

PERSPECTIVE ON *AMERICAN LIBRARY ASSOCIATION v. UNITED STATES*

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On May 31, 2002, a three-judge panel of the U.S. District Court for the Eastern District of Pennsylvania decided *American Library Ass'n, Inc. v. United States*.¹ The decision declared a 2001 measure of the United States Congress known as the Children's Internet Protection Act (CIPA) unconstitutional.² Under this act, public libraries that wished to participate in a program denominated "E-rate"—under which libraries get subsidies for Internet access, or get aid under the Federal Museum and Library Services Act for purchasing computers—had to install filtering-software. The purpose of such software was to ensure that library patrons could not, when using the Internet, access visual depictions that were either obscene, child pornography, or (in the case of minors) harmful to minors. The American Library Association, various state and regional library associations, some website publishers, a few public library systems, and individuals who wanted to use their local library's computers to do research on the Internet sued to have the CIPA declared unconstitutional. One such individual was a sixteen-year-old girl who wanted to take advantage of the Internet to research issues relating to her sexual identity; another was a man who wanted to employ the computer to discover various ways in which his mother's breast could be reconstructed after surgery to combat cancer.

In a very lengthy opinion, the three-judge court agreed that the CIPA was unconstitutional. Writing the unanimous opinion was Edward R. Becker, Chief Judge of the Third Circuit Court of Appeals. Joining him were John P. Fullam and Harvey Bartle III, District Judges from the Eastern District of Pennsylvania. The court began its analysis with *South Dakota v. Dole*,³ in which the

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¹ 201 F.Supp.2d 401 (E.D. Pa. 2002).

² *Id.* at 411.

³ 483 U.S. 203 (1987).

Supreme Court sustained a federal highway grant-in-aid bill containing a clause that reduced highway funds going to states that allowed persons under twenty-one years of age to purchase alcoholic beverages. The *American Library Ass'n* court emphasized a part of *Dole* that admitted that Congress could not grant the states funds on the condition that the latter use them to engage in unconstitutional activities such as “the infliction of cruel and unusual punishment.”⁴ The Supreme Court said nothing explicitly about federal assistance that induced the states to violate the First Amendment, but Chief Judge Becker’s opinion correctly assumed that federal boons awarded to states—including, of course, state or local agencies such as public libraries—that pushed the recipients to infringe the First Amendment’s guarantees of freedom of speech, press, religion, etc., would be illegitimate for that reason. The question most of the opinion wrestled with, therefore, was whether a library’s installation of filtering-software on the computers used by its patrons would violate the First Amendment.

The focus of this essay is not First Amendment law. Consequently, this essay will briefly summarize the reasons for the three-judge court’s conclusion that public libraries’ adherence to the CIPA’s filtering-software requirement would cause them to infringe the First Amendment. Chief Judge Becker and his colleagues felt that when public libraries buy computers to enable their patrons to use the Internet they are creating a public forum analogous “to traditional public fora, such as sidewalks and parks, in which content-based restrictions on speech are always subject to strict scrutiny.”⁵ “Strict scrutiny” means that the restrictions on speech must serve a compelling governmental interest and must be narrowly tailored to promote that interest.⁶ Moreover, if there is a less restrictive way of promoting that interest, the government must use it.⁷ Chief Judge Becker did find that the CIPA served compelling governmental interests, such as barring the dissemination of obscenity. However, the statute was not “narrowly tailored” to achieve these goals because the filtering-software that is now commercially available blocks a considerable amount of constitutionally-protected material—for example, a web site that promotes federalism in Uganda.⁸ Moreover, there were

⁴ *Id.* at 210–11.

⁵ *Am. Library Ass’n*, 201 F.Supp.2d at 466.

⁶ *Id.* at 471.

⁷ *See id.*

⁸ *See id.* at 478.

less restrictive alternatives available to achieve the government's laudable goals, including revoking the library privileges of a patron who accesses hard-core smut or informing the gendarmerie about his or her nefarious activities. Thus, when libraries attach the filtering-software they will inevitably violate the First Amendment, and so, under *Dole*, the CIPA must be stricken from the statute books.

The U.S. Supreme Court has noted probable jurisdiction over the three-judge court decision.⁹ The Court has several options. The Court can affirm Chief Judge Becker and his colleagues for one or another of the reasons that they employed in reaching their decision. The Court can sustain the result using pieces of First Amendment doctrine other than the ones on which the three-judge panel focused. The Court can reverse and say that the CIPA is perfectly consistent with the First Amendment. Or, it can grapple with a constitutional doctrine that the district court mentioned but, given its result flowing from traditional First Amendment theory, it decided not to fully address. This is the doctrine of unconstitutional conditions.

