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Internet Filters and the First Amendment: Public Libraries after *United States v. American Library Association*

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Note

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I. INTRODUCTION

In November 2003, two grandparents took their grandson to the public library in a suburb of Chicago.[1] As the nine-year-old boy was using the library's computer, which was located in a children's section, he was able to access pornographic files that had been saved to the computer by a previous user.[2] The library responded to the grandparents' complaint by turning off the computers until it could formulate an appropriate response to library patrons accessing inappropriate materials.[3] This library, like many others, has struggled to find ways to protect children from accessing inappropriate materials on the Internet.[4]

Over the last decade the Internet[5] has become a tool used by more than 143 million Americans, providing quick and easy access to

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1. Joseph Sjostrom, *Oak Park Library Turns Off Computers; Sexual Images Seen in Children's Area*, CHI. TRIB., Nov. 21, 2003, at 10, *available at* 2003 WL 68334794.

2. *Id.*

3. *Id.*

4. *Id.*; *see infra* Part II.D.1–2 (describing filtering software and its alternatives).

5. For a definition of the "Internet" and a discussion of its history, see Susan J. Drucker & Gary Gumpert, *Legal Geography: The Borders of Cyberlaw Introduction*, *in* REAL LAW @ VIRTUAL SPACE: COMMUNICATION REGULATION IN CYBERSPACE 3 (Susan J. Drucker & Gary Gumpert eds., 1999). The Internet may be separated into two subcategories: the "publicly-indexable Web," which is more easily accessible, and the "Deep Web," which contains materials

information from around the world.[6] Individuals who do not have access to the World Wide Web (the "Web")[7] at home must go elsewhere, including their local public library, to gain access.[8] Indeed, ten percent of Americans who use the Internet do so at public libraries.[9]

While the Internet provides access to much valuable information, it also contains a vast amount of pornographic material.[10] Children, who constitute a large number of Internet users,[11] often access the Internet in

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that potential viewers must seek out more actively. *See* Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 418–19 (E.D. Pa. 2002) [hereinafter ALA I] (discussing the differences between these two types of Internet materials), *rev'd*, 123 S. Ct. 2297, 2309 (2003).

6. *ALA I*, 201 F. Supp. 2d at 405, 422; *see* Drucker & Gumpert, *supra* note 5, at 3 (stating that the number of Internet users is growing at a rate that is difficult to keep current). Because the Web is a world-wide medium, there are difficulties in dealing with jurisdictional issues. Drucker & Gumpert, *supra* note 5, at 7–15 (discussing some issues pertaining to jurisdiction when dealing with a world-wide medium, such as the Internet). Some commentators argue that "cyberspace [should] be considered a 'place,' rather than a medium, with its own constitution on which to base a developing body of applicable law and self-regulatory systems." *Id.* at 16.

7. *See* Drucker & Gumpert, *supra* note 5, at 3 (describing the Web and its history).

> The Web refers to the thousands of host computers and servers interconnected through the Internet featuring graphical sites called "home pages," which feature graphics, hypertext markup or highlighted text, and "hot links" that interlock sites globally, allowing one to browse or "surf" many sites. Web browsers operating on a "point and click" basis have fueled the enormous growth of the Internet. The Web allows for the display of text, images, sound, and video. Commercial online services such as America Online (AOL), CompuServe, and Prodigy provide content and organization and now incorporate Web browsers.

Id.

8. *ALA I*, 201 F. Supp. 2d at 422; Internet Free Expression Alliance, Joint Statement for the Record on "Kids and the Internet: The Promise and the Perils" (Dec. 14, 1998), *available at* http://www.eff.org/Censorship/Censorware/19981214_ifea_nclis.statement (last visited Mar. 15, 2004). Approximately 95% of public libraries in the United States have Internet access available. United States v. Am. Library Ass'n, 123 S. Ct. 2297, 2301 (2003) [hereinafter ALA II].

9. *ALA I*, 201 F. Supp. 2d at 405.

10. *ALA II*, 123 S. Ct. at 2301; *see also ALA I*, 201 F. Supp. 2d at 406 ("There are more than 100,000 pornographic websites that can be accessed for free and without providing any registration information, and tens of thousands of Web sites contain child pornography."). *But see* Mitchell P. Goldstein, *Congress and the Courts Battle over the First Amendment: Can the Law Really Protect Children from Pornography on the Internet?*, 21 J. MARSHALL J. COMPUTER & INFO. L. 141, 144–45 (2003) (stating that commercial adult websites make up just over 2.1% of the total number of websites).

11. Minors constitute a large number of Internet users, with approximately seventy-five percent of fourteen- to seventeen-year-olds and sixty-five percent of ten- to thirteen-year-olds using online services. NAT'L TELECOMM. & INFO. ADMIN., U.S. DEP'T OF COMMERCE, EXECUTIVE SUMMARY, A NATION ONLINE: HOW AMERICANS ARE EXPANDING THEIR USE OF THE INTERNET, (Feb. 2002), *available at* http://www.ntia.doc.gov/ntiahome/dn/html/execsum.htm (last visited Mar. 15, 2004). An increasing number of children access the Internet to work on school projects, research items of interest, or connect with others through e-mail or chat sessions. *See* SAMUEL JOSHUA FRIEDMAN, CHILDREN AND THE WORLD WIDE WEB: TOOL OR TRAP? 8 (2000) (reporting that, in 1997, close to one million children were using the Web and at least 3.8 million had access, and forecasting that the number of children using and accessing the Web

places with no parental supervision, such as schools, libraries, and friends' homes.[12] Easy access to sexually explicit materials has created problems for libraries, which report that patrons of all ages use library computers to view online pornography.[13] Additionally, some libraries report that patrons leave pornographic materials on the monitors or even in the printers.[14] Due to the increasing number of younger Internet users and the vast amount of pornography available on the Internet, Congress has grappled with ways to protect children from these harmful materials.[15]

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would quadruple every four years). *See generally* Goldstein, *supra* note 10, at 142–43 (discussing general uses of the Internet and number of users).

12. COMM'N ON ONLINE CHILD PROT., REPORT TO CONGRESS 14 (Oct. 20, 2000), *available at* http://www.copacommission.org/report/COPAreport.pdf (last visited Mar. 15, 2004). *See generally* Gretchen Witte, Comment, *Internet Indecency and Impressionable Minds*, 44 VILL. L. REV. 745, 757–70 (1999) (discussing some of the negative effects of children's access to online pornography). One commentator recognized that children's viewing of pornography has some detrimental effects, such as desensitizing children to the severity of sexual violence, teaching children to view women negatively, contributing to children's premature sexual development, and allowing children to be more accessible to sexual predators. *Id.* at 764–70. Conversely, this commentator also argued that there are some benefits of allowing children access to sexually explicit materials, such as to teach children the proper names for body parts. *Id.* at 771

13. *ALA II*, 123 S. Ct. at 2301; DAVID BURT, FAMILY RESEARCH COUNCIL, DANGEROUS ACCESS, 2000 EDITION: UNCOVERING INTERNET PORNOGRAPHY IN AMERICA'S LIBRARIES (2000) (discussing numerous instances where patrons or librarians reported that other patrons used the library computer terminals to access pornography), *available at* http://www.copacommission.org/papers/bi063.pdf (last visited Mar. 15, 2004). *But see* Gregory K. Laughlin, *Sex, Lies, and Library Cards: The First Amendment Implications of the Use of Software Filters To Control Access to Internet Pornography in Public Libraries*, 51 DRAKE L. REV. 213, 236 (2003) (discussing a study finding that in the preceding one-year period, less than twenty percent of libraries received any formal complaints about Internet content).

14. *ALA II*, 123 S. Ct. at 2301–02; BURT, *supra* note 13, at 6–11 (describing incidents of patrons using library computers to access and even print pornographic images).

15. *See infra* Part II.D.3.a (discussing the Communications Decency Act of 1996); *infra* Part II.D.3.b (discussing the Child Online Protection Act); *infra* Part III.A (discussing the Children's Internet Protection Act); *see also* COMM'N ON ONLINE CHILD PROT., *supra* note 12 (reviewing different proposals for regulating children's access to the Internet). The Commission on Online Child Protection report includes analysis of the following:

> [F]iltering and blocking services; labeling and rating systems; age verification efforts; the possibility of a new top-level domain for harmful to minors material; "greenspaces" containing only child-appropriate materials; Internet monitoring and time-limiting technologies; acceptable use policies and family contracts; online resources providing access to protective technologies and methods; and options for increased prosecution against illegal online material.

Id. at 14. The Commission on Online Child Protection conducted its study on the proposed protective methods with the focus on use in homes or other private environments. *Id.* at 15. Also, whereas the Child Online Protection Act applied only to Web materials, the commission looked at other contexts, including e-mail, chat rooms, instant messaging, and newsgroups. *Id.*

In *United States v. American Library Ass'n*,[16] the Supreme Court addressed the latest congressional attempt to curb children's access to the Internet: the Children's Internet Protection Act ("CIPA").[17] The Supreme Court held that CIPA, which requires public libraries to use Internet filtering software to block inappropriate material, did not violate the United States Constitution.[18]

Before examining the Court's decision in *United States v. American Library Ass'n*, Part II of this Note will address First Amendment principles of content-based and content-neutral restrictions on speech, the right to receive information, and the lack of protection for certain types of sexually explicit materials.[19] Part II then will discuss various attempts to protect children from inappropriate materials on the Internet.[20] Next, Part II will address Spending Clause jurisprudence and congressional power to attach conditions to federal funding.[21] Part III will examine the district court and the Supreme Court decisions regarding the constitutionality of CIPA.[22] Part IV will analyze the Supreme Court decision and argue that the plurality applied the incorrect level of scrutiny when it found CIPA to be constitutional.[23] Finally, Part V will discuss the impact of the Supreme Court's finding that CIPA was constitutional.[24]

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16. ALA II, 123 S. Ct. 2297 (2003).

17. Although CIPA is a federal statute, some states have enacted legislation to deal with children's access to inappropriate Internet materials. *See* Amy Keane, Annotation, *Validity of State Statutes and Administrative Regulations Regulating Internet Communications Under Commerce Clause and First Amendment of Federal Constitution*, 98 A.L.R. 5TH 167, § 3b (2003) (listing state statues that have attempted to address children's Internet access).

18. *ALA II*, 123 S. Ct. at 2309. In addition to libraries, schools receiving specified federal funds also must comply with CIPA provisions. *See* 47 U.S.C. § 254(h)(1)(B) (2003). However, this Note will only address CIPA in the library context.

19. *See infra* Part II.A (discussing the distinction between content-neutral and content-based restrictions on speech and the requisite levels of constitutional scrutiny); *infra* Part II.B (discussing the First Amendment right to receive information); *infra* Part II.C (discussing the lack of First Amendment protection for certain sexually explicit material).

20. *See infra* Part II.D (discussing some options for libraries and recent legislative attempts to protect children from accessing Internet pornography).

21. *See infra* Part II.E (discussing standards applied to the use of the Spending Clause to regulate activities).

22. *See infra* Part III (discussing the rationale of the district court decision and the reasoning of the Supreme Court when it reversed the district court opinion by finding CIPA constitutional).

23. *See infra* Part IV.A. (discussing the dissent's correct application of strict scrutiny, in contrast with the plurality's application of rational basis review).

24. *See infra* Part V. (discussing how the Supreme Court's decision impacts local libraries).

II. BACKGROUND

This Part begins with an analysis of the First Amendment's distinction between content-based and content-neutral restrictions on speech and public forum designations.[25] This Part then examines the right to receive information guaranteed under the First Amendment and how it applies to libraries and the Internet.[26] Next, this Part addresses the First Amendment's lack of protection for obscene material, child pornography, and material that is "harmful to minors."[27] This Part then examines methods for restricting minors' access to inappropriate material on the Internet, including filtering software and legislative efforts.[28] Finally, this Part addresses Congress's powers under the Spending Clause and its use of those powers to regulate the Internet.[29]

A. The First Amendment Distinction Between Content-neutral and Content-based Regulations

The First Amendment provides, in part, that "Congress shall make no law . . . abridging the freedom of speech."[30] Contrary to its specific language, this amendment does not prohibit all restrictions on speech;

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25. *See infra* Part II.A.1–2 (discussing speech restrictions based on content, including their regulation in different public forums, and the requisite levels of scrutiny).

26. *See infra* Part II.B.1–2 (discussing the First Amendment right to receive information and how courts have interpreted this doctrine in the contexts of libraries and the Internet).

27. *See infra* Part II.C.1–3 (discussing the rationale supporting the Supreme Court's decisions, where the Court determined that the First Amendment does not protect obscenity, child pornography, and materials that are "harmful to minors").

28. *See infra* Part II.D.1–2 (discussing filtering software and other library-based alternatives, as well as statutes that have attempted to deal with the problem of children accessing inappropriate materials on library computers).

29. *See infra* Part II.E (discussing the powers that the Constitution confers on Congress and how these powers are supplemented by the Spending Clause).

30. U.S. CONST. amend. I. "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." Roth v. United States, 354 U.S. 476, 488 (1957).

> Speech, it is said, is divided into three sorts—(1) speech that everyone has a right to (political speech, speech about public affairs); (2) speech that no one has a right to (obscene speech, child porn); and (3) speech that some have a right to but others do not (in the United States, *Ginsberg* speech, or speech that is 'harmful to minors,' to which adults have a right but kids do not).

Lawrence Lessig & Paul Resnick, *Zoning Speech on the Internet: A Legal and Technical Model*, 98 MICH. L. REV. 395, 395 (1999). "The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly." United States v. Playboy Entm't Group, 529 U.S. 803, 826 (2000). *See generally* DANIEL A. FARBER, THE FIRST AMENDMENT 8–13 (1998) (discussing the history behind the enactment of the First Amendment); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 957–59 (14th ed. 2001) (outlining the history behind the First Amendment).

instead, the First Amendment prohibits only the suppression of speech that is based on content.[31] Therefore, the government may not restrict speech because it disagrees with the message, ideas, subject matter, or substance of that speech.[32] Additionally, the government may not justify its restrictions on speech solely on content.[33] Consequently, when the government attempts to regulate speech, the regulation's constitutionality depends on whether it is linked to the content of the speech.[34]

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31. *See* Ashcroft v. ACLU, 535 U.S. 564, 573 (2002) (plurality opinion) ("As a general matter, 'the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" (citing Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983))).

32. Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972).

> To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principal that debate on public issues should be uninhibited, robust, and wide-open."

Id. at 95–96 (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)). *See generally* Laughlin, *supra* note 13, at 221–34 (outlining the history of censorship and particularly the history of censorship in American libraries); Christopher D. Hunter, Filtering the Future?: Software Filters, Porn, Pics and the Internet Content Conundrum 11–20 (n.d.) (outlining the general history of censorship), *available at* http://www.copacommission.org/papers/hunter-thesis.pdf (last visited Mar. 15, 2004).

33. *Mosley*, 408 U.S. at 96. In *Police Department of Chicago v. Mosley*, Chicago enacted an ordinance that prohibited picketers from demonstrating directly before, during, or directly after school hours. *Id.* at 92–93. The defendant had picketed outside of a local high school, claiming that the school discriminated against African-Americans. *Id.* at 93. Because the ordinance allowed some types of picketing (such as for labor disputes) rather than others, the Court applied an Equal Protection analysis after finding that the ordinance constituted a content-based restriction on speech. *Id.* at 94–95. The Supreme Court went further than just issuing a finding of viewpoint discrimination by announcing a broad rule: "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* at 95.

34. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 385 (1992) ("We have long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses . . . ."). In *R.A.V.*, the city of St. Paul enacted an ordinance that made criminal any act where the speaker "knows or has reasonable grounds to know" that the act "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *Id.* at 380. Communications that were not related to one of the protected categories were permissible, even if quite severe or hostile. *Id.* The state argued that these communications were construed to mean "fighting words," which previously had been ruled as not privileged for First Amendment protection. *Id.* The majority of the Supreme Court viewed the ordinance as a content-based regulation that was not narrowly tailored to the city's compelling interest. *Id.* at 395–96.

1. Distinction Between Content-neutral and Content-based Regulations

To determine if a regulation is content-neutral or content-based, the main question is whether the government instituted the regulation because it disagreed with the content of the message it aimed to suppress.[35] In making this determination, the government's intent is the focus of the inquiry.[36] If a restriction is content-based, then the regulation may stand only if it meets a heightened level of judicial scrutiny; however, if the restriction is content-neutral, courts will not apply a heightened level of scrutiny.[37]

Indeed, if a regulation's purposes are content-neutral, the regulation does not violate the First Amendment, even if it incidentally restricts protected speech.[38] For a regulation to be content-neutral, the Supreme Court announced in *United States v. O'Brien* that it must: (1) not reference the content of the materials, (2) be "narrowly tailored"[39] to the significant government interest in question, and (3) leave ample room for alternative methods of receiving the regulated speech.[40] Therefore,

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35. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). In *Ward*, a sponsor of a music concert at the Central Park bandshell sued New York City, claiming a First Amendment violation for an ordinance that required the use of city sound technicians. *Id.* at 784. The plaintiff, Rock Against Racism ("RAR"), a group that advocated against racist views, held an annual event at the bandshell for which it supplied its own sound technicians. *Id.* at 784–85. RAR had received warnings that the sound exceeded the allowed limits, after which its power was cut off, which in turn lead to an unruly and hostile reaction from the attendees. *Id.* at 785.

36. *Id.* at 791.

37. *See* City of Renton v. Playtime Theaters Inc., 475 U.S. 41, 46–47 (1986) (stating that there is a presumption of a constitutional violation when the government enacts a content-based restriction, but that the regulation may stand if it meets strict scrutiny). However, for examples of using a lower level of scrutiny, see *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 185 (1997), which addressed speech-related restrictions in the broadcasting and cable television arenas, and *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389–90 (1969), which addressed speech-related restrictions in radio and television broadcasting.

38. *Ward*, 491 U.S. at 791.

39. United States v. O'Brien, 391 U.S. 367, 376 (1968). A restriction is narrowly tailored when it is no greater than necessary to further the government's interest. *Id.*

40. *Id.* In *Unites States v. O'Brien*, the defendant burned his draft card in protest of the Vietnam War. *Id.* at 369. The Supreme Court upheld the ban on burning draft cards because the cards provided the means to check one's draft status. *Id.* at 378–80. The Court found the ban on burning draft cards to be content-neutral, because its restriction on speech was no more restrictive than necessary to further a significant government interest. *Id.* at 381–82. Chief Justice Warren announced the following test for content-neutrality:

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

for a regulation to be content-neutral, the restriction on speech must be narrowly tailored, so as to be no greater than is necessary to further the government's interest.[41]

The Supreme Court later clarified the *O'Brien* three-factor test, holding that a regulation may be content-neutral even if it does not employ the least restrictive option.[42] Consequently, a restriction is content-neutral if it reasonably relates to a significant government interest, other than the suppression of speech because of its content, and is narrowly tailored to a significant government interest, even though it need not be the least restrictive alternative.[43]

Regulations based on the content of speech presumptively violate the First Amendment.[44] Thus, a restriction may remain in effect only if the content-based restriction withstands strict scrutiny, a heightened level of review.[45] To withstand strict scrutiny, the restriction on protected speech must be narrowly tailored to further a compelling government interest.[46] Courts apply a two-step inquiry for strict scrutiny: (1) whether there is a compelling government interest involved, and (2) where there is a compelling government interest, whether the restriction is narrowly tailored to the government interest.[47] If there is a less

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41. *Id.* Under the Equal Protection Clause, statutes that affect one's First Amendment rights must be narrowly tailored to the government's objectives. Police Dep't of Chi. v. Mosley, 408 U.S. 92, 101 (1972). The Fourteenth and First Amendments are intertwined because "the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment" of different types of speech. *Id.* at 95; *see also* Niemotko v. Maryland, 340 U.S. 268, 272 (1951) (discussing the intersection of the First Amendment and Equal Protection).

42. *Ward*, 491 U.S. at 789–90; *see O'Brien*, 391 U.S. at 377 (outlining the three-factor test).

43. *Ward*, 491 U.S. at 796–803. The Supreme Court stated:

> [E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."

Id. at 791 (citing Clark v. Cmty. for Creative Non-violence, 468 U.S. 288, 293 (1984)).

44. City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 46–47 (1986).

45. United States v. Playboy Entm't Group, 529 U.S. 803, 813 (2000); Sable Communications of Cal. Inc. v. FCC, 492 U.S. 115, 126 (1989). Rational basis review is a lower threshold standard, in which the challenged practice need only be reasonable, the government interest in question need not be compelling, the restriction need not be narrowly tailored to the government interest, and the practice need not be the most reasonable or even the only reasonable practice. Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 808–09 (1985); *see* Goldstein, *supra* note 10, at 142 (stating that "regulations based on the time, place or manner of speech—content-neutral regulations—only need some rational basis to survive constitutional scrutiny under the First Amendment").

46. *Playboy*, 529 U.S. at 813; *Sable*, 492 U.S. at 126.

47. *Playboy*, 529 U.S. at 813; *Sable*, 492 U.S. at 126.

restrictive alternative that would meet the needs of the government's interest, the legislature must employ that alternative.[48]

2. Public Forum Analysis

Because content-based restrictions are presumptively unconstitutional, the government generally may not restrict speakers from accessing government property for speech purposes if the regulation is content-based.[49] However, the type of public forum does affect the level of scrutiny the regulation must withstand.[50] The Supreme Court has recognized three types of forums: (1) traditional

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48. *Playboy*, 529 U.S. at 813; *Sable*, 492 U.S. at 126 ("The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling [government] interest if it chooses the least restrictive means to further the articulated interest."); *see also* Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 637 (1980) (stating that legislatures must use "narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms" when trying to regulate a fundamental right); ROBERT S. PECK, LIBRARIES, THE FIRST AMENDMENT AND CYBERSPACE: WHAT YOU NEED TO KNOW 12 (2000) ("Where less drastic means are available to achieve the same basic purpose, even if the result would be less complete from the viewpoint of the government's asserted interest, that less restrictive alternative must be utilized.").

In *Playboy*, the Supreme Court examined restrictions placed on television channels that have sexually oriented programming. *Playboy*, 529 U.S. at 806. Under the Telecommunications Act of 1996, cable television stations that primarily provided sexually oriented programming were required to fully scramble the pictures, or otherwise fully block the images or limit the transmission to times when children likely would not view the channels. *Id.* The Supreme Court in *Playboy* ruled that the statute in question imposed a content-based regulation, since it applied solely to sexually oriented materials, thereby subjecting it to strict scrutiny. *Id.* at 811–12. The Court stated, "[The statute] 'focuses *only* on the content of the speech and the direct impact that speech has on its listeners.' . . . This is the essence of content-based regulation." *Id.* (citation omitted). The Court further reasoned that, although the government's interest in protecting children from viewing sexually oriented materials was compelling, this interest was not compelling enough to support a "blanket ban" on materials if there was a less restrictive alternative. *Id.* at 814. "Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists. We are expected to protect our own sensibilities 'simply by averting [our] eyes.'" *Id.* at 813 (citing Cohen v. California, 403 U.S. 15, 21 (1971)).

49. PECK, *supra* note 48, at 13–14.

50. *See* ALA I, 201 F. Supp. 2d 401, 454 (E.D. Pa. 2002) (stating that "the First Amendment affords greater deference to restrictions on speech in those areas considered less amenable to free expression," such as military bases or airport terminals, than to state universities, public parks, or sidewalks). Although the forum's designation generally determines the level of scrutiny for content-based restrictions, the restriction may still be proper if it is a reasonable regulation of "time, place, or manner." Ward v. Rock Against Racism, 491 U.S. 781, 784 (1989). In *Ward*, the Supreme Court held that the ordinances, which required that musicians use city sound equipment and city sound technicians, were permissible, because they were based on the government's interest in noise control. *Id.* at 802. The Court reasoned that for a regulation to be a time, place, and manner restriction, it did not need to involve the least restrictive option for meeting the government interest. *Id.* at 797–98. Rather, the government must show that the alternatives would not be as effective as the one implemented. *Id.* at 799.

public forums, (2) designated public forums, and (3) non-public forums.[51]

First, a traditional public forum is an area that individuals and groups historically have used for public discussion and expression and that requires no official government designation.[52] For example, public areas such as sidewalks, streets, and parks are traditional public forums.[53] Traditional public forums are subject to strict scrutiny; consequently, the government may exclude a speaker from a traditional public forum only when the exclusion serves a compelling government interest and is narrowly tailored to achieve that interest.[54]

Second, a designated public forum is an area that was not traditionally open to public discussion; instead, the government took an affirmative step to make the area available as a place for public discussion.[55] To determine whether the government has created a designated public forum, courts will look to whether the government intended to designate an area as a public forum.[56] Some examples of designated public forums include school board meetings,[57] state university facilities,[58] and municipal theaters.[59] Similar to traditional public forums, courts apply strict scrutiny to the government's exclusion of a speaker from a designated public forum.[60]

Third, non-public forums, which are made up of properties not deemed traditional or designated public forums, are areas that traditionally have not been open for public expression and have not been designated a public forum by the government.[61] Speech

51. Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 802 (1985); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983).

52. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998) ("Traditional public fora are defined by the objective characteristics of the property, such as whether, 'by long tradition or by government fiat,' the property has been 'devoted to assembly and debate.'" (citing *Perry*, 460 U.S. at 45)); *see* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680–81 (1992) (rejecting the attempt to broaden the traditional public forum from its historical roots).

53. *ALA I*, 201 F. Supp. 2d at 454–55.

54. *Cornelius*, 473 U.S. at 800.

55. *Lee*, 505 U.S. at 678; *Cornelius*, 473 U.S. at 802 ("The government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional [public] forum for public discourse.").

56. *Cornelius*, 473 U.S. at 802.

57. City of Madison Joint Sch. Dist. v. Wis. Employment Relations Comm'n, 429 U.S. 167, 175 (1976).

58. Widmar v. Vincent, 454 U.S. 263, 267–68 (1981).

59. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 555 (1975).

60. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998).

61. Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 673, 679 (1992).

restrictions in non-public forums are still subject to review, but only under a reasonableness test.[62] The general difference between a designated public forum and a non-public forum is that a designated public forum provides "general access," while a non-public forum provides only "selective access," primarily for federal employees.[63] For example, military bases,[64] airport terminals,[65] and the federal workplace[66] are non-public forums and not designated public forums because they generally are reserved for federal employees.[67] Non-public forums are subject to a rational relation review; therefore, the government may restrict speakers so long as the restrictions are reasonable and do not attempt to stifle a speaker's views solely because public officials dislike those particular views.[68]

Because the forum's classification directly affects the level of scrutiny that courts utilize when examining content-based regulations, determining the forum at issue in the regulation is key.[69] Courts ascertain which type of public forum is at issue by examining the specific access the speaker seeks, not the location of the government

62. *Forbes*, 523 U.S. at 677–78; ALA I, 201 F. Supp. 2d 401, 455 (E.D. Pa. 2002). An airport terminal is an example of a non-public forum. *Lee*, 505 U.S. at 678.

