THE RIGHT TO RECEIVE INFORMATION: THE CURRENT STATE OF THE DOCTRINE AND THE BEST APPLICATION FOR THE FUTURE

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Generally, the United States Supreme Court interprets the First Amendment of the United States Constitution[1] to imply a negative right[2] that prevents the government from placing obstacles in the path of constitutionally protected speech.[3] This interpretation focuses on the rights of the speaker, preventing the government from restraining protected speech.[4] To enforce speech restrictions in public forums, the government must withstand strict scrutiny.[5]

Another context has emerged, however, where the focus of the First Amendment's protections shifts to an audience's right to receive

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[1] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.").

[2] Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 864 (2001).

> The distinction between positive and negative rights is an intuitive one. One category is a right to be free from government, while the other is a right to command government action. A 'positive right is a claim to something . . . while a negative right is a right that something not be done . . . .'

Id.

[3] *See generally* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 1360-1461 (14th ed. 2001) (setting forth a discussion of the rights ancillary to freedom of speech). This Comment will rely on the definition of a right as a constitutionally protected restraint on government. *See id.* When professing a right, the Supreme Court generally relies on negative rights as a way to facilitate a citizen's constitutionally mandated freedoms by preventing certain government action rather than requiring it. Cross, *supra* note 2, at 860.

[4] Cross, *supra* note 2, at 902.

[5] *See generally* SULLIVAN & GUNTHER, *supra* note 3. To overcome a test of strict scrutiny, the government must show "its action is necessary to achieve a compelling interest." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 237 (2d ed. 2001).

information, as opposed to an individual's rights to speak.[6] Since the 1940s, the Court has referred to a right to receive information[7] in various contexts.[8] In some cases, the right to receive information requires the government to provide the press and the public access to information uniquely in its possession.[9] This implies an affirmative governmental act to facilitate speech rather than merely lifting barriers to promote free speech. But American society generally dislikes rights that require positive government action.[10] For this reason, the parameters of the right to receive information have never been fully articulated, and the Court has never given the right full support.[11] As later illustrated, the right is best used when lifting barriers to promote free speech.

In 2003, Justice Breyer addressed the right to receive information in his concurring opinion in *United States v. American Library Association*,[12] however, that opinion left unresolved the strength of the right, and the proper context in which it should be applied.[13] This Comment will address what the Court's decision in *American Library Association* signifies for the right to receive information and will further provide the best use of the right to receive information for the future. Part I examines the contexts in which the right has been invoked, the instability of the right and the varying degrees of support it has received over the years. Part II discusses the notion of positive and negative rights as applied to the right to receive information. Part III examines *American Library Association* in detail and discusses where the right stands today.

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[6] *See* William E. Lee, *The Supreme Court and the Right to Receive Expression*, 1987 SUP. CT. REV. 303, 306 (1988).

[7] *Id.* at 305.

[8] *Id.* at 306. *See infra* Part I.

[9] *See, e.g.*, Press-Enter. Co. v. Superior Court, 478 U.S. 1 (1986); Press-Enter. Co. v. Superior Court, 464 U.S. 501 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Gannet v. DePasquale, 443 U.S. 368 (1978); Houchins v. KQED, 438 U.S. 1 (1978).

[10] *See* Cross, *supra* note 2, at 880. Professor Cross argues that reliance on positive rights is not the optimum choice for protecting constitutionally mandated freedoms because of the way the U.S. Government works, particularly due to the difficulties the judiciary faces in enforcing such rights. *Id.* at 862. The most blatant concern is not to undermine the power and legitimacy of the Court. *Id.*

[11] Lee, *supra* note 6, at 307.

[12] 539 U.S. 194 (2003).

[13] The plurality opinion, written by Chief Justice Rehnquist, ignored the right to receive information in the analysis. Only Justice Breyer's concurrence acknowledged the right, and his use of the right does not follow the Court's previous analysis in cases of a similar kind. *Id.* at 216. *See* Bd. of Educ. v. Pico, 457 U.S. 853 (1982).

Finally, part IV suggests the strongest context for application of the right and how the Court should utilize it in future cases.

I. HISTORICAL BACKGROUND AND INSTABILITY IN APPLICATION

The Court has invoked the right to receive information in a variety of scenarios which can be organized into three categories: (1) the use of the right to prevent the government from placing barriers between speakers and listeners of constitutionally protected speech; (2) the use of the right to require government intervention to compel affirmative actions by the press; and (3) the use of the right to claim access to information that is in the government's possession due to funding constraints to facilitate the free exchange of information and an informed public.[14] The second category often requires the government to perform an affirmative act to facilitate the flow of expression.[15] In all contexts, the right is justified as a tool to promote the marketplace of ideas and a well-informed public.[16]

Scholars have justified the Free Speech Clause of the First Amendment in terms of the search for truth and the ability to self-govern and participate in a democratic government.[17] Overarching all of the theories, however, is the marketplace of ideas, first articulated by Justice Holmes in his dissent in *Abrams v. United States*.[18] Since then, "[s]cholars and jurists frequently have used the image of a 'marketplace of ideas' to explain and justify the [F]irst [A]mendment freedoms of speech and press."[19] The theory "ultimately assures the proper evolution of society, wherever that evolution might lead."[20] As the theory developed, jurists began to view the marketplace as an essential tool for participation in government or self-government[21] by allowing "a free and full

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[14] Lee, *supra* note 6, at 306.

[15] *Id.*

[16] *See* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 2-6 (1984).

[17] *See id.*

[18] 250 U.S. 616, 630 (1919). "[T]he best test of truth is the power of thought to get itself accepted in the competition of the market . . . ." *Id.*

[19] Ingber, *supra* note 16, at 2.

[20] *Id.* at 3. The marketplace of ideas is a metaphor to describe the way in which the Court has found two corollary rights. *Pico*, 457 U.S. at 867. The sellers, or the speaker of the information, have the freedom to speak. Ingber, *supra* note 16, at 4. In order to make their freedom effective, the buyers, or the receivers of information, must also have a freedom to receive it. *Id.*

[21] Ingber, *supra* note 16, at 4. To protect a democracy and self-government,

competition of ideas within the community, rather than by paternalistic state-sponsored efforts to protect citizens from the ill effects of bad ideas."[22] Going hand in hand with the marketplace of ideas are the theories of a well-informed public, individual autonomy, and uninhibited debate.[23]

Justice Brennan explored the right to receive information in his concurrence in *Lamont v. Postmaster General*.[24] The Justice stated, "I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them."[25] Justice Brennan further pointed out that the government's job is not to monitor and decide for citizens what information they should receive.[26] Instead, the government should merely facilitate the process and only assist a citizen in ridding himself or herself of unwanted communication when that citizen specifically requests such assistance.[27] This theory tends to persuade the Court in that it does not differentiate amongst the type of speech the First Amendment protects; therefore the Court has accepted the premise in numerous cases. It is a broad interpretation of freedom to speak and listen and "generally requires government to avoid making subjective value judgments about either the specific content of speech or the means of communication."[28] Ultimately, those jurists would subscribe to a broad interpretation of free speech and "believe that if only

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citizens need the ability to access as much information as possible to make informed choices. *Id.* at 8. This is necessary to facilitate assessment of political candidates and political issues, influence government, hold governmental officials accountable and enable dissent when necessary. *Id.*

[22] Ronald J. Krotoszynski, Jr., *The Chrysanthemum, the Sword and the First Amendment: Disentangling Culture, Community and Freedom of Expression*, 1998 WIS. L. REV. 905, 914 (1998).

[23] *Id.*

[24] 381 U.S. 301 (1965).

[25] *Id.* at 308 (Brennan, J., concurring). Justice Brennan and Justice Marshall are historically the strongest proponents of a strong right to receive information. *See, e.g.*, *Pico*, 457 U.S. 853; *Lamont*, 381 U.S. 301.

[26] *Lamont*, 381 U.S. at 308.

