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The Spending Clause: Funding a Filth-Free Internet or Filtering Out the First Amendment?

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THE SPENDING CLAUSE: FUNDING A FILTH-FREE INTERNET OR FILTERING OUT THE FIRST AMENDMENT?

United States v. American Library Ass'n, 123 S. Ct. 2297 (2003)

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The Children's Internet Protection Act[1] (CIPA) sets conditions on public libraries' receipt of federal financial assistance for Internet access.[2] Under CIPA, libraries must install filters on all of their Internet-connected computers to help block obscene and pornographic images and prevent minors from accessing harmful material.[3] Respondents[4] challenged CIPA on Spending Clause grounds, arguing that CIPA imposes an unconstitutional condition on public libraries.[5] Respondents asserted that libraries should not be required to relinquish their First Amendment right to provide patrons with unfiltered Internet access as a condition on their receipt of federal benefits.[6] The United States District Court for the

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* For my grandmother, Emily Broda.

1. Pub. L. No. 106-554, 114 Stat. 2763 (2000) (codified as amended in scattered sections of 20 U.S.C.).

2. Children's Internet Protection Act § 1712, 20 U.S.C. § 9134 (2000). Public libraries that comply with CIPA are eligible for the E-rate and Library Services and Technology Act (LSTA) programs. Pub. L. No. 104-208, 110 Stat. 3009 (1996) (prior to 2003 amendment). United States v. Am. Library Ass'n, 123 S. Ct. 2297, 2301 (2003). The E-rate program, established by the Telecommunications Act of 1996, Pub. L. No. 104-104, § 101, 110 Stat. 56 (1996), entitles public libraries to buy Internet access at a discount. 47 U.S.C. § 254(h)(1)(B). Pursuant to section 231 of the LSTA, the Institute of Museum and Library Services provides grants to state library administrative agencies to "electronically link[] libraries with educational, social, or information services," "assist[] libraries in accessing information through electronic networks," and "pay[] costs for libraries to acquire or share computer systems and telecommunications technologies." § 231, 110 Stat. at 3009 (current version at 20 U.S.C. § 9141(a)(1)). A public library that does not comply with CIPA stands to lose between twenty and ninety percent of its federal assistance for Internet access, depending upon its economic disadvantage and location in an urban or rural area. 47 C.F.R. § 54.505(b) (2000).

3. 20 U.S.C. § 9134(f)(1). CIPA permits, but does not require, libraries to disable the filters "to enable access for bona fide research or other lawful purposes." *Id.* § 9134(f)(3).

4. Respondents included the American Library Association, regional library organizations, and a group of public libraries, library patrons, and Web site publishers. Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 414-17 (E.D. Pa. 2002), *rev'd*, 123 S. Ct. 2297 (2003).

5. *Id.* at 407.

6. *Id.* Respondents challenged CIPA on three additional grounds. First, filters are unable to block only unprotected speech, therefore libraries that use filters would "impose content-based restrictions on patrons' access to constitutionally protected speech." *Id.* Second, CIPA serves as an unconstitutional prior restraint on speech by granting filtering companies and library administrators complete discretion to suppress speech before it has been received by patrons and before a court has determined that it is not protected by the First Amendment. *Id.* at 407 n.1. Third, "CIPA is

Eastern District of Pennsylvania held CIPA facially unconstitutional on other grounds.[7] Petitioner appealed the decision and the United States Supreme Court granted certiorari.[8] In reversing the district court's decision, the Court HELD, that CIPA does not impose an unconstitutional condition on public libraries.[9]

The Spending Clause empowers Congress to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence and general Welfare of the United States."[10] The Court has traditionally interpreted Congress' spending power broadly.[11] The Court has held that Congress' authority to tax and spend is not restricted by the direct grants of legislative power enumerated in Article I, Section 8 of the Constitution.[12] Rather, Congress' authority exists as a separate substantive power.[13] Thus, Congress may accomplish goals not specifically mentioned in the Constitution through the conditional grant of federal funds.[14]

There are, however, limits on Congress' authority to use conditional subsidies.[15] Under the doctrine of unconstitutional conditions, the Government may not deny an individual a benefit on a basis that infringes a constitutionally protected right, even if the person has no entitlement to

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unconstitutionally vague." *Id.*

7. *Id.* at 479. The district court held that CIPA induced public libraries to violate the First Amendment and enjoined the Government from withholding federal assistance for failure to comply with CIPA. *Id.* at 479, 495. The district court did not decide the question of whether CIPA imposed an unconstitutional condition on public libraries, but noted that Respondents "ha[d] good arguments" for such a claim. *Id.* at 490 n.36. The district court also declined to decide whether CIPA served as an unconstitutional prior restraint on speech or was unconstitutionally vague. *Id.* at 490.

