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Adding *Marks* to the Mix of an Already Muddled Decision Regarding Public Forums and Freedom of Speech on the Internet

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I. INTRODUCTION

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech."[1] Generally, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[2] But Congress and the Supreme Court have recognized that, in certain circumstances, restrictions on free speech are necessary.[3] This results in the difficult question of when and where such restrictions are appropriate. Adding public libraries and Internet-related free speech to the mix muddles things further.

In 1996, Congress began offering federal assistance to help public libraries provide Internet access to library patrons.[4] From 1996 to 2002, Congress appropriated over $200 million to help public libraries connect to the Internet.[5] In doing so, Congress made it easier for library patrons to access obscene images and child pornography,[6] both of which are abundantly available on the Internet.[7] In response to this unintended consequence, Congress enacted the Children's Internet Protection Act[8] ("CIPA"), which provides:

> [A] library may not receive E-rate or LSTA assistance unless it has "a policy of Internet safety for minors that includes the operation of a

1. U.S. CONST. amend. I.

2. Ashcroft v. ACLU, 535 U.S. 564, 573 (2002) (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983) (quoting Police Dep't v. Mosley, 408 U.S. 92, 95 (1972))).

3. *See* Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988) ("First Amendment principles, like other principles, are subject to limitations.").

4. In 1996, Congress established the E-rate program that allowed qualifying public libraries to receive Internet access at a discount. 47 U.S.C. § 254(h)(1)(B) (2003). In 2002, pursuant to the Library Services and Technology Act ("LSTA"), Congress agreed to help "pa[y] costs for libraries to acquire or share computer systems and telecommunications technologies." 20 U.S.C. § 9141(a)(1)(E) (2003).

5. *See* United States v. Am. Library Ass'n, 539 U.S. 194, 199 (2003) (plurality opinion).

6. *Id.*

7. *Id.*

8. Pub. L. No. 106-554, 114 Stat. 2763A-335 (2000) (codified as amended in 47 U.S.C. § 254 and scattered sections of 20 U.S.C.).

> technology protection measure . . . that protects against access" by all persons to "visual depictions" that constitute "obscen[ity]" or "child pornography," and that protects against access by minors to "visual depictions" that are "harmful to minors."[9]

CIPA defines an acceptable "technology protection measure" as "a specific technology that blocks or filters Internet access to the material" covered by CIPA.[10]

A group of public libraries, library associations, library patrons, and Web site publishers brought suit challenging the facial constitutionality of CIPA.[11] They argued that Internet filters unconstitutionally restricted free speech and thus Congress violated its spending power by requiring public libraries to act in an unconstitutional manner as a condition upon the receipt of federal funds.[12]

In a plurality decision, the U.S. Supreme Court upheld the constitutionality of the Act; six of the Justices concurred in the outcome, but no majority agreed on the reasoning.[13] Thus, the Court left a fractured opinion from which lower courts will need to glean some sort of guidance. To find the precedential value of *American Library Ass'n*, courts must rely on *Marks v. United States*,[14] the purported "Rosetta Stone" of plurality opinions. *Marks* states that where there is a plurality opinion, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ."[15]

Unfortunately, this tool for extrapolating the "true" holding of a plurality decision is quite difficult, if not impossible, to employ. As noted by numerous judges and commentators, the *Marks* test is much easier stated than applied.[16] Thus, before determining which of the *American Library Ass'n* concurrences is guiding under *Marks*, one must evaluate how *Marks* should be used.

This Note starts with a brief introduction to the facts and procedural history of *American Library Ass'n*, as well as a quick review of the associated opinions. Part III discusses in detail when, where, and how the

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9. *Am. Library Ass'n*, 539 U.S. at 201 (plurality opinion) (citing 20 U.S.C. § 9134(f)(1)(A)(i), (B)(i) (2003); 47 U.S.C. § 254(h)(6)(B)(i), (C)(i) (2003)).

10. 47 U.S.C. § 254(h)(7)(I) (2003).

11. Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 407 (E.D. Pa. 2002).

12. *Id.*

13. *See* United States v. Am. Library Ass'n, 539 U.S. 194 (2003).

14. 430 U.S. 188 (1977).

15. *Id.* at 193 (citing Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion) (emphasis added)).

16. *See infra* Part III.

Marks doctrine should be applied. Part IV delves deeper into the *American Library Ass'n* opinions, evaluates the opinions under *Marks*, and concludes that Justice Kennedy's concurrence is the holding of the Court. Part V provides a short conclusion.

II. *UNITED STATES V. AMERICAN LIBRARY ASS'N*: BACKGROUND

A. Facts

In response to the problems created by the availability of obscenity and pornography on Internet terminals in public libraries, Congress enacted the Children's Internet Protection Act.[17] Under this Act, a public library may not receive federal assistance in providing Internet access unless it implements software filters[18] to block obscene images and child pornography.[19] Since obscenity and child pornography are not constitutionally protected speech, requiring libraries to block such speech as a condition of receiving federal funding is not facially unconstitutional.[20] However, CIPA is constitutionally questionable because the required software filters often "over-block"[21] constitutionally protected speech.