[27] *Id.* Ideally, the government should only act when a citizen requests assistance; however, the statute in *Lamont* required the government to act paternalistically and decide for citizens what information they should or should not receive. *Id.* Not only does this fail to give citizens enough freedom in their personal affairs, but it also puts the government in a position to act rather than step back and allow the flow of information. *Id.* at 310. Striking down the statute in *Lamont* ensured citizens' ability to continue to be self-governing. *Id.*

[28] Krotoszynski, *supra* note 22, at 915.

government can be kept away from 'ideas,' the self-operating force of '[f]ull and free discussion' will promote ideas that are 'true to our genius' and keep us from 'embracing what is cheap and false.'"[29]

A. Government Barriers

1. Restrictions on speech struck down due to audience interest

A number of cases invoke the right to receive information to prevent governmental obstacles to the dissemination of information.[30] One of the earliest cases, *Martin v. City of Struthers*,[31] involved a Jehovah's Witness who walked door-to-door ringing doorbells to publicize a religious meeting,[32] and in doing so, violated a city ordinance barring the distribution of "handbills, circulars or other advertisements" through door-to-door solicitation.[33] In announcing the opinion of the Court, Justice Black stressed the broad scope of the freedom of speech and press and found that it "embraces the right to distribute literature and necessarily protects the right to receive it."[34] In coming to this conclusion, the Court balanced the rights of the speaker and the rights of the individual householder against the interests of the entire community.[35] In the end, the interests of the speaker and the potential audience prevailed, as the individual householders must be given the opportunity to choose whether to listen to the speaker's message, rather than having the community choose for them.[36]

The ordinance in *Martin* stood as a barrier to protected

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[29] Ingber, *supra* note 16, at 10 (alteration in original) (quoting Dennsi v. United States, 341 U.S. 494, 584 (1951) (Douglas, J., dissenting)).

[30] *See e.g.*, Marsh v. Alabama, 326 U.S. 501 (1946) (barring a company-owned town from imposing criminal punishment on a person who was distributing religious literature); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (prohibiting a state from taxing Jehovah's Witnesses for spreading or selling religious literature as an unconstitutional violation of the Jehovah's Witnesses' First Amendment rights).

[31] 319 U.S. 141 (1943).

[32] *Id.* at 142.

[33] *Id.* The purpose of the ordinance was to prevent unsolicited visitors from distributing information, including, but not limited to, commercial information. *Id.* The City of Struthers cited peace, order and comfort of the community as reasons for the ordinance. *Id.* at 144.

[34] *Id.* at 143.

[35] *Martin*, 319 U.S. at 143.

[36] *Id.* at 144.

communications.[37] Justice Black pointed out that this barrier can act to prevent "dissemination of ideas in accordance with the best traditions of free discussion."[38] The Court emphasized that "[f]reedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved."[39] Importantly, *Martin* marks the first time the Court has considered the right to receive information. While the Court did not expressly rely upon this right in its holding, *Martin* represents the first step towards the Court's recognition of the right. The Court determined the proper use of the right to receive information was to allow a free exchange of ideas without government intervention to mold the nature of those ideas or to protect citizens from undesirable information.[40]

Two years later, the Court noted the right in *Thomas v. Collins*.[41] In *Thomas*, a Texas district court enjoined a union president and labor organizer from soliciting members for labor union membership. His actions violated a Texas statute because he did not properly obtain an organizer's card.[42] Because Thomas had not registered with the State, the district court prevented him from making a public speech regarding the merits of joining a union.[43]

The Court's holding in *Thomas*, although narrow as it only related to Thomas's particular circumstances, clarifies the Court's

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[37] *Id.* The two parties whose rights were at issue were the speaker and the person whose doorbell the speaker rang. *Id.* The Court found it is necessary to protect both sides when protecting speech in this category. *Id.*

[38] *Id.* at 145.

[39] *Martin*, 319 U.S. at 146-47. This statement would lead to the conclusion that the Court's interest in protecting the right would require strict scrutiny, thus giving the right a strong status. *Id.* From Justice Black's language, the inference can be drawn that only a compelling governmental interest, i.e., public health and safety, would prevent a citizen from soliciting door to door. *Id.* at 147. In this case, there were other ways to satisfy health and safety concerns, such as trespass ordinances, while still allowing citizens to make their own choice about the information being offered. *Id.* at 147-48.

[40] *Id.* at 148.

[41] 323 U.S. 516 (1945).

[42] *Id.* at 519; TEX. LAB. CODE ANN. § 5 (1943). The Legislature designed section 5 to allow Texas to maintain closer control of union activity. *Thomas*, 323 U.S. at 519. The statute required union organizers to file a written request by mail before attempting to solicit new members in Texas. § 5.

[43] *Thomas*, 323 U.S. at 522.

position regarding the right to receive information.[44] The Court, in dicta, emphasized Thomas's right to speak and the public's right to hear his message.[45] The Court found a restraint on free speech, thus determining the restriction is "so destructive of the right of public discussion, without greater or more imminent danger to the public interest than existed in this case, is incompatible with the freedoms secured by the First Amendment."[46] Thomas had a right to inform the public about the merits of joining a union, and the government could not restrain him from doing so.[47] The government, in attempting to prevent the speech, violated both Thomas's right to speak and the audience's right to hear his message.[48] "That there was a restriction upon Thomas' right to speak and the rights of the workers to hear what he had to say, there can be no doubt."[49] Accordingly, Thomas had a right to give his speech, free from governmental restraint.[50] Again, as in *Martin*, the Court did not rely on the right to receive information, but set the stage for future analysis. Both *Martin* and *Thomas* are often cited as the precursors to use of the right to receive information as a basis for holdings striking down restraints on free speech.[51]

By the time the Court decided *Lamont v. Postmaster General*,[52] the

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[44] *Id.* at 534. The Court stressed that the holding did not facially invalidate the Texas statute. *Id.* at 518. Instead, the Court viewed the case in the context of Thomas making a public speech. *Id.* at 533. The Court did not extend the Texas statute to allow the prevention of public speech. *Id.* at 534. Because Thomas did not actually sign up any new members, the Court was able to narrowly construe his actions as merely a speech on the merits of union membership. *Id.* at 533. If Thomas had actually signed up any new members, the Court would likely have found he violated the Texas statute and may have ruled differently. *Thomas*, 323 U.S. at 533.

[45] *Id.* at 534. Thomas merely made a speech in Texas. *Id.* The Court refused to force a speaker to register with the Texas government in order for the speaker to enjoy the freedom to speak, and for the attendees to enjoy the corollary right to hear the message. *Id.*

[46] *Id.* at 537.

[47] *Id.* at 532. *See* Thornhill v. Alabama, 310 U.S. 88, 102-03 (1940) (affirming rights of union members to picket and disseminate information); Senn v. Tile Layers Protective Union, 301 U.S. 468 (1937) (affirming rights of union members to assemble and speak).

[48] *Thomas*, 323 U.S. at 534.

[49] *Id.* at 534.

[50] *Id.* at 536.

[51] *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Counsel, 425 U.S. 748 (1976); Procunier v. Martinez, 416 U.S. 396 (1974); Stanley v. Georgia, 394 U.S. 557 (1969).

[52] 381 U.S. 301 (1965).

Court had mentioned the right to receive information but had not yet used it to form the basis of an opinion.[53] In *Lamont*, the Court faced a challenge to the constitutionality of Section 305(a) of the Postal Service and Federal Employees Salary Act of 1962.[54] The relevant part of the statute permitted the Postal Service to detain "communist political propaganda" until the addressee requested the mail be sent.[55] Each piece of mail required an affirmative action on the part of the addressee to send a reply card alerting the Post Office of the addressee's desire to receive the mail.[56]

The Court struck down the statute as an unnecessary restraint on free speech.[57] Justice Brennan, in his concurrence, found that the government's actions amounted to an unnecessary restraint on free speech and the corollary right to receive information.[58] In *Lamont*, the Court's primary concern related to the additional burden placed on a citizen to receive information, thus continuing the theme in *Thomas*. By requiring an additional step by the addressee to obtain his mail, the "regime of this Act is at war with the 'uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment."[59] The Court equated the government's attempt in *Lamont* to control the flow of the mail to the attempt in

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[53] *See, e.g.*, Martin v. City of Struthers, 319 U.S. 141, 143 (1943); Thomas v. Collins, 323 U.S. 516, 537 (1945).

[54] 39 U.S.C. § 4008(a) (1962). The statute gave the Postmaster General the power to detain any mail, except sealed letters, that the Secretary of the Treasury deemed to be communist political propaganda. *Id.* The addressee would then be notified and would have to submit a written request for delivery to receive the mail. *Id.* The statute further laid out a definition of "communist propaganda" to assist the Postal Service in making such decisions to detain certain pieces of mail. § 4008(c).

[55] *Id.* Leading up to this case, in the 1940s and 1950s, United States citizens and the United States Government were fearful of Communism and its potential impact on our country. ELLEN SCHRECKER, THE AGE OF MCCARTHYISM: A BRIEF HISTORY WITH DOCUMENTS 9-15 (1994). Adding to these fears at the beginning of the Cold War were the activities of Senator Joseph McCarthy and the House Un-American Activities Committee. *Id.* "From the State Department and Congress to the Post Office and the Supreme Court, federal bureaucrats, politicians, and judges struggled with the issues of domestic communism as they debated and implemented policies to deal with it." *Id.*

[56] *Lamont*, 381 U.S. at 303.

