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Filtering Software in Public Libraries: Traditional Collection Decision or Congressionally Induced First Amendment Violation?

In *United States v. American Library Ass'n*,[1] the United States Supreme Court held that filtering provisions of the Children's Internet Protection Act ("CIPA" or "Act")[2] are constitutional and are a valid exercise of Congress's spending power because they do not induce public libraries to violate their patrons' First Amendment rights.[3] The Court also held that CIPA does not place unconstitutional conditions upon public libraries' receipt of federal funding.[4]

I. FACTUAL BACKGROUND

Congress provides federal assistance to public libraries for Internet access through the E-rate program[5] and the Library Services and

1. 123 S. Ct. 2297 (2003).
2. Pub. L. No. 106-554, § 1(a)(4), 114 Stat. 2763, 2763A-335 (2000).
3. 123 S. Ct. at 2305.
4. *Id.* at 2307.
5. 47 U.S.C. § 254(h)(1)(B) (2000).

Technology Act ("LSTA").[6] These programs allow public libraries to provide Internet access to their patrons by authorizing discounted rates and offering federal grants. The E-rate program, allowing qualified libraries to purchase Internet access at a discount, was established by the Telecommunications Act of 1996.[7] In the fiscal year ending June 30, 2002, discounts earned by public libraries through the E-rate program totaled $58.5 million. Through the LSTA, the Institute of Museum and Library Services awards grants to state agencies overseeing library systems to purchase Internet access and other computer-based telecommunications technologies. Congress appropriated more than $149 million in LSTA grants in fiscal year 2002.[8]

Upon discovering that library patrons, including minors, were regularly using the Internet to visit pornographic sites, Congress became concerned that its dollars were being used to facilitate access to pornography. Of particular concern was evidence that patrons were viewing child pornography and that obscene material of all varieties was being left on computer screens and printers for everyone to see. In response to the problem, Congress enacted CIPA. The Act contains filtering provisions that deny federal funding for Internet access to public libraries that do not install software that blocks websites containing images that constitute obscenity or child pornography.[9] The provisions provide, in part, that a library may not receive federal assistance unless it has "'a policy of Internet safety for minors that includes the operation of a technology protection measure.'"[10] However, the Act allows libraries to disable filters "'to enable access for bona fide research or other lawful purposes.'"[11]

The American Library Association ("ALA") joined a group of libraries, library patrons, and web site publishers in challenging the constitutionality of CIPA's filtering provisions in the United States District Court for the Eastern District of Pennsylvania. The ALA alleged that CIPA's filtering provisions induce public libraries to violate the First Amendment rights of their patrons, and in the alternative, that the Act places an unconstitutional condition upon the libraries' receipt of federal assistance by requiring them to surrender their First Amendment right to provide the public with access to constitutionally protected speech.[12]

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6. 20 U.S.C. §§ 9121-9163 (2000).
7. Pub. L. No. 104-104, § 1(a), 110 Stat. 56 (1996).
8. 123 S. Ct. at 2301.
9. *Id.* at 2301-02.
10. *Id.* at 2302 (quoting 20 U.S.C. § 9134(f)(1)(A)(i) (2000)).
11. *Id.* (quoting 20 U.S.C. § 9134(f)(3) (2000)).
12. *Id.*

The district court found for the ALA, ruling that the filtering provisions were facially invalid on the ground that they induced public libraries to violate patrons' First Amendment rights. The district court enjoined the Government from withholding federal assistance for failure to comply with CIPA, reasoning that the Internet is a public forum subject to strict scrutiny. Although it found that the Government has a compelling interest in protecting minors from obscenity and preventing the dissemination of child pornography, the district court determined that the use of software filters is not narrowly tailored to further that interest.[13]