63. *Forbes*, 523 U.S. at 679 (citing Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 803–05) (1985). "By recognizing this distinction, we encourage the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all." *Id.* at 680.

64. Greer v. Spock, 424 U.S. 828, 838–39 (1976).

65. *Lee*, 505 U.S. at 682.

66. Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 805 (1985). In *Cornelius*, the NAACP attempted to participate in the Combined Federal Campaign ("CFC"), a charity drive that targeted federal employees. *Id.* at 790, 793. Organizations that wished to participate submitted a thirty-word description of their activities for inclusion in CFC literature. *Id.* at 790–91. The NAACP Legal Defense and Education fund, along with other plaintiffs, participated in attempts to influence public policy, such as advocating, lobbying, and participating in litigation. *Id.* at 793. The plaintiffs challenged the CFC's "direct services" requirement, arguing that this requirement violated the First and Fifth Amendments. *Id.* The district court ruled against the plaintiffs, which lead to President Reagan's issuance of an Executive Order that clarified the CFC's objectives. *Id.* at 794. The NAACP filed another suit, and the Supreme Court decided whether the petitioners had a First Amendment right to solicit contributions under the CFC. *Id.* at 797.

67. *See ALA I*, 201 F. Supp. 2d at 460 (explaining that with public forums, the government is creating an environment for the expression of private speech).

68. *Cornelius*, 473 U.S. at 800. "Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Id.* at 799–800.

69. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46–47 (1983) (examining which system—the whole school system or the school's internal mail system—was the appropriate context for public forum analysis).

property.[70] For example, in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, the Supreme Court addressed the local educators' union's right to use the public school's internal mail system to reach teachers' mailboxes.[71] The Court found that the relevant forum was not the public school itself, but the school's internal mail system.[72] Only after the Court determined what forum was at issue in the case could it classify the forum and determine the requisite level of scrutiny.[73]

To determine the level of scrutiny necessary to analyze government restrictions on Internet access in public libraries, courts first must determine the relevant forum.[74] Courts have found that libraries create designated public forums because the government has taken affirmative steps to make the library facilities open for public access to information.[75] Therefore, when the government provides Internet access within a public library, it creates a designated public forum, thereby subjecting it to strict scrutiny.[76]

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

> Although . . . as an initial matter a speaker must seek access to public property or to private property dedicated to public use to evoke First Amendment concerns, forum analysis is not completed merely by identifying the government property at issue. Rather, in defining the forum [the Supreme Court has] focused on the access sought by the speaker. When speakers seek general access to public property, the forum encompasses that property. In cases in which limited access is sought, our cases have taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property.

Id. (citations omitted).

71. *Perry*, 460 U.S. at 44.

72. *Id.* at 46. The Court reasoned that there was no evidence that the school's internal mail system was generally open to the public. *Id.* at 47. The Court noted that although schools allow some civic and church organizations to use the school's facilities, "[t]his type of selective access does not transform government property into a public forum." *Id.*

73. *Id.* at 41. However, in *Kreimer v. Bureau of Police of Morristown*, the United States Circuit Court of Appeals for the Third Circuit clarified the public forum analysis for libraries, stating that courts must consider three factors: (1) government intent, (2) extent of the forum's use, and (3) nature of the forum. Kreimer v. Bureau of Police of Morristown, 958 F.2d 1242, 1259–61 (3d Cir. 1992). At issue in *Kreimer* was the library's policy that (1) required individuals who were not "reading, studying, or using library materials" to leave the library facility; (2) prohibited patrons from engaging in harassing or annoying behavior; and (3) required patrons "whose bodily hygiene is offensive so as to constitute a nuisance to other persons" to leave the library. *Id.* at 1262–64. After applying the factors it set forth, the *Kreimer* court found that the local public library was a limited public forum, which the court stated was "a sub-category of designated public fora." *Id.* at 1261; *see also* Mainstream Loudoun v. Bd. of Trs. of the Loudoun County Library, 24 F. Supp. 2d 552, 562–63 (E.D. Va. 1998) (applying the *Kreimer* three-factor analysis to a library, finding that the county board created a designated public forum, thus subjecting its use of Internet filters to strict scrutiny).

74. ALA I, 201 F. Supp. 2d 401, 455 (E.D. Pa. 2002).

75. *Kreimer*, 958 F.2d at 1261; *Mainstream Loudoun*, 24 F. Supp. 2d at 562.

76. *See Mainstream Loudoun*, 24 F. Supp. 2d at 562–63 (ruling that the public library's system was a designated public forum). In *Mainstream Loudoun*, the court stated that the library

B. The First Amendment Right To Receive Information

The Supreme Court has recognized that the First Amendment creates an implicit right to receive information because without this ancillary rule, freedom of speech would have no real meaning.[77] The right to receive information directly flows from the right of an individual to send information.[78] Consequently, the right to receive is a necessary predicate for the meaningful exercise of the recipients' First Amendment freedoms.[79] This section first focuses on the relationship between the right to receive information and public libraries.[80] Next, this section discusses the right to receive in relation to the Internet.[81]

1. Right To Receive and Libraries

In *Board of Education v. Pico*, the Supreme Court considered the right to receive information in the context of children's access to information in libraries.[82] At issue in *Pico* was the local school board's decision to remove certain objectionable books from the school district's libraries.[83] The Supreme Court, in a plurality opinion written by Justice Brennan, held that once a library makes an article available, content-based decisions to remove it must survive strict scrutiny.[84] The

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board passed a resolution providing that the library's "primary objective . . . [is] that the people have access to all avenues of ideas." *Id.* at 563. "Because the Policy at issue limits the receipt and communication of information through the Internet based on the content of that information, it is subject to strict scrutiny analysis . . . ." *Id.*

77. Kleindienst v. Mandel, 408 U.S. 753, 762–63 (1972); Stanley v. Georgia, 394 U.S. 557, 564 (1969). *See generally* Susan Nevelow Mart, *The Right To Receive Information*, 95 LAW LIBR. J. 175, 175 (2003) (discussing how the right to receive information has evolved and asserting that it is a necessary part of the right of free speech).

78. Martin v. Struthers, 319 U.S. 141, 143 (1943) ("The right of freedom of speech and press . . . embraces the right to distribute literature, and necessarily protects the right to receive it." (citation omitted)).

79. Bd. of Educ. v. Pico, 457 U.S. 853, 866–67 (1982) (plurality opinion).

80. *See infra* Part II.B.1 (discussing the role of libraries in an individual's right to receive information).

81. *See infra* Part II.B.2 (discussing how the advent of the Internet has affected individuals' First Amendment right to receive information).

82. *Pico*, 457 U.S. at 855–56 (plurality opinion). *See generally* Mainstream Loudoun v. Bd. of Trs. of Loudoun County Library, 2 F. Supp. 2d 783, 792 (E.D. Va. 1998) (discussing the implications of the *Pico* decision).

83. *Id.* at 856–57. The School Board argued that it removed books that were "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy." *Id.* at 857; *see also id.* at 856 n.3 (listing the titles and authors of the nine books that were removed from the school library).

84. *Id.* at 870–71; *see also Mainstream Loudoun*, 2 F. Supp. 2d at 796 ("[I]n this case, the Library Board need not offer Internet access, but, having chosen to provide it, must operate the service within the confines of the First Amendment."). Although the Court in *Pico* did not issue a majority opinion, the justices affirmed the decision of the Second Circuit Court of Appeals that

Court explained that, although school districts have discretion over managing school matters, this discretion must comply with constitutional mandates.[85] Therefore, because the First Amendment protects individuals' rights to receive information, libraries' decisions to remove materials must comport with strict scrutiny.[86]

2. Right To Receive and the Internet

In *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, the United States District Court for the Eastern District of Virginia ruled that the First Amendment right to receive information applied to the Internet, after it examined the use of filtering technology in a local library.[87] The plaintiffs in *Mainstream Loudoun* argued that the Internet was an integrated system and, therefore, was different from a library's collection of print materials.[88] The plaintiffs also argued that the library board's decision to block certain websites was analogous to library staff blacking out inappropriate sections of print materials.[89] The court agreed with the plaintiffs' contentions, stating that because the library board chose to provide Internet access, it could not

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the case should be remanded to the district court to determine the library's motive for removing the materials. *Pico*, 457 U.S. at 853 (plurality opinion).

85. *Pico*, 457 U.S. at 864 (plurality opinion); *see also* Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 513–14 (1969) (holding that the school board had infringed on students' First Amendment rights by suspending them for wearing armbands in protest of the Vietnam War); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that a student could not be forced to salute the flag).

86. *Pico*, 457 U.S. at 875 (Blackmun, J., concurring).

87. *Mainstream Loudoun*, 2 F. Supp. 2d at 792. Loudoun County chose not to appeal the district court's judgment. Goldstein, *supra* note 10, at 184. For a general discussion of the *Mainstream Loudoun* case, including its history and disposition, see Goldstein, *supra* note 10, at 180–84. *See generally* Laughlin, *supra* note 13, at 215–16 n.9 (discussing generally Loudoun County's Internet filtering policy); J. Adam Skaggs, *Burning the Library to Roast the Pig? Online Pornography and Internet Filtering in the Free Public Library*, 68 BROOK. L. REV. 809, 835–38 (2003) (stating that the *Mainstream Loudoun* case was the backdrop for a CIPA challenge); David F. Norden, Note, *Filtering Out Protection: The Law, the Library, and Our Legacies*, 53 CASE W. RES. L. REV. 767, 780–83 (2003) (stating that the *Mainstream Loudoun* case set the stage for CIPA). *But see* Kim Houghton, Note, *Internet Pornography in the Library: Can the Public Library Employer Be Liable for Third-party Sexual Harassment When a Client Displays Internet Pornography to Staff?*, 65 BROOK. L. REV. 827, 874–81 (1999) (stating that the *Mainstream Loudoun* court applied the wrong law, because it should have considered the library's use of Internet filters to address the secondary effects of accessing inappropriate materials, such as sexual harassment).

88. *Mainstream Loudoun*, 2 F. Supp. 2d at 793.

89. *Id.*; *see* Laughlin, *supra* note 13, at 262 ("[T]ext-based filters are not a tool for aiding librarians in making professional judgments, but rather are a blunt instrument used to avoid the work of collection development.").

selectively restrict Internet materials when it did not like the content.[90] Moreover, the district court found that the policy was not narrowly tailored to the interest the library board was trying to serve.[91] In sum, the district court held that the use of Internet filters failed to pass strict scrutiny.[92]

C. The First Amendment's Lack of Protection for Obscenity and Child Pornography

Although the First Amendment generally protects freedom of speech, some types of speech receive no protection.[93] Specifically, the First Amendment does not protect obscenity, child pornography, or materials that are otherwise "harmful to minors."[94]

1. The First Amendment Does Not Protect Obscenity

In *Roth v. United States*, the Supreme Court held that the First Amendment does not protect obscene speech and established a test to determine whether speech constitutes obscenity.[95] Specifically, the Court stated that to determine if speech is obscene, courts must examine "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[96]

In a subsequent case, *Miller v. California*, the Court announced a more refined test for determining what type of material was considered

90. *Mainstream Loudoun*, 2 F. Supp. 2d at 795–96; *see also id.* at 796 ("[I]n this case, the Library Board need not offer Internet access, but, having chosen to provide it, must operate the service within the confines of the First Amendment.").

91. *Id.* at 795.

92. *Id.*

93. FARBER, *supra* note 30, at 14–15.

94. New York v. Ferber, 458 U.S. 747, 756–66 (1982) (ruling that child pornography is not protected under the First Amendment); Roth v. United States, 354 U.S. 476, 492 (1957) (ruling that obscenity was not protected material); *see also* Goldstein, *supra* note 10, at 146–55 (describing the evolution of obscenity law, which includes addressing the different standards for adults versus minors, and child pornography).

95. *Roth*, 354 U.S. at 481, 489–90. Roth sent unsolicited advertisements through the mail to get new customers for his business. *Id.* at 480. He was convicted of mailing obscene materials, in violation of federal obscenity law, after an unsuspecting recipient of Roth's materials opened the advertisements. *Id.*

96. *Id.* at 489. The Supreme Court reasoned that obscenity is not the same as sex. *Id.* at 487. "The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press." *Id.* Rather, obscenity applies to materials that appeal to a prurient interest, which means that they have "a tendency to excite lustful thoughts." *Id.* at 488 & n.20 (quoting Thornhill v. Alabama, 310 U.S. 88, 101 (1940)).

"obscene."[97] This refined test for obscenity asks whether: (1) "the average person applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest"; (2) the material "depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law"; and (3) "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[98]

Since *Miller*, courts have grappled with applying contemporary community standards to nationwide media, such as telecommunications or the Internet.[99] However, in *Sable Communications of California v. FCC*, the Supreme Court clarified the proper application of contemporary community standards to nationwide media.[100] The Court held that Congress was not precluded from enacting legislation that prohibits acts that would be subject to varying community standards simply because there exists no national standard for obscenity.[101] The

97. Miller v. California, 413 U.S. 15, 24 (1973). Miller was convicted of knowingly distributing obscene materials, which he did not believe were obscene, after he sent some of his brochures through an unsolicited mass mailing to a recipient in another community who was offended by their content and complained to the police. *Id.* at 16–17.

98. *Miller*, 413 U.S. at 24; *see also* United States v. Thomas, 74 F.3d 701, 710–11 (6th Cir. 1996) (applying the *Miller* test in the Internet context). The Court in *Miller* declined to include the standard of whether the materials were "utterly without redeeming social value." *Miller*, 413 U.S. at 24–25. *See generally* A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass., 383 U.S. 413, 419 (1966) (discussing the utterly without redeeming social value standard).

99. *See* Sable Communications of Cal. v. FCC, 492 U.S. 115, 125–26 (1989) (applying contemporary community standards to a "dial-a porn" business, arguing that Sable could tailor its messages to the communities from which its messages are originated); *Memoirs*, 383 U.S. at 418–21 (applying the contemporary community standards to a book distributed to many locations); *Thomas*, 74 F.3d at 709–10 (ruling that, although the defendants ran their website from California, because their materials were received in Tennessee, the Tennessee standard applied); COMM'N ON ONLINE CHILD PROT., *supra* note 12, at 13 ("Material published on the Internet may originate anywhere, presenting challenges to the application of the law of any single jurisdiction."); Goldstein, *supra* note 10, at 156 (stating that "[p]orn[ography] vendors in more liberal jurisdictions have been prosecuted if they have knowingly or intentionally distributed obscenity into conservative jurisdictions").

100. *Sable*, 492 U.S. at 124–26.

101. *Id.* at 125.

> There is no constitutional barrier under *Miller* to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others. If Sable's audience is comprised of different communities with different local standards, Sable ultimately bears the burden of complying with the prohibition on obscene messages.

Id. at 125–26. Further, the Court explained that businesses are free to tailor their messages to the communities they choose to serve. *Id.* at 125. The Court further reasoned that a message provider may hire operators to determine from where the calls originated or work with the telephone company to screen and block out-of-area phone calls. *Id.* However, this would create

Court explained that it included a "community standard" factor into the obscenity test so that the average person's perception would guide the decision, rather than the perception of a particularly sensitive individual.[102] Furthermore, the Court reasoned that if a speaker only wants her materials judged by one particular community, then the speaker should use a medium that would enable her to target that community, rather than a medium such as the Internet, where the speaker's materials can be accessed from almost any geographic area.[103] Therefore, website operators may be at risk of obscenity charges if their materials are accessed from or are sent to communities that have stricter obscenity standards than their own.[104]

2. The First Amendment Does Not Protect Child Pornography

Like obscenity, the First Amendment does not protect child pornography.[105] In *New York v. Ferber*, the Supreme Court held that child pornography was illegal and not subject to First Amendment protection.[106] In *Ferber*, the defendant ran a store that specialized in

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another cost for the message provider. *See id.* (holding that being forced to incur implementation costs is not prohibited by the Constitution).

102. Ashcroft v. ACLU, 535 U.S. 564, 575 (2002) (plurality opinion); *Miller*, 413 U.S. at 33.

103. *Ashcroft v. ACLU*, 535 U.S. at 583 (plurality opinion); *see Sable*, 492 U.S. at 125 (stating that interstate "dial-a-porn" companies could tailor their messages to particular communities). For example, in *United States v. Thomas*, the Sixth Circuit clarified the government's evidentiary burden as it pertained to the Internet by stating that, although the government must show that the defendants knowingly used a means of interstate commerce to distribute their obscene materials, the government did not need to show that the defendants had specific knowledge of the destination of each transmission over their website. United States v. Thomas, 74 F.3d 701, 709 (6th Cir. 1996).

104. *Thomas*, 74 F.3d at 709. In *United States v. Thomas*, the defendant and his wife were charged under the federal obscenity statute after materials ordered from their website, which was based in California, were shipped by United Parcel Service to Tennessee. *Id.* at 705. The Sixth Circuit Federal Court of Appeals rejected the defendants' argument that they did not cause their materials to be accessed from another state; rather, the defendants argued that the customer, who was actually a government agent, accessed their website without the defendants' knowledge, causing the defendants to enter Tennessee. *Id.* at 709. Here, the defendants challenged the venue of their trial in Tennessee when their residence and website were based in California. *Id.* The Court upheld the Tennessee venue, emphasizing that "there is no constitutional impediment to the government's power to prosecute pornography dealers in any district into which the material is sent." *Id.*

105. New York v. Ferber, 458 U.S. 747, 765–66 (1982).

106. *Id.* at 765–66.

> The *Miller* formulation is adjusted in the following respects: A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole.

Id. at 764.

adult materials.[107] Due to an increasing number of incidents regarding the sexual exploitation of children, many states enacted laws prohibiting the creation and dissemination of pornography involving minors.[108] The Supreme Court found that child pornography and the sexual abuse of children were "intrinsically related" because (1) the pornographic materials were a permanent record of the child's abuse, and (2) the materials were distributed through a closed network so as to protect the offenders.[109] Also, the Court reasoned that the production of child pornography was an integral part of an already illegal activity—child sexual abuse.[110] Consequently, one need not apply the *Miller* obscenity test to determine whether the First Amendment protects an article of child pornography because, as the Supreme Court held, the First Amendment does not protect child pornography.[111]

3. Different Standards for Adults Versus Children

In *Ginsberg v. New York*, the Supreme Court held that the First Amendment provides different standards of protection to speech, with adults receiving more First Amendment protections than children.[112] In *Ginsberg*, a shopkeeper was convicted of selling sexually explicit magazines to a minor.[113] The Supreme Court affirmed the conviction, noting that the states have increased authority over regulating children's conduct and are allowed to restrict certain freedoms for children that otherwise are protected for adults.[114] The Court explained that creating

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107. *Id.* at 751–52. He was convicted of disseminating child pornography after he sold two videotapes that depicted two young boys engaged in sexual activity to an undercover police officer. *Id.* at 752.

108. *Id.* at 757. "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Id.*; *see also id.* at 749 n.2 (describing numerous state laws attempting to combat child pornography). The Supreme Court recognized the compelling state interest not only in protecting children from nonobscene material that is harmful to minors, but also in "safeguarding the physical and psychological well-being of a minor." *Id.* at 756–57. The Court distinguished purely textual depictions from the depictions of child pornography in *Ferber*. *Id.* at 765.

109. *Id.* at 759–60 & nn.10–11.

110. *Id.* at 761–62. The Court also stated that unprotected materials are limited to those involving photographs, live performance, or other depictions of live performance involving children. *Id.* at 765.

111. *See id.* at 765 (stating that production and distribution of child pornography are not afforded First Amendment protection).

112. Ginsberg v. New York, 390 U.S. 629, 636 (1968) ("[T]he concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined.").

113. *Id.* at 631.

114. *Id.* at 638–39; *see, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 170 (1944) (upholding the conviction of two guardians for violating Massachusetts' child labor laws by allowing their nine-year-old child to sell Jehovah's Witness materials on the streets). In *Prince*, although there

an additional standard for non-obscene materials that are "harmful to minors" was warranted because there are some materials that, while appropriate for adults to access, are inappropriate for minors.[115]

Later, the Supreme Court established a three-factor test to determine whether the government should be afforded additional discretion when applying restrictions to children in areas constitutionally protected for adults.[116] First, courts may look to children's particular vulnerabilities in the area suggested for regulation.[117] Second, courts may consider a child's ability, or inability, to make informed decisions.[118] Third, courts may afford deference to the role parents play in child-rearing.[119] Thus, the Supreme Court created two levels of First Amendment analysis, one for examining materials that are constitutionally protected for everyone, including minors, and one for examining materials that are only constitutionally protected for adults.[120]

D. Means of Protecting Against Children Accessing Inappropriate Materials on the Internet

Because the Internet contains a large quantity of objectionable content, libraries and legislators have experimented with different ways of regulating access to obscenity, child pornography, and materials

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was a question of religious freedom, the state had an interest in protecting the child's well-being. *Id.*

115. *Ginsberg*, 390 U.S. at 636 ("Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults."). To decide whether an article is "harmful to minors," one would apply the *Miller* obscenity test as it relates to minors. PECK, *supra* note 48, at 51–52.

> Thus, the first element [of the *Miller* obscenity test] requires that the material must appeal to the prurient interest *of minors*. The second provides a legislature with somewhat more leeway to specify the kind of sexual conduct depicted or described that would be patently offensive *for minors*. These statutes are often called "harmful-to-minor" laws, which is a synonym for "obscene for minors." Finally, the last element must be evaluated in light of whether, taken as a whole, the work lacks serious literary, artistic, political, or scientific value *for minors*. That value for minors must be examined in light of whether the material holds serious value for "any reasonable minor, including a seventeen-year-old." If it does, then it cannot be restricted as harmful to minors.

Id. (citations omitted).

116. Bellotti v. Baird, 443 U.S. 622, 634 (1979). The *Bellotti* Court reasoned that some groups of people are treated differently due to their particular vulnerabilities. *Id.* at 634.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Ginsberg*, 390 U.S. at 636.

deemed "harmful to minors."[121] This section first addresses the use of filtering software, such as how the software works and how it overblocks constitutionally protected materials and underblocks the materials it is meant to protect against.[122] Next, this section examines alternatives to filtering software.[123] Finally, this section addresses previous legislative efforts to regulate children's access to sexually explicit materials on the Internet.[124]

1. Filtering Software

To protect against patrons or employees accessing inappropriate materials, many organizations have installed and used Internet filtering software[125] to block objectionable content from computer terminals.[126] Internet filters may be installed either on individual computers or on a network, the latter commonly being used by public libraries.[127] When a request for a website is made by clicking on a link or typing in a domain name or Web address, the filtering software checks the requested address against a "control list," which contains categories of Universal Resource Locators ("URLs") to be blocked.[128]

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121. *See* COMM'N ON ONLINE CHILD PROT., *supra* note 12, at 14–32 (discussing the numerous methods of dealing with children accessing inappropriate materials on the Internet).

122. *See infra* Part II.D.1 (discussing the manner in which filtering software functions and its limitations).

123. *See infra* Part II.D.2 (discussing proposed alternatives to using filtering software on library computers).

124. *See infra* Part II.D.3 (discussing two congressional attempts to regulate children's access to objectionable online materials).

125. "A content filter is one or more pieces of software that work together to prevent users from viewing material found on the Internet." HARRY HOCHHEISER, FILTERING FAQ § 1.1, *at* http://www.cpsr.org/filters/faq.html (Apr. 6, 2001).

126. Geoffrey Nunberg, *The Internet Filter Farce*, AM. PROSPECT ONLINE, *at* http://www.prospect.org/print/v12/1/nunberg-g.html (Jan. 1, 2001).

127. ALA I, 201 F. Supp. 2d 401, 428 (E.D. Pa. 2002). The network-based filtering software is meant to be installed on a network of computers and uses a "centralized network device" to run requests for Internet materials. *Id.* The network-based program is the most widely used type of filtering software in public libraries because it operates on multiple terminals. *Id.*; *see* THE INTERNET FILTER ASSESSMENT PROJECT, FILTER PRODUCTS, *at* http://bluehighways.com/tifap/products.html (last updated Sept. 28, 1999) [hereinafter TIFAP] (containing a list of different filtering software programs, the websites for their respective manufacturing companies, and general information about their performance).

128. *ALA I*, 201 F. Supp. 2d at 428. The district court stated that the three software companies that were deposed for this case in connection with *ALA I* had control lists that contained between 200,000 and 600,000 URLs. *Id.* at 427–28. Of the software companies that design filtering software, SurfControl reported that it used forty categories; N2H2 reported that it used thirty-five categories, along with seven "exception" categories; and Websense and Secure Computing both used thirty categories. *Id.* at 428–29 (listing as well the numerous categories available for blocking through the respective filtering software programs). Much of the filtering software

There are two main ways that filtering software programs block content.[129] First, some software companies use a text-based approach, which uses keywords in the control list to block websites that contain those words.[130] This method, however, is problematic because the software blocks out any websites that contain the specified words.[131] For example, if either "breast" or "sex" is on the control list, the filtering software will block information on breast cancer and safe sex.[132] Additionally, the text-based filters do not recognize visual depictions, which may allow for some objectionable content to sneak through the filters.[133]

The second method of categorizing inappropriate materials involves using individuals to analyze websites and categorize their content;[134] however, this method also has proven problematic.[135] Due to the enormous amount of Web materials, software companies are unable to review every website even one time, let alone re-review the content of websites that frequently are updated or modified.[136] Also, using humans to review and categorize the content of websites leaves room for subjective, value-based judgments that may not match the needs of the software customer.[137]

A user may customize the filtering software either by selecting which categories to block and which to allow, or by adding or removing

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programs focus on Web content; therefore, the filters will not block information found in such Internet-based functions as e-mail or newsgroups. HOCHHEISER, *supra* note 125, § 1.5.

129. *See ALA I*, 201 F. Supp. 2d at 430–36 (describing methods of reviewing websites and categorizing them); HOCHHEISER, *supra* note 125, § 2.5 (describing the keyword approach to filtering software).

130. HOCHHEISER, *supra* note 125, § 2.5. Using keyword searches, the filtering software is unable to interpret the context in which the word is being used. *Id.*

131. *See* Nunberg, *supra* note 126 (stating that overblocking is an "inevitable consequence" of the keyword approach).

132. J.M. Balkin et al., Filtering the Internet: A Best Practices Model 10 (Sept. 15, 1999), *available at* http://www.copacommission.org/papers/yale-isp.pdf (last visited Mar. 15, 2004).

133. HOCHHEISER, *supra* note 125, § 2.5. "Keyword searches cannot interpret graphics. It is not currently possible to 'search' the contents of a picture. Therefore, a page containing sexually explicit pictures will be blocked only if the text on that page contains one or more words from the list of words to be blocked." *Id.*

134. *See* Balkin et al., *supra* note 132, at 10 ("Evaluators generate lists of acceptable and unacceptable sites; software either restricts access to the unacceptable sites ('blacklisting') or allows access to only the acceptable ones ('whitelisting').").

135. *See* ALA I, 201 F. Supp. 2d 401, 430 (E.D. Pa. 2002) (describing the methods and limitations used by software companies).