[57] *Id.* at 307.

[58] *Id.* at 308 (Brennan, J., concurring). *See also Thomas*, 323 U.S. at 534.

[59] *Lamont*, 381 U.S. at 307 (quoting N.Y. Times v. Sullivan, 376 U.S. 254, 270 (1964)). The Court encountered a First Amendment issue in *New York Times* regarding allegedly libelous statements printed about an elected official from Alabama. 376 U.S. at 256.

Thomas to control the flow of ideas.[60] As the recipient of the mail must have affirmatively acted to receive the mail in question, the government was indirectly burdening the flow of information as it did in *Thomas*.[61] This burden was an impermissible restraint on the recipient's right to receive information.

That same year, in *Griswold v. Connecticut*,[62] a plurality of the Court demonstrated its concern not only with protecting the First Amendment rights of doctors and patients, but also the right to privacy for actions occurring in a citizen's home. In *Griswold*, the government attempted to create a barrier between a citizen and constitutionally protected information relating to the private affairs of a husband and wife, thus violating the citizen's right to receive information. The appellants in the case were the executive director and medical director for the New Haven location of the Planned Parenthood League of Connecticut.[63] The claims at issue related to the constitutionality of two Connecticut statutes, which prohibited the use and dissemination of contraception.[64] Striking down the statutes, Justice Douglas, writing for a plurality, implicated the First Amendment as a barrier to the government interfering in the "intimate relation of husband and wife and their physician's role in one aspect of that relation."[65]

Justice Douglas opined

> In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach–indeed the freedom of the entire university community.[66]

Justice Douglas stressed the importance of the right of privacy and

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[60] *Lamont*, 381 U.S. at 306.

[61] *Id.*

[62] 381 U.S. 479 (1965).

[63] *Id.* at 480. One purpose of Planned Parenthood was to give "information, instruction and medical advice" to prevent conception. *Id.*

[64] *Id.* The Connecticut statutes provided for fine or imprisonment for use of contraception or for providing and assisting with the use of contraception. CONN. GEN. STAT. §§ 53-32, 54-196 (1958).

[65] *Griswold*, 381 U.S. at 482.

[66] *Id. See, e.g.*, Sweezy v. New Hampshire, 354 U.S. 234, 249-50 (1957); Weiman v. Updegraff, 344 U.S. 183, 195 (1952); Martin v. City of Struthers, 319 U.S. 141, 143 (1943).

right of association.[67] More specifically, the plurality found that the right to receive requested constitutionally protected information is one form of facilitating a citizen's right to privacy in conducting his personal affairs.[68]

A few other cases within the category of governmental barriers also relate specifically to the relationship between the right to receive information and the rights to liberty and privacy.[69] In *Stanley v. Georgia*,[70] the Court ventured into new territory, protecting the "right to receive information and ideas, regardless of their social worth."[71] In *Stanley*, the state of Georgia investigated Stanley for bookmaking activities.[72] While conducting a search of Stanley's home, agents found an obscene film.[73] Following his arrest, a jury convicted Stanley of possession of obscene matter.[74] The issue before the United States Supreme Court regarded the constitutionality of the Georgia statute prohibiting private possession of obscene matter.[75]

Justice Marshall, writing for the majority, used the right to receive information as a basis to strike down the Georgia statute.[76] Recognizing the government's interest in regulating obscene information, Justice Marshall also affirmed that such interest is not always paramount.[77] The Court based its holding on the right to

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[67] *Griswold*, 381 U.S. at 483.

[68] *Id.*

[69] *See also* Meyer v. Nebraska, 262 U.S. 390 (1923) (overturning a statute prohibiting a parochial school teacher from teaching German to students who had not completed eighth grade, finding a violation of student and teacher liberty).

[70] 394 U.S. 557 (1969).

[71] *Id.* at 564. This case is the first and last time the Court allowed any kind of protection of information deemed obscene. *See* Osborne v. Ohio, 495 U.S. 103, 109 (1990) (refusing to apply the principles set forth in *Stanley*, stating that the government's compelling interest in regulating child pornography outweighed the plaintiff's First Amendment rights). There is an argument that the Court is not truly protecting obscene information, but rather the Court is protecting the right to have that information in a citizen's home. *Stanley*, 394 U.S. at 563. *See, e.g.*, United States v. Reidel, 402 U.S. 351 (1971); Roth v. United States, 354 U.S. 476 (1957).

[72] *Stanley*, 394 U.S. at 558.

[73] *Id.* The statute at issue was GA. CODE ANN. § 26-6301 (Supp. 1968). The statute deemed possession or distribution of obscene materials a felony. *Id.* The statute defined obscene matter as "applying contemporary community standards, its predominant appeal is prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion." *Id.*

[74] *Stanley*, 394 U.S. at 559.

[75] *Id.*

[76] *Id.* at 563.

[77] *Id.* Justice Marshall dismissed *Roth v. United States*, 354 U.S. 476 (1957) as dispositive, despite the holding in the case that obscene information is not

receive information, coupled with the "fundamental . . . right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."[78] Given the nature of the regulation regarding speech that is not constitutionally protected and Justice Marshall's statement that "it is now well established that the Constitution protects the right to receive information and ideas," the Court gave the right its strongest endorsement.[79] It is also important to note that Justice Marshall could have reached the holding in this case without referencing the right to receive information. This fact makes the Justice's endorsement of the right even stronger as Justice Marshall chose to include the right to receive information is his analysis, even though it was not necessary.

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[80] a statute prevented pharmacists from "publishing, advertising, or promoting" the price of a prescription drug.[81] The Court found that the statute was an impermissible restraint on commercial speech and the patients' right to receive information.[82] This case both affirmed the protection of commercial speech and the Court's continued protection of the right to receive information.[83] Justice Blackmun opined that "[f]reedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its

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constitutionally protected information. *Stanley*, 394 U.S. at 560. The Justice found that the *Roth* decision could not be the only factor in determining whether a statute that prohibits *private* possession of material is unconstitutional. *Id.* at 564. Justice Marshall viewed this as more than a case of preventing obscenity but a case of a citizen's private possessions. *Id.*

[78] *Stanley*, 394 U.S. at 564. This case is an example of the government striking down a paternalistic statute. *See* Brian Verbon Cash, *Images of Innocence or Guilt?: The Status of Laws Regulating Child Pornography on the Federal Level and in Alabama and an Evaluation of the Case Against Barnes & Noble*, 51 ALA. L. REV. 793, 811-12 (2000). *Stanley* "was based on a paternalistic interest in regulating thoughts out of fear that obscenity would 'poison the minds of its viewers' and hurt public morality." *Id.* (citing Osborne v. Ohio, 495 U.S. 103, 108-09 (1990)).

[79] *Stanley*, 394 U.S. at 564.

[80] 425 U.S. 748 (1976).

[81] *Id.* at 750. The Virginia Statute allowed the state to charge a pharmacist with unprofessional conduct if he issued, published, or broadcasted any information about prices for prescription drugs. VA. CODE ANN. § 54-524.35 (1974).

[82] *Va. Citizens Consumer Council*, 425 U.S. at 772. This case is not the first to announce First Amendment protection for commercial speech. *See, e.g.,* Bigelow v. Virginia, 421 U.S. 809 (1975); Bread v. Alexandria, 341 U.S. 622 (1951).

[83] *Va. Citizens Consumer Council*, 425 U.S. at 772.

recipients both."[84]

Finding a solid basis in the free flow of ideas and information, Justice Blackmun concluded that commercial speech is protected in order to shelter consumers.[85] The Court held that governmental barriers to dissemination of this kind of information will not be tolerated. In *First National Bank v. Bellotti*,[86] the Court addressed the constitutionality of a Massachusetts statute that prohibited businesses from publicizing views regarding questions posed on an election ballot.[87] Protecting corporate expression and the rights of businesses to disseminate information, the Court struck down the law.[88] In discussing the reasoning behind the holding, Justice Powell found that "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."[89] The public has a right to gather all possible information, despite its source, to make an effective judgment in private affairs, thus promoting and enhancing the idea of self-government.[90]

2. Uphold speech restrictions because other rights outweigh audience rights

While this first category of cases supports the right to receive information, there are a few cases where a separate right proves more powerful. For example, in *Kleindienst v. Mandel*,[91] Stanford University

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[84] *Id.* at 756.

