

UNITED STATES V. AMERICAN LIBRARY ASS'N: THE CHILDREN'S INTERNET PROTECTION ACT, LIBRARY FILTERING, AND INSTITUTIONAL ROLES

By Felix Wu

The explosive growth of the Internet over the last decade has revolutionized communications, greatly expanding the potential audience for any one message and the messages available to any one person. There is more of every kind of communication, from personal correspondence to commercial transactions, and from political commentary to pornography. It is the ready availability of pornography on the Internet that has troubled many in the United States, some of whom claim that such material threatens to undermine the development of the Internet as a whole.¹ In particular, there is substantial concern that the future of the Internet as an educational tool for children depends on being able to prevent children from seeking out or stumbling upon pornographic material.²

Congress initially responded to this concern by regulating the Internet directly, attempting to ban the transmission of indecent material to minors.³ However, the Supreme Court has all but stated that such efforts are doomed to failure, because any attempt to restrict minors' access to speech will impermissibly restrict adults' access to the same speech.⁴ The Court

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1. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 885 (1997) ("The Government apparently assumes that the unregulated availability of 'indecent' and 'patently offensive' material on the Internet is driving countless citizens away from the medium because of the risk of exposing themselves or their children to harmful material.").

2. *See YOUTH, PORNOGRAPHY, AND THE INTERNET* 19-20 (Dick Thornburgh & Herbert S. Lin eds., 2002) ("Success in dealing with [concerns about pornography] is arguably a necessary (but not sufficient) condition for fully exploiting the social and educational potential of the Internet for children."), available at http://bob.nap.edu/html/youth_internet/.

3. *See Child Online Protection Act (COPA)*, Pub. L. No. 105-277, 112 Stat. 2681-736 (1998) (codified at 47 U.S.C. § 231 (2000)); *Communications Decency Act of 1996 (CDA)*, Pub. L. No. 104-104, § 502, 110 Stat. 133, 133-36 (codified as amended at 47 U.S.C. § 223 (2000)).

4. *See Reno v. ACLU*, 521 U.S. 844 (1997) (striking down CDA § 502 except as applied to child pornography); *see also Ashcroft v. ACLU*, 535 U.S. 564 (2002) (raising questions about the constitutionality of COPA); *ACLU v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003) (affirming the grant of a preliminary injunction against COPA), *cert. granted*, 124 S. Ct. 399 (2003).

has suggested that a better approach might be to allow individuals to filter the content they receive at home, so that adults can decide for themselves how to control what they and their children see.⁵

Congress' latest attempt to protect children from pornography takes up the idea of filters, but moves it from the home to public libraries and schools, raising First Amendment questions in the process. The Children's Internet Protection Act (CIPA) requires that libraries enable filters on all Internet-accessible computers in order to receive federal subsidies for Internet access and related computer equipment.⁶ In *United States v. American Library Ass'n* ("ALA II"), a highly fractured Supreme Court held that the Act does not violate the First Amendment because libraries have the discretion to provide only filtered Internet access and Congress has the discretion to refuse subsidies to libraries with unfiltered access.⁷

The constitutionality of CIPA hinges primarily on the level of scrutiny a court should apply to the Act. This question in turn implicates a host of First Amendment doctrines, including public forum doctrine, editorial discretion cases, the selection-removal distinction, and prior restraint doctrine. Unfortunately, the Supreme Court has never laid out a consistent framework for dealing with these different doctrines, and as a result, the many opinions in this case talk past each other, each using a different doctrinal framework without explaining why one framework should be preferred over another.

Reconciling the competing doctrines and cases is possible if one understands that to choose among them is to make judgments about the social roles of various institutions. To say that the public forum doctrine does or does not apply to this case is to say something about the role of libraries, the nature of the Internet, and the place for federal subsidies to libraries. Framing the debate in this way clarifies the real differences in a way that First Amendment doctrines standing alone do not. More importantly, by focusing on institutions, courts have a way of grounding the inevitably normative judgments that these doctrines invite. Whether or not library Internet access is a public forum depends on how one characterizes such access. In the absence of constraints on this characterization, courts remain free to choose whatever characterization justifies the ultimate re-

5. See *Reno*, 521 U.S. at 877.

6. Children's Internet Protection Act (CIPA), Pub. L. No. 106-554, 114 Stat. 2763A-335 (2000) (codified at 20 U.S.C. § 9134(f) (2000) and 47 U.S.C. § 254(h) (2000)). The Act also requires the filtering of Internet content on public school computers, but this provision was not at issue in this case and will not be analyzed in this Note.