The Government appealed the district court's decision, and the United States Supreme Court noted probable jurisdiction. In a 6-3 decision reversing the ruling of the United States District Court for the Eastern District of Pennsylvania, the Supreme Court held that the filtering provisions of the Children's Internet Protection Act are constitutional because they do not induce public libraries to violate their patrons' First Amendment rights,[14] and CIPA does not place unconstitutional conditions upon public libraries' receipt of federal funding.[15]

II. LEGAL BACKGROUND

A. *Congressional Authority Under the Spending Clause*

The Spending Clause[16] of the United States Constitution reads, in pertinent part: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."[17] Congress's authority under the Spending Clause was defined by the Supreme Court in *South Dakota v. Dole*.[18] In that case, the state of South Dakota challenged the constitutionality of 23 U.S.C. § 158,[19] which directs the Secretary of Transportation to withhold a percentage of federal funding for highways from states that allow persons under the age of twenty-one to purchase or possess alcohol.[20] South Dakota was subject to the statute's withholding policy because it permitted persons nineteen years of age or older to purchase beer that contained up to 3.2

13. *Id.* at 2303.
14. *Id.* at 2305.
15. *Id.* at 2307.
16. U.S. CONST. art. I, § 8, cl. 1.
17. *Id.*
18. 483 U.S. 203 (1987).
19. 23 U.S.C. § 158 (2000).
20. *Id.*

percent alcohol.[21] The Supreme Court upheld the constitutionality of the statute, affirming that Congress has broad authority to condition its granting of federal assistance upon the recipient's compliance with desired policy objectives.[22] However, the Court noted the existence of certain restrictions that limit Congress's otherwise broad spending power.[23] With these restrictions, courts generally give substantial deference to the judgment of Congress, but the Court in *Dole* reiterated that separate constitutional provisions may provide an independent bar to congressional action under its spending power.[24] The Court defined this "independent constitutional bar" by announcing the proposition that Congress may not use its spending power to induce a federal assistance recipient to violate the constitutional rights of a third party.[25] Applying this principle to the facts in *Dole*, the Court concluded that South Dakota would not be violating anyone's constitutional rights by raising its drinking age to twenty-one, thereby rendering the federal statute a valid inducement under the Spending Clause.[26]

B. First Amendment Forum Analysis

The First Amendment provides, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[27] In *Perry Education Ass'n v. Perry Local Educators' Ass'n*,[28] the Supreme Court affirmed that while not all public property guarantees a forum for protected speech, the government's right to limit protected speech is sharply circumscribed when the venue for such speech is a public forum.[29] In that case, an educators' association challenged a school district's denial of access to the inter-school mail system when the same system was opened to a rival union officially recognized by the district.[30] Although it held that the inter-school mail system was not a public forum, the Court announced that the heightened level of scrutiny applies when speech is restricted in a public forum.[31] The Court stated that the government may effectively enforce content-neutral prohibitions

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21. *Dole*, 483 U.S. at 205.
22. *Id.* at 206.
23. *Id.* at 207-08.
24. *Id.*
25. *Id.* at 210.
26. *Id.* at 211.
27. U.S. CONST. amend. I.
28. 460 U.S. 37 (1983).
29. *Id.* at 44-45; *see also* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761 (1995).
30. *Perry*, 460 U.S. at 39.
31. *Id.* at 45-46.

of expression in a public forum through the imposition of reasonable time, place, and manner restrictions, but it may regulate content in a public forum only if it asserts a compelling interest for the restriction, such restriction is necessary, and the restriction is narrowly tailored to serve the compelling state interest.[32]