8. *See* United States v. Am. Library Ass'n, 123 S. Ct. 2297 (2003).

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

10. U.S. CONST. art. I, § 8, cl. 1.

11. In *United States v. Butler*, 297 U.S. 1, 65-66 (1936), the Court settled the long-standing debate over the meaning of the Spending Clause, adopting the expansive interpretation originally advocated by Alexander Hamilton and later by Justice Story. James Madison, on the other hand, believed the Spending Clause merely granted Congress the power to tax and spend to further the other enumerated powers in Article I, Section 8 of the Constitution. *Id.* at 65. For an argument that the Court misunderstood Hamilton's view and decided *Butler* according to the contrary Madisonian view, see David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 35-37 (1994).

12. *Butler*, 297 U.S. at 66.

13. *Id.*

14. South Dakota v. Dole, 483 U.S. 203, 206-07 (1987).

15. *See Dole*, 483 U.S. at 207; *Butler*, 297 U.S. at 66.

that benefit.[16] In *FCC v. League of Women Voters*,[17] the Court applied this doctrine in the context of the First Amendment.

In *League of Women Voters*, the Court examined a statutory provision[18] that prohibited editorializing by non-commercial broadcasting stations receiving federal grants.[19] The Court held that Congress could not require broadcasting stations to give up their First Amendment rights as a condition on receiving federal funds.[20] The Court indicated that a condition is unconstitutional if it restricts the actions of the grantee, rather than the activities of the federal program.[21] Under the challenged provision, a broadcasting station that received only one percent of its income from federal grants, and the rest from private sources, was barred from all editorializing.[22] It would not have been possible for the broadcasting station to limit the use of federal funds to all non-editorializing activities.[23] The Court observed that the condition would have been valid if the statute had allowed broadcasting stations to establish affiliate organizations that could use the stations' facilities to editorialize with non-federal funds.[24] In

16. *See* Perry v. Sindermann, 408 U.S. 593, 597 (1972). Further, in *Speiser v. Randall*, 357 U.S. 513, 514-15 (1958), veterans challenged a provision of the California Constitution, which conditioned veterans' receipt of a property-tax exemption on their declaration that they did not advocate the overthrow of the United States Government. The Court stated that denying the exemption to claimants for engaging in certain forms of speech would deter the claimants from engaging in the proscribed speech. *Id.* at 519. The Court concluded that the denial of the exemption was "aimed at the suppression of dangerous ideas." *Id.* (quoting Am. Communications Ass'n v. Donds, 339 U.S. 382, 402 (1950)).

17. 468 U.S. 364 (1984).

18. 47 U.S.C. § 399 (1981) (as amended by the Public Broadcasting Amendments Act of 1981, Pub. L. No. 97-35, 95 Stat. 730 (1981)).

19. *League of Women Voters*, 468 U.S. at 366, 402. Section 399 restricted the "expression of editorial opinion on matters of public importance." *Id.* at 375.

20. *Id.* at 402.

21. *Id.* at 400-01 & n.27. The Court distinguished *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983), which was decided one year earlier. In *Regan*, the Court held that the Spending Clause permitted Congress to refuse to subsidize the lobbying activities of tax-exempt organizations by prohibiting them from using tax-deductible donations to support their lobbying efforts. *Id.* at 550. The Court reasoned that an organization could create two separate affiliates: one to conduct non-lobbying activities using tax-deductible donations, and one to pursue lobbying without contributions. *Id.* at 544. "Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for [Taxation With Representation's] lobbying." *Id.* at 546; *see also* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1468 (1989) (explaining that the Government may set conditions on a recipient's use of public money "so long as it does not impair the recipient's use of its own money").

22. *League of Women Voters*, 468 U.S. at 400.