136. *See id.* at 433 (stating that there are approximately 1.5 million new Web pages each day and that software companies do not have enough staff to review this volume of websites).

137. *See id.* ("None of the filtering companies trains its reviewers in the legal definitions concerning what is obscene, child pornography, or harmful to minors, and none instructs reviewers to take community standards into account when making categorization decisions.").

specific URLs to or from the control lists.[138] Although filtering software users may customize the software or even disable the filters, problems exist when the software incorrectly blocks information.[139] In fact, many studies have indicated that filtering software overblocks constitutionally protected materials while also underblocking materials that the filtering software was meant to block.[140]

2. Alternatives to Filtering Software

To avoid problems associated with the use of Internet filtering software, many libraries have experimented with numerous

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138. *Id.* at 429. The categories also did not include reference to community standards or judicial involvement in making the category determinations. *Id.* Only the companies that design the filtering software have access to the complete list of URLs in each category. *Id.* at 429–30. The district court in *ALA I* found it problematic that none of the categories used by the filtering software designers were identical to the categories that CIPA required to be blocked. *Id.* at 429. Since these lists are considered proprietary, the software companies do not make the lists available for public review. *Id.* at 430.

Companies compile these lists in two phases. *Id.* First, they collect or "harvest" relevant URLs from the Web. *Id.* at 431–32. Next, they sort through the collected URLs in order to classify the websites into the software's categories. *Id.* at 432–35. After the websites are placed into categories, most software companies do not revisit the website to check whether the content has changed and may need to be placed into another category or even unblocked. *Id.* at 435–36. "Priority is placed on reviewing and categorizing new sites or pages, rather than on re-reviewing already categorized sites and pages. Typically, a filtering software vendor's previous categorization of a Web site is not re-reviewed for accuracy when new pages are added to the Web site." *Id.* at 435.

139. *See* HOCHHEISER, *supra* note 125, § 1.3 (stating that filtering software can be turned off by the user, but that the systems may be subject to hackers who could "guess the password or disable the program by other means"); Nunberg, *supra* note 126 (stating that filtering software companies have a "natural interest in drawing the circle very broadly, so as to block sites that might be objectionable to one or another segment of their market, even if they wouldn't be considered pornographic or offensive by any reasonable standard").

140. *See generally* COMM'N ON ONLINE CHILD PROT., *supra* note 12, at 19–22 (describing the problems with using filtering software); ELECTRONIC FRONTIER FOUND., INTERNET BLOCKING & CENSORWARE, WHY BLOCKING TECHNOLOGY CAN'T WORK, *at* http://www.eff.org/Censorship/Censorware (last visited Mar. 15, 2004) (listing ten reasons why filtering technology does not work); KAREN G. SCHNEIDER, LEARNING FROM TIFAP, *at* http://www.bluehighways.com/tifap/learn.html (Sept. 13, 1997) (documenting the findings from a study performed by volunteer librarians on filtering software programs that found that the filtering software, over thirty-five percent of the time, blocked information that the librarian needed to answer patron questions); JONATHAN ZITTRAIN & BENJAMIN EDELMAN, DOCUMENTATION OF INTERNET FILTERING WORLDWIDE, *at* http://www.cyber.law.harvard.edu/filtering/ (last updated Oct. 24, 2003) (summarizing numerous studies on filtering software that have been conducted around the world); Hunter, *supra* note 32, at 69–91 (applying "social science methods" to examine filter effectiveness); Christopher D. Hunter, Internet Filter Effectiveness: Testing Over and Underinclusive Blocking Decisions of Four Popular Filters 10–13 (n.d.) (finding that, after performing a study on four software programs, the best-performing program only blocked sixty-nine percent of objectionable material), *available at* http://www.copacommision.org/papers/filter_effect.pdf (last visited Mar. 15, 2004).

alternatives.[141] Some of these alternatives are proactive, while others are reactive.[142] For example, libraries have attempted to prevent patrons' access to inappropriate materials by implementing Internet use policies, which outline acceptable uses for the libraries' computer terminals as well as consequences for not following the guidelines.[143] Alternatively, libraries have educated library patrons on Internet resources and appropriate uses[144] and have compiled lists of recommended websites, which the librarians have reviewed and deemed appropriate for their patrons.[145]

In addition, libraries have physically placed Internet terminals away from the main areas of the library to protect against patrons' inadvertent exposure to objectionable materials.[146] Conversely, some libraries have moved Internet terminals to areas that may be viewed easily by librarians, so that they can monitor the patrons' searches and intervene

141. *See* Laughlin, *supra* note 13, at 269–72 (discussing some of the methods used by libraries to protect against patrons accessing Internet pornography and concluding ultimately that holding individuals responsible is the paramount approach, which may be done in conjunction with other methods). For a discussion of the Platform for Internet Content Selection ("PICS") option, which may work in conjunction with Internet filters, see Norden, *supra* note 87, at 777–78 (describing the manner in which PICS operates and its relation to filtering software). PICS was developed as an alternative to filtering software because, rather than blocking what is distributed, it enables users to control what they receive. HOCHHEISER, *supra* note 125, § 3.1.

142. *See ALA I*, 201 F. Supp. 2d at 423–27 (outlining the many methods libraries use to protect against patrons viewing inappropriate materials).

143. *Id.* at 425; *see* COMM'N ON ONLINE CHILD PROT., *supra* note 12, at 36 (outlining the implications of implementing acceptable use policies, which patrons sign to acknowledge their agreement to use a library's computers for appropriate uses). The American Library Association has issued some guidelines for libraries to consider when implementing an Internet use policy. *See* AM. LIBRARY ASS'N, GUIDELINES AND CONSIDERATIONS FOR DEVELOPING A PUBLIC LIBRARY INTERNET USE POLICY (Nov. 2000), *available at* http://www.ala.org/Template.cfm?Section=Other_Policies_and_Guidelines&Template=/ContentManagement/ContentDisplay.cfm&ContentID=13098 (last visited Mar. 16, 2004); AM. LIBRARY ASS'N, GUIDELINES FOR THE DEVELOPMENT OF POLICIES AND PROCEDURES REGARDING USER BEHAVIOR AND LIBRARY USAGE (Nov. 17, 2000), *available at* http://www.ala.org/Template.cfm?Section=Other_Policies_and_Guidelines&Template=/ContentManagement/ContentDisplay.cfm&ContentID=13147 (last visited Mar. 16, 2004); AM. LIBRARY ASS'N, GUIDELINES FOR THE DEVELOPMENT AND IMPLEMENTATION OF POLICIES, REGULATIONS AND PROCEDURES AFFECTING ACCESS TO LIBRARY MATERIALS, SERVICES AND FACILITIES (June 28, 1994), *available at* http://www.ala.org/Template.cfm?Section=Other_Policies_and_Guidelines&Template=/ContentManagement/ContentDisplay.cfm&ContentID=13141 (last visited Mar. 16, 2004).

144. *See ALA I*, 201 F. Supp. 2d at 424 (describing training used to channel patrons' use of the Internet); *see also* COMM'N ON ONLINE CHILD PROT., *supra* note 12, at 18 (describing the effectiveness of educating parents and families on Internet resources).

145. *ALA I*, 201 F. Supp. 2d at 424–25.

146. *See id.* at 425–26.

if patrons access obscenity or child pornography.[147] If library patrons access inappropriate materials, librarians also have used the "tap-on-the-shoulder" method and will ask the patrons either to go to a new website or to discontinue their Internet session.[148] Some libraries have even created special areas where children have computer terminals designated for Internet access.[149] In lieu of monitoring the computer screens, some libraries use privacy screens[150] or recessed monitors[151] so that patrons may access the Internet without fear of exposing others to potentially objectionable materials.[152] Finally, libraries could require some type of parental involvement.[153] This would entail educating parents and their children about the Internet, requiring parental consent to use unfiltered computers, having parents designate a filtering level when a child applies for a library card, or only allowing children to use the Internet when their parents can monitor its use.[154]

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147. *Id.*; *see* COMM'N ON ONLINE CHILD PROT., *supra* note 12, at 34–35 (describing the issues around libraries' use of monitoring and time-limiting practices). *But see* Nunberg, *supra* note 126 (arguing that monitoring Internet use may inhibit young people from using library computers to access information on sensitive topics, such as safer sex, sexual orientation, or suicide).

148. *ALA I*, 201 F. Supp. 2d at 424. With the "tap-on-the-shoulder" method, librarians may tap on the patron's shoulder, requesting him or her to change websites, or, if the patron refuses to comply, ask the patron to terminate his or her session. *Id.* at 425–26. However, this method makes some librarians uncomfortable—not only with the sexual content on the patron's screen but also with the idea of confrontation. *Id.* at 426.

149. *Id.* at 425.

150. When using a privacy screen, the computer's monitor appears blank unless one is looking at it head-on. *Id.*

151. A recessed monitor is a screen that sits below the level of the desktop on which the computer is located. *Id.*

152. *Id.* Yet, some have complained that these methods create difficulties when more than one person is using the computer. *Id.* This method also proves difficult when a librarian is trying to assist a patron with Internet searches, because both the patron and the librarian will not be able to view the monitor at the same time. *Id.*

153. *See* Kelly Rodden, Note, *The Children's Internet Protection Act in Public Schools: The Government Stepping on Parents' Toes?*, 71 FORDHAM L. REV. 2141, 2156–61 (2003) (discussing whether CIPA infringes on parents' right to control what information their children receive).

> Parents may claim that they, not the government, should be making decisions about the material to which their children are exposed. The Internet is a vast resource, and parents may want their children to have access to information about sexuality, human anatomy, and other similar topics that potentially would be blocked by filtering technology. Some individuals feel these are sensitive topics, and therefore it is important to maintain meaningful choices for parents in this realm, and avoid risking overly burdensome state influence on [children's] beliefs and values.

Id. at 2160.

154. *See id.* at 2161 ("CIPA's opponents may argue that deferring to parental regulation avoids broader constitutional problems, such as First Amendment concerns, that arise when the federal government attempts to regulate speech."). *But see* Witte, *supra* note 12, at 779 (arguing

Some libraries have chosen to use a combination of the above methods, because each library has different needs and constraints, such as the lack of financial resources or limited physical space.[155] This allows libraries to tailor their proposed solutions to their specific community and circumstances.[156]

3. Congressional Attempts To Control Children's Access to Online Pornography

The government has not placed on public libraries the entire burden of restricting minors from obscenity, child pornography, and other materials that are "harmful to minors."[157] Instead, recognizing the government's strong public interest in protecting children from such inappropriate speech on the Internet,[158] Congress enacted legislation.[159]

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that Internet filters may be appropriate when used privately by parents to tailor their children's restricted access to the Internet). By allowing parents to choose the level of access for their children, parents can tailor filtering software to the specific concerns for each child. *Id.* For example, a parent may be more concerned about violence than sexually explicit materials. *Id.*

155. *See* COMM'N ON ONLINE CHILD PROT., *supra* note 12, at 17–38 (discussing the effectiveness of the many proposed methods to control children's access to inappropriate materials).

156. *See ALA I*, 201 F. Supp. 2d at 425–26 (discussing the various methods used by different libraries that allow the libraries to address their unique settings and circumstances).

157. *See infra* Part II.D.3 (discussing Congress's attempts to regulate children's access to inappropriate Internet materials).

158. ALA II, 123 S. Ct. 2297, 2310 (2003) (Kennedy, J., concurring) ("The interest in protecting young library users from material inappropriate for minors is legitimate, and even compelling, as all Members of the Court appear to agree."); Reno v. ACLU, 521 U.S. 844, 869 (1997) ("We agreed that 'there is a compelling interest in protecting the physical and psychological well-being of minors' which extended to shielding them from indecent messages that are not obscene by adult standards." (quoting Sable Communications of Cal. v. FCC, 492 U.S. 115, 126 (1989))); FCC v. Pacifica Found., 438 U.S. 726, 749 (1978) ("The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting."); Miller v. California, 413 U.S. 15, 18–19 (1973) ("This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles."); Ginsberg v. New York, 390 U.S. 629, 639 (1968) ("The world of children is not strictly part of the adult realm of free expression. The factor of immaturity, and perhaps other considerations, impose different rules."); Transcript of Oral Argument at 6, *ALA II* (No. 02-361) (arguing that the protection from obscenity, child pornography, and materials that are harmful to minors is a compelling interest), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-361.pdf (last visited Mar. 16, 2004). For a report discussing incidents where children accessed pornographic materials at public libraries, see BURT, *supra* note 13, at 6–11. This Family Research Council report was based on an analysis of Freedom of Information Act requests to public libraries for incident reports. *Id.* at 1. There were reports of children accessing pornographic websites and even masturbating while viewing the websites. *Id.* at 6–11. There was even a reported incident in which the police of one locality had to be contacted after a teenager was goaded by a person with whom he was chatting online into approaching a younger child for sexual acts. *Id.* at 9.

a. Communications Decency Act

The Communications Decency Act of 1996 ("CDA") was Congress's first attempt to regulate children's access to Internet pornography.[160] As enacted, the CDA prohibited (1) the knowing transmission of obscene or indecent messages or images to any person under the age of eighteen, and (2) the sending or displaying of "patently offensive" sexual messages that would be accessible to minors.[161] This statute criminalized the above acts and created penalties of up to two years in prison.[162] The CDA applied to all communications on the Internet, not just commercial communications.[163]

The ACLU challenged the CDA in *ACLU v. Reno*, and a three-judge district court panel unanimously found that the CDA's content-based restrictions on speech were unconstitutional.[164] On appeal to the Supreme Court, the government argued that the CDA was constitutional under three prior Supreme Court opinions: *Ginsberg v. New York*, *FCC v. Pacifica Foundation*, and *City of Renton v. Playtime Theaters, Inc.*[165]

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159. *See infra* Part II.D.3.a–b (discussing the CDA and COPA, prior attempts to regulate children's access to Internet materials); *see also* Rebecca L. Covell, Note, *Problems with Government Regulation of the Internet: Adjusting the Court's Level of First Amendment Scrutiny*, 42 ARIZ. L. REV. 777, 781 (2000) ("Congress has addressed the problem of child access to Internet pornography in two ways—by regulating transmission of pornographic material over the Internet and by regulating receipt of the information.").

160. Communications Decency Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 133 (codified as amended at 47 U.S.C. § 223 (2000 & West Supp. 2003)).

161. 47 U.S.C. § 223(d)(1)(A)–(B) (2000), *amended by* PROTECT Act, Pub. L. No. 108-21, § 603(2), 117 Stat. 650, 687 (2003). The CDA defined a "minor" as an individual under the age of eighteen; the Child Online Protection Act defined a minor as an individual under seventeen years of age. *Reno v. ACLU*, 521 U.S. at 876 (stating that an individual can be charged if he or she transmits a message or image while knowing that it is likely that one or more minors will view it). The Supreme Court argued that without adequate age verification processes, and given the large number of Internet-users, including those who are minors, it is possible that any transmission may be viewed by a minor. *Reno v. ACLU*, 521 U.S. at 876.

162. 47 U.S.C. § 223(a)(2), *amended by* Pub. L. No. 108-21, § 603(1), 117 Stat. at 687. An individual who violated the CDA was subject to a fine, imprisonment of up to two years, or both. *Id.*

163. *See* Ashcroft v. ACLU, 535 U.S. 564, 568–69 (2002) (plurality opinion) (distinguishing the problems with the CDA from the subsequently enacted Child Online Protection Act).

164. ACLU v. Reno, 929 F. Supp. 824, 849, 857, 883 (E.D. Pa. 1996) (issuing a preliminary injunction after finding that the plaintiffs likely would succeed on the merits with their facial invalidation claim).

165. *Reno v. ACLU*, 521 U.S. at 864; *see* City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 54–55 (1986) (holding that a city ordinance requiring adult theaters to be more than 1000 feet away from any residential zone did not violate the First Amendment's freedom of expression); FCC v. Pacifica Found., 438 U.S. 726, 749–51 (1978) (holding that the FCC acted constitutionally when it regulated a radio broadcast that consisted of inappropriate language); Ginsberg v. New York, 390 U.S. 629, 643 (1968) (upholding a statute that created a rule that materials may be obscene as to minors but not as to adults). In defending the CDA, the

The Supreme Court disagreed, however, and distinguished the case at hand from the three listed above on numerous grounds.[166]

In addition, the Supreme Court found that many terms within the CDA created uncertainty among Internet users.[167] Although the government argued that the CDA only applied to "pornographic" material, the Court found to be overly vague the term "indecent" and the section stating "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."[168]

Also, the Court held that the CDA created uncertainty because the statute required courts to judge the materials according to

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government argued that the CDA was an attempt to "cyberzone" the Internet, thereby placing inappropriate materials out of the reach of children. *Reno v. ACLU*, 521 U.S. at 867–68. *See generally* Lawrence Lessig, *Code and Other Laws of Cyberspace* (distinguishing between zoning and filtering options), *in* CYBERLAW: PROBLEMS OF POLICY AND JURISPRUDENCE IN THE INFORMATION AGE 434–35 (Patricia Bellia et al. eds., 2003); Lessig & Resnick, *supra* note 30, at 395 (discussing alternative solutions to the CDA and the Child Online Protection Act); Hunter, *supra* note 32, at 41–44 (rejecting the argument that the CDA was a proper attempt to zone the Internet). The zoning solution, as compared to the filtering solution, is narrower, because "there would be no incentive for speakers to block out listeners; the incentive of a speaker is to have more, not fewer listeners." Lessig, *supra*, at 435.

166. *Reno v. ACLU*, 521 U.S. at 864–68. The Court distinguished the CDA from the statute in *Ginsberg* in the following ways: (1) the statute in *Ginsberg* did not affect parents' abilities to purchase materials for their children, whereas the CDA may punish parents who, for example, send safe sex information to their child in college; (2) the *Ginsberg* statute only applied to commercial transactions, whereas the CDA applies to all material; (3) the *Ginsberg* statute included in the definition of what is "harmful to minors" a requirement that it was "utterly without redeeming social importance to minors"; and (4) where the CDA defines minor as an individual under the age of eighteen, the *Ginsberg* statute applied to those under the age of seventeen. *Id.* at 865–66.

The Court in *Reno* distinguished the CDA from the ordinance in *Renton* because the zoning ordinance in *Renton* targeted the "secondary effects" of the adult theaters, such as crime and deterioration of property values. *Reno v. ACLU*, 521 U.S. at 868. The Court found that the CDA targeted the primary effects of children's access to "indecent" or "patently offensive" materials and, therefore, constituted a content-based restriction on speech, subjecting it to strict scrutiny. *Id.*; *see also* Hunter, *supra* note 32, at 43 (applying the *Renton* three-prong test to the CDA). The three-part test addresses (1) whether the regulation was content-neutral, (2) whether the regulation was narrowly tailored to serve a substantial governmental interest, and (3) whether the regulation left adequate room for alternatives. *Id.*

The Court distinguished the statute in *Pacifica* from the CDA because the material in question in *Pacifica* was a specific broadcast, the FCC's declaratory order was not a criminal sanction, and the material in question was broadcast on a medium that had "received the most limited First Amendment protection." *Id.* at 867.

167. *Reno v. ACLU*, 521 U.S. at 871 ("This uncertainty undermines the likelihood that the CDA has been carefully tailored to the congressional goal of protecting minors from potentially harmful materials.").

168. *Id.* at 870–71; *see* 47 U.S.C. § 223(a) (2000) (outlining the provisions required by the CDA prior to the PROTECT Act amendments), *amended by* PROTECT Act, Pub. L. No. 108-21, § 603(1), 117 Stat. 650, 687 (2003).

"contemporary community standards."[169] This concept is difficult to apply to Internet materials because an individual may send an image or message from one state without knowing whether it will be viewed outside of the sender's state.[170] The Court feared that by applying "community standards" to a world-wide medium in which distributors do not know where recipients may access the materials, the materials would be judged by the most strict and conservative definitions, thereby severely hindering adults' abilities to access protected materials.[171] Thus, the Court found that the terms of the CDA were overbroad and not narrowly tailored, thereby rendering the statute an unconstitutional limitation on free speech.[172]

The CDA also included provisions describing affirmative defenses that applied when one either took good faith measures to protect against minors accessing the indecent materials or used a method of age verification.[173] However, the Court considered the fact that only commercial websites could normally afford the approved age verification methods, which would impact non-commercial websites significantly, and that such measures might discourage adults from accessing materials available to them.[174] The Court also took issue with

169. *Reno v. ACLU*, 521 U.S. at 877–78; *see supra* note 99 and accompanying text (addressing how courts apply "contemporary community standards" to Internet materials).

170. *See* Ashcroft v. ACLU, 535 U.S. 564, 575–82 (2002) (plurality opinion) (discussing how the Third Circuit addressed the difficulties when applying "contemporary community standards" to the Internet); ACLU v. Reno, 217 F.3d 162, 180 (3d Cir. 2000) ("[W]eb publishers are currently without the ability to control the geographic scope of the recipients of their communications.").

171. *Reno v. ACLU*, 521 U.S. at 877–78.

172. *Id.* at 882.

> In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.

Id. at 874.

173. 47 U.S.C. § 223(e)(5)(A)–(B) (2000). It is a defense that a person "has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology." *Id.* § 223(e)(5)(A). It is a defense that a person "has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number." *Id.* § 223(e)(5)(B). *See generally* COMM'N ON ONLINE CHILD PROT., *supra* note 12, at 25–27 (describing the two main ways in which websites verified their patrons' ages and discussing issues related to the use of credit cards or independently-issued identification as forms of age verification).

174. *Reno v. ACLU*, 521 U.S. at 856–57 (reasoning that the high cost of implementing a credit card system for age verification would be financially beyond the reach of noncommercial websites). Although these methods historically have been used by commercial websites, there are

the age verification defense in the statute, stating that it was not "technologically feasible" to allow minors to access protected materials, such as art discussions, while blocking access to "indecent" or "patently offensive" materials.[175] Thus, only the part of the CDA prohibiting the knowing transmission of obscene materials survived constitutional review, since obscenity does not enjoy First Amendment protections.[176]

b. Child Online Protection Act

After the Supreme Court struck down certain provisions of the CDA in *Reno v. ACLU*, Congress enacted the Child Online Protection Act ("COPA") in yet another attempt to control children's access to online materials.[177] COPA applies only to information on the Web and prohibited individuals from knowingly making commercial materials available to minors.[178] For COPA to apply, the materials must (1) depict or represent in a "patently offensive" manner as pertains to minors or sexual acts or body parts of minors, (2) have been intended to appeal to a prurient interest of minors, and (3) "lack serious literary, artistic,

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many websites offering free access to pornographic materials. *See* Rodden, *supra* note 153, at 2145 (discussing the means by which some websites offer free, uninhibited access to pornographic materials). There are many ways in which individuals, including minors, may access inappropriate online materials for free:

> [M]any sexually explicit sites are free of charge and do not require user registration information. Innocuous domain names and ambiguous site descriptions sometimes make it difficult to avoid viewing pornographic material. Users often unintentionally reach sexually explicit sites, and recurring pop-up windows impede users' ability to exit these sites once they are accessed. Industry mechanisms such as "kidnappings"—redirecting users from legitimate websites to pornographic ones—and "mousetrappings"—disabling "back" and "close" buttons, and linking users to additional sexually explicit sites—force users to view pornographic information against their will. Furthermore, the structure of the Internet affords accidental exposure to inappropriate information more readily than other forms of media because "sex on the Internet is not segregated and signposted like in a bookstore."

Id. (footnotes omitted); *see* Covell, *supra* note 159, at 777–79 (discussing the means by which website designers trap viewers, forcing them to view inappropriate materials on the Internet, and the particular harm it causes minors).

175. *Reno v. ACLU*, 521 U.S. at 856. Furthermore, the government did not offer evidence as to any methods that could adequately screen out offensive materials, meaning that adults' access to protected materials, including indecent but not obscene materials, was affected. *Id.* at 855–56.

176. Ashcroft v. ACLU, 535 U.S. 564, 569 (2002) (plurality opinion); *Reno v. ACLU*, 521 U.S. at 883.

177. Child Online Protection Act, Pub. L. No. 105-277, §§ 1401–1406, 112 Stat. 2681-736 (1998) (codified at 47 U.S.C. §§ 230–231 (2000)); *see Reno v. ACLU*, 521 U.S. at 883 (striking down provisions of the CDA as being unconstitutionally overbroad).

178. 47 U.S.C. § 231(a)(1) (2000); *see Ashcroft v. ACLU*, 535 U.S. at 574 (plurality opinion) (analyzing the material according to the *Miller* test for obscenity). *See generally supra* notes 97–98 and accompanying text (discussing the *Miller* test).

political, or scientific value for minors."[179] An individual's violation of COPA provisions could lead to criminal and/or civil penalties.[180]

Congress drafted COPA in an attempt to avoid some of the problems that caused the Supreme Court to strike down most of the CDA.[181] First, COPA only applies to commercial transactions.[182] Second, COPA only applies to information on the World Wide Web, which excluded, for example, e-mails.[183] Third, COPA prohibited materials that are "harmful to minors," a much narrower class of materials than those that are "indecent" or "patently offensive."[184]

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179. 47 U.S.C. § 231(e)(6); *see also Ashcroft v. ACLU*, 535 U.S. at 578–79 (plurality opinion). "Harmful to minors" is defined as

> any communication . . . that is obscene or that—
>
> (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.

47 U.S.C. § 231(e)(6).

180. 47 U.S.C. § 231(a); *see also Ashcroft v. ACLU*, 535 U.S. at 570–71 (plurality opinion). Under COPA, the penalties are as follows:

> (1) Prohibited conduct. Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both.
>
> (2) Intentional violations. In addition to the penalties under paragraph (1), whoever intentionally violates such paragraph shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.
>
> (3) Civil penalty. In addition to the penalties under paragraphs (1) and (2), whoever violates paragraph (1) shall be subject to a civil penalty of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

47 U.S.C. § 231(a).

181. *See Ashcroft v. ACLU*, 535 U.S. at 569–70 (plurality opinion) (distinguishing the CDA's problematic provisions from COPA).

182. *Id.* at 569.

183. *Id.* The CDA applied to all transmissions over the Internet, which included e-mails, not just commercial transactions. *Id.*

184. *See id.* at 569–70 (distinguishing the content outlawed by COPA and stating that it is more narrowly defined than the categories under the CDA that the Supreme Court found unconstitutional). Similar to the CDA, COPA did contain some affirmative defenses:

> It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors—
>
> (A) by requiring use of a credit card, debit account, adult access code, or adult

In *ACLU v. Ashcroft*, a group of plaintiffs challenged COPA, claiming that the statute infringed on constitutionally protected speech because the application of "contemporary community standards" to what was deemed as "harmful to minors" hindered adults' access to protected speech.[185] While noting that using "contemporary community standards" to analyze materials on the Web was problematic because the Web is an international medium,[186] the Supreme Court nonetheless held that COPA's "contemporary community standards" provision by itself did not render the entire statute unconstitutional.[187]

The Court distinguished COPA from the CDA by noting that COPA covered considerably fewer materials.[188] Additionally, the Supreme Court reasoned that COPA included extra conditions—that the materials are designed to appeal to the prurient interest of minors and lack serious artistic or social value for minors—which distinguished COPA from the CDA.[189] The Court further explained that the application of "contemporary community standards" does not relate to specific geographic areas.[190] Instead, a juror may use personal knowledge of his or her current or former home community.[191] Therefore, Justice Thomas's plurality opinion held, in a very limited sense, that COPA's

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personal identification number;

(B) by accepting a digital certificate that verifies age; or

(C) by any other reasonable measures that are feasible under available technology.