B. Procedural History

Based on the over-blocking tendency of Internet filters, a group of libraries, library associations, library patrons, and Web site publishers brought a lawsuit claiming that CIPA is unconstitutional.[22] The plaintiffs forwarded two arguments: (1) CIPA is unconstitutional because the Internet, accessed via public libraries, is a public forum and any

17. *See Am. Library Ass'n*, 539 U.S. at 198-99 (plurality opinion).

18. Internet filters, as used in this Note, refer to tools and software that prevent someone who accesses the Internet from visiting specific Web sites. While some sites are blocked based on an enumerated list of specific Web sites that the filter administrator has chosen to exclude, the majority of excluded sites are blocked when the filtering software deems a certain site inappropriate based on the filter's "analysis" of the Web site's content.

19. *Am. Library Ass'n*, 539 U.S. at 199 (plurality opinion).

20. *See* South Dakota v. Dole, 483 U.S. 203 (1987). *Dole* holds that Congress may not induce the recipients of federal funds to "engage in activities that would themselves be unconstitutional" as a condition upon the receipt of the federal funds. *Id.* at 210. Here, the plaintiffs challenged CIPA's constitutionality arguing that the Act violated Congress's spending power under *Dole* because it required libraries to act unconstitutionally (by enacting Internet filters) as a condition upon the receipt of federal E-rate and LSTA funds.

21. Over-blocking refers to the tendency of Internet filters to block constitutionally protected speech in addition to obscenity and child pornography. As noted by the district court, "[F]iltering programs erroneously block a huge amount of speech that is protected by the First Amendment." Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 448 (E.D. Pa. 2002).

22. *Id.* at 407.

restrictions on speech must overcome strict scrutiny review; and (2) that Congress exceeded its authority under the Spending Clause by imposing an unconstitutional condition upon the receipt of federal funds.[23] In its defense, the government argued that a public library's decision to exclude certain books and publications from its collection has always been reviewed under rational basis rather than strict scrutiny review and that a library's decision to block certain Internet material and Web sites should be subject to the same standard.[24]

After undertaking a lengthy discussion of the public forum doctrine,[25] the United States District Court for the Eastern District of Pennsylvania concluded that Internet access in public libraries amounted to both a designated public forum[26] and a traditional public forum.[27] The court then held that Internet filters were content-based restrictions on access to a public forum and were therefore subject to strict scrutiny analysis.[28] Based on this heightened standard of review, the court held CIPA facially unconstitutional because the Act was not narrowly tailored to further the state's compelling interest in preventing the dissemination of obscenity and child pornography.[29] In other words, the district court found that other less restrictive means of preventing minors from accessing obscenity and pornography at public libraries were available, and thus, the Internet filters did not survive strict scrutiny review.[30]

C. The Opinions: Briefly[31]

Chief Justice Rehnquist wrote for the plurality[32] and held that CIPA was facially constitutional because the filtering requirements met the standards established by rational basis review—the restrictions were rationally related to the problem of people accessing obscenity and child

23. *See id.*

24. *See id.* at 407, 409.

25. *See generally id.* at 454.

26. *Id.* at 457.

27. *Id.* at 466.

28. "Software filters, by definition, block access to speech on the basis of its content, and content-based restrictions on speech are generally subject to strict scrutiny." *Id.* at 454.

29. The District Court agreed that the government had a compelling state interest in preventing the dissemination of obscene material and child pornography. *Id.* at 471. But a compelling interest, on its own, will not overcome the exacting standards of strict scrutiny. Any restrictions proffered to further the government's interest must be narrowly tailored or the least restrictive means of achieving that interest. *Id.* at 477.

30. *Id.*

31. For a more detailed look at these opinions, *see infra* Part IV.A-D.

32. The plurality included Chief Justice Rehnquist, Justice O'Connor, Justice Scalia, and Justice Thomas.

pornography via public library Internet access.[33] The Chief Justice dismissed the public forum principles relied upon by the lower court as inapplicable and instead relied upon rational basis review which, he argued, is the standard of review that the Court has traditionally applied when evaluating public libraries' collection-based decisions.[34]

Justice Breyer concurred in the decision but felt that intermediate scrutiny, as opposed to rational basis, was the appropriate standard of review.[35] Like the plurality, Justice Breyer dismissed public forum principles as inapplicable. He concluded on intermediate scrutiny based on Supreme Court jurisprudence applying intermediate scrutiny where First Amendment and freedom of speech issues intersect.[36]

Justice Kennedy also concurred in the judgment but reached his conclusion in a much shorter fashion. Rather than address the standard of review issue, Justice Kennedy noted that if libraries, upon the request of patrons, removed or deactivated the Internet filters in a timely manner, then no First Amendment rights would be violated.[37] Therefore, CIPA does not require libraries to act unconstitutionally because the unconstitutional act would be failing to remove or deactivate the filters, *not* merely implementing them.[38]

Although dissenting, Justice Stevens agreed that it is "neither inappropriate nor unconstitutional for a local library to experiment with filtering software as a means of curtailing children's access to Internet Web sites."[39] However, he held CIPA to be facially unconstitutional because it "operates as a blunt nationwide restraint on adult access to an enormous amount of valuable information."[40] As will be discussed in Part IV.F, Justice Stevens' reasoning is somewhat suspect and his conclusions seem to support the argument forwarded by Justice Kennedy.

