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Major Shifts in First Amendment Doctrine Narrowly Averted

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As the U.S. Supreme Court concluded a Term in which First Amendment claims were almost uniformly unsuccessful,[1] several core free speech doctrines narrowly escaped injury in the Court's fractured decision in *United States v. American Library Association* (*ALA*).[2] In *ALA*, the Court considered a constitutional challenge to the Children's Internet Protection Act (CIPA), a federal law that requires public libraries receiving federal Internet funding to use blocking software, or filters, on their Internet terminals. Although the Court ultimately upheld the statute, no single rationale garnered a majority of votes. Indeed, the narrow concurrences of Justices Kennedy and Breyer—at least one of which was necessary to uphold CIPA—scarcely addressed the reasoning of the plurality opinion, relying instead on an expansive interpretation of a provision in the law permitting libraries to disable the filters.

Had another Justice signed onto Chief Justice Rehnquist's plurality opinion, the case would have signaled a shift in free speech jurisprudence. The plurality offered a sweeping rejection of the plaintiffs' First Amendment claims, with language and reasoning that would limit both the public forum doctrine and the doctrine of unconstitutional conditions. The plurality opinion thus illustrates the precarious nature of those two fundamental free speech doctrines.

Children's Internet Protection Act

After several failed attempts to regulate Internet speech, Congress enacted CIPA in 2000. Rather than directly restricting online expression, CIPA imposes conditions on federal funding programs for public Internet connections. One of those programs, the FCC-administered universal service or E-rate program, provides libraries and schools with discounted rates for access to telecommunications services, such as high-speed Internet access and internal network connections. CIPA also modifies the Library Services and Technology Act of 1996 (LSTA), which funds state library administrative agencies that, in turn, support a variety of local library services, including the provision of public Internet access.[3] Both programs have contributed significantly to the increased availability of Internet access in public libraries, especially in low-income communities.

CIPA requires a public library accepting federal Internet funds to install and use a filter on all of its Internet terminals, at all times.[4] Under CIPA, recipient libraries must certify that the blocking software "protects against access . . . to visual depictions" on the Internet that are "obscene" or "child pornography" (as defined in the federal criminal code) and, during Internet use by minors, blocks material that is "harmful to minors."[5]

Although the statute does not specify which particular blocking software libraries must use, filtering programs are commercially available from only a handful of software companies. For the most part, each of the commercially available filters operates in substantially similar ways. Once installed on a library's computer network, blocking software prevents users from viewing a webpage if that page is included on the software's preestablished list of pages or sites to be blocked. These lists group

webpages into a wide range of content categories such as "nudity," "alcohol," "sex," "tasteless/gross," "travel," etc., selected through a combination of human review and automatic sorting.

To address the fact that filters often block websites erroneously, CIPA contains a disabling provision that ultimately proved crucial to the judgment in *ALA*. That provision permits libraries to turn off the required blocking software "to enable access for bona fide research or other lawful purposes."[6] As written, however, the statute does not require libraries to disable under those circumstances, and it does not provide any additional guidance explaining the terms "bona fide research" or "other lawful purposes."

District Court Litigation

Shortly after CIPA's enactment, a broad coalition of libraries, library associations, and patrons filed a facial challenge to the statute in the U.S. District Court in Philadelphia. The plaintiffs raised two basic First Amendment claims. First, they argued that CIPA is an unconstitutional exercise of Congress's spending power under *South Dakota v. Dole*,[7] because it requires public libraries, as a condition of receiving federal Internet funding, to engage in conduct that would violate the First Amendment. The plaintiffs argued that filtering software is inherently flawed, and necessarily blocks vast amounts of constitutionally protected (and often innocuous) material. Consequently, the plaintiffs contended, CIPA imposes content-based restrictions on the "designated public forum" created when libraries provide Internet access to the public.

