# *United States v. American Library Association:* A Missed Opportunity for the Supreme Court to Clarify Application of First Amendment Law to Publicly Funded Expressive Institutions

*Robert Corn-Revere*

In *United States v. American Library Association* the Supreme Court rejected a First Amendment challenge to federal funding conditions set forth in the Children's Internet Protection Act (CIPA) that require the use of content filters to block pornographic images on Internet access terminals in public libraries.[1] The case confronted the difficult issues arising from public Internet access in libraries. While this phenomenon has obliterated the limitations of shelf space by making available to library patrons the virtually limitless information resources of the Internet and the World Wide Web, it also has provided access to information that, in a traditional collection policy, would rarely be selected by a librarian for inclusion in the stacks. This applies to much of the information on the Web, and not just pornography, since the medium is anything but selective. Accordingly, the case presented the question whether federal filtering requirements should be viewed as nothing more than an updated form of a typical book selection policy, or whether mandating the use of third-party software designed solely to exclude information from a vast medium is more akin to censorship. A majority of Justices viewed the filtering mandate as analogous to book selection, and in the process presented starkly different views about the nature and purpose of public libraries.

The decision in *American Library Association* resolved the immediate dispute as to the facial validity of CIPA, but the ruling may have

[1]United States v. American Library Association, 123 S. Ct. 2297 (2003).

raised more questions than it answered. The practical effect on the day-to-day administration of Internet access is speculative, since a majority of justices appeared to agree that the law may require libraries to disable filters for adults upon request—a conclusion that could permit libraries to continue to provide unfiltered Internet access for most adult patrons. For libraries that adopt more restrictive approaches, the decision raises the possibility of further challenges to the statute as applied. In doctrinal terms, the various opinions highlight the poor fit of the First Amendment doctrines of the ''public forum'' and ''unconstitutional conditions'' when applied to restrictions on public institutions created for the purpose of disseminating speech. The public forum doctrine, which originated as a way to preserve a ''First Amendment easement'' for private speakers on public streets and sidewalks, is not well-suited to the task of analyzing restrictions imposed on public institutions that are designed for the purpose of disseminating information. Likewise, the doctrine of unconstitutional conditions, which prohibits the government from accomplishing forbidden results indirectly, such as through incentives rather than prohibitions, may be of little use where there remains some doubt about how far the government may go in restricting information in public libraries. As a consequence, the precedential value of the *American Library Association* decision is questionable, and the case represents a missed opportunity for the Court to clarify constitutional doctrine.

**Background**

A growing debate over Internet content filtering emerged after the Supreme Court struck down key portions of the Communications Decency Act (CDA) in *Reno v. ACLU*. That law was designed to shield children from access to indecent and pornographic speech on the Internet. Holding that the CDA unduly restricted online speech, the Court noted that ''[s]ystems have been developed to help parents control the material that may be available on a home computer with Internet access.''[2] The *Reno* Court was not considering the question of government-mandated content filtering but instead was commenting only on the voluntary private use of filters in the home. Almost immediately thereafter, however, the debate over Internet

[2] *Reno v. ACLU*, 521 U.S. 821, 854–855 (1997).

filtering software centered on whether such filters should be required at the principal public institutions that provide Internet access—public libraries and schools.

Confrontations over filtering requirements tracked the rapid growth of public Internet access in schools and libraries. By 1999, more than 96 percent of public libraries provided public access to the Internet, according to a survey prepared for the American Library Association.[3] This represented a significant increase in public Internet access from what the same researchers found in 1998, when 73 percent of the nation's public libraries offered basic Internet access to their patrons.[4] A 1996 survey had found that only 28 percent of libraries offered Internet access. At the same time a growing number of schools began to provide Internet access. This increase in Internet access was promoted in part by Section 254(h) of the Telecommunications Act of 1996, which established the ''e-rate'' program to subsidize telecommunications services and computer networking equipment for schools and libraries. A primary goal of the e-rate program is to provide affordable Internet connections to all public schools.[5] Subsidies were also provided through the Elementary and Secondary Education Act (ESEA) and the Library Services and Technology Act (LSTA).

The rapid growth of Internet use brought with it access to information rarely, if ever, seen in the library setting. This access included personal Web pages, online gaming sites, and fringe political sites to name but a few examples. It also included access to the 2 percent of the Web that includes pornographic sites. This development prompted libraries to adopt a wide variety of measures, such as acceptable use policies, to cope with the challenges presented by this new medium. Some libraries also began to use filtering software. By 1999, 16.8 percent of the libraries that offered public Internet access reported the use of filters on some or all access terminals,

[3]JOHN CARLO BERTOT AND CHARLES R. MCCLURE, SURVEY OF INTERNET ACCESS MANAGEMENT IN PUBLIC LIBRARIES (Library Research Center, Univ. of Illinois, June 2000) (''Library Survey 2000'').

[4]JOHN CARLO BERTOT AND CHARLES R. MCCLURE, THE 1998 NATIONAL SURVEY OF U.S. PUBLIC LIBRARY OUTLET INTERNET CONNECTIVITY (ALA, Office of Information Technology Policy, Oct. 1998).

[5]*See* FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE, REPORT AND ORDER, 12 FCC Rcd. 8776 (1997).

while 83.2 percent did not use filters.[6] The 1998 survey had found that more than 85 percent of public libraries with Internet access did not use content filters. Of the libraries that used filters to restrict Internet content, most—approximately 60 percent—provided patrons with access to terminals without filters as well.[7] However, some libraries adopted more restrictive policies, thus spawning litigation over the issue.