[85] *Id.* Sheltering consumers is one form of a paternalistic government the Court is unwilling to accept. *Id.* at 770. Rather than allowing consumers to evaluate the information prohibited by the statute, the government is making that decision for consumers, thus keeping them in ignorance. *Id.* The Court does not find this type of restriction an acceptable way for the government to achieve its interests. *Id.*

[86] 435 U.S. 765 (1978).

[87] *Id.* at 769. The Massachusetts statute was designed to prevent businesses from using influence and heightened resources to disseminate political views unless the issue specifically related to the corporation's business. MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977).

[88] *Bellotti*, 435 U.S. at 795.

[89] *Id.* at 783.

[90] *Id.* The government should be prevented from denying citizens the right to receive information merely because of the source of the information, unless there is a compelling interest. *Id.* If a corporation's management has views on a subject, the public has a right to hear those views and evaluate them. *Id.* Preventing dissemination of those views essentially makes decisions for citizens about what information is important in evaluating the issue in question. *Id.*

[91] 408 U.S. 753 (1972).

students invited Ernest Mandel, a Belgian citizen and Marxist scholar, to lecture at a conference; nonetheless, the United States denied his entrance into the country.[92] He was forced to give his lecture via telephone rather than in person.[93] The Court refused to extend the right to receive information to compel Congress to allow a visiting lecturer from another country to attend an academic conference,[94] regardless of the fact that Congress's denial of his visa stemmed from a dislike of Mandel's political views.[95] Despite the fact that the students could not hear Mr. Mandel's remarks in person, the Court determined Congress's refusal did not infringe the First Amendment rights of the Americans who invited him.[96] The opinion recognized the First Amendment right to receive information, but held that it did not override Congress's right to exclude aliens from entry into the country.[97]

Justice Marshall, dissenting, saw the case as a clear-cut violation of the First Amendment,[98] and opined that "[t]he activity of speakers becoming listeners and listeners becoming speakers in the vital interchange of thought is the 'means indispensable to the discovery and spread of political truth.' Its protection is 'a fundamental principle of the American government.'"[99] Justice Marshall opposed the Court's analysis and found the Court balanced the competing interests incorrectly, therefore infringing on the listener's rights.[100]

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[92] *Id.* at 759.

[93] *Id.* Mr. Mandel, a Belgian journalist and author of a book entitled *Marxist Economic Theory* was invited by students to speak at a conference on *Technology and the Third World* at Stanford University. *Id.* at 756. Mr. Mandel then applied to the American Consul in Brussels under federal law to obtain permission to enter the United States. *Id.* at 757. His application was denied. *Id.*

[94] *Kleindienst*, 408 U.S. at 754.

[95] *Id.* at 762.

[96] *Id.* at 765.

[97] *Id.* at 764. The Court found that Congress, in enacting statutes to regulate entry into the country, had a compelling governmental interest that outweighed the students' right to receive Mr. Mandel's information in the form of a live speech. *Id.* at 765. While the Court does not ultimately dispose of the case using the right to receive information, it is important to note that the right is still viable and that strict scrutiny is applied when the right is threatened. *Id.*

[98] *Kleindienst*, 408 U.S. at 775. Again showing Justice Marshall's unwavering support for First Amendment rights, the Justice would have found that Congress's rationale was not compelling enough to overtake the students' First Amendment rights. *Id.* at 785.

[99] *Id.* at 775-76 (Marshall, J., dissenting).

[100] *Id.* Justice Marshall criticizes the majority for only allowing a "[m]erely 'legitimate' governmental interest[]" to "override constitutional rights." *Id.* at 777.

B. Government action requiring affirmative acts by the Press

1. Uphold affirmative speech requirements out of concern for audience rights

The Court has only used the right to receive information to require an affirmative act by speakers in a handful of cases.[101] The first, *Red Lion Broadcasting v. Federal Communications Commission*,[102] involved a Constitutional challenge to the FCC's Fairness Doctrine and section 315 of the Communications Act requiring "that [a] discussion of public issues be presented on broadcast stations, and that each of those issues must be given fair coverage."[103] Relying heavily on the fact that broadcast frequencies are scarce, the Court upheld the constitutionality of the Fairness Doctrine.[104] The Court found that the Fairness Doctrine enhanced the freedoms associated with freedom of speech and the press.[105] The crux of the argument rested on the notion that the right of free speech does not allow a broadcaster to ignore the free speech of others given the scarcity of

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Justice Marshall, as evidenced in later cases, is the strongest proponent for strong use of the right to receive information. *See, e.g.,* Stanley v. Georgia, 394 U.S. 557 (1969); Meyers v. Nebraska, 262 U.S. 390 (1923).

[101] *See, e.g.*, Ark. Educ. Television Comm. v. Forbes, 523 U.S. 666 (1998); FCC v. League of Women Voters, 468 U.S. 364 (1984); CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973). All three decisions reject "the argument that broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues." *CBS*, 412 U.S. at 105. These cases do not discuss the right to receive information or issues of scarcity, but deal with whether the public forum doctrine should be extended to public television broadcasting. *Id.* While the analysis is different, the result conflicts with the analysis in *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969). *See infra* notes 100-07 and accompanying text. It is also important to note, however, that the Court in *League of Women Voters* implied that the government may treat broadcasting differently from other media, thus not completely turning away from *Red Lion*. *League of Women Voters*, 468 U.S. at 376-77, 380, 402. The Court in *Forbes* further implied that candidate debates required a special analysis and are an exception to the above stated rule requiring strict scrutiny. *Forbes*, 523 U.S. at 675. Lastly, the Court in *Reno v. ACLU*, 521 U.S. 844 (1997), continued to recognize the fact that broadcasting is treated differently than other forms of media expression. *Id.* at 867.

[102] 395 U.S. 367 (1969).

[103] *Id.* at 369. The Fairness Doctrine and a provision of the Communications Act, 47 U.S.C. § 315 (1967), place requirements on broadcasters. 47 U.S.C. § 315. The FCC's Fairness Doctrine deals with personal attacks in the context of controversial public issues and political editorializing. *Id.* Section 315 of the Communications Act requires broadcasters to provide candidates with equal airtime to discuss their views. *Id.*

[104] *Red Lion*, 395 U.S. at 392-93.

[105] *Id.* at 393.

the broadcast frequencies.[106] The Court posited that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." [107]

The government's mandate required an affirmative act on the part of the broadcasters, essentially taking away the broadcasters' right to make certain choices relating to content.[108] The Court found that "[i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC."[109] In another medium, this analysis would more than likely fail.

The Court also upheld a restraint on a broadcaster's freedom to choose editorial content in *CBS v. Federal Communications Commission*.[110] Petitioner CBS sought to invalidate a provision of the Communications Act[111] as an impermissible restraint on its free speech and ability to choose editorial content.[112] The statute provided that the FCC may revoke a broadcaster's license "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station . . . by a legally qualified candidate for Federal elective office

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[106] *Id.* The Court justified the different First Amendment standards due to the different mediums that supply information. *Id.* at 386. Based on the universal reach of a radio signal and the highly technical nature of the medium, the Court found the government had significant interest in regulating the forum. *Id.* at 387. Furthermore, because broadcast radio reaches large audiences, the government must intervene to allow radio to be used effectively. *Id.* at 389. Without government regulation the hope for intelligible information is lost, as too many people will be competing to use the same broadcast frequencies. *Red Lion*, 395 U.S. at 389. Therefore, it is an unfortunate consequence that certain willing broadcasters will be turned away due to scarce resources. *Id. See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994).

[107] *Red Lion*, 395 U.S. at 390.

[108] *Id.* Normally the right of the press would overshadow any requirements the government may impose. Because of the difficulty in entering the broadcasting market and the limited number of broadcast channels, however, the Court chose to protect the public's right to receive both sides of a story rather the press's right to choose content. *Red Lion*, 395 U.S. at 389.

[109] *Id.* at 390. The Court is explaining the rationale behind allowing the Fairness Doctrine. *Id.*

[110] 453 U.S. 367 (1981).

[111] 47 U.S.C. § 312(a)(7).

[112] *CBS*, 453 U.S. at 373-74.

on behalf of his candidacy."[113] After the networks denied the Carter-Mondale Presidential Committee's request for airtime relating to President Carter's formal announcement of his candidacy, the campaign filed a complaint with the FCC alleging the networks violated section 312(a)(7)'s reasonable access requirement.[114]

The Court upheld the constitutionality of the statute and the Carter-Mondale charge.[115] Citing *Red Lion*, the Court found,

> A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a . . . frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others . . . .[116]

In other words, broadcast media is different from other media, therefore the government was allowed to step in and ensure that all viewpoints are heard.[117] The Court noted that "[s]ection 312 (a)(7) [sic] thus makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process."[118]

2. Striking down speech requirements because audience interest is met otherwise

In contrast, in *Miami Herald Publishing Co. Division of Knight Newspapers, Inc. v. Tornillo*,[119] the Court struck down, as a restraint on freedom of press, a Florida statute that required a newspaper to give an opportunity for reply to a person running for office if the newspaper published a criticism about that candidate.[120] The tension

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[113] 47 U.S.C. § 312(a)(7). The stated purpose of the Act was to "give candidates for public office greater access to the media so that they may better explain their stand on the issues, and thereby more fully and completely inform the voters." *CBS*, 453 U.S. at 379 (quoting S. REP. NO. 92-96, at 20 (1971)).