Second, the plaintiffs argued that CIPA is an unconstitutional condition on public libraries' receipt of federal funds. Even if an individual public library's decision to filter Internet access were constitutional, the plaintiffs contended, the statute impermissibly coerces libraries into making that restrictive decision. The plaintiffs argued that, under a series of U.S. Supreme Court precedents, the First Amendment prohibits Congress from wielding its spending power to distort a library's decisions about what types of speech to make available to patrons—just as Congress can not use its spending power to force private or public universities to make particular curricular decisions that Congress happens to favor.

After a two-week bench trial, the district court invalidated CIPA.[8] Addressing the plaintiffs' first argument, the district court concluded that, in providing public Internet access, "public libraries create a public forum open to any speaker around the world to communicate with library patrons via the Internet on a virtually unlimited number of topics."[9] The court held that Internet access in public libraries is thus a type of designated public forum, "analogous to traditional public fora such as streets, sidewalks, and parks, in which content-based restrictions are always subject to strict scrutiny."[10]

In its factual findings, the district court determined that filtering software is an inherently crude tool that both "underblocks," in that it fails to block a substantial number of targeted sites, and "overblocks," in that it blocks an enormous amount of constitutionally protected speech on the Internet, including much that has no sexual content whatsoever.[11] The court found the problems with overblocking to be particularly significant. Because filters block according to content categories that are far broader than those proscribed by CIPA, the court concluded, the software necessarily would block a substantial amount of protected speech even if it worked with perfect accuracy.[12] Moreover, the district court found, "[m]any erroneously blocked [web] pages contain content that is completely innocuous for both adults and minors, and that no rational person could conclude matches the filtering companies' category definitions, such as 'pornography' or 'sex.' "[13]

Incorporating these factual findings into its public forum analysis, the district court struck down CIPA, concluding that a library complying with the statute's filtering mandate necessarily would violate the constitutional rights of its patrons. In addition, although unnecessary to its holding, the district court observed in a lengthy footnote that, on their second claim, the plaintiffs had "a good argument that CIPA's requirement that public libraries use filtering software distorts the usual functioning of public libraries in such a way that it constitutes an unconstitutional condition on the receipt of funds."[14]

Turning Off the Filters

On appeal from the district court, the U.S. Supreme Court reversed.[15] Although six Justices voted to uphold CIPA, only three—Justices Scalia, Thomas, and O'Connor—joined Chief Justice Rehnquist's plurality opinion. Justices Kennedy and Breyer concurred in the judgment sustaining the statute, but each wrote a separate opinion that focused heavily on CIPA's disabling provision as a statutory safety valve. As a result, the concurrences virtually nullified the precedential value of the plurality opinion.

At oral argument in *ALA*, the government offered a broad interpretation of CIPA's disabling provision. As recounted in the plurality opinion, "[t]he Solicitor General confirmed that a 'librarian can, in response to a request from a patron, unblock the filtering mechanism altogether,' and further explained that a patron would not 'have to explain . . . why he was asking a site to be unblocked or the filtering to be disabled.' "[16] With that expansive view in mind, Justice Kennedy concluded in his brief concurrence that "[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."[17] Although the broad disabling provision foreclosed a facial challenge to the statute, Justice Kennedy reasoned, an as-applied challenge might well be appropriate if a library were unable or unwilling to unblock websites and disable the filtering software for adult patrons.[18]

Similarly, Justice Breyer's concurrence placed great weight on CIPA's disabling provision. Justice Breyer crafted his own analytical approach in *ALA*, applying a form of intermediate scrutiny that balanced the government's objectives against the statute's harm to free expression.[19] Under that approach, Justice Breyer concluded that the law's disabling provision, as described by the government at oral argument, cured any constitutional deficiencies in the statute. "[T]he Act allows libraries to

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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.' "[20]

Justices Souter and Ginsburg, however, were unconvinced by the government's characterization of CIPA's disabling provision at oral argument. In dissent, they acknowledged the government's assertion that, under the disabling provision, an adult library patron could "obtain an unblocked terminal simply for the asking."[21] "If that policy were communicated to every affected library as unequivocally as it was stated to us at oral argument," their dissent explained, "local librarians might be able to indulge the unblocking requests of adult patrons to the point of taking the curse off the statute for all practical purposes."[22] Nonetheless, Justices Souter and Ginsburg concluded that the actual, discretionary language of CIPA's disabling provision belied the interpretation offered by the government.[23] Accordingly, they voted to affirm the district court, as did Justice Stevens, albeit on different grounds.