Early cases held that public libraries could not adopt filtering policies that unduly restricted Internet access and that libraries were not compelled to use filtering to protect children. In *Mainstream Loudoun v. Board of Trustees*, the U.S. District Court for the Eastern District of Virginia held that the Internet access policy for the public library in Loudoun County, Virginia, was unconstitutional.[8] The court held that the policy, which required the use of blocking software at all times for all users, violated the First and Fourteenth Amendments to the United States Constitution. It concluded that the mandatory filtering policy was not necessary to further a compelling government interest in that no problem of accessing pornography had been demonstrated in the Loudoun County system. The court also found that the policy restricted adult library patrons to accessing only information suitable for minors, that it lacked adequate standards for restricting speech, and that it had inadequate procedural safeguards. In an earlier ruling denying the library board's motion to dismiss the case, the court found that the First Amendment governs library policies regarding Internet access, thereby rejecting the county's comparison of its policy with a book acquisition or interlibrary loan system.[9]

With regard to an obligation to protect children, the California Court of Appeals rejected a claim that the public library is required to install Internet content filters. In *Kathleen R. v. City of Livermore*, a parent filed suit to compel the use of filters after her son reportedly downloaded sexually oriented images using the library computer terminal. The trial court dismissed the claim under Section 230(c) of the Telecommunications Act of 1996 which provides that ''[n]o

[6]BERTOT AND MCCLURE, *supra* note 3, at 7.

[7]*Id.* at 8.

[8]Mainstream Loudoun v. Board of Trustees, 24 F. Supp.2d 552 (E.D. Va. 1998).

[9]*Id.* at 783.

provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider'' and that ''[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.''[10] The California Court of Appeals affirmed the judgment of dismissal pursuant to Section 230.[11]

**The Children's Internet Protection Act**

The Children's Internet Protection Act added a provision conditioning federal subsidies on the use of Internet content filters as an amendment to the 2001 Labor, Health and Human Services Appropriations Bill, H.R. 4577.[12] Among other things, CIPA added the filtering mandate to e-rate subsidies administered by the Federal Communications Commission (FCC), funding via the Elementary and Secondary Education Act, and funding through the Library Services and Technology Act, programs that affected Internet access in public schools and libraries. The amendment combined earlier proposals submitted in both the 105th and 106th Congresses.

The law requires recipients of federal funds under the specified programs to develop ''Internet safety policies'' that meet a number of specific requirements. As part of this requirement all libraries and schools that receive e-rate funding for Internet access, Internet service, or internal connections must install and use blocking and filtering technology to preclude access to ''visual depictions'' that are obscene, constitute child pornography, or are harmful to minors.[13] Filters are required for all users on all access terminals regardless of the number of computers with Internet access that a school or library provides. However, when adults are using Internet terminals CIPA allows filters to be configured (theoretically, at least) so as not to block images that merely are ''harmful to minors'' but not obscene.

The various subsidy programs include provisions that allow blocked sites to be restored or filters to be turned off under certain

[10] 47 U.S.C. § 230(c)(1), (3)(1996).

[11] Kathleen R. v. City of Livermore, 87 Cal. App. 4th 684 (Cal. App. 2001).

[12] Pub. L. No. 106-554, 114 Stat. 2763A-335.

[13] 20 U.S.C. §§ 9134(f)(1)(A)(i) and (B)(i); 47 U.S.C. §§ 254(h)(6)(B)(i) and (C)(i).

conditions. The e-rate program permits recipients of funds to ''disable the technology protection measure . . . during use by an adult, to enable access for bona fide research or other lawful purpose.''[14] The LSTA funding restrictions also permit institutions to ''disable a technology protection measure . . . to enable access for bona fide research or other lawful purposes.''[15] Institutions that receive subsidies through multiple programs must adhere to the more restrictive e-rate provision that permits disabling filters only for adult access.

**Judicial Challenge to CIPA**

Two challenges were filed against the CIPA.[16] The complaints focused on the funding conditions that related to public libraries, rather than schools, and did not challenge the general requirement that recipients of funds create ''Internet safety policies.'' The cases were filed under the expedited judicial review provisions of CIPA, which provide that any facial constitutional challenge be heard by a three-judge district court, with a right of direct appeal to the Supreme Court if the law is found to be invalid.

The two cases were consolidated and in May 2002 the U.S. District Court for the Eastern District of Pennsylvania held in *American Library Association v. United States* that the CIPA filtering requirements for public libraries were unconstitutional. As a threshold matter, the district court found that Internet access in public libraries was a designated public forum and that filtering requirements were an effort to exclude certain speech selectively from the forum. Thus, the court reasoned that ''where the state designates a forum for expressive activity and opens the forum for speech by the public at large on a wide range of topics, strict scrutiny applies to restrictions that single out for exclusion from the forum particular speech whose content is disfavored.''[17] Such 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

[14] 47 U.S.C. §§ 254(h)(6)(D).

[15] 20 U.S.C. § 9134(f)(3).

[16] American Library Ass'n. v. United States, No. 01-CV-1303 (E.D. Pa. filed March 20, 2001); Multnomah County Public Library v. United States, No. 01-CV-1322 (E.D. Pa. filed March 20, 2001).

[17] American Library Association v. United States, 201 F. Supp. 2d 401, 460–461 (E.D. Pa. 2002).

millions of individuals around the world on a virtually limitless number of subjects.''[18]

In applying strict scrutiny, the court agreed that the government has a compelling interest in limiting the distribution of obscenity and child pornography, but rejected the claim of a compelling interest in preventing unlawful or inappropriate conduct in libraries. It reasoned that the appropriate response to improper behavior in the library was to impose sanctions on the conduct, not to limit access to speech.[19] Ultimately, after an exhaustive review of available technology, the court found that the use of filters resulted in substantial overblocking (restricting nonpornographic information) as well as underblocking (failing to block pornographic information). Consequently, it concluded that CIPA was not narrowly tailored and could not survive First Amendment scrutiny. While the First Amendment ''does not demand perfection when the government restricts speech in order to advance a compelling interest,'' the court noted, ''the substantial amounts of erroneous blocking inherent in the technology protection measures mandated by CIPA are more than simply *de minimis* instances of human error.''[20] CIPA's filtering requirements were also found to be constitutionally infirm because acceptable use policies and other measures represented a less restrictive alternative means of serving the government's asserted interest.[21]

**The Supreme Court Decision**

In *United States v. American Library Association* the Supreme Court reversed the district court in a fractured decision that garnered no clear majority position and generated five separate opinions.[22] Led by Chief Justice Rehnquist's plurality opinion, the Court rejected claims that CIPA exceeded Congress's spending power to impose conditions on federal programs. A majority of the Justices agreed that the government did not create a designated public forum by

[18] *Id.* at 464.