7. 123 S. Ct. 2297 (2003) [hereinafter *ALA II*].

sult they reach. The characterization of library Internet access should depend, however, on the characterization of libraries and the characterization of the Internet. The histories and social roles of these institutions limit the universe of plausible characterizations of library Internet access.

In particular, in the case of government restrictions on public spaces or public subsidies, there are at least two distinct institutions that matter: the government entity making the restriction and the space⁸ being restricted. Whether the entity can restrict the space consistent with the First Amendment should depend on the level and type of discretion entrusted to it as an institution, and on the openness of the space, as an institution, to public discourse. Courts often use one or both of these factors, but they rarely do so explicitly, leading to gaps in their analysis. Thus, the plurality in *ALA II* fixates on the need to continue to defer to libraries' book selection decisions, even though such deference is ambiguous at best in defining the role of libraries and potentially inapplicable in the context of the Internet. An explicit analysis of institutions suggests that the evolution of librarians from gatekeepers to information managers and the interactive nature of the Internet together require that library filtering be subject to strict scrutiny. Similarly, the role of the federal government in libraries and the federal interest in using subsidies to promote widespread Internet access together suggest that the decision to mandate filters as part of a federal funding program is also subject to strict scrutiny. Because the Act cannot pass strict scrutiny, the Court erred in upholding it.

Part I describes the treatment of pornography under the First Amendment, explains why filtering technology poses First Amendment problems, and sets out the doctrines that courts have applied to these problems. Part II fits the *ALA II* opinions into this First Amendment framework. Finally, Part III explores the importance of the social roles of institutions to the application of First Amendment doctrines, examining the roles of libraries, of Internet access, and of federal funding for libraries and Internet access.

I. BACKGROUND

To understand *ALA II*, one must understand not only the Act in question, but also the reasons why filtering pornography tends to raise First

8. Throughout this Note, "space" refers to both physical spaces and the nonphysical "spaces" created by funding programs. One can conceive of those who receive funding as having been admitted into the space created by the program. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995) ("The [fund] is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable."); see also *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788 (1985) (applying public forum doctrine to a charity drive aimed at federal employees).

Amendment issues and the tools courts have used to deal with similar issues in the past.

A. Children's Internet Protection Act

CIPA requires that a library may only receive funds under two programs designed to subsidize the cost of Internet access and associated computer equipment if

(A) such library—

(i) has in place a policy of Internet safety for minors that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are obscene, child pornography, or harmful to minors; and

(ii) is enforcing the operation of such technology protection measure during any use of such computers by minors; and

(B) such library—

(i) has in place a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are obscene or child pornography; and

(ii) is enforcing the operation of such technology protection measure during any use of such computers.⁹

Libraries "may disable a technology protection measure . . . to enable access for bona fide research or other lawful purposes."¹⁰ One program restricts such disabling to "use by an adult."¹¹

B. Pornographic Content and Filtering Technology

Not all content that might be considered pornographic receives the same treatment under the First Amendment. Two types of pornography can be banned outright: obscenity¹² and child pornography.¹³ The First

9. 20 U.S.C. § 9134(f)(1) (restricting grants under the Library Services and Technology Act); *see also* 47 U.S.C. § 254(h)(6)(B)-(C) (placing similar restrictions on discounts under the E-rate program).

10. 20 U.S.C. § 9134(f)(3).

11. 47 U.S.C. § 254(h)(6)(D).

12. *Miller v. California*, 413 U.S. 15, 24 (1973) (defining the test for obscenity). Material is obscene if:

(a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;

(b) whether the work depicts or describes, in a patently offensive way,

Amendment protects pornography that does not fall into one of these two categories, and governments cannot restrict adult access to such material.¹⁴ Much of this material is considered “harmful to minors,” however, and access by minors can be restricted.¹⁵ Ostensibly, the goal of CIPA is to restrict all access to obscenity and child pornography and to restrict minors’ access to material harmful to minors.¹⁶

If it were possible to filter out only material in these three categories (two for adults), filtering would pose no constitutional issue; the problem is that no filter can block precisely the content that fits into one of the legal categories.¹⁷ The predominant form of filtering technology in use today consists of software that compares each request for a Web page against a precompiled control list of pages.¹⁸ The control list is generally divided into categories of potentially objectionable content, one or more of which usually deals with sexual content.¹⁹ If a given category has been selected, the software will block all requests for Web pages within that

sexual conduct specifically defined by the applicable state law; and
(c) whether . . . the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id.