In a dissent that paralleled the reasoning of the lower court, Justice Souter[41] argued that filtering Internet access at public libraries violated library patrons' First Amendment rights and was thus unconstitutional.[42] Consequently, CIPA was unconstitutional because it required libraries to

33. *See* United States v. Am. Library Ass'n, 539 U.S. 194, 214 (2003) (plurality opinion).

34. *See id.* at 205.

35. *Id.* at 217 (Breyer, J., concurring).

36. *Id.*

37. *Id.* at 214 (Kennedy, J., concurring).

38. *Id.*

39. *Id.* at 220 (Stevens, J., dissenting).

40. *Id.* (internal quotations omitted).

41. Justice Souter's dissent was joined by Justice Ginsburg.

42. "I would hold in accordance with conventional strict scrutiny that a library's practice of blocking would violate an adult patron's First and Fourteenth Amendment right to be free of Internet censorship . . . ." *Am. Library Ass'n*, 539 U.S. at 242 (Souter, J., dissenting).

perform unconstitutional acts in order to remain eligible for federal funding—a clear violation of Congress's spending power.[43]

With no clear majority, lower courts must determine which of the opinions is guiding for precedential purposes.

III. *MARKS*: WHEN AND WHERE IT WORKS

In *Marks v. United States*,[44] the Supreme Court explained how to determine the precedential value of a plurality decision. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'"[45] The Court has not elaborated on what "narrowest grounds" means, but it is generally accepted that the phrase refers to "the ground that is most nearly confined to the precise fact situation before the Court"[46] or "'the rationale offered in support of the result that would affect or control the fewest cases in the future.'"[47]

This theoretical framework for discovering the "true" holding of a plurality decision seems straightforward enough: look at all the opinions that concur in the judgment and decide which is the narrowest or least restrictive. Unfortunately, as both courts and commentators have noted, this purported Rosetta Stone of plurality opinions is "more easily stated than applied . . . ."[48]

Most of the confusion surrounding the *Marks* analysis arises from a single question: whether the concurring opinions must share some fundamental basis or similar reasoning before being proffered as the Court's true holding. The answer to this question is critical; if underlying similarities are not required, *Marks* seems to allow a single Justice to change the holding of a case by concurring instead of dissenting. Justice Powell's opinion in *Regents of University of California v. Bakke*[49] is illustrative. Because Justice Powell seemed to concur on the narrowest grounds, several lower courts identified his opinion as the true holding of the case. However, other courts and numerous commentators have

43. "[T]he Act's blocking requirement in its current breadth calls for unconstitutional action by a library recipient, and is itself unconstitutional." *Id*. at 243.

44. 430 U.S. 188 (1977).

45. *Id.* at 193 (citing Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)).

46. United States v. Martino, 664 F.2d 860, 872-73 (2d Cir. 1981).

47. *Id.* (quoting Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 764 (1980)).

48. Nichols v. United States, 511 U.S. 738, 745-46 (1994).

49. 438 U.S. 265 (1978).

questioned the precedential value of Justice Powell's concurrence because the other eight Justices explicitly rejected the rule proffered by Justice Powell.[50] It seems illogical to extract precedent from a concurring opinion that no other Justice agrees with.

In addition to allowing a single Justice to "speak for the Court" where the other eight Justices do not support the reasoning, applying *Marks* to the narrowest concurrence without looking for underlying congruence creates the potential for judicial politicking. The following hypothetical illustrates: assume there is a split Court with four Justices supporting the plurality, one Justice concurring, and four Justices dissenting. What is to stop a would-be dissenting Justice, who obviously does not agree with the decision reached by the plurality, from concurring on extremely narrow grounds rather than dissenting? By concurring, the Justice may have to stomach an unfavorable ruling in the case at bar, but he or she can significantly affect how courts treat similar cases in the future.

In this hypothetical, the originally dissenting but now concurring Justice's opinion is the most narrow and thus, under *Marks*, the precedential opinion of the case. A Justice could conceivably use the *Marks* doctrine as a weapon to impose judicial precedent contrary to majority reasoning. Presumably, a Supreme Court Justice would not attempt to manipulate the system in such a way. However, the possibility of such manipulation still exists.