This doctrine came into being as a reaction to two famous decisions penned during the 1890s by Judge Oliver Wendell Holmes, then of the Supreme Judicial Court of Massachusetts. The first is *McAuliffe v. Mayor of New Bedford*.¹⁰ There, Holmes upheld the firing of a city policeman who, contrary to the City's regulations, had solicited political contributions and who joined a political committee. The officer maintained that his discharge violated his free speech rights. In a much-quoted remark, Holmes declared that

[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract.¹¹

In *Commonwealth v. Davis*,¹² Holmes upheld the conviction of a minister for speaking without a permit in Boston Common. Holmes averred that "the legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public

⁹ United States v. Am. Library Ass'n., Inc., 123 S. Ct. 551 (2002).

¹⁰ 29 N.E. 517 (Mass. 1892).

¹¹ *Id.* at 517-18.

¹² 39 N.E. 113 (Mass. 1895).

uses. So it may take the less[er] step of limiting the public use to certain purposes.”¹³

The heart of the legal philosophy behind *McAuliffe* and *Davis* is that since the government is under no constitutional obligation to give individuals or groups any assistance at all, it can condition the provision of its boons on the surrender of the grantee’s fundamental constitutional rights such as participating in political activity. By now, however, most American courts accept one version or another of the above-mentioned doctrine of unconstitutional conditions—the idea that when the government hands out largesse, it cannot always condition the grant on the waiver by the recipient of his or her constitutional rights. For a description of the doctrine, it is best to cite the following declaration by Justice William J. Brennan in *Sherbert v. Verner*,¹⁴ which invalidated a South Carolina administrative agency’s rule that a Seventh Day Adventist could be denied unemployment compensation benefits because she refused to labor on Saturday, her holy day. His majority opinion proclaimed that “conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms.”¹⁵

The *American Library Ass’n* district court opinion said that the Supreme Court’s “unconstitutional conditions” cases were “not strictly controlling”¹⁶ because under *Dole* the issue was whether the requirement of filtering-software as a condition of federal aid to public libraries *forced* the latter to violate the First Amendment—not whether the libraries had to *waive* any First Amendment or other constitutional right as a condition of getting the federal help. It admitted, however, that these “unconstitutional conditions” cases were “highly instructive.”¹⁷ The district court also pointed out that one of the allegations made by the plaintiffs was that the CIPA was unconstitutional because it compelled the public libraries to relinquish their own—as opposed to infringing their patrons’—constitutional rights as a condition of getting largesse from Washington. Due to the finding that the CIPA was null and void because it compelled libraries to violate freedom of speech and press, it asserted that it “need not reach the plaintiffs’ alternative theor[y] that CIPA is invalid . . . because it requires public libraries,

¹³ *Id.*

¹⁴ 374 U.S. 398 (1963).

¹⁵ *Id.* at 405.

¹⁶ 201 F.Supp.2d 401, 453 (E.D. Pa. 2002).

¹⁷ *Id.*

as a condition on the receipt of federal funds, to relinquish their own First Amendment rights to provide the public with unfiltered Internet access.”¹⁸

Nonetheless, the federal court decision did devote a lengthy footnote to this theory.¹⁹ Obviously, before deciding whether a largesse statute imposes an unconstitutional condition on the exercise of a state or local entity’s First Amendment rights, one has to ask oneself the question of whether these bodies have such rights. The footnote did not come to any conclusive answer on whether they do. It noted, however, that “[t]here is at least an argument that the marketplace of ideas would be unduly curtailed if municipalities could not freely express themselves on matters of public concern,”²⁰ and that “plaintiffs have good arguments that they may assert an unconstitutional conditions claim by relying . . . on the public libraries’ First Amendment rights.”²¹ Next, assuming that state or local agencies such as public libraries do have First Amendment rights, it becomes necessary to articulate the specific right applicable in this case. The footnote verbalized this as the right of public libraries to use their “discretion to make available to patrons as wide a range of constitutionally protected speech as possible.”²²

Like the Becker footnote, these pages will not offer any definitive solution to the knotty problem of the First Amendment rights of public libraries, or to the question of whether the CIPA’s requirement that filtering-software be installed if they wanted federal largesse unconstitutionally mandated libraries to waive one or more of these rights. As noted however, the Supreme Court, when it decides *American Library Ass’n* on appeal, may, if it wishes, deal with these issues. If it takes this route, it should ask itself at least some of the questions posed toward the end of this essay’s penultimate paragraph.