In *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*,[33] the Supreme Court clarified the distinctions it drew in *Perry* by holding that the level of protection granted to constitutionally protected speech on public property is dependent upon whether the property is a "traditional" or "designated" public forum, as opposed to a nonpublic forum.[34] In *Cornelius* the Combined Federal Campaign ("CFC"), a charitable fund supported by donations from federal employees, excluded political advocacy groups from participating as potential beneficiaries. The CFC limited its participants to charitable organizations, thereby excluding several pseudo-charitable outfits that were primarily advocacy groups. A group of legal defense funds and advocacy groups challenged their exclusion on the ground that they were denied their First Amendment rights to solicit charitable contributions.[35] In deciding that the CFC was not a public forum, and therefore not subject to heightened judicial scrutiny, the Court first applied its definition from *Perry* stating that traditional public fora are those which "'by long tradition or by government fiat have been devoted to assembly and debate.'"[36] The Court reasoned that the principal purpose of a traditional public forum is to promote the "free exchange of ideas," while the principal purpose of the CFC was to support charitable organizations.[37] The Court also stated that the government must make an affirmative choice to create a public forum to satisfy the definition of a designated public forum.[38] The Court reasoned, "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."[39] Because the CFC was designed as a forum of limited access, as opposed to general access, the Court concluded that the government did not intend to designate a public forum when it created the CFC.[40]

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32. *Id.*
33. 473 U.S. 788 (1985).
34. *Id.* at 800, 802.
35. *Id.* at 790-94.
36. *Id.* at 802 (quoting *Perry*, 460 U.S. at 45).
37. *Id.* at 800.
38. *Id.* at 802-03.
39. *Id.* at 802.
40. *Id.*

The Court elaborated on the characteristics that constitute a traditional public forum in *International Society for Krishna Consciousness, Inc. v. Lee*.[41] In that case, a religious organization challenged the constitutionality of a Port Authority regulation that prohibited the organization from soliciting donations inside an airport terminal.[42] The Court, holding that airport terminals are not public fora, cited its decision in *Hague v. Committee for Industrial Organization*[43] to emphasize the importance of the historical status of the venue in applying traditional public forum analysis.[44] In *Hague* the Court reasoned that streets and parks are traditional public fora because "they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[45]

The Supreme Court held a student activities fund to be a designated public forum in *Rosenberger v. Rector & Visitors of University of Virginia*.[46] The University of Virginia established a fund that subsidized any form of student publication unless it was based on religion. A group of students challenged the university's regulations pertaining to the student activities fund after the university denied authorization of payments to outside contractors for the printing costs of their paper because it "primarily promote[d] or manifest[ed] a particular belief in or about a deity or an ultimate reality."[47] The Court held that the fund had created a public forum by providing state money to student groups who desired publication, thereby encouraging "a diversity of views from private speakers;" therefore, the university could not discriminate on the basis of viewpoint.[48]

In *Arkansas Educational Television Commission v. Forbes*,[49] the Supreme Court held that a public television station has wide latitude in its editorial judgments regarding the private speech it presents to its viewers.[50] In that case a group of state-owned television stations sponsored a series of televised debates for federal senatorial and congressional candidates from which it excluded an independent candidate with little support. The Commission, a state agency made up

41. 505 U.S. 672, 679-80 (1992).
42. *Id.* at 674-76.
43. 307 U.S. 496 (1939).
44. *Lee*, 505 U.S. at 680.
45. *Hague*, 307 U.S. at 515.
46. 515 U.S. 819 (1995).
47. *Id.* at 822-25.
48. *Id.* at 819, 834.
49. 523 U.S. 666 (1998).
50. *Id.* at 672-73.

of gubernatorial appointees, decided, in the interest of time and editorial discretion, to limit the debates to major party candidates and independent candidates with broad support.[51] The Court "rejected the view that traditional public forum status extends beyond its historic confines" and refused to apply traditional public forum analysis in this context.[52] Like the selective access to the CFC in *Cornelius*, the debate in *Forbes* was limited to congressional candidates in that particular district.[53] Noting that the debate was not an "open-mic" format of general access, the Court refused to recognize it as a designated public forum.[54] The Court maintained that restrictions of a nonpublic forum will be upheld as long as those restrictions are reasonable.[55] Likewise, if governmental limitations on speech in a nonpublic forum are not based on a speaker's viewpoint, then those limitations are not inconsistent with the requirements of the First Amendment.[56]

