

CASE COMMENTS

Constitutional Law—Constitutionality of Mandatory Filters on Federally Funded Internet Access in Public Libraries—*United States v. American Library Association, Inc.*, 539 U.S. 194 (2003)

The First Amendment guarantees freedom of speech and expression without government intrusion.¹ Since the emergence of the Internet as a valuable informational resource, legislators have tried to strike a balance between the online protection of minors and the preservation of First Amendment rights.² In *United States v. American Library Association, Inc.*,³ the United States Supreme Court considered whether filters on federally funded Internet access violate the First Amendment rights of library patrons.⁴ Recognizing Internet filtering as a library's collection decision, the Court held that public libraries' use of Internet filtering software did not violate the First Amendment.⁵

In 2001, Congress enacted the Children's Internet Protection Act (CIPA) in response to the unrestricted ability of minors to access obscene and pornographic material through the Internet.⁶ CIPA states that public libraries may not receive federal funding for Internet access unless the library certifies that it will install filtering software on all computers.⁷ Key words or phrases trigger the filtering software to block any site that is likely to contain obscene or pornographic material.⁸ Although the filters are relatively effective at

1. See U.S. CONST. amend. I. The First Amendment provides, in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of press . . ." *Id.*

2. See Namita E. Mani, Note, *Judicial Scrutiny of Congressional Attempts to Protect Children from the Internet's Harms: Will Internet Filtering Technology Provide the Answer Congress Has Been Looking For?*, 9 B.U. J. SCI. & TECH. L. 201, 207 (2003) (commenting on implications of Internet protection on First Amendment).

3. 539 U.S. 194 (2003).

4. See *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 203 (2003) (introducing case issue).

5. *Id.* at 214 (indicating holding of case).

6. See *Am. Library Ass'n, Inc. v. United States*, 201 F. Supp. 2d 401, 448 (E.D. Pa. 2002) (explaining purpose of statute), *rev'd*, 539 U.S. 194 (2003). The court found that approximately 100,000 sites offer free sexually explicit material. *Id.* at 419. Some libraries reported that "youthful patrons have persistently attempted to use the Internet to access hardcore pornography." *Id.* at 448.

7. See Children's Internet Protection Act, 47 U.S.C. § 254 (2001) (articulating terms of statute); *Am. Library Ass'n, Inc. v. United States*, 201 F. Supp. 2d 401, 412-13 (E.D. Pa. 2002) (discussing terms of statute), *rev'd*, 539 U.S. 194 (2003). The Library Services and Technology Act and E-rate programs allow public libraries and schools to receive Internet access at a discounted rate. *Am. Library Ass'n*, 201 F. Supp. 2d at 412-13. According to CIPA, in order to participate in these programs libraries must install the filtering software on their federally and non-federally funded computers with Internet access. *Id.*

8. See *Am. Library Ass'n, Inc. v. United States*, 201 F. Supp. 2d 401, 431 (E.D. Pa. 2002) (summarizing

blocking these sites, they overblock a substantial amount of sites containing protected speech due to the imprecise nature of keyword filtering.⁹ The filter can be disabled during adult use but the Federal Communications Commission (FCC) leaves the decision to disable the software to local officials who are in the best position to make such a judgment.¹⁰

In May 2002, a group of public libraries, library associations, library patrons, and Internet publishers challenged the constitutionality of CIPA in the United States District Court for the Eastern District of Pennsylvania.¹¹ The plaintiffs alleged that CIPA was unconstitutional because it induces libraries to violate the First Amendment by using filters to censor a substantial amount of protected speech.¹² The district court found that filtering software is subject to strict scrutiny because it constitutes a content-based restriction on access to a public forum.¹³ Additionally, the court concluded that although the government had a compelling interest in protecting minors from pornographic and obscene material on the Internet, the filter would not survive strict scrutiny due to its overblocking defect and the availability of less restrictive alternatives.¹⁴ On appeal, the United States Supreme Court granted certiorari and reversed the decision of the district court.¹⁵ The Supreme Court held that

function of filter), *rev'd*, 539 U.S. 194 (2003). Search engines have only indexed approximately fifty percent of the pages that are theoretically indexable because a substantial amount of material on the Internet cannot be indexed. *Id.* Filtering software companies use automated text analysis to identify as many URLs as possible that are likely to contain content that falls within the companies' category definitions. *Id.* No filtering company's categories identically match CIPA's definitions of what is unsuitable for minors. *Id.* at 429.

