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To Surf and Protect: The Children's Internet Protection Act Policies Material Harmful to Minors and a Whole Lot More

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NOTE

TO SURF AND PROTECT: THE CHILDREN'S INTERNET PROTECTION ACT POLICES MATERIAL HARMFUL TO MINORS AND A WHOLE LOT MORE

*Michael B. Cassidy**

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INTRODUCTION	438
I. THE FIRST AMENDMENT	440
A. <i>The Supreme Court's Interpretation of the First Amendment</i>	440
B. <i>The Standard of Review Applied to Internet Content</i>	441
C. <i>Protection of Minors and the Regulation of Speech</i>	444
II. THE FIRST AMENDMENT AND LIBRARIES	446
A. <i>Board of Education v. Pico</i>	446
B. <i>Mainstream Loudoun v. Board of Trustees of Loudoun County Library</i>	448
III. STATUTORY FRAMEWORK	449
A. <i>The E-rate Program</i>	449
B. <i>Library Services and Technology Act (LSTA)</i>	449
C. <i>The Children's Internet Protection Act (CIPA)</i>	450
IV. INTERNET FILTERS	450
A. <i>How Filters Work</i>	450
B. <i>The Ineffectiveness of Internet Filters</i>	451
C. <i>What the Libraries Want</i>	455
V. UNITED STATES V. AMERICAN LIBRARY ASSOCIATION, INC.	456
A. <i>The District Court</i>	456
B. <i>The Supreme Court Plurality</i>	457
C. <i>The Concurrences</i>	461
D. <i>The Dissenters</i>	462

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VI. HOW THE SUPREME COURT ERRED.....	463
A. <i>Library Patrons Have First Amendment Rights</i>	464
B. <i>Public Libraries Are Limited Public Fora</i>	465
C. <i>The Libraries in the ALA Case Are Limited Public Fora</i>	467
D. <i>CIPA Imposes Unconstitutional Conditions</i>	469
E. <i>CIPA Cannot Survive Strict Scrutiny</i>	470
CONCLUSION	472

INTRODUCTION

A man and his child are walking down the street, heading to a newsstand to browse a few magazines. They arrive at the stand and are confused by what they see. The front covers of several magazines are completely covered by a black page. While this might be common practice for the adult magazines on the top shelf, on this day, black covers shield magazines scattered throughout. Surely the man and his child could just ask the stand owner to remove the covers, but should they have to? The black page prevents them from seeing any information about the magazine, so they do not know what kind of material is being blocked. Should they have to provide the stand owner with a bona fide reason as to why they want the cover removed? What if the owner is too busy assisting other customers and cannot help them? What if it turns out one of the magazines with a black cover has a front-page story about Vice President Dick Cheney? Another is an art magazine with a cover story remembering the famous poet Anne Sexton. Yet another contains headlines on the cover discussing constitutional rights and gay marriage. Why are the man and his child prohibited from viewing these covers?

On June 23, 2003, the United States Supreme Court decided *United States v. American Library Association, Inc. (ALA)*,¹ a case that effectively made the situation above a reality, not with regard to print media, but to Internet content in public libraries. The Court in that case upheld the Children's Internet Protection Act (CIPA), which provides that public libraries must install Internet filters on library computers to receive federal funding.² This ruling will affect millions of people who log onto the Internet from public libraries. This is because while Internet filters may block material that is harmful to minors, they also block library patrons' access to an enormous amount of constitutionally protected speech.³ The

1. 539 U.S. 194 (2003).

2. See *Am. Library Ass'n, Inc. v. United States*, 201 F. Supp. 2d 401, 412 (E.D. Pa. 2002).

3. See *infra* notes 136–157 and accompanying text (providing examples of several legitimate Web sites blocked by Internet filters).

outcome of the *ALA* case was a victory for members of Congress in favor of protecting children from potentially harmful material at all costs. The road traveled by those members in favor of Internet regulation, however, has not been a smooth one.

In 1997 the Supreme Court struck down the Communications Decency Act (CDA), Congress' first statute enacted to regulate Internet pornography.⁴ In 1998, Congress made a second attempt with the Child Online Protection Act (COPA).⁵ The Supreme Court reversed both lower courts' decisions in the COPA case, finding that the statute was constitutional, but remanded the case back to the Third Circuit Court of Appeals to examine the issues.⁶ The Third Circuit essentially reversed the Supreme Court's decision and found that COPA was indeed unconstitutional.⁷ Apparently unsatisfied with the Third Circuit's reasoning, the Supreme Court again granted certiorari in the COPA case.⁸ The second time the Court followed the Third Circuit's reasoning, and held that the lower court was probably correct in finding that COPA violates the First Amendment.⁹ But the Supreme Court refused to end the COPA saga, and remanded the case once again to the lower court to give the government an opportunity to prove the law is constitutional.¹⁰ While the courts were tied up with COPA, Congress enacted CIPA to protect children from accessing harmful material in libraries.¹¹

In 2000, public libraries, library associations, library patrons, and Web site publishers challenged the constitutionality of CIPA alleging that the statute's filtering requirements violated the First Amendment.¹² The district court found for the plaintiff libraries and held that CIPA was unconstitutional because 1) filters would impose viewpoint-based restrictions on speech in public fora, and 2) filtering software was not narrowly tailored to achieve a compelling government interest.¹³ The Supreme Court reversed the district court's decision, holding that CIPA did not violate library patrons' First Amendment rights because libraries are not public fora.¹⁴ The Court also held that the government is entitled

4. See *Reno v. ACLU*, 521 U.S. 844, 845 (1997).

5. See *Ashcroft v. ACLU*, 535 U.S. 564, 567-69 (2002) (noting that the Communications Decency Act was Congress' first attempt to regulate Internet pornography):

6. See *id.* at 1713-14.

7. See *ACLU v. Ashcroft*, 322 F.3d 240, 268 (2003).

8. *Ashcroft v. ACLU*, 540 U.S. 944 (2003).

9. See Bill Mears, *High Court Bars Internet Porn Law Enforcement*, CNN Washington Bureau, at <http://www.cnn.com/2004/LAW/06/29/scotus.web.indecency/index.html> (June 29, 2004) (last visited June 30, 2004).

10. See *id.*

11. See *Am. Library Ass'n, Inc.*, 201 F. Supp. 2d at 406.

12. *Id.* at 401.

13. See *id.* at 453, 479.

14. See *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 205-06 (2003).

“broad limits” when attaching conditions to the receipt of federal funds, and that installing filtering software did not constitute an unconstitutional condition.¹⁵ The *ALA* Court, however, incorrectly decided the CIPA case. First, the Court overlooked its well-settled First Amendment jurisprudence regarding libraries. Moreover, it failed to properly apply the public forum analysis and the unconstitutional conditions doctrine. Finally, the Court refused to apply the proper standard of statutory review: strict scrutiny.

This Note will examine the constitutional issues raised by installing Internet filtering software in public libraries. Part I explores the First Amendment, the standard of review for restricting Internet material, and the government’s role in protecting minors and regulating speech. Part II discusses library patrons’ First Amendment rights in public libraries. Part III provides the statutory framework of the E-rate and LSTA programs, as well as the Children’s Internet Protection Act (CIPA). Part IV examines the effectiveness of current Internet filtering technology and provides the American Library Association’s policies on Internet filtering in public libraries. Part V discusses the district court’s and the Supreme Court’s reasoning in *United States v. American Library Associations, Inc.* Finally, Part VI analyzes how the Supreme Court erred in failing to hold CIPA unconstitutional.

I. THE FIRST AMENDMENT

A. *The Supreme Court’s Interpretation of the First Amendment*

The First Amendment of the Constitution provides that “Congress shall make no law . . . abridging the freedom of speech.”¹⁶ The Supreme Court’s interpretation of the amendment is relevant in the discussion of Internet filters in libraries. While the Court has held that the right to speak and receive speech is protected,¹⁷ it has also held that the First Amendment does not afford protection to speech relating to violence, libel, fighting words, and obscenity.¹⁸ In addition, the Court has ruled

15. *See id.* at 211.

16. U.S. CONST. amend. I.

17. *See Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (stating the First Amendment includes “the right to receive information and ideas”); *Martin v. Struthers*, 319 U.S. 141, 143 (1943) (explaining “The right of freedom of speech and press . . . embraces the right to distribute literature, and necessarily protects the right to receive it.” (citations omitted)).

18. *See Miller v. California*, 413 U.S. 15, 24 (1973) (applying a three-prong test to determine what constitutes obscenity). The prongs established by *Miller* are as follows:

- a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;

that content-based restrictions on constitutionally protected speech are subject to the standard of strict scrutiny.¹⁹ Applying that standard, courts will strike down regulations that are overbroad²⁰ or vague,²¹ or not narrowly tailored to achieve a compelling government interest.²² Questions arise, however, on whether these standards are manageable when applied to new technology.

B. *The Standard of Review Applied to Internet Content*

The Internet is rapidly expanding²³ and it is distinguishable from traditional sources of media, such as broadcast or print materials.²⁴ The Supreme Court has rejected attempts to link Internet and broadcast sources, reasoning that radio and television are more “invasive” than the World Wide Web.²⁵ Broadcast material can find listeners and viewers who were not looking for it, and the Supreme Court has held that increased government regulation is justified to protect children from indecent speech via radio and television.²⁶ While the Court did not articulate a specific standard of review for government regulations regarding broadcast material, it is clear that strict scrutiny does not apply.²⁷

- b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by applicable state law; and
- c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id.

19. See *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994) (holding content-based restrictions on speech are subject to the most exacting scrutiny); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (stating that government regulations on constitutionally protected speech must be tailored using the least restrictive means to achieve a compelling government interest).

20. See, e.g., *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992). “It is well established that in the area of freedom of expression an overbroad regulation may be subject to facial review and invalidation, even though its application in the case under consideration may be constitutionally unobjectionable.” *Id.* at 129.

21. See, e.g., *NAACP v. Button*, 371 U.S. 415 (1963). “[S]tandards of permissible statutory vagueness are strict in the area of free expression.” *Id.* at 432.

22. See *Reno v. ACLU*, 521 U.S. 844, 882 (1997) (holding that the Communications Decency Act was unconstitutional because the government’s defenses to the burden the Act placed on protected speech did not constitute narrow tailoring).