23. *Id.*

24. *Id.* at 400-01. The Court concluded that without such a statute, *Regan* was not controlling. *Id.* at 401. *See* Sullivan, *supra* note 21, at 1468 (noting that *League of Women Voters* and *Regan* "[s]trangely" did not examine whether requiring rigid separation of public and private expenditures

this way, the broadcasting stations would have been free to exercise their First Amendment rights without losing federal grants.[25]

Subsequently, in *Rust v. Sullivan*,[26] the Court left intact the *League of Women Voters* test, but articulated a more deferential standard for conditions that survive the test.[27] In *Rust*, the Court considered whether a federal program[28] that provided family-planning grants to health care agencies violated the First Amendment rights of doctors by prohibiting abortion counseling.[29] Unlike the Court in *League of Women Voters*, the *Rust* Court found the condition permissible because it merely restricted the activities of the program, not the actions of the grantee.[30] Whereas the *League of Women Voters* condition prohibited broadcasting stations from editorializing outside the scope of the federal program,[31] the *Rust* condition did not force doctors or health care agencies to give up abortion-related speech.[32] The *Rust* condition allowed the grantees to engage in abortion-related speech in projects that were separate and distinct from the program receiving federal family-planning money.[33] Thus, the grantees were free to use private money to finance abortion-related speech outside the federal program.[34]

The Court emphasized that Congress has broad authority to use conditions that pass the *League of Women Voters* test.[35] The Court held that the Government may insist that public funds be spent for their designated purpose.[36] Since Congress had allocated money for family-planning services, Congress could reasonably require doctors to refrain from abortion counseling.[37]

In *Legal Services Corp. v. Velazquez*,[38] the Court restricted the holding of *Rust*, substantially reducing Congress' power to use conditional subsidies. In *Velazquez*, the Court held unconstitutional a statute[39] that

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burdens recipients' constitutional rights).

25. *See League of Women Voters*, 468 U.S. at 400.

26. 500 U.S. 173 (1991).

27. *See id.* at 196-97.

28. Family Planning and Population Research Act of 1970, § 6, 42 U.S.C. §§ 300, 300a-6 (2000).

29. *Rust*, 500 U.S. at 196.

30. *Id.* at 196-97.

31. *Id.* at 197.

32. *Id.* at 196.

33. *Id.*

34. *Id.*

35. *See id.*

36. *Id.*

37. *See id.*

38. 531 U.S. 533 (2001).

39. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134 § 504(a)(16), 110 Stat. 1321 (1996).

prohibited attorneys employed by groups receiving federal legal-services grants from attacking existing welfare laws.[40] The Court noted that the *Rust* Court did not explicitly rely on the fact that the doctors' counseling activities under the federal program amounted to governmental speech.[41] Nonetheless, the Court explained that *Rust* stood for the principle that the Government may impose viewpoint-based conditions when the Government itself is the speaker or when, as in *Rust*, the Government uses private speakers to convey a specific programmatic message.[42] The Court noted, however, that when the Government expends money to encourage a diversity of views from private speakers, it may not impose viewpoint-based conditions.[43]

Although acknowledging that the legal-services program did not seek to encourage a diversity of views, the Court held the program was still entitled to the same protection from viewpoint-based conditions.[44] The key point, the Court explained, was that the program promoted "private speech," rather than a "governmental message."[45] The program facilitated private speech because it enabled attorneys to advise and represent their private clients.[46] The Court concluded that since the Government was financing constitutionally protected expression, it could not use conditional subsidies to exclude certain theories and ideas.[47]

The Court further curbed Congress' spending power, asserting that Congress may not use a conditional subsidy to distort a medium of expression.[48] When the Government attempts to regulate a medium through a restriction on speech, the Court will look to the medium's traditional usage to determine whether the restriction is necessary for the program's purposes.[49] The purpose of the legal-services program was to help welfare claimants receive benefits.[50] The restriction on the attorneys' speech undermined that purpose by distorting the traditional role of attorneys and the legal system.[51]

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40. *Velazquez*, 531 U.S. at 548-49.
41. *Id.* at 541.
42. *Id.*
43. *Id.* at 542 (citing Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 834 (1995)).
44. *Id.*
45. *Id.*
46. *Id.* at 542-43.
47. *Id.* at 548-49.
48. *See id.* at 543.
49. *Id.*
50. *Id.* at 542.
51. *Id.* at 544.