9. *See* Am. Library Ass'n, Inc. v. United States, 201 F. Supp. 2d 401, 442 (E.D. Pa. 2002) (quantifying rates of overblocking), *rev'd*, 539 U.S. 194 (2003). The court used data provided by the government and estimated the minimum rates of overblocking to be between six and fifteen percent. *Id.*; *see also* Adam Horowitz, *The Constitutionality of the Children's Internet Protection Act*, 13 ST. THOMAS L. REV. 425, 435 (2000) (noting filtering inefficiency).

10. 47 U.S.C. § 254(h)(6)(D) (2001) (setting forth disabling procedure). The statute provides that "[a]n administrator, supervisor, or other person authorized by the certifying authority . . . may disable the technology protection measure concerned, during use by an adult, to enable access for bona fide research or other lawful purpose." *Id.*; *see* 539 U.S. at 232 (Souter, J., dissenting) (quoting FCC's judgment about local officials' ability to disable filter). The FCC bestows the decision to disable on local librarians whom they believe to be most knowledgeable about the varying circumstances of schools or libraries within those communities. 539 U.S. at 232.

11. Am. Library Ass'n, Inc. v. United States, 201 F. Supp. 2d 401, 401 (E.D. Pa. 2002) (identifying parties to litigation), *rev'd*, 539 U.S. 194 (2003).

12. Am. Library Ass'n, Inc. v. United States, 201 F. Supp. 2d 401, 401 (E.D. Pa. 2002) (articulating claim presented), *rev'd*, 539 U.S. 194 (2003).

13. *See* Am. Library Ass'n, Inc. v. United States, 201 F. Supp. 2d 401, 470 (E.D. Pa. 2002) (characterizing public libraries' Internet access as public forums), *rev'd*, 539 U.S. 194 (2003).

14. *See* Am. Library Ass'n, Inc. v. United States, 201 F. Supp. 2d 401, 489-90 (recognizing filter's inability to survive strict scrutiny), *rev'd*, 539 U.S. 194 (2003). Every technology protection measure offered by the government blocks access to a substantial amount of speech which is constitutionally protected with respect to both adults and minors. *Id.* at 477. The government failed to show that less restrictive alternatives such as requiring minors to use specific filtered Internet terminals and issuing specific library cards to minors indicating that they may only use filtered Internet terminals, are ineffective at furthering the government's interest. *Id.* at 482.

15. 539 U.S. at 202-03 (detailing procedural history).

the use of Internet filters in public libraries did not violate the First Amendment because it was a collection decision as opposed to a restraint on free speech.¹⁶

The Supreme Court recognizes Congress' authority under the United States Constitution's Spending Clause to condition the appropriation of federal funds on certain limitations.¹⁷ The "independent constitutional bar" qualifies this power by stating that the government may not condition benefits on the forfeiture of constitutional rights.¹⁸ At the same time, the government may selectively fund one activity to the exclusion of another.¹⁹

The public forum doctrine determines the First Amendment implications regarding the government's content-based restrictions on speech in certain venues.²⁰ Under public forum principles, the extent to which the government can restrict speech is dependent on the character of the forum.²¹ The three types of forums include: the traditional public forum, the limited public forum created by government designation, and the nonpublic forum.²² Restrictions on speech in public forums must survive strict scrutiny by showing a compelling government interest and that the restriction is narrowly tailored to achieve that interest.²³ Yet, restrictions on speech in nonpublic forums only need to be reasonable in light of the purpose and nature of the property.²⁴

Federal courts have held that public libraries are limited public forums and this classification extends to public libraries' print collections and to Internet access.²⁵ Public libraries with Internet access constitute limited public forums

16. *Id.* at 214 (holding Internet filter does not violate First Amendment).

