AMERICAN LIBRARY ASSOCIATION, BRADBURN, AND THE MOVEMENT TO CENSOR THE INTERNET♦

INTRODUCTION

"Breast cancer"; "Middlesex County"; "Moby Dick"; "*at least 21* people. . .killed or wounded in Indonesia"; "The Owl and the Pussy Cat." Each of these is one of the many benign phrases that have triggered the blocking of websites by commercial Internet filters programmed to detect online material that is obscene or harmful to minors.[1] Two brothers in middle school spend every afternoon in the library until their mother finishes work and can take them home. The mother worries about what her children may access online in the library without guidance, and wants to restrict what they can look at without her supervision.[2] Software that detects keywords with potentially

[1] MARJORIE HEINS, CHRISTINA CHO & ARIEL FELDMAN, BRENNAN CENTER FOR JUSTICE, INTERNET FILTERS: A PUBLIC POLICY REPORT, at i (2d ed. 2006) (emphasis added).

[2] Parents have previously attempted to limit such access in public libraries. *See, e.g.*, Evan

vulgar undertones, and blocks the websites on which such keywords appear, might be an effective tool to protect children, but it places a heavy burden on the rights of adults to access material that falls within the speech protections of the First Amendment.[3] In taking steps to protect children from obscene, pornographic, and violent speech on the Internet, it is necessary for legislatures and courts to be cautious in weighing the First Amendment speech rights of adults.[4]

In May 2010, in *Bradburn v. North Central Regional Library District*, the Washington State Supreme Court upheld a library district's Internet policy that denies unfiltered Internet access to adult patrons under any and all circumstances.[5] This Note takes the position that *Bradburn* misconstrues the Supreme Court's earlier ruling in *United States v. American Library Ass'n* ("*ALA*"), in which the Court upheld the constitutionality of the Children's Internet Protection Act (CIPA), which requires public libraries receiving federal funding to install filtering software to prevent minors from accessing websites featuring materials that are "obscene; child pornography; or harmful to minors,"[6] and that *Bradburn* distorts First Amendment jurisprudence with regard to online content, and sets a troubling precedent for how deeply legislatures and other regulating bodies may invade the First Amendment rights of adults under the pretext of protecting minors.

The Supreme Court upheld the constitutionality of CIPA in the ALA decision in June 2003 with a six to three vote, with three Justices joining the plurality opinion authored by Chief Justice Rehnquist and concurrences by Justices Kennedy and Breyer.[7] The Court ruled that Congress may constitutionally require federally funded libraries to place filters on public Internet access in order to block websites that may contain material deemed harmful to minors.[8]

The *ALA* ruling was premised on the fact that CIPA "expressly authorizes library officials to 'disable' a filter altogether," upon a request submitted by an adult, "to enable access for bona fide research and other lawful purposes."[9] Chief Justice Rehnquist wrote that any concerns regarding adult access to protected speech "are dispelled by the ease with which [adult] patrons may have the filtering software

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Jensen, *Estacada Library Board Rejects Limit on Internet Access for Minors*, ESTACADA NEWS (Sept. 1, 2010), http://www.estacadanews.com/news/story.php?story_id=128329811481029000.

[3] U.S. CONST. amend. I.

[4] *See generally* S. REP. NO. 106-141, at 7-9 (1999).

[5] Bradburn v. N. Cent. Reg'l Library Dist., 231 P.3d 166, 181 (Wash. 2010).

[6] United States v. Am. Library Ass'n, 539 U.S. 194, 199 (2003) (Rehnquist, C.J., plurality opinion); *see also* Children's Internet Protection Act § 1712(f), Pub. L. No. 106-554, 114 Stat. 2763 (2000) (codified as amended in scattered sections of 20 U.S.C.) (requiring libraries receiving federal funding to have in place an Internet safety policy including technological protection meaures to prevent access to obscene materials and child pornography).

[7] *Am. Library Ass'n*, 539 U.S. at 194-98.

[8] *Id.* at 214 (Rehnquist, C.J., plurality opinion).

[9] *Id.* at 209 (quoting 20 U.S.C. § 9134(f)(3) (2000)) (internal quotation marks omitted).

disabled."[10] The two concurring Justices explicitly conditioned their joining of the plurality opinion on the government's representation that, under CIPA, "on the request of an adult user, a librarian will unblock filtered material or disable the Internet software filter without significant delay . . . ."[11] Justices Kennedy and Breyer made it clear that, without such a safeguard for the First Amendment rights of adults, a statute conditioning federal funding on the implementation of content-filtering software would not withstand constitutional scrutiny.[12]

Bradburn v. North Central Regional Library District was filed in the United States District Court for the Eastern District of Washington, challenging the district's Internet policy, denying unfiltered Internet access to adult patrons under any and all circumstances, on both state and federal grounds.[13] The district court certified the state law issue to the Washington State Supreme Court.[14] The state supreme court upheld the Internet policy on state law grounds,[15] but did so through reasoning that equated the scope of protection available to adult library patrons pursuant to the Washington State Constitution with the scope of protection provided by the United States Constitution.[16] Although the majority in *Bradburn* claimed to base its opinion on the language, arguments and conclusions of *ALA*, the *Bradburn* ruling nonetheless went much further than *ALA*'s holding, doing more to limit the reach of First Amendment protections than *ALA* allows for. In fact, the *Bradburn* ruling is directly at odds with the views of five United States Supreme Court Justices in *ALA*,[17] and is in tension with the expressed assumptions of Chief Justice Rehnquist's plurality opinion.[18]

Part I of this Note examines the landscape prior to *Bradburn*, reviewing the context of CIPA's enactment, and its affirmation by the Supreme Court in *ALA*. Part II reviews the *Bradburn* decision, highlighting the ways in which the *Bradburn* majority misused *ALA* to give nearly unbridled discretion to libraries in limiting adult access to

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[10] *Id*.
[11] *Id.* at 214 (Kennedy, J., concurring).
[12] *Id.* at 215 (Kennedy, J., concurring) ("[I]f it is shown that an adult user's election to view constitutionally protected Internet material is burdened in some other substantial way, that would be the subject for an as-applied challenge . . . ."); *id.* at 219 (Breyer, J., concurring) ("[T]he adult patron need only ask a librarian to unblock the specific Web site or, alternatively, ask the librarian, 'Please disable the entire filter.'").
[13] Bradburn v. N. Cent. Reg'l Library Dist., No. 06-0327, 2008 U.S. Dist. LEXIS 87134 (E.D. Wash. Sept. 30, 2008).
[14] *Id.* at *28.
[15] *Bradburn*, 231 P.3d at 169.
[16] *Id*.
[17] Both Justices Kennedy and Breyer, in separate concurring opinions, expressed that they conditioned their opinions on the understanding that adult First Amendment rights remained unburdened under CIPA. *Am. Library Ass'n*, 539 U.S. at 215 (Kennedy, J., concurring); *id.* at 219 (Breyer, J., concurring). Justice Stevens, in dissent, found CIPA to be an unconstitutional prior restraint on protected speech. *Id.* at 220 (Stevens, J., dissenting). Justice Souter, in dissent with Justice Ginsburg joining, found CIPA to impermissibly condition federal funding on the restraint of First Amendment protections for adults. *Id.* at 231 (Souter, J., dissenting).
[18] *Id.* at 209 (Rehnquist, C.J., plurality opinion).

constitutionally-protected speech. Part III posits that *Bradburn* is an important signal of a climate in which legislatures and judiciaries have not fully understood the new medium for speech created by the Internet and, supported by public fear and by media pressure, are creating and supporting laws that overly limit speech in the name of protecting minors.[19] This Note concludes with the assessment that, despite disappointing rulings in *Bradburn* and in *ALA* itself, it is in fact the judiciary that is in the best position to intervene in defense of First Amendment rights online. Opportunities for such intervention lie in the following two areas: first, a reversal of the Washington State Supreme Court's *Bradburn* ruling,[20] which would lead to more accurate applications of *ALA* going forward; and second, continued challenges to CIPA's application around the country, which would give the United States Supreme Court opportunities to assess the impact of CIPA on adult First Amendment rights in meaningful contexts.