13. *New York v. Ferber*, 458 U.S. 747, 764 (1982) (finding that for child pornography, the *Miller* test should be adjusted such that “[a] trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole”).

14. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (invalidating a ban on “virtual” child pornography—material produced using adults, but made to look like child pornography); *Reno v. ACLU*, 521 U.S. 844, 875 (1997) (“[T]he Government may not ‘reduce the adult population [to consuming] only what is fit for children.’”) (quoting *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 759 (1996)) (brackets added).

15. *Ginsberg v. New York*, 390 U.S. 629 (1968).

16. *See* 20 U.S.C. § 9134(f)(1) (2000); 47 U.S.C. § 254(h)(6)(B)-(C).

17. The focus here is on the technological limits of filters, but even if filters were technologically perfect, uncertainty about the application of the *Miller* test would still lead to filtering errors. *See Jenkins v. Georgia*, 418 U.S. 153, 164-65 (1974) (Brennan, J., concurring in the result) (“Thus, it is clear that as long as the *Miller* test remains in effect ‘one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so.’”) (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 92 (1973) (Brennan, J., dissenting)).

18. *Am. Library Ass’n v. United States*, 201 F. Supp. 2d 401, 428 (E.D. Pa. 2002) [hereinafter *ALA I*]. *See generally* Richard J. Peltz, *Use “The Filter You Were Born With”: The Unconstitutionality of Mandatory Internet Filtering for the Adult Patrons of Public Libraries*, 77 WASH. L. REV. 397, 404-16 (2002) (discussing the technology and limits of filtering).

19. *ALA I*, 201 F. Supp. 2d at 428.

category. While each software company compiles its control list somewhat differently (and keeps secret its process for doing so),²⁰ the basic idea is that the company first searches the Web to find the universe of Web pages, much as a search engine might do, then uses automated techniques to try to focus on potentially objectionable pages, and then employs some human review of the content on these pages.²¹ Companies do not generally re-review pages on a systematic basis.²²

This process inevitably leads to both underblocking, the omission of objectionable pages from the control list, and overblocking, the inclusion of unobjectionable pages on the control list.²³ Underblocking happens because no search can find every Web page, pages are constantly being added, and automated screening cannot detect pages with objectionable pictures but no text.²⁴ Overblocking happens because the automated screening is very imprecise, and the subsequent human review is either not comprehensive or prone to error.²⁵ Furthermore, overblocking and underblocking occur when Web page content changes from objectionable to unobjectionable, or vice versa, between when the control lists are compiled and when they are used.²⁶ Given the technological limitations, any filtering system that blocks enough unprotected content to be considered an effective technology protection measure will also block a substantial amount of protected content.²⁷

Because of the substantial overblocking, courts would likely hold that banning outright all material blocked by any given software filter would be overbroad and hence a violation of the First Amendment.²⁸ The question in this case is whether a public library's use of the same filter violates the First Amendment, and if not, whether Congress can require such filtering as a condition of federal funding.

C. Library Filtering and First Amendment Doctrines

Before *ALA I*, the only case to address the constitutionality of library Internet filtering was *Mainstream Loudoun v. Board of Trustees of the*

20. *Id.* at 430.

21. *Id.* at 430-33.

22. *Id.* at 435-36.

23. *Id.* at 436-37.

24. *Id.* at 431-32.

25. *Id.* at 432-35.

26. *Id.* at 435-36.

27. *Id.* at 450.

28. *See Reno v. ACLU*, 521 U.S. 844, 870-79 (1997) (finding the coverage of the CDA to be overbroad).

Loudoun County Library.²⁹ In *Loudoun*, members of the local community challenged the library board's decision to install filters on all library computers. In finding the library's policy unconstitutional, the district court held that library Internet filtering was: (1) a content-based restriction in a limited public forum;³⁰ (2) not simply an exercise of the library's discretion in selecting materials for its collection;³¹ (3) a content-based removal decision;³² and (4) a prior restraint.³³ For all of these reasons, the court applied strict scrutiny.³⁴ Finding "many less restrictive means available," including the possibility of only filtering children's access, the court invalidated the library policy.³⁵ The three-judge district court panel³⁶ in *ALA I* used similar reasoning to reach the same conclusion that library Internet filtering is unconstitutional, and thus found CIPA unconstitutional.³⁷ Each of these lines of First Amendment doctrine, as well as their application in *Loudoun* and *ALA I*, will be examined below.