Problems such as the potential for manipulative abuse of the *Marks* doctrine and the ability of a single Justice to rule for the entire Court where no other Justice supports the reasoning can be solved by requiring that underlying similarities and commonalities be established before applying *Marks*. Many lower courts[51] and commentators[52] support this approach.

The Supreme Court, however, has failed to clarify the issues surrounding the *Marks* analysis. In fact, the Court recently had the opportunity to illuminate the incongruities in the application of *Marks* but failed to do so. In *Grutter v. Bollinger*,[53] the Court was asked to

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50. *See, e.g.*, Cass R. Sunstein, *Public Deliberation, Affirmative Action, and the Supreme Court*, 84 CAL. L. REV. 1179, 1185 (1996) ("The other eight participating justices explicitly rejected [Justice Powell's] rule. Ironically, the case stands for a proposition that only one justice thought sensible.").

51. *E.g.*, King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991) ("In essence, the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment.").

52. *E.g.*, Lackland H. Bloom, Jr., Hopwood, Bakke *and the Future of the Diversity Justification*, 29 TEX. TECH L. REV. 1, 29 (1998) ("The *Marks* approach may not be particularly useful in a case where the plurality opinions are arguably inconsistent with each other.").

53. 539 U.S. 306 (2003).

decide whether Justice Powell's *Bakke* opinion was valid precedent or whether the *Marks* analysis was inapplicable to *Bakke* due to the lack of underlying agreements or similarities in the reasoning of the concurring Justices. The Court dodged the question stating, "[w]e do not find it necessary to decide whether Justice Powell's opinion is binding under *Marks*. It does not seem 'useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it.'"[54] Thus, rather than spell out how *Marks* is correctly applied, the Court decided that the "degree of confusion following a splintered decision . . . is itself a reason for reexamining that decision."[55]

Unfortunately, the Supreme Court's position in *Grutter* does nothing to clarify the confusion surrounding the *Marks* doctrine. In essence, the Court said that if enough lower courts reached differing results under the *Marks* analysis, then the Supreme Court might simply throw the *Marks* application out the window and reconsider the entire issue.[56] Although lower courts must still apply *Marks*, the question of whether or not *Marks* applies when the concurring opinions do not share any common reasoning remains unclear.

Ultimately, the "correct" application of *Marks* remains unclear. While one can argue that *Marks* should simply apply to the narrowest concurrence, the inherent problems and difficulties of this approach, as previously discussed, lend support to the theory requiring a threshold inquiry into underlying similarities and commonalities before using *Marks* to glean guiding principles from a fractured decision. This Note proceeds on the basis that *Marks* is appropriately applied by looking to the underlying reasoning of the concurrences rather than to the narrowest concurrence itself.

IV. *AMERICAN LIBRARY ASS'N* UNDER *MARKS*

Because *American Library Ass'n* is a plurality decision, lower courts should apply the *Marks* doctrine in order to find the "true" holding of the Court.[57] Rather than following the opinion concurring on the narrowest grounds, lower courts should dissect the various opinions looking for similarities and reasoning supported by a majority of Justices.[58] With *Marks* application in mind, this Note now turns to the *American Library*

54. *Id.* at 325 (citing Nichols v. United States, 511 U.S. 738, 745-46 (1994)).
55. *Nichols*, 511 U.S. at 746.
56. *See id*.
57. Marks v. United States, 430 U.S. 188, 193 (1977).
58. *See supra* Part III.

Ass'n opinions in search of common underlying reasoning so that the precedential value of the case can be established.

A. Dissents

Despite basic confusion surrounding the appropriate application of the *Marks* doctrine to *American Library Ass'n*, one thing is clear: the dissents' conclusion on strict scrutiny as the standard of review is not the holding of the Court. Even if one wants to argue that *Marks* does not require similar underlying commonalities and reasoning, the rule itself clearly states that only concurring opinions will be evaluated in the analysis.[59] As declared by the Supreme Court, "the holding of the Court may be viewed as that position taken by those Members who *concurred* in the judgments on the narrowest grounds . . . ."[60] Thus, by definition, the *Marks* analysis will not evaluate the reasoning or grounds underlying a dissenting opinion.[61] While it may be unclear which of the concurring opinions is the "holding" for *stare decisis* purposes, it is clear that the dissents do not qualify.

B. The Plurality

In a plurality opinion, Chief Justice Rehnquist reversed the district court and upheld CIPA as facially constitutional.[62] The Chief Justice first attacked the district court's application of the public forum doctrine to Internet access at libraries.[63] He then argued that without the public forum classification, content-based restrictions on Internet access at public libraries do not necessarily require strict scrutiny review.[64]

In assailing the district court's application of the public forum doctrine, Chief Justice Rehnquist argued that Internet access in public libraries is neither a traditional public forum nor a designated public forum. In support of his first proposition, Chief Justice Rehnquist pointed out that the Internet does not meet the definition of a traditional public forum.[65] Specifically, he reasoned that since the Court has traditionally

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59. *Marks*, 430 U.S. at 193 (1977).