The *ALA* plurality concluded that Internet access in public libraries is neither a traditional nor a designated public forum.

Public Forum Doctrine

The plurality opinion in *ALA* upheld CIPA on far broader grounds than those offered by the concurrences. Although Chief Justice Rehnquist's opinion noted the expansive reach of CIPA's disabling provision, it concentrated more on the level of scrutiny appropriate to the statute. In the process, the plurality rejected the district court's public forum analysis outright, subjecting the law only to the most deferential standard of review.

Under the public forum doctrine, the state's ability to restrict expression on government property is directly tied to the nature of the forum at issue. The U.S. Supreme Court has identified three types of fora: traditional, designated (or limited), and nonpublic fora.[24] In a traditional public forum, such as a street or park, speech restrictions are subject to strict scrutiny. Relatedly, the government creates a designated public forum when it opens property for broad expressive use by the public. Although the state is not obligated to establish a designated public forum, once it does so it is bound by the same strict standards applicable to traditional public fora.[25] Finally, the government has considerable leeway to restrict expression in a nonpublic forum, where speech limitations need only be reasonable and viewpoint neutral.[26]

The *ALA* plurality concluded that the forum regulated by the CIPA, i.e., Internet access in public libraries, is neither a traditional nor a designated public forum, and should therefore enjoy no heightened First Amendment protection. The plurality first examined the nature of the public library, likening a library's selection of books and other materials to the editorial decisions of a public broadcasting station and the selective funding choices of the National Endowment for the Arts.[27] The plurality then reasoned that a library's provision of public Internet access should be treated no differently from its selection of books.

The plaintiffs had argued that book selection and Internet access are analytically distinct, because, unlike the review and acquisition of a necessarily limited set of books, libraries offering Internet access automatically make available the entire universe of online speech. Having opened up a portal to a virtually unlimited number of topics, the plaintiffs contended, a library should not be free to exclude a disfavored category of protected speech based on its content. Rejecting that argument, Chief Justice Rehnquist reasoned that it makes no difference, under the public forum doctrine, whether an initial selection decision is based on individualized determinations—as with books and other physical materials—or whether it is broadly and indiscriminately made—as with the Internet. "[I]t is entirely reasonable," the plurality concluded, "for public libraries . . . to exclude certain categories of content, without making individualized judgments that everything they do make available has requisite and appropriate quality."[28]

The plurality's reasoning, if adopted by the Court, would have profound implications for public forum analysis. First, even accepting the plurality's characterization of the traditional mission of the public library, Chief Justice Rehnquist's opinion does not account for distinctions among fora within the library. In past public forum doctrine cases, the U.S. Supreme Court has focused on the specific property or medium to which the speaker or audience seeks access. When analyzing speech restrictions on a federal workplace charity drive, for example, the Court has viewed the charity drive itself, and not the federal workplace generally, as the relevant forum.[29] Similarly, in a series of cases addressing speech limitations on meeting rooms located in public schools, the Court has focused on the forum created by the meeting rooms, and not on the expressive characteristics of the buildings in which those rooms were located.[30] In *ALA*, however, the plurality placed great emphasis on libraries generally and their physical collections, rather than on the unique characteristics of the Internet. Having linked the library's provision of Internet access to classic library collection development, the plurality could then recast the forum of the Internet in more speech-restrictive terms. Thus, according to the plurality, when a library offers free Internet access to the public, it "does so to provide its patrons with materials of requisite and appropriate quality, not to create a public forum for Web publishers to express themselves."[31]