I. THE PRE-*BRADBURN* LANDSCAPE

A. *CIPA: The Children's Internet Protection Act*

The protection of minors has long been a focus around which censorship battles have been waged in the United States, and such battles have often taken place in libraries.[21] In 1881, the Boston Public Library was the site of the first major library controversy, when the library was accused of making "immoral books" available to children.[22] A board of censors was proposed to screen material and label "harmless" books for the use of children. A pitched public debate ensued and the end result was removal of the contested books, the creation of separate library cards for younger patrons, and discretion given to library staff to "suppress all works discovered to be vicious."[23] Since then, United States history has been fraught with disputes over censorship, the balancing of moral impulses, protection of children, freedom of expression and the right to access information.[24]

More recently, Congress has taken legislative measures to limit the material available to minors online in response to the massive growth of the Internet during the 1990s.[25] CIPA, the contested statute in *ALA*, was

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[19] *See, e.g.*, ALASKA STAT. § 11.61.128 (2010); MASS. GEN. LAWS ch. 272, § 31 (2010).
[20] Bradburn v. N. Cent. Reg'l Library Dist., 231 P.3d 166, was ruled on in May 2010 by the Washington Supreme Court, in response to questions certified to it by the U.S. District Court for the Eastern District of Washington. Bradburn v. N. Cent. Reg'l Library Dist., No. 06-87134, 2008 U.S. Dist. LEXIS 87134 (Sept. 30, 2008). The U.S. District Court for the Eastern District of Washington will hear arguments in the case beginning on October 25, 2011.
[21] 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*, 151 DRAKE L. REV. 213, 225 (2003).
[22] *Id.* at 222-23.
[23] *Id*.
[24] *Id*. at 225-28.
[25] HEINS ET AL., *supra* note 1, at 1.

the third congressional attempt at such legislation. First, in 1996, Congress amended the Communications Decency Act to shield minors from Internet pornography by criminalizing "indecent" or "patently offensive" communications online.[26] The Supreme Court invalidated that legislation in *Reno v. ACLU*, finding that the breadth of the law's prohibitions, and its imposition of criminal liability, constituted an abridgment of the freedom of speech protected by the First Amendment.[27] Congress responded by enacting the Child Online Protection Act (COPA),[28] prohibiting an individual or entity from knowingly making "any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors."[29] The Supreme Court also struck down this statute as overbroad in *Ashcroft v. ACLU*.[30]

With CIPA, Congress was more successful than it had been previously in establishing lasting restrictions to further its interest in protecting children using the Internet.[31] Republican Senator John McCain introduced the Act, representing it as "a rational response to what could otherwise be a terrible and unintended problem."[32] The problem Senator McCain identified was the potential increase in the exposure of children to harmful online content, resulting from the increase of Internet use in schools and libraries.[33] The Senate Committee Report on CIPA set out a series of cautionary tales presented to support the position that the Internet is an increasingly dangerous place for children because it heightens exposure to pornography and other "inappropriate" materials.[34] The Report extolled the ability of Internet filtering software to protect children accessing the Internet.[35]

CIPA went into effect April 20, 2001, as an amendment to Section 254 of the Communications Act of 1934.[36] In enacting CIPA, Congress used its power under the Constitution's Spending Clause to require libraries that receive federal funding[37] to install filtering[38] software on

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[26] Telecommunications Act of 1996 § 502(1), Pub. L. No. 104-104, 110 Stat. 56 (1996). *See also* Reno v. Am. Civil Liberties Union, 521 U.S. 844, 870 (1997) (quoting Am. Civil Liberties Union v. Reno, 929 F. Supp. 824, 842 (E.D. Pa. 1996)).
[27] Reno v. Am. Civil Liberties Union, 521 U.S. 844 (1997).
[28] Child Online Protection Act (COPA), Pub. L. No. 105-277, § 1402, 112 Stat. 2681, 2736 (1998) (codified as amended in scattered titles and sections of U.S.C.).
[29] *Id.*
[30] 542 U.S. 656, 673 (2004).
[31] The Supreme Court upheld CIPA's constitutionality in United States v. Am. Library Ass'n, 539 U.S. 194, 198 (2003). The order in which the two statutes were enacted (COPA in 1998 and CIPA in 2001), and COPA was enjoined (1999), indicates that CIPA was a direct response to Congress's concern that COPA would not survive constitutional scrutiny.
[32] 145 CONG. REC. S532 (daily ed. Jan. 19, 1999) (statement of Sen. John McCain).
[33] *Id.* at 531-32.
[34] S. REP. NO. 106-141, at 5 (1999).
[35] *Id.*
[36] Children's Internet Protection Act, Pub. L. No. 106-554, 114 Stat 2763 (2000) (codified as amended in scattered titles and sections of U.S.C.); *see also* S. REP. NO. 106-141, at 10 (1999).
[37] CIPA regulates two forms of federal assistance to libraries: the E-rate program allows qualifying libraries to buy Internet access at a discount, 47 U.S.C. § 254(h)(1)(B) (1996), and the

library computers providing Internet access, blocking websites that contain material deemed obscene or harmful to minors, or material containing child pornography.[39] As of 2008, every state in the United States, plus the District of Columbia, American Samoa, and Guam, was receiving the federal funding that triggers CIPA requirements,[40] making the impact of the law far-reaching.

B. *CIPA Affirmed: American Library Association v. United States*

Upon the enactment of CIPA, the American Library Association ("the ALA") brought a facial challenge[41] to the statute's constitutionality.[42] The ALA argued that CIPA required libraries to violate the First Amendment rights of their adult patrons as a condition of federal funding,[43] and that Congress had used its spending power "to conscript public libraries into its censorship program."[44] The ALA further argued that the imprecise nature of filtering software,[45] which had previously been a concern of the Supreme Court in evaluating the legislation that preceded CIPA,[46] leaves libraries "with an impossible choice: either install mechanical, imprecise, and incredibly broad speech restrictions on Internet resources, or forgo vital federal funds to which libraries are otherwise entitled."[47] Finally, the ALA pointed to the provision of CIPA that permits libraries to disable filters to grant access to adults for "bona fide research or other lawful purposes."[48] The ALA

Library Services and Technology Act (LSTA) makes grants to state library agencies to pay for libraries to acquire or share computer systems, 47 U.S.C § 9121 *et seq* (1996). *See also* United States v. Am. Library Ass'n, 539 U.S. 194, 201 (2003).

[38] COMMISSION ON CHILD ONLINE PROTECTION, REPORT TO CONGRESS 19 (2000) ("[A filter is] server software that denies access to particular content sources . . . that have been selected for blocking.").

[39] Children's Internet Protection Act, Pub. L. No. 106-554, 114 Stat 2763 (2000) (codified as amended in scattered titles and sections of U.S.C.); S. REP. NO. 106-141, at 1 (1999); *see also FCC Consumer Facts: Children's Internet Protection Act*, FCC, 1 http://transition.fcc.gov/cgb/consumerfacts/cipa.pdf (last visited Aug. 28, 2011).

[40] Education and Library Networks Coalition Frequently Asked Questions, http://www.edlinc.org/get_facts.html (last visited Aug. 28, 2011) (listing the states receiving federal funding for libraries).

[41] *See, e.g.*, United States v. Salerno, 481 U.S. 739, 745 (1987) (To bring a facial challenge, "the challenger must establish that no set of circumstances exists under which the Act [in question] would be valid.").

[42] United States v. Am. Library Ass'n, 539 U.S. 194 (2003).

[43] *Id.* at 202.

[44] Complaint for Declaratory and Injunctive Relief at 3, Am. Library Ass'n v. United States, 201 F. Supp. 2d 401 (E.D. Pa. 2002) (No. 01-1303), *rev'd*, 539 U.S. 194 (2003) [hereinafter Comp'l for Decl. and Injunctive Relief].

[45] *Id.* at 4 ("[N]o technology exists that can effectively block the precise categories of speech enumerated in the Act.").

[46] Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 685 (2004) (Breyer, J., dissenting) ("[F]iltering is faulty, allowing some pornographic material to pass through without hindrance[,]" and it "lacks precision, with the result that those who wish to use it to screen out pornography find that it blocks a great deal of material that is valuable.").

[47] Comp'l for Decl. and Injunctive Relief, *supra* note 44, at 4. Notably, it was precisely this provision of CIPA that the *ALA* plurality relied upon in finding that the statute was not overly burdensome to adult First Amendment rights. *Am. Library Ass'n*, 539 U.S. at 209.