60. *Id.* (emphasis added) (citing Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)).

61. *Id.*

62. *See* United States v. Am. Library Ass'n, 539 U.S. 194 (2003) (plurality opinion).

63. "[T]he public forum principles on which the District Court relied are out of place in the context of this case. Internet access in public libraries is neither a 'traditional' nor a 'designated' public forum." *Id.* at 195.

64. *Id.*

65. *Id.* at 205-06.

refused to extend the public forum designation beyond those arenas that have "immemorially been held in trust for the use of the public and . . . [have] been used for purposes of assembly, communication of thoughts between citizens, and discussing public questions,"[66] the Internet, as a new and constantly changing resource, should not be given traditional public forum status.[67]

In support of his denial of designated public forum status to the library Internet terminals, Chief Justice Rehnquist referred to *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*,[68] which states, "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse."[69] Since libraries obtain Internet terminals not to create a public forum for Web publishers to express themselves or to encourage a diversity of views from private speakers, but to "facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality,"[70] Internet terminals in public libraries cannot be considered designated public forums; the library is not "intentionally opening a non-traditional forum for public discourse."[71]

Without a public forum designation, content-based restrictions on Internet terminals at public libraries do not require strict scrutiny review.[72] Chief Justice Rehnquist argued that rational basis review is a better approach because libraries' collection-based decisions for print and other materials have always been reviewed using a rational basis standard.[73]

Under rational basis review, the Internet filters are constitutional because they are rationally related to the problem Congress was attempting to solve in enacting CIPA.[74] Since the filters are

66. *Id.* (citing Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679 (1992)). *See also* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 678 (1998) ("The Court has rejected the view that traditional public forum status extends beyond its historic confines.").

67. *See Am. Library Ass'n*, 539 U.S. at 207 n.3 (plurality opinion).

68. 473 U.S. 788 (1985).

69. *Id.* at 802.

70. *Am. Library Ass'n*, 539 U.S. at 206 (plurality opinion).

71. *Id.* (citing *Cornelius*, 473 U.S. at 802).

72. *See generally id.* at 205-07.

73. *See id.* at 202-04. There is universal agreement that "generally the First Amendment subjects libraries' content-based decisions about which print materials to acquire for their collections to only rational [basis] review." *Id.* at 202 (internal citations omitted). Here, the District Court held that the Internet terminals were different from traditional print collections and thus subject to a different standard of review. As previously noted, Chief Justice Rehnquist disagreed with this stance and held that rational basis was the correct standard of review for both the print collection and Internet terminals.

74. *Id.* at 214. Congress sought to prevent minors from accessing obscenity and pornography at public library Internet terminals. The Internet filters are rationally related to this goal and thus are constitutional under rational basis review.

constitutional, Congress had every right to restrict federal funds from those libraries that did not implement the filters.[75]

C. Justice Breyer's Concurrence

Like the plurality, Justice Breyer concluded that CIPA was facially constitutional. His reasoning, however, was starkly different. He dismissed rational basis review calling it an inadequate means of resolution because of the significant First Amendment issues arising from restrictions on constitutionally protected speech.[76] "[W]e should not examine the statute's constitutionality as if it raised no special First Amendment concern—as if, like tax or economic regulation, the First Amendment demanded only a 'rational basis' for imposing a restriction."[77]

Justice Breyer then attacked the strict scrutiny approach supported by the district court[78] and the dissents.[79] He pointed out that libraries often engage in the selection of materials for their collections and that "[t]o apply 'strict scrutiny' to the 'selection' of a library's collection . . . would unreasonably interfere with the discretion necessary to create, maintain, or select a library's 'collection.'"[80] In other words, "'strict scrutiny' implies too limiting and rigid a test . . . to believe that the First Amendment requires it in this context."[81]

Falling between the plurality and the dissenters, Justice Breyer concluded on heightened (intermediate) scrutiny—a standard the Court has applied in other contexts where speech-related restrictions were at issue.[82] Under heightened scrutiny, Justice Breyer concluded that the compelling nature of protecting minors from obscenity and pornography outweighed the "comparatively small burden that the Act imposes upon the library patron seeking legitimate Internet materials."[83] Since "no one has presented any clearly superior or better fitting alternatives"[84] to

75. *Id.*

76. *See id.* at 216 (Breyer, J., concurring).

77. *Id.*

78. *See* Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 454 (E.D. Pa. 2002).

79. *See infra* Part IV.F.

80. *Am. Library Ass'n*, 539 U.S. at 217 (Breyer, J., concurring).

81. *Id.*

82. *Id.* Justice Breyer cites several examples where the Court used heightened scrutiny to evaluate speech-related restrictions. *See, e.g.*, Bd. of Trs. v. Fox, 492 U.S. 469 (1989); Denver Area Ed. Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727, 740-47 (1996) (plurality opinion); Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 227 (1997) (Breyer, J., concurring); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 389-90 (1969).