17. *See, e.g., Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587-88 (1998) (justifying government allocation of funds according to content-based criteria); *Rust v. Sullivan*, 500 U.S. 173, 192-94 (1991) (approving prohibition of federal fund use for programs with abortion counseling); *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987) (upholding conditioning federal highway funds on states adopting minimum drinking age of twenty-one).

18. *See South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987) (outlining limits on Congress' spending power). The Court states that Congress' discretion regarding their spending power may not be used to induce states to engage in activities that would be unconstitutional. *Id.*

19. *Nat'l Endowment of the Arts v. Finley*, 524 U.S. 569, 588 (1998) (quoting *Rust v. Sullivan*, 500 U.S. 173, 192-94 (1991)) (regarding selective funding).

20. *See Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 805-06 (1985) (applying public forum principles to charity drive); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46-48 (1983) (utilizing public forum doctrine to determine nature of school's internal mail system).

21. *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 799-800 (1985) (explaining impact of public forum principles on government restrictions on speech).

22. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983) (describing forums).

23. *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (outlining what government must show to uphold restrictions on speech in public forums); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (explaining speech restrictions in public forums must survive strict scrutiny). *See generally United States v. Carolene Products Co.*, 304 U.S. 144 (1938) (announcing intention to subject certain government restrictions to more exacting judicial scrutiny).

24. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (indicating level of scrutiny applied to non-public forums). *See generally Reed v. Reed*, 404 U.S. 71 (1971) (stating government restrictions must have rational basis to objective asserted).

25. *See Kreimer v. Bureau of Police*, 958 F.2d 1242, 1259 (3d Cir. 1992) (classifying public library as limited public forum); *Mainstream Loudoun v. Bd. of Trs. of the Loudoun County Library*, 24 F. Supp. 2d 552,

because the government opens public libraries and grants Internet access to provide information and ideas to the public.²⁶ While the Supreme Court has not considered the constitutionality of Internet site blocking in libraries, the Court has held that content-based decisions to remove books from public school libraries violate the First Amendment.²⁷

In *United States v. American Library Association, Inc.*, the Court considered whether libraries violated the First Amendment by employing the filtering software that CIPA required.²⁸ The Court explained that Internet access in a public library is not a limited public forum because the government did not provide Internet access to create a public forum for web publishers.²⁹ The proper analysis is whether the restrictions are reasonable in light of the purpose and nature of Internet access in a public library.³⁰

The Court concluded that Internet filtering is analogous to collection decisions.³¹ Libraries must be able to make content-based selections without heightened scrutiny because of limited resources, space, and the role of the public library in selecting quality material.³² The Court reasoned that libraries should be granted that same privilege when collecting material from the Internet.³³ Any possible constitutional problems created by the filter are dispelled by the disabling provision.³⁴ As a result, the Court held that filters on

562-63 (E.D. Va. 1998) (determining Internet access within scope of county's public libraries' public forum designation); see also Steven D. Hinckley, *Your Money or Your Speech: The Children's Internet Protection Act and the Congressional Assault on the First Amendment in Public Libraries*, 80 WASH. U. L.Q. 1025, 1077 (2002) (affirming federal courts classification of public libraries as limited public forum); Richard J. Peltz, *Use the Filter you were Born with: The Unconstitutionality of Mandatory Internet Filtering for the Adult Patrons of Public Libraries*, 77 WASH. L. REV. 397, 460 (2002) (reiterating public libraries limited public forum status extends to libraries' Internet access).

26. See *Mainstream Loudoun v. Bd. of Trs. of the Loudoun County Library*, 24 F. Supp. 2d 552, 562-63 (E.D. Va. 1998) (granting public forum status to Internet access in public libraries). The government opened the public library for the use of the general public for certain expressive activities. *Id.* at 563. The nature of the public library is compatible with the expressive activity of communication of ideas through the Internet. *Id.*

27. *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 870-72 (1982) (holding removal of books from school library based on content violates First Amendment). In the plurality opinion, the Court was careful to specify that the holding was limited to the removal of books from school libraries. *Id.* at 862.

28. 539 U.S. at 203 (reiterating case issue).