More fundamentally, the plurality's analysis would afford the government nearly unbounded discretion to define the nature of its forum. Under that analysis, the content restriction in question—filtering the Internet in this case—is, by itself, evidence of the government's intent not to create a designated forum. But that approach does not distinguish between the state's affirmative, limited *selection* in an otherwise-closed forum (such as a public television station's editorial decision-making process),[32] and the govern-

ment's content-based *exclusion* of only one subset of speech from a forum generally open to broad expression (as when a municipality allows broad access to a public auditorium, and then bars a small class of speakers).[33] Within the plurality's framework, nearly every speech restriction in a nontraditional forum would be permissible once the government defined the forum in a way that incorporated that same restriction. Such an approach, as Justice Kennedy recognized in an earlier case, would virtually eliminate the designated public forum category altogether: "If Government has a freer hand to draw content-based distinctions in limiting a forum than in excluding someone from it, the First Amendment would be a dead letter in designated public fora; every exclusion could be recast as a limitation."[34]

As a practical matter, the public forum doctrine would have greatly diminished significance without designated public fora, particularly looking toward a future where traditional public fora such as streets and parks will become increasingly less important as compared to "virtual" forms of communication. But because the plurality opinion failed to secure a necessary fifth vote, the public forum doctrine narrowly survived the decision in *ALA*.

Lest free speech advocates find comfort in this outcome, however, it is worth noting that Justice Stevens, in his dissenting opinion, expressed sympathy with the plurality's public forum approach. Before concluding that CIPA imposes unconstitutional conditions on library Internet access nationwide, Justice Stevens cited the plurality favorably, remarking that an individual library may, consistent with the First Amendment, "experiment with filtering software as a means of curtailing children's access to Internet Web sites displaying sexually explicit images."[35] It is thus unclear where a majority of the Court stands on the public forum doctrine generally and how any particular case might be resolved.

Some might argue that the death of the public forum doctrine ultimately would serve the interests of free speech. Critics of the doctrine—many of them ardent First Amendment advocates—are legion, both in judicial[36] and academic[37] circles. Many decry the public forum doctrine's malleability, which often falls well short of its original speech-protective objectives. Indeed, under the *ALA* plurality's forum analysis, Internet expression—expression that the Court has recognized to be "as diverse as human thought"[38]—would enjoy no heightened protection in a public library, which is itself a forum once described by Chief Justice Rehnquist as "designed for freewheeling inquiry."[39]

But unless and until the Court finds a more workable analytical framework for reviewing speech restrictions on public property, the public forum doctrine will remain a key component of free speech jurisprudence. Given that reality, First Amendment litigants should find the *ALA* plurality's restrictive forum analysis troubling.

The Plurality Opinion and the Doctrine of Unconstitutional Conditions

Similarly disconcerting is the plurality opinion's treatment of the *ALA* plaintiffs' unconstitutional conditions claim. Even accepting the notion that libraries constitutionally may choose whether and how to filter Internet access, the plaintiffs argued that the First Amendment prohibits Congress from using its funding power to impose a filtering mandate on every recipient library across the country, 93 percent of which had not chosen a filtering policy as restrictive as that mandated by CIPA. The plaintiffs thus contended that CIPA unconstitutionally conditions the receipt of E-rate and LSTA funds on the grantees' relinquishment of all local discretion in the provision of Internet access. The *ALA* plurality rejected that claim, quoting the Court's earlier pronouncement in *Rust v. Sullivan*[40] that "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program."[41] If adopted by a majority of the Court, the plurality's unconstitutional conditions analysis—with its heavy reliance on *Rust*—would undermine First Amendment limits on funding restrictions.