In *National Endowment for the Arts v. Finley*,[57] the Supreme Court upheld an art-funding program that required the National Endowment for the Arts ("NEA") to consider content when making funding decisions.[58] A group of performance artists brought suit against the NEA after their applications for NEA grants were initially approved by an advisory committee but subsequently rejected by the Council. The rejections were based on an amendment to the National Foundation on the Arts and Humanities Act,[59] which requires the NEA to ensure that "artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[60] The Court, noting the inherent subjectivity of art appreciation, upheld the constitutionality of the NEA's decision-making process, explaining that "[a]ny content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding."[61] The Court rejected forum analysis in this

51. *Id.* at 669-71.
52. *Id.* at 678.
53. *Id.* at 680; *see Cornelius*, 473 U.S. at 805.
54. *Forbes*, 523 U.S. at 680.
55. *Id.* at 682.
56. *Id.*
57. 524 U.S. 569 (1998).
58. *Id.* at 585.
59. Pub. L. No. 106-554, § 1(a)(4), 114 Stat. 2763, 2763A-335 (2000).
60. 20 U.S.C. § 954(d)(1) (2000).
61. 524 U.S. at 585.

context and distinguished *Rosenberger* by recognizing that the competitive grant process must inevitably exclude some protected speech.[62]

When faced with questions regarding the nature of the Internet and other new and rapidly advancing technologies, the Supreme Court has been hesitant to apply the public forum doctrine.[63] In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*,[64] a case concerning the broadcast of sexually explicit programming on leased cable access channels, Justice Breyer wrote: "[W]e are wary of the notion that a partial analogy in one context, for which we have developed doctrines, can compel a full range of decisions in such a new and changing area."[65] In *Denver* the Court agreed that protecting children from harmful material was a compelling interest and applied a form of heightened scrutiny while rejecting forum analysis.[66]

III. COURT'S RATIONALE

In a plurality opinion written by Chief Justice Rehnquist, the Supreme Court concluded that because public libraries' use of filtering software does not violate the First Amendment rights of their patrons, the Children's Internet Protection Act[67] ("CIPA") does not induce the libraries to engage in unconstitutional activities and is a valid exercise of Congress's spending power.[68] The Court began its analysis with the proposition from *South Dakota v. Dole*[69] that Congress has wide latitude to attach conditions to the receipt of federal funding.[70] However, the Court noted that Congress may not induce a recipient of federal assistance "'to engage in activities that would themselves be unconstitutional.'"[71]

The Court examined the traditional role of libraries in our society to determine whether libraries would be violating their patrons' First Amendment rights by using filtering software on their computers.[72] Citing the American Library Association's ("ALA") Library Bill of Rights,

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62. *Id.* at 586 (citing *Rosenberger*, 515 U.S. 819).

63. *See, e.g.*, Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 749 (1996); United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 814 (2000); Reno v. ACLU, 521 U.S. 844, 849-57 (1997).

64. 518 U.S. 727 (1996).

65. *Id.* at 749.

66. *Id.* at 755.

67. 20 U.S.C. §§ 9121-9163 (2000).

68. 123 S. Ct. 2297 (2003).

69. 483 U.S. 203 (1987).

70. 123 S. Ct. at 2303 (citing *Dole*, 483 U.S. at 206).

71. *Id.* (quoting *Dole*, 483 U.S. at 210).

