas free of . . . undue hindrance. Such undue hindrance may entail deliberate interference with the acquisition of specified information; more commonly, it entails government action that is largely indifferent to individual information gathering but that nonetheless operates as a deterrent to its uninhibited pursuit. Such a right to know may entail no correlative right in any particular source to originate the communication.

Id.

has a right to receive information, and “a public forum can be created by government designation of a place or channel of communication for use by the public at large for assembly and speech,”¹²⁷ Internet access in a library may reasonably be considered a limited public forum for the purposes of receiving information.¹²⁸

If Internet access in a library is characterized as a limited public forum, any content-based restriction on speech (and its receipt) is subject to strict scrutiny.¹²⁹ Internet filtering as required by CIPA fails strict scrutiny: although it has as its root a compelling governmental

127. *Cornelius*, 473 U.S. at 801.

128. *See Am. Library Ass’n*, 201 F. Supp. 2d at 457 (holding that the purpose of a library in general and the provision of the Internet within the public library in particular, is for use “by the public for expressive activity, namely the dissemination and receipt by the public of a wide range of information” and therefore “when the government provides Internet access in a public library, it has created a designated public forum”); *see also* *Mainstream Loudon v. Bd. of Tr. of Loudon County Library*, 24 F. Supp. 2d 552, 563 (E.D. Va. 1998) (finding that the government intended to designate the local libraries as public fora for the limited purposes of the expressive activities they provide, including the receipt and communication of information through the Internet). According to *Cornelius*, public forum analysis would include looking at the nature of the property involved, the manner in which the government has made the forum generally available, and whether the property is consistent with expressive activities. *Cornelius*, 473 U.S. at 802-03. In the facts at hand, the nature of the property involved – the Internet – was described in *Reno*, 521 U.S. at 853, as a “vast library including millions of readily available publications” with expression “as diverse as human thought.” The government (in this case the library) made the forum available by “open[ing] its doors to the public at large.” *See American Library Association Library Bill of Rights*, *supra* note 120 (stating that the purpose of a library is to provide free access to the public). The property, whether viewed as the Internet or the library itself, is opened for the receipt of information. *Id.* Thus, based on the *Cornelius* test, Internet access in a public library would be deemed a limited public forum. *See Am. Library Ass’n*, 201 F. Supp. 2d at 456-57; *Mainstream Loudon*, 24 F. Supp. 2d at 563; Brief of Appellees American Library Association at 20, *United States v. American Library Association*, 539 U.S. 194 (2003) (No. 02-361). *But see* Bernard W. Bell, *Filth, Filtering and the First Amendment: Ruminations on Public Libraries’ Use of Internet Filtering Software*, 53 FED. COMM. L.J. 191, 217-227 (arguing that the Court should identify libraries as a “new type of forum,” rejecting conventional public forum analysis altogether in the library setting). Bell opines that “unlike designated public fora, where the government can set the substantive bounds of the debate, public libraries should be open to all intellectual inquiries. Because libraries are the archetypal fora for listeners, library patrons should have access to any speech protected by the First Amendment . . . such a presumption is consistent with the history of public libraries in this country.” *Id.* at 226.

129. *See, e.g., Ark. Ed. Television Comm’n v. Forbes*, 523 U.S. 666 (1998) (observing that designated public fora are created by purposeful governmental action). If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny. *Id.* To survive strict scrutiny, a restriction on speech must be narrowly tailored to promote a compelling Governmental interest; if a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative. *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000). *But see Buckley v. Valeo*, 424 U.S. 1 (1976) (holding that a legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny).

interest,¹³⁰ it is neither narrowly tailored¹³¹ nor the least restrictive means available.¹³² Even if filters did not over-block material, CIPA could not pass strict scrutiny because the filters restrict access to information on all computers to that which is acceptable for a child.¹³³ As a result of over-blocking and suppression of material adults are entitled to receive, CIPA fails constitutional muster by impermissibly restricting protected speech in a limited public forum.

130. See *Reno*, 521 U.S. 844,869-70 (1997) (holding that government has a compelling interest in protecting the physical and psychological well-being of minors which extends to shielding them from indecent messages that are not obscene by adult standards. . . .) (internal quotation marks omitted); *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (stating that it is evident beyond the need for elaboration a state's interest in safeguarding the physical and psychological well-being of a minor is compelling).

131. *Am. Library Ass'n*, 201 F. Supp. 2d at 475-80. Given the thousands of over-blocked pages and the lack of ability to tailor blocking to the legal definitions of obscenity or pornography, Internet filtering cannot succeed as being "narrowly tailored." *Id.*

132. See *Am. Library Ass'n*, 201 F. Supp. 2d at 480-84 (listing several alternatives to filtering, such as Internet use policies, recessed monitors, or a simple tap on the shoulder). See also S. REP. NO. 106-141 (1999) (requiring filtering or blocking technology to be turned on *only* while a computer is in use by a minor and allowing local communities to decide the nature and extent of filtering). Prior to CIPA's implementation Congress had considered an alternative bill, the Neighborhood Children's Internet Protection Act (NCIPA), geared specifically toward children and clearly less restrictive than CIPA. Neighborhood Children's Internet Protection Act, H.R. 4577, Amend. No. 3635, 106th Congress, 146 Cong. Rec. § 5823-07, Sec. 5842 (June 27, 2000). NCIPA in its original form would have given libraries two ways to qualify for library Internet subsidies: either implement a comprehensive plan to prevent children from accessing harmful material on the Internet, or purchase the filtering technology now required by CIPA. 146 Cong. Rec. § 5843. Libraries choosing the former method would have had full discretion to develop their own standards regarding what is appropriate for children; federal agencies could not review the decisions. *Id.* Although Congress eventually passed a version of NCIPA, 47 U.S.C. 254 (1), libraries receiving E-rate discounts must comply with both CIPA and NCIPA – they cannot choose between the Acts. See Brief of Appellees American Library Association at 4, nn.5&6, *United States v. American Library Association*, 539 U.S. 194 (2003) (No. 02-361) (internal quotations omitted).