[48] Comp'l for Decl. and Injunctive Relief, *supra* note 44, at 5.

argued that this provision was "hopelessly vague," giving no interpretive guidance to libraries, and imposing a "dangerous chilling effect on the exercise of patrons' right to receive information anonymously by attaching a threat of stigma to the receipt of fully protected expressive materials."[49]

The United States District Court for the Eastern District of Pennsylvania agreed with the ALA's position, and declared CIPA to be facially unconstitutional,[50] finding a library to be a public forum, and the challenged filters to be constitutionally prohibited content-based restrictions[51] on access to a public forum.[52] The district court held that Congress had overstepped its authority under the Constitution's Spending Clause, because any public library complying with CIPA would necessarily violate the First Amendment.[53] The case was appealed directly to the Supreme Court,[54] which reversed the ruling.[55]

At the Supreme Court level, the *ALA* plurality rejected the argument that Internet filtering presents "a significant prior restraint on adult access to protected speech."[56] Prior restraint does not apply to Internet access in libraries, the plurality held, because a library's decision to filter Internet access "is a collection decision," entitling libraries to discretion in determining which materials to acquire.[57] The plurality did not analyze whether or not a public library itself is a public forum, but rather determined that "Internet access in public libraries" is not a public forum.[58] On that basis, the plurality found that CIPA was

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[49] *Id.*

[50] Am. Library Ass'n v. United States, 201 F. Supp. 2d 401 (E.D. Pa. 2002), *rev'd*, 539 U.S. 194 (2003).

[51] *See* Hill v. Colorado, 530 U.S. 703, 737 (2000) (Souter, J., concurring) ("[A] restriction is content based only if it is imposed because of the content of the speech . . . .").

[52] 16A AM. JUR. 2D *Constitutional Law* § 540 (2d ed. 2011) ("A 'traditional public forum,' in the context of free speech analysis, is a type of property that has the physical characteristics of a public thoroughfare, the objective use and purpose of open public access or some other objective use and purpose inherently compatible with expressive conduct, and historically and traditionally has been used for expressive conduct.").

[53] *Am. Library Ass'n*, 201 F. Supp. 2d at 411.

[54] The Children's Internet Protection Act allows for direct appeal to the Supreme Court of a District Court's ruling that the statute was unconstitutional. Children's Internet Protection Act § 1741, Pub. L. No. 106-554, 114 Stat. 2763 (2000) (codified as amended in scattered sections of 20 U.S.C.).

[55] United States v. Am. Library Ass'n, 539 U.S. 194 (2003).

[56] Justice Stevens, a dissenter, makes this argument. *Id.* at 225 (Stevens, J., dissenting).

[57] *Id.* at 209 n.4 (Rehnquist, C.J., plurality opinion). The *ALA* plurality acknowledged no distinction between library acquisitions of books and periodicals and determinations of which portions of the Internet to provide to library patrons. Chief Justice Rehnquist wrote, "'the Internet is simply another method for making information available in a school or library' . . . It is 'no more than a technological extension of the book stack.'" *Id.* at 207 (citing S. REP. NO. 106-141, at 7 (1999)).

[58] *Id.* at 205 ("The 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."); *see* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983) ("The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.").

not subject to a strict scrutiny constitutional analysis,[59] which would have required that the challenged restrictions be narrowly tailored to a compelling government interest.[60] According to the plurality, the government "must have broad discretion to make content-based judgments in deciding what private speech to make available to the public"[61] and such a need for discretion is incompatible with heightened judicial scrutiny.[62] The plurality was unconcerned by potential burdens on the First Amendment rights of adults, accepting the government's reassurances that filters would be lifted by libraries upon the request of an adult patron,[63] and held CIPA to be a constitutionally valid exercise of congressional spending power.[64]

C. *Narrow Concurrences: Protecting Adult Access*

In their separate opinions concurring in the judgment, Justices Kennedy and Breyer were unequivocal in their view that adults have a constitutionally protected right to receive constitutionally protected material via the Internet in a public library.[65] Justice Kennedy joined the Court's constitutional analysis, but opened his opinion with a major qualification: "[i]f, on the request of an adult user, a librarian will unblock filtered material or disable the Internet software filter without significant delay, there is little to this case. The Government represents this is indeed the fact."[66] For Justice Kennedy, the facial challenge brought against CIPA in *ALA* could be overcome, but only if the

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[59] *Am. Library Ass'n*, 539 U.S. at 205 ("The public forum principles on which the District Court relied . . . are out of place in the context of this case."); 16A AM. JUR. 2D *Constitutional Law* § 480 ("The most exacting scrutiny test is applied to regulations that suppress, disadvantage, or impose different burdens upon speech on the basis of its content.").

[60] 16A AM. JUR. 2D *Constitutional Law* § 480 ("Where a statute regulates speech based on its content, it is subject to strict judicial scrutiny, requiring the government to show that the challenged regulation is narrowly tailored to serve or promote a compelling government interest.").

[61] *Am. Library Ass'n*, 539 U.S. at 204-05 (citing Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 672-74 (1998)) ("Broad rights of access for outside speakers would be antithetical . . . to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations"); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 585-86 (1998) (stating the NEA may use content-based criteria in making funding decisions because "any content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding.").

[62] *Am. Library Ass'n*, 539 U.S. at 204-05 ("[F]orum analysis and heightened judicial scrutiny are incompatible with . . . the discretion that public libraries must have to fulfill their traditional missions."). In reversing the district court on this issue, the Supreme Court also effectively overruled, at least with regard to libraries receiving federal funding, *Mainstream Loudoun v. Bd. of Trustees of the Loudoun County Library*, 24 F. Supp. 2d 552, 563 (E.D. Va. 1998), in which the U.S. District Court for the Eastern District of Virginia had established public libraries as limited public forums.

[63] *Am. Library Ass'n*, 539 U.S. at 209.

[64] *Id.* at 214.

[65] *Id.* at 215 (Kennedy, J., concurring) ("[I]f it is shown that an adult user's election to view constitutionally protected Internet material is burdened in some other substantial way, that would be the subject for an as-applied challenge"); *id.* at 219 (Breyer, J., concurring) ("[T]he adult patron need only ask a librarian to unblock the specific Web site or, alternatively, ask the librarian, 'Please disable the entire filter.'").

[66] *Id.* at 214 (Kennedy, J., concurring); *see also id.* at 214 (Rehnquist, C.J., plurality opinion).

government's representation regarding the ease of unblocking for adult library patrons was accurate. An opening remained for an "as applied"[67] challenge in the instance where a library lacked the capacity or will to unblock specific websites or disable a filter, or if any substantial burden to an adult patron's ability to view constitutionally protected material on the Internet could be shown.[68]

Justice Breyer disagreed with the Court's decision to apply low-level scrutiny to the constitutional challenge, and advocated heightened scrutiny based on the First Amendment concerns raised by CIPA.[69] For Justice Breyer, CIPA met the demands of the heightened scrutiny test,[70] but he trusted the constitutionality of the statute based on a very specific assumption: "[t]he Act allows libraries to permit any adult patron access to an 'overblocked' Web site; the adult patron need only ask a librarian to unblock the specific Web site or, alternatively, ask the librarian, 'Please disable the entire filter.'"[71] Like Justice Kennedy, Justice Breyer's concurrence explicitly relied on the ability of an adult library patron to easily gain access to constitutionally protected material. In a scenario in which such access was not readily available, Justice Breyer's heightened constitutional scrutiny would be less likely to be met. Thus, Justices Kennedy and Breyer, although concurring with the opinion authored by Chief Justice Rehnquist, restricted their concurrences based on their important substantive conclusion that adults have a constitutionally protected right to unfiltered Internet in a public library upon request.