From a free speech perspective, *Rust* was a low point in modern unconstitutional conditions jurisprudence. In *Rust*, the U.S. Supreme Court upheld a restriction on family planning funding that had prohibited grantees from counseling patients about abortion.[42] Rejecting a First Amendment-based unconstitutional conditions claim, the Court in *Rust* held that "the Government [was] not denying a benefit to anyone, but [was] instead simply insisting that public funds be spent for the purposes for which they were authorized."[43]

Taken at face value, the *Rust* rule would effectively allow the government to insulate from review almost any restriction on speech funding. Perhaps in recognition of this danger, the Court subsequently cabined its decision in *Rust* by recognizing that the abortion counseling funding in that case was "government speech"—that is, funding to promote a particular governmental message.[44] Accordingly, in the decade since *Rust*, the Court consistently has distinguished between funding programs like that in *Rust*, in which the state itself acts as a speaker, and those in which the government "expends funds to encourage a diversity of views from private speakers."[45] Although, in the former situation, the state enjoys substantial discretion to tailor its message, in the latter case, the First Amendment forbids content-based limits on the funded expression.[46] Where a funding program is "designed to facilitate private speech,"[47] the U.S. Supreme Court recently explained, the government may not "seek[] to use an existing medium of expression and to control it, . . . in ways which distort its usual functioning."[48]

The *ALA* plurality sought to rehabilitate *Rust*, quoting it extensively and distinguishing the cases that followed. That effort should give First Amendment advocates pause. Under the *Rust* analysis adopted by the *ALA* plurality, "Congress may certainly insist that [its] 'public funds be spent for the purposes for which they were authorized.' "[49] In essence, this approach to unconstitutional conditions suggests that a funding restriction is permissible if the restriction is consistent with its own parameters. As with the plurality's public forum analysis, acceptance of this rationale by a majority of the Court would leave the unconstitutional conditions doctrine practically toothless. As the Court recently warned, if Congress can "recast a condition on funding as a mere definition of its program in every case," the First Amendment will be "reduced to a simple semantic exercise."[50]

It was particularly disturbing to see the plurality adopt this approach—designed essentially to overrule the unconstitutional conditions doctrine—in a case where the funding recipients were public (generally municipal) libraries. That fact might have allowed

the Court to reach the same result in a much narrower way, relying on the conclusion that state actors like public libraries cannot mount a First Amendment defense to a condition on federal funds, even if a private party might be able to do so.[51] But the Chief Justice's opinion chose instead to attempt to revive the *Rust* rule that any federal fund recipients must accept the speech restrictions that go with the money.

Strikingly, the plurality showed no awareness of the federalism concerns caused by giving the federal government unlimited ability to control local government through funding restrictions. CIPA, after all, is a law under which Congress attempts to micromanage the internal operations of a particular agency of local government (the public library), imposing a one-size-fits-all Internet use policy regardless of community served, the library's physical characteristics, or any other local factor. Such a federal law would be unimaginable if it were not keyed to federal funding. But in the spending clause context, the plurality did not appear troubled at all by this level of federal intrusion into a particularly sensitive area of local governmental operations.

Without the necessary fifth vote, however, the *ALA* plurality's unconstitutional conditions analysis serves primarily as a warning to free speech advocates. Were it adopted by a majority of the Court, it could extend to, and ultimately permit, a virtually boundless array of speech restrictions.

Conclusion

The plurality opinion in *ALA* underscores the tenuousness of the public forum and unconstitutional conditions doctrines, and suggests that the U.S. Supreme Court's free speech jurisprudence is now, as much as ever, in a state of flux. While all of the opinions in the *ALA* case raise significant doctrinal questions, the Court's fractured take on many pressing issues likely will have to be resolved in subsequent cases.[52]