23. See *infra* note 161 and accompanying text (stating the number of Web pages on the Internet and the amount added daily).

24. See Kurt Wimmer & Victoria Carter, *Let the Internet Industry Regulate Itself*, 149 N.J.L.J. 460 (1997).

25. See *id.*; see also *Reno*, 521 U.S. at 869.

26. See *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 749 (1978).

27. See *id.* at 748 (“[A] broadcaster may be deprived of his license and his forum if the Commission decides that such an action would serve ‘the public interest, convenience, and necessity.’”).

Unlike invasive broadcasting, viewers of print media make an affirmative choice when they select printed materials.²⁸ Since viewers of print media can easily avoid undesirable content by choosing not to select it, government regulation is subject to strict scrutiny.²⁹ Print materials differ from the Internet in that a newspaper reader has “a set path of how to proceed in a self-contained package.”³⁰ However, an Internet user affirmatively enters a Web address into a search engine or selects a link, which is analogous to browsing a newspaper.³¹ Ultimately, the Internet falls into the same category as print media in the constitutional arena³² and therefore Internet regulation must be based on a compelling government interest and be achieved through the least restrictive means.

The Communications Decency Act (CDA) of 1996³³ was the first attempt by Congress to regulate Internet content.³⁴ In *ACLU v. Reno*,³⁵ the plaintiffs alleged that two provisions of the CDA violated their First Amendment rights and their Fifth Amendment Due Process rights.³⁶ Specifically, the challenged provisions of the CDA prohibited any person from knowingly transmitting obscene or indecent messages or displaying patently offensive communication on the Internet to children under eighteen years of age.³⁷ The Supreme Court struck down these provisions of the CDA as unconstitutionally vague and overbroad, because the terms “indecent” and “patently offensive” covered “large amounts of nonpornographic material with serious educational or other value.”³⁸ The plaintiffs in that case argued that parental control was a better option, suggesting that indecent material could be marked and parents could decide what type of content could enter their homes.³⁹ Using this approach, children would not be deprived of material containing artistic or educational value, such as nude art.

28. See Wimmer & Carter, *supra* note 24.

29. See *id.* (“When the audience can easily avoid undesired content on that medium, censorship is an inappropriate and constitutionally invalid approach to protecting sensitive citizens, including children.”).

30. April Mara Major, *Internet Red Light Districts: A Domain Name Proposal for Regulatory Zoning of Obscene Content*, 16 J. MARSHALL J. COMPUTER & INFO. L., 21, 24–25 (1997).

31. See Wimmer & Carter, *supra* note 24.

32. See *id.*

33. 47 U.S.C. § 223 (1996).

34. See *Ashcroft v. ACLU*, 535 U.S. 564, 567 (2002).

35. 929 F. Supp. 824 (E.D. Pa. 1996).

36. See *id.* at 849.

37. See *id.* at 827.

38. *Reno v. ACLU*, 521 U.S. 844, 877 (1997).

39. See *id.* at 879.

The Child Online Protection Act (COPA)⁴⁰ of 1998 was Congress' second attempt to regulate Internet content.⁴¹ COPA established a three-part test⁴² to determine whether commercially published pornography on the Internet was "harmful to minors."⁴³ In *American Civil Liberties Union v. Reno*,⁴⁴ the United States District Court for the Eastern District of Pennsylvania found that COPA infringed the First Amendment rights of adults and issued a preliminary injunction.⁴⁵ The United States Court of Appeals for the Third Circuit affirmed and the Supreme Court granted certiorari. The Supreme Court found that the type of content restricted by COPA, unlike that restricted by the CDA, was narrowly defined, and that using "contemporary community standards" to determine what material was harmful to minors did not make the statute unconstitutional.⁴⁶ Justice Thomas, writing for the Court, stated that the Court's holding was limited only to the issue of community standards.⁴⁷ The Court kept the injunction in place and remanded the case to the Third Circuit to examine the issues.⁴⁸

The Third Circuit essentially rejected the Supreme Court's reasoning, holding that COPA infringed on the rights of adults and was not narrowly tailored to protect minors.⁴⁹ Specifically, the court found that the term "minor" in the COPA statute included any person under the age of seventeen,⁵⁰ and reasoned that the definition of the term minor was

40. 47 U.S.C. § 231 (1998).

41. See *Ashcroft v. ACLU*, 535 U.S. 564, 567-69 (2002) (noting that the Communications Decency Act was Congress' first attempt).

42. *ACLU v. Ashcroft*, 322 F.3d 240, 246 (2003) (listing the three-part test applied to Internet material, all of which must be satisfied to determine whether the material is "harmful to minors"). COPA established 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 sexual 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.

Id.

43. *Id.*

44. 31 F. Supp. 2d 473 (1999).

45. See *id.* at 498 (holding that the rights of minors cannot be protected "at the expense of stifling the rights embodied in the Constitution.").

46. See *id.* at 1703.

47. See *id.*

48. See *id.* at 1714.

49. See *ACLU v. Ashcroft*, 322 F.3d 240, 268 (2003)

50. *Id.* at 268.

overbroad because material that would be appropriate for a sixteen-year old would not be appropriate for a ten-year old child.⁵¹ The court stated “[b]ecause COPA’s definition of ‘minor’ therefore broadens the reach of ‘material that is harmful to minors’ under the statute to encompass a vast array of speech that is clearly protected for adults—and indeed, may not be obscene as to older minors—the definition renders COPA significantly overinclusive.”⁵² Additionally, the court held that using contemporary community standards to determine what type of Internet material is harmful to minors would restrict the range of appropriate material under COPA to the standards of the most “puritanical communities.”⁵³ The court kept the preliminary injunction in place and the Supreme Court again granted certiorari.⁵⁴ The second time the Court reviewed the case it followed the lower court’s reasoning.⁵⁵ Justice Kennedy, writing for the 5-to-4 majority, stated that COPA probably violates the First Amendment.⁵⁶ He explained that if the law was upheld, “[t]here [would be] a potential for extraordinary harm and a serious chill upon protected speech.”⁵⁷ But the Court did not lay the statute to rest; rather, it remanded the case back to the lower court to give the government another opportunity to prove the constitutionality of the law.⁵⁸

C. *Protection of Minors and the Regulation of Speech*

Children are protected by the Constitution, but a child’s constitutional rights are not equal to the constitutional rights of an adult.⁵⁹ The Supreme Court has articulated three reasons why children are entitled to lesser protection of their Constitutional rights: “the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.”⁶⁰ Also, while the Court has held that States have the power to limit chil-

51. *Id.*

52. *Id.*

53. *See id.* at 252.

54. *Ashcroft v. ACLU*, 540 U.S. 944 (2003).

55. *See Bill Mears, High Court Bars Internet Porn Law Enforcement*, CNN Washington Bureau, June 29, 2004, available at <http://www.cnn.com/2004/LAW/06/29/scotus.web.indecency/index.html>.

56. *See id.*

57. *Ascroft v. ACLU*, 124 S.Ct. 2783, 2794 (2004).

58. *See id.*

59. *See Bellotti v. Baird*, 443 U.S. 622, 633–34 (1979).

60. *Id.* at 634.

dren's constitutional rights,⁶¹ the Court has rejected state regulations aimed at protecting minors that also suppress adult speech.⁶²

States have the constitutional power to regulate children's access to sexually explicit material.⁶³ In *Ginsberg v. New York*,⁶⁴ the appellant was charged with selling "girlie" magazines to a sixteen year-old boy.⁶⁵ The magazines at issue in the case were constitutionally protected for adults because they were not considered obscene.⁶⁶ Justice Brennan, writing for the Court, concluded that minors have lesser First Amendment rights than adults.⁶⁷ He considered the magazines unprotected for minors, and thus the Brennan Court held that the government does not have to show a compelling need to restrict minors' access to sexually explicit material.⁶⁸ Rather, since the State's interest was in the development of the youth, a rational-basis standard was sufficient.⁶⁹

The States have the power to limit children's First Amendment rights, but this power is not limited to them; the federal government can restrict minors' rights as well. Ten years after *Ginsberg*, the Supreme Court decided *Federal Communications Commission v. Pacifica Foundation*.⁷⁰ The issue in this case was whether the Federal Communications Commission (FCC) could regulate the time of day that indecent, but not obscene, radio broadcasts could be aired.⁷¹ The Court ruled that the FCC could regulate the time of day because radio broadcasts are accessible to minors and that indecent broadcasts could enter the home by surprise.⁷² The Court in its later holdings, however, has construed *Pacifica* narrowly; it applies only to communications not completely banned by the regulation in place, and also to communications that could enter the home without warning.⁷³

In 1989 the Supreme Court distinguished *Pacifica* in *Sable Communications of California, Inc. v. Federal Communications Commission*.⁷⁴

61. *Id.* at 635 (stating that "[T]he States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences.").

62. *See* *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

63. *See* *Ginsberg v. New York*, 390 U.S. 629, 640 (1968).

64. 390 U.S. at 629.

65. *Id.* at 631.

66. *See id.* at 634-35.

67. *See id.* at 636-37.

68. *See id.* at 641 (stating that the State has to only "rationally conclude" that materials are harmful to minors).

69. *See id.*

70. 438 U.S. 726 (1978).

71. *See id.* at 729-30.

72. *See id.* at 748-49.

73. *See* *Sable Communications of Cal.*, 492 U.S. at 127-28.

74. *See id.* at 127.

In *Sable*, the Court had to determine whether “dial-a-porn” messages violated the Communications Act of 1934, which imposed a ban on all indecent and obscene commercial telephone calls.⁷⁵ The Court held that the ban on obscene messages was constitutional, while the ban on indecent messages violated the First Amendment.⁷⁶ The Court recognized that protecting the well being of children constituted a compelling government interest, but also determined that the compelling interest did not justify a total ban on all of the messages.⁷⁷ The Court distinguished this case from *Pacifica* for two reasons: 1) the ban in *Sable* was a total ban, in *Pacifica* it was not, and 2) dialing a telephone differs from listening to a radio in that dialing a phone number requires an affirmative act, while a radio broadcast could intrude upon a listener without warning.⁷⁸ The Supreme Court’s jurisprudence has laid the framework for balancing the State’s interest in protecting minors from harmful material and adults’ constitutional rights, holding that the State may not “reduce the adult population . . . to reading only what is fit for children.”⁷⁹

II. THE FIRST AMENDMENT AND LIBRARIES

A. Board of Education v. Pico

First Amendment protection includes the “right to receive information and ideas.”⁸⁰ Even though libraries are not legally required to obtain certain books for circulation, First Amendment concerns do arise when a library deliberately removes books from its collection.⁸¹ In *Board of Education v. Pico*, a public school board removed books⁸² from the school library that it labeled as “anti-American, anti-Christian, anti-Semitic, and just plain filthy.”⁸³ The school board reasoned that it had a duty to protect the students from the “moral danger” posed by the

75. *See id.* at 117–18.