D. *Dissent: "A Blunt Nationwide Restraint on Adult Access"*[72]

The dissenting Supreme Court Justices in *ALA* agreed with the district court in finding CIPA to be facially unconstitutional. Both dissenting opinions acknowledged the compelling government interest in protecting minors from harmful material,[73] but found that the burden placed on adult access to protected speech was too heavy to stand. Justice Stevens argued that the demonstrated over-blocking[74] by

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[67] *See, e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 462 (1978) ("He . . . attacks the validity of [the Rules] not facially, but as applied to his acts . . . .").
[68] *Am. Library Ass'n*, 539 U.S. at 215 (Kennedy, J., concurring).
[69] *Id.* at 217-18 (Breyer, J., concurring).
[70] *Id.* at 218.
[71] *Id.* at 219 (citing 20 U.S.C. § 9134(f)(3) (2006), which permits library officials to "disable a technology protection measure . . . to enable access for bona fide research or other lawful purposes.").
[72] *Id*. at 220 (Stevens, J., dissenting).
[73] *Id.* ("[I]t 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."); *id.* at 231-32 (Souter, J., dissenting) ("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 . . . .").
[74] *Id.* at 208 (Rehnquist, C.J., plurality opinion) ("[T]he dissents fault the tendency of filtering software to 'overblock'—that is, to erroneously block access to constitutionally protected speech that falls outside the categories that software users intended to block."); *id.* at 222 (Stevens, J.,

Internet filters, undisputed by any of the parties, constituted a clear prior restraint on speech.[75] Justice Stevens advocated a "least restrictive means" test,[76] and was certain that less restrictive alternatives to filtering software were available that would meet the goals of CIPA,[77] which the *ALA* plurality declined to consider.[78] Justice Stevens quoted the District Court's proposal of less restrictive protective measures,[79] which included Internet terminals designated for children that could be filtered or placed within view of librarians, terminals for adults that are out of the view of other patrons or equipped with privacy screens, and strict library policies against viewing pornography.[80]

Justice Souter added a slightly different perspective, arguing (with Justice Ginsburg joining) that CIPA requires libraries, as a condition of receiving federal funding, to violate the First Amendment rights of their adult patrons.[81] Justice Souter agreed with the plurality that libraries have discretion in making collection decisions.[82] However, "[a]fter a library has acquired material in the first place . . . the variety of possible reasons that might legitimately support an initial rejection are no longer in play."[83] For Justice Souter, the plurality missed a crucial distinction between Internet access in public libraries and library acquisitions of physical materials; Justice Souter's view was that Internet filtering is akin to *removal* of library materials that have already been acquired. He wrote, "[t]here is no good reason, then, to treat blocking of adult enquiry as anything different from the censorship it presumptively is."[84] For Justice Souter, CIPA's breadth demands unconstitutional censorship by libraries receiving federal funds, making the statute itself unconstitutional under even the lowest scrutiny.[85]

E. *ALA's Narrow Path*

ALA is a plurality opinion; there were four votes in the lead opinion by Chief Justice Rehnquist, such that one of the two narrow concurrences of Justice Kennedy and Justice Breyer was required to

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dissenting) ("[T]he effect of the overblocking is the functional equivalent of a host of individual decisions excluding hundreds of thousands of individual constitutionally protected messages . . . .").

[75] *Id.* at 225 (Stevens, J., dissenting).

[76] *Id.* at 223 ("[T]he District Court expressly found that a variety of alternatives less restrictive are available at the local level").

[77] *Id.* (citing Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 410 (E.D. Pa. 2002), *rev'd* 539 U.S. 194 (2003)); *id.* at 234 (Souter, J., dissenting) (citing *Am. Library Ass'n*, 201 F. Supp. 2d at 422-27).

[78] *Id.* at 207 (Rehnquist, C.J., plurality opinion) ("[W]e require the Government to employ the least restrictive means only when the forum is a public one and strict scrutiny applies[.]").

[79] *Id.* at 223 (Stevens, J., dissenting) (citing *Am. Library Ass'n*, 201 F. Supp. 2d at 410).

[80] *Id*.

[81] *Id.* at 231 (Souter, J., dissenting).

[82] *Id.* at 236.

[83] *Id.* at 242.

[84] *Id*.

[85] *Id.* at 243.

achieve the necessary fifth vote for CIPA to be declared constitutionally valid. The use of plurality opinions as precedent is limited by their concurrences: in relying on a plurality opinion, lower courts must follow the position taken by the Justice(s) who concurred in the judgment on the narrowest grounds.[86] As a result, the holding in *ALA* is that Congress may require libraries receiving federal assistance to protect children from harmful material by placing filtering software on computers providing public Internet access, *so long as* those libraries will disable the filter, without substantial delay, upon the request of an adult library patron to view constitutionally protected speech.[87] The constitutionality of CIPA was determined under the explicit assumption that adult library patrons would retain their First Amendment rights.[88] Seven years later, the Washington State Supreme Court in *Bradburn* failed to acknowledge this clear message when it upheld the constitutionality of a library Internet filtering policy that prohibited the disabling of the filter for adult patrons under any circumstances.[89] The *Bradburn* court's failure to acknowledge and follow *ALA*'s emphasis on shielding the First Amendment rights of adults is precisely what Justice Kennedy expressed concern for in *ALA*.[90]

II. BRADBURN V. NORTH CENTRAL REGIONAL LIBRARY DISTRICT

The North Central Regional Library District (NCRL) in Washington State has a district-wide, CIPA-compliant Internet policy that places filtering software on all library computer terminals providing Internet access.[91] NCRL's policy is *not* to disable its Internet filters at the request of an adult library patron unless a specific website is erroneously blocked (i.e. it is blocked by the filter, but does not actually fall within one of the prohibited categories programmed into the filter).[92] Plaintiff library patrons and one not-for-profit organization, the Second Amendment Foundation (SAF), brought suit in federal court challenging the district's filtering policy as overbroad, an unconstitutional prior restraint on speech,[93] and an unconstitutional content-based restriction on speech.[94] *Bradburn* reached the Washington State Supreme Court because the Plaintiffs' challenge was partially grounded in article I, section 5 of the Washington State

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[86] Marks v. United States, 430 U.S. 188, 193 (1977) ("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 . . . .'") (citations omitted).
[87] *Am. Library Ass'n*, 539 U.S. at 214 (Kennedy, J., concurring).
[88] *Id.* at 209 (Rehnquist, C.J., plurality opinion).
[89] Bradburn v. N. Cent. Reg'l Library Dist., 231 P.3d 166, 181 (Wash. 2010).
[90] *Am. Library Ass'n*, 539 U.S. at 215 (Kennedy, J., concurring).
[91] *Bradburn*, 231 P.3d at 171.
[92] *Id.*
[93] *Id.* at 181.
[94] *Id.* at 171.

Constitution, and the assertion that the state's speech protections are broader than their federal counterparts in the First Amendment.[95]

On May 6, 2010, in *Bradburn v. North Central Regional Library District*, the Washington State Supreme Court held "a public library may, consistent with *article I, section 5 of the Washington State Constitution*, filter Internet access for all patrons without disabling the filter to allow access to web sites containing constitutionally protected speech upon the request of an adult library patron."[96] The state supreme court concluded that Washington's constitutional free speech protection, in this context, is no broader than what is provided by the First Amendment of the United States Constitution, and that *neither* provision is a barrier to unmitigated filtering of Internet access for all patrons of federally funded libraries.[97]

The *Bradburn* court cited the *ALA* opinion extensively in making its constitutional determination,[98] but failed to take any notice of the plurality's assumption that filters needed to be easily removed for adult library patrons under CIPA,[99] or the view of the two concurring justices that *without* ready unblocking, CIPA would fail a constitutional inquiry.[100] Apart from that significant omission, the *Bradburn* decision tracked the *ALA* plurality opinion closely. Just as the plurality had found in *ALA*, the Washington State Supreme Court found that Internet filtering was sheltered from heightened constitutional scrutiny as a collection decision and therefore was not a content-based restriction on constitutionally protected material.[101] Without acknowledging that the filtering policy challenged in *Bradburn* was far more restrictive than any scenario contemplated by the Supreme Court in *ALA*, the state supreme court held the filtering policy to be constitutionally valid.[102]

Three Justices on the Washington State Supreme Court dissented in *Bradburn*. Writing for the dissent, Justice Chambers stood squarely with the *ALA* dissenters, arguing that a public library cannot actively restrict adult access to web sites containing constitutionally protected speech.[103] Justice Chambers also raised the problem addressed by Justice Souter, dissenting in *ALA*, that Internet filtering cannot be