47 U.S.C. § 231(c)(1).

185. *Ashcroft v. ACLU*, 535 U.S. at 571 n.4, 571–72 (plurality opinion). The plaintiffs' websites "contain[ed] 'resources on obstetrics, gynecology, and sexual health; visual art and poetry; resources designed for gays and lesbians; information about books and stock photographic images offered for sale; and online magazines.'" *Id.* at 571 (citing ACLU v. Reno, 31 F. Supp. 2d 473, 484 (E.D. Pa. 1999)).

186. *Id.* at 575 (citing ACLU v. Reno, 217 F.3d, 162, 180 (3d Cir. 2000)).

187. *Id.* at 585.

188. *Id.* at 578. COPA is limited to materials on the World Wide Web, whereas the CDA applied to all Internet materials. *Id.* at 569. Also, the CDA applied to "indecent" materials that depicted or described sexual or excretory activities or organs, not just materials that were obscene or harmful to minors. *See* Reno v. ACLU, 521 U.S. 844, 858–59 (1997) (describing the provisions of the CDA).

189. *Ashcroft v. ACLU*, 535 U.S. at 578–79 (plurality opinion). The Supreme Court focused on the second of these conditions, because this element under COPA was not subject to "contemporary community standards." *Id.* at 579. The correct analysis, according to the Court, is "whether a reasonable person would find . . . value in the material, taken as a whole." *Id.* (citing Pope v. Illinois, 481 U.S. 497, 501 (1987)). The Court previously had stated that contemporary community standards do not apply to the serious value of the materials because "the value of [a] work [does not] vary from community to community based on the degree of local acceptance it has won." *Reno v. ACLU*, 521 U.S. at 873 (citing Pope v. Illinois, 481 U.S. 497, 500 (1987)).

190. *Ashcroft v. ACLU*, 535 U.S. at 576–77.

191. *Id.*

"contemporary community standards" provision, used to identify material harmful to minors, by itself, did not render the entire statute unconstitutional.[192]

E. Using the Spending Clause To Regulate

The Spending Clause of the Constitution empowers Congress to provide for the general welfare through funding of programs and services.[193] In *South Dakota v. Dole*, the Supreme Court explained that under the Spending Clause, Congress has the power to regulate areas that the Constitution does not specifically designate to Congress.[194] Therefore, Congress may use the Spending Clause to justify legislative regulation of areas that normally may not be under legislative control.[195]

When exercising its powers under this clause, Congress has wide latitude, including the power to attach conditions on the acceptance of federal funding.[196] Yet, Congress may not impose conditions that

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192. *Id.* at 585. The question on appeal was whether COPA's use of "community standards" to identify materials that are "harmful to minors" violated the First Amendment. *Id.* at 575–76. The Court remanded the case for further examination of the ACLU's other claims. *Id.* at 586. The Supreme Court declined to rule on whether the statute as a whole was unconstitutionally vague, or whether a strict scrutiny analysis was appropriate. *Id.* at 585–86. The Third Circuit Court of Appeals heard this case on remand and again upheld the district court's issuance of a preliminary injunction, stating that the ACLU likely would succeed on the merits by proving COPA's failure to meet strict scrutiny and that COPA was overbroad. ACLU v. Ashcroft, 322 F.3d 240, 268 (3d Cir. 2003). The Supreme Court recently granted certiorari for another review of COPA, and this time the review will focus on restrictions on children's speech that affect adults' access to constitutionally protected speech. Associated Press, *High Court To Revisit Online-Porn Law* (Oct. 14, 2003), *available at* http://www.msnbc.com/news/980102.asp (last visited Mar. 16, 2004).

193. U.S. CONST. art. I, § 8, cl. 1. The Constitution allows Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." *Id.* Under the General Welfare Clause, Congress may decide which expenditures will best promote general welfare. Buckley v. Valeo, 424 U.S. 1, 90 (1976). Congress's authorization to expend funds for the general welfare is not limited to Congress's constitutionally enumerated grants of power. *Id.* Additionally, Congress's Spending Clause powers are limited only by those that are constitutionally enumerated. *Id.* at 90–101. The Constitution does not obligate Congress to use its Spending Clause powers to give funds to states; rather, the funds are treated like gifts. Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686–87 (1999).

194. South Dakota v. Dole, 483 U.S. 203, 207 (1987).

195. *Id.* Congress is still limited to spending federal funds only for the "general welfare" of the United States. *Id.* Both Congress and numerous courts have recognized that protecting children from accessing materials that are harmful to minors is a compelling government interest, which likely would suffice to meet the "general welfare" requirement. *See supra* note 158 (citing cases in which courts have recognized a compelling interest in protecting children from harmful materials).

196. *Id.* at 210 (allowing the federal government to limit funds to states that had legal drinking ages of at least twenty-one); *see also id.* at 206 ("Incident to this power, Congress may attach

require recipients to engage in activities that violate the Constitution.[197] The Supreme Court has ruled that conditions attached to the acceptance of funding may not necessarily "induce" the recipients to violate the Constitution.[198] Thus, under the doctrine of unconstitutional conditions, the government may not deny benefits to a person through a method that infringes upon her or his freedom of speech.[199]

Yet, in *Rust v. Sullivan*, the Supreme Court held that it was an appropriate legislative function of the government to prefer or encourage one type of activity over another.[200] In *Rust*, the Supreme Court held that Congress acted constitutionally when it enacted a statute that placed limits on funding for family planning services, effectively restricting information on abortion and abortion services.[201] Consequently, Congress's decision to fund one type of protected activity over another does not mean that the denial of funding for other

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conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broach policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'" (quoting Fullilove v. Klutznick, 448 U.S. 448, 474 (1980))); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 590 (1998) (holding that the NEA procedure of convening a "diverse" review panel to provide guidance in awarding grants to artists was appropriate); Rust v. Sullivan, 500 U.S. 173, 203 (1991) (holding limits placed on funding for family planning services, which restricted information on abortion and abortion services, constitutional).

197. *Dole*, 483 U.S. at 210. *But see* Regan v. Taxation with Representation, 461 U.S. 540, 549 (1983) ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."). Some conditions may rise to the level of inducing recipients to violate Constitutional rights, reaching a point where "pressure turns into compulsion." *Dole*, 483 U.S. at 211. However, Justice Cardozo cautioned that "to hold that motive and temptation is equivalent to coercion is to plunge the law in endless difficulties." *Id.* (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)); *see also Finley*, 524 U.S. at 587 ("If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case."). For a discussion of how the lower courts have had difficultly delineating between "financial inducement" and "coercion," see Lynn A. Baker & Mitchell N. Berman, *Getting Off the* Dole*: Why the Court Should Abandon Its Spending Doctrine and How a Too-clever Congress Could Provoke It To Do So*, 78 IND. L.J. 459, 467–69 & nn.53–54 (2003).

198. *Dole*, 483 U.S. at 210–11.

199. Goldstein, *supra* note 10, at 191.

200. *Rust*, 500 U.S. at 193 ("There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." (quoting Maher v. Roe, 432 U.S. 464, 475 (1977))). Whereas the plurality in *United States v. American Library Ass'n* found that *Rust* applied to CIPA's filtering conditions, Justice Stevens disagreed, arguing that *Rust* only applies to situations where the government is trying to communicate a specific message. ALA II, 123 S. Ct. 2297, 2309 n.7 (2003) (plurality opinion); *id.* at 2317 (Stevens, J., dissenting). As Stevens reasoned, the Library Services and Technology Act and "E-rate" discount statutes, which CIPA amended, were enacted to promote access to the Internet, particularly in low-income areas. *Id.* at 2317 (Stevens, J., dissenting).

201. *Rust*, 500 U.S. at 199–200.

protected activities constitutes a penalty.[202] The Supreme Court, however, also ruled that attaching conditions upon the recipients, rather than on the programs or services, may extend beyond congressional spending power.[203]

The Court did not view the attachment of undesirable conditions to funding as a penalty, for the recipients could still continue their practices by seeking alternate funding.[204] The denial of funding is not a penalty because recipients are not compelled to operate federally funded programs.[205] Rather, the Court explained that by accepting federal dollars, recipients voluntarily consent to conditions placed on the funding.[206] To avoid the restrictions, the recipient may choose to decline the federal funding to avoid the attached conditions.[207]

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202. *Id.* In *Rust*, the petitioners argued that they had been subject to viewpoint discrimination by the government. *Id.* at 194. However, the Court reasoned that excluding abortion services and the discussion of this option for pregnant women from Congress's definition of "family planning" did not constitute a penalty. *Id.* at 199 n.5.

203. *Id.* at 197; *see also* FCC v. League of Women Voters, 468 U.S. 364, 400–01 (1984) (invalidating a federal law which prohibited federally-funded noncommercial television and radio stations from editorializing).

204. *See Finley*, 524 U.S. 569, 579–80 (1998); *Rust*, 500 U.S. at 197–200. The denial of federal funding also did not make it impossible for the recipients of federal funding to talk about abortion. *Rust*, 500 U.S. at 197–200. Rather, they could not discuss abortion as part of the federally funded "family planning" grant. *Id.*; *see also* Regan v. Taxation with Representation, 461 U.S. 540, 545 (1983) (ruling that Congress is not required to provide public funding for lobbying activities).

205. *Rust*, 500 U.S. at 199 n.5. Some commentators have argued that the Court should redefine the coercion element under *Dole* so that it would be impermissibly coercive if the condition placed upon the funding "presents a state with either no rational choice or no fair choice but to accept, even if it leaves the state with a practical choice not to." Baker & Berman, *supra* note 197, at 520–21.

206. *Rust*, 500 U.S. 199 n.5; *see also* Baker & Berman, *supra* note 197, at 522.

> [M]ost lower courts seem to read *Dole* as implicating the "no practical choice" conception of what it means to be impermissibly coerced: if a state could reject the condition [imposed on receiving federal funding] and still survive essentially as a state, then acceptance of the condition is freely chosen and the condition is not impermissibly coercive.

Id.

207. *Rust*, 500 U.S. at 199 n.5 (citing Grove City College v. Bell, 465 U.S. 555, 575 (1984)).

> By accepting Title X funds, a recipient voluntarily consents to any restrictions placed on any matching funds or grant-related income. Potential grant recipients can choose between accepting Title X funds—subject to the Government's conditions that they provide matching funds and forgo abortion counseling and referral in the Title X project—or declining the subsidy and financing their own unsubsidized program. [The Supreme Court has] never held that the Government violates the First Amendment simply by offering that choice. . . . [A program] is in no way "barred from using even wholly private funds to finance" its proabortion activities outside the Title X program.

Id. at 199. An example of Congress's use of its Spending Clause powers is *Finley*, in which Congress enacted a law in reaction to certain art exhibits deemed by some to be offensive. *Finley*, 524 U.S. at 575–76. These exhibits were funded by grants from the National Endowment

III. DISCUSSION: CIPA CHALLENGED IN *UNITED STATES V. AMERICAN LIBRARY ASSOCIATION*

On June 23, 2003, the Supreme Court announced its decision in *United States v. American Library Ass'n*, basing its holding on Spending Clause and First Amendment precedent.[208] The Justices submitted five opinions, none able to capture a majority, with six justices agreeing that CIPA was constitutional and three dissenting.[209] The Supreme Court reversed the district court opinion by holding the CIPA filtering conditions constitutional.[210] As a result, libraries receiving either the "E-rates" or Library Services and Technology Act ("LSTA") funds must implement a filtering technology to block access to obscenity, child pornography, and materials "harmful to minors."[211] The Court's five opinions consisted of the Court's plurality opinion, authored by Chief Justice Rehnquist, in which Justices O'Connor, Scalia, and Thomas joined; two concurring opinions, authored by Justices Kennedy and Breyer, respectively; and two dissenting opinions, one authored by Justice Stevens and the other authored by Justice Souter and joined by Justice Ginsburg.[212]

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for the Arts ("NEA"), and, consequently, the NEA was forced to revise its procedures for making funding decisions, which included having to convene a panel to provide diverse opinions and guidance in awarding grants and taking "decency and respect" into consideration. *Id.* at 576. However, the Court reasoned that the statute in question stopped short of committing viewpoint discrimination because the statute guided the NEA's decision-making while reforming the NEA's procedures without operating as a tool to preclude protected speech. *Id.* at 582. The Supreme Court also stated that "decency and respect" was but one factor in making funding determinations. *Id.* at 583. *See generally* FARBER, *supra* note 30, at 30–31 (providing a definition of viewpoint discrimination).

> The phrase 'viewpoint discrimination' is not self-explanatory. Presumably, the idea is that some perspectives on a topic are allowed while opposing views are not. . . . [One] problem is deciding what counts as an *opposing* viewpoint, because this depends on how we conceptualize the relevant debate. The easiest picture involves one person affirming and the other denying a proposition. A statute that distinguishes between a statement and its negation is clearly viewpoint-based.

Id.

208. ALA II, 123 S. Ct. 2297 (2003) (plurality opinion). *See generally infra* Part III.C (outlining each justice's opinions in the case at hand).

209. *ALA II*, 123 S. Ct. at 2300.

210. *Id.* at 2303 (plurality opinion).

211. *See* 47 U.S.C. § 254(h)(6) (2000) (defining the requirement of certain libraries to certify that they have implemented a technology protection measure to protect children from the above three categories of content); *see also infra* notes 216–18 (describing the E-rate discounts and LSTA programs).

212. *ALA II*, 123 S. Ct. at 2300. *See generally infra* Part III.C.1 (discussing Chief Justice Rehnquist's plurality opinion); *infra* Part III.C.2 (discussing Justice Kennedy's concurring opinion); *infra* Part III.C.3 (discussing Justice Breyer's concurring opinion); *infra* Part III.C.4 (discussing Justice Stevens's dissenting opinion); *infra* Part III.C.5 (discussing Justice Souter's dissenting opinion).

A. The Facts

Congress feared that federal subsidies for the Internet were facilitating access in public libraries to obscenity, child pornography, and other materials "harmful to minors."[213] Hence, pursuant to its Spending Clause powers, Congress enacted CIPA.[214] This Act permitted public libraries to accept two types of federal funding only by complying with certain conditions; moreover, CIPA created a national standard for dealing with online pornography rather than allowing localities to decide how to handle the issue.[215]

The first type of funding, through the LSTA, provided libraries with funds to access information through electronic networks and to reach out and assist underserved or rural communities.[216] The LSTA originally did not include filtering requirements for libraries; however, CIPA amended the LSTA to impose the filters as a requirement for

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213. *See ALA II*, 123 S. Ct. at 2302 ("Congress learned that adults 'us[e] library computers to access pornography that is then exposed to staff, passersby, and children,' and that 'minors acces[s] child and adult pornography in libraries.'"). *See generally* Kathleen Conn, *Protecting Children From Internet Harm (Again): Will the Children's Internet Protection Act Survive Judicial Scrutiny?*, 153 EDUC. L. REP. 469, 486–91 (2001) (discussing a textual analysis of CIPA provisions, including a discussion of terms such as "technology protection measures," "harmful to minors," "Internet safety policies," and "local agencies").

214. *ALA II*, 123 S. Ct. at 2302.

215. *Id.* at 2313 (Stevens, J., dissenting) (arguing that that CIPA acts as a "blunt nationwide restraint on adult access" to protected materials). Before the enactment of CIPA, close to 17% of public libraries used some type of filtering software on at least some of their computer terminals, while 7% of public libraries had filtering software on all of their terminals. *Id.* at 2302 (plurality opinion); *see supra* Part II.E (discussing Spending Clause precedent). Reportedly, President Clinton had reservations about signing CIPA into law:

> Clinton stated that although his administration has been actively involved in protecting children from harmful internet material, he was "disappointed" with the form of the legislation that Congress had chosen. Clinton preferred local development and implementation of an internet use plan, which he believed would be more effective than mandatory filtering. . . . He was also concerned that the weakness of current filtering technology would not be able to distinguish between harmful and non-harmful content, and would thus limit access to valuable information in a way that would interfere with First Amendment rights to free speech. His goal, therefore, was to work within the confines of the statute as it was written, "to implement the policy in a way that maximizes local flexibility and minimizes local burdens within the framework of the statute."

Susannah J. Malen, *Protecting Children in the Digital Age: A Comparison of Constitutional Challenges to CIPA and COPA*, 26 COLUM J.L. & ARTS 217, 228–29 (2003) (citations omitted).

216. *See ALA II*, 123 S. Ct. at 2301 (stating that for the fiscal year 2002, Congress set aside over $149 million for LSTA funding).

receiving LSTA funds.[217] The second type of funding, "E-rate" discounts, subsidized the cost of Internet services and connections.[218]

To receive either type of funding, libraries must certify to the Federal Communications Commission ("FCC") that they have an Internet protection policy and have installed a "technology protection measure" to block access to certain materials.[219] A "technology protection measure" filters or restricts access to materials designated by the statute.[220] Specifically, the technology protection measure required by the act must prohibit access, by all users, of "visual depictions" constituting "obscenity" or "child pornography," as well as restricting minors' access to materials that are "harmful to minors."[221] CIPA also requires that libraries equip all Internet-accessible computers with the filtering software.[222]

CIPA permits libraries to disable the filtering technology to allow access for bona fide research or any other lawful purposes.[223] However,

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217. *See* Malen, *supra* note 215, at 227 (providing a background of the LSTA funds prior to CIPA's enactment).

218. *See ALA II*, 123 S. Ct. at 2301 (stating that, for the fiscal year ending June 30, 2002, public libraries received approximately $58.5 million in E-rate discounts).

219. 47 U.S.C. § 254(h)(6)(B) (2000). If a library fails to certify with the FCC that it is complying with CIPA, the library will not receive services under LSTA or the E-rates until they comply. Children's Internet Protection Act Certifications Required from Recipients of Discounts Under the Federal Universal Service Support Mechanism for Schools and Libraries, 47 C.F.R. § 54.520(d) (2003). *See generally* Conn, *supra* note 213, at 486–87 (providing a textual analysis of "technology protection measures").

220. 47 U.S.C. § 254(h)(7)(I) (2000 & West Supp. 2003).

221. 20 U.S.C. § 9134(f)(1)(A)(i), (B)(i) (2000); 47 U.S.C. § 254(h)(6)(B)(i), (C)(i); *ALA II*, 123 S. Ct. at 2302; *see* 47 U.S.C. § 254(h)(7)(D) (defining a minor as "any individual who has not attained the age of 17 years"). CIPA defines materials that are "harmful to minors" as

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

47 U.S.C. § 254(h)(7)(G). For more definitions, see 47 U.S.C. § 254(h)(7)(E)–(F) (stating that CIPA's definition of "obscene" is the same as the definition in 18 U.S.C. § 1460 and CIPA's definition of "child pornography" is the same as the definition in 18 U.S.C. § 2256).

222. *See* Federal-State Joint Board on Universal Service; Children's Internet Protection Act, 16 F.C.C.R. 8182, para. 30 (2001) [hereinafter FCC CIPA Implementation]. If a library knowingly fails to comply with CIPA's filtering requirement, it must pay back the amount of its federal monies under the LSTA or E-rate program for the time period during which there was noncompliance. 47 C.F.R. § 54.520(e).

223. 20 U.S.C. § 9134(f); 47 U.S.C. § 254(h)(6)(D); *ALA II*, 123 S. Ct. at 2302.

libraries receiving funds under the E-rate program may disable the filters only "during use by an adult."[224] In contrast, libraries receiving funds under the LSTA program may disable the filters during use by any person.[225] Therefore, under the LSTA program, libraries can provide access to (1) materials protected by the First Amendment, such as pornographic material, which would be deemed "harmful to minors" but protected for adults; or (2) constitutionally protected materials that were blocked incorrectly.[226]

B. The District Court Decision

Four groups of plaintiffs brought suit in the District Court for the Eastern District of Pennsylvania challenging CIPA's constitutionality.[227] Due to the limits of the filtering technology, the district court determined that public libraries could never comply with CIPA's requirements without also restricting access to a substantial amount of protected speech.[228]

The plaintiff group of libraries claimed that the use of filtering software constituted a content-based restriction on their patrons' access to materials protected by the Constitution, thereby subjecting the statute to strict scrutiny.[229] The plaintiffs further argued that CIPA was not

224. 47 U.S.C. § 254(h)(6)(D).

225. 20 U.S.C. § 9134(f)(3).

226. *See* ALA I, 201 F. Supp. 2d. 401, 485 (E.D. Pa. 2002) (discussing an interpretation of the statutory provisions that call for libraries to disable the filters if a patron seeks access to constitutionally protected speech).

227. *Id.* at 407. The first two groups of plaintiffs consisted of libraries and library associations that received federal subsidies under the E-rate and the LSTA. *Id.* at 414–15. The second group of plaintiffs consisted of patrons who tried to access information that was blocked by each of their respective library's filters. *Id.* at 415 (stating that one woman, Emmalyn Rood, tried to access information about her sexual identity when she was a teen and another patron attempted to find information about breast reconstructive surgery after his mother was diagnosed with breast cancer). *Id.* The third group of plaintiffs consisted of website publishers whose websites were blocked by filtering software, such as Planned Parenthood Federation of America, an operator of a website aimed at gay, lesbian, bisexual, and transgendered individuals, and a congressional candidate. *Id.* The district court gave an expedited review of the case because libraries needed to certify their compliance with CIPA by July 1, 2002. *Id.* at 408; *see* 47 C.F.R. § 54.520(d)(1) (stating that if a library knowingly fails to submit the certification of its compliance with CIPA, it will not be eligible for the funding under the federal program until such certification is submitted).

228. *ALA I*, 201 F. Supp. 2d at 407.

229. *Id. See generally supra* notes 46–48 and accompanying text (discussing the requirements of strict scrutiny analysis).

narrowly tailored to serve a compelling government interest.[230] A three-judge district court panel heard the case.[231]

1. Spending Clause Analysis

The district court agreed with the parties that an analysis of Congress's Spending Clause powers was the proper framework for the case at hand.[232] Because CIPA attaches the condition that recipients must install filtering software on all of their computers to receive federal funding, the district court examined whether this condition overstepped Congress's powers.[233] The plaintiffs challenged CIPA's conditions, claiming that the use of filtering technology induced the libraries to violate the First Amendment; however, the plaintiffs and the government disagreed regarding whether CIPA constituted an "inducement."[234]

The plaintiffs claimed that the mandated use of Internet filters, as required by CIPA, was facially unconstitutional because it forced libraries to infringe upon their patrons' First Amendment rights, and therefore, Congress exceeded its Spending Clause powers.[235]

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230. *ALA I*, 201 F. Supp. 2d at 407.

231. *Id.* This district court panel was authorized by statute. ALA II, 123 S. Ct. 2297, 2302–03 (2003).

232. *ALA I*, 201 F. Supp. 2d at 450. *See generally supra* Part II.E (discussing Spending Clause jurisprudence).

233. *ALA I*, 201 F. Supp. 2d at 450. The district court looked to four rules, which were outlined in *South Dakota v. Dole*:

> First, "the exercise of the spending power must be in pursuit of 'the general welfare.'" Second, any conditions that Congress sets on states' receipt of federal funds must be sufficiently clear to enable recipients "to exercise their choice knowingly, cognizant of the consequences of their participation." Third, the conditions on the receipt of federal funds must bear some relation to the purpose of the funding program. And finally, "other constitutional provisions may provide an independent bar to the conditional grant of federal funds."

Id. (citations omitted). For further discussion of Spending Clause jurisprudence, see generally *supra* Part II.E.

234. *ALA I*, 201 F. Supp. 2d at 450–51; *see supra* note 197 and accompanying text (outlining the rule that Congress may not, under its Spending Clause powers, induce a funding recipient to violate the Constitution).

235. *ALA I*, 201 F. Supp. 2d at 407. The plaintiffs argued three other alternative theories for the facial invalidation of CIPA. *Id.* at 407 n.1. First, the plaintiffs argued that CIPA is facially invalid because (1) it "impose[d] an unconstitutional condition on public libraries by requiring them to relinquish their own First Amendment rights to provide unfiltered Internet access as a condition on their receipt of federal funds"; (2) it "effect[ed] an impermissible prior restraint on speech by granting filtering companies and library staff unfettered discretion to suppress speech before it has been received by library patrons and before it has been subject to a judicial determination that it is unprotected under the First Amendment"; and (3) CIPA is unconstitutionally vague. *Id.*; *see* Bernard W. Bell, *Filth, Filtering, and the First Amendment:*

Generally, when dealing with a claim of facial invalidity,[236] a court may sustain the challenge if the plaintiffs can show that the statute provides for no constitutionally sound application.[237] However, the district court recognized that a limited exception existed, permitting the facial invalidation of a statute that restricted a substantial amount of protected speech, regardless of the fact that the statute may be constitutional in certain circumstances.[238]

2. Strict Scrutiny

The district court agreed with the plaintiffs that strict scrutiny was the appropriate analysis, finding that the use of filters constituted a content-based restriction on speech because the filters block speech based on the subject (such as being sexually explicit) in a public forum.[239] The district court reasoned that although the Internet does not enjoy the

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Ruminations on Public Libraries' Use of Internet Filtering Software, 53 FED. COMM. L.J. 191, 208–14 (2001) (discussing the doctrine of prior restraint in the context of Internet filters).

236. In order to make a successful facial invalidation claim, plaintiffs must show that there is not a set of circumstances under which the legislative act will comply with the Constitution. Rust v. Sullivan, 500 U.S. 173, 183 (1991).

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid.

Id. (quoting United States v. Salerno, 421 U.S. 739, 745 (1987)). Conversely, an "as-applied" challenge arises when there is a particular set of circumstances that render the legislation in question unconstitutional. *See ALA II*, 123 S. Ct. at 2310 (Kennedy, J., concurring) (discussing the possibility of an as-applied challenge to the use of filtering software in libraries if the particular facts merit that review).

237. *ALA I*, 201 F. Supp. 2d at 451.