133. See also *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002) (stating that the Government may not suppress lawful speech as a means to suppress unlawful speech); *Reno v. ACLU*, 521 U.S. 844, 875 (1997) (stating that the government's interest in protecting children "does not justify an unnecessarily broad suppression of speech addressed to adults. . . . [T]he Government may not 'reduce the adult population to only what is fit for children.'" (internal citations and quotation marks omitted). Although CIPA mandates different standards for adults and children (only children are restricted from accessing "material harmful to children"), because of the way filtering works in a library - from one main terminal - all computers will have the same level of filtering. 47 U.S.C. § 254(h)(6)(B)-(C); 20 U.S.C. § 9134(f)(1)(A). See also *supra* notes 62-69 and accompanying text, describing filtering technology. The American Library Association noted in their brief that "although both history and the name of the Act focus on children, the restrictions are clearly applicable to adults. The Senate report dismissed the acknowledged First Amendment concerns over filtering by focusing on the fact that the bill, at the time, required filtering 'only while the computer is in use by a minor.'" Brief of Appellees American Library Association at 3, *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003) (No. 02-361) (citing S. REP. NO. 106-141 at 1, 7).

B. CIPA's Conditional Subsidy Exceeds Congress's Spending Power

The plurality opined that the core of Spending Clause analysis rests in whether the condition imposed would be unconstitutional if the libraries imposed it unilaterally; if so, CIPA would violate the “independent constitutional bar” prong of the *Dole* test.¹³⁴ Therefore, because CIPA is unconstitutional based on the forum analysis undertaken in part A above, CIPA also fails the *Dole* test of compliance with the Spending Clause. Congress’s conditional spending under CIPA could fail of its own volition, however, based on a separate analysis under the *Dole* holding.¹³⁵ In addition to the four-part test set out above, the *Dole* court acknowledged a further limit established by its previous holdings: a financial inducement offered by Congress cannot be so coercive as to pass the point at which “pressure turns into compulsion.”¹³⁶ Thus, if a library has no realistic choice except “filtered access” or “no access,” Congress has exceeded its spending authority.¹³⁷

134. *Am. Library Ass’n*, 539 U.S. at 203-04. The Court considered the fourth prong of the *Dole* test, establishing that “Congress may not induce the recipient [of federal funds] to engage in activities that would themselves be unconstitutional.” *Id.* Thus, the Court opined that if the First Amendment permits a library to install filters itself, Congress’s conditional spending would be upheld. *Id.*

135. *See supra* note 44 (setting out the four part test relevant to Congress’s conditional spending). *See also* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 687 (1999) (acknowledging that the “intuitive difference between” a “denial of a gift or gratuity” and a “sanction” disappears when the gift that is threatened to be withheld is substantial enough).

136. *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (holding that a condition on five percent of the federal funds otherwise obtainable did not amount to coercion, but an incentive). *Compare* Va. Dep’t of Educ. v. Riley, 106 F.3d 559 (4th Cir. 1997) (en banc) (striking down a statute based on ambiguity, but stating in dicta that the withholding of the entirety of a state’s sixty million dollar federal education grant due to a failure to meet a condition affecting 126 students is “considerably more pernicious than the relatively mild encouragement at issue in *Dole*” and “begins to resemble impermissible coercion if not forbidden regulation in the guise of a Spending Clause condition”).

137. *See Dole*, 483 U.S. at 211. *But see* Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine and How a Too-Clever Congress Could Provoke It To Do So*, 78 IND. L.J. 459, 466-67 (2002) (stating that during the last fifteen years the lower courts have for the most part read the “coercion” provision of the *Dole* test to be “toothless” and for the most part non-justiciable because of the difficulty in drawing a line between “financial inducement” and “coercion”). Baker and Berman further elaborate that “the lower courts have consistently failed to find impermissible coercion. . . [and] have increasingly questioned whether there is any viability left in the coercion theory.” *Id.* at 468; Lynn A. Baker, *Conditional Federal Spending and States Rights*, 574 ANNALS AM. ACAD. POL. SOC. SCI. 104 (offering a substitute for the *Dole* test with one that would “better safeguard state autonomy” and noting that since only three members of the *Dole* majority are still sitting. . . the possibility of change is real”). *See, e.g.*, *Kansas v. United States*, 214 F.3d 1196, 1202 (10th Cir. 2000) (holding that even the loss of \$130 million in grants is not coercive and observing that the Court has never employed the coercion theory to invalidate a funding condition); *Nevada v. Skinner*, 884 F.2d 445, 448 (9th Cir. 1989) (observing that the coercion theory has been “much discussed but infrequently applied in

Substantial government funds are allocated to finance the Internet in libraries.¹³⁸ A low-income community library receiving 90% of its Internet funding from the government most likely cannot provide Internet access without the subsidy.¹³⁹ Whether a subsidy is determined to be coercive, however, can depend on whether the Court looks at the amount at issue as a fraction of a total state budget, or as a fraction of each library's budget.¹⁴⁰ If the relevant budget is the library's, CIPA gives libraries receiving a significant amount of federal technology funding the choice between "filtered access" or "no access" in violation of the Spending Clause.¹⁴¹

federal case law, and never in favor of the challenging party"); *Oklahoma v. Schweiker*, 655 F.2d 401, 414 (D.C. Cir. 1981) (finding no coercion in the state's threatened loss of its entire Medicaid funding, opining that "the courts are not suited to evaluating whether the states are faced here with an offer they cannot refuse or merely with a hard choice," and "follow[ing] the lead of other courts that have explicitly declined to enter this thicket when similar funding conditions have been at issue").

138. E-rate discounts amounted to \$58.5 million in the year ending June 2002 according to the Justice Department; LSTA grants totaled more than \$149 million in fiscal year 2002. Charles Lane, *Ruling Backs Porn Filters in Libraries*, WASHINGTON POST, June 24, 2003, at A01.