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[95] *Id.* at 173; WASH. CONST. art. I, § 5 ("Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.").
[96] *Bradburn*, 231 P.3d at 181.
[97] *Id.* at 172 ("[I]n deciding whether the filtering policy suffers from overbreadth under *article I, section 5*, our analytical approach aligns with the approach taken under the *First Amendment*.").
[98] *Id.* at 174, 176, 177, 178, 179, 180.
[99] United States v. Am. Library Ass'n, 539 U.S. 194, 209 (2003) (Rehnquist, C.J., plurality opinion).
[100] *Id.* at 214 (Kennedy, J., concurring); *id.* at 219 (Breyer, J., concurring).
[101] *Id.* at 202 (Rehnquist, C.J., plurality opinion); *id.* at 217 (Breyer, J., concurring); *Bradburn*, 231 P.3d at 181 ("A public library has traditionally and historically enjoyed broad discretion to select materials to add to its collection of printed materials for its patrons' use. We conclude that the same discretion must be afforded a public library to choose what materials from millions of Internet sites it will add to its collection and make available to its patrons.").
[102] *Id.* at 169.
[103] *Id.* at 183 (Chambers, J., dissenting).

properly analogized to a library collection decision to refrain from purchasing physical materials.[104] He wrote, "censoring material on the Internet is not the same thing as declining to purchase a particular book. It is more like refusing to circulate a book that is in the collection based on its content. That would raise serious constitutional concerns."[105] Most importantly, Justice Chambers emphasized his view that the *Bradburn* court had fundamentally misread the *ALA* decision. He argued strenuously that *ALA* does not support a holding that the NCRL's policy is constitutional, noting, "eight justices found the ability of a patron to *disable* the filter constitutionally critical."[106]

A. *Improper Interpretation: Bradburn and ALA*

ALA provides an explicit bar to library Internet policies that do not enable adult patrons to receive unfiltered Internet access. The meaning of *ALA* that is binding on lower courts is the opinion authored by Chief Justice Rehnquist, *as modified by* a concurring opinion that provided the critical fifth vote. In *ALA*, the concurrences of Justices Kennedy and Breyer agreed that adults have a constitutional right to unfiltered Internet access in public libraries, upon request.[107] In *Bradburn*, the Washington State Supreme Court failed to address *ALA*'s limiting concurrences, and therefore failed to follow *ALA*'s narrow holding, in responding to the question certified to it by the district court.[108] In the one area in which the *Bradburn* court did cite an *ALA* concurrence, the court was selective, drawing from Justice Breyer's concurring opinion to put forward the view that a public forum analysis could not properly be applied to a library's collection decisions.[109] The *Bradburn* court characterized the NCRL filtering policy as merely a library collection decision, and, as such, not a prior restraint on speech.[110] The court refrained, however, from following an equally important assertion in

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[104] *Id.* at 185.

[105] *Id.*

[106] *Id.* ("Justice Stevens alone thought the ability of an adult patron to have the filter removed was constitutionally irrelevant and even with that escape hatch, the CIPA was flatly unconstitutional.").

[107] *Am. Library Ass'n*, 539 U.S. at 215 (Kennedy, J., concurring) ("[I]f it is shown that an adult user's election to view constitutionally protected Internet material is burdened in some other substantial way, that would be the subject for an as-applied challenge"); *id.* at 219 (Breyer, J., concurring) ("[T]he adult patron need only ask a librarian to unblock the specific Web site or, alternatively, ask the librarian, 'Please disable the entire filter.'").

[108] The *Bradburn* court followed the majority in *ALA* in addressing and dismissing the problem of overblocking, *Bradburn*, 231 P.3d at 177 (citing *Am. Library Ass'n*, 539 U.S. at 209), but did not discuss the issue emphasized most strongly by Justice Kennedy, concurring in *ALA*, of providing access to protected material, even if properly blocked by a filter, upon the request of an adult library patron. *Am. Library Ass'n*, 539 U.S. at 215 (Kennedy, J., concurring).

[109] *Bradburn*, 231 P.3d at 174 (citing *Am. Library Ass'n*, 539 U.S. at 205-07 (Rehnquist, C.J., plurality opinion); *id.* at 215-16 (Breyer, J., concurring)) ("A majority of the Court in *A.L.A.* agreed that public forum analysis is inappropriate in determining whether a library can constitutionally filter certain Internet content.").

[110] *Id.* ("NCRL's filtering policy does not prevent any speech and in particular it does not ban or attempt to ban online speech before it occurs. Rather, it is a standard for making determinations about what will be included in the collection available to NCRL's patrons.").

Justice Breyer's concurrence: the constitutionality of CIPA notwithstanding, any failure to provide adult library patrons access to constitutionally protected material online upon request constitutes an unconstitutional application of the statute.[111]

Having dispatched the issue of prior restraint based on an inadequate interpretation of the *ALA* opinion (passing over the limitations placed on the holding by Justices Kennedy and Breyer), the *Bradburn* majority was also unconvinced by the argument that NCRL's filtering policy contained content-based restrictions.[112] The *Bradburn* court determined that, under the low scrutiny applied by the *ALA* plurality, a public library's Internet filtering policy may be found constitutional "if it is reasonable when measured in light of the library's mission and policies, and is viewpoint neutral."[113] The court went on to declare that NCRL's policy was both reasonable and viewpoint neutral.[114] It is likely that the concurring Justices in *ALA* would agree with the *Bradburn* court regarding the standard of scrutiny to be applied to the content-based restriction issue.[115] However, Justices Kennedy and Breyer would be far less likely to have come to the same determination as the *Bradburn* court on the merits: in an instance where filters are never to be removed, under any circumstances,[116] it is difficult to imagine the concurring *ALA* Justices characterizing such a policy as reasonable and viewpoint neutral.

III. *ALA* AND THE FUTURE OF LIBRARY CENSORSHIP

The legal outcome in *Bradburn* results from a misconstruction of the United States Supreme Court's decision in *ALA* by the Washington State Supreme Court. Because the state court decision was prompted by certification from the district court, the litigation concerning NCRL's Internet filtering policy is once again before the U.S. District Court for the Eastern District of Pennsylvania. That court, as well as the court of appeals, will have the opportunity to resolve the question of whether the NCRL policy, as applied to adults, violates the United States Constitution, in light of the Supreme Court's decision in *ALA* and in the wake of the state supreme court's ruling in *Bradburn*.

Regardless of how the *Bradburn* case is resolved in federal court, it is likely that burdens will continue to be placed on adult Internet access as a result of a national climate of fear and media pressure

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111 *Am. Library Ass'n*, 539 U.S. at 219 (Breyer, J., concurring).
112 *Bradburn*, 231 P.3d at 178 ("[N]ot all content-based distinctions are presumptively invalid or reviewed under a strict scrutiny standard.").
113 *Id.* at 180.
114 *Id.*
115 This is evidenced by the fact that neither of the state supreme court justices made any mention of the *ALA* plurality's handling of the content-based restriction issue.
116 *Bradburn*, 231 P.3d at 171 ("NCRL also has a policy that its Internet filter not be disabled at the request of an adult patron.").

regarding the Internet[117] that has led to flawed laws and imperfect jurisprudence.[118] The Internet is a relatively new medium for speech, with which legislatures and courts have not fully caught up,[119] and this has led to an explosive political climate that places minors in the center of the debate.[120] Legislators are under pressure from the media and from advocacy groups to continue to take measures to "protect" minors from dangers online,[121] which translates into strong pressure on libraries—and other providers of expressive materials—to carry the burden of protection, as evidenced by CIPA's enactment. As the *Bradburn* case demonstrates, radical interpretations of a legislature's mandate by individual library districts can too-easily result in what is, at least for Justice Souter dissenting in *ALA*, ongoing censorship.[122]

A. *CIPA and the Legislative Climate*

CIPA itself is a flagship statute for legislation in numerous states curtailing speech in the name of protecting minors. In recent years, legislation has been introduced in a number of states that goes even further than CIPA in restricting the content available in many public

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[117] *See, e.g.*, Lesley Farrey Pacey, *Hidden Dangers of the Digital Age*, MOBILE REGISTER, Jan. 28, 2011, at Z2; Julia Sellers, *Parents Get Tips on Keeping Kids Safe on Internet*, THE AUGUSTA CHRONICLE, Dec. 8, 2010, at A12; *Dangers Lurk for Kids on Internet*, THE SPECTRUM (St. George, Utah), Oct. 15, 2010, at C4; *Today Show: for Kids, Danger Lurks a Click Away* (NBC television broadcast Feb. 4, 2005), *available at* http://today.msnbc.msn.com/id/6893488/ns/today-parenting/; *Dateline NBC with Chris Hansen: Dangers Children Face Online* (NBC television broadcast Nov. 11, 2004), *available at* http://www.msnbc.msn.com/id/6083442/ns/dateline_nbc/; NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, ONLINE VICTIMIZATION: A REPORT ON THE NATION'S YOUTH 9 (2000).