238. *Id.* at 451–52. The plaintiffs argued that the CIPA filter requirement "chilled" protected speech. *Id.* at 452. The plaintiffs feared that because of the need for federal funding, some libraries would go along with CIPA's requirements and limit patrons' access to protected materials. *Id.* "The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere. Under this principal, [a law] is unconstitutional on its face if it prohibits a substantial amount of protected expression." Ashcroft v. Free Speech Coalition, 535 U.S. 234, 244 (2002). On the facial invalidation claim, the district court did not decide the issue of whether the plaintiffs would have to show that CIPA induced the states to engage in unconstitutional activities or that CIPA restricted library patrons' access to a significant amount of constitutionally protected materials, thereby causing libraries to violate the First Amendment. *ALA I*, 201 F. Supp. 2d at 453. The district court assumed that the plaintiffs would have to show that any library complying with CIPA would effectively violate the First Amendment. *Id.*

239. *ALA I*, 201 F. Supp. 2d at 409, 460. The district court found that the government created a designated public forum when it made Internet access available in public libraries, and the district court held that strict scrutiny applied. *Id.* at 457. *See generally supra* notes 54–60 and accompanying text (stating that strict scrutiny applies to content-based restrictions in public forums).

historical foundation of many public forums, the Internet shares many characteristics with other public forums, such as taxpayer funding and general availability for public use.[240] Thus, the district court held that CIPA was subject to strict scrutiny because CIPA constituted a content-based restriction that regulates a public forum, due to the fact that filtering technology blocks websites based on their content.[241]

The district court compared the filtering of Internet materials with general library collections decisions, finding that the library had not reviewed all of the accessible Web-based materials.[242] Further, the district court found the government's argument that the library used its

240. *ALA I*, 201 F. Supp. 2d at 466–67. Furthermore, the district court found that the public forum protection applied to speakers and listeners, meaning that when libraries provide Internet access, they open their doors to speakers from around the world, as well as their own patrons. *Id.* at 467–68; *see, e.g., id.* at 470 (arguing the that Internet "provides unique possibilities for promoting First Amendment values" and justifies the application of strict scrutiny). "[P]ublic libraries, like sidewalks and parks, are generally open to any member of the public who wishes to receive speech that these fora facilitate, subject only to narrow limitations." *Id.* at 466. *But cf.* Kreimer v. Bureau of Police of Morristown, 958 F.2d 1242, 1260 (1992) (stating that the library in question had rules making it clear that it was open to the public only for specified purposes of reading, studying, and using library materials, not for the exercise of all First Amendment rights). *See generally supra* Part II.A.2 (discussing the appropriate levels of scrutiny for various public forums).

241. *ALA I*, 201 F. Supp. 2d at 409, 460. According to the court:

> While the First Amendment permits the government to exercise editorial discretion in singling out particularly favored speech for subsidization or inclusion in a state-created forum, we believe that where the state provides access to a "vast democratic forum[]," open to any member of the public to speak on subjects "as diverse as human thought,"and then selectively excludes from the forum certain speech on the basis of its content, such exclusions are subject to strict scrutiny. These exclusions risk fundamentally distorting the unique marketplace of ideas that public libraries create when they open their collections, via the Internet, to the speech of millions of individuals around the world on a virtually limitless number of subjects.

Id. at 464–65 (citing Reno v. ACLU, 521 U.S. 844, 868, 870 (1997)). "Application of strict scrutiny finds further support in the extent to which public libraries' provision of Internet access uniquely promotes First Amendment values in a manner analogous to traditional public forums such as streets, sidewalks, and parks, in which content-based restrictions are always subject to strict scrutiny." *Id.* at 409. *See generally supra* Part II.A.1–2 (examining the distinction between different types of public forums and their respective levels of scrutiny).

242. *ALA I*, 201 F. Supp. 2d at 463. The district court did not follow the reasoning in *Mainstream Loudoun v. Board of Trustees of Loudoun County Library*, which relied on the analysis that a library's decision to block websites is fundamentally different from it decisions regarding the acquisition of print materials. *Id.* at 465 n.25. *See generally* Mainstream Loudoun v. Bd. of Trs. of Loudoun County Library, 2 F. Supp. 2d 783, 793–94 (1998). The district court in *American Library Ass'n v. United States* reasoned that libraries have scarce resources, especially when it comes to time and Internet access. *ALA I*, 201 F. Supp. 2d at 465 n.25. For example, there was testimony that patrons' demand for Internet access far outweighed the library's supply, for allowing a patron unlimited access to the Internet leads to another patron having to wait. *Id.*

acquisition discretion unconvincing because the library made no effort to review all of the blocked Internet materials.[243]

Therefore, the court noted that for CIPA's provisions to pass constitutional muster, they must be narrowly tailored to further a compelling government interest.[244] The district court stated that protecting library patrons from obscenity, child pornography, and materials that were "harmful to minors" constituted a compelling government interest.[245]

Nevertheless, the district court held that use of filtering software was not narrowly tailored to further the compelling government interest.[246] The district court examined the effectiveness of the existing filtering technology and its limits, including the failure to block all categories of speech required by CIPA.[247] Additionally, the district court looked to

243. *ALA I*, 201 F. Supp. 2d at 464.

244. *Id.* at 410. The district court recognized that there are compelling government interests in protecting library patrons from unwillingly viewing sexually explicit materials, along with obscenity and child pornography, and when dealing with minors, materials that are harmful to minors. *Id. See generally supra* notes 47–48 and accompanying text (discussing the elements for passing strict scrutiny).

245. *ALA I*, 201 F. Supp. 2d at 409, 471–72. Although the Supreme Court has not recognized a compelling state interest in protecting unwilling viewers from constitutionally protected speech, the district court stated that there was not a complete bar against protecting viewers from inadvertent exposure to sexually explicit materials. *Id.* at 409, 472–74. The state's interest in protecting the unwilling viewer can be found in the obscenity doctrine, which was initiated by a case involving an unwilling viewer. *Id.* at 473; *see* FCC v. Pacifica Found., 438 U.S. 726, 749 n.27 (1986) (stating that, when outside of the home, the scales may sometimes tip in favor of the speaker and away from the unwilling listener, requiring the offended listener to turn away); Miller v. California, 413 U.S. 15, 18–19 (1973) (recognizing that the government has an interest in protecting the sensibilities of unwilling recipients); *supra* notes 97–98 and accompanying text (discussing the *Miller* obscenity rule). *But see supra* notes 47–48 and accompanying text (discussing the elements required for passing strict scrutiny).

246. *ALA I*, 201 F. Supp. 2d at 409–75. "The proper method for a library to deter unlawful or inappropriate patron conduct, such as harassment or assault of other patrons, is to impose sanctions on such conduct, such as either removing the patron from the library, revoking the patron's library privileges, or, in the appropriate case, calling the police." *Id.* at 475.

247. *Id.* at 410 ("No category definition used by the blocking programs is identical to the legal definitions of obscenity, child pornography, or material harmful to minors, and, at all events, filtering programs fail to block access to a substantial amount of content on the Internet that falls into the categories defined by CIPA."). Under CIPA, libraries are required to use a technology measure to block visual depictions of obscenity, child pornography, and materials that are harmful to minors. 20 U.S.C. § 9134(f)(1)(A)(i), (B)(i) (2000); 47 U.S.C. § 254(h)(6)(B)(i), (C)(i) (2000 & West Supp. 2003). Two reasons for why the filtering software have the underblocking and overblocking problems are that the software companies do not re-review websites that have been categorized, and the companies use humans, who are subject to error, in their reviewing and categorizing processes. *ALA I*, 201 F. Supp. 2d. at 436. Filtering companies rely on human review to determine what categories websites will belong in. *Id.* at 476. There are problems associated with this method, including blocking every page on a website that contains some materials that fall into a particular category when other materials may not. *Id.* The plaintiffs employed a Harvard University student, Benjamin Edelman, to quantify the number of

numerous alternatives that may provide more appropriate options for libraries.[248] Finally, the district court held that the disabling provisions of CIPA did not constitute narrow tailoring because a patron's embarrassment or desire for privacy may deter him or her from requesting disablement of the program and librarians may not have enough time to complete the request.[249]

The district court concluded that CIPA's filtering requirements were subject to strict scrutiny because the filters constituted a content-based restriction and Internet access in public libraries constituted a public forum.[250] Further, the court held that because the filtering software

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websites that were blocked erroneously by four software companies. *Id.* at 442. Edelman compiled a list of over 500,000 URLs, which he then fed through four filtering programs and sent parts of the list for suitability review to librarians and professors of library science. *Id.* Even the government's own expert testified that of the blocked Web pages that public library patrons attempted to access, "between 6% and 15% 'contained no content' that [met] even the filtering products' own definitions of sexually explicit content." *Id.* at 448; *see, e.g., id.* at 446–47 (listing numerous websites that were blocked erroneously or categorized incorrectly by the filtering software).

248. *ALA I*, 201 F. Supp. 2d at 480–84. According to the district court:

> Although these methods of detecting use of library computers to access illegal content are not perfect, and a library, out of respect for patrons' privacy, may choose not to adopt such policies, the government has failed to show that such methods are substantially less effective at preventing patrons from accessing obscenity and child pornography than software filters.

Id. at 481. The district court recognized that some of the methods, including the "tap-on-the-shoulder" method, allowed for a librarian's discretion. *Id.* at 482. The district court further reasoned, however, that given the instances of underblocking by the filters, librarians will have to resort to this tactic anyway. *Id. See generally* Norden, *supra* note 87, at 780–81 (stating that approximately "95% of all libraries providing public Internet access have a written policy or set of guidelines to 'regulate public use of the Internet.'"). Among libraries without formal Internet use policies, 50% were in the process of designing a policy and 26% were considering formulating such policies. *Id.* at 781.

249. *ALA I*, 201 F. Supp. 2d at 486–87. The district court stated that the Supreme Court had ruled that "content-based restrictions that require recipients to identify themselves before being granted access to disfavored speech are subject to no less scrutiny than outright bans on access to such speech." *Id.* at 486. Some libraries have instituted procedures to allow for anonymous requests for disabling filters. *Id.* at 487. Under the E-rate program, "an administrator, supervisor, or other person authorized by the certifying authority . . . may disable the technology protection measure concerned, during use by an adult, to enable access for bona fide research or other lawful purpose." 47 U.S.C. § 254(h)(6)(D). Under the LSTA subsidy, "an administrator, supervisor or other authority may disable a technology protection measure . . . to enable access for bona fide research or other lawful purposes." 20 U.S.C. § 9134(f)(3). However, the LSTA allows for the disabling of the filters during use by either adults or minors. 47 U.S.C. § 254(h)(6)(D); 20 U.S.C. § 9134(f)(3); *ALA I*, 201 F. Supp. 2d at 414. The length of time that it takes to review a website before deciding whether the site complies with the statutory purpose is especially problematic in areas where libraries are short-staffed. *ALA I*, 201 F. Supp. 2d at 487–88. The district court also noted that the patrons' need to request affirmatively that the filters be disabled could be problematic when patrons are given a limited amount of time to "surf" the Internet, which they may not want to spend talking to a librarian about unblocking a website. *Id.* at 488.

250. *ALA I*, 201 F. Supp. 2d at 489.

requirement was not narrowly tailored to the compelling government interest of protecting against exposure to obscenity, child pornography, and materials that are "harmful to minors," CIPA was facially invalid.[251] Accordingly, the United States appealed, and the case proceeded directly to the United States Supreme Court, as provided for in CIPA.[252]

C. The Supreme Court Decision

The Supreme Court reversed the district court by finding CIPA constitutional in a plurality opinion.[253] This section first addresses Chief Justice Rehnquist's plurality opinion, which held that CIPA was constitutional because it did not attach an unconstitutional condition upon the receipt of federal funding.[254] Next, this section analyzes Justice Kennedy's concurring opinion, in which he found that CIPA was not facially unconstitutional but left open the possibility of an as-

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251. *Id.* at 489–90. The district court also found that CIPA was severable from the other parts of the statutes that contain the LSTA and E-rates. *Id.* at 494. Because the district court found CIPA to be facially invalid on the grounds that the filtering software violates the First Amendment, the district court did not decide the issues of whether there was a prior restraint on protected speech and whether CIPA was invalid because it induced the recipients of federal funding to violate the constitution. *Id.* at 490; *see id.* at 490 n.36. Similarly, the filtering software was not narrowly tailored to a library's interest in protecting patrons from unwillingly viewing inappropriate materials. *Id.* at 478.

> To prevent patrons from accessing visual depictions that are obscene and child pornography, public libraries may enforce Internet use policies that make clear to patrons that the library's Internet terminals may not be used to access illegal speech. Libraries may then impose penalties on patrons who violate these policies, ranging from a warning to notification of law enforcement, in the appropriate case. Less restrictive alternatives to filtering that further libraries' interest in preventing minors from exposure to visual depictions that are harmful to minors include requiring parental consent to or presence during unfiltered access, or restricting minors' unfiltered access to terminals within view of library staff. Finally, optional filtering, privacy screens, recessed monitors, and placement of unfiltered Internet terminals outside of sight-lines provide less restrictive alternatives for libraries to prevent patrons from being unwillingly exposed to sexually explicit content on the Internet.

Id. at 410. For example, the Multnomah County Library and Fort Vancouver Regional Library, both of which were parties in *ALA I*, had Internet use policies that "[did] not prohibit adult patrons from viewing sexually explicit materials on the Web, as long as they did so at terminals with privacy screens or recessed monitors . . . and as long as it [did] not violate state or federal law to do so." *Id.* at 422; *see also id.* at 422–23 (describing other examples of libraries' Internet use policies).

252. Pursuant to section 1741(b) of CIPA, a direct appeal can be made to the United States Supreme Court. Goldstein, *supra* note 10, at 192. The government exercised this right; therefore no court of appeals heard this case. *Id.*

253. ALA II, 123 S. Ct. 2297, 2309 (2003) (plurality opinion).

254. *See infra* Part III.C.1 (discussing the plurality's reasoning in finding that CIPA was a constitutional exercise of Congress's Spending Clause powers).

applied challenge to the statute.[255] This section then addresses Justice Breyer's concurring opinion, in which he applied an intermediate level of scrutiny.[256] Next, this section analyzes Justice Stevens's dissenting opinion, in which he found CIPA unconstitutional because the statute's provisions violated First Amendment rights and were distinguishable from Spending Clause precedent.[257] Finally, this section discusses Justice Souter's dissenting opinion, in which he found that strict scrutiny, not rational basis, was the appropriate level of review and that the filtering technology did not survive strict scrutiny.[258]

1. Chief Justice Rehnquist's Plurality Opinion

Chief Justice Rehnquist authored the plurality opinion of the Court, in which Justices O'Connor, Scalia, and Thomas joined.[259] The plurality held that CIPA did not violate the First Amendment because rational basis, rather than strict scrutiny, was the appropriate level of scrutiny.[260] The plurality also held that CIPA did not violate the Spending Clause because it neither constituted a penalty for its recipients nor induced libraries to violate the Constitution.[261]

To determine whether the CIPA filtering software requirement violated the First Amendment, the plurality opinion began by examining the role of public libraries in our society.[262] The plurality relied on the American Library Association's Library Bill of Rights, which states that libraries ought to provide materials for the interest and enlightenment of the community.[263] To effectuate this purpose, libraries have broad

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255. *See infra* Part III.C.2 (discussing Justice Kennedy's concurring opinion and the extent to which his analysis differed from the plurality opinion).

256. *See infra* Part III.C.3 (discussing Justice Breyer's concurring opinion, how he found the need for an intermediate level of scrutiny, and his determination under this level of scrutiny).

257. *See infra* Part III.C.4 (discussing Justice Stevens's dissenting opinion and his reasoning that distinguishes the case from the plurality's interpretation of Spending Clause precedent and First Amendment requirements).

258. *See infra* Part III.C.5 (discussing Justice Souter's dissenting opinion and his conclusions that the plurality applied the incorrect level of scrutiny and that, under the proper strict scrutiny, CIPA would be found unconstitutional).

259. *ALA II*, 123 S. Ct. 2297, 2301 (2003) (plurality opinion).

260. *Id.* at 2309 (plurality opinion).

261. *Id.* (plurality opinion). *See generally supra* Part II.C (discussing the test for whether Congress's use of its Spending Clause powers are unconstitutional).

262. *ALA II*, 123 S. Ct. at 2303–04 (plurality opinion).

263. *Id.* at 2303–04 (plurality opinion); *see also* AM. LIBRARY ASS'N, LIBRARY BILL OF RIGHTS (Jan. 23, 1996), *available at* http://www.ala.org/ala/oif/statementspols/statementsif/librarybillrights.htm (last visited Mar. 16, 2004). The Library Bill of Rights states,

> The American Library Association affirms that all libraries are forums for information and ideas, and that the following basic policies should guide their services.

discretion in deciding which materials to acquire and make available to their patrons.[264] The plurality stated that the goal of libraries did not include providing information on every topic.[265] Rather, libraries try to provide material that would be of interest to their communities.[266] Therefore, the plurality noted that libraries seek materials that they consider appropriate for their patrons and have wide discretion in selecting such materials.[267] Accordingly, libraries must consider the content of the materials when deciding whether to acquire them.[268]

Because the libraries in question dealt with the public, the plurality next addressed content-based judgments in making materials available to the public.[269] The plurality stated that the public forum principles on which the district court relied were inappropriate in the context of the case.[270] The plurality explained that just as public forum principles,

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> I. Books and other library resources should be provided for the interest, 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 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 abridgment 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. The Library Bill of Rights was adopted on June 18, 1948 and was reaffirmed on January 23, 1996 by the ALA council. *Id.*

264. *ALA II*, 123 S. Ct. at 2304 (plurality opinion).

265. *Id.* (plurality opinion).

266. *Id.* (plurality opinion).

267. *Id.* (plurality opinion).

268. *Id.* (plurality opinion).

269. *Id.* (plurality opinion).

270. *Id.* (plurality opinion). The Supreme Court previously held in two cases that the government had broad discretion when making content-based judgments on public materials, such as arts or television communications. *Id.* In *Arkansas Educational Television Commission v. Forbes*, the Court held that public forum principles were not generally applicable to editorial judgments made by a public television station. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 672–73 (1998). In *National Endowment for the Arts v. Finley*, the Court upheld the NEA's use of content-based criteria in making funding decisions, explaining that it is in the "nature" of arts funding. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 585 (1998). *See generally supra* Part II.A.2 (discussing public forum principles); *supra* Part III.B.2 (discussing the district court's decision that CIPA was subject to strict scrutiny).

along with the strict scrutiny analysis, were inappropriate in the public television and arts funding realms, they were likewise inappropriate in the context of the discretion given to libraries for the acquisition of materials.[271]

Further, the plurality rejected the classification of Internet access in a public library as either a traditional or a designated public forum.[272] A traditional public forum generally has a long-standing or historical status.[273] Therefore, because of the recent emergence of the Internet, the plurality stated that the Internet did not have the requisite historical status.[274] The plurality similarly rejected classification of the Internet as a designated public forum.[275] To be a designated public forum, the government must take an affirmative step and make the property available for public use.[276] The plurality stated that public libraries provided Internet access for their patrons—not to give publishers of Web-based materials the opportunity to express themselves.[277] Rather, libraries provided Internet access so that patrons have yet another medium for researching, learning, and recreation, which is of the same appropriate quality as library print collections.[278]

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271. *ALA II*, 123 S. Ct. at 2304 (plurality opinion). *See generally supra* Part II.A.2 (discussing public forum principles).

272. *ALA II*, 123 S. Ct. at 2304–05 (plurality opinion). *See generally* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 802 (1985) (outlining the different types of public forums); *supra* notes 52–60 and accompanying text (discussing the rules for finding traditional and designated public forums); *supra* notes 239–40 and accompanying text (discussing the district court's finding regarding CIPA and public forums).

273. *ALA II*, 123 S. Ct. at 2305 (plurality opinion); *see also Ark. Educ. Television Comm'n*, 523 U.S. 666, 678 (1998) (stating that the Court "rejected the view that traditional public forum status extends beyond its historic confines" (citation omitted)); *supra* notes 52–53 and accompanying text (noting traditional public forum principles).

274. *ALA II*, 123 S. Ct. at 2305 (plurality opinion).

275. *Id.* (plurality opinion). *See generally supra* notes 55–60 and accompanying text (noting designated public forum principles); *supra* notes 239–40 and accompanying text (discussing the district court's finding in regards to CIPA and public forums).

276. *ALA II*, 123 S. Ct. at 2305 (plurality opinion). "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse." *Id.* (plurality opinion) (citing *Cornelius*, 473 U.S. at 802). Although the district court relied on *Rosenberger v. Rector & Visitors of University of Virginia*, the plurality distinguished the limited public forum created, which involved the receipt of public money to fund student groups that wished to use the money to publish materials, because the people administering the fund could not engage in viewpoint discrimination. *Id.* (plurality opinion). *See generally supra* notes 55–60 and accompanying text (discussing the requirements for a finding of designated public forum status).

277. *ALA II*, 123 S. Ct. at 2305 (plurality opinion). Libraries "provide Internet access [to facilitate research], not to 'encourage a diversity of views from private speakers.'" *Id.* (plurality opinion) (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 834 (1995)).

278. *Id.* (plurality opinion). The Court cited to a congressional finding that stated, "The Internet is simply another method for making information available in a school or library." *Id.*

Furthermore, the plurality disagreed with the district court's decision that the libraries' discretion to choose books and other tangible materials for public access was related to providing Internet access.[279] The district court reasoned that libraries review books using their discretion to decide whether to obtain the material for their collections, but are unable to review every website the Internet makes available.[280] However, the plurality found that the libraries' inability to review all websites on the Internet was irrelevant because libraries historically have chosen to exclude pornographic materials from their collections, and such decisions were not subject to strict scrutiny.[281] Therefore, the plurality reasoned that because decisions to collect or not to collect pornographic print materials were not subject to strict scrutiny, the decisions to exclude pornographic materials on the Internet similarly are not subject to strict scrutiny.[282] Moreover, the plurality stated that libraries must apply the same discretion when dealing with online materials as with print resources because the means through which a library chooses its materials directly relates to its purpose of making suitable materials available to its community.[283]

The plurality next held that it was appropriate for libraries to restrict access to certain categories of materials on the Internet rather than making individualized judgments for each material.[284] The plurality reasoned that libraries would confront much difficulty if they chose to screen out specific online resources that were deemed inappropriate because new materials appear on the Internet daily, while existing Internet materials are modified and updated constantly.[285] Furthermore, the plurality stated that a vast amount of protected materials, which the library would not have the time or means to review, would be excluded if a library limited Internet access only to specific websites that it approved.[286]

(plurality opinion) (citing S. REP. NO. 106-41, at 7 (1999)). The Internet is "no more than a technological extension of the book stack." *Id.* (plurality opinion).

279. *Id.* at 2306 (plurality opinion). *See generally supra* notes 242–43 (discussing the district court's finding that Internet filters should not be examined as library acquisition decisions).

280. *ALA II*, 123 S. Ct. at 2306. *See generally supra* notes 242–43 (discussing the district court's finding in regards to library acquisition discretion and its application to Internet filters).

281. *ALA II*, 123 S. Ct. at 2306 (plurality opinion). *See generally supra* notes 264–68 and accompanying text (discussing the plurality's agreement that libraries are afforded wide discretion in making acquisition decisions).

282. *ALA II*, 123 S. Ct. at 2306 (plurality opinion).

283. *Id.* (plurality opinion). *See generally supra* notes 262–66 and accompanying text (reviewing the Court's view of the role of libraries).

284. *ALA II*, 123 S. Ct. at 2306 (plurality opinion).

285. *See id.* (plurality opinion).

286. *Id.* (plurality opinion).

Although the filtering technology also excluded protected materials, the plurality held that the CIPA provision allowing libraries to disable the filters cured this problem.[287] The plurality recognized the flaws of the filtering technology but reasoned that the burden on the First Amendment was insignificant because libraries could disable the filters upon request.[288] Unlike the district court and the dissenters, the plurality was unconcerned with the embarrassment created by a patron's request for disablement and the time necessary to effectuate the request.[289] The plurality opinion concluded that although the Constitution guaranteed the right to free speech, it did not guarantee the right to ask for information without embarrassment.[290] Therefore, any concerns regarding overblocking were dispelled by the "ease" of disabling the filters.[291]

Next, the plurality turned to the respondent's argument that by requiring libraries to breach their First Amendment rights to provide the public with access to protected materials, CIPA imposed an unconstitutional condition upon the receipt of federal funding.[292] The plurality analogized the CIPA filtering condition to the panel review of

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287. *ALA II*, 123 S. Ct. at 2306 (plurality opinion). *See generally supra* notes 223–26 and accompanying text (describing CIPA's disabling provisions); *supra* note 249 and accompanying text (examining how the district court treated CIPA's disabling provision).

288. *ALA II*, 123 S. Ct. at 2306 (plurality opinion). *See generally supra* notes 223–26 and accompanying text (describing CIPA's disabling provisions).

289. *ALA II*, 123 S. Ct. at 2306 (plurality opinion). Conversely, the district court found that patrons' embarrassment was a key factor in finding that the disabling provision did not save the statute. *See supra* note 249 and accompanying text (discussing the court's finding that patrons' embarrassment could be a deterrent to asking librarians to disable Internet filters). *See generally* 20 U.S.C. § 9134(f)(3) (2000) (permitting the filters to be disabled for both adults and children); 47 U.S.C. § 254(h)(6)(D) (2000) (allowing the disabling of the filters for adults). At oral arguments, the Solicitor General stated that a patron would have to approach a librarian to request that the filters be disabled and would not have to explain her reasons for the request. Transcript of Oral Argument at 4, *ALA II* (No. 02-361), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-361.pdf (last visited Mar. 16, 2004).

290. *ALA II*, 123 S. Ct. at 2306 (plurality opinion). *But see* Lamont v. Postmaster General, 381 U.S. 301, 307 (1965) (arguing that requiring a patron to make affirmative steps to get his or her mail was "an affirmative obligation which we do not think the Government may impose on him"). In *Lamont General*, Congress enacted a statute that "sets administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await response before dispatching the mail." *Id.* at 306. The petitioner was the addressee on material that was considered "communist," and the post office required that he take affirmative steps to receive his mail. *Id.* at 304. The Supreme Court held that the statute violated the First Amendment. *Id.* at 307.

291. *ALA II*, 123 S. Ct. at 2307 (plurality opinion). The plurality was careful to state that these fears would be dispelled *assuming* that the filtering software violated the Constitution. *Id. See generally supra* notes 223–26 and accompanying text (describing CIPA's disabling provisions).

292. *ALA II*, 123 S. Ct. at 2307 (plurality opinion).

art grants in *National Endowment for Arts v. Finley*, where the plaintiffs claimed that their First Amendment rights were violated by the statutory requirement of a "decency" review.[293] The plurality rejected the appellee's argument, stating that even if the Court found the filtering condition unconstitutional, Congress's wide Spending Clause discretion in attaching conditions to the receipt of federal funding would allow for the condition.[294] The plurality compared the CIPA conditions to the conditions on family planning dollars in *Rust v. Sullivan*, stating that the government did not deny a benefit to anyone.[295] Rather, Congress required that the recipients spend the public funds only for their authorized purpose.[296]

Moreover, the plurality reasoned that because public libraries traditionally have excluded pornographic materials from their collections, Congress acted reasonably when it imposed similar limits on libraries' online collections.[297] The plurality also reasoned that libraries were not being "penalized" if they chose not to install the filtering technology.[298] Congress's denial of federal subsidies to a library that refused to limit Internet access did not prohibit that library from continuing to provide unfiltered Internet access.[299] Instead, the

293. *Id.* at 2304. *See generally supra* note 207 (discussing the *Finley* case).