72. *Id.*

the Court defined public libraries' mission as "facilitating learning and cultural enrichment."[73] In accordance with their mission, public libraries must have broad discretion in making content-based decisions when deciding what materials to provide to their patrons.[74] Rather than striving to provide universal coverage, libraries seek to provide materials of benefit or interest to the community that they deem to possess the "requisite and appropriate quality."[75]

The Court analogized the role of public libraries in our society to that of the public television station in *Arkansas Educational Television Commission v. Forbes*,[76] in which the Court held that public forum principles generally do not apply to a public television station's editorial judgments regarding private speech.[77] The Court also likened this case to *National Endowment for the Arts v. Finley*,[78] in which the Court upheld an art-funding program requiring the National Endowment for the Arts to use content-based considerations when making funding decisions.[79] The Court reasoned that the same principles at work in *Forbes* and *Finley*, in which forum analysis was not applied, also adhere to a public library's exercise of judgment in making collection decisions.[80] The Court stated: "Just as forum analysis and heightened judicial scrutiny are incompatible with the role of public television stations and the role of the NEA, they are also incompatible with the discretion that public libraries must have to fulfill their traditional missions."[81]

The Court rejected the district court's view that Internet access in public libraries qualifies as a public forum for purposes of First Amendment analysis.[82] The Internet is not a traditional public forum, the Court reasoned, because it is a relatively new resource that lacks the requisite history of public communication and assembly.[83] Internet access in public libraries also failed to satisfy the Court's definition of a designated public forum because the Government did not "make an

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73. *Id.*
74. *Id.* at 2304.
75. *Id.* (citing W. KATZ, COLLECTION DEVELOPMENT: THE SELECTION OF MATERIALS FOR LIBRARIES 6 (1980)).
76. 523 U.S. 666 (1998).
77. 123 S. Ct. at 2304.
78. 524 U.S. 569 (1998).
79. 123 S. Ct. at 2304.
80. *Id.*
81. *Id.*
82. *Id.* at 2304-05.
83. *Id.*

affirmative choice to open up its property for use as a public forum."[84] To the contrary, the Court concluded that libraries offer Internet access to facilitate research and learning, not to provide a public forum for the expression and exchange of ideas.[85] A library does not collect books to provide a public forum for the authors, and because the Internet is "'no more than a technological extension of the book stack,'"[86] a library does not acquire Internet access to create a public forum for Web publishers.[87]

The Court also disagreed with the district court's contention that filtering software differs from a library's traditional selection process regarding its print collection.[88] The district court reasoned that because a library makes an affirmative choice as to every book in its print collection, but does not make such choices regarding the websites it provides, the library enjoys less discretion in providing Internet access than it does in making book selections.[89] The Court concluded that this distinction was not constitutionally relevant, noting that "[a] library's failure to make quality-based judgments about all the material it furnishes from the Web does not somehow taint the judgments it does make."[90] Most libraries exclude pornography from their print collections, and the Court emphasized that such decisions are not subjected to heightened judicial scrutiny.[91] The Court did not see a reason to treat the same decisions regarding Internet pornography any differently.[92]

Appellees argued that the filtering software "overblocks" by erroneously blocking access to constitutionally protected speech that does not satisfy filtering companies' category definitions, such as "pornography" or "sex."[93] Without determining that overblocking would create a constitutional problem, the Court concluded that any such difficulties are overcome by the "ease with which patrons may have the filtering software disabled."[94] Library patrons may ask librarians to unblock a

84. *Id.* at 2305.
85. *Id.*
86. *Id.* (quoting S. REP. NO. 106-141, at 7 (1999)).
87. *Id.*
88. *Id.* at 2306.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*

blocked site, and in the case of adults, disable a filter altogether "'to enable access for bona fide research or other lawful purposes.'"[95]

Appellees' alternative argument, that CIPA imposes an unconstitutional condition on the receipt of federal assistance by requiring libraries to surrender their First Amendment right to provide the public with access to constitutionally protected speech, also failed before the Court.[96] The Government argued that public libraries, as governmental entities, do not have First Amendment rights.[97] Without deciding that question, the Court determined that appellees' argument would still fail on the merits.[98] Relying on its decision in *Rust v. Sullivan*,[99] the Court asserted that Congress may define the limits of a program when it appropriates funds to establish the program.[100] Because the E-rate and Library Services and Technology Act[101] ("LSTA") programs were designed to help libraries fulfill their traditional mission of acquiring material of "requisite and appropriate quality," the Court held that Congress may insist that these "'public funds be spent for the purposes for which they were authorized.'"[102]