76. *See id.* at 126.

77. *See id.*

78. *See id.* at 127–28.

79. *Butler v. Michigan*, 352 U.S. 380, 383 (1957). The Supreme Court has repeatedly affirmed the *Butler* holding. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 252 (2002); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 814 (2000).

80. *See Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

81. *See Bd. of Educ. v. Pico*, 457 U.S. 853, 871 (1982) (holding that the First Amendment bars a library from removing books based on political or religious motive).

82. The books removed from the high school library were: *Slaughter House Five*, by Kurt Vonnegut, Jr.; *The Naked Ape*, by Desmond Morris; *Down These Mean Streets*, by Piri Thomas; *Best Short Stories of Negro Writers*, edited by Langston Hughes; *Go Ask Alice*, of anonymous authorship; *Laughing Boy*, by Oliver LaFarge; *Black Boy*, by Richard Wright; *A Hero Ain’t Nothin’ But A Sandwich*, by Alice Childress; and *Soul on Ice*, by Eldridge Cleaver. *Id.* at 857 n.3.

83. *Id.* at 857.

books.⁸⁴ A group of students filed a suit alleging that the books' removal violated their First Amendment rights.⁸⁵ The students requested that the nine removed books be returned and that the school board refrain from removing any more books.⁸⁶

Justice Brennan, writing for the plurality, explained that the constitutional rights of students may be violated by removing books from a school library because the First Amendment grants "public access to discussion, debate, and the dissemination of information and ideas."⁸⁷ Justice Brennan stated that the First Amendment guarantees the right to free speech and press, and that the right to receive information is inherent in these rights for two reasons.⁸⁸ First, because the right to free speech and press allow an individual the freedom to distribute literature, it follows that the individual also has the right to receive it.⁸⁹ He further reasoned that the distribution of ideas is moot if individuals are unable to receive them.⁹⁰ The plurality ruled that the school board could not remove books from the school library simply because they did not agree with the ideas in the books.⁹¹ The Court remanded the case to determine if in fact the motive of the school was to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."⁹²

Justice Rehnquist, in his dissent in *Pico*, stated that the government's role in education is to instill knowledge and social values in young people.⁹³ Accordingly, schools are justified in making decisions based on personal moral, social, and political views.⁹⁴ Justice Rehnquist further reasoned that school libraries supplement the government's teaching role in elementary and secondary schools.⁹⁵ He explained that "[u]nlike university or public libraries, elementary and secondary school libraries are not designed for freewheeling inquiry; they are tailored, as public school curriculum is tailored, to the teaching of basic skills and ideas."⁹⁶ He also stated that if the books were easily available at another location, then the

84. *Id.*

85. *Id.* at 859.

86. *See id.*

87. *Id.* at 866; *see also* *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (recognizing "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.").

88. *See Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982).

89. *Id.* (citing *Martin v. Struthers*, 319 U.S. 141, 143 (1943)).

90. *Pico*, 457 U.S. at 853 (citing *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring)).

91. *Pico*, 457 U.S. at 872.

92. *See Id.* (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

93. *Pico*, 457 U.S. at 909 (Rehnquist, Burger, & Powell, JJ., dissenting).

94. *See id.*

95. *See id.* at 915 (Rehnquist, Burger, & Powell, JJ., dissenting).

96. *Id.* (emphasis added).

benefit that could be gained by the students was not restricted by the government's action.⁹⁷ Justice Rehnquist noted that the books removed from the school library were readily available at a public library.⁹⁸

B. Mainstream Loudoun v. Board of Trustees of Loudoun County Library

Sixteen years after the Supreme Court decided *Pico*, the United States District Court for the Eastern District of Virginia handed down the first major ruling on the merits regarding the use of Internet filtering software in public libraries. In *Mainstream Loudoun v. Board of Trustees of Loudoun County Library*,⁹⁹ Judge Brinkema found that public libraries constitute limited public fora,¹⁰⁰ and therefore, any content-based restriction is subject to strict scrutiny.¹⁰¹ The court concluded that even if reducing access to illegal pornography and avoiding sexually hostile environments constituted compelling government interests, the filtering policy adopted by the library was neither reasonably necessary¹⁰² to further a compelling governmental interest nor narrowly tailored to achieve those interests.¹⁰³ Judge Brinkema cited several less restrictive alternatives: changing the location of Internet terminals, installing privacy screens, and implementing an acceptable use policy.¹⁰⁴ The court rejected the library's argument that filtering Internet content was analogous to the library's decisions in determining what types of books to acquire.¹⁰⁵ Rather, the court relied on *Pico* and held that Internet filtering constituted removal of the material and was therefore subject to strict scrutiny.¹⁰⁶

97. *See id.* at 913 (Rehnquist, Burger, & Powell, JJ., dissenting).

98. *See id.* (Rehnquist, Burger, & Powell, JJ., dissenting). "Students are not denied books by their removal from a school library. The books may be borrowed from a public library, read at a university library, purchased at a bookstore, or loaned by a friend." *Id.* at 915.

99. 24 F. Supp. 2d 552 (E.D. Va. 1998).

100. *See id.* at 563.

101. *See id.* at 562-63. Content-based restrictions must be "narrowly drawn to effectuate a compelling state interest." *Id.* at 562 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)).

102. *Mainstream Loudoun*, 24 F. Supp. 2d at 565-66. The evidence showed that only one person complained about a minor viewing pornography in a public Virginia library, and the court reasoned that such an isolated incident could not prove the filtering policy was necessary. *See id.*

103. *Id.* at 566-67.

104. *Id.* at 566.

105. *Id.* at 561.

106. *See id.*

III. STATUTORY FRAMEWORK

A. *The E-rate Program*

In the Telecommunications Act of 1996, Congress instructed the Federal Communications Commission to develop a plan that would provide affordable telecommunications service to all Americans.¹⁰⁷ Congress determined that schools and libraries would be beneficiaries of the plan, and this portion of the plan is commonly referred to as the "E-rate" program.¹⁰⁸

Under the E-rate program "[a]ll telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service . . . provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties."¹⁰⁹ A library must meet three requirements to be eligible for the discounts.¹¹⁰ The library must be an independent entity, function as a not-for-profit business, and be eligible for the assistance under the Library Services and Technology Act.¹¹¹

B. *Library Services and Technology Act (LSTA)*

Congress enacted the LSTA in 1996 as part of the Omnibus Consolidated Appropriations Act of 1997, with the goal of improving library services nationwide.¹¹² To achieve this, LSTA put together the Grants to States Program.¹¹³ Under this program, libraries are awarded funds to pay for costs involved in computer systems, accessing information electronically, and telecommunications technologies.¹¹⁴ Through this program libraries have used LSTA funds to provide Internet services to their patrons.¹¹⁵

Given this Congressional action to provide funding to enhance library use of technology and specifically the Internet, it was only a matter of time before Congress established additional requirements for the receipt of the federal funds. Congress set forth these requirements in the Children's Internet Protection Act (CIPA),¹¹⁶ which amended the E-rate

107. *Am. Library Ass'n, Inc. v. United States*, 201 F. Supp. 2d 401, 411 (E.D. Pa 2002).

108. *Id.*

109. 47 U.S.C. § 254(h)(1)(B)(2001).

110. *Am. Library Ass'n, Inc.*, 201 F. Supp. 2d at 412.

111. *Id.*

112. *Id.*

113. *Id.*

114. *See* 20 U.S.C. § 9141(a)(2000).

115. *Am. Library Ass'n, Inc.*, 201 F. Supp. 2d at 412.

116. Pub. L. No. 106-554, § 1701, 114 Stat. 2763, 2763A-335 (2000).

and LSTA programs,¹¹⁷ and provided that recipients of E-rate and LSTA funds must install Internet filters on all computers, or forfeit the funds.¹¹⁸

C. *The Children's Internet Protection Act (CIPA)*

CIPA applies to two types of federal funding directly related to libraries: first, it applies to LSTA grants, and second, it applies to discounts associated with the E-rate program.¹¹⁹ Under CIPA, libraries are required to purchase and install software filters on their computers in order to participate in LSTA or E-rate funding programs.¹²⁰ CIPA requires Internet filters that block images that constitute obscenity or child pornography, and prevent minors from obtaining access to material that is harmful to them.¹²¹ Material harmful to minors is a picture, image, graphic, file or other visual illustration that (1) "taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex or excretion," or that (2) "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 (3) "taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors."¹²²

CIPA expressly prohibits federal interpretation of what content is suitable for minors and instead defers judgment to the local communities.¹²³ Library officials are permitted to disable the filters for all patrons for "bona fide research or other lawful purposes" under the LSTA program, but under the E-rate program only adults can access unfiltered material.¹²⁴

IV. INTERNET FILTERS

A. *How Filters Work*

Internet filters block speech by using one or more of the following methods: blacklists, allow lists, keyword blocking, image blocking, and

117. See *Am. Library Ass'n, Inc.*, 201 F. Supp. 2d at 412-13.

118. See *id.*

119. See *id.* at 412.

120. See *id.*

121. *Id.* at 413.

122. 47 U.S.C. § 254(h)(7)(G)(i)-(iii) (2000).

123. See 47 U.S.C. § 254(l)(2) ("A determination regarding what matter is appropriate for minors shall be made by the school board, local educational agency, library or other authority responsible for making the determination.").