294. *ALA II*, 123 S. Ct. at 2303, 2307–08 (plurality opinion). The Court found that *South Dakota v. Dole*, 483 U.S. 203 (1987), was the appropriate framework for addressing whether CIPA was constitutional. *See ALA II*, 123 S. Ct. at 2303 n.2 ("CIPA does not directly regulate private conduct; rather, Congress has exercised its Spending Powers by specifying conditions on the receipt of federal funds."). *See generally* Baker & Berman, *supra* note 197, at 467–69 nn.53–54 (2003) (criticizing the *Dole* decision and offering new solutions); *supra* notes 196–206 and accompanying text (describing Congress's powers to attach conditions to federal funding).

295. *ALA II*, 123 S. Ct. at 2307–08 (plurality opinion). For a discussion of *Rust v. Sullivan*, see *supra* notes 200–02 and accompanying text, and for an examination of Spending Clause jurisprudence, see *supra* Part II.E.

296. *ALA II*, 123 S. Ct. at 2308 (plurality opinion); *see also supra* Part II.E (discussing Congress's powers to attach conditions to federal funding under its Spending Clause powers).

297. *ALA II*, 123 S. Ct at 2308 (plurality opinion). *See generally supra* Part II.E (discussing Congress's powers to attach conditions to federal funding).

298. *ALA II*, 123 S. Ct. at 2308 (plurality opinion). A legislature's decision not to subsidize the exercise of a fundamental right does not infringe that individual's rights. *Id.* (citing Rust v. Sullivan, 500 U.S. 173, 193 (1991)). *See generally supra* notes 200–02 and accompanying text (examining Congress's spending powers, including the ability to attach conditions to funding).

299. *ALA II*, 123 S. Ct. at 2308 (plurality opinion). However, many of the libraries that receive the federal subsidies in question are in rural or impoverished areas. *See ALA I*, 201 F. Supp. 2d 401, 467 n.26 (E.D. Pa. 2002) ("[A]bout 20.3% of Internet users with household family income of less than $15,000 per year use public libraries for Internet access, and approximately 70% of libraries serving communities with poverty levels in excess of 40% receive E-rate discounts."). There is an underlying equal protection argument that has been mentioned by some commentators. *See, e.g.*, Rodden, *supra* note 153, at 2154 (stating that CIPA may have a disparate impact on low-income families). Rodden argued that because poorer school districts and libraries rely on these federal monies to provide services to individuals and families in their

plurality argued, CIPA merely reflected Congress's desire to provide funds should libraries choose to limit Internet access.[300] Therefore, the plurality held that CIPA was not an unconstitutional condition upon the receipt of federal funding.[301] Accordingly, the plurality held that CIPA was constitutional because CIPA's filtering requirement violated neither the First Amendment nor the Spending Clause.[302]

2. Justice Kennedy's Concurring Opinion

Justice Kennedy concurred in the judgment of the Court, but he rendered his own opinion as to the reasoning.[303] Justice Kennedy reduced the dispute to the issue of whether a librarian would unblock filtered materials upon the request of a patron.[304] He stated that deciding CIPA's constitutionality would be an easy issue if the libraries unblocked a website or disabled the entire filter when an adult made a request; however, he doubted that this would be the practice.[305]

Justice Kennedy first noted that the district court erroneously relied on information that was not a factual finding.[306] Specifically, the district court placed significance on the great length of time that the unblocking of the websites or disabling of the software could take at libraries with few staff members, even though this information was not part of the record as a factual finding.[307] Yet, Justice Kennedy reasoned that the district court could not have placed too much significance on this assertion because it still assumed that the disabling provisions of CIPA permit a library to provide access to protected materials.[308]

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communities, these poorer families are being impacted more directly by CIPA's requirements than are wealthier communities. *Id.* However, the Supreme Court did not address this issue in *ALA II*.

300. *ALA II*, 123 S. Ct. at 2308 (plurality opinion). *See generally supra* Part II.E (discussing Spending Clause jurisprudence).

301. *ALA II*, 123 S. Ct. at 2309 (plurality opinion). *See generally supra* notes 196–99 and accompanying text (noting that Congress's spending powers are limited, in that Congress may not attach unconstitutional conditions to federal funding).

302. *ALA II*, 123 S. Ct. at 2309 (plurality opinion).

303. *Id.* at 2309–10 (Kennedy, J., concurring).

304. *Id.* at 2309 (Kennedy, J., concurring).

305. *Id.* (Kennedy, J., concurring). The government stated that unblocking filtered material upon adult request was the appropriate response. Transcript of Oral Argument at 4–5, *ALA II* (No. 02-361), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-361.pdf (last visited Mar. 16, 2004).

306. *ALA II*, 123 S. Ct. at 2309 (Kennedy, J., concurring).

307. *Id.* (Kennedy, J., concurring); *see also* ALA I, 201 F. Supp. 2d 401, 411 (E.D. Pa. 2002) (explaining some of the problems with CIPA's disabling provision). *See generally supra* notes 223–26 and accompanying text (describing CIPA's disabling provision).

308. *ALA II*, 123 S. Ct. at 2309 (Kennedy, J., concurring). *See generally supra* notes 223–26 and accompanying text (describing CIPA's disabling provision).

Justice Kennedy echoed all of his fellow justices in recognizing that protecting minor patrons of public libraries from inappropriate materials constituted a compelling interest.[309] However, Justice Kennedy believed that Congress's solution, enacting CIPA, did not place enough of a significant burden on protected speech for adults as to make the statute facially invalid.[310] Rather, Justice Kennedy argued that he would have been more willing to find CIPA unconstitutional in an "as-applied" challenge if, for example, a library did not have the capacity to disable the filters or unblock the websites or if the filtering software substantially hindered an adult patron's right to view constitutionally protected speech.[311] Consequently, Justice Kennedy agreed with the plurality's conclusion that the plaintiffs' facial invalidation claim should be reversed; however, he left open the possibility of a successful "as-applied" challenge.[312]

3. Justice Breyer's Concurring Opinion

Justice Breyer concurred with the judgment, but he concluded that CIPA was constitutional following a different analysis.[313] According to Justice Breyer, the plurality incorrectly analyzed CIPA as if it had no First Amendment implication because, as Justice Breyer noted, CIPA directly restricted library patrons' receipt of information, which is within recognized First Amendment rights.[314] Under CIPA, according to Justice Breyer, Congress restricted access to materials from two extremely important sources of information: public libraries and the Internet.[315]

Also, while Justice Breyer stated that some form of heightened scrutiny was proper for analyzing the constitutionality of CIPA, he did not advocate the application of strict scrutiny to CIPA, stating that it

309. *ALA II*, 123 S. Ct. at 2310 (Kennedy, J., concurring); *see supra* note 47 and accompanying text (noting that a compelling government interest is one prong in the strict scrutiny analysis).

310. *ALA II*, 123 S. Ct. at 2310 (Kennedy, J., concurring).

311. *Id.* (Kennedy, J., concurring).

312. *Id.* (Kennedy, J., concurring). *See generally supra* note 236 (discussing the difference between facial challenges and "as-applied" challenges to statutes).

313. *ALA II*, 123 S. Ct. at 2310 (Breyer, J., concurring).

314. *Id.* (Breyer, J., concurring). *See generally supra* Part II.B (examining the right to receive information pursuant to the First Amendment).

315. *ALA II*, 123 S. Ct. at 2310 (Breyer, J., concurring). "The Web is . . . comparable, from the readers' viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services." Reno v. ACLU, 521 U.S. 844, 853 (1997).

was too strict a test for libraries.[316] He reasoned that CIPA's filtering software functioned as a selection restriction, similar to the selection decisions that libraries must engage in when choosing materials for their collections.[317] Hence, Justice Breyer stated that applying strict scrutiny to the selection of library materials would unreasonably interfere with libraries' discretion to choose materials for their collections.[318]

Accordingly, Justice Breyer proposed that the Court use a higher level of scrutiny, but not strict scrutiny.[319] This approach, Breyer stated, would be in accord with the Court's analysis of speech-related restrictions in other contexts.[320] In prior cases, the Court examined whether the speech-related interests were disproportionate to the justifications and the potential alternatives.[321] With this intermediate test, the Supreme Court looked for a good fit between the state's objective, the proposed restriction, and any less restrictive alternatives.[322] Justice Breyer argued that this approach should supplement strict scrutiny rather than substitute for it, giving

316. *ALA II*, 123 S. Ct. at 2311 (Breyer, J., concurring). Justice Breyer argued that strict scrutiny was too rigid a test to apply to library selection decisions because such a high level of scrutiny "would unreasonably interfere with the discretion necessary to create, maintain, or select a library's 'collection' (broadly defined to include all the information the library makes available)." *Id.* (Breyer, J., concurring). *See generally supra* notes 37, 44–48 and accompanying text (describing the levels of scrutiny as they relate to content-based regulations).

317. *ALA II*, 123 S. Ct. at 2311 (Breyer, J., concurring). Justice Breyer likened the filtering software to a "kind of editing," because the software decides which materials libraries make available to their patrons over the Internet. *Id.* (Breyer, J., concurring). Justice Breyer also noted that libraries must have discretion when compiling collections because of lack of resources and because they likely follow specific collection policies. *Id.* (Breyer, J., concurring).

318. *Id.* (Breyer, J., concurring).

319. *Id.* (Breyer, J., concurring). *See generally supra* notes 37, 44–48 and accompanying text (describing strict scrutiny as it relates to content-based regulations).

320. *ALA II*, 123 S. Ct. at 2311 (Breyer, J., concurring); *see, e.g.*, Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 185 (1997) (addressing "must-carry" provisions as speech-related restrictions in the broadcasting and cable television arenas); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 389–90 (1969) (addressing the relevance of First Amendment speech-related restrictions in radio and television broadcasting).

321. *ALA II*, 123 S. Ct. at 2311 (Breyer, J., concurring).

322. *Id.* (Breyer. J., concurring). The Supreme Court has ruled:

> What our decisions require is a 'fit' between the legislature's ends and the means chosen to accomplish those ends,"—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' that employs not necessarily the least restrictive means but, as we have put it in the other contexts . . . a means narrowly tailored to achieve the desired objective.

Bd. of Trs. v. Fox, 492 U.S. 469, 480 (1989) (citation omitted).

legislatures more flexibility than the rigid strict scrutiny analysis.[323] However, even under this intermediate level of scrutiny, Justice Breyer found that CIPA was constitutional.[324]

Under both the strict scrutiny and his less-rigid heightened scrutiny standards, Justice Breyer recognized the compelling government interest in protecting children from obscenity, child pornography, and materials that are "harmful to minors."[325] He reasoned that filtering technology was an inexpensive yet fairly effective means for furthering this government objective.[326] Even though the existing filtering technology tends to overblock protected materials, Justice Breyer stated that no party presented evidence of a better-fitting alternative.[327]

Like the plurality, Justice Breyer considered the CIPA provision that allows libraries to disable the filters or unblock protected websites.[328] Justice Breyer noted that library patrons must request that the librarian disable the filters, but he did not consider this a dispositive fact because libraries use a similar procedure for print materials that are located in closed stacks.[329] In such instances, library patrons must ask the librarian to obtain those materials.[330] Thus, Justice Breyer rejected the argument that CIPA is unconstitutional, reasoning that the requirement that patrons take an affirmative step to have the library disable the filters was not enough to find CIPA unconstitutional.[331]

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323. *ALA II*, 123 S. Ct. at 2311–12 (Breyer, J., concurring). *See generally supra* notes 37, 44–48 and accompanying text (describing the strict level of scrutiny as it relates to content-based regulations).

324. *ALA II*, 123 S. Ct. at 2312 (Breyer, J., concurring).

325. *Id.* (Breyer, J., concurring). "These objectives are 'legitimate' and indeed often 'compelling.'" *Id.* (Breyer, J., concurring); *see, e.g.*, Reno v. ACLU, 521 U.S. 844, 869–70 (1997) (stating that protecting minors from inappropriate materials is "compelling"); New York v. Ferber, 458 U.S. 747, 756–57 (1982) (finding similarly that the protection of minors from inappropriate materials was a "compelling" interest); Miller v. California, 413 U.S. 15, 18–19 (1973) (finding that prohibiting access to obscenity was "legitimate" when the mode of dissemination or exhibition poses a significant danger of exposure to minors); *supra* text accompanying note 47 (outlining compelling government interest as one prong of the strict scrutiny analysis).

326. *ALA II*, 123 S. Ct. at 2312 (Breyer, J., concurring).

327. *Id.* (Breyer, J., concurring). *See generally supra* notes 47–48 and accompanying text (outlining compelling government interest and less restrictive alternatives as the two prongs of strict scrutiny analysis).

328. *ALA II*, 123 S. Ct. at 2312 (Breyer, J., concurring). *See generally supra* notes 223–26 and accompanying text (describing CIPA's disabling provision).

329. *ALA II*, 123 S. Ct. at 2312 (Breyer, J., concurring). *See generally supra* notes 223–26 and accompanying text (describing CIPA's disabling provision).

330. *ALA II*, 123 S. Ct. at 2312 (Breyer, J., concurring).

331. *Id.* (Breyer, J., concurring).

Therefore, believing that CIPA imposed a small burden on a library patron's access to Internet materials, Justice Breyer argued that CIPA's filtering condition was an appropriate "fit" to the government's interest in protecting children from using public libraries to access inappropriate materials.[332]

4. Justice Stevens's Dissenting Opinion

Justice Stevens began his dissent by agreeing with the plurality that libraries ought to have broad discretion when deciding what materials to make available to their patrons.[333] He did not believe that Congress's decision that libraries should implement filtering software to prevent children from accessing sexually explicit materials on the Internet was either inappropriate or unconstitutional.[334] Justice Stevens also agreed with the plurality's statement that the seven percent of libraries using filtering software of their own volition, prior to CIPA's enactment, acted lawfully.[335] However, Justice Stevens diverged dramatically from the plurality's opinion regarding whether the government could require other libraries in the country to employ similar filters, stating that CIPA's filtering requirement was unconstitutional.[336] Justice Stevens also believed that one of CIPA's flaws was that it created a national standard rather than a local, tailored criterion.[337]

In reaching his conclusion that CIPA was unconstitutional, Justice Stevens agreed with the district court's finding that the existing filtering technology was fundamentally flawed.[338] Justice Stevens noted that filtering software blocks websites by recognizing key words or phrases,

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332. *Id.* (Breyer, J., concurring).

333. *Id.* at 2312–13 (Stevens, J., dissenting). *See generally supra* text accompanying notes 264–68 (discussing the need for discretion so that libraries can meet the needs of their particular communities).

334. *ALA II*, 123 S. Ct. at 2312–13 (Stevens, J., dissenting). Justice Stevens argued that courts should allow libraries to experiment with filtering software as a method to protect against minors accessing inappropriate Internet materials. *Id.* at 2313 (Stevens, J., dissenting). "A law that prohibits reading without official consent, like a law that prohibits speaking without consent, 'constitutes a dramatic departure from our national heritage and constitutional tradition.'" *Id.* at 2315 (Stevens, J., dissenting) (quoting Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 166 (2002)).

335. *Id.* at 2313 (Stevens, J., dissenting). However, Justice Stevens took issue with Congress imposing a requirement on the other 93% of public libraries. *Id.* (Stevens, J., dissenting).

336. *Id.* (Stevens, J., dissenting).

337. *Id.* (Stevens, J., dissenting). Justice Stevens reasoned that local libraries should be able to remedy this problem by tailoring their solutions to their particular communities. *Id.* at 2314 (Stevens, J., dissenting).

338. *Id.* at 2313 (Stevens, J., dissenting). *See generally supra* notes 246–49 and accompanying text (outlining the district court's findings regarding the effectiveness of the filtering technology).

allowing for searches of text only, but allows visual images to pass through unblocked.[339] Publishers of websites containing inappropriate materials may use this loophole to their advantage by using image files, rather than text files, to escape detection by the filters.[340] Therefore, Justice Stevens reasoned that a substantial amount of pornographic material may remain unblocked, giving parents a false sense of security.[341]

Conversely, Justice Stevens stated that the filtering software also overblocked and restricted access to protected materials.[342] He reasoned that overblocking was equivalent to library staff making the decision, for each blocked website, to prevent constitutionally protected materials from being accessed in their libraries.[343] Justice Stevens thus stated that in attempting to restrict unlawful speech, the government may not restrict protected speech.[344] Also, Justice Stevens noted that when a website is blocked, the patron is unlikely to know what is being restricted, and therefore whether it is worthwhile to ask for the unblocking.[345] Because each library individually would handle unblocking requests, there was no way to monitor the effect of CIPA on patrons' use, Justice Stevens argued.[346]

Justice Stevens then considered the less restrictive alternatives available to achieve CIPA's goal of preventing children from accessing sexually explicit materials on the Internet.[347] Justice Stevens quoted the district court's finding that there were alternatives such as (1) implementing Internet use policies that explicitly inform patrons that they may not access illegal materials; (2) requiring parental consent to, or parental presence for, children's use of unfiltered computers; and (3) providing minors with unfiltered access on computer terminals within a

339. *ALA II*, 123 S. Ct. at 2313 (Stevens, J., dissenting).

340. *Id.* (Stevens, J., dissenting) (citing ALA I, 201 F. Supp. 2d 401, 431–32 (E.D. Pa. 2002)). For example, if Playboy used a logo rather than text on its website, its website would avoid being blocked. *ALA I*, 201 F. Supp. 2d at 432.

341. *ALA II*, 123 S. Ct. at 2313 (Stevens, J., dissenting) (citing *ALA I*, 201 F. Supp. 2d at 431–32).

342. *Id.* (Stevens, J., dissenting).

343. *Id.* at 2313–14 (Stevens, J., dissenting).

344. *Id.* at 2314 (Stevens, J., dissenting) (citing Ashcroft v. Free Speech Coalition, 535 U.S. 234, 255 (2002)).

345. *Id.* at 2315 (Stevens, J., dissenting).

346. *Id.* (Stevens, J., dissenting).

347. *Id.* at 2314 (Stevens, J., dissenting) (citing ALA I, 201 F. Supp. 2d at 411, 410 (2002)). *See generally supra* notes 40–41 and accompanying text (discussing the no-less-restrictive-alternative requirement of strict scrutiny).

librarian's view.[348] Further, Justice Stevens stated that the alternatives considered by the district court were in line with the views of scholars and that allowing localities to tailor solutions to their communities was more appropriate than Congress implementing a nationwide mandate.[349] Justice Stevens agreed with the plaintiffs that the filtering software distorted the Internet medium so as to restrict its normal operation.[350] Consequently, because the filtering software underblocked sexually explicit materials and overblocked protected materials, despite the availability of less restrictive alternatives, Justice Stevens concluded that CIPA violated the First Amendment.[351]

Next, Justice Stevens found that CIPA imposed an unconstitutional condition on the receipt of government funding.[352] Agreeing with the plurality, Justice Stevens stressed that libraries have discretion in making selection decisions.[353] Moreover, this discretion in compiling library collections enjoys First Amendment protection because of the government's commitment to the exchange of ideas and protection of academic freedom.[354] Justice Stevens found that CIPA's mandate to

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348. *ALA II*, 123 S. Ct. at 2314 (Stevens, J., dissenting) (quoting *ALA I*, 201 F. Supp. 2d at 410). *See generally supra* note 248 and accompanying text (addressing the district court's discussion of alternatives to filtering software).

349. *ALA II*, 123 S. Ct. at 2314 (Stevens, J., dissenting). As Justice Stevens elucidated, quoting Professor Gregory Laughlin:

> "Indeed, one nationwide solution is not needed, as the problems are local and, to some extent, uniquely so. Libraries in rural communities, for instance, have reported much less of a problem than libraries in urban areas. A library in a rural community with only one or two computers with Internet access may find that even the limited filtering advocated here provides little or no additional benefit. Further, by allowing the nation's public libraries to develop their own approaches, they may be able to develop a better understanding of what methods work well and what methods add little or nothing, or are even counter-productive. Imposing a mandatory nationwide solution may well impede developing truly effective approaches that do not violate the First Amendment. The federal and state governments can best assist this effort by providing libraries with sufficient funding to experiment with a variety of constitutionally permissible approaches."

Id. at 2315 n.3 (Stevens, J., dissenting) (quoting Laughlin, *supra* note 13, at 279). *See generally supra* note 248 and accompanying text (describing the district court's treatment of filtering alternatives).

350. *ALA II*, 123 S. Ct. at 2316 (Stevens, J., dissenting) (citing to Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 543 (2001)); *see also id.* at 2308–09 (plurality opinion). According to Justice Stevens, the tendency of the filtering software to overblock and underblock distorted that medium. *Id.* at 2317 (Stevens, J., dissenting).

351. *Id.* at 2316 (Stevens, J., dissenting).

352. *Id.* at 2315 (Stevens, J., dissenting). *See generally supra* Part II.E (discussing how Congress's Spending Clause powers are limited when imposing unconstitutional conditions on the receipt of funding).

353. *ALA II*, 123 S. Ct. at 2316 (Stevens, J., dissenting).

354. *Id.* (Stevens, J., dissenting).

use filtering software on Internet-accessible terminals in libraries receiving certain types of federal funding and consequent denial of funds to libraries that refuse to comply with that mandate violated the First Amendment and created an unconstitutional condition on federal funds.[355]

Justice Stevens distinguished the case at hand from the Spending Clause precedent on which the plurality relied.[356] First, he argued that the plurality misinterpreted *Rust v. Sullivan* because, as explained in subsequent cases, *Rust* established a rule for instances in which the government attempted to communicate a specific message.[357] However, under the E-rate and LSTA programs, the government was not trying to subsidize any particular message.[358] Rather, Congress implemented these programs for the general purpose of giving libraries resources to provide Internet access to patrons.[359] Further, Justice

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355. *Id.* (Stevens, J., dissenting). In evaluating whether the denial of funds to libraries constituted an unconstitutional condition, Justice Stevens relied on cases pertaining to government employment. *Id.* (Stevens, J., dissenting). Justice Stevens noted that government employment may not be conditioned on one relinquishing her or his First Amendment rights. *Id.* (Stevens, J., dissenting). Justice Stevens further argued that there is "no distinction between the penalty of discharge from one's job and the withholding of the benefit of a new job." *Id.* (Stevens, J., dissenting).

> "Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine .... It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."

Id. (Stevens, J., dissenting) (quoting Sherbert v. Verner, 374 U.S. 398, 404 (1963)). *See generally supra* notes 196–207 and accompanying text (examining Congress's wide latitude when attaching conditions to federal funding).

356. *ALA II*, 123 S. Ct. at 2317–18 (Stevens, J., dissenting). *See generally supra* notes 292–96 and accompanying text (discussing the plurality's reasoning about the applicability of the Spending Clause).

357. *ALA II*, 123 S. Ct. at 2317–18 (Stevens, J., dissenting). *See generally* Bd. of Regents v. Southworth, 529 U.S. 217, 229 (2000) (distinguishing *Rust* because there was no issue presented about the government's right to distribute funds to advance a particular message); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 834 (1995) (stating that although the government generally can decide what activities to fund, the Supreme Court "reaffirmed the requirement of viewpoint neutrality in the Government's provision of financial benefits by observing that [t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas'" (alteration in original) (citing Regan v. Taxation with Representation, 461 U.S. 540, 549 (1983))); *supra* note 200 and accompanying text (discussing interpretations and implications of *Rust*).

358. *ALA II*, 123 S. Ct. at 2317 (Stevens, J., dissenting).

359. *Id.* (Stevens, J., dissenting). Justice Stevens argued that if any message does come from the use of filtering software, it is that "all speech that gets through the software is supported by the Government." *Id.* (Stevens, J., dissenting). For discussion of the purposes of the LSTA programs, see AM. LIBRARY ASS'N, LIBRARY SERVICES AND TECHNOLOGY ACT: BASIC QUESTIONS AND ANSWERS, *at* http://www.ala.org/cfapps/archive.cfm?path=washoff/lstaqa.html (last updated Mar. 8, 2001).

Stevens stated that even though Congress enacted CIPA to restrict children's access to visual depictions of obscenity, child pornography, or materials that were harmful to minors, the tendency of the filtering software to err, through underblocking inappropriate sites and overblocking protected information, nullified this purpose.[360]

Second, Justice Stevens distinguished the case at hand from *National Endowment for the Arts v. Finley* because the plaintiffs in *Finley* did not challenge a statute's constitutionality generally; rather, they challenged the statute's specific application to them.[361] Justice Stevens argued that *Finley* would apply here only if patrons challenged the libraries' decision to use filtering software.[362]

Finally, Justice Stevens addressed the CIPA provisions that required libraries to install filtering software on all computers in the library if they received the E-rate or LSTA funding.[363] If a library used the E-rate or LSTA funding for just one computer, but had ten others, CIPA required that the library equip all eleven computers with filters.[364] Justice Stevens noted that this eliminated the option of providing filtered computers in a children's area while simultaneously providing unfiltered computers in the adult area.[365] Therefore, he stated that the government's interest in protecting children from accessing

360. *ALA II*, 123 S. Ct. at 2317 (Stevens, J., dissenting).

361. *Id.* at 2318 (Stevens, J., dissenting). *See generally supra* note 207 (describing the *Finley* case and its implications).

362. *ALA II*, 123 S. Ct. at 2318 (Stevens, J., dissenting). Justice Stevens distinguished the case at hand from *Finley* because in *Finley*, the NEA decision-making entity retained a large degree of discretion. *Id.* (Stevens, J., dissenting).

> *Finley* did not involve a challenge by the NEA to a governmental restriction on its ability to award grants. Instead, the respondents were performance artists who had applied for NEA grants but were denied funding. . . . If this were a case in which library patrons had challenged a library's decision to install and use filtering software, it would be in the same posture as *Finley*. Because it is not, *Finley* does not control this case.

Id. (Stevens, J., dissenting) (citation omitted). *See generally* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 577–78 (1998) (explaining the claims of the four individual plaintiffs); *supra* Part II.E (discussing Spending Clause jurisprudence).

363. *ALA II*, 123 S. Ct. at 2318 (Stevens, J., dissenting). *See generally supra* note 222 and accompanying text (outlining the CIPA requirement that all computers in libraries receiving LSTA or E-rate discounts be equipped with filtering software).

364. *ALA II*, 123 S. Ct. at 2318 (Stevens, J., dissenting). *See generally* Kimberly S. Keller, Comment, *From Little Acorns Great Oaks Grow: The Constitutionality of Protecting Minors from Harmful Internet Material in Public Libraries*, 30 ST. MARY'S L.J. 549, 602–03 (1999) (discussing the implications of requiring filtering software on all computers, particularly in libraries that have only one Internet-accessible computer).