Justice Kennedy, concurring in the judgment, asserted that a library's inability to unblock a specific Web site or disable a filter may lead to an as-applied challenge to CIPA's constitutionality, as opposed to the facial challenge made in this case.[103] Justice Breyer, also concurring in the judgment, reached the same conclusions as the plurality through different means.[104] Justice Breyer was persuaded that some form of heightened judicial scrutiny should be applied here because the Act "directly restricts the public's receipt of information."[105] Justice Breyer suggested that the Court ask "whether the harm to speech-related interests is disproportionate in light of both the justifications and the potential alternatives."[106] He concluded that the Act was, in this case, narrowly tailored and did satisfy these constitutional demands.[107]

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95. *Id.* (quoting 20 U.S.C. § 9134(f)(3) (2000); 47 U.S.C. § 254(h)(6)(D) (2000)).
96. *Id.* at 2307.
97. *Id.*
98. *Id.*
99. 500 U.S. 173, 194 (1991).
100. 123 S. Ct. at 2307-08.
101. 20 U.S.C. §§ 9121-9163 (2000).
102. 123 S. Ct. at 2308 (quoting *Rust*, 500 U.S. at 196).
103. *Id.* at 2310 (Kennedy, J., concurring).
104. *Id.* (Breyer, J., concurring).
105. *Id.* (Breyer, J., concurring).
106. *Id.* at 2311 (Breyer, J., concurring).
107. *Id.* at 2312 (Breyer, J., concurring).

In his dissent, Justice Stevens stated that while it is not unconstitutional for a library to choose to employ filtering software on its computers, it is unconstitutional for Congress to require a library to do so.[108] Justice Stevens reasoned that the broad sweep of CIPA restricts an enormous amount of valuable, protected speech that could not possibly be reviewed by librarians, leading to the conclusion that local lawmakers should tailor protections to address specific local problems.[109]

In addition to the overblocking of constitutionally protected speech, Justice Stevens was concerned with the underblocking that would result from defects in the filtering software.[110] Relying on the district court's findings of fact, Justice Stevens pointed out that image-recognition technology is either unavailable or extremely primitive, meaning that sexually explicit websites containing pictures, but no text, would not be recognized by the software's search engine.[111] The underblocking would cause the statute to "provide parents with a false sense of security without really solving the problem that motivated its enactment."[112]

Justice Stevens also argued that less restrictive alternatives to CIPA are available and sufficiently address the Government's concerns.[113] Once again relying on the district court, Justice Stevens provided several examples of less restrictive means, including the enforcement by libraries of Internet use policies, requirements of parental consent for Internet use by minors, and the removal from sight of computer monitors with Internet access.[114]

Justice Stevens asserted that the statute imposes an unconstitutional condition on public libraries because it conditions the receipt of funding on the restriction of the libraries' First Amendment rights.[115] He likened the role of libraries in our society to the role of universities because a library's functions include providing information for the purpose of education.[116] Observing that "safeguarding academic freedom" is a priority in our nation, Justice Stevens reasoned that a library's collection decisions must be entitled to First Amendment protection.[117]

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108. *Id.* at 2313 (Stevens, J., dissenting).
109. *Id.* (Stevens, J., dissenting).
110. *Id.* (Stevens, J., dissenting).
111. *Id.* (Stevens, J., dissenting).
112. *Id.* (Stevens, J., dissenting).
113. *Id.* at 2314 (Stevens, J., dissenting).
114. *Id.* (Stevens, J., dissenting).
115. *Id.* at 2315 (Stevens, J., dissenting).
116. *Id.* at 2315-16 (Stevens, J., dissenting).
117. *Id.* at 2316 (Stevens, J., dissenting).