The instant Court[52] did not reject the Internet filtering condition under *Velazquez*'s bar to government distortion of a medium. Instead, the plurality in the instant case upheld the condition under *Rust*'s deferential standard for conditions that pass the *League of Women Voters* test.[53] Congress could insist that public money be spent to carry out the purpose of the Internet-assistance programs: to help libraries satisfy their traditional role of providing worthwhile material.[54] The instant Court stated that filters help libraries provide quality material; therefore, Congress may reasonably impose a condition on public libraries.[55]

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52. Chief Justice Rehnquist wrote the plurality opinion, in which Justices O'Connor, Scalia, and Thomas joined. United States v. Am. Library Ass'n, 123 S. Ct. 2297, 2301 (2003). Justices Kennedy and Breyer concurred in the judgment and each filed a separate opinion. *Id.* at 2309 (Kennedy, J., concurring); *id.* at 2310 (Breyer, J., concurring). Neither Justice Kennedy nor Breyer addressed Respondents' unconstitutional conditions claim. *See id.* at 2309 (Kennedy, J., concurring); *id.* at 2310-12 (Breyer, J., concurring).

53. *See id.* at 2307-09 (plurality opinion). Respondents' unconstitutional conditions claim could only succeed if the instant Court recognized that public libraries have First Amendment rights. *See id.* at 2307 (plurality opinion). The instant Court noted that it is an open question whether governmental entities have First Amendment rights. *See id.* (plurality opinion). The instant Court declined to decide the question, asserting that an unconstitutional conditions claim would fail on the merits. *Id.* (plurality opinion). The only Supreme Court opinion to consider this issue was a concurrence by Justice Stewart, in which Chief Justice Burger and Justice Rehnquist joined. *See* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 139 (1973) (Stewart, J., concurring) ("The First Amendment protects the press from governmental interference; it confers no analogous protection on the Government."); *id.* at 139 n.7 ("'The purpose of the First Amendment is to protect private expression and nothing in the guarantee precludes the government from controlling its own expression or that of its agents.'") (quoting THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 700 (1970)).

Some lower federal courts have considered the question but have declined to decide it. The Seventh Circuit stated that it was not "out of the question that a municipality could have First Amendment rights." Creek v. Village of Westhaven, 80 F.3d 186, 192 (7th Cir. 1996). The court noted that there is a valid argument that the "marketplace of ideas would be unduly curtailed if municipalities could not freely express themselves." *Id.* at 193. The Eastern District of Pennsylvania found there to be no textual support for distinguishing between municipal corporations and private corporations, which the Supreme Court has recognized have First Amendment rights. Am. Library Ass'n v. United States, 201 F. Supp. 2d 407, 490 n.36 (E.D. Pa. 2002), *rev'd*, 123 S. Ct. 2297 (2003); *see also* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.").

54. *Am. Library Ass'n*, 123 S. Ct. at 2308 (plurality opinion).

55. *Id.* (plurality opinion). The instant Court stated that because public libraries have traditionally excluded pornography from their print and video collections, Congress could therefore impose a parallel limitation on their Internet programs. *Id.* (plurality opinion). The district court noted, however, that many libraries include sexually explicit material in their print collections, such as the books THE JOY OF SEX and THE JOY OF GAY SEX. *Am. Library Ass'n*, 201 F. Supp. 2d at 420. Web sites that contain similarly explicit material would likely be blocked by Internet filters. *See id.* at 428.

The instant Court distinguished *Velazquez*, restricting its holding to situations in which the grantee is "pit[ted] . . . against the Government."[56] The instant Court stated that public libraries, unlike attorneys representing welfare claimants, have no adversarial role against the Government.[57] Thus, there was no comparable assumption that library subsidies must be free of conditions.[58] The instant Court further found *Velazquez* inapplicable, stating that *Velazquez* only bars viewpoint-based conditions when the Government spends money to encourage a diversity of views from private speakers.[59] Public libraries install Internet terminals to provide patrons with worthwhile material, not to provide a forum for private Web publishers.[60]

In his dissent, Justice Stevens criticized the plurality's dismissal of *Velazquez*, arguing that that case's holding was "not limited to instances in which the recipient of Government funds might be 'pit[ted]' against the Government."[61] Justice Stevens asserted that the filtering condition was unconstitutional because it distorted the normal usage of library Internet terminals as sources of a wide array of information.[62] He reasoned that filters accidentally block protected speech, while failing to block many pornographic images.[63]

The instant Court expanded Congress' authority to use conditional subsidies by altering *Velazquez*, extending the scope of *Rust*, and neglecting the *League of Women Voters* test. First, by limiting *Velazquez* to situations in which the grantee is directly pitted against the Government, the instant Court undermined the significance of *Velazquez*'s bar to government distortion of a medium of expression.[64] The instant decision demonstrates that Congress will only be blocked from distorting a medium in instances of direct opposition between the grantee and Government—for example, in litigation.[65] Consequently, the instant decision enables Congress to distort the traditional usage of public libraries.[66]

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56. *Am. Library Ass'n*, 123 S. Ct. at 2308-09 (plurality opinion).