139. E-rate and LSTA were implemented to allow "low-income communities" and "families with incomes below the "poverty line" to gain Internet access at libraries and schools. 47 U.S.C. § 254 (h)(1); 20 U.S.C. § 9121. Discounts on services for eligible libraries are set as a percentage of the pre-discount price, and range from 20 percent to 90 percent, depending on a library's level of economic disadvantage and its location in an urban or rural area. *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401, 412 (E.D. Penn. 2002), *rev'd*, 539 U.S. 194 (2003). Currently, a library's level of economic disadvantage is based on the percentage of students eligible for the national school lunch program in the school district in which the library is located. *Id.* For example, in the Nioga Library system in New York, the loss of E-rate would result in an increase in the cost of phone access lines for Internet hookups from \$7,500 to \$15,000 – over a 40 percent increase. Charity Vogel, *Internet Ruling puts Libraries in the Hot Seat*, BUFFALO NEWS, June 24, 2003, at B1. Even the loss of a relatively small portion of their budget makes a library think twice about refusing the filters because, as one librarian put it "with our funding situation . . . we count every penny twice and every dollar three times." *Id.* Refusing to implement filters would result in a loss in the range of a few thousand dollars in small communities to \$1 million in the Milwaukee, Wisconsin system; critics note that the court's ruling will hit hardest in communities that can ill-afford to turn down federal funding. Scott Williams & Katharine Goodloe, *Library Internet filters upheld; but Administrators in State Call it Censorship*, MILWAUKEE JOURNAL SENTINEL, June 24, 2003, at 01A. San Francisco libraries, by contrast, get only about \$150,000 from the federal government annually, out of a \$53 million overall budget. *Web Porn Filters Go To High Court: Case to Decide Whether Use in Libraries Violates Freedom of Speech*, SAN FRANCISCO CHRONICLE, March 5, 2003, at A5.

140. See *Kansas*, 214 F.3d at 1202; *Nevada*, 884 F.2d at 448; *Schweiker*, 655 F.2d at 414.

141. See *Dole*, 483 U.S. at 210. But see S. REP. NO. 105-1619 (opining that because universal service assistance only provides a discount, ineligibility to receive that discount does not rise to the level of impermissible coercion).

C. CIPA Violates the Doctrine of Unconstitutional Conditions

Even if CIPA managed to make it through the above public forum and Spending Clause analyses, it violates the unconstitutional conditions doctrine.¹⁴² The plurality held that, assuming the library, as a public entity, had constitutional rights,¹⁴³ the claim would fail because CIPA is simply a limit on spending and nothing more.¹⁴⁴ However, because

142. See *supra* note 45 (explaining the unconstitutional conditions doctrine). The doctrine of unconstitutional conditions is difficult to apply because, “despite wide acknowledgement of the doctrine’s importance in modern constitutional law, attempts to explain how it arises or what it does have been largely unsuccessful.” Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185, 1186 (1990). Baker further notes that “the Court has yet to arrive, explicitly or implicitly, at a clear limiting principle for deciding challenges to conditions on government benefits.” *Id.* at 1195. Important to the analysis is the baseline chosen to determine the unconstitutionality of the condition. Comparing “no benefit” with “benefit with a condition” makes the condition virtually always permissible; comparing “benefit without a condition” with “benefit with a condition” makes the condition virtually always fail. *Id.* at 1192. See also Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1419 (observing that the doctrine serves a limited but crucial role because it identifies a characteristic technique by which government appears not to, but does burden constitutionally preferred liberties, triggering a demand for especially strong justification). In its application, the Court blurs what Sullivan sees as three distinct approaches to determining the constitutionality of a conditioned benefit: the coercive nature of the condition, the defect in the legislative process which created it, and the inalienability of constitutional rights. *Id.* at 1419-21.

143. Justice Rehnquist did not definitively state whether a library, as a public entity, had First Amendment rights because that issue remains unanswered. *United States v. Am. Library Ass’n*, 539 U.S. 194, 211 (2003). In asserting that government entities do not have constitutional rights, the government relied on a concurrence in *Colum. Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 139 (1973) (opining that [t]he First Amendment protects the press *from* governmental interference; it confers no analogous right *on* the government). However, based on its analysis, the district court opined in dicta 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.” *Am. Library Ass’n*, 201 F. Supp. 2d at 490.

144. *Am. Library Ass’n*, 539 U.S. at 212. The Court stated that the claim would fail on its merits because “[w]ithin broad limits, when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.” *Id.* The plurality continued that the government is not “denying a benefit to anyone but instead simply insisting that public funds be spent for the purposes for which they were authorized.” *Id.* (internal quotations omitted). The Court thus analogized the situation to that in *Rust*, in which the government funded speech in a family planning clinic, but prohibited discussion of abortion as part of the federally-funded program. *Rust v. Sullivan*, 500 U.S. 173 (1991). However, the Court in that case clearly defined the parameters of an unconstitutional condition, stating that a condition is unconstitutional where “the government has placed a condition on the recipient of the subsidy, rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in protected conduct outside the scope of the federally funded program.” *Id.* at 174. The *Rust* Court held in essence that where the government seeks to leverage its grant-making power by imposing restrictions beyond the grant’s scope, the unconstitutional conditions doctrine is triggered; as long as the government limits its restriction to activities engaged in with the aid of the governmental grant, it has not imposed an unconstitutional condition. David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government Funded Speech*, 67 N.Y.U. L. REV. 675 (1992).

CIPA conditions funding on installing filters on every single computer,¹⁴⁵ even those wholly funded with state and local dollars, the Act reaches beyond its funding limits.¹⁴⁶ In addition, although the government partially funds the installation of filters through LSTA subsidies, CIPA requires local libraries to pay the balance, further burdening local funds.¹⁴⁷ The plurality states that CIPA “does not penalize libraries that choose not to install software . . . [t]o the extent that libraries choose to offer unfiltered access, they are free to do so without federal assistance.”¹⁴⁸ The plurality fails to mention that,

145. 20 U.S.C. § 9134(f)(1)(A), (B) and 47 U.S.C. § 254 (h)(6)(B), (C). Under CIPA, a public library receiving E-rate or LSTA funding must certify that blocking software operates on “any of its computers with Internet access” during “any use of such computers.” *Id.* (emphasis added). Solicitor General Theodore Olson, in oral argument before the Supreme Court, acknowledged that a library receiving federal money could not designate one of 10 computer terminals in a branch as an unsubsidized unfiltered computer; a library system that wanted to offer unimpeded access could, however, establish a separate operation that would not accept federal money. Linda Greenhouse, *The Supreme Court: Internet Filters. Sides Debate Web Access in Libraries*, N. Y. TIMES, March 6, 2003, at A1.