[19] *Id.* at 475.

[20] *Id.* at 479.

[21] *Id.* at 480.

[22] *American Library Ass'n.*, 123 S. Ct. at 2297 (2003).

providing Internet access in public libraries, and, based on a questionable reading of the law regarding the disabling of filters, concluded that the restrictions on speech were modest. Justices Stevens, Souter, and Ginsburg dissented.

The plurality reasoned that Congress has wide latitude to attach conditions on the receipt of federal assistance to further its policy objectives, although it may not ''induce'' the recipient of funds to engage in unconstitutional activities.[23] In this regard, the inquiry focused on whether the condition Congress attached would be unconstitutional if it was performed by the library itself. Chief Justice Rehnquist concluded that the use of Internet filters was not unconstitutional, because libraries normally exercise great discretion in selecting books for their collections and do not traditionally include pornography in their stacks.[24] The principal thrust of the plurality opinion was to characterize the federal funding conditions as reinforcing the traditional mission of libraries.

The plurality minimized the First Amendment significance of the case by classifying a library's decision to use filtering software as ''a collection decision, not a restraint on private speech.''[25] The goal of libraries has never been to provide ''universal coverage,'' according to the Chief Justice, but to provide materials ''that would be of the greatest direct benefit or interest to the community.'' Describing the Internet as ''no more than a technological extension of the book stack,''[26] the plurality maintained that a library's need to exercise judgment in making collection decisions is based on its traditional role of identifying suitable and worthwhile material and that ''it is no less entitled to play that role when it collects material from the Internet than when it collects material from any other source.''[27]

The plurality rejected the district court's finding that providing Internet access in the public library created a designated public forum. Chief Justice Rehnquist was quite clear on this point:

[23] 123 S. Ct. at 2303 (plurality opinion) (citing *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

[24] *Id.* at 2303–04.

[25] *Id.* at 2307 n.4.

[26] *Id.* at 2305 (quoting S. Rep. 141, 106th Cong., 1st Sess. at 7 (1999)).

[27] *Id.* at 2306.

> A public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak. It provides Internet access, not to ''encourage a diversity of views from private speakers'' . . . but for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality.

Accordingly, he concluded that Internet access in public libraries is neither a ''traditional'' nor a ''designated'' public forum.[28] This point was bolstered by reference to *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998), where the Court held that public broadcast stations could exercise editorial discretion in presenting debates by political candidates, and *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), where it upheld the use of ''standards of decency'' as one factor in making arts grants. On the basis of these analogous decisions, the plurality concluded that ''the government has broad discretion to make content-based judgments in deciding what private speech to make available to the public.''[29]

The plurality also discounted the significance of CIPA's burden on speech in the library setting. Responding to the district court's conclusion that filters erroneously block access to constitutionally protected speech, it noted that any constitutional concerns are dispelled by the ''ease with which patrons may have the filtering software disabled.'' Individual cases of improper blocking may be brought to the attention of the librarian or the filtering company and the problem can be corrected. Or, under the law, filters may be disabled upon request ''to enable access for bona fide research or other lawful purposes.''[30] The plurality opinion relied heavily on the Solicitor General's characterization of this provision, quoting his statement during oral argument that a librarian can unblock the filtering mechanism upon request, and that the patron ''would not 'have to explain . . . why he was asking a site to be unblocked or

[28] *Id.* at 2305.

[29] *Id.* at 2304.

[30] *Id.* at 2306.

the filtering to be disabled.' ''[31] It discounted the district court's concern that requiring patrons to make such a request would be stigmatizing, noting that ''the Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment.''[32]

The plurality opinion also rejected the alternative grounds cited by the district court that CIPA imposed an unconstitutional condition on the use of federal funds. In doing so, the plurality bypassed the government's broader argument that government entities do not have First Amendment rights, but instead reaffirmed the holding in *Rust v. Sullivan*, 500 U.S. 173 (1991), that the government has a right to insist that public funds be used for the purpose for which they were authorized. In this case, it noted that the e-rate and LSTA programs ''were intended to help public libraries fulfill their traditional role of obtaining material of requisite and appropriate quality for educational and informational purposes.''[33] Chief Justice Rehnquist distinguished *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2000), where the Court invalidated funding conditions imposed on legal aid lawyers. In that case, the Court found that the restrictions distorted the usual functioning of the legal profession by precluding zealous advocacy against the government on behalf of indigent clients. In *American Library Association*, the plurality opined that there is no comparable assumption that public libraries ''must be free of conditions that their benefactors might attach to the use of donated funds or other assistance.''[34]

Justice Kennedy based his brief concurring opinion on the lack of evidence that adult access to material on the Internet had been burdened in a significant way. Although he acknowledged a statement in the district court's opinion that unblocking might take days or may be unavailable in some libraries, he said that the statement ''does not appear to be a specific finding.'' Accordingly, Justice Kennedy suggested that ''there is little to this case'' if, ''on the request of an adult user, a librarian will unblock filtered material or disable

[31] *Id.* at 2306–07 (quoting Argument Tr. at 4).