[114] *Id.* at 373-74.

[115] *Id.* at 397.

[116] *CBS*, 453 U.S. at 395 (quoting *Red Lion*, 395 U.S. at 389).

[117] *Id.* at 396. *See also* CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (observing the competing interests of the role of the government and the role of the press).

[118] *CBS*, 453 U.S. at 396.

[119] 418 U.S. 241 (1974).

[120] *Id.* at 257. The "Right to Reply Statute," FLA. STAT. § 104.38 (1973), provided a candidate running for public office the opportunity to reply to any negative commentary in any newspaper about that candidate's personal character or official

between the right to receive information and the free flow of information versus the freedom of the press is epitomized in this case. The right of the press ultimately prevailed. The Court found it was no longer the right of listeners that are "paramount" once the scarcity issue, as seen in *Red Lion*, was no longer a factor.[121] The Court concluded that

> [e]ven if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors.[122]

This case shows a clear boundary over which the Court is unwilling to step. This case also shows a limitation of the right to receive information in the context of the government requiring an affirmative act by the press to disseminate information where there are no scarcity of resource issues due to the government's action in giving broadcasters a monopoly over broadcast frequencies.

C. Claim of access to information in government's possession

Libraries/Book Removal

In *Board of Education v. Pico*,[123] the Court encountered a local New York board of education decision to remove certain "objectionable" books from the libraries of the junior and senior high schools.[124] The school board, a state agency and government actor, made a decision to remove the books in order to "protect the

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record. *Id.*

[121] *Id.* at 258. This analysis is dominant in press cases where the Court balances audience's right to receive information and the freedom of the press to choose content. *Id.*

[122] *Id.*

[123] 457 U.S. 853 (1982).

[124] *Id.* at 872. The Board of Education of the Island Trees Union Free School District Number 26 determined that the books in question were "anti-American, anti-Christian and anti-Semitic." *Id.* at 857. The books at issue at Island Trees High School were *Slaughter House Five* by Kurt Vonnegut, Jr.; *The Naked Ape* by Desmond Morris; *Down These Mean Streets* by Piri Thomas; *Best Short Stories of Negro Writers* edited by Langston Hughes; *Go Ask Alice*, of anonymous authorship; *Laughing Boy* by Oliver LaFarge; *Black Boy* by Richard Wright; *A Hero Ain't Nothin' But A Sandwich* by Alice Childress; and *Soul on Ice* by Eldridge Cleaver. *Id.* The book at issue at Island Trees Memorial Junior High School was *A Reader for Writers*, edited by Jerome Archer. *Id.*

children in our schools from this moral danger."[125] All of the books were constitutionally protected and did not fall into any of the categories of unprotected speech.[126] A district court judge noted that the record indicated that the Board of Education chose to remove the particular books in question to make an example. The Board's motivation was to establish "proper" views and tastes for children, rather than to protect their welfare.[127]

The plurality opinion, written by Justice Brennan and joined by two other Justices, began by acknowledging a school board's broad discretion in making content-based education decisions.[128] It also, however, confirmed secondary students' right to receive information through reading as an essential part of a student's freedom to inquire.[129] Because the students' rights and those of the school board may be in conflict, the Court fell short of recognizing the school board's absolute discretion, finding the board may not infringe upon the students' rights.[130] Specifically, the plurality determined that book removal from school libraries is limited by the students' First Amendment rights:[131] "[W]e think that the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library."[132] Apparently, as one commentator has noted, the Court is especially concerned with the removal of previously available books and believes that "[a]n unshelving implicates the right to receive information because the

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[125] *Id.* at 857.

[126] *Id.* at 857 n.2.

[127] *Id.* at 861.

[128] *Pico*, 457 U.S. at 863.

[129] *Id.* at 866.

[130] *Id.*

[131] *Id.* at 872. Book removal in public libraries is a frequently debated topic. *See generally* Rosemary C. Salomone, *Free Speech and School Governance in the Wake of Hazelwood*, 26 GA. L. REV. 253 (1992); Linda L. Berger, *Government Owned Media: The Government as Speaker and Censor*, 35 CASE W. RES. 707 (1985); Martin D. Munic, *Education or Indoctrination – Removal of Books from Public School Libraries*, 68 MINN. L. REV. 213, 237 (1983). The Court has previously recognized a library staff's broad discretion is choosing appropriate content, citing the resource issue as the primary rationale. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). Libraries would be unable to house all of the information available, and Courts are unable to step in and regulate the choices that the library is forced to make. *Pico*, 457 U.S. at 866. Once a library does choose to obtain a book, however, the First Amendment rights of the patrons are implicated when a library chooses to make that book unavailable. *Id.*

[132] *Pico*, 457 U.S. at 866.

state is hindering access to information previously available."[133]

Justice Brennan, writing for the plurality, reaffirmed the Constitutional protection of the right to receive information:[134]

> This right is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution, in two senses. First, the right to receive ideas follows ineluctably from the sender's First Amendment right to send them: The right of freedom of speech and press embraces the right to distribute literature, and necessarily protects the right to receive it. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.[135]

Once the library makes the books available, the right to receive information is implicated if those books are later taken away.[136] The Court remanded the case for further fact-finding regarding the motivations behind removal of the books, holding that the students' First Amendment right to receive information is implicated by improperly motivated removal.[137]

The right to receive information, however, is not as strongly supported by *Pico* as might first appear. One of the Justices who supported remand, Justice Blackmun, did not consider the right in his discussion. He was more concerned with discrimination against ideas and the Board of Education's improper motives.[138] The fifth vote for remand, Justice White, refused to consider the scope of the student's First Amendment rights, reasoning that such discussions were premature until the facts regarding the board's motives had been clarified.[139] Even the plurality opinion qualified the right by narrowly holding that the student's First Amendment right is only violated when the decision to remove a book is provoked by the school board's aversion to the ideas pronounced in the works in

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[133] Munic, *supra* note 131, at 237.

[134] *Pico*, 457 U.S. at 866. The student's right to receive information is at issue. *Id.* Students' First Amendment rights have previously been recognized, including the right to receive more information than that which the State chooses to communicate. *See* Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966).

[135] *Pico*, 457 U.S. at 867 (internal quotations omitted). *See also Lamont*, 381 U.S. at 308; Martin v. Struthers, 319 U.S. 141, 143 (1943).

[136] *Pico*, 457 U.S. at 867.

[137] *Id.* at 875.

[138] *Id.* at 878.

[139] *Id.* at 884.

question.[140] This reasoning thereby forms a narrow right in the context of school libraries.

Chief Justice Burger rejected the right recognized by the plurality on grounds that it would involve an affirmative right to have the government provide this information.[141] This, however, mischaracterizes the right to receive information in the library context. What is really involved is a right to maintain the status quo to insure there is no improper removal of the library materials. In the instance where the government chooses to restrict materials once those materials are publicly offered, as in *Pico*, then an action to compel the government to reacquire those materials will rely on a negative right rather than a positive one.[142] Once the government chooses to obtain and make information public, the government is then unable to take it away for an improper purpose.[143] Without the government's initial choice to offer information through the library, an action to compel the offering would rely on a positive right.[144] Once the government has chosen to acquire the materials, however, the right to compel the offering becomes negative.[145] Since this Comment is focused on those materials previously offered, the right to receive information would rely on a negative right. The removal of books previously offered goes to the heart of the right to receive information.[146] The state should not be permitted to choose to communicate certain ideas nor remove those ideas from the public once they have been offered.