146. In his dissent, Justice Stevens, noting that CIPA’s reach, asserted that “respondents are not merely challenging a ‘refusal to fund protected activity, without more . . . they are challenging a restriction that applies to property that they acquired without federal assistance.’” *Am. Library Ass’n*, 539 U.S. at 231 n.7 (Stevens, J., dissenting). See *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983) (upholding tax exempt status for organizations that did not use tax deductible contributions for lobbying activity). In upholding the deduction, the Court noted that a single organization may have a non-lobbying section eligible for deductible contributions and simultaneously operate a lobbying affiliate which would not be able to receive tax deductible contributions. *Regan*, 461 U.S. at 549. See also *Fed. Comm. Comm’n. v. League of Women Voters of Cal.*, 468 U.S. 364 (1984) (striking down a condition that public television stations receiving federal funds not editorialize with any of their funds, whether federal or not). In its analysis, the Court held that while Congress could require stations to segregate their funds and use only non-federal funds for activities Congress did not wish to subsidize; it could not withdraw all public funding from a station that engaged in editorializing. *Id.* at 400. In its brief, ALA asserts that “as in *League of Women Voters*, this [restriction even on non-federally funded computers] creates an unconstitutional funding scheme because a recipient that receives only 1% of its overall funding from federal grants is barred absolutely from all provision of unfiltered Internet access.” Brief of Appellees American Library Association at 43, *United States v. Am. Library Ass’n*, 539 U.S. 194 (2003) (No. 02-361) (internal quotations omitted).

147. S. REP. NO. 106-141, at 11. Under the needs-based matrix, universal service assistance will provide up to a 90 percent discount on the purchase price of these filtering systems. *Id.* The remainder will be incurred by the schools and libraries, and the cost *per computer* is likely to be relatively small. *Id.* (emphasis added). Library officials for the Buffalo & Erie County Public Library stated that in 2000 they were given an estimate by SurfControl for filtering software: the software alone cost \$10,000, annual updates were estimated at \$2,600 per year, and a new server and switch necessary to run the filtering system was estimated at \$10,000; the officials noted that this estimate did not include related costs for installation, support, and staff training. Charity Vogel, *Filtering the Web: Now that the Supreme Court Has Spoken, the Buffalo & Erie County Public Library Must Wrestle with the Task of Blocking Children’s Access to Internet Pornography*, BUFFALO NEWS, June 30, 2003, at B1.

148. *Am. Library Ass’n*, 539 U.S. at 212. The plurality goes on to say that “the legislature’s

contrary to the spirit of its previous holdings in *Rust*, *Regan* and *League of Women Voters*, the library is not free to provide unfiltered access even on computers purchased with state and local dollars as long as the library is taking one penny of federal funds.¹⁴⁹ In addition, Supreme Court precedent indicates that the *Rust* holding applies only in situations where government speech is subsidized, not where funding is intended to provide access to a variety of private speech.¹⁵⁰ Thus, because CIPA reaches beyond its funding provisions and its restriction on funding of private speech is impermissible, the Act fails the unconstitutional conditions standard.

D. Infringement Upon the States' Tenth Amendment Rights

Congress cannot invade a state's autonomy and impose regulation without a constitutional basis for its power.¹⁵¹ Through its broad application of the Spending Clause, Congress circumvents the Tenth Amendment's restriction of federal power.¹⁵² If Congressional spending

decision not to subsidize the exercise of a fundamental right does not infringe the right." *Id.* (quoting *Regan*, 461 U.S. at 549). *But see* the dissent by Justice Stevens, stating that "an 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." *Am. Library Ass'n*, 539 U.S. at 227 (Stevens, J., dissenting).

149. 20 U.S.C. § 9134(f)(1)(A), (B) and 47 U.S.C. § 254 (h)(6)(B), (C).

150. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833-34 (1995). When the government appropriates funds to promote a particular policy of its own, it is entitled to say what it wishes. *Id.* When the government disburses funds to a private entity to convey a governmental message, it may take appropriate steps to ensure the message is not garbled or distorted. *Id.* But, where the government does not itself speak or subsidize transmittal of a message it favors, but instead expends funds to encourage a diversity of views from private speakers, viewpoint-based restrictions are not proper. *Id.* *See also Am. Library Ass'n*, 539 U.S. at 228 (Stevens, J., dissenting) (noting that *Rust* only applies when the government seeks to communicate a specific message, but not in this situation where the subsidies are designed to provide access to a "vast amount and wide variety of public speech").

151. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. AMEND. X. *See, e.g., New York v. United States*, 505 U.S. 144 (1992) (holding that the take title provision of the Low-Level Radioactive Waste Policy Act of 1985 exceeded Congress's enumerated powers and violated the Tenth Amendment). In *New York v. U.S.*, the Court explained that if a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress. *Id.* at 156. *See also Printz v. United States*, 521 U.S. 898 (1997) (holding that a provision of the Brady Handgun Act which required state law enforcement officers to conduct background checks on handgun purchasers unconstitutionally required state officers to execute federal law).

152. *South Dakota v. Dole*, 483 U.S. 203, 210 (1987) (holding that the "Tenth Amendment limitation on congressional regulation of state affairs does not concomitantly limit the range of conditions legitimately placed on federal grants," and also observing that "objectives not thought to

power as applied to the states is invalidly exerted, however, the legislation also fails Tenth Amendment scrutiny because Congress is then regulating the states without constitutionally valid authority for doing so.¹⁵³

As discussed previously, CIPA violates the Spending Clause because installation of filters that block constitutionally protected speech infringes upon library patrons' constitutionally protected right to receive information in a limited public forum.¹⁵⁴ Thus, CIPA conditions receipt of federal funds on a state's violation of its patrons' constitutional rights; in doing so it violates *Dole's* holding that Congress may not condition receipt of federal funds on a state's violation of the Constitution.¹⁵⁵ Additionally, an argument can be made that the coercive nature of CIPA invalidates Congress's use of its spending power in this instance.¹⁵⁶ Because Congress's authority to enact CIPA through the Spending Clause is invalid, and other constitutional authority for such state regulation is non-existent, CIPA violates the Tenth Amendment.¹⁵⁷

Furthermore, the conditional spending at issue in CIPA creates a collision of the unconstitutional conditions doctrine, Congress's spending power and the Tenth Amendment.¹⁵⁸ Simply put, the

be within Article I's enumerated legislative fields . . . may nevertheless be attained through use of the spending power and the conditional grant of federal funds"). *See also* Baker *supra* note 137 at 104 (observing that "[p]revailing spending clause doctrine, however, permits Congress to use conditional offers of federal funds in order to circumvent any restrictions the Constitution might be found to impose on its authority to regulate the states directly").