83. *Am. Library Ass'n*, 539 U.S. at 220 (Breyer, J., concurring).

84. *Id.* at 219.

Internet filters, the restrictions survive the heightened scrutiny test and are constitutional. Following this line of reasoning, Justice Breyer concluded that CIPA is facially constitutional because it does not require libraries to act in an unconstitutional manner as a condition upon the receipt of federal funds.[85]

D. Justice Kennedy's Concurrence

Justice Kennedy took only four paragraphs to conclude that CIPA was facially constitutional.[86] His position is succinctly described at the end of his concurrence:

> The interest in protecting young library users from material inappropriate for minors is legitimate, and even compelling, as all Members of the Court appear to agree. Given this interest, and the failure to show that the ability of adult library users to have access to the material is burdened in any significant degree, the statute is not unconstitutional on its face.[87]

Justice Kennedy never reached the applicability of the public forum doctrines and the associated standard of review question.[88] He noted that there is little to this case if, at the request of a patron, a librarian will unblock filtered material or disable the filter without significant delay.[89] If the library removes the filter, the patron's First Amendment rights have not been violated. Since CIPA allows libraries to remove the filters upon patron request and thus prevent violation of patrons' constitutional rights, the requirement of the filters is not adequate grounds for a facial challenge.[90]

Justice Kennedy's approach falls in line with Supreme Court jurisprudence on facial challenges to acts of Congress: "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that *no set of circumstances exists* under which the Act would be valid."[91] Moreover, as noted in *Bowen v. Kendrick*,[92] the Supreme Court will not declare a legislative act facially unconstitutional simply because there is the

85. *See id.* at 220.
86. *See id.* at 215 (Kennedy, J., concurring).
87. *Id.*
88. *Compare id.* at 214-15, *with id.* at 203-09 (plurality opinion).
89. *Id.* at 214 (Kennedy, J., concurring).
90. *Id.* at 215.
91. United States v. Salerno, 481 U.S. 739, 745 (1987) (emphasis added).
92. 487 U.S. 589 (1988).

anticipation that particular applications of the act may result in the unconstitutional use of funds.[93]

Thus, Justice Kennedy held that CIPA is facially constitutional because, as of yet, no library patron's First Amendment rights have been infringed upon.[94] Additionally, the Court will not hold the Act unconstitutional merely because someone anticipates that the libraries might act unconstitutionally in following the Act.[95] If, however, a library did not have the capacity to remove the filters or unblock protected speech or if the library "burdened" an adult user's First Amendment right to view constitutionally protected Internet material, an "as-applied" challenge to CIPA's constitutionality would be appropriate.[96]

E. The Underlying Reasoning

Breaking down the various opinions into specific logical steps clarifies the similarities and the differences in the Justices' underlying reasoning.

The plurality held CIPA to be facially constitutional because Congress did not violate its spending power by enacting it.[97] The spending power was not exceeded because CIPA did not require libraries to act in an unconstitutional manner as a condition upon the receipt of federal funds.[98] The filters were constitutional because they met the rational basis burden; they were reasonably related to the compelling state interest of preventing the dissemination of obscenity and child pornography and protected children from accessing harmful material on the Internet.[99] The rational basis test was appropriate because courts have always reviewed libraries' content-based collection decisions using a rational basis standard. Moreover, Internet access at public libraries did not constitute a public forum and thus the strict scrutiny requirement of content-based restrictions in public forums was not invoked.[100]

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93. "It has not been the Court's practice, in considering facial challenges to statutes of this kind, to strike them down in anticipation that particular applications may result in unconstitutional use of funds." *Id.* at 612 (quoting Roemer v. Bd. of Pub. Works, 426 U.S. 736, 761 (1976)).

94. *See generally Am. Library Ass'n*, 539 U.S. at 214-15 (Kennedy, J., concurring).

95. *Id.*

96. *Id.*

97. *See id.* at 211-12 (plurality opinion).

98. *Id.*

99. *See generally id.* at 200-01 (arguing that preventing the dissemination of obscenity and child pornography and protecting children from harmful aspects of the Internet are legitimate concerns of the government).

100. "Internet access in public libraries is neither a 'traditional' nor a 'designated' public forum." *Id.* at 205.

Justice Breyer held CIPA to be facially constitutional[101] because Congress did not violate its spending power by enacting it.[102] The spending power was not exceeded because CIPA did not require libraries to act in an unconstitutional manner as a condition upon the receipt of federal funds. The filters were constitutional because they passed the intermediate scrutiny test; the filters could be removed relatively easily and they served the compelling interests of preventing the dissemination of obscenity and child pornography and of protecting children from accessing harmful material on the Internet.[103] Intermediate scrutiny was the appropriate standard for judging the restrictions because of the competing constitutional interests involved;[104] previous cases involving First Amendment rights and compelling state interests were judged on intermediate scrutiny standards.[105] Justice Breyer agreed with the plurality's conclusion that strict scrutiny should not apply because Internet terminals were not public forums.[106]

Justice Kennedy held CIPA to be facially constitutional[107] because Congress did not violate its spending power by enacting it.[108] The spending power was not exceeded because CIPA did not require libraries to act in an unconstitutional manner as a condition upon the receipt of federal funds. The filters were constitutional because they could be removed relatively easily and they served the compelling interests of preventing the dissemination of obscenity and child pornography and of protecting children from accessing harmful material on the Internet.[109] Justice Kennedy never reached the public forum and associated standard of review question.[110]

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101. "I therefore agree with the plurality that the statute does not violate the First Amendment . . . ." *Id.* at 220 (Breyer, J., concurring).