If the Supreme Court does take this route, it also would have an opportunity to modify the rigidity of the distinction between conditional grants to states (and, implicitly, their subdivisions) and coercing states (and their subdivisions) to regulate, which appeared in Justice Sandra Day O’Connor’s opinion in *New York v. United*

¹⁸ *Id.* at 490.

¹⁹ *See id.* at 490 n.36.

²⁰ *Id.* at 491 n.36 (quoting *Creek v. Village of Westhaven*, 80 F.3d 186, 193 (7th Cir. 1996).

²¹ *Am. Library Ass’n*, 201 F.Supp.2d at 494 n.36.

²² *Id.*

States.²³ This case arose when Congress passed the Low-Level Radioactive Waste Policy Amendments Act of 1985, designed to provide a solution to what every member of the Court admitted was a serious problem—how to dispose of the millions of cubic feet of low-level radioactive waste produced each year by hospitals, research institutions, and industry. To simplify, Justice O'Connor's majority opinion upheld the provisions of the law that gave the states funds to help dispose of this waste safely if they had previously taken certain steps to achieve this goal. It overturned, however, another section of the statute that offered the states, as an alternative to regulating waste disposal in the way that Congress ordered, the option of taking title to all low-level radioactive waste within their borders and accepting liability for all damages that the generators of this residue suffered as a result of any failure by the state to take title promptly. The latter section was invalid under the Tenth Amendment because it coerced the states to regulate pursuant to Washington's instructions, while the conditional grant of money simply provided them with "encouragement" for taking certain actions that the federal government desired (*e.g.*, choosing sites within their borders for the disposal of waste or entering into an interstate compact for this purpose).²⁴

The trouble with Justice O'Connor's rigid differentiation between conditional grants to states and coercing states to regulate is that it neglects the coercive element implicit in at least some conditions upon grants. As Chief Justice Warren Burger pointed out in his opinion in *Thomas v. Review Board of Indiana Employment Security Division*²⁵—in which the Court overturned Indiana's decision to deny a Jehovah's Witness unemployment compensation benefits when he left his job because it involved making parts for army tanks and thus violated his pacifist religious principles—there often is compulsion, albeit "indirect," when conditions are appended to government largesse since "substantial pressure" is being applied to an individual to "modify his behavior."²⁶ Assuming that the Supreme Court in the appeal of *American Library Ass'n* chooses to view it as a case involving possible unconstitutional conditions on the First Amendment rights of a public agency, rather than as a case about whether the CIPA inevitably makes that agency violate

²³ 505 U.S. 144 (1992).

²⁴ *Id.* at 175.

²⁵ 450 U.S. 707 (1981).

²⁶ *Id.* at 718.

the First Amendment, it would be obliged—if it relied on Justice O'Connor's *New York v. United States* distinction—to uphold the act's filtering-software installation requirement simply because it takes the form of a condition on a grant to a public body. It would be better if the Court would first query whether this condition merely "encourages" rather than "forces" public libraries to install the filtering-software. If the Court found mere "encouragement," it could legitimate the CIPA on the ground that any regulations or rights-waivers by libraries that it enticed were voluntarily adopted. If, on the other hand, it ascertained that the threatened funding cut off legitimately "coerced" the libraries into regulating their patrons' computer use by installing filtering programs, it next would have to decide whether the Tenth Amendment barred such coercion of public bodies under the circumstances of the case. If it answered this query in the negative, it would then have to determine whether public libraries have First Amendment rights. If it answered this in the affirmative, it would have to specify which of these rights the filtering-software installation condition forced them to waive, such as a right to use their discretion to give their customers access to an extremely wide variety of information. Then, finally, it would have to adjudge whether the benefits from this waiver were substantial enough to require that the waiver be declared legitimate.

Obviously, this "enticement" vs. "coercion to regulate" analysis could be used in many cases involving conditional federal grants to the states and their subdivisions, not only to those involving a possible First Amendment issue. This would not result in the wholesale invalidation of such federal grants if the Court were simultaneously, as I hoped it would do, but failed to do in *New York v. United States*, to accept the fact that national problems require national solutions, and therefore, that Washington's power to "coerce" the states is more extensive than Justice O'Connor was willing to recognize in *New York v. United States*.