[118] United States v. Am. Library Ass'n, 539 U.S. 194, 200 (2003) (citing *The Children's Internet Protection Act: Hearing on S. 97 Before the Senate Committee on Commerce, Science, and Transportation*, 106th Cong. 49 (1999) (prepared statement of Bruce Taylor, President and Chief Counsel, National Law Center for Children and Families) ("Congress learned that adults 'use library computers to access pornography that is then exposed to staff, passersby, and children,' and that 'minors access child and adult pornography in libraries.'"); S. REP. NO. 106-141, at 3 (1999) ("Natural sexual development occurs gradually, throughout childhood. Exposure of children to pornography distorts this natural development by shaping sexual perspective through premature exposure to sexual information and imagery. 'The result is a set of distorted beliefs about human sexuality.'") (citations omitted).

[119] One piece of evidence for this assertion is the wrong-headed argument made in both *ALA* and in *Bradburn*, analogizing collection decisions regarding books and periodicals to decisions to place filters on the Internet. *Am. Library Ass'n*, 539 U.S. at 207 (citing S. REP. NO. 106-141, at 7 (1999)) ("[T]he Internet . . . is no more than a technological extension of the book stack."); *Bradburn*, 231 P.3d at 176 (citing *Am. Library Ass'n*, 539 U.S. at 207). Since the 1990s, the Internet has been characterized by scholars, as well as by courts, as fundamentally different from books and other physical communication media, a kind of "commons" for largely unrestricted communication and development of ideas. *See* Reno v. Am. Civil Liberties Union, 521 U.S. 844, 870 (1997) (analogizing the Internet to a soapbox in the town square, a classic example of a public forum).

[120] *See* S. REP. NO. 106-141, at 2-4 (1999) (emphasizing the prevalence of dangerous material available to minors online, and the "threat" of minors accessing such material).

[121] Advocacy groups such as Enough is Enough call for "aggressive enforcement of existing laws and enactment of new laws to stop the exploitation and victimization of our children online." *Accomplishments*, ENOUGH IS ENOUGH, http://www.enough.org/inside.php?id=1RVZV34B2 (last visited Aug. 28, 2011). *See also supra* note 117 and accompanying text.

[122] *Am. Library Ass'n*, 539 U.S. at 234-35 (Souter, J., dissenting).

locations, including, but not limited to, libraries.[123] There are at least seven state laws currently undergoing litigation as to their constitutionality,[124] all of which impose content-based restrictions on the distribution of both online and physical materials.[125] Examples of these restrictive, content-based laws exist in places as politically and geographically diverse as Alaska and Massachusetts.[126] Section 11.61.128 of the Alaska Statutes went into effect in 2010,[127] imposing strict limitations on the distribution of constitutionally protected speech on topics ranging from sexual health to literature—on the Internet generally, as well as in book stores, video stores, and libraries.[128] Massachusetts recently passed Chapter 74 of the Acts of 2010,[129] which attaches criminal liability to any person who operates a website or communicates through a listserv,[130] where nudity or sexually related material appears, if that material can be considered "harmful to minors" under the definition of the law, even if it is constitutionally protected material.[131] To date, constitutional challenges have been brought against both the Alaska and the Massachusetts laws,[132] and both have been at least partially enjoined by district courts.[133]

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123 *See, e.g.*, ALASKA STAT. § 11.61.128 (2010); MASS. GEN. LAWS 272, § 31 (2010); *see also* Michael Kelley, *Librarians, Booksellers Seek to Overturn Alaska Law*, LIBRARY JOURNAL (Oct. 20, 2010), http://www.libraryjournal.com/lj/home/887371-264/librarians_booksellers_seek_to_overturn.html.csp.

124 Kelley, *supra* note 123 (Virginia, Vermont, Michigan, Arizona, South Carolina, New York and Ohio).

125 *Id.*

126 Modern use of "red" to signify Republican or conservative states and "blue" to signify Democratic and liberal states has been a popular shorthand at least since the 2000 United States Presidential election. Paul Farhi, *Elephants are Red, Donkeys are Blue*, WASH. POST (Nov. 2, 2004), http://www.washingtonpost.com/wp-dyn/articles/A17079-2004Nov1.html. Alaska and Massachusetts, on opposite sides of the United States geographically, are characterized as red and blue, respectively. *CNN Projects: Who's Ahead in the Fight for the Electoral College?*, CNN POLITICS (June 9, 2008), http://politicalticker.blogs.cnn.com/2008/06/09/cnn-projects-whos-ahead-in-the-fight-for-electoral-college-votes/.

127 *Alaska Booksellers Sue to Block Censorship Law*, AMERICAN BOOKSELLERS ASSOCIATION (Aug. 31, 2010), http://news.bookweb.org/news/alaska-booksellers-sue-block-censorship-law.

128 The law provides for prosecution of a bookseller, video retailer or librarian for even unknowingly providing to a minor materials containing nudity or sexual content that can be considered "harmful to minors" under the meaning of the statute, either online or in a brick-and-mortar location. Violators can be sentenced to up to two years in prison, must register as a sex offender, and can be forced to give up their business. ALASKA STAT. § 11.61.128 (2010); *see also Alaska Booksellers Sue to Block Censorship Law*, *supra* note 127.

129 MASS. GEN. LAWS 272, § 31 (2010); *see also* Press Release, American Civil Liberties Union, Local Booksellers, National Trade Associations, ACLU, and Others Sue to Block Internet Censorship Law (July 13, 2010), http://www.aclu.org/free-speech/local-booksellers-national-trade-associations-aclu-and-others-sue-block-Internet-censors.

130 *What Is a LISTSERV Mailing List?*, INDIANA UNIVERSITY INFORMATION TECHNOLOGY SERVICES KNOWLEDGE BASE (Oct. 2, 2010), http://www.kb.indiana.edu/data/afah.html (A "listserve" is a computer program that allows individuals, organizations, or businesses to create, manage, and control electronic mailing lists).

131 This law reaches beyond CIPA's focus on libraries and schools to criminalize any content deemed harmful to minors and attach up to $10,000 in fines and/or up to five years in prison to successful prosecution. MASS. GEN. LAWS 272, § 31 (2010).

132 Am. Booksellers Found. for Free Expression (ABFFE) v. Sullivan, No. 3:10-CV-0193, 2011 WL 2600734 (D. Alaska. June 30, 2011); Am. Booksellers Found. for Free Expression (ABFFE) v. Coakley, No. 10-CV-11165, 2010 WL 4273802 (D. Mass. Oct. 26, 2010).

133 *ABFFE*, 2011 WL 2600734 (the United States District Court for the District of Alaska found

Libraries across the country (and their counterparts in brick and mortar bookstores and online) have followed the lead of the American Library Association in trying to safeguard unrestricted access to constitutionally protected speech. District courts have largely responded by enjoining statutes that impose content-based restrictions on protected speech. However, it is important to note that the district court in *ALA* also issued an injunction in response to CIPA, but was reversed by the Supreme Court; district court injunctions are by no means the final word on these challenged statutes. With regard to a facial challenge to the imposition of filtering software as a condition of federal funding to libraries, *ALA* stands as the final word from the highest court in this country. There is no indication that the change in membership on the Supreme Court since the *ALA* ruling has shifted the view of the Court on this issue.[134] However, it is clear that *ALA* does not stand as a bar to as-applied challenges.[135] Additionally, it is not clear what position the Supreme Court would take regarding measures that restrict adult access to protected materials in contexts outside of federally funded public libraries. Statutes with criminal implications, such as those being challenged in Alaska and Massachusetts, require a different type of constitutional treatment, as they implicate due process and free speech concerns under the Fourteenth Amendment, and challenges to these laws may fare better.[136]

B. *Living with the Internet*

Along with statutory support, another invitation to restrict online speech is in the public fear of the expanded access minors have to

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the challenged statute unconstitutional, striking it down and noting that eighteen federal judges in five circuits had previously struck down state statutes like that considered by the court); *ABFFE*, 2010 WL 4273802 (allowing a preliminary injunction against the challenged statute).