Both Chief Justice Burger and then-Justice Rehnquist in their dissents refused to recognize the right to receive information in the context of junior and senior high schools.[147] Neither Justice, however, expressly stated that this right would not apply in the context of other libraries. Further, Justice Rehnquist acknowledged that "the Court has recognized a limited version of that right in other settings."[148] Justice Rehnquist argued that the books are still available to students

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[140] *Id.* at 872.
[141] *Id.* at 888.
[142] Cross, *supra* note 2, at 865.
[143] *Pico*, 457 U.S. at 871-72.
[144] *Id.*
[145] *Id.*
[146] Ingber, *supra* note 16, at 2. The theme is the marketplace of ideas. *Id.*
[147] *Pico*, 457 U.S. at 887, 910.
[148] *Id.* at 911.

outside of the school library.[149] This argument, however, also distorted the real issue. The First Amendment rights of citizens do not rest on their ability to speak in *any* forum. Rather, the First Amendment is implicated when the citizens' right to speak has been censored in a certain forum. The same analysis applies to the First Amendment right to receive information; it should not matter if the audience can find the information elsewhere. What matters most is that citizens are denied information due to government constraints and improper motives.

Last, Justice Rehnquist expressed concern over the motive requirement set forth by the plurality. The Justice posited that if there is a true right to receive information, motive would not matter.[150] Just as there is no absolute First Amendment right to speak, however, it follows there is not an absolute right to receive information. The improper motive requirement is what makes this case about the First Amendment. Without it, the case would merely concern decisions unrelated to speech, such as removing a book because of its condition.

The strengths of the right to receive information outweigh the weaknesses explored in *Pico*. As such, *Pico* paves the way to invoke the right in other library cases. This can be seen particularly in cases not involving libraries in public schools, where the dissent's position that the right to receive information should not apply in *school* libraries is inapplicable.

II. POSITIVE AND NEGATIVE RIGHTS

The distinction between positive and negative rights is deceptively simple. Many scholars have attempted to define them, but they do not agree on the details.[151] Professor Cross proposed what may be the most satisfactory test for distinguishing them. "[I]f there was no government in existence, would the right be automatically fulfilled?"[152] If there is no government in place and the

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[149] *Id.* at 915.

[150] *Id.* at 917-18.

[151] Gerald MacCallum wrote one of the first philosophical essays regarding the distinction between positive and negative rights. Cross, *supra* note 2, at 865. "He contended that all rights issues fit a triadic relationship: 'x is (is not) free from y to do (not do, become, not become) z." *Id.* (citing Gerald MacCallum, Jr., *Negative and Positive Freedom*, 76 PHIL. REV. 312, 314 (1967)). X is the actor, Y prevents the action, and Z is the action. *Id.*

[152] *Id.* at 866.

right is fulfilled, that right would be a negative right; however, if government action is necessary to fulfill the mandate, then the right is considered positive.[153] For the purpose of this Comment, the definition of a positive right is a "right to command government action,"[154] while a negative right is "a right to be free from government."[155]

The debate surrounding the difference between positive and negative rights hinges on whether the Constitution's text even recognizes positive rights.[156] The standard view is that the Constitution is "a charter of negative rather than positive liberties."[157] Many scholars, however, such as Stephen Holmes and Cass Sunstein, argue that the Due Process Clause does include positive rights.[158] They assert that states must make courts available to enforce contract rights, that government must create trespass laws to enforce protection against takings, and that liberty includes providing police protection.[159]

Professor Cross rejects their contentions on the basis of Supreme Court decisions and on a different interpretation of the text of the Constitution.[160] Currently, no Supreme Court case recognizes positive rights, although the Court has noted the distinction between positive and negative rights.[161] In *Deshaney v. Winnebago County Department of Social Services*,[162] the Court stated that "our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."[163]

There are many reasons why positive rights would cause

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[153] *Id.*

[154] *Id.* at 864.

[155] *Id.*

[156] Cross, *supra* note 2, at 864. "Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference . . . , it does not confer an entitlement to such [government assistance] as may be necessary to realize all the advantages of that freedom." Harris v. McRae, 448 U.S. 297, 317-18 (1980).

[157] Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983).

[158] *See* STEPHEN HOLMES & CASS SUNSTEIN, THE COSTS OF RIGHTS 52-54 (1999).

[159] *Id.* at 52-56.

[160] Cross, *supra* note 2, at 872.

[161] *Id.* at 874.

[162] 489 U.S. 189 (1989).

[163] *Id.* at 196.

difficulties if utilized.

According to Professor Cross,

> [t]he recognition of positive rights holds out the prospect that the courts can be petitioned to intervene and compel such action, when the legislature fails to act sufficiently to advance the rights. Hence, the crucial issue is the effect of permitting judicial enforcement of these rights. The inability of the judiciary to develop remedies that effectively enforce positive rights constitutes a reason not to recognize them.[164]

Courts cannot enforce judicially-made rights without the support of the legislature; therefore, the politics of rights enforcement weigh against recognition. The crux of the argument is that "it is futile to rely on the judiciary to provide basic welfare for the disadvantaged, if the political branches are unwilling to do so."[165] One of the primary reasons driving the limitations of the judiciary is that positive rights often require the government to spend money in enforcing the right.[166] Considering the judiciary has no control over budgets and government money spent, requiring the government to enforce such a right is often not the business of the courts.[167] The credibility of the courts could be at issue as the courts are unable to enforce a decision if the government chooses not to support it.[168] Furthermore, the judiciary should not make it their function to create policy.

Last, the economics of law enforcement weigh against recognition of positive rights. In order to enforce positive rights, a plaintiff must have the ability to take advantage of the legal system, which requires the necessary resources.[169] Generally speaking, the group of people most likely to bring an action to enforce a positive right is the poor.[170] Unfortunately, that group is the one that

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[164] Cross, *supra* note 2, at 879.

[165] *Id.* at 888.

[166] *Id.* at 889.

[167] *Id. See also* Herman Schwartz, *Recent Development: Do Economic and Social Rights Belong in a Constitution?*, 10 AM. U.J. INT'L L. & POL'Y 1233, 1237 (1995).

[168] Cross, *supra* note 2, at 889. "[T]he intractable economic, social and even philosophical problems presented by public welfare assistance programs are not the business of this Court." Dandridge v. Williams, 397 U.S. 471, 487 (1970).

[169] Cross, *supra* note 2, at 880.

[170] *Id.* Professor Cross cites studies that identify six resources necessary for success in litigating for rights enforcement: (1) amount of money available, (2) support of the federal government, (3) ability to maintain the effort over long periods of time, (4) expert legal staff, (5) publicity and, (6) cooperation of other groups with similar interests. *Id.* (citing LEE EPSTEIN, CONSERVATIVES IN COURT 12-13 (1985)). The study concludes that the best results occur when all six factors are present. *Id.*

struggles most to afford the necessary representation to litigate such claims, especially considering those claims generally must end up in front of the United States Supreme Court.[171] Therefore, the economics of positive right enforcement is another reason why positive rights are rarely recognized. While negative rights also cost money to enforce, positive right enforcement requires the first step of recognition of that right, something the Court has not yet done, thereby proving fairly cost prohibitive for poorer groups more likely to try to bring a suit based on a positive right.

For the above reasons, society has never fully embraced positive rights, nor have the courts recognized them.[172] Applying the definition stated above to the right to receive information, the second category of cases requiring the government to force access to certain information falls into the category of a positive right.[173] The audience would not hear the information in question unless the government acted to enable the dissemination.[174] Therefore, based on that definition, the right to receive information, in certain contexts, is a positive right. The framework for the right to receive information as a positive right is splintered and it is often difficult to predict how the Court will rule in a case depending on the medium of expression.[175]

At first glance, the *Pico* decision appeared to be mandating positive rights; however, after further analysis, the decision in fact relied on negative rights as the government had already decided to provide the information before the public requested it.[176] The difference between the right described in *Pico* and a positive right is that once the government makes certain information available, the government cannot later decide to make that information

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[171] *Id.* "The key to effective rights enforcement is a 'support structure for legal mobilization,' which requires 'rights-advocacy organizations, a diverse and organizationally sophisticated legal profession, a broad array of financing sources, and federal rights-advocacy efforts.'" *Id.* at 880 (quoting CHARLES R. EPP, THE RIGHTS REVOLUTION 69 (1998)).

[172] Cross, *supra* note 2, at 879.

[173] *Id.* at 866.

[174] *Id.*

[175] *Compare* Press-Enter. Co. v. Superior Court, 464 U.S. 501 (1984) (finding a First Amendment violation when a court closed voir dire proceedings), *and* Richmond Newspapers v. Virginia, 448 U.S. 555 (1980) (declaring a First Amendment right of access to court proceedings), *with* Houchins v. KQED, 438 U.S. 1 (1978) (denying the press the right to access prisons to observe conditions), *and* Saxbe v. Washington Post Co., 417 U.S. 843 (1974) (upholding regulations preventing the press from interviewing particular prisoners).