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

58. *Id.* (plurality opinion).

59. *Id.* at 2309 n.7 (plurality opinion) (citing Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 834 (1995)).

60. *Id.* (plurality opinion).

61. *Id.* at 2316 n.5 (Stevens, J., dissenting) (quoting *id.* at 2309 (plurality opinion)). Justices Souter and Ginsburg joined in Part II of Justice Stevens' dissent, which discusses the unconstitutional conditions claim. *Id.* at 2318 (Souter, J., dissenting).

62. *Id.* at 2316-17 (Stevens, J., dissenting).

63. *Id.* at 2313, 2316-17 (Stevens, J., dissenting).

64. *See id.* at 2308-09 (plurality opinion).

65. *See id.* at 2309 (plurality opinion).

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

While public libraries may not be in direct opposition to the Government, their traditional role as centers of "freewheeling inquiry"[67] creates the presumption that conditions on their subsidies will be free of content-based restrictions.[68] The mission of public libraries is to provide access to a wide range of views and ideas and to contest encroachments upon the freedom to read.[69] A condition mandating Internet filters distorts this mission by "deny[ing] patrons access to constitutionally protected speech that libraries would otherwise provide."[70] Furthermore, the condition usurps libraries' authority to make collection decisions. Libraries are forced to accept the collection decisions of private filtering companies,

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67. Bd. of Educ. v. Pico, 457 U.S. 853, 915 (1982) (Rehnquist, J., dissenting).

68. The instant Court states that in order to facilitate learning and cultural enrichment, "libraries must have broad discretion to decide what material to provide to their patrons." *Am. Library Ass'n*, 123 S. Ct. at 2304 (plurality opinion). The instant Court further provides:

> A library's need to exercise judgment in making collection decisions depends on its traditional role in identifying suitable and worthwhile material; 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. Most libraries already exclude pornography from their print collections because they deem it inappropriate for inclusion. We do not subject these decisions to heightened scrutiny; it would make little sense to treat libraries' judgments to block online pornography any differently, when these judgments are made for just the same reason.

Id. at 2306 (plurality opinion); *see also* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (noting the nation's "commit[ment] to safeguarding academic freedom" and the "robust exchange of ideas").

69. The American Library Association's Freedom to Read Statement holds that "[i]t is in the public interest for publishers and librarians to make available the widest diversity of views and expressions, including those that are unorthodox or unpopular with the majority." AM. LIBRARY ASS'N, THE FREEDOM TO READ STATEMENT (2000), *available at* http://www.ala.org/content/NavigationMenu/Our_Association/Intellectual_Freedom3'/Statements_and_Policies/Freedom_to_Read_Statement/Freedom_to_Read_Statement.htm. It further states that "[i]t is the responsibility of... librarians... to contest encroachments upon [this] freedom [to read] by individuals or groups seeking to impose their own standards or tastes upon the community at large." *Id.*

70. Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 494 n.36 (E.D. Pa. 2002). Benjamin Edelman, an information technology specialist at Harvard Law School's Berkman Center, testified as an expert witness before the district court. *Id.* at 442 & n.14. He tested more than 500,000 Web sites likely to be erroneously blocked, to determine whether they would in fact be blocked by four commonly used filtering programs. *Id.* at 443. Edelman discovered that filters block innocuous information, including Web sites of religious organizations, health organizations, and political candidates. *Id.* at 446-47. Erroneously blocked Web sites included: the Knights of Columbus Council 4828, a Catholic men's group associated with St. Patrick's Church, blocked by one program's "Adult/Sexually Explicit" category; Kelley Ross, a Libertarian candidate for the California State Assembly, blocked by a third program's "Nudity" category; the Willis-Knighton Cancer Center, a Shreveport, Louisiana cancer treatment facility, blocked by another program's "Sex" category. *Id.*

which do not make decisions based on whether a Web site contains protected speech or whether it would benefit a library's collection.[71]