102. Admittedly, Justice Breyer never brought up the issue of Congress's spending power. However, the original challenge to CIPA was that it induced libraries to violate their patrons' first amendment rights and was thus unconstitutional because, under its spending power, Congress cannot condition the receipt of money on unconstitutional action. By upholding the constitutionality of CIPA, Justice Breyer implicitly held that Congress didn't violate its spending clause power.

103. *See generally Am. Library Ass'n*, 539 U.S. at 218-20 (Breyer, J., concurring).

104. *Id.* at 217.

105. *Id.*

106. "[T]he plurality first finds the public forum doctrine inapplicable . . . . I agree with [the] determination." *Id.* at 215.

107. "[T]he statute is not unconstitutional on its face." *Id.* (Kennedy, J., concurring).

108. Like Justice Breyer, Justice Kennedy never explicitly addresses the spending power issue. However, as previously discussed, holding CIPA to be constitutional necessarily requires a similar holding that Congress did not violate its spending power. *See supra* note 102.

109. "Given this [compelling] interest, and the failure to show that the ability of adult library users to have access to the material is burdened in any significant degree, the statute is not unconstitutional on its face." *Am. Library Ass'n*, 539 U.S. at 215 (Kennedy, J., concurring).

110. Since CIPA allowed for the filters to be removed, the Act, arguably, did not put any restriction upon library patrons' First Amendment right to receive constitutionally protected speech.

F. The Narrowest Grounds

The plurality and the concurring opinions all held CIPA to be facially constitutional because Congress did not exceed its spending power by requiring libraries to use software filters as a condition of receiving federal funds.[111] All three opinions reached this conclusion based on the fact that CIPA did not violate the spending clause because libraries were acting constitutionally when they implemented the filters.[112] From here the opinions diverge. Chief Justice Rehnquist applied rational basis review and found the filters to be constitutional. Justice Breyer found the filters constitutional based on a strict scrutiny standard. In holding that a facial challenge was inappropriate, Justice Kennedy never reached the standard of review question.

Of the three opinions, Justice Kennedy's is the narrowest and least restrictive because it is more confined to the facts before the court. Justice Kennedy recognized that the standard of review and public forums need not be addressed because the facial challenge to CIPA was inadequate.[113] Moreover, by leaving significant constitutional questions—standard of review and public forum issues—open for discussion, Justice Kennedy's concurrence would affect or control fewer cases in the future.[114] Because it leaves these issues open for discussion, Justice Kennedy's concurrence is the least restrictive of First Amendment rights.

Both Chief Justice Rehnquist's and Justice Breyer's reasoning support the conclusion reached by Justice Kennedy. Justice Kennedy's reasoning, however, does not get you to either the plurality's or Justice Breyer's conclusion. A majority of the Court agreed with Justice Kennedy's reasoning; the reverse is not true.

Under *Marks*, then, Justice Kennedy's opinion establishes guiding precedent because it "concurred . . . on the narrowest grounds."[115] It is the only opinion, which, in its entirety, relies upon reasoning supported by a majority of the other Justices.[116]

A related side-note is that Justice Stevens, although dissenting,

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In any event, the facial challenge to the act did not allege any specific instances of First Amendment rights violations and thus, the standard of review question could not be reached on the facts before the Court.

111. *See Am. Library Ass'n*, 539 U.S. at 214-15 (Kennedy, J., concurring).

112. *See id.* at 220-21.

113. *Cf.* United States v. Martino, 664 F.2d 860, 872-73 (2d Cir. 1981).

114. *See id.* (quoting Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 764 (1980)).

115. *See* Marks v. United States, 430 U.S. 188, 193 (1977).