[134] Chief Justice Rehnquist, and Justices O'Connor, Souter, and Stevens have since been replaced on the Supreme Court by Chief Justice Roberts, and Justices Alito, Sotomayor, and Kagan, respectively. Commentators have characterized Justice Alito as a First Amendment "absolutist," pointing to his position upholding corporate speech in *Citizens United v. Federal Elections Commission* (*FEC*), 130 S. Ct. 876 (2010). Adam Liptak, *On Speech, Kagan Leaned Toward Conservatives*, N.Y. TIMES, May 15, 2010, at A19, *available at* http://www.nytimes.com/2010/05/16/us/politics/16court.html [hereinafter Liptak, *On Speech*]. Justice Alito and Chief Justice Roberts (who was also in the *Citizens United* majority), however, would likely distinguish *Citizens United* from a case like *ALA*, in which the public forum analysis enables an application of lower-level scrutiny to content-based restrictions made by public libraries (in *Citizens United*, the forum of elections was clearly public). *Citizens United*, 130 S. Ct. at 976. It has been noted that Justice Sotomayor's record prior to her appointment to the Supreme Court indicated that her appointment does not seriously alter the balance of power on the Court with regard to First Amendment issues. *Initial Look at Sotomayor's First Amendment Record*, FIRST AMENDMENT CENTER (May 27, 2009), http://www.firstamendmentcenter.org/initial-look-at-sotomayors-first-amendment-record. While there is little record to draw on in projecting the position of Justice Kagan, her views on the First Amendment have been characterized as "absolutist," aligned more closely with Justices Scalia, Alito and Thomas as contrasted with Justice Stevens. Liptak, *On Speech*, *supra*.

[135] *Am. Library Ass'n*, 539 U.S. at 215 (Kennedy, J., concurring).

[136] *See, e.g.*, Am. Civil Liberties Union v. Mukasey, 534 F.3d 181 (3d Cir. 2008) (striking down the Children's Online Protection Act (COPA), in part, for impermissible vagueness, in violation of the Fifth Amendment).

harmful materials online. Heightened concern for the safety of minors easily takes center stage in the national debate and leads to fearful calls for drastic actions. Much has been made, by lawmakers and the media, of easy access to inappropriate material.[137] However, reports of the grave dangers to minors online are not without criticism and contradictory data.[138] As the Internet Safety Technical Task Force to the State Attorneys General of the United States has put it in a report, "[t]he Internet increases the availability of harmful, problematic and illegal content, but does not always increase minors' exposure."[139] It is also the case that the Internet provides access to information that individual adults need for their own health and well-being, as well as for purposes of civic participation.[140] In a climate of heightened urgency, it is imperative that courts take great care in balancing the legitimate interest in protecting minors from harmful content with a full consideration of adult interests in First Amendment protections, recalling that content-based restrictions are unconstitutional if they effectively limit adults to accessing only materials deemed suitable for children.[141]

The policy argument put forward by the Senate Committee on Commerce, Science, and Transportation in its report on CIPA,[142] favoring Internet filtering as a means of protecting minors, has an important counterweight in a policy argument asserted by Justice Stevens, dissenting in *ALA*. Justice Stevens placed great emphasis on the fact that CIPA restrictions apply to programs that are designed largely to provide Internet access for individuals in low-income

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137 *See supra* note 117 and accompanying text; *see also* 145 Cong. Rec. S531 (daily ed. Jan. 19, 1999) (statement of Sen. John McCain).

138 *See, e.g.*, BERKMAN CENTER FOR INTERNET & SOCIETY AT HARVARD UNIVERSITY, ENHANCING CHILD SAFETY & ONLINE TECHNOLOGIES 5 (2008), *available at* http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/ISTTF_Final_Report.pdf [hereinafter "Berkman Center, *Enhancing Child Safety*"] ("Unwanted exposure to pornography does occur online, but those most likely to be exposed are those seeking it out, such as older male minors.").

> The public and the professional impression about what's going on in these kinds of crimes is not in sync with the reality, at least so far as we can ascertain it on the basis of research that we've done . . . .
>
> If you think about what the public impression is about this crime, it's really that we have these internet pedophiles who've moved from the playground into your living room through the internet connection . . . .
>
> But actually, the research in the cases that we've gleaned from actual law enforcement files, for example, suggests a different reality for these crimes.

David Finkelhor, Advisory Committee to the Congressional Internet Caucus, Transcipt, *Just the Facts About Online Youth Victimization, Researchers Present the Facts and Debunk Myths*, May 3, 2007, http://www.netcaucus.org/events/2007/youth/20070503transcript.pdf.

139 BERKMAN CENTER, ENHANCING CHILD SAFETY, *supra* note 138, at 5.

140 *Am. Library Ass'n*, 539 U.S. at 229 (Stevens, J., dissenting) (citing Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 446-47 (E.D. Pa. 2002), *rev'd*, 539 U.S. 194 (2003)).

141 Butler v. Michigan, 352 U.S. 380, 383-84 (1957) (stating the legislation before the court will "reduce the adult population . . . to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the *Due Process Clause*") (emphasis added).

142 S. REP. NO. 106-141, at 5 (1999).

communities[143] who are likely to have no alternative means of Internet access when faced with filtering.[144] Individuals with home computers, or Internet access at their place of work, face inconvenience when confronted with library Internet filters, but have other means of acquiring the content they seek. Those without alternatives, largely low-income individuals,[145] will disproportionately confront the issues of privacy, dignity, and necessity that attend restrictions on access. Recalling that libraries in every state in the United States are subject to CIPA restrictions, the law may have devastating effects with regard to the ability of many individuals to access necessary information online.[146]

There are numerous sensitive topics that could require individuals needing unfiltered public Internet access to share private information with a librarian. Some of the topics that have been subject to blocking include research on a diagnosis of breast cancer,[147] exploration of sites addressing issues of homosexuality,[148] and information regarding sexual health.[149] If library Internet users seek a website that is blocked (whether erroneously or correctly), or if they simply want to browse without a filter, CIPA requires them to make a face-to-face request to library staff. The *ALA* plurality was unconcerned by face-to-face requests: "the Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment."[150]

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[143] CIPA applies to grants under the Library Services and Technology Act (LSTA), 20 U.S.C. § 9121 *et seq*. (2006), and to "E-rate discounts" for Internet access and support under the Telecommunications Act. 47 U.S.C. § 254 (2006). The stated purpose of these two grant programs is to provide library services primarily to low-income families and communities. Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 406–07 (citing 20 U.S.C. § 9134(f)(1)(A) (2006) (LSTA); 47 U.S.C. § 254(h)(6)(B) & (C) (2006) (E-rate)).

[144] *Am. Library Ass'n*, 201 F. Supp. 2d at 422 ("Public libraries play an important role in providing Internet access to citizens who would not otherwise possess it. Of the 143 million Americans using the Internet, approximately 10%, or 14.3 million people, access the Internet at a public library. Internet access at public libraries is more often used by those with lower incomes than those with higher incomes. About 20.3% of Internet users with household family income of less than $ 15,000 per year use public libraries for Internet access. Approximately 70% of libraries serving communities with poverty levels in excess of 40% receive E-rate discounts."). *See also Am. Library Ass'n*, 539 U.S. at 228 (Stevens, J., dissenting).

[145] SAMANTHA BECKER ET AL., OPPORTUNITY FOR ALL: HOW THE AMERICAN PUBLIC BENEFITS FROM INTERNET ACCESS AT U.S. LIBRARIES 33 (2010) ("Income is a major driver for uses of public library Internet access. People earning between 100 and 200 percent of the poverty guidelines, or about $22,000 to $44,000 for a family of four, had higher odds of using library computers or wireless connections by a factor of 2.68 than people earning more than 300 percent of the poverty guidelines.").

[146] *See* Education and Library Networks Coalition, *supra* note 40.

[147] *Am. Library Ass'n*, 201 F. Supp. 2d at 427 ("We also credit the testimony of Mark Brown, who stated that he would have been too embarrassed to ask a librarian to disable filtering software if it had impeded his ability to research treatments and cosmetic surgery options for his mother when she was diagnosed with breast cancer.").