124. 47 U.S.C. § 254(h)(6)(D) (2000). See *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 201 (2003).

protocol blocking.¹²⁵ Blacklists block access to any prohibited Web address contained in a predetermined database.¹²⁶ Filter companies design their filters to allow users to designate categories such as “nudity” and “profanity,” and prohibited addresses are then deposited in these categories.¹²⁷ Allow lists operate in a similar way except that they depend on a pre-approved list of Web sites.¹²⁸ Keyword blocking software blocks any Internet sites that include words contained in a list of prohibited words.¹²⁹ Image blocking software works in the same way as keyword blocking, except that it uses more advanced technology to block any pornographic images detected.¹³⁰ Filters used to block entire categories, also called protocol filters,¹³¹ are used to deny a user access to an entire domain or to a large portion of the Internet.¹³² This type of software is commonly used to block chat rooms, games, newsgroups containing graphic images, and to restrict library patrons from using e-mail.¹³³

B. *The Ineffectiveness of Internet Filters*

While it is impossible for any of these filtering methods to exclude all targeted material and no other, many commercial Internet filters block a substantial amount of appropriate and constitutionally protected speech.¹³⁴ The Free Expression Policy Project’s policy report on Internet filters found a substantial amount of appropriate, constitutionally protected speech blocked by commercial Internet filters including:

- The “University of Kansas’s Archie R. Dykes Medical Library (upon detecting the word ‘dykes’)”

125. Junichi P. Semitsu, *Burning Cyberbooks in Public Libraries: Internet Filtering Software vs. The First Amendment*, 52 STAN. L. REV. 509, 513 (2000).

126. *See id.*

127. *See* Jeannette Allis Bastian, *Filtering the Internet in American Public Libraries: Sliding Down the Slippery Slope*, 2 FIRST MONDAY 10, 16, at http://www.firstmonday.dk/issues/issue2_10/bastian/ (last visited June 30, 2004) (stating that CyberPatrol, a popular Internet filter, blocks twelve categories including profanity, violence, sexual acts, etc.).

128. Semitsu, *supra* note 125, at 513.

129. *See id.* at 514.

130. *See* *Anti-Pornography Software Breakthrough—Launch of Pornography Blocking Software*, M2 Presswire, Mar. 25, 1997, available at 1997 WL 8032313 (explaining that ImageCensor scans for pornographic images and then allows the user, upon detection, to lock out the program or capture it and store it).

131. Bastian, *supra* note 127, at 15.

132. Semitsu, *supra* note 125, at 514.

133. *Id.*

134. *See* Marjorie Heins & Christina Cho, *Free Expression Policy Project, Internet Filters: A Public Policy Report*, at <http://www.fepproject.org/policyreports/filteringreport.html> (analyzing over seventy studies and tests) (last visited June 30, 2004) [hereinafter *Free Expression*]; *see also* MAJORIE HEINS, NOT IN FRONT OF THE CHILDREN: “INDECENCY,” CENSORSHIP, AND THE INNOCENCE OF YOUTH 181–200 (2001).

- “‘Let’s Have an Affair’ catering company”
- “‘Marijuana: Facts for Teens (a brochure published by the National Institute on Drug Abuse)’”
- “‘House Majority Leader Richard ‘Dick’ Arney’s official Web site”
- “‘Georgia O’Keeffe and Vincent Van Gogh sites.’”¹³⁵

Keyword blocking software is responsible for most of the over-blocking described above since any Web site, sentence, phrase, or word containing the prohibited word will be blocked.

The word “breast” was banned from some areas of America Online’s (AOL) service and breast cancer survivors were prohibited from entering AOL’s bulletin boards.¹³⁶ CyberPatrol, a popular filtering software product among schools and public libraries, blocked access to Web sites containing material on the poet Anne Sexton because her name contains the word “sex.”¹³⁷ While it is clear that keyword blocking is ineffective in filtering out potentially inappropriate material and still retaining appropriate, educational material,¹³⁸ this method of filtering is still in use. Yahoogigans! is a “Web guide for kids” provided by the popular search engine Yahoo!.¹³⁹ Searches by the author in Yahoogigans! for “Dick’s Sporting Goods,” and “Anne Sexton,” yielded the same result: Sorry, no results were found. A similar search performed using Yahoo!’s unrestricted search function provided over 100,000 hits for each of the above mentioned search strings. Without a doubt, keyword-based filtering technology is alive and well.

While it is understandable, at least mechanically, that filters using keyword blocking would prohibit access to “Sexton” Web sites, it is perplexing that filters block some information with no explanation whatsoever. The Electronic Privacy Information Center (EPIC) found that useful and appropriate material for children was blocked by Internet filtering software, and the researchers conducting the study were unable

135. See *Free Expression*, *supra* note 134.

136. See Semitsu, *supra* note 125, at 514.

137. See Bastian, *supra* note 127, at 16; Online Policy Group, *Harmful to Minors Review*, at <http://www.onlinepolicy.org/access/harmfultominorsreview.shtml> (last visited June 30, 2004).

138. See *Free Expression*, *supra* note 134.

139. See <yahoogigans.yahoo.com>.

to explain why such material was blocked.¹⁴⁰ EPIC conducted searches using a Web-based search engine called Net Shepard Family Search (Family Search) to determine the impact Internet filters had on information on the Internet.¹⁴¹ The EPIC researchers submitted a search request and that request would be directed to a search engine called AltaVista.¹⁴² AltaVista's results are then filtered by the Family Search ratings database, and the user is presented with the filtered results.¹⁴³

An Internet user could search for "The National Aquarium in Baltimore" using AltaVista and receive 2,134 results.¹⁴⁴ The same search, using Family Search produced only 63 results.¹⁴⁵ The researchers at EPIC decided to view the first 200 pages returned from AltaVista, looking for any content or material that would cause Family Search to exclude these results.¹⁴⁶ EPIC researchers found that the pages included speeches and papers about the aquarium, information about aquariums located outside the United States, and information about events held at the aquarium.¹⁴⁷ EPIC received similar results from searches containing the terms "Thomas Edison," "The United States Supreme Court," and the "National Basketball Association."¹⁴⁸ While there is no concrete explanation for these results, it is clear that Internet filters erroneously block a substantial amount of appropriate material.

Most of the criticism regarding filters is due to the fact that filters are over-inclusive; they block sites beyond the scope intended by their creators.¹⁴⁹ A filtering company may, however, block sites that offend its political and moral agenda.¹⁵⁰ One popular Internet filter, Cybersitter, blocks the Web sites of the National Organization for Women (NOW) and Peacefire,¹⁵¹ as well as nonpornographic gay themed material such as

140. See Electronic Privacy Information Center, *Faulty Filters: How Content Filters Block Access to Kid-Friendly Information on the Internet*, at <http://www2.epic.org/reports/filter-report.html> (last visited June 30, 2004) [hereinafter EPIC].

141. See *id.*

142. See *id.*

143. See *id.*

144. See *id.*

145. See *id.*

146. See *id.* (rationalizing that because Family Search returned only 63 results, the next 137 may contain material harmful to minors).

147. See *id.*

148. See *id.*

149. See *Free Expression*, *supra* note 134 (showing that Internet filters designed to block content harmful to minors also block Web sites with educational value).

150. See Marjorie Heins, *On Protecting Children From Censorship: A Reply to Amitai Etzioni*, 79 CHI.-KENT L. REV. 229, 235 (2004) (stating that subjective judgments by company employees "are driven by the political and moral views of the company owners.").

151. Peacefire is an anti-censorship youth organization that frequently reports on the inaccuracies of Internet filters. www.peacefire.org. See Elizabeth Wasserman, *On-Line Smut*

alt.politics.homosexualnewsgroup.¹⁵² Another filter, NetNanny, blocks government Web sites such as the Central Intelligence Agency, and the filter SurfWatch blocks Reuters articles about HIV and AIDS.¹⁵³ Cyber-Patrol's software blocks the Queer Resources Directory and the M.I.T. Free-Speech Society.¹⁵⁴ Software companies usually choose to block sites containing material such as pornography, hate crimes, violence and profanity.¹⁵⁵ What is unusual about the blocked sites listed above is that they do not contain material objectionable by a software company's typical criteria.

Over-inclusiveness is not the only fatal flaw present in filters; studies have shown that some filters are also under-inclusive. The Censorware Project conducted a test of the filter Bess and concluded that thousands of pornographic sites were granted access with the filter in place.¹⁵⁶ Opponents of filters argue that the reason for under-inclusiveness is because of the size and rate of growth of the Internet.¹⁵⁷ The World Wide Web currently contains over two billion pages and is adding pages at a rate of two million per day.¹⁵⁸ If a filtering company's employees could read an entire Web page in thirty seconds, the company would have to employ 750 people to read all of the new information being added to the Internet.¹⁵⁹ That is assuming, of course, the employees are working twenty-four hours a day and seven days a week.¹⁶⁰ N2H2, the company that makes the filtering software Bess, employs fifteen full-time and fifty-eight part-time employees to review Web pages.¹⁶¹ It is obvious that such a small workforce would be hard-pressed to view all pages even a single time, but taking into account the fact that Web pages are constantly changing, N2H2's employees first read through will be quickly outdated. Given the vast amount of information proving the inaccuracies of Inter-

Filters Are Not Infallible, THE RECORD (Northern New Jersey), Jan. 5, 1998, at H9, available at 1998 WL 5790655 (last visited June 30, 2004).

152. See *Free Expression*, *supra* note 134.

153. See *id.*

154. See *id.*

155. See Semitsu, *supra* note 125, at 513 (stating Web sites "[U]sually [sort Internet content] into categories such as "full nudity" and "profanity.").

156. See The Censorware Project, *Passing Porn, Banning the Bible: N2H2's Bess in Public Schools*, at <http://censorware.net/reports/bess/> (last visited June 30, 2004) [hereinafter Censorware].

157. See *id.*

158. See Heins, *supra* note 150, at 234.

159. See Censorware, *supra* note 156.

160. See *id.*

161. *Id.* (basing these facts on the company's recent IPO filing).

net filters, it is not surprising that the American Library Association adamantly opposes the use of filters in public libraries.¹⁶²

C. *What the Libraries Want*

The American Library Association (ALA) believes that intellectual freedom can exist only if the public has unrestricted access to materials and information, regardless of content.¹⁶³ Therefore, the ALA does not believe the libraries' role is to be a gatekeeper of information. To the contrary, public libraries have distinguished themselves from schools in that they do not stand in *loco parentis*.¹⁶⁴ The ALA supports the idea that public libraries encourage the dissemination of information to all patrons.¹⁶⁵ Additionally, the ALA's Library Bill of Rights¹⁶⁶ explicitly states that no library shall deny an individual access to information on the basis of age.¹⁶⁷ With the popularity of the Internet continually increasing, the ALA has directly addressed the libraries' role in regulating patrons'

162. See American Library Associations, *Resolution on the Use of Filtering Software in Libraries*, at http://ala.org/alaorg/oif/filt_res.html (last visited June 30, 2004) [hereinafter *Resolution*].