Endnotes

1. *See* United States v. Am. Library Ass'n, 123 S. Ct. 2297 (2003) (upholding statute conditioning federal funds on public library use of Internet blocking software); Illinois *ex rel.* Madigan v. Telemarketing Assocs., 123 S. Ct. 1829 (2003) (holding that states may, consistent with the First Amendment, punish as fraud statements by telemarketers designed to deceive consumers); Nike, Inc. v. Kasky, 123 S. Ct. 2554 (2003) (dismissing certiorari as improvidently granted in commercial speech case); Virginia v. Hicks, 123 S. Ct. 2191 (2003) (rejecting First Amendment overbreadth challenge to housing development's trespass policy); Virginia v. Black, 123 S. Ct. 1536 (2003) (rejecting broad First Amendment challenge to cross burning statute); *but see Black*, 123 S. Ct. at 1541 (invalidating statutory provision establishing that cross-burning was prima facie evidence of an intent to intimidate).

2. 123 S. Ct. 2297 (2003).

3. In addition, CIPA conditions funding to public schools, although that provision was not challenged or addressed in *ALA*.

4. *See* 47 U.S.C. § 254(h)(6)(B), (C) (for E-rate); 20 U.S.C. § 9134(f)(1)(A), (B) (for LSTA).

5. *Id.*

6. 47 U.S.C. § 254(h)(6)(D); 20 U.S.C. § 9134(f)(3).

7. 483 U.S. 203 (1987).

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

9. *Id.* at 409.

10. *Id.*

11. *Id.* at 408, 433, 437, 442, 446–50.

12. *Id.* at 410, 429.

13. *Id.* at 449.

14. *Id.* at 490 n.36.

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

16. *Id.* at 2306–07 (plurality opinion) (quoting Tr. of Oral Arg. 11, 4).

17. *Id.* at 2309 (Kennedy, J., concurring).

18. *Id.* at 2310 (Kennedy, J., concurring).

19. *Id.* at 2310–12 (Breyer, J., concurring).

20. *Id.* at 2312 (Breyer, J., concurring).

21. *Id.* at 2319 (Souter and Ginsburg, JJ., dissenting).

22. *Id.*

23. *Id.*

24. *See, e.g.*, Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998); Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802 (1985).

25. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983); *see also, e.g., Forbes*, 523 U.S. at 677.

26. *See, e.g., Forbes*, 523 U.S. at 677–78.

27. *Am. Library Ass'n*, 123 S. Ct. at 2304 (plurality opinion) (discussing *Forbes*, 523 U.S. at 672–73 (public television stations) and NEA v. Finley, 524 U.S. 569, 585 (1998) (arts funding)).

28. *Id.* at 2306 (plurality opinion).

29. *See Cornelius*, 473 U.S. at 801–02.

30. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 391–92 (1993); Widmar v. Vincent, 454 U.S. 263, 267–68 (1981).

31. *Am. Library Ass'n*, 123 S. Ct. at 2307 n.4 (plurality opinion).

32. *See Forbes*, 523 U.S. at 674–75.

33. *See* S.E. Promotions, Ltd. v. Conrad, 420 U.S. 546, 555 (1975).

34. Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 801 (1996) (Kennedy, J., concurring).

35. *Am. Library Ass'n*, 123 S. Ct. at 2313 (Stevens, J., dissenting).

36. *See, e.g., Denver Area*, 518 U.S. at 749 (Breyer, J., concurring) ("[I]t is not at all clear that the public forum doctrine should be imported wholesale into the area of common carriage regulation. . . . [W]e are wary of the notion that a partial analogy in one context, for which we have developed doctrines, can compel a full range of decisions in such a new and changing area."); Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 694 (1992) (Kennedy, J., joined by Blackmun, Stevens, Souter, JJ., concurring in part in the judgment) ("I believe that the Court's public forum analysis in [recent] cases is inconsistent with the values underlying the Speech and Press Clauses of the First Amendment."); United States v. Kokinda, 497 U.S. 720, 741 (1990) (Brennan, J., joined by Marshall, Stevens, and Blackmun, JJ., dissenting) ("I have questioned whether public forum analysis, as the Court has employed it in recent cases, serves to obfuscate rather than clarify the issues at hand.").