[148] *Id.* ("We credit the testimony of Emmalyn Rood . . . that she would have been unwilling . . . to ask a librarian to disable filtering software so that she could view materials concerning gay and lesbian issues.").

[149] Jeremy Manier, *Web Porn Filters Block Health Data*, CHICAGO TRIBUNE, Dec. 11, 2002, at 21.

[150] United States v. Am. Library Ass'n, 539 U.S. 194, 209 (2003).

But an emphasis on embarrassment simplifies and downplays the real risk, as Justice Souter alluded to in his dissent[151]: at risk in the imposition of face-to-face unblocking requests is the ability of individuals to obtain information without fear of consequence. That is, of course, if they can obtain it at all in the wake of *Bradburn*, which would obstruct such information irrevocably.[152]

C. *Protecting Adult Inquiry*

Libraries, booksellers and other aligned professionals, and their affiliated advocacy organizations, are making strenuous efforts to protect their territory for freedom of inquiry, both online and offline, but they are fighting an uphill battle against a wave of legislation. The strongest opportunity for shielding public library Internet access against overly expansive readings of CIPA restrictions, like that which appears in *Bradburn*, is a proper analysis of *ALA*. Such an analysis must recognize the concurring justices' emphasis on maintaining First Amendment protections for adults, in spite of CIPA's filtering requirements,[153] and the plurality's assumption of the availability of unblocking for adults.[154] There is substantial support to be found in *ALA* for the United States District Court for the Eastern District of Washington to overturn or at least limit the Washington State Supreme Court's ruling in *Bradburn*.[155] With *ALA* as precedent, however, any future lower court rulings seeking to limit the reach of CIPA will likely find themselves back in front of the Supreme Court. The open question is whether, confronted again with a CIPA challenge, the Supreme Court will further clarify its *ALA* holding to explicitly adopt the limitations placed by concurring Justices Kennedy and Breyer, emphasizing protections for adult access to material that falls within the reach of the First Amendment.

Doctrines of judicial restraint[156] make it unlikely that the Supreme Court would seize upon an opportunity to revisit a facial challenge to CIPA. However, the Supreme Court readily could—and should—take advantage of as-applied challenges to CIPA to clarify its holding in *ALA*. There are a number of circumstances in which an as-applied

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151 Justice Souter noted that embarrassment was not a concern with regard to minors seeking unfiltered Internet access, but did not dismiss such a concern with regard to adults, and went on to criticize the vagueness of CIPA's provision for unblocking requests. *Id.* at 232-33 (Souter, J., dissenting).

152 Bradburn v. N. Cent. Reg'l Library Dist., 231 P.3d 166, 169 (Wash. 2010).

153 *Am. Library Ass'n*, 539 U.S. at 209, 214 (Kennedy, J., concurring), 219 (Breyer, J., concurring); *id.* at 225 (Stevens, J., dissenting); *id.* at 232 (Souter, J., dissenting).

154 *Id.* at 209 (Rehnquist, C.J., plurality opinion).

155 *Bradburn* now returns to the district court for a ruling and, depending on that court's holding, could find its way to the U.S. Supreme Court, which would afford another opportunity to look at *ALA*.

156 For example, the doctrine of stare decisis, under which a court will adhere to a previously set out principle of law as applied to a particular set of facts, applying the same principle where facts are substantially the same. 20 AM. JUR. 2d *Courts* § 129.

challenge might emerge: libraries might respond to CIPA by denying adults access to unfiltered Internet, as in *Bradburn*; a particular request for unblocking might result in harmful consequences, ranging from expulsion from the library to the public sharing of personal information; and individual adult library patrons might bring suits alleging that they found it impossible to receive unfiltered Internet access "without significant delay."[157] Should such a case reach the Supreme Court, the Court could find that libraries have implemented CIPA's restrictions in ways that are overly restrictive of the First Amendment rights of adult library patrons. Such a finding would allow the Court to provide a majority opinion that explicitly states the clear message from *ALA*'s plurality: filtering policies that inhibit the First Amendment rights of adult library patrons are patently unconstitutional.[158]

A new Supreme Court review of *ALA* in an as-applied challenge would also provide an opportunity to re-visit the policy arguments on both sides of the issue. Currently, at the state and local level, the importance of maintaining the First Amendment protections afforded to adults is in danger of being outweighed by a public call to take extreme steps to protect minors online.[159] Through as-applied CIPA challenges, the arguments on both sides[160] could be re-assessed in light of more current studies.[161] The current state of filtering technologies could be reviewed and considered in context, and the merits of the least restrictive means test, as applied to filtering, could also be reviewed.[162]

CONCLUSION

The *ALA* decision is a disappointing one, premised on the view of the majority of Supreme Court justices that CIPA is—at least facially—constitutionally valid. But where *ALA* is disappointing, *Bradburn* is disturbing, because it draws conclusions from *ALA* about interpreting CIPA that should properly be precluded by *ALA*'s concurring opinions. *Bradburn* takes First Amendment jurisprudence in a direction that weakens protections for adult access, which at least five members of the Supreme Court clearly opposed in *ALA*, and that arguably the entire Court opposed. It remains to be seen how the federal district court will respond to the Washington State Supreme Court's ruling, but there is certainly room for the court to use *ALA* to reverse the state supreme court's *Bradburn* decision.[163] The *ALA* decision was overly conclusory,

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157 *Am. Library Ass'n*, 539 U.S. at 214 (Kennedy, J., concurring).
158 *Id.*
159 *See, e.g.*, ALASKA STAT. § 11.61.128 (2010); MASS. GEN. LAWS 272 § 31 (2010).
160 *Compare* S. REP. NO. 106-141 (1999), *with* Finkelhor, *supra* note 138.
161 *See, e.g.*, BERKMAN CENTER, ENHANCING CHILD SAFETY, *supra* note 138.
162 *Am. Library Ass'n*, 539 U.S. at 223 (Stevens, J., dissenting) ("[T]he District Court expressly found that a variety of alternatives less restrictive are available at the local level.").
163 *Am. Library Ass'n*, 539 U.S. at 215 (Kennedy, J., concurring); *id.* at 219 (Breyer, J., concurring in the judgment).

in that it relied unquestioningly on the Government's representation of the ease with which adult library patrons would receive unfiltered Internet access.[164] However, *ALA* does not support the result in *Bradburn* and, particularly with its limiting concurrences, it offers substantial support for future courts to correct the *Bradburn* ruling.

The climate of fear and pressure with regard to protecting children online makes it imprudent to rely on legislatures to honor the traditional First Amendment values that demand unfettered public access to the Internet.[165] It will likely fall to the courts to defend these values. This is in keeping with the traditional role of courts,[166] and it plays to the strengths of the judiciary, which is not politically accountable or vulnerable, by comparison to legislative bodies. It is crucial that courts going forward—including the Supreme Court, should the opportunity arise—recognize the narrowness of the *ALA* ruling, unequivocally upholding the First Amendment rights of adult library patrons in accessing the Internet. As Justice Souter wrote in *ALA*, dissenting,

> A library that chose to block an adult's Internet access to material harmful to children (and whatever else the undiscriminating filter might interrupt) would be imposing a content-based restriction on communication of material in the library's control that an adult could otherwise lawfully see. This would simply be censorship.[167]

Current courts at all levels must begin to recognize such censorship for what it is, and take steps to stop it. As scholars at the Brennan Center for Justice have pointed out, "[a]lthough some may say that the debate is over and that filters are now a fact of life, it is never too late to rethink bad policy choices."[168]

Olivia J. Greer[*]

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[164] *Id.* at 209 (Rehnquist, C.J., plurality opinion).

[165] *Am. Library Ass'n*, 539 U.S. at 235 (Souter, J., dissenting) (citing Bigelow v. Virginia, 421 U.S. 809, 829 (1975)) ("The policy of the First Amendment favors dissemination of information and opinion, and the guarantees of freedom of speech and press were . . . designed to prevent . . . any action of the government by means of which it might prevent such free and general discussion of public matters.").

[166] *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."); Reno v. Am. Civil Liberties Union, 521 U.S. 844, 875 (1997) ("It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials . . . But that interest does not justify an unnecessarily broad suppression of speech addressed to adults.").

[167] *Am. Library Ass'n*, 539 U.S. at 234-35 (Souter, J., dissenting).

[168] HEINS ET AL., *supra* note 1, at ii.

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