[176] *Pico*, 457 U.S. at 871-72.

unavailable, thus relying on a negative right.[177] Granting the public's demand for that information once it is available is a negative right because the public is demanding what has already been given, not asking for information the government has not already chosen to make accessible.[178] This is a strong use of the right, thus preventing a paternalistic government from having the ability to determine when all information in the government's possession will be available. So long as the information is in the public domain, the Court should continue to enable the public to have access to it, unless there is a compelling governmental interest for its removal. In the analysis for removal, the Court would focus on the motives behind information removal to ensure only neutral reasons drive the decisions for removal.

III. CURRENT USE OF THE RIGHT TO RECEIVE INFORMATION – *AMERICAN LIBRARY ASSOCIATION*

The Court decided the most recent case relating to the right to receive information in 2003. *United States v. American Library Association*[179] involved a facial challenge to the constitutionality of the Children's Internet Protection Act ("CIPA").[180] CIPA was designed to assist federal public libraries in providing Internet access to library patrons.[181] The funding was conditioned upon the library installing filtering software designed to prevent access to obscenity and any other information deemed harmful to children.[182] CIPA permits the library to set the filters to block certain categories of sites, such as those containing pornography or violence.[183] The library has some

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[177] *Id.*

[178] Cross, *supra* note 2, at 866.

[179] 539 U.S. 194 (2003).

[180] 20 U.S.C. § 9134 (2004).

[181] *Am. Library Ass'n*, 539 U.S. at 199. There are two programs of federal assistance. *Id.* The first, the E-rate program allows libraries to buy discounted Internet access to make the acquisition more affordable. *Id.* The second program, pursuant to the Library Services and Technology Act gives grants to library agencies for Internet access. *Id.*

[182] *Id.* The technology of library filters is far from perfect. *Id.* at 208. In many cases, the filters are both over and under inclusive, at times allowing information supposedly blocked to pass and at other time preventing protected information that should not be filtered. *Id.* The plurality appears to dismiss this issue, while Justice Kennedy and Justice Breyer acknowledge the problem. *Id.* at 234, 238-39.

[183] *Id.* at 200. For a more detailed look at the technology of filters, see Junichi P. Semitsu, *Burning Cyberbooks in Public Libraries: Internet Filtering Software vs. The First Amendment*, 52 STAN. L. REV. 509 (2000); Glenn Kutoba, *Public School Usage of Internet*

flexibility and may set the filters to enable certain categories that might otherwise be blocked or to add or delete specific sites as necessary.[184] The primary issue in the case revolved around whether CIPA's filtering requirement violated the First Amendment rights of the libraries to choose content and also the First Amendment rights of the patrons to receive information.[185] The district court found CIPA facially unconstitutional and enjoined the appropriate government agencies from withholding funding for those libraries that did not comply with CIPA's filtering terms.[186]

The Supreme Court, in a plurality opinion written by Chief Justice Rehnquist, upheld the constitutionality of CIPA, finding no impermissible restraints on First Amendment rights.[187] The plurality equated a library's right to choose what Internet sites should be available with its right to make content-based determinations to buy or not buy printed materials, and affirmed previous decisions regarding the broad discretion the library staff enjoys in choosing content.[188] In reaching this conclusion, Chief Justice Rehnquist first examined the role of public libraries in society and the relevant history driving a library's mission to "facilitate learning and cultural enrichment."[189] After determining that public libraries do not provide "universal coverage," Chief Justice Rehnquist analogized the library's right to make content choices with the government's right to determine what private speech should be made public.[190] "Just as

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Filtering Software: Book Banning Reincarnated?, 17 LOY. L.A. ENT. L.J. 687 (1997).

[184] *Am. Library Ass'n*, 539 U.S. at 200.

[185] *Id.*

[186] *Id.* at 202. The court held the filters were a content-based restriction on access to a public forum and applied strict scrutiny. *Id.*

[187] *Id.* at 214.

[188] *Id.* at 206. *See* Bd. of Educ. v. Pico, 457 U.S. 853 (1982). Justice Souter argued against the majority opinion on grounds that the scarcity of resources which justifies choosing one book and not another does not apply to the Internet. *See Am. Library Ass'n*, 539 U.S. at 235 (Souter, J., dissenting). The library staff does not have to worry about finding enough space to house "the Internet" in that it does not take up physical space the way that books, periodicals or other printed materials do. *Id.* For this reason, the Court could have chosen, but did not, to treat the library staff's discretion in the way they treated the Board of Education's decision in *Pico* and scrutinize the filtering system closer.

[189] *Am. Library Ass'n*, 539 U.S. at 206. Chief Justice Rehnquist cited the American Library Association's Bill of Rights as the basis for the mission. *Id.* "[L]ibraries should 'provide books and other resources for the interest, information, and enlightenment of all people of the community the library serves.'" *Id.* at 203-04 (citation omitted).

[190] *Id.* at 204-05. Chief Justice Rehnquist cited *Arkansas Educational Television*

forum analysis and the heightened judicial scrutiny are incompatible with the role of public television states and the role of the NEA, they are also incompatible with the discretion that public libraries must have to fulfill their traditional missions."[191] Therefore, Chief Justice Rehnquist made no distinction between the library's discretion in choosing printed materials and its discretion in providing access to certain web sites.[192]

Chief Justice Rehnquist's reasoning essentially ignored the inherent difference in the manner in which Internet access and printed materials are chosen and provided.[193] All printed materials are handpicked, primarily due to scarcity of resources and space.[194] The Internet, however, is a package and does not require a library to exercise discretion in choosing which sites are available.[195] There is no space or scarcity of resources issues.[196] While libraries do not have the time or space available to allow all library visitors to spend as much time as they want utilizing the computers, libraries also do not allow patrons to take out books indefinitely, nor can they allow patrons to sit and read the newspapers they offer all day. Just as it would be improper for a library to cut up a newspaper and only provide the part the staff feels is proper, so is taking out parts of the Internet that the library previously purchased as a package. So long as the information is available, the right to receive information is satisfied. The Chief Justice's opinion, rather, focused on the library's traditional mission and equated the library's mission of providing Internet access to its same mission for providing printed materials.[197] Therefore, the Court extended the same basis of review to libraries for content-based decisions for printed materials, rational basis review, as the Court extended for content-based decisions regarding

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Commission v. Forbes, 523 U.S. 666 (1998), and *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), as support for his analogy. *Id.* The *Forbes* case, however, appears to contradict the Court's decision in *Red Lion*, 395 U.S. 367 (1969), a case that Chief Justice Rehnquist failed to mention.

[191] *Id.* at 205.

[192] *Id.* at 208. Chief Justice Rehnquist reasoned that the library chooses to exclude pornography for its other collections, so the Internet should be no different. *Id.*

[193] Semitsu, *supra* note 183, at 527.

[194] *Id.*

[195] *Id.*

[196] *Id.*

[197] *Am. Library Ass'n*, 539 U.S. at 206. The library's traditional mission is "to facilitate research, learning, and recreational pursuits by furnishing materials of appropriate and requisite quality." *Id.*

Internet access.[198]

Justice Kennedy concurred because he believed that a patron's ability to disable the filters saves the law from facial unconstitutionality.[199] The Justice was willing, however, to consider possible future challenges if a patron was able to show that protected speech had been blocked and the patron was unable to succeed in convincing a library representative to unblock the filter. Justice Kennedy, however, was convinced by the remainder of the Chief Justice's arguments and agreed that the compelling governmental interest of protecting young library users, coupled with the plaintiffs' failure to show that adult library users are actually hindered in obtaining protected speech, supported the constitutionality of CIPA.[200]

The plurality opinion did not address the right to receive information. Justice Breyer, in his concurrence, recognized that right, but he ultimately agreed with the judgment of the plurality and upheld CIPA.[201] Justice Breyer believed that because CIPA "directly restricts the public's receipt of information," heightened scrutiny is the correct standard to apply.[202] The Justice declined to apply strict scrutiny because CIPA affects a library's discretion in selection, creation, and maintenance of a collection.[203] The Justice's application ultimately balanced the importance of CIPA's goals and the alternatives to meet those goals.[204] Because he found no other means to filter the undesired information, Justice Breyer concurred in the judgment. Justice Breyer's application of heightened but not strict scrutiny takes away some of the protection defenders of the right to receive information would like it to receive.[205]

Two dissents appear in the case, the first written by Justice Stevens.[206] Justice Stevens viewed this case from the library's perspective and found CIPA to be an unconstitutional restraint on the library's First Amendment rights, arguing that judgments about what material to make available and how are better left to local