163. See OFFICE FOR INTELLECTUAL FREEDOM OF THE AM. LIBRARY ASS'N, *INTELLECTUAL FREEDOM MANUAL* (5th ed. 1996) (noting that intellectual freedom is achieved when society agrees to the right to unrestricted access of information regardless of the content of the work or the viewpoints of the author and the receiver).

164. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (discussing schools standing in *loco parentis*).

165. See American Library Association, *Library Bill of Rights*, at <http://www.ala.org/ala/oif/statementspols/statementsifs/librarybillrights.htm> (last visited June 30, 2004) [hereinafter *ALA Bill of Rights*].

166. *Id.* The American Library Association Bill of Rights provides:

- I. Books and other library resources should be provided for the interests, information, and enlightenment of all people of the community the library serves. Materials should not be excluded because of the origin, background, or views of those contributing to their creation.
- II. Libraries should provide materials and information presenting all points of view of view on current and historical issues. Materials should not be proscribed or removed because of partisan or doctrinal disapproval.
- III. Libraries should challenge censorship in the fulfillment of their responsibility to provide information and enlightenment.
- IV. Libraries should cooperate with all persons and groups concerned with resisting abridgement of free expression and free access to ideas.
- V. A person's right to use a library should not be denied or abridged because of origin, age, background, or views.
- VI. Libraries which make exhibit spaces and meeting rooms available to the public they serve should make such facilities available on an equitable basis, regardless of the beliefs or affiliations of individuals or groups requesting their use.

Id.

167. See *id.*

Internet access.¹⁶⁸ The ALA has stated that individuals' Internet access should not be restricted based upon their age or based upon the content of the information.¹⁶⁹ The ALA further states that it is the patron's responsibility to decide what material is appropriate for viewing and that parents must determine what material is suitable for their children.¹⁷⁰

In 1997, the ALA addressed the issue of filtering software on library computers.¹⁷¹ The ALA stated that libraries that decided to implement filtering software in an attempt to prevent patrons from viewing inappropriate content online violated the Library Bill of Rights, and that blocking constitutionally protected speech could subject the libraries to legal liability.¹⁷² Based on the ALA's stated position and its Library Bill of Rights, installing filtering software on library computers is totally inconsistent with the ALA's mission. For this reason, the ALA filed a lawsuit against the United States alleging that CIPA is unconstitutional.

V. UNITED STATES V. AMERICAN LIBRARY ASSOCIATION, INC.

A. *The District Court*

Shortly after President Clinton signed CIPA in 2000, a group of public libraries, library associations, library patrons, and Web site publishers sued the United States, alleging that CIPA's filtering requirements violated the First Amendment.¹⁷³ A three-judge district court heard the case and ruled after a trial that CIPA was facially unconstitutional.¹⁷⁴ The court held that any public library that complies with CIPA's conditions will necessarily violate the First Amendment by imposing viewpoint-based restrictions on speech in a public forum.¹⁷⁵

The district court distinguished decisions about Internet material from decisions regarding print material.¹⁷⁶ The court noted that in general, libraries' decisions regarding which print materials to acquire are subject to rational basis review.¹⁷⁷ The court stated the key difference was that "by providing patrons with even filtered Internet access, the library

168. See *Resolution*, *supra* note 162.

169. See *ALA Bill of Rights*, *supra* note 165; *Resolution*, *supra* note 162.

170. See American Library Association, *Access to Electronic Information, Services, and Networks: An Interpretation of the Library Bill of Rights*, at <http://www.ala.org/alaorg/oif/elelectacc.html> (last visited June 30, 2004).

171. See *Resolution*, *supra* note 162.

172. See *id.*

173. *Am. Library Ass'n, Inc. v. United States*, 201 F. Supp. 2d 401, 407 (E.D. Pa. 2002).

174. *Id.* at 490.

175. *Id.* at 453.

176. *Id.* at 462.

177. See *id.*

permits patrons to receive speech on a virtually unlimited number of topics, from a virtually unlimited number of speakers, without attempting to restrict patrons' access to speech that the library, in the exercise of its professional judgment, determines to be particularly valuable."¹⁷⁸ The court also found that public libraries constitute limited public fora.¹⁷⁹ Accordingly, the court explained that content-based restrictions on speech in a limited public forum trigger strict scrutiny.¹⁸⁰ The court held that the government has a compelling interest in preventing the dissemination of illegal or harmful material to minors,¹⁸¹ but the use of software filters is not narrowly tailored to further that compelling interest.¹⁸²

B. The Supreme Court Plurality

The Supreme Court reversed.¹⁸³ Writing for the plurality, Chief Justice Rehnquist stated that Congress has broad discretion in attaching conditions to the receipt of federal funds.¹⁸⁴ He also noted that Congress may not impose conditions on the receipt of federal funds that would require the recipient "to engage in activities that would themselves be unconstitutional."¹⁸⁵ The plurality then considered the role of libraries in modern society to determine whether filter requirements violate the First Amendment.¹⁸⁶

Libraries, Rehnquist pointed out, strive to provide a vast amount of information and acquire materials that will directly benefit the community.¹⁸⁷ The Chief Justice further stated that universal access to all materials has never been a goal of libraries; rather, they provide a wealth of information tailored to meet the public's needs.¹⁸⁸ Justice Rehnquist compared libraries to institutions involved in two prior cases in which the Court held that the government had broad discretion to decide which private speech to support and that public forum analysis, therefore, did not apply.¹⁸⁹ Justice Rehnquist relied on the Court's decision in *Arkansas Ed. Television Commission v. Forbes*,¹⁹⁰ a case in which the Supreme Court held that "public forum principles do not generally apply to a

178. *Id.*

179. *See id.* at 457.

180. *See id.* at 460.

181. *See id.* at 471.

182. *See id.* at 479.

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

184. *Id.* at 203 (citing *South Dakota v. Dole*, 483 U.S. 203, 206 (1987)).

185. *Id.* (citing *Dole*, 483 U.S. at 210).

186. *Id.*

187. *See id.* at 2303-04.

188. *See id.* at 2304.

189. *See id.*

190. 523 U.S. 666 (1998).

public television station's editorial judgments regarding the private speech it presents to its viewers," because "broad rights of access for outside speakers would be antithetical . . . to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations."¹⁹¹ Similarly, he relied on *Nat'l Endowment for the Arts v. Finley*,¹⁹² a case in which the Court held that an art-funding program, that used content-based criteria, did not require forum analysis because the quality of the work was ingrained in the nature of the program.¹⁹³ Justice Rehnquist reasoned that in the same way that forum analysis does not apply to public television stations and art-funding programs, it also does not apply to the decisions public libraries make to achieve their traditional goals.¹⁹⁴ Justice Rehnquist stated that the Court's reasoning in *Forbes* and *Finley* also applies to libraries because library employees consider content and are entitled to broad discretion when selecting material.¹⁹⁵

The district court's reliance on the public forum analysis, Justice Rehnquist stated, was incorrect.¹⁹⁶ He reasoned that because Internet access in public libraries is not a "traditional" public forum, forum analysis was irrelevant in this case.¹⁹⁷ The Chief Justice defined a traditional public forum as one that has "immemorially been held in trust for the use of the public and, time out of mind . . . been used for purposes of assembly, communication of thoughts between citizens, and discussing public questions."¹⁹⁸ In addition, he stated that the Court was unwilling to extend the traditional public forum doctrine to newer technology such as Internet access because of its lack of history.¹⁹⁹

The plurality also rejected the district court's conclusion that the public forum doctrine applies because public libraries serve as a public forum for Web publishers.²⁰⁰ Justice Rehnquist stated that since libraries do not create public fora for the authors of books to speak, it follows that it does not create fora for Web publishers to express themselves.²⁰¹ According to Rehnquist, Internet access and printed materials in a library are there for the same purpose: to facilitate research and learning, and to

191. *Id.* at 673.

192. 524 U.S. 569 (1998).

193. *Am. Library Ass'n, Inc.*, 539 U.S. at 205.

194. *See id.*

195. *See id.*

196. *See id.*

197. *See id.*

198. *Id.* at 205 (citing *International Soc. For Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992)).

199. *Am. Library Ass'n, Inc.*, 539 U.S. at 205-06.

200. *See id.* at 206.

201. *See id.*

provide a benefit for the community.²⁰² The Internet is “no more than a technological extension of the book stack.”²⁰³ Additionally, just as libraries are permitted to determine what books they select for their collection, they are equally entitled to choose the kind of material they collect from the Internet.²⁰⁴ The plurality reasoned that because of the vast amount of information available on the Internet, libraries have two choices: first, a library could limit its Internet collection to sites it finds worthwhile, or second, a library could use filtering software to exclude certain content.²⁰⁵ The plurality concluded that the latter was the better option, because the former could potentially exclude an enormous amount of information.²⁰⁶

In addition to rejecting the public forum analysis, the plurality rejected the appellees’ argument that CIPA’s filtering requirement for receipt of federal assistance is unconstitutional.²⁰⁷ The appellees argued that filters restrict the libraries’ First Amendment rights to provide protected speech to its patrons.²⁰⁸ Their argument was based on the unconstitutional conditions doctrine, which provides that Congress cannot attach unconstitutional conditions to the receipt of federal funds.²⁰⁹ The government responded to this claim by arguing that libraries do not have First Amendment rights because they are government entities.²¹⁰ The plurality agreed only that “the government ‘may not deny a benefit to a person on a basis that infringes his constitutionally protected. . . freedom of speech, even if he has no entitlement to that benefit.’”²¹¹ The plurality declined to address the issue of whether libraries have First Amendment rights, reasoning that if libraries did have such a claim, that claim was without merit.²¹² Rather, Justice Rehnquist cited *Rust v. Sullivan*,²¹³ and stated that the government is entitled “broad limits” when it

202. See *id.*

203. *Id.* (citing S.Rep. No. 106-141, at 7 (1999)).