In their dissent, Justice Souter and Justice Ginsburg agreed with Justice Stevens and dissented on the additional ground that CIPA induces public libraries to violate the First Amendment rights of their patrons through the use of filtering software.[118] Like Justice Stevens, Justices Souter and Ginsburg were concerned with the overblocking and underblocking that would occur as a result of the software's deficiencies, as well as the vagueness of the statute's allowance for unblocking at the request of library patrons.[119] However, Justices Souter and Ginsburg did not agree that a library could constitutionally impose these restrictions on its own, claiming that a content-based restriction on communication that an adult would otherwise have access to amounts to censorship.[120]

IV. IMPLICATIONS

The Supreme Court's decision in this case, while alleviating the problem of harmful access to Internet pornography in public libraries, may also work to restrict access to constitutionally protected speech on educationally valuable websites. These restrictions could potentially hinder the library's role in our society as a source of education and cultural enrichment. Sites relating to history or the arts could remain untapped resources for the library researcher operating on a computer equipped with filtering software, as would sites discussing topics ranging from breast cancer to homosexuality.

Filtering software, like the Internet itself, is a new technology. As it continues to develop, it remains far from perfect in its blanket restrictions of websites that fall within its category definitions. The software currently available for filtering relies solely on text, as opposed to image recognition technology. This means that websites that utilize images only will not be recognized as pornographic by a search engine, whereas a nonpornographic website that contains one or more key words or phrases will be blocked. Sites that are designed to avoid the reaches of the filtering software currently on the market can do so by implementing dummy text, or no text at all, while still featuring pornographic images. As a result, underblocking will undermine the purpose of the Act, while overblocking will deny library patrons access to constitutionally protected speech.

While library patrons retain the ability to request that a site be unblocked, or in the case of an adult, that a filter be disabled, such a

118. *Id.* at 2318 (Ginsberg & Souter, J.J., dissenting).
119. *Id.* at 2318-19 (Ginsberg & Souter, J.J., dissenting).
120. *Id.* at 2320 (Ginsberg & Souter, J.J., dissenting).

request could be both embarrassing and unduly burdensome. In the course of attempting to gain access to constitutionally protected speech, a library patron forced to make such a request suffers a sacrifice in privacy to which this decision does not offer an alternative. Librarians are left, in such circumstances, in the unenviable position of having to make case-by-case determinations of what websites should be unblocked, and for whom they should be unblocked. In addition, the statute does not say that sites must be unblocked when a patron makes such a request, only that they may be unblocked. Librarians will likely suffer confusion as a result of both the ambiguity of the statute and the subjectivity that is inherent in making case-by-case, content-based determinations. As Justice Stevens noted in his dissent, a library patron is also unlikely to know what sites have been blocked or hidden after performing a search.[121] Therefore, the patron would have no realistic way of knowing what sites to request be unblocked, and the remedy for overblocking relied upon by the majority in its decision becomes ineffective.

In the swiftly evolving realm of Internet law, the Court's decision in this case could have an enormous impact. Refusing to recognize the Internet as a public forum could pave the way for future restrictions of speech in the form of undesirable websites. The Court analogized the Internet to a library print collection,[122] a more sizable version of a database of stagnant information available for both research and pleasure. In doing so, the Court refused to recognize the Internet as primarily a venue for the exchange of ideas akin to a park or street corner. With the rapid development of e-mail technology, instant messaging, and chat rooms, and the proliferation of "Internet Cafés" around the world, the Court's analysis is certainly subject to debate. Although a sizable problem has been addressed by this decision, Americans growing more and more dependent upon the Internet as a tool for research and communication may now face other difficulties in its aftermath.

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121. 123 S. Ct. 2297, 2315 (2003) (Stevens, J., dissenting).
122. *Id.* at 2304-05.