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198 *Id.* at 210.
199 *Id.* at 214-15 (Kennedy, J., concurring).
200 *Id.*
201 *Id.* at 216 (Breyer, J., concurring).
202 *Am. Library Ass'n*, 539 U.S. at 216.
203 *Id.*
204 *Id.* at 217.
205 *Id.*
206 *Id.* at 220 (Stevens, J., dissenting).

governments to narrowly tailor a solution fitting the issue.[207] Justice Stevens's opinion focused on the less restrictive alternatives available,[208] rather than the current technology that both over- and under-blocks[209] certain web sites.[210] Because CIPA hindered the library's discretion to choose its materials, the government's action forcing the filters in order to obtain funding unconstitutionally restrains the library's First Amendment rights.[211]

The second dissent, written by Justice Souter and joined by Justice Ginsberg, took a different perspective, considering CIPA from the perspective of the library patron, or the audience.[212] Justice Souter took issue with the potential overblocking of protected sites, as it would be unconstitutional for a library to restrict an adult's access to protected sites despite CIPA's mandate.[213] Justice Souter equated filtering with censorship, rejecting the plurality's analysis that equated filters with a library's selection of available materials.[214] Therefore, Justice Souter distinguished a library's discretion in choosing print materials and in choosing Internet access.[215] He argued that a library has greater discretion in choosing print materials because of space and money constraints.[216] Neither of these issues are of concern in regards to Internet access.[217] As a result,

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[207] *Am. Library Ass'n*, 539 U.S. at 223 n.3.

[208] *See infra* Conclusion.

[209] "Over-blocking" and "under-blocking" are terms of art referencing the propensity of the filtering software to either incorrectly block sites that should not be blocked, or incorrectly display websites that should have been blocked, respectively. *Am. Library Ass'n*, 539 U.S. at 223 n.3.

[210] *Id.* at 223-24. Like the District Court, Justice Stevens cited the alternatives that are available at a local level. *Id.* at 223. These alternatives include library enforcement of policies that do not allow access to obscenity, requiring parental consent for minors to use Internet terminals, privacy screens, recessed monitors, and hidden placement of Internet terminals. *Id.*

[211] *Id.* "The effect of the overblocking is the functional equivalent of a host of individual decisions excluding hundreds of thousands of individual constitutionally protected messages from Internet terminals located in public libraries throughout the nation." *Id.* at 222 (Stevens, J., dissenting).

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

[213] *Id.* Justice Souter did not find the Solicitor General's assurances that a library patron could ask to unblock a site as convincing as the plurality did. *Id.* The Justice cited the FCC's failure to set federal policy for local libraries to know when unblocking would be suitable. *Id.*

[214] *Am. Library Ass'n*, 539 U.S. at 235.

[215] *Id.* at 236-37.

[216] *Id.*

[217] *Id.* The Internet is purchased as a package, rather than selected one site at a time. *Id.* Therefore, filtering is more like removal, and less like selection. *Id.*

there should be different levels of scrutiny to determine if a library patron's First Amendment rights have been abridged depending on the type of material that the library is selecting.

> The proper analogy therefore is not to passing up a book that might have been bought; it is either to buying a book and then keeping it from adults lacking an acceptable 'purpose,' or to buying an encyclopedia and then cutting out pages with anything thought to be unsuitable for all adults.[218]

Therefore, Justice Souter would have applied strict scrutiny to CIPA and would have found that the filtering requirement violated an adult patron's First Amendment rights.[219]

CONCLUSION

The right to receive information is a corollary of the right to speak, meaning that audience rights stem from speaker rights.[220] The common theme in the first category of cases discussed in Part I is the government's attempt to prevent otherwise protected speech.[221] The attempts to prevent such speech occur in various ways, including specific criminal statutes, censorship of mail, and limitations on corporation expression.[222] In balancing the competing interests in those cases, it is clear that if the speech is protected, the government customarily has no place regulating the dissemination of information. Therefore, the Court should utilize the right to receive information going forward to prevent governmental barriers to protected information, in line with years of strong precedent.

The second category of cases represents the rare case where the government, due to limitations on broadcast frequencies, will require the press to make information available to the public.[223] This small set of cases is unlikely to be duplicated, thus the analysis should not be used in the future, especially given the advent of new technology. The final category of cases has the potential to permit audience use

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[218] *Id.* at 237.

[219] *Am. Library Ass'n*, 539 U.S. at 242-43.

[220] *See, e.g.*, Procunier v. Martinez, 416 U.S. 396, 408-09 (1974); Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Lamont v. Postmaster Gen., 381 U.S. 301 (1965).

[221] *See* discussion *supra* Part I.A (describing the history of the right to receive information in the context of prevention of government barriers to protected information).

[222] *See* discussion *supra* Part I.A.

[223] *See* discussion *supra* Part I.B (describing the press cases relating to the Fairness Doctrine).

of the right to receive information to claim access to information in the government's possession. To compel the government to give the public access to information in its possession requires reliance on a positive right.[224] Because of the judiciary's limited capacity to enforce such rights, reliance on a positive right is not a strong use of the right to receive information.[225] Within this category of cases, however, are opinions that prevent the government from giving information and then later taking it away. This group of opinions represents a second strong application of the right to receive information.[226]

Once the government chooses to make the information available, the right to receive that information prevents the government from later taking that information away from the public.[227] The decision to permit the information to be public is one that has already been made; therefore, any action to ensure that the information remains public would rely on a negative right.[228] Here, the action would essentially be similar to the first group of cases preventing governmental barriers to information.

A natural case to reference in the Court's *American Library Association* decision would have been *Pico*, as removal of websites is the equivalent to the removal of books.[229] The plurality, however, chose to reject the analogy and instead determined that the two are not related.[230] The dissent recognized this analogy and applied strict scrutiny, in line with precedent.[231] The plurality misapplied precedent by ignoring the similarity in facts to *Pico*. In *Pico*, the Court prevented the government from improperly removing books from the school library it had already chosen to acquire.[232] In *American Library Association*, the Court should have prevented the government from removing websites it had already chosen to acquire. The

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[224] *See* discussion *supra* Part II (defining positive rights and applying the analysis to the right to receive information).

[225] Cross, *supra* note 2, at 872.

[226] *See* discussion *supra* Part I.B (distinguishing between cases where the government is required to provide information and cases where the government had already provided the information and then attempts to take that information away).

[227] *Pico*, 457 U.S. at 868.

[228] *See* discussion *supra* Part II (defining positive rights and applying the analysis to the right to receive information).

[229] *See* discussion *supra* Part III (providing a detailed account of the United States Supreme Court's recent decision in *American Library Association*).

[230] *See* discussion *supra* Part III.

[231] *See* discussion *supra* Part III.

[232] *Pico*, 457 U.S. at 872.

Internet is purchased as a package thus giving access to all available sites. Therefore, public libraries should not have free reign to pick and choose which websites should be publicly available. It is up to the patron to make content choices, rather than having the library limit those choices improperly. As Justice Souter stated, "[D]eciding against buying a book means there is no book (unless a loan can be obtained), but blocking the Internet is merely blocking access purchased in its entirety and subject to unblocking if the librarian agrees."[233] The dissent's analogy is the correct application of the right to receive information; once the library chooses to obtain content, the library should not be permitted to later remove that content.

Furthermore, the government can meet the goal of CIPA, to protect children from harmful messages, through less restrictive means without infringing the right to receive information.[234] For example, a library can choose to permit certain computers to be available for use by children. Those computers could contain filters and be located in the children's section, while other computers in the library for adult use would be free from filters and located in a separate section of the library. Second, the library can institute a policy only enabling children to use the Internet with adult supervision, thereby dispensing with the need for filters. Finally, the library can make a strict policy that forbids anyone from making obscene or harmful information available to children. Anyone found to violate this policy, enforced by other patrons and library staff, would be denied access to the library. Any of these suggestions would be a less restrictive way to accomplish the goals of CIPA and protect a library patron's First Amendment rights.[235]

Ideally, the strongest case application for the right to receive information is to extend free speech rights to speakers and audiences, unless the government has a compelling interest. The two categories, preventing barriers and precluding government from withholding previously accessible information, are the two strongest applications. The decision in *American Library Association*, however, has undermined the right in the second context despite the plurality's attempts to distinguish the facts in *Pico*. The decision to disregard the clear similarities between the two cases ignores the fact that once the government chooses to make access to the Internet in

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[233] *Am. Library Ass'n*, 539 U.S. at 237.
[234] *Id.* at 223.
[235] *See id.*

public libraries available, the government should not improperly determine which websites to make available. Despite the *American Library Association* decision, the Court should continue to use this conceptual framework and apply the right to receive information to prevent the government from creating barriers to information and to inhibit the government from acquiring information for public use and later attempting to improperly remove public access to that information.