[32] *Id.* at 2307.

[33] *Id.* at 2308.

[34] *Id.* at 2309.

the Internet software without significant delay.''[35] But while he rejected the facial challenge to the CIPA conditions, Justice Kennedy noted that as-applied challenges might be brought if particular libraries lack the capacity to unblock specific Web sites, to disable the filter, or if they impose other burdens on adult users' access to constitutionally protected information.[36]

Justice Breyer agreed with the plurality opinion that public libraries do not create a public forum when they make Internet access available to the public and that the CIPA conditions are facially valid. However, he rejected the plurality's assumption that CIPA is valid if it is supported only by a rational basis, and he disputed the government's suggestion that the Court should presume CIPA is constitutional. Thus, unlike the plurality Justice Breyer applied ''a form of heightened scrutiny'' because ''[t]he Act directly restricts the public's receipt of information.''[37] This did not rise to the level of strict scrutiny, he explained, because such a rigorous test ''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).'' Justice Breyer compared the level of constitutional scrutiny that should be applied in this case with the intermediate scrutiny appropriate to the regulation of commercial speech or broadcast content, or that which applies to content-neutral rules for cable television.[38]

Applying this level of review, Justice Breyer concluded that CIPA satisfied constitutional demands. Like the other Justices, he found the government's interest to be legitimate and often compelling, and he found that software filters '' 'provide a relatively cheap and effective' means of furthering [its] goals.''[39] He also agreed that filters tended to both overblock and underblock the speech targeted by

[35] *Id.* (Kennedy, J., concurring).

[36] *Id.* at 2310.

[37] *Id.* (Breyer, J., concurring).

[38] *Id.* at 2311 (citing Board of Trustees v. Fox, 492 U.S. 469 (1989) (commercial speech); Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727 (1996) (cable television leased access rules); Turner Broadcasting System v. FCC, 520 U.S. 180 (1997) (mandatory carriage rules for cable television); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (broadcast content regulations)).

[39] *American Library Ass'n.*, 123 S. Ct. at 2312 (Breyer, J., concurring) (quoting *American Library Ass'n.*, 201 F. Supp. 2d at 448).

CIPA, but noted that ''no one has presented any clearly superior or better fitting alternatives.'' Justice Breyer pointed to the provisions that allow libraries to unblock disputed Web sites or disable filters altogether, and concluded that the burden on patrons of having to make such requests is no more onerous than traditional library practices associated with requesting access to closed stacks for certain restricted materials or interlibrary loan practices.[40] He left open the possibility that local library policies may be more restrictive when allowing access to overblocked material or disabling filters, but explained that the Court was considering only a facial challenge to CIPA's overall mandate.

**The Dissents**

The dissenters were far less sanguine about the minimal extent to which the CIPA conditions restricted protected speech. However, they argued that the CIPA requirements were unconstitutional without reference to the public forum doctrine that had been the centerpiece of the district court decision and was a major focus of the plurality opinion. Instead, they addressed the effect of filtering as a prior restraint and on the CIPA requirements as unconstitutional conditions.

Justice Stevens pointed out that only 7 percent of libraries had chosen to require filters on all Internet terminals, so that CIPA necessarily required the remaining 93 percent of the libraries to do likewise (to the extent they accepted federal funds). He described CIPA as ''a blunt nationwide restraint on adult access to 'an enormous amount of valuable information' that individual librarians cannot possibly review.''[41] Citing the district court's findings regarding the imprecision of filtering technology, Justice Stevens described the effect of overblocking as ''the functional equivalent of a host of individual decisions excluding hundreds of thousands of individual constitutionally protected messages from Internet terminals located in public libraries throughout the Nation.''[42] He pointed to various less restrictive alternatives cited by the court below (including optional filtering policies, parental consent requirements, acceptable

[40] *Id.*

[41] *Id.* at 2313 (Stevens, J., dissenting).

[42] *Id.* at 2313–14.

use policies, privacy screens, etc.) and suggested that the choice of alternatives should be left to local decisionmakers and not mandated by the federal government.

Justice Stevens was less impressed than the plurality with the Solicitor General's assurance that filters could be disabled at a library patron's request, noting that a person would be unlikely to know which information was being excluded in advance, and therefore could not know whether making an unblocking request would be worthwhile. He compared it with a library keeping a substantial portion of its resources in unmarked locked rooms or cabinets. In such a scenario ''[s]ome curious readers would in time obtain access to the hidden materials, but many would not.''[43] But in Justice Stevens's view the most significant problem was not the empirical question of how many patrons would be intimidated from seeking unfiltered access but the fact that CIPA requires them to make the request in the first place. He described it as a ''significant prior restraint'' because a law that ''prohibits reading without official consent'' is like a law ''that prohibits speaking without consent.'' Both, in his view, constitute ''a dramatic departure from our national heritage and constitutional tradition.''[44]

Justice Stevens concluded that the CIPA requirements imposed an unconstitutional condition on protected expression. Building on the plurality's discussion of a library's need for discretion to make collection decisions, he compared the need with a university's interest in freedom ''to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.''[45] He also cited unconstitutional conditions cases relating to employment, as well as *Velazquez*, and concluded that the CIPA conditions distort the usual functioning of libraries. Justice Stevens distinguished these cases from *Rust v. Sullivan*, cited by the plurality, noting that *Rust* had been limited to cases in which the government was sponsoring its own speech.[46] Here,

[43] *Id.* at 2315.

[44] *Id.* (quoting Watchtower Bible & Tract Soc. of N.Y., Inc. v. Village of Stratton, 536 U.S. 150, 166 (2002)).

[45] *Id.* (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the result)).

[46] *Id.* at 2316–17.

however, he noted that the LSTA and e-rate programs were designed to foster Internet access and to make a vast amount of information available to library patrons, not to promote any particular governmental message.