1. Public Forum Doctrine

Public forum doctrine captures the idea that the more a government venue is open to speech and speakers, the less control the government has over speech within the venue.³⁸ Courts have divided such venues into four categories: traditional public forums, limited public forums, nonpublic forums, and nonforums. Traditional public forums are places such as streets and parks that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public ques-

29. 24 F. Supp. 2d 552 (E.D. Va. 1998) [hereinafter *Loudoun II*] (granting plaintiff's motion for summary judgment); 2 F. Supp. 2d 783 (E.D. Va. 1998) [hereinafter *Loudoun I*] (denying defendant's motion to dismiss and motion for summary judgment).

30. *Loudoun II*, 24 F. Supp. 2d at 563.

31. *Loudoun I*, 2 F. Supp. 2d at 793-94.

32. *Id.* at 794-95.

33. *Id.* at 797.

34. Under strict scrutiny, "[a] content-based limitation on speech will be upheld only where the state demonstrates that the limitation 'is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" *Loudoun II*, 24 F. Supp. 2d at 564 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). Part of this test involves determining whether the limitation is the "least restrictive means" to achieve those interests. *Id.* at 566.

35. *Id.* at 566-67.

36. CIPA stipulates that challenges to its constitutionality will be heard by a three-judge district court panel and provides for a direct appeal to the Supreme Court of any decision holding the act unconstitutional. See CIPA, Pub. L. No. 106-554, § 1741, 114 Stat. 2763A-335, -351 to -352 (2000).

37. See *ALA I*, 201 F. Supp. 2d 401 (E.D. Pa. 2002).

38. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

tions.”³⁹ Such forums cannot be closed, and any content-based restrictions within them are subject to strict scrutiny.⁴⁰

Limited or designated public forums are venues the government sets aside for expressive activity, often for a particular purpose and possibly for a particular set of participants. Examples include public university meeting spaces available to registered student groups,⁴¹ and municipal theaters available for arts productions.⁴² Such forums can be closed, and the government has some leeway in defining the boundaries of the forum, but otherwise, content-based restrictions are still subject to strict scrutiny.⁴³

Nonpublic forums are venues in which communicative activity occurs, but which the government has not opened for such activity; one example is a public school teacher’s mailbox.⁴⁴ In nonpublic forums, content-based restrictions need only be “reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”⁴⁵ Finally, non-forums are venues not designed for public discourse of any sort. In such spaces, the government can eliminate speech altogether or use the venue to promote its own views without providing an opportunity to respond.⁴⁶

Thus, to determine whether to apply strict scrutiny, one issue courts need to consider is whether the relevant venue is a limited public forum. In *Kreimer v. Bureau of Police*, the court determined that a library is a limited public forum, in the course of deciding whether the library could exclude a homeless man for violating its patron conduct rules.⁴⁷ The court cited three factors relevant to this determination: government intent, extent of use, and the nature of the forum.⁴⁸ In assessing these factors, the court noted that the government established libraries for the express purpose of

39. *Hague v. CIO*, 307 U.S. 496, 515 (1939).

40. *Perry*, 460 U.S. at 45.

41. *Widmar v. Vincent*, 454 U.S. 263 (1981).

42. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

43. *Perry*, 460 U.S. at 46.

44. *Id.* at 46-47.

45. *Id.* at 46.

46. Courts generally do not use the label “non-forums” in the context of public forum doctrine. Rather, courts often speak about “whether public forum principles apply to the case at all.” See *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 672 (1998). When venues are found to be non-forums, that is, outside the other forum categories, courts allow the venue to “facilitate the expression of some viewpoints instead of others.” *Id.* at 674.

47. 958 F.2d 1242 (3d Cir. 1992).

48. *Id.* at 1259-62.

communicating information, libraries were open to the public generally, and the nature of libraries was compatible with communicative activity.⁴⁹ All three factors suggested that the government had designed libraries to provide the widest possible access to the written word.⁵⁰

The *Loudoun* court cited *Kreimer* and used the same factors to find that the library, considered as a whole, is a limited public forum.⁵¹ The *ALA I* court noted that the access sought in the case defined the relevant forum, so that in this case, it was library Internet access, and not the access to library as a whole or the library's book collection, that defined the relevant forum.⁵² The court also distinguished between content restrictions that define the boundaries of a limited public forum, and content restrictions within a limited public forum, noting that the former is subject to more lenient review.⁵³ Finding that filtering removes content from what is otherwise a relatively broad forum, the court held that Internet filtering did not simply define the boundaries of a limited forum and was therefore subject to strict scrutiny.⁵⁴

2. Editorial Discretion

An important class of cases that courts have held to lie outside the public forum doctrine is those in which the government legitimately exercises some form of editorial discretion. Thus, in *Arkansas Educational Television Commission v. Forbes*,⁵⁵ the Court held that public television stations have wide latitude in deciding which programs to air, and in *National Endowment for the Arts v. Finley*,⁵⁶ the Court held that the NEA has wide latitude in deciding which proposals to fund. Courts have almost universally suggested that libraries have the same discretion in deciding which books to acquire.⁵⁷ The *ALA I* court, however, held that such discretion did not apply to decisions about Internet filtering, reasoning that dis-

49. *Id.*

50. *Id.*

51. *Loudoun II*, 24 F. Supp. 2d 552, 563 (E.D. Va. 1998).