365. *ALA II*, 123 S. Ct. at 2318 (Stevens, J., dissenting).

inappropriate materials did not justify this overly broad restriction on adults' access to constitutionally protected materials.[366]

5. Justice Souter's Dissenting Opinion

Justice Souter, in a dissenting opinion in which Justice Ginsburg joined, agreed with Justice Stevens's finding that the CIPA filtering requirements were unconstitutional conditions on federal funding.[367] Further, Justice Souter stated that the filtering conditions constituted an invalid use of Congress's Spending Clause powers because the filtering conditions required actions that would have violated the First Amendment had the libraries chosen to implement them on their own.[368]

First, Justice Souter turned to the discussion of disabling the filtering software.[369] Justice Souter stated that he would not have dissented if he believed that librarians actually would disable the filters upon the request of an adult.[370] Justice Souter remained skeptical that libraries would interpret the statute as permitting their librarians to disable the filters upon request, even though the Solicitor General clearly stated that librarians would do so.[371]

To further his argument, Justice Souter referenced an FCC regulation providing that unblocking determinations were to be handled at the local level.[372] Also, he noted that the statute provided that libraries

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366. *Id.* (Stevens, J., dissenting).

367. *Id.* at 2318 (Souter, J., dissenting); *see also supra* text accompanying note 336 (noting Justice Stevens's argument on this point). Like the other justices, Justice Souter recognized that there is a compelling government interest in protecting children from inappropriate materials. *Id.* at 2319 (Souter, J., dissenting).

368. *ALA II*, 123 S. Ct. at 2318 (Souter, J., dissenting). *See generally supra* Part II.E (discussing Spending Clause jurisprudence).

369. *ALA II*, 123 S. Ct. at 2319 (Souter, J., dissenting). *See generally supra* note 249 and accompanying text (discussing CIPA's disabling provision).

370. *ALA II*, 123 S. Ct. at 2319 (Souter, J., dissenting).

371. *Id.* (Souter, J., dissenting). Justice Souter stated that he

> realize[d] the Solicitor General represented this to be the Government's policy . . . and if that policy were communicated to every affected library as unequivocally as it was stated to [the Court] at argument, local librarians might be able to indulge the unblocking requests of adult patrons to the point of taking the curse off the statute for all practical purposes.

Id. (Souter, J., dissenting) (citation omitted).

372. *Id.* (Souter, J., dissenting). See FCC CIPA Implementation, *supra* note 222, para. 53, which states:

> Federally-imposed rules directing school and library staff when to disable technology protection measures would likely be overbroad and imprecise, potentially chilling speech, or otherwise confusing schools and libraries about the requirements of the statute. We leave such determinations to the local communities, whom we believe to

"may," rather than "must," unblock protected material.[373] Moreover, he stated that the uncertainty of the terms "lawful purpose" and "bona fide research," coupled with the wide discretion of library staff, compounded the restrictions on speech.[374] Finally, he noted that unblocking may be unavailable for days, especially in libraries that are understaffed.[375]

Next, Justice Souter turned to the First Amendment issue and stated that the Court needed to understand that, while CIPA restricted children's access to a considerable amount of speech that was considered harmful to children, it also withheld that material from adults, for whom it was protected, and restricted access to a similarly large amount of material that was harmful to no one, including children.[376]

Moreover, because less restrictive alternatives to filtering software existed, Justice Souter stated that the attempt to protect children from inappropriate materials through the filtering technology did not justify the restrictions it placed on adult speech.[377] There were numerous options that could meet the government objective without casting such a wide net over adults' protected speech.[378] For example, libraries could install filters on computers specifically designated for children as well as having librarians monitor the displays on all of the computer screens.[379] Alternatively, Justice Souter suggested that CIPA may pass constitutional muster if it provided for disabling the filters "with no

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be most knowledgeable about the varying circumstances of schools or libraries within those communities.

Id.

373. *ALA II*, 123 S. Ct. at 2319 (Souter, J., dissenting); *see* 20 U.S.C. § 9134(f)(3) (2000) (providing that "[a]n administrator, supervisor, or other authority may disable a technology protection measure . . . to enable access for bona fide research or other lawful purposes."); 47 U.S.C. § 254(h)(6)(D) (2000) (providing the requirements under CIPA). *See generally supra* note 249 and accompanying text (discussing CIPA's disabling provision).

374. *ALA II*, 123 S. Ct. at 2319 (Souter, J., dissenting). *See generally supra* note 249 and accompanying text (discussing CIPA's disabling provision).

375. *ALA II*, 123 S. Ct. at 2319 (Souter, J., dissenting).

376. *Id.* at 2320 (Souter, J., dissenting). Justice Souter noted that the plurality also agreed that this was inevitable when using the existing filtering technology. *Id.* (Souter, J., dissenting); *see also id.* at 2306 (plurality opinion) (recognizing that filtering technology blocks protected speech).

377. *Id.* at 2320 (Souter, J., dissenting). *See generally supra* note 41 and accompanying text (outlining the requirement that in order for a restriction to pass strict scrutiny, there may be no less restrictive alternatives available).

378. *ALA II*, 123 S. Ct. at 2319 (Souter, J., dissenting) (suggesting different computer terminals for adults and children).

379. *Id.* at 2320 (Souter, J., dissenting).

questions asked."[380] However, Justice Souter argued that the government's requirement that libraries install filtering technology was "overkill," as evidenced by its refusal to trust even library staff, whose computer terminals also must have filtering software, despite the fact that staff computers are not accessible to the public.[381]

Therefore, Justice Souter believed that the appropriate question was whether a library, of its own accord, would be acting constitutionally if it were to install and use filtering technology on publicly accessible computer terminals.[382] Justice Souter answered by stating that if a library chose to use filtering software to block out material "harmful to minors," the filtering software would constitute a content-based decision and thus censorship.[383] Although CIPA permits adults to request that a librarian disable the filters, this does not remedy CIPA's constitutional problems because some requests do not qualify for the unblocking.[384] Justice Souter argued that those that did not qualify for the unblocking provision would be subject to a government act of censorship, which is prohibited under the First Amendment.[385]

Justice Souter asserted that the plurality did not treat the filtering software as censorship; rather, the plurality treated the filtering software

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380. *Id.* at 2319 (Souter, J., dissenting). However, Justice Souter also believed that the embarrassment a child may feel when asking a librarian to unblock a protected sight is not enough to rule CIPA unconstitutional. *Id.* (Souter, J., dissenting).

381. *Id.* at 2320 (Souter, J., dissenting). *See generally* FCC CIPA Implementation, *supra* note 222, para. 30 (stating that CIPA filtering requirements also apply to the librarians' computers).

382. *ALA II*, 123 S. Ct. at 2320 (Souter, J., dissenting).

383. *Id.* at 2320 (Souter, J., dissenting). As Justice Souter reasoned:

> The question for me, then, is whether a local library could itself constitutionally impose . . . restrictions on the content otherwise available to an adult patron through an Internet connection, at a library terminal provided for public use. The answer is no. A library that chose to block an adult's Internet access to material harmful to children (and whatever else the undiscriminating filter might interrupt) would be imposing a content-based restriction on communication of material in the library's control that an adult could otherwise lawfully see. That would simply be censorship.

Id. (Souter, J., dissenting). In *Butler v. Michigan*, there was a fear that by restricting adults' access to material harmful to minors, states would "reduce the adult population . . . to reading only what is fit for children." Butler v. Michigan, 352 U.S. 380, 383 (1957).

384. *ALA II*, 123 S. Ct. at 2320 (Souter, J., dissenting). CIPA provides that the filters may be turned off for "bona fide research or other lawful purpose." 47 U.S.C. § 254(h)(5)(D) (2003); *see also supra* note 249 and accompanying text (examining CIPA's disabling provision).

385. *ALA II*, 123 S. Ct. at 2320 (Souter, J., dissenting). As Justice Souter noted:

> "The policy of the First Amendment favors dissemination of information and opinion, and the guarantees of freedom of speech and press were not designed to prevent the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential."

Id. (Souter, J., dissenting) (quoting Bigelow v. Virginia, 421 U.S. 809, 829 (1975)).

as it would the means generally exercised by libraries in choosing materials for their collections.[386] Justice Souter argued that the plurality's theory was not accurate because, while libraries must be concerned with monetary limits and shelf space when deciding which print materials to acquire, Internet materials do not have such limitations.[387] When acquiring access to Internet materials, there is no concern for expending extra resources or taking up large amounts of space.[388] Thus, Justice Souter reasoned that the Court should treat Internet filtering differently than it would libraries' acquisition of print materials, because with Internet access, libraries have already purchased the access and filtering consequently eliminates materials acquired through the purchase of Internet access.[389]

Justice Souter next disagreed with the plurality's reliance on the general purpose of libraries, arguing that even the public libraries have rejected the plurality's statement of libraries' mission.[390] Justice Souter also reasoned that libraries are not in the practice of restricting adult access to materials.[391] Rather, libraries traditionally have been opposed to censorship and have given adults access to any of the libraries'

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386. *Id.* at 2320–21 (Souter, J., dissenting); *see also id.* at 2306 (plurality opinion) (arguing that libraries have no opportunity to filter Internet sites, like they can books and other print materials).

387. *Id.* at 2321 (Souter, J., dissenting). Justice Souter stated that "[s]electivity is . . . necessary and complex" and that when libraries are making these decisions, most courts would apply a rational basis test. *Id.* (Souter, J., dissenting). Justice Souter stated that this was an inadequate assessment. *Id.* (Souter, J., dissenting). Justice Souter stated the proper analysis as follows:

> [D]eciding against buying a book means there is no book (unless a loan can be obtained), but blocking the Internet is merely blocking access purchased in its entirety and subject to unblocking if the librarian agrees. The proper analogy therefore is not to passing up a book that might have been bought; it is either to buying a book and then keeping it from adults lacking an acceptable "purpose," or to buying an encyclopedia and then cutting out pages with anything thought to be unsuitable for all adults.

Id. at 2321–22 (Souter, J., dissenting).

388. *Id.* at 2320 (Souter, J., dissenting). CIPA actually requires that libraries expend extra resources, because they now have to purchase the Internet access as well as filtering software. *See id.* at 2321 (Souter, J., dissenting) (distinguishing a library's Internet access from general print collections).

389. *Id.* (Souter, J., dissenting). Justice Souter noted:

> Since it makes no difference to the cost of Internet access whether an adult calls up material harmful for children or the Articles of Confederation, blocking (on facts like these) is not necessitated by scarcity of either money or space. In the instance of the Internet, what the library acquires is electronic access, and the choice to block is a choice to limit access that has already been acquired.

Id. (Souter, J., dissenting).

390. *Id.* at 2322 (Souter, J., dissenting). *See generally supra* notes 262–65 and accompanying text (reviewing the plurality's understanding of libraries' purposes).

391. *ALA II*, 123 S. Ct. at 2322 (Souter, J., dissenting).

holdings (so long as the adult is entitled to use the library).[392] Further, Justice Souter stated that libraries traditionally have not required adults requesting materials to present an appropriate purpose for their requests.[393]

Finally, Justice Souter found that library acquisition decisions were poor candidates for effective judicial resolution.[394] Due to the number of legitimate considerations taken into account during this decision-making process, along with the volume of possible legal challenges, Justice Souter argued that courts generally should avoid these types of cases.[395] However, in this case, Justice Souter concluded that the Court should have applied strict scrutiny to CIPA's filtering mandate and that the filtering mandate violates the First Amendment.[396] Further, Justice

392. *Id.* (Souter, J., dissenting). Justice Souter stated that, toward the beginning and middle of the twentieth century, there have been some instances in which libraries placed a portion of their collection apart from the open stacks, which would be available only upon specific requests, but that he had not been able to find instances of a library "barring access to materials in its collection on a basis other than a reader's age." *Id.* at 2323 (Souter, J., dissenting). "It seems to have been out of the question for a library to refuse a book in its collection to a requesting adult patron, or to presume to evaluate the basis for a particular request." *Id.* (Souter, J., dissenting). However, the American Library Association adopted a statement that stated that it was against restricting minors' access to library materials. *Id.* at 2323 (Souter, J., dissenting); AM. LIBRARY ASS'N, FREE ACCESS TO LIBRARIES FOR MINORS: AN INTERPRETATION OF THE LIBRARY BILL OF RIGHTS (1991), *reprinted in* PECK, *supra* note 48, at 166–67. The ALA recognized that libraries used many means to restrict minors' access to materials, including having separate reading rooms or collections for adults or issuing library cards that limit access to some materials for adults only. *Id.*; AM. LIBRARY ASS'N, *supra*, *reprinted in* PECK, *supra* note 48, at 171–72. The ALA stated that it opposed the use of these restrictions, asserting further that "only the parent . . . may restrict his children—and only *his* children—from access to library materials and services." *ALA II*, 123 S. Ct. at 2323 (Souter, J., dissenting); *see also* PECK, *supra* note 48, at 148–75 (reprinting ALA's interpretation of the *Library Bill of Rights*.).

393. *ALA II*, 123 S. Ct. at 2323 (Souter, J., dissenting). Justice Souter based his discussion on the American Library Association's advocating for full access to materials for adults and minors. *Id.* (Souter, J., dissenting).

> If such a practice has survived into the latter half of the 20th century, one would surely find a statement about it from the ALA, which had become the nemesis of anything sounding like censorship in library holdings. The silence bespeaks an American public library that gives any adult patron any material at hand, and a history without support for the plurality's reading of the First Amendment as tolerating a public library's censorship of its collection against adult enquiry.

Id. at 2323–24 (Souter, J., dissenting). Justice Souter discussed how libraries have handled materials that are protected for adults but not for minors. *Id.* (Souter, J., dissenting). His analysis considered the means used during the first half and then the latter half of the twentieth century. *Id.* (Souter, J., dissenting).

394. *Id.* at 2324 (Souter, J., dissenting).

395. *Id.* (Souter, J., dissenting).

396. *Id.* (Souter, J., dissenting).

Souter argued that CIPA's filtering mandate was unconstitutional because its breadth resulted in unconstitutional actions by libraries.[397]

IV. ANALYSIS

Although the Supreme Court in *United States v. American Library Ass'n* held that CIPA was constitutional, the justices failed to reach a majority opinion.[398] This Part first will argue that the plurality incorrectly applied a rational basis analysis, based on its finding that filtering software should be treated similarly to library acquisition decisions.[399] Then, this Part will assert that Justice Souter's finding that filtering software is more analogous to library removal decisions was correct and therefore CIPA should have been subjected to strict scrutiny.[400] Finally, this Part argues that CIPA does not withstand strict scrutiny and the Court should have struck it down, as Justices Souter and Stevens advocated.[401]

A. Strict Scrutiny, Not Rational Basis, Was the Proper Level of Scrutiny

All of the justices agreed that there is a compelling government interest in protecting children from accessing inappropriate materials on the Internet.[402] Their disagreement was whether strict scrutiny applied to CIPA, and if so, whether the statute passed this more rigorous test.[403] Justice Souter was correct to apply strict scrutiny to CIPA's filtering mandates because the filters, by blocking materials based on

397. *Id.* at 2324–25 (Souter, J., dissenting). "[T]he Act's blocking requirement in its current breadth calls for unconstitutional action by a library recipient, and is itself unconstitutional." *Id.* at 2325 (Souter, J., dissenting).

398. *Id.* at 2300 (plurality opinion).

399. *See infra* Part IV.A.1 (examining the Chief Justice's rationale and how it is distinguishable from precedent).

400. *See infra* Part IV.A–B (discussing Justice Souter's disagreement with the plurality opinion and how filtering software works to remove materials from library collections).

401. *See ALA II*, 123 S. Ct. at 2325 (Souter, J., dissenting) (arguing that CIPA's filtering mandate violated library patrons' First Amendment rights); *id.* at 2318 (Stevens, J., dissenting) (finding CIPA's filtering conditions unconstitutionally overbroad).

402. *Id.* at 2300 (plurality opinion); *id.* at 2309 (Kennedy, J., concurring); *id.* at 2310 (Breyer, J., concurring); *id.* at 2314 (Stevens, J., dissenting); *id.* at 2319 (Souter, J., dissenting).

403. *See* Mainstream Loudoun v. Bd. of Trs. of Loudoun County Library, 2 F. Supp. 2d 783, 796 (E.D. Va. 1998) (determining that "a public library must satisfy strict scrutiny before it may engage in content-based regulation of protected speech."). Applying strict scrutiny here is in agreement with *Mainstream Loudoun*, which found that the use of Internet filters to block inappropriate materials constituted a content-based restriction on speech, subjecting it to strict scrutiny. *Id.* at 796–97.

categorizations, constituted content-based restrictions on speech.[404] This section begins by addressing the principles relevant in determining which level of scrutiny should apply and argues that the Court should have applied strict scrutiny because (1) Internet filters are distinguishable from library acquisition decisions and (2) Internet access in public libraries is a designated public forum.[405]

1. Internet Filters Are Distinguishable from Library Acquisition Decisions

The plurality incorrectly stated that Internet materials available in public libraries were similar to library print acquisition decisions, which the Supreme Court has ruled involve the use of discretion.[406] Instead, the plurality should have analyzed the case according to library removal decisions and applied a strict scrutiny analysis in accordance with *Pico*.[407]

Internet materials must be treated differently from library print collections because, although library staff review all of their print materials, library staff cannot feasibly review every website.[408] Thus, Justice Souter correctly determined that Internet filters were distinguishable from library acquisition decisions because librarians do

404. *See ALA II*, 123 S. Ct. at 2319–20 (Souter, J., dissenting). In his concurring opinion, Justice Breyer disagreed with the plurality, stating that the Chief Justice's opinion treated the issue as though there were no First Amendment implications. *Id.* at 2310 (Breyer, J., concurring). Justice Breyer correctly identified that the use of filtering software blocks library patrons' right to receive information and must be treated differently than library acquisition decisions. *Id.* (Breyer, J., concurring). However, unlike the dissenters, Justice Breyer did not go so far as to advocate strict scrutiny; rather, he advocated for a heightened level of scrutiny, which balanced the government's objectives, proposed restriction, and less restrictive alternatives. *Id.* at 2311 (Breyer, J., concurring). Using this incorrect test, Justice Breyer came to the conclusion that filtering software was adequate to meet the government objective and was an inexpensive means of doing so, thereby stating that the filtering conditions were not disproportionate to the government interest. *See id.* (Breyer, J., concurring) (applying an intermediate level of scrutiny to CIPA). *But see id.* at 2319–20 (Souter, J., dissenting) (finding that strict scrutiny is the proper analysis for CIPA). However, Justice Breyer stated that this intermediate level of scrutiny was meant to supplement strict scrutiny, not replace it. *Id.* at 2311–12 (Breyer, J., concurring).

405. *See infra* Part IV.A.1 (arguing that the plurality was incorrect in finding that filtering software is similar to library acquisition decisions because it is more analogous to removal decisions, which are subject to a heightened level of scrutiny).

406. *See ALA II*, 123 S. Ct. at 2305 (plurality opinion); Bd. of Educ. v. Pico, 457 U.S. 853, 864 (1982) (plurality opinion) (explaining that libraries have wide discretion when deciding which materials to add to their collections, but that their removal decisions are subject to a higher level of scrutiny).

407. *See Pico*, 457 U.S. at 866 (plurality opinion). *See generally supra* notes 82–86 and accompanying text (outlining *Pico* and its implications).

408. *ALA II*, 123 S. Ct. at 2305 (plurality opinion). Not only are thousands of new websites added daily, but website operators frequently update and modify existing websites. *See id.* at 2306 (discussing some of the problems encountered by attempts to review Internet materials).

not review websites and make individualized determinations as to whether the sites fall into a constitutionally protected category.[409] Further, Justice Souter correctly reasoned that while a library must use discretion with print collections because of financial limits or lack of physical space, a library does not need to use discretion with Internet materials for those same reasons.[410] Instead, when a library purchases Internet access, it makes the whole of the Internet available to its patrons.[411] Then, when filtering software is installed, the software restricts access to Internet materials based on the software manufacturer's specifications, not on a librarian's opinion as to what is appropriate for his or her patrons, or the library's financial limits or lack of physical space.[412] Finally, excluding materials from the Internet is distinguishable from libraries' historical exclusion of pornographic materials from their print collections because the exclusion of pornographic print materials likely involved the librarian reviewing the materials and using his or her acquisition discretion to not purchase or accept those materials.[413]

Consequently, the plurality incorrectly failed to distinguish Internet filters from library acquisition decisions.[414] Instead, the plurality should have analyzed the case according to library removal decisions, as

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409. *See id.* at 2320–21 (Souter, J., dissenting). As Justice Souter noted:

> [W]hen the library makes a book decision, doesn't it make a decision that says, we will not put God's Little Acre on our shelves? It's a yes or no decision with respect to the book. It's quite true there are lots of books out there that the library not—may not know about, but when it makes a decision not to put it on the shelf, it knows what it's deciding not to do, and here it doesn't.

Transcript of Oral Argument at 9, *ALA II* (No. 02-361), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-361.pdf (last visited Mar. 17, 2004).

410. *ALA II*, 123 S. Ct. at 2321 (Souter, J., dissenting). Justice Souter reasoned that there are two major reasons why courts should afford libraries discretion concerning acquisition decisions: first, librarians need to consider such factors as "demand, scholarly or esthetic quality, alternative purchases, relative cost and so on"; and second, there are so many library acquisition decisions that the court system would be overloaded should it have to judge the constitutionality of each decision. *Id.* at 2324 (Souter, J., dissenting).

411. *See id.* at 2321 (Souter, J., dissenting). Justice Souter argued that library decisions regarding print collections cannot be treated the same as blocking Internet access because the concern for physical resources and money are not present with Internet access. *Id.* (Souter, J., dissenting).

412. *Id.* at 2324 (Souter, J., dissenting).

413. *Id.* at 2306 (plurality opinion).

414. *Compare id.* (plurality opinion) (outlining the plurality's finding that Internet filters ought to be treated as library acquisition decisions), *with id.* at 2320–21 (Souter, J., dissenting) (arguing that the Court should not have analyzed CIPA as an acquisition decision).

in *Pico*, and subjected CIPA to strict scrutiny.[415] The filtering requirements of CIPA are more similar to a removal decision than a print acquisition decision because a library purchases the whole of the Internet, and the filtering technology selectively excludes materials.[416] Therefore, strict scrutiny was the appropriate analysis for CIPA.[417]

In his concurring opinion, Justice Breyer was correct in agreeing with Chief Justice Rehnquist that libraries must be afforded discretion when choosing materials for their collections.[418] Justice Breyer, however, did not go so far as to advocate a strict scrutiny analysis.[419] Rather, he argued that even though libraries should be afforded discretion in making acquisition decisions, they still should be subject to an intermediate level of scrutiny, although not strict scrutiny.[420] Therefore, Chief Justice Rehnquist's and Justice Breyer's conclusions that Internet filters are similar to library acquisition decisions were incorrect because librarians do not review all of the available Internet materials.[421]

2. Public Forum

It is true that the Internet does not enjoy the same historical status required for traditional public forums.[422] However, the plurality incorrectly stated that the government did not make an affirmative step to designate Internet access as a public forum.[423] The government took an affirmative step to designate Internet access as a public forum when it announced that the reason libraries provide Internet access is to give their patrons another medium for research.[424] Internet access in public

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415. *See id.* at 2320–21 (Souter, J., dissenting) (arguing that strict scrutiny was the appropriate analysis). *See generally supra* notes 82–86 and accompanying text (outlining *Pico* and its implications).

416. *ALA II*, 123 S. Ct. at 2320–21 (Souter, J., dissenting); *supra* notes 82–86 and accompanying text (outlining the different rules for acquisition and removal decisions).

417. *See ALA II*, 123 S. Ct. at 2320–21 (Souter, J., dissenting).

418. *See id.* at 2311 (Breyer, J., concurring).

419. *Id.* (Breyer, J., concurring). Justice Breyer argued that the application of strict scrutiny to library selection decisions, regardless of whether the decisions were made by the libraries themselves or other legitimate community entities, would interfere with the discretion that is necessary to maintain an appropriate collection of materials. *Id.* (Breyer, J., concurring).

420. *Id.* (Breyer, J., concurring).

421. *See id.* at 2306 (plurality opinion) (finding that filtering software should be treated like library acquisition decisions); *id.* at 2311 (Breyer, J., concurring) (finding similarly that appropriate discretion was involved).

422. *See supra* Part II.A.2 (discussing distinctions between different types of public forums).

423. *See ALA II*, 123 S. Ct. at 2305 (plurality opinion); *id.* at 2320–21 (Souter, J., dissenting) (arguing that strict scrutiny was the appropriate analysis).

424. *See id.* at 2305 (plurality opinion) (outlining the reasons why the government provides Internet access in libraries).

libraries is a designated public forum; therefore, the First Amendment does include a right to receive, and CIPA should have been subject to strict scrutiny.[425]

B. If Strict Scrutiny Were Applied, CIPA Would Fail

Justices Breyer, Souter, and Stevens correctly recognized that filtering software blocks a considerable amount of protected speech, which directly affects library patrons' First Amendment rights to receive information.[426] Additionally, all of the justices' opinions acknowledged that filtering technology, mandated by CIPA, was flawed.[427] However, both Chief Justice Rehnquist and Justice Breyer incorrectly found that the existing filtering technology was an adequate response to protecting against Internet pornography.[428] First Amendment jurisprudence requires that government-imposed, content-based restrictions, especially in designated public forums, be subject to strict scrutiny.[429] Justice Souter used the appropriate level of scrutiny and consequently found that CIPA would not pass this review.[430] Therefore, this section argues that when strict scrutiny is applied to CIPA, it becomes clear that the provisions are not narrowly tailored to the compelling government interest, thereby rendering CIPA's filtering mandate unconstitutional.[431]

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425. *See id.* at 2320–21 (Souter, J., dissenting) (arguing that, because CIPA constituted a content-based restriction on speech in a public forum, strict scrutiny was the appropriate standard).

426. *See id.* at 2310 (Breyer, J., concurring); *id.* at 2319 (Souter, J., dissenting).

427. *Id.* at 2306 (plurality opinion); *id.* at 2310 (Kennedy, J., concurring); *id.* at 2312 (Breyer, J., concurring); *id.* at 2313–14 (Stevens, J., dissenting); *id.* at 2320 (Souter, J., dissenting); *see* United States v. Playboy Entm't Group, 529 U.S. 803, 824 (2000) (holding that unless the filtering technology is perfect, the issues were not reconciled with the First Amendment); ALA I, 201 F. Supp. 2d 401, 481 (E.D. Pa. 2002) (stating that "[u]nless software filters are themselves perfectly effective," the government cannot argue that the alternatives are imperfect).

428. *See ALA II*, 123 S. Ct. at 2306 (Rehnquist, C. J., plurality opinion) (arguing that although the filtering software is flawed, it will suffice to meet the government's interest); *id.* at 2312 (Breyer, J., concurring) (concluding, through the application of an intermediate level of scrutiny, that filtering software is inexpensive and fairly effective, and that there was no evidence of a better alternative).

429. *See supra* Part II.A.1 (laying out the general requirement that content-based restrictions must withstand strict scrutiny to remain active).

430. *See ALA II*, 123 S. Ct. at 2320 (Souter, J., dissenting). *See generally supra* notes 46–48 and accompanying text (outlining the requirements for passing strict scrutiny).

431. *See infra* Part IV.B.1–3 (reasoning that, when strict scrutiny is applied, filtering software is not narrowly tailored to the government's interest in protecting children from inappropriate material).