153. *See, e.g.,* Baker, *supra* note 137, at 105 (opining that "the states will be at the mercy of Congress so long as Congress is free to make conditional offers of funds to the states that, if accepted, regulate the states in ways that Congress could not directly mandate"); Sullivan, *supra* note 142, at 1417 (observing that although the Court has held that the federal government may not use its spending power to pressure states into yielding constitutionally protected autonomy, the Court has nevertheless rejected every federalism-based challenge to conditions on federal subsidies since the New Deal).

154. *See supra* note 43 discussing public forum doctrine.

155. *Dole*, 483 U.S. at 208 (recognizing that other constitutional provisions may provide an independent bar to the grant of federal funds, but the Tenth Amendment alone is not a bar).

156. *See supra* notes 135-141 and accompanying text (discussing impermissible coercion).

157. *See supra* note 151 for a discussion of the Tenth Amendment restriction providing that Congress may not exercise powers not enumerated in the Constitution; rather these are reserved to the states.

158. *See Baker & Berman, supra* note 137, at 484. The authors state that: conditional spending is just another example of this phenomenon (after listing other unconstitutional condition situations) for it involves the federal government's conditioning the benefit of federal funds on an offeree state's waiver of one of its sovereign prerogatives. . . . [Yet] *Dole* proceeds as though the Court's own resolution of other constitutional conditions cases has absolutely no bearing on the conditional spending problem.

Id.

unconstitutional conditions problem arises whenever government conditions a benefit on the offeree's waiver of a constitutional right.¹⁵⁹ CIPA forces any library receiving funding to install filters on all library computers – even those purchased with state and local dollars; thus, the conditional spending reaches beyond its boundaries in violation of the unconstitutional conditions doctrine.¹⁶⁰ Rather than simply “restricting the use of its funds,” it also restricts the library's use of state and local funds.¹⁶¹ Such overreaching also violates the Tenth Amendment because the state must waive its sovereign right to control state and local dollars in exchange for receipt of federal funding.¹⁶²

The plurality, however, ignored any federalism concerns.¹⁶³ Ironically, Chief Justice Rehnquist, who authored the opinion, has previously been described as an advocate of states' rights.¹⁶⁴ Justice Kennedy (who concurred that CIPA was constitutional based on its disabling provisions) has publicly remarked that “conditional federal spending . . . is the major states' rights issue facing the country

159. Baker & Berman, *supra* note 137, at 484. *See also supra* notes 142-150 and accompanying text (discussing the unconstitutional conditions doctrine in more detail).

160. *See supra* notes 45, 142-150 and accompanying text (discussing unconstitutional conditions).

161. *See supra* notes 144-146 and accompanying text. Potential threats to state autonomy occur when the federal government attempts to increase its own power at the expense of the states. Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951, 955 (2001). “Such aggrandizement may occur, for example, when the federal government takes over regulatory functions traditionally exercised by the states [or] preempts sources of state revenue.” *Id.*

162. *See supra* notes 144-148 and accompanying text. In *College Savings Bank*, the Court held constructive waivers of sovereign immunity to be inherently coercive, saying “the point of coercion is automatically passed – and the voluntariness of the waiver destroyed – when what is attached to the refusal to waive [sovereign immunity] is the exclusion of the state from otherwise lawful activity.” *Coll. Sav. Bank*, 527 U.S. 666, 687 (1999). But see early cases setting the tone of current Spending Clause doctrine, such as *Massachusetts v. Mellon*, 262 U.S. 447, 482 (1923) (deciding that the powers of the state are not invaded, since the funding offer imposes no obligations but simply extends an option which the state is free to accept or reject); *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127, 143-44 (1947) (finding no violation of the State's sovereignty because the state has the choice not to yield to what it calls “federal coercion”).

163. *See* Paul M. Smith & Daniel Mach, *Major Shifts in First Amendment Doctrine Narrowly Averted*, 21 FALL COMM. LAW. 1, 31 (2003). The plurality showed no awareness of the federalism concerns caused by giving the federal government unlimited ability to control local government through funding restrictions. *Id.* Through CIPA, Congress attempts to micromanage the internal operations of a library (an agency of the local government), imposing a one-size-fits-all Internet use policy regardless of any local factors. *Id.*

164. *See* Baker & Berman, *supra* note 137, at 460 (generally describing the Rehnquist Court's federalism revival advancing a “single core purpose: the reduction of national power . . . and the concomitant increase of state power”). The author describes Chief Justice Rehnquist as one of the “States' Rights Five” along with Justices O'Connor, Scalia, Kennedy and Thomas. *Id.* at 460-61.

today.”¹⁶⁵ The Court’s decisions allowing Congress’s spending power to go virtually unchecked have permitted invalid circumvention of the Tenth Amendment’s restrictions on regulating the states.¹⁶⁶ Respecting states’ autonomy is important not only as a constitutional matter, but also for our democratic society’s general need to respect the diversity of its citizens.¹⁶⁷ A state’s freedom from federal interference, like an individual’s freedom from governmental restrictions, is a freedom to make choices, not just a freedom to choose wisely.¹⁶⁸ The Court, in upholding CIPA, imposed its “wisdom” upon the states without any valid power to do so.

165. Baker, *Conditional Federal Spending*, *supra* note 137, at 115. Additionally, Justice Kennedy, joined by Chief Justice Rehnquist and Justices Scalia and Thomas recently observed: Under *Dole*, Congress can use its spending power to pursue objectives outside of Article I’s enumerated legislative fields by attaching conditions to the grant of federal funds . . . the Spending Clause power, if wielded without concern for the federal balance, has the power to obliterate distinctions between national and local spheres of interest and power by permitting the federal government to set policy in the most sensitive areas of state concern, areas which otherwise would lie outside its reach.

Baker & Berman, *supra* note 137, at 510 (quoting *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 654-55 (1999) (Kennedy, J., dissenting)).

166. Baker, *Conditional Federal Spending*, *supra* note 137. According to Professor Baker, “the greatest threat to state autonomy is, and has long been, Congress’s spending power.” *Id.* at 105. She notes that Justice O’Connor sounded a similar concern in her dissent in *Dole*:

If the spending power is to be limited only by Congress’ notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives ‘power to the Congress to tear down the barriers, to invade the states’ jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.’ This, of course, was not the Framers’ plan and it is not the meaning of the Spending Clause.

Dole, 483 U.S. at 217 (O’Connor, J., dissenting).