Second, by restricting the *Velazquez* Court's protection against viewpoint-based conditions to programs that encourage a diversity of private views, the instant Court undercuts the protection *Velazquez* accords to programs that only facilitate private speech.[72] The instant decision suggests that programs which merely promote private speech will fall outside *Velazquez* and therefore be treated as governmental speech under *Rust*, subject to viewpoint-based conditions.[73] The instant Court thus expands the scope of *Rust*: It increases Congress' ability to restrict speech it disfavors by stating that it is merely insisting that its funds be used for their designated purpose.[74]

Even though public libraries do not provide Internet access to encourage a diversity of views from Web publishers, Internet-assistance programs arguably facilitate private speech and qualify for protection under *Velazquez*.[75] Libraries set up Internet terminals to enable patrons to access speech from a multitude of private sources.[76] Moreover, Internet-assistance programs do not purport to convey a specific governmental message.[77] However, because libraries do not intend to create a forum for Web publishers, the instant Court treats private Internet speech as it treated the doctors' governmental speech under *Rust*, making it subject to viewpoint-based conditions.[78]

The instant Court further expands Congress' authority to use conditional subsidies by overlooking the *League of Women Voters* test. The *League of Women Voters* Court indicated that a condition will be

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71. *Id.* at 493 n.36; *see also id.* at 429-30 (noting that filtering companies do not use any category definition that is "identical to CIPA's definitions of visual depictions that are obscene, child pornography, or harmful to minors"). The uniform resource locators (URLs) of the Web sites contained in the filter companies' category lists are considered "proprietary information and are unavailable for review by customers or the general public." *Id.*

72. The instant Court stated, "*Velazquez* held only that viewpoint-based restrictions are improper 'when the [government] does not itself speak or subsidize transmittal of a message it favors *but instead expends funds to encourage a diversity of views from private speakers.*'" *Am. Library Ass'n*, 123 S. Ct. at 2309 n.7 (plurality opinion) (alteration in original) (emphasis added) (quoting Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 834 (1995)).

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

74. *See id.* at 2308 (plurality opinion).

75. *See* 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, 459 (2002) (asserting that public library Internet terminal speech should be analyzed under *Velazquez* and *Rosenberger*, rather than under *Rust*).

76. *See Am. Library Ass'n*, 123 S. Ct. at 2301 (plurality opinion) ("By connecting to the Internet, public libraries provide patrons with a vast amount of valuable information.").

77. Peltz, *supra* note 75, at 459.

78. *See Am. Library Ass'n*, 123 S. Ct. at 2307-08 (plurality opinion).

found unconstitutional if it restricts the actions of the grantee, rather than the activities of the federal program.[79] CIPA requires libraries to install filters on *all* Internet-connected computers if the libraries receive *any* federal subsidies,[80] just as the *League of Women Voters* provision required broadcasting stations to cease *all* editorializing if they received *any* federal grants.[81] Consequently, libraries are even forced to install filters on computers acquired without federal assistance.[82]

Like the anti-editorializing condition, CIPA does not contain a provision allowing libraries to set up affiliates that could use privately acquired computers to provide unfiltered Internet access with non-federal funds.[83] Under the *League of Women Voters* reasoning, the absence of this provision would render the filtering condition unconstitutional.[84] By neglecting the *League of Women Voters* test, the instant Court avoids a rule that would have required it to invalidate the filtering condition.

The instant Court presumably enhanced Congress' power to use the filtering condition because it wished to promote the favorable policy goal of protecting children from Internet pornography.[85] In upholding the condition, however, the instant Court undercut a library's ability to deal with the problem in a more effective manner that is less restrictive of the library's First Amendment rights, and less burdensome on patrons' access to protected speech.[86] The instant Court was undoubtedly influenced by the fact that CIPA only limited Internet access in public libraries; it did not

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79. *See supra* note 21 and accompanying text.

80. 20 U.S.C. § 9134(f)(1) (2003).

81. FCC v. League of Women Voters, 468 U.S. 364, 400 (1984).

82. *See Am. Library Ass'n*, 123 S. Ct. at 2318 (Stevens, J., dissenting).

83. *See* 20 U.S.C. § 9134(f)(1).

84. *See League of Women Voters*, 468 U.S. at 400-01.

85. See *Am. Library Ass'n*, 123 S. Ct. at 2301-02 (plurality opinion) (noting that "[t]he accessibility of [pornography on the Internet] has created serious problems for libraries, which have found that patrons of all ages, including minors, regularly search for online pornography" and noting that staff, passersby, and children are consequently exposed to pornography on library computers).