1. Existing Filtering Technology Is Not Good Enough

A restriction on speech will survive strict scrutiny if the government can show that the regulation is related to a compelling government interest and is narrowly tailored to achieve that compelling interest.[432] All of the justices agreed that there is a compelling government interest in protecting children from viewing inappropriate materials on the Internet.[433] CIPA's provisions, however, are not narrowly tailored to serve that interest.[434]

Filtering software blocks a vast amount of material that the First Amendment protects for adults, as well as a significant amount of material that is protected for both adults and children.[435] Whereas Chief Justice Rehnquist conceded that filtering software did indeed restrict access to constitutionally protected materials, he incorrectly stated that the filtering software was sufficient.[436] There are two main ways in which filtering software poses First Amendment problems: first, filtering software only recognizes text, not visual depictions, which results in underblocking the materials CIPA was meant to protect against; and second, filtering software overblocks constitutionally protected materials.[437] Hence, even though Congress designed CIPA's conditions to protect against children accessing inappropriate materials, the conditions are not adequate to meet its purpose because filtering software does not sufficiently recognize and block the materials CIPA was meant to protect against.[438]

Justices Souter and Stevens further reasoned that CIPA's filtering mandates extended too far because the statute requires that even the librarians' computers must be equipped with Internet filters.[439] Finally,

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432. *Playboy*, 529 U.S. at 813; Sable Communications of Cal. Inc. v. FCC, 492 U.S. 115, 126 (1989).

433. *ALA II*, 123 S. Ct. at 2301–02 (Rehnquist, C.J., concurring); *id.* at 2309 (Kennedy, J., concurring); *id.* at 2310 (Breyer, J., concurring); *id.* at 2314 (Stevens, J., dissenting); *id.* at 2319 (Souter, J., dissenting).

434. *See id.* at 2320 (Souter, J., dissenting) (finding that CIPA failed strict scrutiny); *see also supra* notes 46–48 and accompanying text (outlining the requirements for passing strict scrutiny).

435. *See supra* note 140 and accompanying text (noting studies that have shown that filters often over- and underblock information).

436. *See ALA II*, 123 S. Ct. at 2319 (Souter, J., dissenting).

437. *Id.* at 2320 (Souter, J., dissenting); *see* Laughlin, *supra* note 13, at 262 (stating that text-based filters are distinguishable from library collection decisions because they automatically block out materials, requiring no effort or decision-making by librarians); *see also supra* note 140 and accompanying text (noting studies that have shown the inadequacies of filtering software).

438. *See supra* notes 129–37 and accompanying text (describing how Internet filters recognize what materials to block).

439. *ALA II*, 123 S. Ct. at 2318 (Stevens, J., dissenting); *id.* at 2320 (Souter, J., dissenting) (stating that this provision constituted "overkill").

the existing filtering technology fails strict scrutiny because less restrictive alternatives exist.[440]

2. Alternatives to Filtering Would Suffice

Because the existing filtering technology was not narrowly tailored, Justices Stevens and Souter correctly advocated for some alternatives to installing filtering software.[441] Each of these alternatives provide less restriction on speech because libraries can tailor them to the particular needs of their communities, taking spatial arrangements, Internet demand, and financial resources into consideration.[442] Moreover, these alternatives do not require libraries to spend extra money for the filtering software mandated by CIPA or extra time training staff on how to use the software, thus lessening the financial strain on libraries that already have expressed an economic need by applying for federal subsidies.[443]

For instance, commentators have suggested having separate banks of computers with filtering software for children and unrestricted computers for adult use.[444] However, as both Justices Stevens and Souter correctly noted, this alternative would fail under CIPA, since CIPA requires that if a library receives LSTA or E-rate funding, all of the library's computers must use filtering software.[445] Libraries also may place unrestricted computer terminals in areas that are set aside

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440. *Id.* at 2320 (Souter, J., dissenting).

441. *See id.* at 2313–15 (Stevens, J., dissenting); *id.* at 2319 (Souter, J., dissenting). *See generally supra* Part II.D.2 (discussing alternatives to filtering software).

442. *ALA II*, 123 S. Ct. at 2313 (Stevens, J., dissenting) (citing as one of CIPA's flaws that it created a nationwide solution to a problem that should be left to localities to decide); *see also* NAT'L TELECOMM. & INFO. ADMIN., DEP'T OF COMMERCE, REPORT TO CONGRESS (Aug. 2003) (outlining numerous "successful best practices," many of which could be implemented simultaneously for a more effective response), *available at* http://www.ntia.doc.gov/ntiahome/ntiageneral/cipa2003/CIPAreport_08142003.htm (last visited Mar. 17, 2004).

443. *See ALA II*, 123 S. Ct. at 2321 (Souter, J., dissenting) (describing some financial concerns in regards to CIPA).

444. *Id.* at 2319 (Souter, J., dissenting). Some alternatives recommended by commentators include the use of privacy monitors or recessed screens or the implementation of an Internet use policy. *See* Mainstream Loudoun v. Bd. of Trs. of Loudoun County Library, 24 F. Supp. 2d. 552, 565 (E.D. Va. 1998) (referencing an incident in which a Virginia library offered unrestricted Internet access but used privacy screens and thus addressed the problem of patrons accessing inappropriate materials); Goldstein, *supra* note 10, at 182 (proposing various alternatives to filtering software); *see also* COMM'N ON ONLINE CHILD PROT., *supra* note 12 (reviewing different proposals for regulating children's access to the Internet); *supra* note 143 and accompanying text (discussing Internet use policies and proposed guidelines for the implementation thereof); *supra* notes 146–47 and accompanying text (discussing the placement of computers in infrequently used or easily monitored areas as alternatives to filters).

445. *See ALA II*, 123 S. Ct. at 2318 (Stevens, J., dissenting); *id.* at 2320 (Souter, J., dissenting).

from the library's main children's area.[446] Additionally, libraries may choose to place computer terminals in areas easily monitored by librarians.[447] Also, librarians may tap patrons on their shoulders and request that the patrons go to different websites or discontinue their Internet sessions.[448] As Justice Souter insightfully noted, librarians will have to use this method of controlling Internet access to inappropriate materials even if they have the filtering software installed because the filtering software underblocks a significant amount of pornographic material.[449]

Finally, libraries could require some type of parental involvement.[450] This could entail educating parents and their children about the Internet, requiring parental consent for children to use unfiltered computers, asking parents to designate a filtering level when a child applies for a library card, or mandating parental supervision.[451]

All of these alternatives are less restrictive to speech than the existing filtering software; therefore, the filtering technology of CIPA does not withstand strict scrutiny, and Justices Stevens and Souter correctly advocated the use of these alternatives.[452]

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446. *Id.* at 2319 (Souter, J., dissenting); *supra* note 146 and accompanying text (noting that physically moving computers away from high-traffic areas can be used as a way to eliminate inadvertent exposure).

447. *ALA II*, 123 S. Ct. at 2319 (Souter, J., dissenting); *supra* note 147 and accompanying text (stating that the physical placement of the computers in easily-monitored areas could be used as an alternative to filters).

448. *Id.* (Souter, J., dissenting); *see supra* note 148 and accompanying text (describing the "tap-on-the-shoulder" method and its qualities and limitations).

449. *ALA II*, 123 S. Ct. at 2319 (Souter, J., dissenting); *see also supra* Part II.D.2 (examining alternatives to filtering software).

450. *ALA II*, 123 S. Ct. at 2319 (Souter, J., dissenting); *see* Rodden, *supra* note 153, at 2156–61 (discussing whether CIPA infringes on parents' right to control what information their children receive). *See generally supra* Part II.D.2 (discussing alternatives to filtering software, including those methods involving parental involvement).

451. *ALA II*, 123 S. Ct. at 2319 (Souter, J., dissenting); *see* Rodden, *supra* note 153, at 2161 ("CIPA's opponents may argue that deferring to parental regulation avoids broader constitutional problems, such as First Amendment concerns, that arise when the federal government attempts to regulate speech."); *see also* Witte, *supra* note 12, at 779 (arguing that Internet filters may be appropriate when used by parents to tailor their children's restricted access to the Internet). If parents are allowed to choose the level of access for their children, the parents can tailor the filtering software to the specific concerns for that child. *Id.* at 779. *See generally supra* Part II.D.2 (discussing various methods libraries may employ in lieu of filtering software).

452. *See supra* Part II.D.2 (outlining the numerous alternatives to filtering software and how libraries may tailor their responses to their particular needs); *cf ALA II*, 123 S. Ct at 2313 (Stevens, J., dissenting) (discussing the belief that CIPA created a "blunt" national standard).

3. CIPA's Disabling Provisions Do Not Save the Statute

Justice Souter correctly stated that CIPA's disabling provisions did not render CIPA narrowly tailored to the compelling government interest of protecting children from harmful Internet material.[453] Instead, Justice Souter properly reasoned that the disabling provisions do not remedy CIPA's constitutional problems because the ability of a librarian to disable the filtering software or unblock a specific website, as a practical matter, may be nonexistent or severely hindered in some areas for several reasons.[454]

First, CIPA leaves the decision to unblock a website to the local librarian, who must review the website to determine if it comports with CIPA's guidelines.[455] Second, CIPA includes a restrictive guideline for making this decision: the patron's request to unblock websites must be for "bona fide" research activities or any other lawful purpose.[456] Justice Souter properly feared that there may be inconsistencies in determining which websites are accessible under CIPA because unblocking determinations are handled on the local level.[457] Moreover, the exact language of the statute, which states that librarians "may," not "must," disable the filters or unblock websites upon a patron's request, compounds this issue.[458]

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453. *See ALA II*, 123 S. Ct. at 2319 (Souter, J., dissenting).

454. *Id.* (Souter, J., dissenting); *see also supra* note 249 and accompanying text (examining some practical concerns, such as patron embarrassment or delay, surrounding CIPA's disabling provisions). One commentator argued that CIPA's disabling provision, which only allowed librarians to disable the filters for "bona fide research or other lawful purpose" was not precise. Conn, *supra* note 213, at 491–92. This commentator argued that the CIPA disabling provision "does not specify for what or for whose use the technology protection measures may be disabled, i.e., students, minors, or adults." *Id.* at 492. *See generally supra* notes 223–25 and accompanying text (discussing CIPA's disabling provisions); Urofsky v. Gilmore, 167 F.3d 191, 196 (4th Cir. 1999) (finding that a state school's requirement that faculty request access to sexually explicit material on the school's computers was constitutional), *aff'd on reh'g*, 216 F.3d 401 (4th Cir. 2000), *cert. denied*, 121 S. Ct. 759 (2001).

455. 20 U.S.C. § 9134(f)(3) (2000); 47 U.S.C. § 254(h)(6)(D) (2000); *see also supra* notes 223–25 and accompanying text (discussing CIPA's disabling provisions).

456. 47 U.S.C. § 254(h)(6)(D). For example, if an adult were to ask a librarian to disable the filtering software so that he may access a website that includes pornographic materials, which the First Amendment protects for adults, arguably this would qualify under the lawful purpose provision. *See ALA II*, 123 S. Ct. at 2319 (Souter, J., dissenting) (providing a textual analysis of CIPA's disabling provision); *supra* notes 223–25 and accompanying text (describing CIPA's disabling provisions).

457. *See ALA II*, 123 S. Ct. at 2319 (Souter, J., dissenting); *see also* FCC CIPA Implementation, *supra* note 222, para. 30 (ruling that determinations as to whether CIPA's disabling provisions apply are left up to local communities).

458. 20 U.S.C. § 9134(f)(3); 47 U.S.C. § 254(h)(6)(D); *see ALA II*, 123 S. Ct. at 2319 (Souter, J., dissenting) (stating that the language of the statute "must impose some limitation eligibility for unblocking" and that library staffs decide "who gets complete Internet access and who does not");

Also, Justice Souter correctly stated that CIPA's disabling provisions did not render CIPA constitutional because libraries may not have the opportunity to screen the requested websites in a timely manner.[459] When a patron asks the librarian to unblock a particular website, the librarian first must review the website to determine whether it is appropriate under CIPA.[460] Then, if the librarian determines that the website is appropriate, the librarian can disable the filters.[461] However, this process may take a long time, possibly posing problems in libraries that are understaffed.[462] Although the plurality argued that CIPA's disabling provision was adequate to pass constitutional muster, the reality is that many library patrons will have neither the time to wait for the librarians to review and unblock websites nor the desire to make the initial request because of fear of embarrassment.[463] Considering that the purpose of LSTA and E-rate funding is to assist libraries in reaching out to underserved or rural communities, it is likely that this problem will continue to develop.[464]

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id. at 2312 (Breyer, J., concurring) (leaving open the possibility that local communities may choose to implement "library rules or practices [that] could further restrict the ability of patrons to obtain 'overblocked' Internet material"); *supra* notes 223–25 and accompanying text (discussing the allowances provided for in CIPA's disabling provisions).

459. *See ALA II*, 123 S. Ct. at 2319 (Souter, J., dissenting). Justice Breyer argued that the fact that CIPA required patrons to make the initial request for disabling did not cause a substantial burden on library patrons. *Id.* at 2312 (Breyer, J., concurring). Further, Justice Breyer argued that this step was similar to library patrons having to make specific requests for materials from closed stacks or through interlibrary loans. *Id.* (Breyer, J., concurring).

460. *Id.* at 2319 (Souter, J., dissenting). The government has left determinations as to whether the librarian should disable the filters to the particular libraries, which the FCC "believ[ed] to be most knowledgeable about the varying circumstances of schools or libraries within those communities." FCC CIPA Implementation, *supra* note 222, para. 53.

461. *ALA II*, 123 S. Ct. at 2319 (Souter, J., dissenting); *see supra* notes 223–25 and accompanying text (discussing CIPA provisions that allow librarians to disable the filtering software in certain circumstances). Justice Souter noted that the terms "bona fide research" and "lawful purposes" would cause uncertainty. *ALA II*, 123 S. Ct. at 2319 (Souter, J., dissenting); *see also* Conn, *supra* note 213, at 492 (arguing that CIPA's disabling provision needs clarification).

462. *ALA II*, 123 S. Ct. at 2319 (Souter, J., dissenting).

463. *See id.* at 2307 (plurality opinion) (finding that the filters were an adequate answer to the government's interest); *ALA I*, 201 F. Supp. 2d 401, 486–87 (E.D. Pa. 2002) (arguing that requiring patrons to identify themselves before being granted access to speech is unconstitutional); *supra* note 249 and accompanying text (describing problems such as lengthy waits and embarrassment on the part of patrons who request that librarians disable the filtering software).

464. *ALA I*, 201 F. Supp. 2d at 486–87. One of the purposes of the LSTA is "to stimulate excellence and promote access to learning and information resources in all types of libraries for individuals of all ages." AM. LIBRARY ASS'N, SUPPORT THE LIBRARY SERVICES AND TECHNOLOGY ACT (LSTA) PART OF THE MUSEUM AND LIBRARIES SERVICES ACT 3 (n.d.), *available at* http://www.ala.org/ala/washoff/WOissues/federallibprog/lsta/lstatalkpoints.pdf (last visited Mar. 17, 2004).

Finally, Justices Souter and Stevens correctly noted that the disabling provisions do not remedy CIPA's constitutional problems because patrons may not know the content of the materials that have been blocked and, therefore, may not understand that they have the right to request access through a disabling of the filters.[465] If one were to type in a specific URL that was blocked, the patron would be able to request access specifically to that URL.[466] However, if one is surfing casually through various materials, he or she may not know what has been blocked and whether it is worth time and effort to request unblocking.[467] Therefore, CIPA's disabling provision does not save the statute because there are practical problems with its implementation, including patron embarrassment and delays in disabling.[468]

V. IMPACT

This Part will begin with a discussion of CIPA's immediate impact of preventing library patrons from accessing constitutionally protected materials.[469] This Part then will address libraries' continuing need, due to the flaws of filtering technology, to use other means to protect against patrons accessing inappropriate materials.[470] Next, this Part will discuss how the Supreme Court's holding that CIPA was constitutional removes an incentive for software companies to improve their products because these companies now have a guaranteed customer base.[471] Finally, this Part will discuss the possibility of an "as-applied" challenge to CIPA and how it would lessen the impact of the Court's holding that CIPA was facially constitutional.[472]

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465. *See ALA II*, 123 S. Ct. at 2315 (Stevens, J., dissenting); *id.* at 2319 (Souter, J., dissenting). *See generally supra* notes 223–25 and accompanying text (discussing CIPA's disabling provisions).

466. *See ALA II*, 123 S. Ct. at 2315 (Stevens, J., dissenting) ("Until a blocked site or group of sites is unblocked, a patron is unlikely to know what is being hidden and therefore whether there is any point in asking for the filter to be removed.").

467. *Id.* at 2319 (Souter, J., dissenting) (commenting that requesting websites be unblocked may not be easy).

468. *Id.* (Souter, J., dissenting).

469. *See infra* Part V.A (arguing that the immediate impact of CIPA is the denial of access to constitutionally protected speech in libraries).

470. *See infra* Part V.B (arguing that, because existing filtering technology does not adequately block inappropriate materials, librarians will have to continue monitoring patrons' Internet access).

471. *See infra* Part V.C (arguing that by holding CIPA constitutional, the Supreme Court guaranteed a customer-base for software manufacturers).

472. *See infra* Part V.D (agreeing with Justice Kennedy's analysis that although CIPA withstood a facial invalidation claim, there still may be room for an "as-applied" challenge).

A. CIPA Restricts Library Patrons' Access to Constitutionally Protected Materials

The most immediate effect of the Supreme Court's decision holding CIPA constitutional is that library patrons will be unable to view materials that they have a constitutional right to access.[473] Without modifications, the existing filtering technology will continue to block access to vital material.[474] For instance, the filters frequently block information related to health or sexuality, making it difficult for library patrons to conduct research on breast cancer, birth control, and gay and lesbian issues.[475]

Although the plurality argued that the First Amendment does not guarantee the right to receive information without embarrassment, the purpose of libraries is to provide materials that the library believes are appropriate for their communities.[476] Filtering software does not give libraries the opportunity to make the decision as to what is appropriate; rather, filtering software makes this decision.[477] Ultimately, filtering software will deny library patrons access to information that they have a right to receive under the First Amendment, which will impede the libraries' purpose of providing relevant and appropriate materials for their communities.[478]

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473. *See ALA II*, 123 S. Ct. at 2306 (plurality opinion) (conceding that the filtering software was flawed); *id.* at 2312 (Breyer, J., concurring) (recognizing that although the existing filtering software was flawed, there was no evidence of a better alternative); *id.* at 2313–14 (Stevens, J., dissenting) (finding that filtering software, because of the overblocking of protected websites, was overbroad); *id.* at 2320 (Souter, J., dissenting) (stating that an understanding of CIPA requires the acknowledgement that "adults will be denied access to a substantial amount of nonobscene material harmful to children but lawful for adult examination, and a substantial quantity of text and pictures harmful to no one"); *see also infra* Part II.B (examining the First Amendment's right to receive information).

474. *See supra* note 140 and accompanying text (discussing studies that have attempted to determine the effectiveness of filtering software). All of these studies concluded that a significant amount of constitutionally protected material was erroneously blocked by the technology. *See id.*

475. *See ALA I*, 201 F. Supp. 2d 401, 415–16 (E.D. Pa. 2002) (describing the content from the websites of one group of plaintiffs, which included information on sexual health, anatomy, reproductive rights, and gay, lesbian, bisexual, and transgendered issues).

476. *ALA II*, 123 S. Ct. at 2307 (plurality opinion); *see* AM. LIBRARY ASS'N, *supra* note 263 (outlining appropriate purposes for library collection decisions).

477. *See* Bd. of Educ. v. Pico, 457 U.S. 853, 870–71 (1982) (differentiating between the standards for library acquisition decisions, and the discretions afforded them, and library removal decisions, which must comply with the First Amendment); *supra* Part II.D.1 (discussing how filtering technology works and its limitations).

478. *See ALA II*, 123 S. Ct. at 2303–04 (plurality opinion). Chief Justice Rehnquist based much of the plurality opinion on the role libraries play in communities and the fact that they provide a forum for the receipt of information. *Id.* (plurality opinion); *see also supra* notes 262–66 and accompanying text (explaining the plurality's opinion concerning the purpose of libraries). However, Justice Souter stated that "the plurality's conception of a public library's mission has

B. Libraries Will Still Have To Use the Alternatives to Filtering Software

The Supreme Court found that CIPA's mandate, requiring public libraries receiving certain federal funding to implement filtering software, did not violate the First Amendment.[479] However, in reality, the filtering software overblocks constitutionally protected materials while underblocking the materials that the software was meant to block.[480] For instance, Internet filters do not screen e-mails, chat sessions, and other Internet-based programs for inappropriate materials.[481] Moreover, because the existing filtering technology is primarily text-based, the technology is unable to recognize visual depictions that constitute obscenity, child pornography, or materials that are "harmful to minors."[482] Therefore, because the filtering technology continues to allow patrons access to unprotected materials, librarians will have to use other means to restrict patrons from accessing inappropriate materials.[483] Only with software alternatives, such as the "tap-on-the-shoulder" method and the implementation of an Internet use policy, can libraries truly achieve Congress's goal of prohibiting access to obscenity, child pornography, and other materials deemed to be "harmful to minors."[484]

C. Filtering Software Companies May Sustain the Status Quo

Software designers use methods that lead to the overblocking of a significant number of constitutionally protected websites and the

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been rejected by the libraries themselves." *See ALA II*, 123 S. Ct. at 2322 (Souter, J., dissenting). Justice Souter added that "no library that chose to block adult access in the way mandated by [CIPA] could claim that the history of public library practice in this country furnished an implicit gloss on First Amendment standards, allowing for blocking out anything unsuitable for adults." *Id.* (Souter, J., dissenting); *see also id.* at 2322–23 (Souter, J., dissenting) (examining the history of censorship since the middle of the nineteenth century).

479. *See ALA II*, 123 S. Ct. at 2308 (plurality opinion) (finding that CIPA was constitutional).

480. *See supra* note 140 and accompanying text (discussing studies on filtering software that found that the technology significantly overblocked protected speech and underblocked materials they were designed to thwart).

481. HOCHHEISER, *supra* note 125, § 2.5; *see supra* Part II.D.1 (examining filtering technology and its limitations).

482. *ALA I*, 201 F. Supp. 2d 401, 431–32 (E.D. Pa. 2002); Balkin et al., *supra* note 132, at 10; HOCHHEISER, *supra* note 125, § 2.5; *supra* Part II.D.1 (describing filtering technology and its limitations).

483. *See supra* Part II.D.2 (discussing alternatives to filtering software, which allow libraries to tailor their responses to their particular needs).

484. *See supra* Part II.D.2 (outlining the methods libraries can use to cope with children accessing inappropriate online materials).

underblocking of materials CIPA was meant to block.[485] Now that the Supreme Court has endorsed the use of filtering software that restricts protected speech, software companies have lost one incentive for improving their software programs.[486]

Because public libraries receiving LSTA funds or E-rate discounts now must purchase filtering software, the software manufacturers have a built-in customer base.[487] Without incentives for improving their methods of blocking materials, software manufacturers may uphold the status quo rather than actively try to reduce the number of underblocked and overblocked websites.[488] Hopefully, the significant private demand for the filtering software and the large number of filtering software designers will lead to enough competition to encourage these companies to continue to improve their products.[489]

D. Facial Invalidation Leaves Room for an "As-applied" Challenge

In *United States v. American Library Ass'n*, the Court rejected the challenge to the facial validity of CIPA.[490] However, as Justice Kennedy argued, the Court's decision left open room for an "as-applied" challenge, which may exist if, for example, a patron's request that the librarian disable the filters was denied or extensively delayed.[491] Thus, the impact of this case is limited because there is still the possibility that a particular plaintiff may bring suit to challenge CIPA's constitutionality.[492] For example, if a library patron tries to

485. *See* ALA II, 123 S. Ct. 2297, 2308 (2003) (plurality opinion) (upholding CIPA's constitutionality).

486. *See id.* (finding that CIPA was constitutionally sound). Because CIPA was held to be valid, thousands of libraries across the nation must purchase Internet filtering software.

487. *See* 47 U.S.C. § 254(h)(1)(B) (2003) (requiring libraries receiving E-rate discounts to install filtering software); *see also* AM. LIBRARY ASS'N, THE E-RATE, *at* http://www.ala.org/ala/pio/factsheets/erate.htm (last revised Jan. 18, 2004) (stating that, at the initiation of E-rate discounts, more than 30,000 schools and libraries "completed the application process, secured local and state level approval, and committed other financial resources for ineligible hardware, software, training, and the non-discounted portion of discounted services").

488. *See supra* note 140 and accompanying text (discussing studies that have documented filtering software failures).

489. *See* COMM'N ON ONLINE CHILD PROT., *supra* note 12, at 13 (discussing the use of filtering software in many arenas, including private homes); *see also* TIFAP, *supra* note 127 (summarizing the methods of seventeen different types of filtering software in existence as of 1999).

490. *ALA II*, 123 S. Ct. at 2308 (plurality opinion). *See generally supra* note 236 (describing "as-applied" versus facial invalidation challenges to statutes).

491. *ALA II*, 123 S. Ct. at 2310 (Kennedy, J., concurring). *See generally supra* notes 223–25 and accompanying text (discussing CIPA's disabling provisions).

492. *See ALA II*, 123 S. Ct. at 2310 (Kennedy, J., concurring) (arguing that the Court left room for an "as-applied" challenge).

access protected speech through a library's Internet access and is denied access by the filtering software, and the library subsequently fails to disable the filters after being requested to do so, that patron still may have a valid claim against CIPA.[493] Therefore, although CIPA survived a facial invalidation challenge, it still may be vulnerable to attacks by individuals whose First Amendment rights have been directly affected by the filtering condition or disabling provisions.[494]

VI. CONCLUSION

The Supreme Court's decision to hold CIPA constitutional undoubtedly will affect the ways in which individuals use their local libraries. More importantly, filtering software only provides a false sense of security because the filters still allow a large amount of prohibited material through the software. In addition, even though libraries must spend extra resources to purchase ineffective Internet filtering software, librarians still will have to use some of the alternatives suggested to achieve CIPA's compelling goal.

> If some libraries do not have the capacity to unblock specific Web sites or to disable the filter or if it is shown that an adult user's election to view constitutionally protected material is burdened in some other substantial way, that would be the subject for an as-applied challenge, not the facial challenge made in this case.

Id. (Kennedy, J., concurring); *see supra* note 236 (describing the difference between facial invalidation and "as-applied" challenges). Additionally, Justice Stevens's dissenting opinion alluded to the possibility of the Court ruling a different way under Spending Clause precedent. *See ALA II*, 123 S. Ct. at 1218 (Stevens, J., dissenting) (arguing that the plurality misapplied *National Endowment for the Arts v. Finley* because *Finley* involved four plaintiffs who had been harmed directly by the government's regulations, while with CIPA, a directly harmed plaintiff had yet to bring a constitutional challenge).

493. *ALA II*, 123 S. Ct. at 2310 (Kennedy, J., concurring); *see supra* notes 223–25 and accompanying text (discussing CIPA's disabling provisions).

494. *See ALA II*, 123 S. Ct. at 2310 (Kennedy, J., concurring).