167. See generally Baker & Berman, *supra* note 137, at 471. In the absence of a nationwide consensus, permitting state-by-state variation will almost always satisfy more people than would the imposition of a uniform national policy, and will almost always therefore increase aggregate social welfare. *Id.* Because *Dole*’s interpretation of the spending power is so generous, Congress’s authority to drive states toward a single nationwide policy is greatly enhanced, regardless of the preferences of citizens in some states to have a different policy. *Id.* at 472. Further, because through the spending power Congress need only respond to the preferences of a majority of the states, its actions may well be at odds with the preferences of a dissenting minority of states; yet the will of the majority is imposed. *Id.* at 472, 476. But see Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 U.C.L.A. L. REV. 903, 935 (1994) (opining that “the United States is a single, functioning nation, and that it generally defines good policy through a national decision-making process”).

168. Baker & Berman, *supra* note 137, at 479. Federalism, including judicially enforced limits on Congress’s power, seeks to create a space within which a political community can make choices about how to govern itself without interference from the national government. *Id.* at 480.

E. Libraries Cannot Literally Comply with CIPA's Provisions

CIPA requires a library to install a technology device to block access to “visual depictions” that are “obscene, child pornography or harmful to minors.”¹⁶⁹ With current technology, libraries cannot possibly comply with these requirements because no currently available filter is capable of screening for “visual depictions.”¹⁷⁰ Therefore, any attempt to comply with CIPA will necessarily fail.¹⁷¹ The most commonly used Internet filters use word lists to screen for words or phrases that suggest a website contains material that is “obscene, child pornography or harmful to minors.”¹⁷² This situation presents another barrier to compliance: under modern Supreme Court jurisprudence, concepts such as “obscenity” and “material harmful to children,” even if statutorily defined, must be interpreted based on local community standards.¹⁷³ Computer software developers alone create the parameters of their filtering lists; libraries and other users have no input into what is filtered and do not know what websites are blocked.¹⁷⁴ Although a

169. 47 U.S.C. §254(h)(6)(B)(i)-(ii) (regarding E-rate); 20 U.S.C. §9134(f)(1)(A)(i)-(ii) (regarding LSTA).

170. Peltz, *supra* note 62 at 406. *See also* Am. Library Ass’n v. United States, 201 F. Supp. 2d 401, 431 (E.D. Penn. 2002) (discussing the inability of filters to screen visual depictions), *rev’d*, 539 U.S. 194 (2003).

171. Even the U.S. Attorney General admitted that blocking programs inescapably fail to block objectionable speech because they are unable to screen for images. Brief of Appellant United States at 40-41, *Reno v. ACLU*, 521 U.S. 844 (1997) (No. 96-511).

172. *See supra* notes 62-69 and accompanying text discussing how Internet filtering works.

173. For purposes of federal obscenity prosecutions, the applicable “community” whose standards are to be examined are those of any district in which such offense was begun, continued, or completed. MADELINE SCHACHTER, *LAW OF INTERNET SPEECH* 215 (2002) (citing 18 U.S.C. § 3237). *See, e.g., Miller v. California*, 413 U.S. 15 (1973) (holding that obscenity is to be determined by “contemporary community standards,” not “national standards”); *Ashcroft v. ACLU*, 535 U.S. 564, 583 (2002) (stating that the “Court’s community standards” jurisprudence applies to the Internet). In addition, the *Ashcroft* Court stated that the same “community standard” rule applies to statutory definitions of “harmful to minors.” *Id.* at 583. Further, the Court observed that “although nowhere mentioned in the relevant statutory text, this Court has held that the *Miller* test defines regulated speech for purposes of federal obscenity statutes. . . .” *Ashcroft*, at 786 & n.11. *See also Laughlin, supra* note 6, at 279 (opining that local decision makers should decide if minors’ Internet access requires filters; they are the best persons to judge local community standards for what is obscene, as required by the *Miller* test); Horowitz, *supra* note 65, at 427 (observing that “a finding of obscenity is a legal conclusion that can be made by a fact finder only after applying the test set forth in *Miller*,” and the same standard applies to the Internet as to any other vehicle for expression); Alexander, *supra* note 19, at 1006-10 (discussing that obscenity cannot be regulated “top-down” because no uniform national standards exist to judge obscenity). *But see* William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197, 204 (1995) (asserting that cyberspace erodes the rationale for applying local community standards as the definitive touchstone for whether materials are, in fact, obscene).

174. *Am. Library Ass’n*, 201 F. Supp. 2d at 430. The district court states that no one but the

particular site might be able to be unblocked, a library cannot adjust the filter to their local community standard and certainly cannot assume that the software developers are guided by statutory definitions rather than their own discretion.¹⁷⁵ Thus, even libraries using filters cannot literally comply with the filtering requirements of CIPA.¹⁷⁶

F. Future Problems: Legal Precedent & Public Impact

Because no single opinion spoke for a majority of the Court, the analysis in *United States v. American Library Association* has virtually no precedential value.¹⁷⁷ Had the plurality gained one more vote, the case would have signaled a shift in free speech jurisprudence.¹⁷⁸

filtering companies has access to the complete list of URLs in any category. *Id.* The URLs or IP addresses of Web pages on the filtering software's category lists are considered proprietary information and are unavailable for review by customers. *Id.* See also testimony of Marvin Johnson, attorney for the ACLU:

The terms "obscenity," "child pornography" and "harmful to minors" as used in CIPA are legal terms. None of the current vendors of blocking technology claim to block categories that meet these legal definitions, nor do they employ attorneys or judges to make those determinations. Leaving decisions of what constitutes obscenity, child pornography and material harmful to minors up to legally untrained persons leads to more information being blocked than is legally permissible.

Hearing before the Subcommittee on Telecomm. and the Internet of the Comm. on Energy and Commerce, 107th Cong. 1 (2001) (testimony of Marvin J. Johnson, Legislative counsel for ACLU), available at www.access.gpo.gov/congress/house.

175. The district court stated that based on the information presented to the court, no category definition used by filtering software companies is identical to CIPA's definitions of visual depictions that are obscene, child pornography or harmful to minors. *Am. Library Ass'n*, 201 F. Supp. 2d at 429. The court further noted that category definitions and categorization decisions are made without reference to local community standards. *Id.* See also Horowitz, *supra* note 65, at 431 (opining that it is unlikely that Internet filtering companies have the resources or technology to become sufficiently familiar with the community standards applicable in every library that uses their product, and it is doubtful that any nationally distributed filtering software would be created with any particular community in mind).