116. As previously discussed, Chief Justice Rehnquist's and Justice Breyer's reasoning and logical steps are similar to Justice Kennedy's.

seems to support Justice Kennedy's position:

> I agree with the plurality that it is neither inappropriate nor unconstitutional for a local library to experiment with filtering software as a means of curtailing children's access to Internet Web sites displaying sexually explicit images. I also agree with the plurality that the 7% of public libraries that decided to use such software on all of their Internet terminals in 2000 did not act unlawfully.[117]

Since Congress has the power to place conditions on the receipt of federal funds, Congress only violates its spending power when the conditions require the beneficiary to act unconstitutionally. Here, Justice Stevens admits that public libraries do not violate the Constitution by utilizing Internet filters. Therefore, Congress did not violate its spending power by requiring public libraries to use filters. If an act itself is constitutional, then Congress can require a beneficiary to perform that act as a condition on the receipt of federal money. Under *United States v. Salerno*, which explicitly states that a facial challenge is only appropriate where "*no set of circumstances exists* under which the Act would be valid,"[118] Justice Steven's acknowledgment that there are circumstances under which Internet filters are constitutional implicitly supports Justice Kennedy's conclusion that a facial challenge to CIPA is inappropriate.[119]

V. CONCLUSION

All nine Justices agreed that the "interests" Congress sought to protect by enacting CIPA are both important and compelling.[120] As Justice Souter noted in his dissent, "[l]ike the other Members of the Court, I have no doubt about the legitimacy of governmental efforts to put a barrier between child patrons of public libraries and the raw offerings on the Internet . . . ."[121] But the Court could not agree on the best way to protect minors without infringing upon the First Amendment rights of adult library patrons.

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117. *Am. Library Ass'n*, 539 U.S. at 220 (Stevens, J., dissenting).

118. 481 U.S. 739, 745 (1987) (emphasis added).

119. Justice Souter's dissent indicates that he was aware of the potential for Justice Stevens' dissent to be read as support for Justice Kennedy. After agreeing with Justice Stevens that the blocking requirements of CIPA "impose an unconstitutional condition on the Government's subsidies to local libraries for providing access to the Internet," *Am. Library Ass'n*, 539 U.S. at 231 (Souter, J., dissenting), Justice Souter goes on to state that "[CIPA] mandates action by recipient libraries that would violate the First Amendment's guarantee of free speech *if the libraries took that action entirely on their own*. I respectfully dissent on this further ground." *Id.* (emphasis added).

120. *See supra* Part IV.A-D.

121. *Am. Library Ass'n*, 539 U.S. at 231-32 (Souter, J., dissenting).

The dissents argued that strict scrutiny applies and that Internet filters are unconstitutional under this standard because there are other less restrictive means of accomplishing the same goal.[122]

Justice Breyer would apply intermediate scrutiny because freedom of speech is involved.[123] Under this standard, Justice Breyer upheld the constitutionality of CIPA because of the compelling nature of protecting children and the relative ease with which the filters could be removed upon the request of an adult library patron.[124]

Chief Justice Rehnquist and the plurality applied rational basis review and concluded that CIPA is constitutional because its restrictions are rationally related to the goal of protecting minors from obscenity and pornography.[125]

Justice Kennedy took a much simpler route; before even getting to the standard of review question, he noted that no First Amendment rights would be violated if the filters were removed upon request—CIPA allowed for removal. Since CIPA does not force libraries to act unconstitutionally in all situations, a facial challenge to the Act's constitutionality was inappropriate.[126]

While the Court answered the specific questions surrounding CIPA, the fractured decision, on its face, provides no guidance for evaluating similar situations in the future. Relying on *Marks*, a lower court can find precedent in a plurality decision by looking for the concurrence on the narrowest grounds. Despite confusion surrounding the application of *Marks*, the seemingly best approach is to require some form of underlying reasoning or commonalities between a majority of the concurring Justices before finding a specific opinion to be guiding. Under this approach, Justice Kennedy's concurrence in *American Library Ass'n* should be viewed as the precedential opinion because Justice Kennedy concurs on the narrowest grounds supported by a majority of the concurring Justices.

Simply put, *American Library Ass'n* should be read as upholding the constitutionality of CIPA because a facial challenge was inappropriate. Since Justice Kennedy never reached the public forum issue, the question of whether Internet terminals in public libraries constitute public forums may be unresolved. [127] Clearly though, Justice Kennedy's opinion leaves

122. *See supra* Part IV.A.

123. *See supra* Part IV.C.

124. *See supra* Part IV.C.

125. *See supra* Part IV.B.

126. *See supra* Part IV.D.

127. The four Justices in the plurality and Justice Breyer concluded that public forum principles do not apply to public-access Internet terminals in libraries. But the precedential value of this conclusion is questionable because Justice Kennedy's concurrence does not address the issue

the door open for future "as-applied" challenges to CIPA's constitutionality, an implication that libraries, patrons, and lower courts should keep in mind.

Tyson Snow

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and *Marks* does not speak to the resolution of collateral issues such as this. One might argue that a strict adoption of Justice Kennedy's concurrence causes the public-forum conclusions of the plurality and Justice Breyer to become mere dicta—under Justice Kennedy's approach the public forum question need not be addressed and therefore the conclusions regarding the issue are non-binding. On the other hand, a majority of the concurring Justices held that public library Internet terminals are not public forums; this conclusion represents the narrowest grounds on which a majority of the concurring Justices resolved that specific issue. Whether *Marks* establishes the public forum conclusion as guiding precedent remains unclear.