204. See *Am. Library Ass’n, Inc.*, 538 U.S. at 207–08. Justice Rehnquist also stated that “[m]ost libraries already exclude pornography from their print collections because they deem it inappropriate for inclusion.” *Id.* at 208.

205. See *id.*

206. See *id.* Cf. *Semitsu*, *supra* note 125, at 542 (providing numerous alternatives to Internet filters).

207. See *Am. Library Ass’n, Inc.*, 539 U.S. at 210–13.

208. See *id.*

209. See *id.* The government “[M]ay not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech.” *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

210. See *Am. Library Ass’n, Inc.*, 539 U.S. at 210.

211. See *id.*, citing *Board of Comm’rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 674 (1996) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

212. See *Am. Library Ass’n, Inc.*, 539 U.S. at 211.

213. 500 U.S. 173, 194 (1991).

creates a program and determines how public funds are appropriated to that program.²¹⁴

The issue in *Rust* was whether the government could provide funds for family planning services, but prohibit the use of these funds in programs that included abortion counseling.²¹⁵ Recipients of the funds argued that they had a constitutional right to abortion counseling and that in order to receive funds they would have to forfeit their constitutional right to participate in abortion counseling.²¹⁶ The Supreme Court rejected that claim reasoning that the individual recipients were not being denied a benefit but rather that the government was ensuring that public funds be spent on the program for which they were intended.²¹⁷ Justice Rehnquist stated that the issue in this case was no different,²¹⁸ the funds appropriated for the E-rate and LSTA programs were intended to assist libraries in acquiring material that is educational and informational for members of the community.²¹⁹ The plurality held that “Congress may certainly insist that these ‘public funds be spent for the purposes for which they were authorized.’”²²⁰ The plurality further justified its reasoning by stating that because libraries have excluded pornographic material from their other collections,²²¹ Congress is entirely within its limits to exclude funding for electronic versions of this material.²²² Additionally, Justice Rehnquist stated that libraries are certainly allowed to offer unfiltered Internet access, but if they do so, they will not receive federal funding.²²³

The plurality’s next hurdle was the issue of “overblocking,” which occurs when protected speech is erroneously blocked by the filtering software.²²⁴ Chief Justice Rehnquist, however, notes that overblocking is not a concern because a patron may have the filter disabled.²²⁵ The Chief Justice dismissed the District Court’s view that a request to disable a fil-

214. *Am. Library Ass’n, Inc.*, 539 U.S. at 211.

215. *See Rust*, 500 U.S. at 178.

216. *See id.* at 196.

217. *See id.*

218. *Am. Library Ass’n, Inc.*, 539 U.S. at 211.

219. *See id.*

220. *Id.* at 211–12 (citing *Rust*, 500 U.S. at 196).

221. It is worth noting that most libraries include *The Joy of Sex* and *The Joy of Gay Sex* which contain descriptions and explicit pictures. *Am. Library Ass’n, Inc., v. United States*, 201 F. Supp. 2d 401, 406 (E.D. Pa. 2002).

222. *United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194, 212 (2003).

223. *Id.*

224. *Id.* at 208–09. *See also Free Expression*, *supra* note 134 (listing hundreds of erroneously blocked Web pages).

225. *Am. Library Ass’n, Inc.*, 539 U.S. at 208–09. “Assuming that such erroneous blocking presents constitutional difficulties, any such concerns are dispelled by the ease with which patrons may have the filtering software disabled. When a patron encounters a blocked site, he need only ask a librarian to unblock it or . . . disable the filter.” *Id.* at 209.

ter by a patron might be too embarrassing by stating, “the Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment.”²²⁶

The plurality’s findings led them to several conclusions. First, filtering software does not violate library patrons’ First Amendment rights.²²⁷ Second, CIPA is constitutional under Congress’ Spending Powers.²²⁸ Lastly, installing filtering software for receipt of federal funds is not an unconstitutional condition.²²⁹

C. The Concurrences

Justice Kennedy concurred in the judgment of the plurality, finding that CIPA was constitutional on its face because libraries could unblock filtered material at the request of a patron.²³⁰ Justice Kennedy did note, however, that his decision was predominantly based on the idea that unblocking was a simple process, and that significant delay was not an issue.²³¹ Kennedy’s confidence on this point was unjustified, however, because the district court noted that unblocking could be a lengthy process in branch libraries, which are typically understaffed.²³² Justice Kennedy stated that if the removal of the software was burdensome CIPA would be subject to “as-applied” challenges.²³³ Even though the majority of Justice Kennedy’s opinion focused on this aspect of the case, he found the statute constitutional because the district court did not base its decision on the difficulties involved in disabling the filters.²³⁴

Justice Breyer concurred with the plurality, agreeing that the public forum doctrine was inapplicable and that CIPA’s statutory provisions were constitutional.²³⁵ He did, however, argue that CIPA should be held to a higher standard of scrutiny because it restricted public access to information.²³⁶ Justice Breyer stated that the standard should have been whether “the harm to speech-related interests is disproportionate in light of both the justifications and the potential alternatives.”²³⁷ Using this test, he agreed that CIPA was constitutional.²³⁸

226. *Id.* at 209.

227. *Id.* at 214.

228. *Id.*

229. *Id.*

230. *Id.* at 214 (Kennedy, J., concurring).

231. *Id.*

232. *See* Am. Library Ass’n, Inc., 201 F. Supp. 2d at 411.

233. Am. Library Ass’n, Inc., 539 U.S. at 215 (Kennedy, J., concurring).

234. *Id.* at 214 (Kennedy, J., concurring).

235. *Id.* at 215–16 (Breyer, J., concurring).

236. *Id.* at 216–17 (Breyer, J., concurring).

237. *Id.* at 217 (Breyer, J., concurring).

238. *See id.* at 218 (Breyer, J., concurring).

D. *The Dissenters*

Justice Stevens dissented, arguing that CIPA acts as a “blunt nationwide restraint on adult access to ‘an enormous amount of valuable information’” and that local communities should determine how to remedy their local problems.²³⁹ He also reasoned that given the vast amount of information available on the Internet, it would be impossible for librarians to review all of the Internet sites and determine which sites are appropriate for minors.²⁴⁰ Justice Stevens’ dissent raised serious doubt about the effectiveness of filtering software, and he argued that since filters rely on keyword-based blocking they do not have the ability to define specific categories.²⁴¹ He explained that the software would not recognize Web sites with sexually explicit pictures and that Web sites using image files rather than text to represent words would render automated review impossible.²⁴² The result would be “underblocking,” which would provide parents with a false sense of security.²⁴³ In addition, underblocking will not prevent minors from being exposed to harmful material, and CIPA will have failed to solve the problem that fueled its enactment.²⁴⁴ Justice Stevens also explained that protecting children from harmful material does not justify an overly broad restriction on adults’ rights to constitutionally protected speech.²⁴⁵ Justice Stevens further argued that the libraries’ ability to remove filters was not enough to make CIPA constitutional.²⁴⁶ He reasoned that since patrons cannot see what is being blocked, they cannot know which sites to request.²⁴⁷

Justice Souter, joined by Justice Ginsberg, also dissented, arguing that filtering software in libraries is unconstitutional even without federal compulsion.²⁴⁸ He was extremely skeptical of the idea that an adult patron could obtain access to blocked Web sites simply by asking a librarian.²⁴⁹ Justice Souter referred to the statute’s language, arguing that CIPA only states that a librarian “may” remove or disable the filter, not that a librarian is required to.²⁵⁰ He also questioned the statute’s provision

239. *Id.* at 220 (Stevens, J., dissenting).

240. *See id.* at 222 (Stevens, J., dissenting).

241. *Id.* at 221 (Stevens, J., dissenting).

242. *Id.*

243. *Id.* at 222 (Stevens, J., dissenting).

244. *See id.*

245. *Id.* “The Government may not suppress lawful speech as the means to suppress unlawful speech.” *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002).

246. *See Am. Library Ass’n, Inc.*, 539 U.S. at 224 (Stevens, J., dissenting).

247. *See id.* (stating patrons cannot know what is being blocked until it is unblocked).

248. *See id.* at 231 (Souter & Ginsberg, JJ., dissenting).

249. *See id.* at 232 (Souter & Ginsberg, JJ., dissenting).

250. *Id.* at 233 (Souter & Ginsberg, JJ., dissenting).

regarding removal for “bona fide research or other lawful purpose.”²⁵¹ Justice Souter reasoned that the term “lawful purpose” was ambiguous, and that there must be some restrictions that would prevent a librarian from being the sole determiner.²⁵²

In his dissent, Justice Souter also argued that the statute could have granted adults unrestricted Internet access, no questions asked.²⁵³ He further stated that blocking adults’ access to material inappropriate for children, which adults would lawfully be entitled to see, would be imposing content-based restrictions on material within the library’s control.²⁵⁴ That, he explained, would be censorship.²⁵⁵ Justice Souter was careful to explain that censorship would not occur if adults were successful in persuading a librarian that they were bona fide researchers using the Internet for lawful purposes.²⁵⁶ Adults, however, who could not convince a librarian to remove or disable the filter would be victims of complete censorship.²⁵⁷

VI. HOW THE SUPREME COURT ERRED

In *United States v. American Library Association, Inc.*, (*ALA*) the Court failed to directly address whether CIPA violates the First Amendment rights of library patrons.²⁵⁸ Justice Rehnquist explicitly declined to address the question of whether public entities may assert First Amendment rights against the federal government.²⁵⁹ Rather, the Chief Justice, writing for the plurality, upheld CIPA on the grounds that libraries do not constitute public fora and that Congress has broad discretion to define the limits of a program when the government spends public money on that program.²⁶⁰ The plurality, however, overlooked the First Amendment implications involved in CIPA, incorrectly applied the public forum analysis and the unconstitutional conditions doctrine, and as a result failed to invoke the proper standard of statutory review, strict scrutiny.

251. *Id.* (quoting 20 U.S.C. § 9134 (f)(3)(2003)).

252. *See id.* “[C]ourts should disfavor interpretations of statutes that render language superfluous.” *Connecticut Nat’l. Bank v. Germain*, 503 U.S. 249, 253 (1992).

253. *See Am. Library Ass’n, Inc.*, 539 U.S. at 234 (Souter & Ginsberg, JJ., dissenting).