Justice Stevens pointed to ways in which the CIPA conditions limit the discretion of libraries. For example, CIPA requires a library to install filters on all computers if it receives any discount from the e-rate program or any funds from the LSTA program. As a consequence, a library that seeks to provide Internet service for even a single computer through the federal subsidy programs is obligated to filter all of its computers for both patron and staff use.[47] Nevertheless, he would have approved the mandatory use of filters if the library adopted the policy on its own and not in compliance with a federally imposed condition. Justice Stevens, on the one hand, agreed with the plurality that the 7 percent of libraries that required use of filtering software on all of their Internet terminals ''did not act unlawfully.''[48]

Justice Souter, on the other hand, joined by Justice Ginsburg, wrote that requiring Internet content filters, at least as to adult access, violated the First Amendment whether imposed by the federal government or by local library policies. He disputed the plurality's conclusions about the nature and function of libraries as well as its comparison of filters with book selection policies. In an extended discussion of the history and development of library practices, Justice Souter noted that the traditional function of libraries was to make information freely available, not to censor it. He wrote that the ''[i]nstitutional history of public libraries in America discloses an evolution toward a general rule, now firmly rooted, that any adult entitled to use the library has access to any of its holdings.''[49]

Justice Souter disparaged the plurality's conception of libraries as collecting only materials deemed to have ''requisite and appropriate quality'' as effectively claiming that ''the traditional responsibility of public libraries has called for denying adult access to certain books, or bowdlerizing the content of what libraries let adults see.''[50]

[47] *Id.* at 2318.

[48] *Id.* at 2313.

[49] *Id.* at 2322 (Souter, J., dissenting).

[50] *Id.* at 2322.

He observed, for example, that the plurality's notion of librarianship could not justify denying an interlibrary loan request on grounds that the patron's purpose in seeking the information was ''unacceptable,'' but that CIPA's unblocking procedure operated in just that way. Tracing the history of librarians' opposition to organized censorship during the latter half of the 20th century, including their reactions to what Justice Souter described as the ''assaults'' of McCarthyism, he concluded it was ''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 of a particular request.''[51]

Justice Souter argued that the use of filtering technology ''defies comparison to the process of acquisition.'' In the traditional setting, he explained, a library must affirmatively decide to expend funds to obtain a new resource and must make room on its limited shelf space. In the Internet context, by contrast, the library must expend extra funds for software to restrict access to information that the Internet already has made available. He concluded that ''[t]he 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.''[52]

Like Justice Kennedy, Justice Souter agreed that it would ''tak[e] the curse off the statute for all practical purposes'' if adult patrons could obtain an unblocked Internet terminal ''simply for the asking.'' But he disagreed that CIPA could be read to require such an outcome, even where such a reading would permit the Court to avoid ruling on a difficult constitutional question. Not only had the FCC declined to set forth criteria governing unblocking requests, but also the statute said only that libraries ''may'' unblock Internet terminals for ''lawful purposes'' and ''bona fide research.'' The vague statutory criteria provided additional reason for constitutional doubt, according to Souter's dissent, because it would vest unlimited discretion among library staffs about permitting or denying requests for unfiltered Internet access.[53]

[51] *Id.* at 2322–24.

[52] *Id.* at 2321–22.

[53] *Id.* at 2319–20.

**The Failure of Doctrine**

The *American Library Association* decision resolved the immediate question of CIPA's facial validity, but it is not clear how any future as-applied challenges may fare or whether the case will be influential beyond its specific context. An important reason for this uncertainty, which also explains the splintered opinions and the ambiguous direction of the Court, is that the case was a poor fit under the established First Amendment doctrines of the public forum and unconstitutional conditions. The more precise problem this case presents is the need to determine which kind of First Amendment rules apply to public institutions that are created for the purpose of spreading information and engaging in expressive activities. Various decisions have touched on this issue but no well-defined doctrinal approach has yet emerged. In this regard, *American Library Association* may be considered a missed opportunity to clarify an ambiguous area of constitutional law.

**Whither the Public Forum Doctrine?**

The plurality confronted the district court's decision to analyze the case under the public forum rubric, which asks whether permitting Internet access in public libraries creates a forum for private speakers. By deciding that such access does not create a forum, the plurality concluded that the CIPA filtering conditions did not trigger any type of heightened First Amendment scrutiny.[54] Justice Breyer agreed that no forum had been created, although he subjected CIPA to intermediate scrutiny because ''[t]he Act directly restricts the public's receipt of information.''[55] The remaining four Justices declined to discuss the forum question at all, which suggests that the issue was unnecessary to the Court's ultimate decision. This point was underscored by Justice Breyer's concurrence, for if it is possible to conclude that some form of heightened constitutional scrutiny should be applied without finding that libraries have created a public forum, then conducting a forum analysis may unnecessarily confuse the issues.

The public forum doctrine emerged from Supreme Court cases to become the primary analytic tool for applying the First Amendment

[54] *Id.* at 2304–05.

[55] *Id.* at 2310 (Breyer, J., concurring).

to government property dedicated for expressive purposes. Although the doctrine originated with cases involving various forms of speech and parades on public thoroughfares,[56] it evolved over the years to encompass any form of government property that can be used as a ''channel of communication.'' Courts have devised three categories in which public property may be considered public fora: (1) the traditional public forum, such as streets, sidewalks and public parks, in which members of the public generally have a right to engage in speech activities; (2) the designated public forum, such as university meeting rooms, which have been intentionally opened for expressive purposes for identified groups (*e.g.*, student organizations); and (3) the nonpublic forum, such as an intra-school mail system, which has not been generally opened to the public for communicative purposes.[57] The Supreme Court has identified a variety of factors that reflect the government's intention to create a designated forum, including its practice or policy of allowing or disallowing unrestricted speech in the forum, the characteristics of the property, and the government's stated purpose.[58]

Given its emergence from controversies involving picketing in the streets, the public forum doctrine generally asks the question whether private parties can access government-controlled property in order to speak. Whether the doctrine is applied to buses,[59] mailboxes,[60] billboards,[61] high school student newspapers,[62] charitable campaign drives in federal offices,[63] or internal school mail systems,[64] the primary inquiry is whether private individuals or groups may

[56]Hague v. CIO, 307 U.S. 496, 515 (1939); Jamison v. Texas, 318 U.S. 413 (1943). The term ''public forum'' was coined by Professor Harry Kalven, Jr. in the 1960s. *See* Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUPREME COURT REVIEW 1.