29. See *id.* at 206 (concluding public forum status does not extend to Internet access in public libraries); see also *Cornelius v. NAACP Legal Def. and Educ. Fund Inc.*, 473 U.S. 788, 804-05 (1985) (reasoning charity drives are not established to create public forums); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47-48 (1983) (deciding government did not set up school mail boxes to create public forums).

30. See 539 U.S. at 205-06 (explaining why lower level scrutiny is appropriate).

31. See *id.* at 208 (comparing filtering Internet access to libraries' broad discretion to consider content in collection decisions).

32. See *id.* at 206 (explaining why libraries' content-based collection decisions not subject to strict scrutiny).

33. See *id.* at 208 (approving right of library to make content-based decisions on what material to select from Internet).

34. 539 U.S. at 208-09 (arguing ability of disabling provision to absolve constitutional difficulties).

Internet access in public libraries do not violate the First Amendment.³⁵

The Court's reasoning regarding the expressive purpose of Internet access in public libraries is misguided.³⁶ The government opens libraries and provides Internet access to promote the dissemination and receipt of information.³⁷ This affirmative government act supports the premise that Internet access in a public library is a limited public forum and subject to strict scrutiny.³⁸

The Court's reasoning, which equates Internet site blocking to collection decisions, is distorted.³⁹ When a library purchases Internet access, it has essentially purchased access to all sites, and any subsequent filtering restricts access to material already acquired.⁴⁰ Thus, the filter functions to unconstitutionally remove accessible material.⁴¹ The filter does not allow library staff to review and affirmatively select sites for its collection; it simply restricts access to sites.⁴² Filtering does not support the traditional role of the public library of only selecting quality material; rather, many of the "selected" sites are not of the quality that a library would affirmatively select for its collection.⁴³ There is no pre-acquisition scarcity rationale to support content-

35. See *id.* at 214 (concluding filtering Internet access in public libraries does not violate First Amendment).

36. See *id.* at 206-07 (highlighting flaws in Court's reasoning that Internet access in public libraries constitutes nonpublic forum).

37. See *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401, 457 (E.D. Pa. 2002) (noting purpose of Internet access in public libraries), *rev'd*, 539 U.S. 194 (2003); *Mainstream Loudoun v. Bd. of Trs. of the Loudoun County Library*, 24 F. Supp. 2d 552, 563 (E.D. Va. 1998) (commenting on type of expressive activity Internet access in public libraries provides).

38. See *e.g.*, *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1259 (3d Cir. 1992) (characterizing Internet access in public libraries as public forums based on Supreme Court declarations); *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401, 457 (E.D. Pa. 2002) (classifying Internet access in public libraries as public forums), *rev'd*, 539 U.S. 194 (2003); *Mainstream Loudoun v. Bd. of Trs. of the Loudoun County Library*, 24 F. Supp. 2d 552, 563 (E.D. Va. 1998) (evaluating nature of Internet access in public libraries as public forums); see also Susan Nevelow Mart, *The Right to Receive Information*, 95 LAW LIBR. J. 175, 184 (2003) (noting strict scrutiny applies once government opens limited public forums).

39. See 539 U.S. at 208 (questioning Court's collection decision analogy).

40. See *id.* at 241-42 (Souter, J., dissenting) (contending Internet filtering subject to strict scrutiny because it constitutes removal); *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 870-72 (1982) (holding removing books already acquired from school library shelves violates First Amendment); see also Gregory K. Laughlin, *Sex, Lies, and Library Cards: The First Amendment Implications of the Use of Software Filters to Control Access to Internet Pornography in Public Libraries*, 51 DRAKE L. REV. 213, 247 (2003) (quoting holding in *Mainstream Loudoun v. Bd. of Trs. of the Loudoun County Library*, 2 F. Supp. 2d 783, 793-794 (E.D. Va. 1998)); Kiera Meehan, *Installation of Internet Filters in Public Libraries: Protection of Children and Staff vs. the First Amendment*, 12 B.U. PUB. INT. L.J. 483, 493-94 (2003) (commenting on reasoning of *Mainstream Loudoun* that filters function to remove material already acquired); Peltz, *supra* note 25, at 478 (characterizing filtering as removal and not selection).