86. Alternatives to filters include supervision of computer users, placing Internet terminals in locations where their displays cannot be easily seen by other patrons, and installing privacy screens or recessed monitors. *Id.* at 2305 n.3 (plurality opinion). Some libraries that have decided to forego federal Internet assistance restrict children's access to librarian- or parent-approved Web sites. *See* Alex L. Goldfayn, *Library Charts Own Internet Path for Kids*, CHI. TRIB., Aug. 23, 2003, at C4; Candace Rondeaux, *Internet Law Puts Libraries in a Bind*, ST. PETERSBURG TIMES, Aug. 12, 2003, Clearwater Times, at 1.

In his dissent, Justice Stevens argued that locally designed solutions are most suitable to meet local circumstances. *Am. Library Ass'n*, 123 S. Ct. at 2314 n.3 (Stevens, J., dissenting) (citing Miller v. California, 413 U.S. 15, 24-25 (1973)). Justice Stevens noted that Internet pornography is less of a problem for libraries in rural districts than it is for libraries in urban locations. *Id.* (Stevens, J., dissenting).

restrict Internet access in the privacy of one's own home.[87] However, this legal distinction will be of little consequence to low-income patrons who depend upon library Internet terminals. These patrons may now be forced to reveal their research goals to library administrators in the hope of having the filters disabled.[88] For many libraries, the choice between foregoing federal assistance and submitting to the filtering condition is not a real choice. Without federal assistance, libraries may not be able to continue public Internet services.[89] Yet by installing filters, libraries will inevitably thwart patrons' access to ideas and information. Libraries are therefore faced with the choice between "the rock and the whirlpool."[90]

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87. *See High Court Post-Mortem*, LEGAL TIMES, Aug. 18, 2003, at 24. Paul M. Smith of Jenner & Block, LLC, one of the practitioners that contributed to the symposium, represented the Respondents in the Petitioner's appeal to the Court. *Am. Library Ass'n*, 123 S. Ct. at 2301.

Outside the public library context, the Court has struck down past attempts to control Internet pornography. The Communications Decency Act of 1996 (CDA), Pub. L. No. 104-104, tit. v, 110 Stat. 56 (1996), imposed criminal penalties on people who knowingly transmitted obscene or indecent materials to children. 47 U.S.C. § 223(a)-(e) (2000). The Court held the CDA unconstitutionally burdened protected speech. Reno v. ACLU, 521 U.S. 844, 868 (1997). The Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009 (1996), banned the distribution and possession of images that were, or appeared to be, of a minor engaging in sexually explicit conduct, including images that were wholly computer-generated. 18 U.S.C. §§ 2251-2256(8)(B) (2000). The Court held the ban on virtual child pornography abridged the freedom to engage in a substantial amount of lawful speech, and was therefore overbroad and unconstitutional under the First Amendment. Aschroft v. Free Speech Coalition, 535 U.S. 234, 256 (2002). The Court noted that "[t]he Government may not suppress lawful speech as the means to suppress unlawful speech." *Id.* at 255. *See generally* Jason Baruch, Comment, *Constitutional Law: Permitting Virtual Child Pornography—A First Amendment Requirement, Bad Policy, or Both?*, 55 FLA. L. REV. 1073.

88. *See* 20 U.S.C. § 9134(f)(3) (2000). Ten percent of American Internet users, or 14.3 million people, access the Internet at a public library. Am. Library Ass'n v. United States, 201 F. Supp. 2d. 401, 422 (E.D. Pa. 2002). However, people with lower incomes use public library Internet terminals more than people with higher incomes: about twenty percent of Internet users with household family incomes of less than $15,000 per year use public library Internet terminals. *Id.*

89. *See* Rondeaux, *supra* note 86 (noting that the threat of losing federal assistance "looms large for small- to medium-sized libraries and will likely outweigh the $2,000 to $10,000 cost of installing the filters").

90. The Court used this metaphor in an early case involving conditional subsidies. *See* Frost v. R.R. Comm'n, 271 U.S. 583, 593 (1926) ("In reality, the [beneficiary] is given no choice, except a choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden."). This metaphor is derived from Homer's THE ODYSSEY. *See* HOMER, THE ODYSSEY 191-92 (E.V. Rieu trans., Penguin Books 1964) (n.d.) (narrating Odysseus' confrontation with the six-headed monster, Scylla, and the whirlpool, Charybdis).