[57]Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

[58]Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802–806 (1985).

[59]Lehman v. City of Shaker Heights, 418 U.S. 298, 301–302 (1974) (plurality opinion).

[60]United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 128–129 (1981).

[61]Lebron v. National R.R. Passenger Corp., 513 U.S. 374 (1995).

[62]Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267–270 (1988).

[63]*Cornelius*, 473 U.S. at 803.

[64]*Perry*, 460 U.S. at 49 n.9.

use the forum to convey a message. This certainly is the way the *American Library Association* plurality understood the issue. The four Justices observed that libraries do not acquire Internet terminals ''in order to create a public forum for Web publishers to express themselves,'' and it cited other recent cases supporting the government's discretion to make content-based judgments in deciding ''what private speech to make available to the public.''[65]

But the question of restricting the resources available in a public library is somewhat different, and is not confined to asking whether publishers—on the Web or otherwise—have a constitutional right to place their materials on the physical or virtual shelves of the institution. Public libraries ''are places of freewheeling and independent inquiry''[66] and ''the quintessential locus of the receipt of information.''[67] In this regard, the Supreme Court, in connection with restrictions on libraries, has emphasized that ''the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.''[68] In this spirit, Justice Souter's *American Library Association* dissent focused not on the rights of publishers but on ''the First and Fourteenth Amendment rights of adult library patrons . . . to be free of paternalistic censorship.''[69]

**Government-Sponsored Speech Institutions and the First Amendment**

Other public institutions created for expressive purposes illustrate the pitfalls of attempting to transform the public forum doctrine to fit a range of issues beyond mere access. Cases involving public broadcasting provide a good analogue to libraries because the licenses in many cases are held by government entities and the noncommercial broadcasting system is subsidized by public funds. The connection to government has spawned a number of cases in which viewers and program providers demanded various forms of

[65] *American Library Ass'n*, 123 S. Ct. at 2304–05 (plurality opinion).

[66] Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 914 (1982) (Rehnquist, J., dissenting).

[67] Kreimer v. Bureau of Police, 958 F.2d 1242, 1255 (3d Cir. 1992).

[68] *Pico*, 457 U.S. at 866 (plurality op.) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965)).

[69] *American Library Ass'n*, 123 S. Ct. at 2324 n.8 (Souter, J., dissenting).

access to the medium, leading, in turn, to a series of decisions denying that noncommercial broadcasters are public fora.[70] In *Forbes*, the Supreme Court held that public stations might create ''a forum of some type'' when they sponsor debates between political candidates, but it cautioned that ''broad rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations.''[71]

The *American Library Association* plurality picked up on this notion and concluded that a library must exercise judgment in making collection decisions and it is ''no less entitled to play that role when it collects material from the Internet than when it collects material from any other source.''[72] Justice Rehnquist likewise cited *Finley*, a case involving NEA grants, to reinforce the point that federal grantmakers must have discretion. But the filtering mandates of CIPA are not a good analogy because they do not expand librarians' discretion. Libraries had the option before CIPA was enacted to use filters to block Internet content and a number did so. As Justice Stevens pointed out, CIPA effectively required most libraries to change their Internet filtering policies and precluded any experimentation.[73]

Rather than trying to extend the public forum analogy, the Court might have gained greater insight from cases in which the government sought to use the spending power to restrict information that public broadcasters may transmit. The Supreme Court addressed this issue in *FCC v. League of Women Voters of California* and struck down a ban on editorializing by noncommercial licensees on First Amendment grounds.[74] Similarly, the U.S. Court of Appeals for the District of Columbia Circuit invalidated a requirement that public broadcast licensees make recordings of all broadcasts ''in which any

[70]Knights of the Ku Klux Klan v. Curators of the University of Missouri, 203 F.3d 1085, 1093–94 (8th Cir.), *cert. denied*, 531 U.S. 814 (2000); Chandler v. Georgia Pub. Telecomm. Comm'n, 917 F.2d 486 (11th Cir. 1990), *cert. denied*, 502 U.S. 816 (1991); Muir v. Alabama Educ. Television Comm'n, 688 F.2d 1033, 1037 (5th Cir. 1982) (*en banc*), *cert. denied*, 460 U.S. 1023 (1983).

[71]*Forbes*, 523 U.S. at 673.

[72]*American Library Ass'n*, 123 S. Ct. at 2306 (plurality opinion).

[73]*Id.* at 2313–14 (Stevens, J., dissenting).

[74]F.C.C. v. League of Women Voters of California, 468 U.S. 364 (1984).

issue of public importance is discussed'' because it was designed to facilitate content control.[75] Whether or not noncommercial broadcast stations might be considered public fora was not a relevant question in these cases.