254. *Id.* at 234–35 (Souter & Ginsberg, JJ., dissenting).

255. *Id.*

256. *Id.*

257. *Id.*

258. *See supra* note 212 and accompanying text.

259. *See supra* notes 214–216 and accompanying text.

260. *See supra* notes 200, 214 and accompanying text.

A. Library Patrons Have First Amendment Rights

The first obstacle encountered when challenging the validity of a provision under the First Amendment is to determine whether a First Amendment right exists.²⁶¹ The Supreme Court has held that the First Amendment guarantees “the right to receive information and ideas.”²⁶² In *Pico*, the Court held that students’ rights to receive information was violated when the school board removed certain books from the school library simply because the board disliked the ideas contained in the books.²⁶³ Justice Rehnquist should have adopted the Court’s reasoning in *Pico*, because filtering Internet content is tantamount to removing books. When a public library buys Internet access, all Internet material is instantly available to library patrons.²⁶⁴ It follows that the Internet is similar to a set of encyclopedias,²⁶⁵ and CIPA’s filtering requirement is analogous to removing certain encyclopedias from the set because the filters will block or essentially remove certain portions of the Internet. Indeed, placing filters on public library computers is in effect a removal decision. Blocking Internet material by way of filtering violates library patrons’ rights to receive information and ideas and therefore violates their First Amendment rights.

While the Court should have followed *Pico*, it is understandable that Justice Rehnquist did not adopt *Pico* because he dissented in that case.²⁶⁶ But his reasoning in his *Pico* dissent was based on the removal of books in school libraries, not public libraries.²⁶⁷ Justice Rehnquist argued that school libraries could remove certain books because “unlike university or *public libraries*, . . . school libraries are not designed for freewheeling inquiry.”²⁶⁸ He further stated that the removal was justified because the denied ideas were easily and readily available at public libraries.²⁶⁹ By this very reasoning, removing Internet material from public libraries by way of filtering gives young people almost no other options to access appropriate and controversial but not illegal information. The *ALA* Court should have followed the Court’s reasoning in *Pico*, and found that

261. See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985); *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1250 (3rd Cir. 1992).

262. See *supra* note 17 and accompanying text.

263. See *Bd. of Educ. v. Pico*, 457 U.S. 853, 872 (1982).

264. See *Mainstream Loudoun v. Bd. of Trustees of the Loudoun County Library*, 2 F. Supp. 2d 783, 793 (E.D. Va. 1998).

265. See *id.* at 794.

266. See *Bd. of Educ. v. Pico*, 457 U.S. 853, 904 (1982) (Rehnquist, Burger, & Powell, JJ., dissenting).

267. See *id.* at 915 (Rehnquist, Burger, & Powell, JJ., dissenting).

268. See *id.* (emphasis added).

269. *Id.* at 913 (Rehnquist, Burger, & Powell, JJ., dissenting).

CIPA's filtering requirement is a removal requirement that violates library patrons' First Amendment right to receive ideas.

The Court may have declined to address the First Amendment issue because minors, the class CIPA is designed to protect, are afforded lesser constitutional rights than adults.²⁷⁰ And if filters blocked only material harmful to minors, such as pornography, the Court may have been justified in limiting minors' rights through the use of Internet filtering. Filters, however, block vast amounts of material containing educational and artistic value,²⁷¹ and therefore cannot be relied upon as a constitutional means of limiting minors' First Amendment rights because they block material that does not yield any potentially serious consequences. Recognizing that library patrons have a First Amendment right to receive Internet material is, however, only the first step; whether the government regulation may limit patrons' access depends on what type of forum is at issue.²⁷²

B. Public Libraries Are Limited Public Fora

The Supreme Court in *Perry Educational Association v. Perry Local Educators' Association*,²⁷³ identified three categories of public fora for the purposes of determining the amount of protection afforded to speech.²⁷⁴ These categories are traditional fora, limited or designated public fora, and non-public fora.²⁷⁵ Traditional public fora include sidewalks and parks, and content-based exclusions in these fora are subject to strict scrutiny.²⁷⁶ Limited or designated public fora are places of "public property which the State has opened for use by the public as a place for expressive activity," an example being a municipal theater.²⁷⁷ The ALA district court held, "where the state designates a forum for expressive activity and opens the forum for speech by the public at large on a wide range of topics, strict scrutiny applies to restrictions that single out for exclusion from the forum particular speech whose content is disfavored."²⁷⁸ Non-public fora are places such as federal or state office buildings, and are subject to a very low standard of review.²⁷⁹ While

270. See *supra* notes 59–60 and accompanying text.

271. See *supra* notes 134–154 and accompanying text.

272. *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1255 (3rd Cir. 1992).

273. 460 U.S. 37 (1983).

274. See *id.* at 45–46.

275. *Id.*

276. See *id.* at 45.

277. *Id.*

278. *Am. Library Ass'n, Inc. v. United States*, 201 F. Supp. 2d 401, 461 (E.D. Pa. 2002).

279. See *Perry Ed. Ass'n*, 460 U.S. at 46.

libraries do not constitute traditional or non-public fora, federal courts have held they do constitute limited public fora.²⁸⁰

The United States Court of Appeals for the Third Circuit, in *Kreimer v. Bureau of Police*,²⁸¹ was the first court to determine that a public library was a limited public forum, and its decision was based on three factors: government intent, extent of use, and the nature of the forum.²⁸² Six years later the United States District Court for the Eastern District of Virginia decided *Mainstream Loudoun v. Board of Trustees of Loudoun County Library*,²⁸³ and following *Kreimer* and applying its three factors, the court ruled that a public library in Virginia constituted a limited public forum.²⁸⁴

Both the *Kreimer* and *Mainstream Loudoun* courts found that the “government intended” to open the libraries to the public as limited public fora.²⁸⁵ In *Kreimer*, the court relied on a New Jersey Township’s statute governing the establishment of public libraries which encouraged all patrons to use the library “to the maximum extent possible.”²⁸⁶ The *Mainstream Loudoun* court found that the public library in Virginia intended to create a public forum when the Library Board of Trustees declared in a resolution that its “primary objective . . . [is] that people have access to all avenues of ideas” and that the public interest requires “offering the widest possible diversity of views and expressions.”²⁸⁷

The *Kreimer* and *Mainstream Loudoun* court also ruled that the extent of use granted by the New Jersey and Virginia state governments was sufficient to find that both libraries constituted limited public fora.²⁸⁸ The *Kreimer* court based its reasoning on a state statute granting all residents of Morristown New Jersey access to the library and excluding patrons only if they were found in violation of the library rules.²⁸⁹ The *Mainstream Loudoun* court found that the Virginia public library’s policy granting access to all persons regardless of “age, race, religion, origin, background or views” was sufficient to show the library limited its own

280. See *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1262 (3rd Cir. 1992); *Mainstream Loudoun v. Bd. of Trustees of the Loudoun County Library*, 24 F. Supp. 2d 552, 563 (E.D. Va. 1998).

281. 958 F.2d 1242.

282. *Id.* at 1259–62.

283. 24 F. Supp. 2d 552 (E.D. Va. 1998).

284. *Id.* at 562–563.

285. *Kreimer*, 958 F.2d at 1259; *Mainstream Loudoun*, 24 F. Supp. 2d at 562–63.

286. See *Kreimer*, 958 F.2d at 1259.

287. *Mainstream Loudoun*, 24 F. Supp. 2d at 562–63.

288. See *Kreimer*, 958 F.2d at 1260; *Mainstream Loudoun*, 24 F. Supp. 2d at 563.

289. *Kreimer*, 958 F.2d at 1260.

discretion to restrict access, and therefore, satisfied the “extent of use” prong.²⁹⁰

After finding the first two factors satisfied, the *Kreimer* and *Mainstream Loudoun* courts examined the third factor, the nature of the forum.²⁹¹ To determine the nature of the forum, the *Kreimer* court looked at whether the nature of the public library is compatible expressive activity.²⁹² The court held that the nature of the public library was to assist the patron in acquiring knowledge through reading and writing.²⁹³ The court found that other “oral and interactive First Amendment activities” are not inherent to the nature of a public library.²⁹⁴ The *Mainstream Loudoun* court reasoned that the nature of the public library was to promote the receipt and communication of information, and because Internet users could receive and communicate information through the computer, the nature of the public library was consistent with the expressive activity.²⁹⁵

C. The Libraries in the ALA Case Are Limited Public Fora

Similar to the *Kreimer* and *Mainstream Loudoun* courts, the ALA Court should have found that the state governments of plaintiff libraries intended to open the libraries to the public as limited public fora. The *Kreimer* and *Mainstream Loudoun* courts based a showing of government intent on whom the library intended to grant access to in order to satisfy this prong. The libraries’ briefs in the ALA case explicitly state that the vast majority of public libraries, including themselves, have adopted the American Library Associations’ (ALA) Library Bill of Rights.²⁹⁶ It follows that state public libraries in the ALA case have evinced clear government intent to operate as limited public fora by adopting the ALA’s Bill of Right’s statement; a statement that says the role of libraries is to provide: “[b]ooks and other . . . resources . . . for the interest, information, and enlightenment of all people of the community the library serves.”²⁹⁷ Indeed, Justice Rehnquist quoted the same statement while examining the role of libraries in society.²⁹⁸ Accordingly, the libraries in the ALA case have satisfied the first factor in the public forum analysis.

290. *Mainstream Loudoun*, 24 F. Supp. 2d at 563.

291. *Kreimer*, 958 F.2d at 1260–61; *Mainstream Loudoun*, 24 F. Supp. 2d at 563.

292. *Kreimer*, 958 F.2d at 1260–61.

293. *Id.*

294. *Id.*

295. *See Mainstream Loudoun*, 24 F. Supp. 2d at 563.

296. Brief of Amici Curiae The Cleveland Public Library et al. at 8, *United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194 (2003) (No. 02-361) (stating “The vast majority of public libraries have adopted the ALA Library Bill of Rights.”).

297. *ALA Bill of Rights*, *supra* note 166 (reciting the ALA’s Library Bill of Rights).

298. *United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194 at 203–04.