37. *See, e.g.*, Stephen K. Schutte, International Society for Krishna Consciousness, Inc. v. Lee: *The Public Forum Doctrine Falls to a Government Intent Standard*, 23 GOLDEN GATE U. L. REV. 563, 568 (1993) ("[T] he arbitrary nature of the standards used to decide a property's forum classification, compounded by the Court's strict limitation of traditional public fora, poses a direct threat to First Amendment values."); David S. Day, *The End of the Public Forum Doctrine*, 78 IOWA L. REV. 143, 145, 202 (1992) ("Although the Supreme Court's 'public forum doctrine' was once a speech-protective methodology, the [Court has] converted it into a speech-restrictive methodology. . . . [T]he problem is that the Court's application of the modern forum doctrine blindly trusts the intentions of governmental officials. This is a fatal flaw."); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 987 (2d ed. 1988) ("[M]any recent cases illustrate the blurriness, the occasional artificiality, and the frequent irrelevance, of the categories within the public forum classification."); G. Sidney Buchanan, *The*

of the categories within the public forum classification."); G. Sidney Buchanan, *The Case of the Vanishing Public Forum*, 1991 U. ILL. L. REV. 949, 980 ("[I]n this area, the Court's analytical machinery has broken down. . . ."); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1715 (1987) ("The doctrine has in fact become a serious obstacle not only to sensitive first amendment analysis, but also to a realistic appreciation of the government's requirements in controlling its own property.").

38. Reno v. ACLU, 521 U.S. 844, 870 (1997).

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

40. 500 U.S. 173 (1991).

41. United States v. Am. Library Ass'n, 123 S. Ct. 2297, 2307–08 (2003) (plurality opinion) (quoting *Rust*, 500 U.S. at 194).

42. *Rust*, 500 U.S. at 198.

43. *Id.* at 196.

44. *See, e.g.*, Legal Serv. Corp. v. Velazquez, 531 U.S. 533, 541 (2001) (funding program in *Rust* "amounted to governmental speech"); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995) (in *Rust*, federal government "did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program"); *cf.* Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000) (where, as in *Rust*, the government "speaks," rather than facilitating a broad range of private expression, the analysis is "altogether different").

45. *See, e.g., Velazquez*, 531 U.S. at 542; *Rosenberger*, 515 U.S. at 834.

46. *See, e.g., Velazquez*, 531 U.S. at 542; *Rosenberger*, 515 U.S. at 833–34; FCC v. League of Women Voters, 468 U.S. 364, 383, 392, 395 (1984).

47. *Velazquez*, 531 U.S. at 542.

48. *Id.* at 543.

49. United States v. Am. Library Ass'n, 123 S. Ct. 2297, 2308 (2003) (plurality opinion) (quoting Rust v. Sullivan, 500 U.S. 173, 196 (1991)).

50. *Velazquez*, 531 U.S. at 547.

51. The plurality discussed, but did not resolve, the question whether public libraries—as government entities—may assert an unconstitutional conditions claim. *See Am. Library Ass'n*, 123 S. Ct. at 2307 (plurality opinion).

52. *See, e.g.*, ACLU v. Ashcroft, 322 F.3d 240 (3d Cir. 2003), *cert. granted*, 72 U.S.L.W. 3266 (U.S. Oct. 14, 2003) (No. 03–218).

A recent article published in *Communications Lawyer* (Saul B. Shapiro & Nico Commandeur, *The Uniform Witness Act: A Way Around the Reporter's Privilege?*, COMM. LAW., Summer 2003, at 15) discussed, among other things, efforts by ABC News to fight a subpoena seeking outtakes from interviews that the network had conducted with a criminal defendant in Louisiana. After that issue went to press, the Louisiana prosecutor who originally sought the outtakes agreed to withdraw his request and rely instead on the interviews that ABC had broadcast. ABC had sought this result in the litigation in New York and Louisiana described in the article.