176. The situation complicates a library's legal situation because as at least one court observed "a defendant cannot avoid its constitutional obligation by contracting out its decision-making to a private entity." See *Mainstream Loudon v. Bd. of Tr. of Loudon County Library*, 24 F. Supp. 2d 552, 569 (E.D. Va. 1998).

177. See *supra* note 83 (discussing the lack of legally binding effect of plurality opinions); Smith & Mach, *supra* note 163, at 29 (stating that the reasoning of the concurrences virtually nullified the precedential value of the plurality opinion); Borkowski, *supra* note 49, at 17 (observing that all of the justices - plurality, concurrence & dissent - seemed to come to some key points of consensus: they all agreed that restricting children's access to pornographic material did not pose a constitutional problem and all acknowledged that current Internet filters inevitably blocked non-pornographic material; neither of these issues, however, were in dispute).

178. See Smith & Mach, *supra* note 163, at 1. The plurality opinion, offering a sweeping rejection of the plaintiffs' First Amendment claims, with language and reasoning that would limit both the public forum doctrine and the doctrine of unconstitutional conditions, illustrates the precarious nature of those two fundamental free speech doctrines. *Id.* According to the authors, the

Although the plurality and concurrences disagreed on the reasoning, they agreed CIPA is constitutional on its face.¹⁷⁹ Thus, libraries must install filters.¹⁸⁰ Because the justices essentially re-wrote CIPA's disabling provisions,¹⁸¹ local application of such will vary,¹⁸² opening the door to the "as-applied" challenges foreseen by Justice Kennedy.¹⁸³ When facing such challenges to the disabling provisions

plurality's analysis of public forum doctrine would give the government nearly unbounded discretion to define the nature of its forum; any speech restriction would be permissible once the government defined the forum in a way that encompassed the restriction. *Id.* at 29. Such a circular approach would virtually eliminate the designated public forum category altogether as streets and parks (traditional public fora) become less important as compared to "virtual" forms of communication. *Id.* Interestingly, Justice Stevens, in his dissenting opinion, expressed sympathy with the plurality's public forum approach and might become the needed fifth vote in establishing future precedent. *Id.* Regarding the unconstitutional conditions doctrine, the authors note a similarly circular approach by the plurality. *Id.* at 31. With its heavy reliance on *Rust*, the plurality basically stated that a funding restriction is permissible if the restriction is consistent with its own parameters. *Id.* Acceptance of this rationale by the Court would leave the doctrine practically toothless. *Id.* The Court recently warned that if Congress can "recast a condition on funding as a mere definition of its program in every case," the First Amendment will be "reduced to a simple semantic exercise." *Id.*

179. *United States v. Am. Library Ass'n*, 539 U.S. 194, 214 (2003).

180. *Status of CIPA Filtering Rules for Libraries Following Supreme Court Decision*, Fed. Communications Comm'n Pub. Notice, 18 F.C.C.R. 12865 (June 30, 2003). CIPA finally became effective on July 18, 2003, more than two years after it was passed. *Id.* Although the Court's decision was issued June 23, 2003, under the Supreme Court's rules, its decisions do not become effective until the Court sends a certified copy of its judgment to the district court; the Court does not send the certified copy until 25 days after the entry of judgment. *Id.*

181. CIPA's language allows disabling only for "bona fide research or other lawful purposes" but provides no standards or procedures for those decisions. *See* 20 U.S.C § 9134(f)(3). Based on the testimony of Theodore Olson, the Court concluded that filters can be disabled simply upon adult request without explanation. *Am. Library Ass'n* 539 U.S. at 209. As stated by Justice Kennedy in his concurrence in the judgment, "there is little to this case" if a librarian can unblock a filter "without significant delay." *Id.* at 214 (Kennedy, J., concurring in the judgment). The Director of the American Library Association's Office for Intellectual Freedom commented, "Justices Kennedy and Breyer joined the judgment because they believe adult patrons need only ask the librarian to 'please disable the filter' . . . in light of this we expect libraries that decide they must accept filters to inform their patrons how easily the filters can be turned off." Jan Crawford, *Justices Back Porn Filters at Libraries* CHICAGO TRIBUNE, June 24, 2003, at 1.

182. Although the Court's interpretation of CIPA requires local libraries to turn off the filters on request, according to Carla Hayden, new President of the American Library Association, "it's not that easy to disable a filter." Ryan Davis and Jamie Stiehm, *Libraries Criticize Ruling on Net Pornography Filters*, BALTIMORE SUN, June 25, 2003, at 1A. In Columbus, Ohio, for example, an individual librarian cannot disable a filter—administrators must instead contact the blocking company and arrange for them to make the filtered sites available; once unblocked, any library user can see them. Philip Ewing, *U.S. Supreme Court Porn Filters; it's Business as Usual for Area Libraries*, COLUMBUS DISPATCH, June 24, 2003, at 01A. Librarians in Grandview Heights, Ohio, by contrast, can turn off the filter to let patrons see requested sites, but must do so every time someone asks. *Id.*

183. The discrepancy between the language of CIPA, allowing a librarian discretion as to whether to unblock a filter, and the plurality's view of "on-demand" disabling results in uncertainty

(which alone saved CIPA in at least one justice's view), the federal district courts lack firm precedent for alternative analysis of CIPA's constitutionality and could hand down inconsistent decisions.¹⁸⁴ Disagreement among circuits could result in the Supreme Court having to re-analyze CIPA's constitutionality – thus giving the justices one more chance to alter well-established First Amendment doctrines.¹⁸⁵

Not surprisingly, the general public had varying reactions to the court's holding. Many applauded it as a victory for children and families,¹⁸⁶ while others decried it as further government interference with a citizen's right to access information.¹⁸⁷ Some librarians commented that the ruling would have the effect of making parents feel safe to send their children to the library, but perhaps unjustifiably so – imperfect filters are no substitute for educating children about safe choices.¹⁸⁸ Various commentators observed that the underprivileged

in implementation. According to the director of the Ohio Public Library Information Network, “the questions are innumerable.” Ewing, *supra* note 173. In Florida, Seminole and Osceola county officials said they would have to do more research before deciding whether to disable filtering systems at patron's requests. Sandra Pedicini, *Public Libraries' PCs Must be Filtered*, ORLANDO SENTINEL TRIBUNE, June 24, 2003, at A1. Orange County officials said they don't think they have the capability to switch off filters for just one computer; Lake and Volusia county officials say they plan to disable filters if patrons ask. *Id.*

184. See *supra* note 83 and accompanying text discussing the lack of precedential value of the plurality opinion.

185. As speculation increases that some justices are contemplating retirement because of their age or health (including Chief Justice Rehnquist, Justice O'Connor and Justice Stevens), the composition of the Court could change in the not-to-distant future. See generally Borkowski, *supra* note 49, at 3. In the 2002-2003 term, many of the justices' most important decisions were decided by plurality and five-to-four decisions; thus, any changes on the Court could have important implications. *Id.* In this decision, the retirement of Chief Justice Rehnquist or Justice O'Connor would result in a loss for the plurality; the dissent would lose if Justice Stevens retired.