In the same way the libraries in *Kreimer* and *Mainstream Loudoun* proved the second factor, extent of use, the ALA Court should have found that the libraries in that case could also satisfy this factor. The *Kreimer* and *Mainstream Loudoun* courts looked to the extent of use the government allowed and to whether the library has limited its own discretion to restrict access. The libraries' briefs in the ALA case clearly state that "public libraries [are open] to any member of the public who enters them . . . seeking information."²⁹⁹ In addition, the libraries in the ALA case have adopted the American Library Associations' Bill of Rights,³⁰⁰ which provides that "[a] person's right to use a library should not be denied or abridged because of origin, age, background, or views."³⁰¹ Based on the statements of the libraries and the policies they have adopted, the libraries in the ALA case satisfy the extent of use factor.

In the same way the libraries in the ALA case could satisfy the first two factors of the public forum analysis, the libraries could also show a sufficient basis for the third. The third prong requires that the nature of the forum be compatible with expressive activity. The libraries' brief in the ALA case states that the nature of the public library is "to provide the information sought by the user."³⁰² The *Mainstream Loudoun* court found that the nature of the Virginia public library was to promote the receipt of information. The nature of the libraries in the ALA case and the *Mainstream Loudoun* case are almost identical. And similar to the reasoning in the *Mainstream Loudoun* case, because the nature of the libraries in the ALA case is to provide information, it follows that the Internet provides information to a library patron, and therefore, the nature of the property is consistent with the expressive activity.

The Court has already showed some acceptance the ALA's interpretation of the purpose of a library: to provide resources for the enlightenment of the community. Although the government may have a compelling interest to protect children from certain content obtainable over the internet, the Court has recognized that public libraries function as a means for people to obtain ideas that may not be available in more restrictive environments.³⁰³ There is no reason for the Court not to follow the Third Circuit and the Eastern District of Virginia in their interpretations of public libraries as limited public fora.

299. Brief of Appellees Multnomah County Public Library et al. at 25, *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194 (2003) (No. 02-361).

300. *ALA Bill of Rights*, *supra* note 166 and accompanying text.

301. *ALA Bill of Rights*, *supra* note 166 and accompanying text.

302. Brief of Amici Curiae The Cleveland Public Library et al. at 7, *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194 (2003) (No. 02-361).

303. *See supra* note 274 and accompanying text

D. CIPA Imposes Unconstitutional Conditions

In the *ALA* case the appellees argued that CIPA imposed an unconstitutional condition on their First Amendment rights because filters block library patrons' access to constitutionally protected speech.³⁰⁴ Justice Rehnquist chose not to directly address whether CIPA violates the unconstitutional conditions doctrine, explaining that even if the libraries could assert a claim under this doctrine, it would fail on the merits.³⁰⁵ The doctrine provides that Congress cannot attach unconstitutional conditions to the receipt of federal funds.³⁰⁶ Instead of addressing the issue, Rehnquist cited *Rust v. Sullivan*, and stated, "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program."³⁰⁷ *Rust*, however, only applies to situations in which the government aims to promote a particular message.³⁰⁸ In *Rust*, the message and the result were clear: the message favored by the government was that abortion counseling would not be funded,³⁰⁹ the result was that abortion counseling was not funded.³¹⁰ In the *ALA* case the correlation is not so clear.

The message favored by the government in enacting CIPA is that children should not be exposed to material that is harmful to them, and the means used to advance this message are Internet filters.³¹¹ Internet filters, however, block large amounts of constitutionally protected speech and are also under-inclusive, allowing material that is harmful to minors to sneak through so that minors can access it.³¹² Since the government cannot protect children from harmful material given the ineffectiveness of current filtering technology, the message conveyed is not supported by the results received.³¹³ As a result, the government's condition, the filters, are blocking protected speech; and not the indecent speech that is protected for only adults, but protected speech for all library patrons.

304. See *supra* notes 207–209 and accompanying text.

305. See *supra* note 212 and accompanying text.

306. See *supra* note 209 and accompanying text.

307. *Am. Library Ass'n, Inc.*, 539 U.S. at 211 (citing *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)). See *supra* notes 212–214 and accompanying text.

308. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (distinguishing *Rust* on the ground that "the counseling activities of the doctors . . . amounted to government speech"); *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000) (stating that, unlike *Rust*, "the issue of the government's right . . . to use its own funds to advance a particular message" was not present).

309. See *supra* note 215 and accompanying text.

310. See *supra* note 217 and accompanying text (rejecting the plaintiffs' claims that they were entitled to abortion counseling).

311. See *supra* Part III.C (providing the statutory framework of CIPA).

312. See *supra* Part IV.B (discussing the ineffectiveness of Internet Filters).

313. *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 229 (2003) (Stevens, J., dissenting).

Therefore, the plurality in the *ALA* case should have found that *Rust* does not apply,³¹⁴ and that CIPA imposes unconstitutional conditions on the receipt of federal funding.

E. CIPA Cannot Survive Strict Scrutiny

When the government designates a limited public forum for expressive activity on a broad range of topics and then content-based restrictions exclude one of those topics, strict scrutiny applies.³¹⁵ To survive strict scrutiny, a restriction on speech must be narrowly tailored to achieve a compelling government interest.³¹⁶ The government's interest in shielding minors from obscene and indecent material, as well as material that is harmful to them, is well-established.³¹⁷ CIPA, therefore, can satisfy the first prong of strict scrutiny because it is aimed at achieving a compelling government interest. The statute, however, still fails constitutional muster because the means used to achieve the government interest are not narrowly tailored.

A statute is narrowly tailored "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."³¹⁸ Given the vast amount of legitimate Web sites Internet filters block, CIPA cannot pass the narrowly tailored prong of strict scrutiny because protecting children from harmful Internet content could be achieved more effectively without the statute.

The district court in the *ALA* case found that commercially available filters block thousands of Web sites that are clearly not harmful to minors.³¹⁹ These sites include the "California Jewish Community Center," the Web site for "Wisconsin Right to Life," and the "Willis-Knighton Cancer Center."³²⁰ The court further found, relying on evidence presented by the government's expert witness, that between 6% and 15% of Web sites blocked by filters used in public libraries contained no content that could be deemed harmful to minors.³²¹

The plurality in the *ALA* case did not dispute any of these findings. The Court also did not, however, afford these findings any substantial weight and instead focused on the fact that CIPA allows Internet users to ask a librarian to disable the filter for bona fide research.³²² But this ar-

314. *See id.*

315. *See Am. Library Ass'n, Inc., v. United States*, 201 F. Supp. 2d 401, 460 (2002).

316. *See supra* notes 19-22 and accompanying text.

317. *See Am. Library Ass'n, Inc.*, 201 F. Supp. 2d at 471.

318. *United States v. Albertini*, 472 U.S. 675, 689 (1985).

319. *See Am. Library Ass'n, Inc.*, 201 F. Supp. 2d at 475.

320. *See id.* at 446-48.

321. *See id.* at 475.

322. *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 209 (2003).

gument is unpersuasive considering the evidence presented to the district court, evidence that unblocking could take days and could even be unavailable to users at branch libraries, which are typically understaffed.³²³ Additionally, the Supreme Court's jurisprudence clearly states that lawful speech may not be blocked in an effort to block unlawful speech.³²⁴

In *Ashcroft v. Free Speech Coalition*,³²⁵ the Court held that "[t]he argument . . . that protected speech may be banned as a means to ban unprotected speech . . . turns the First Amendment upside down."³²⁶ Following this reasoning, blocking material that is suitable for minors and adults while aiming to block material that is potentially harmful to minors is unconstitutional. While CIPA on its face requires the suppression of only unprotected constitutional speech, it is impossible for current filtering technology to comply with CIPA without blocking protected speech. Filters, therefore, are not a narrowly tailored means to achieve the government interest of protecting children from inappropriate Internet material. Accordingly, the Court should have looked at less restrictive alternatives.

The District Court in the *ALA* case found a variety of less restrictive alternatives available to public libraries.³²⁷ To prevent patrons from accessing illegal material, such as child pornography, public libraries could institute computer use policies and impose penalties on patrons who violate these policies.³²⁸ Libraries could also require parental consent for minors who want to use the terminals filter-free, or restrict minors' unfiltered searching to computers visible to library staff.³²⁹ In addition, alternatives such as optional filtering, recessed monitors, and privacy screens could also be implemented and serve as less restrictive alternatives.³³⁰

323. *Am. Library Ass'n, Inc., v. United States*, 201 F. Supp. 2d 401, 411 (2002).

324. *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 222 (2003) (citing *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002)).

325. 535 U.S. 234 (2002) (holding that the Child Pornography Prevention Act (CPA), which banned virtual child pornography, was unconstitutional because it also banned a substantial amount of protected speech).

326. *Id.* at 254; see also *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 814 (2000) ("[T]he objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative"); *Reno v. ACLU*, 521 U.S. 844, 875 (1997) (The "governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults."); *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) ("[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted . . .").

327. *Am. Library Ass'n, Inc., v. United States*, 201 F. Supp. 2d 401, 410 (2002).

328. *Id.*

329. *Id.*

330. *Id.*

CONCLUSION

Mandatory filters supplant necessary parental control and education. Someone has to decide what material is suitable for minors, and CIPA leaves this decision to private companies that develop Internet filters and libraries that implement those filters.³³¹ Private companies hire employees to review Web sites and make a determination as to what kind of material should be blocked.³³² Essentially, private companies and their employees choose what kind of material is appropriate for America's youth. CIPA expressly prohibits federal interpretation of what content is appropriate for minors, leaving the determination to local communities.³³³ This scheme provides, however, for librarians, not parents, to determine what type of material is harmful since they are in control of the filtering software. The problem is that what one family deems harmful to minors can vary greatly from what another family deems harmful to minors. Granting private companies or librarians the power to decide what content is harmful to minors puts them in a parenting role, a position beyond the realm of their duties. Children's levels of maturity, emotional stability, and rates of development and learning vary too much for a third party commercial entity to decide what kind Internet material is appropriate. Determining what content children view is a decision for the parents. Privacy screens, restricted passwords, and secluded Internet terminals may be less restrictive alternatives to filters, but all are inferior to education. Rather than preparing children for the world they will live in, these alternatives are preparing them for a world that no longer exists.

331. *Supra* note 123 and accompanying text.

332. *See supra* notes 159–162 and accompanying text.

333. *See supra* note 123 and accompanying text.