41. See 539 U.S. at 241-42 (Souter, J., dissenting) (classifying function of filter as unconstitutional).

42. See *Am. Library Ass'n, Inc. v. United States*, 201 F. Supp. 2d 401, 463 (E.D. Pa. 2002) (distinguishing Internet filtering from book selection process), *rev'd*, 539 U.S. 194 (2003).

43. See 539 U.S. at 205 (describing role of public libraries in selecting material of requisite quality); *Am. Library Ass'n, Inc. v. United States*, 201 F. Supp. 2d 401, 463 (E.D. Pa. 2002) (noting many filtered sites would not be considered quality material by libraries), *rev'd*, 539 U.S. 194 (2003); see also Hinckley, *supra* note 25, at 1085 (determining libraries receive filtered Internet information by default not by selecting quality

based decisions because there are no concerns about space and resources due to the nature of the Internet.⁴⁴ As a result, the filtering software appears to violate the First Amendment.⁴⁵

The disabling provision creates more First Amendment concerns because without a universal federal policy, local librarians are left to their own discretion to decide when disabling is appropriate.⁴⁶ It is somewhat contradictory that the FCC trusts local librarians to determine if unblocking sites is appropriate, yet they are not qualified to determine if blocking sites is appropriate at their facility.⁴⁷ If local librarians were as knowledgeable as the FCC contends they are, then CIPA would only serve to interfere with local officials' efforts to develop a solution that would best serve their particular facility.⁴⁸

In *United States v. American Library Association, Inc.*, the Court considered if filters on Internet access in public libraries violated the First Amendment. The Court held that filters did not violate the First Amendment by narrowly interpreting the purpose of Internet access and mistakenly applying the standard of analysis used for print collection decisions to Internet filtering, despite their differing natures. The Court's failure to recognize and protect the expressive value of the Internet only serves to shrink the marketplace of ideas that the First Amendment was designed to protect.

Abigail K. Holland

material); Mani, *supra* note 2, at 206 (explaining how filtering allows material into libraries that would never be considered for print collections). *But see* 539 U.S. at 208 (reasoning libraries' lack of quality judgments about some material does not taint all judgments).

44. *See* 539 U.S. at 236-37 (Souter, J., dissenting) (distinguishing factors of Internet acquisition from factors considered in book acquisition); *see also* Laughlin, *supra* note 40, at 247 (citing reasoning of *Mainstream Loudoun* that restricting Internet access does not save money or space); Meehan, *supra* note 40, at 494 (discussing how resource related rationale inapplicable to Internet); Peltz, *supra* note 25, at 464 (noting Internet access does not raise space or resource issues). *Compare* *Am. Library Ass'n, Inc. v. United States*, 201 F. Supp. 2d 401, 462-63 (E.D. Pa. 2002) (reasoning content-based decisions are not necessary due to nature of Internet access), *rev'd*, 539 U.S. 194 (2003), *with* *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587-88 (1998) (concluding content-based decisions are necessary due to competitive nature of arts funding), *and* *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674-75 (1998) (arguing content-based decisions must be made to fulfill journalistic purposes). *But see* Susannah J. Malen, Note, *Protecting Children in the Digital Age: A Comparison of Constitutional Challenges to CIPA and COPA*, 26 COLUM.-VLA J.L. & ARTS 217, 246 (2003) (reasoning limited resource arguments irrelevant because libraries not required to provide computers).

45. *See* *Am. Library Ass'n, Inc. v. United States*, 201 F. Supp. 2d 401, 479 (E.D. Pa. 2002) (concluding libraries' use of filtering software does not survive strict scrutiny), *rev'd*, 539 U.S. 194 (2003).

46. *See* Meehan, *supra* note 40, at 496 (commenting on problems created by disabling provision of statute).

47. *See* 539 U.S. at 232 (Souter, J., dissenting) (quoting FCC's contention local officials in best position to make disabling decisions).

48. *See* Horowitz, *supra* note 9, at 443 (advocating local officials in best position to make decisions on Internet safety policies).