As the experience with the public broadcasting cases shows, the government's relationship with speech falls along a ''complex spectrum, not a bipolar one.'' That is, when it comes to speech, the government often acts in various roles, including censor, regulator, manager, employer, policymaker, patron, speaker, or publisher.[76] In this regard, some public institutions ''have a certain First Amendment aura.'' Examples include ''the arts, libraries, universities, and the institutional press.''[77] Similar to its pronouncements with respect to libraries, the Supreme Court has recognized universities as the quintessential ''marketplace of ideas'' with a ''tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.''[78] Even when it upheld funding restrictions on abortion-related speech by doctors in *Rust v. Sullivan*, the Court emphasized that ''the university is a traditional sphere of free expression so fundamental to the functioning of our society that the government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.''[79]

These cases suggest that the First Amendment imposes limits on the government's ability to restrict speech in some institutions in a way that is separate and apart from their possible status as public fora. The Supreme Court has not yet articulated a separate doctrine to

[75]Community-Service Broad. of Mid-America, Inc. v. FCC, 593 F.2d 1102, 1122–23 (D.C. Cir. 1978) (*en banc*).

[76]Randall P. Bezanson, *The Government Speech Forum: Forbes and Finley and Government Speech Selection Judgments*, 83 IOWA L. REV. 953, 964 (1997–98). *See also* Randall P. Bezanson and William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1381 (2001); MARK YUDOF, WHEN GOVERNMENT SPEAKS 44 (1986).

[77]Frederick F. Schauer, *Principles, Institutions and the First Amendment*, 112 HARVARD L. REV. 84, 116 (1998).

[78]Rosenberger v. Rector & Visitors of the Univ. of Virginia, 515 U.S. 819, 835–836 (1995); Healy v. James, 408 U.S. 169, 180 (1972) (''vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools'').

[79]*Rust*, 500 U.S. at 200.

explain the relationship of the First Amendment to such government-sponsored speech institutions, but recent cases suggest a possible approach that was overlooked in *American Library Association*. Such a threoretical approach could incorporate elements of the public forum doctrine, but would recognize that various institutions serve many different functions. Government-sponsored speech enterprises are distinguishable from the designated public forum in that the purpose of the institution is not to create an open platform for all speakers. Like a designated public forum, however, the speech enterprise would come into being only by deliberate action and could be eliminated at the government's option. A government-sponsored speech enterprise also is distinguishable from ''government speech'' in that the institution is created to promote free inquiry and expression, not to disseminate the state's message. No constitutional principle would require the government to create such an enterprise, but after having done so the government would be obligated to adhere to First Amendment principles.

The Supreme Court hinted at such an approach in *Legal Services Corp. v. Velazquez*, where the Court applied the First Amendment to invalidate funding restrictions that limited the speech of government-funded attorneys.[80] The Court analyzed prior cases involving government speech and the public forum and held that the government cannot constitutionally fund a particular speech activity and then impose conditions ''which distort its usual functioning.'' The majority opinion suggested that the same principles apply to other speech enterprises, including universities and public broadcast stations. Thus, the government ''could not elect to use a broadcasting network or a college publication structure in a regime that prohibits speech necessary to the proper functioning of those systems.''[81] In a particularly relevant passage, the Court explained:

> Where the government uses or attempts to regulate a particular medium, we have been informed by its accepted usage in determining whether a particular restriction on speech is necessary for the program's purposes and limitations. In *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984), the Court was instructed by its

[80] Legal Services Corp. v. Velazquez, 531 U.S. 533 (2000).

[81] *Id.* at 543.

> understanding of the dynamics of the broadcast industry in holding that prohibitions against editorializing by public radio networks were an impermissible restriction, even though the Government enacted the restriction to control the use of public funds. The First Amendment forbade the Government from using the forum in an unconventional way to suppress speech inherent in the nature of the medium. *See id*., at 396–397, 104 S.Ct. 3106. In *Arkansas Ed. Television Comm'n v. Forbes*, 523 U.S. 666, 676, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998), the dynamics of the broadcasting system gave station programmers the right to use editorial judgment to exclude certain speech so that the broadcast message could be more effective.[82]

The *Velazquez* majority stressed that the public forum cases were not ''controlling in a strict sense'' but that they provided ''some instruction'' in how to apply the First Amendment to publicly funded institutions.[83] Finding cognizable First Amendment interests in cases of this type requires courts ''to inquire much more deeply into the specific character of the institution, and the functions it serves'' than they have in the past,[84] and the Court in *Velazquez* did just that. It examined the purposes for which the Legal Services Corporation was created (assisting indigent clients in litigation over welfare benefits), the traditional purposes of litigation (''the expression of theories and postulates on both, or multiple, sides of an issue''), and the primary mission of the judiciary (''[i]nterpretation of the law and the Constitution''), and concluded that the statute imposed a ''serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary.''[85]

A coherent theory for analyzing speech restrictions imposed on public institutions might have helped reduce confusion over the public forum doctrine in *American Library Association*. However, it is far from clear that better theoretical tools would have altered the outcome of the case because the plurality and the dissents expressed widely divergent views as to the nature and functions of libraries. Chief Justice Rehnquist took the narrow view that the traditional

[82] *Id.*

[83] *Id.* at 543–544.

[84] Schauer, *supra* note 77, at 116.

[85] *Velazquez*, 531 U.S. at 544–549.

mission of libraries is to provide material ''of requisite and appropriate quality,'' while Justices Souter and Ginsburg traced a history of librarianship based on making information freely available without censorship.[86] In addition, the plurality opinion distinguished *Velazquez* on the theory that libraries do not oppose the government in the same way as legal aid lawyers, and, citing public forum cases, it suggested that there is no comparable assumption that libraries ''must be free of any conditions that their benefactors might attach to the use of donated funds or other assistance.''[87]

The plurality's attempt to distinguish *Velazquez*, however, does not hold up well when compared with the example on which it relied—public broadcasting. Chief Justice Rehnquist's statement that libraries, like public broadcast stations, are not public fora because they need discretion to make content-based choices cannot be extended to its logical conclusion. Applying this reasoning to the facts of *Forbes*, for example, the plurality would allow appropriations for public broadcast stations to be conditioned on prohibiting third parties from participating in candidate debates. After all, if noncommercial television stations are not public fora because they do not traditionally serve as platforms for private speech, then the government should be able to manipulate public funding so as to reinforce that traditional role. This, however, is not the law, as *League of Women Voters* attests. There, the Supreme Court held that federal appropriations could not be conditioned on banning editorials by public broadcasters. The one remaining distinction, that public libraries—unlike legal aid lawyers—do not have a tradition or function of opposing the government simply is beside the point. It is not the mission of a public broadcasting station to oppose the government either, yet funding conditions designed to restrict editorial choice and content have been ruled unconstitutional.