186. After the Court's decision, Sen. John McCain remarked, “Parents can now feel secure that when they entrust their children to a public school or library there is some level of safety for their children when they go on-line.” Lane, *supra* note 138 at A1. The Washington-based Family Research Council said the ruling will protect children and observed that “there is no requirement that public libraries become purveyors of pornography.” Pedicini, *supra* note 183, at A1. The American Center for Law and Justice hailed the ruling as “a breakthrough in regulating Internet pornography.” Jan Crawford Greenburg, *supra* note 181, at C1. Filtering software companies rejoiced; for example the stock of filter-maker N2H2 went up by 35 percent the day after the Court's ruling. *Supreme Court Upholds CIPA; Library Internet Policies Under Review*, AMERICAN LIBRARIES (June 30, 2003) at <http://www.ala.org/ala/online/currentnews/newsarchive/2003/june2003/supremecourtupholds.html>.

187. More than the funding issue, some librarians said, is the disturbing sense that massive intrusions are being made into the privacy and rights of the American people. See Vogel, *Hot Seat*, *supra* note 139. The Chairman of the Central Florida ACLU commented that “damaging First Amendment protections to the Internet to any degree is something that should be concerning to all Americans, because it's a loss of freedom.” See Pedicini, *supra* note 183, at A1.

188. The chief information officer in the Buffalo County, New York system commented that “parents are going to send their children to the library feeling fully confident that ‘oh the library has

would be the most directly affected.¹⁸⁹ Regardless of how individuals feel about the ruling, they will feel the impact at their local library: either the library will accept filtering and keep their funding, thereby limiting patrons' access to information, or the library will refuse filtering and forfeit their funding, thereby possibly losing Internet access entirely and certainly restricting funding in other areas.¹⁹⁰ Through changes in technology and society, CIPA's impact may become less relevant over time.¹⁹¹ Until then, it is the public who'll pay the price.¹⁹²

a filter' – it's going to give parents a false sense of security." Vogel *supra* note 139, at B1. In the Washington D.C. system, the libraries opposed filtering because "information choices should be made by parents." Lane *supra* note 138, at A01. A director of a regional American Library Association office stated: "We have always felt that only education is going to work in protecting children; there is no filter that completely protects children." Vogel *supra* note 139, at B1. *But see* comments of Rep. Chip Pickering of Mississippi, opining that although filters are not 100 percent effective, they are valuable in much the same way as other safety equipment—like seatbelts and brakes—is valuable; he further notes that we don't require 100% effectiveness to use those. *Hearing before the Subcomm. on Telecomm. and the Internet of the Comm. on Energy and Commerce*, 107th Cong. 1 (2001) (comments of Hon. Chip Pickering), available at www.access.gpo.gov/congress/house.

189. ALA President Carla Hayden opined that:

[e]quity of access is a core value of the public library profession at the American Library Association and we must be clear that installing filters that block access to safe and legal information deepens the digital divide between those who have Internet access at home, work, and school, and those who do not.

Press Release: ALA President to Present 'Living in a Post CIPA World' at Midwinter Meeting in San Diego, American Library Association (Dec. 2003) at <http://www.ala.org/ala/pressreleasesbucket/pr2003december/alapresident.html>. *But see* comments of Rep. Chip Pickering, stating that:

[p]arents who are able to provide filtered Internet access in their home will be able to protect their children, while poor children, dependent upon library Internet access, will not have the same protection. The true "digital divide" is between protected children and unprotected children who are exposed to pornography and pedophiles in libraries with unfiltered Internet access.

Hearing before the Subcommittee on Telecomm. and the Internet of the House Comm. on Energy and Commerce, 107th Cong. 1 (2001) (comments of Hon. Chip Pickering), available at www.access.gpo.gov/congress/house.

190. *Supreme Court Upholds CIPA; Library Internet Policies Under Review*, AMERICAN LIBRARIES (June 30, 2003) at <http://www.ala.org/ala/online/currentnews/newsarchive/2003/june2003/supremecourtupholds.html>. According to Emily Shetkoff, executive director of the ALA's Washington office, some libraries such as San Francisco's, would forego E-rate funds rather than offer patrons second rate information. *Id.* Others, such as the Chicago Public Library, cannot afford to keep their subsidies. Chicago would have to spend \$200,000 to install and maintain blocking software to retain \$500,000 in E-rate grants. *Id.* A Chicago library administrator noted, "sadly, this takes away from purchase of books or salaries." *Id.*

191. *See Librarians Hold Key to CIPA Controls*, ALA Midwinter Meeting (Jan. 2004) at http://ala.org/al_online.html. One speaker opines that as society changes, people are going to be able to get online at a lot of different places, not just at libraries. *See also generally* Alice G. McAfee, *Creating a Kid-Friendly Webpace: A Playground Model for Internet Regulation*, 82 TEX. L. REV. 201 (2003) (discussing the "Dot Kids Act" which was signed into law by President Bush on

V. CONCLUSION

The Court's decision in *United States v. American Library Association* is inconsistent with previous rulings and further confuses already muddled constitutional doctrines. Perhaps the Court, having previously noted society's strong interest in protecting children, grew weary of challenges to legislation aimed at achieving that goal and seized the chance to validate CIPA through Congress's already-broad spending power. Because the door remains open to "as-applied" challenges, however, the Court may see a similar case again. If so, perhaps the Justices will embrace the chance to establish a First Amendment doctrine workable in light of today's ever-changing flow of information. Until then, library patrons will remain caught in the net of the Court's decision forcing libraries to forfeit either cash or patrons' constitutional rights.

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December 4, 2002, that created a sub-domain under the .us country code which will be a "haven for material that promotes positive experiences for children and families using the Internet").

192. See *supra* note 190 discussing financial burden on libraries.