Given the doctrinal confusion arising from the overlay of the public forum doctrine in *American Library Association*, it is conceivable that a different theoretical framework might have assisted the Court in analyzing the problem presented by CIPA. Even if such a construct would not have affected the outcome, the case was a missed

[86] *American Library Ass'n*, 123 S. Ct. at 2306 (plurality opinion); *Id.* at 2321–24 (Souter, J., dissenting).

[87] *Id.* at 2309 & n.7 (plurality opinion).

opportunity for explaining the application of the First Amendment to publicly funded expressive institutions.

**Government Speech and Unconstitutional Conditions**

The same is true of the Court's discussion of the unconstitutional conditions doctrine. The plurality quickly dismissed the claim that CIPA imposed an unconstitutional condition because of the rule that the government is entitled to define the limits of the programs it creates.[88] Once again, however, the nature of the publicly funded institution was critical to the analysis. Chief Justice Rehnquist grounded his analysis of this issue on *Rust v. Sullivan*, where the Court upheld regulations prohibiting the use of funds under Title X of the Public Health Service Act from supporting counseling concerning the use of abortion as a method of family planning. In *Velazquez*, the Court described the program in *Rust* as an example of ''government speech'' where ''the government is itself the speaker'' and public officials ''used private speakers to transmit information pertaining to its own program.''[89]

Regardless of whether the mission of public libraries is construed narrowly as in the plurality opinion or broadly as in Justice Souter's dissent, it is at least clear that libraries should not be considered government speakers. That is, libraries as institutions are not comparable with traditional examples of government speech, such as publishing '' 'journals, magazines, periodicals, and similar publications' that are 'necessary in the transaction of the public business.' ''[90] Nor are libraries analogous to government-sponsored public service announcements ''warning of the dangers of cigarette smoking or drug use, praising a career in the armed services, or offering methods for AIDS prevention.''[91] Justice Stevens noted in his dissent that *Rust* does not apply to CIPA because the federal subsidy programs for libraries were not designed ''to foster any particular governmental message.''[92] Instead, as Chief Justice Rehnquist wrote in another

[88] *American Library Ass'n*, 123 S. Ct. at 2307–08 (plurality opinion).

[89] *Velazquez*, 531 U.S. at 541.

[90] *Muir*, 688 F.2d at 1050 (Rubin, J., concurring) (citation omitted).

[91] United States v. Frame, 885 F.2d 1119, 1131 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990).

[92] *American Library Ass'n*, 123 S. Ct. at 2317 (Stevens, J., dissenting).

case, public libraries ''are places of freewheeling and independent inquiry.''[93]

Thus, in the end, *American Library Association* was a dispute about facts and not constitutional doctrine. There was no doubt but that CIPA imposed conditions on public libraries that restricted the information that may be provided to library patrons. The question that divided the Justices was whether the condition violated the First Amendment. This, in turn, was answered by each of the Justices' views on why libraries exist. For that reason, *American Library Association* provides little explanatory power for how the decision may be applied in other contexts. Once again, this problem might have been avoided if the Court had taken the opportunity to revise and clarify its approach to the public forum and unconstitutional conditions doctrines.

**The Future and As-Applied Challenges**

Not only is the doctrinal impact of *American Library Association* rather murky, but its practical implications are uncertain as well. A key factor in the plurality and concurring opinions was the Solicitor General's claim at oral argument that any adult patron could have the filters turned off without having to explain to the librarian ''why he was asking to have a site unblocked or the filtering . . . disabled.''[94] In fact, this reading of the statute could be considered necessary to sustain CIPA's constitutionality because the prevailing opinions suggested that libraries failing to unblock sites upon request or disable filters could be subject to as-applied challenges under the Act.[95] The FCC appears to have read the decision this way, for in its order implementing the e-rate program following *American Library Association* the Commission highlighted the Court's discussion of the ''ease with which patrons may have the filtering software disabled'' and it ruled that compliance with the statute's Internet filtering requirement requires libraries to ''implement a procedure for unblocking the filter upon request by an adult.''[96]

[93] *Pico*, 457 U.S. at 914 (Rehnquist, J., dissenting).

[94] Argument Tr. at 4.

[95] *American Library Ass'n*, 123 S. Ct. at 2306–07 (plurality opinion); *id.* at 2309–10 (Kennedy, J., concurring); *id.* at 2312 (Breyer, J., concurring). *Cf. id.* at 2319–20 & n.1 (Souter, J., dissenting).

[96] FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE, FCC 03-188 ¶¶ 9, 11 (Rel. July 24, 2003).

As a result, it is unlikely that *American Library Association* is the last word on the controversy surrounding Internet content filtering or about the First Amendment status of publicly funded speech institutions. When the next case comes, however, the first task will be to sort through the doctrinal confusion left by the Court's five opinions. The next opportunity to deal with the theoretical issues may not involve a library, but could arise instead from some controversy affecting another institution that has a ''First Amendment aura'' such as a university, museum, or public broadcast station. And when that decision comes, it may well have a more profound effect on libraries than *American Library Association* if it more coherently resolves the question of how the First Amendment applies to publicly funded institutions. It will not only affect how the as-applied challenges may be decided, but will also determine the limits of the government's ability to regulate expression through use of the purse strings.