52. *ALA I*, 201 F. Supp. 2d 401, 455-56 (E.D. Pa. 2002).

53. *Id.* at 457.

54. *Id.* at 461.

55. 523 U.S. 666 (1998).

56. 524 U.S. 569 (1998).

57. *See, e.g., Bd. of Educ. v. Pico*, 457 U.S. 853, 870 (1982) ("Petitioners rightly possess significant discretion to determine the content of their school libraries."); *ALA I*, 201 F. Supp. 2d at 462 ("[W]e agree . . . that generally the First Amendment subjects libraries' content-based decisions about which print materials to acquire for their collections to only rational review.").

cretion only applied to judgments that singled out speech of particular value, rather than those that excluded disfavored speech.⁵⁸

3. *The Selection-Removal Distinction*

In making this distinction, the *ALA I* court joined the *Loudoun* court in distinguishing between a library's selection decisions and its removal decisions. This distinction originated in the case of *Board of Education v. Pico*.⁵⁹ In *Pico*, a local school board removed books from a public high school library that it felt were "anti-American, anti-Christian, anti-[Semitic], and just plain filthy."⁶⁰ Justice Brennan, writing for the plurality, held that although schools had substantial discretion to determine the content of their libraries, they could not exercise that discretion "in a narrowly partisan or political manner," and that books could be removed based on their "educational suitability," but not based on their ideas.⁶¹ Justice Brennan further noted that his opinion was limited to the removal of books, and not their acquisition,⁶² a distinction that drew fire from Justice Rehnquist,⁶³ and that has been the subject of much commentary, particularly in the library filtering context.⁶⁴

The *Loudoun* court applied the distinction and determined that Internet filtering was a removal decision, not a selection decision.⁶⁵ The court found that the Internet is an integrated whole and that in deciding to purchase Internet access, "each Loudoun library has made all Internet publications instantly accessible to its patrons."⁶⁶ A single purchase provided complete access, and the library need not spend additional funds to access

58. 201 F. Supp. 2d at 462-66.

59. 457 U.S. 853 (1982).

60. *Id.* at 857.

61. *Id.* at 870-71.

62. *Id.* at 871-72.

63. *Id.* at 916 (Rehnquist, J., dissenting) ("[T]his distinction between acquisition and removal makes little sense. The failure of a library to acquire a book denies access to its contents just as effectively as does the removal of the book from the library's shelf.")

64. See Bernard W. Bell, *Filth, Filtering, and the First Amendment: Ruminations on Public Libraries' Use of Internet Filtering Software*, 53 FED. COMM. L.J. 191, 215-16 (2001) (arguing that filtering is a removal decision); Mark S. Nadel, *The First Amendment's Limitations on the Use of Internet Filtering in Public and School Libraries: What Content Can Librarians Exclude?*, 78 TEX. L. REV. 1117, 1122-27 (2000) (suggesting that only viewpoint neutrality is required in both selection and removal decisions); Peltz, *supra* note 18, at 468-75 (distinguishing filtering from book selection, regardless of whether an abstract selection-removal distinction can be made); David F. Norden, Note, *Filtering Out Protection: The Law, the Library, and Our Legacies*, 53 CASE W. RES. L. REV. 767, 786-89 (2003) (arguing that filtering is a selection decision).

65. *Loudoun I*, 2 F. Supp. 2d 783, 793-94 (E.D. Va. 1998).

66. *Id.* at 793.

any particular Web page; in fact, the library had to spend additional funds in order to block Web pages.⁶⁷

After the *Loudoun* decision, Mark Nadel criticized the idea that resource constraints would only push libraries to offer more Internet content and not less.⁶⁸ Nadel noted that time on Internet-accessible computers is often a scarce resource and that libraries should have the same discretion in deciding how to fill that time as they do in deciding how to fill their shelves.⁶⁹ The *ALA I* court quoted Nadel on this point approvingly,⁷⁰ but nevertheless found that Internet filtering is a removal decision, noting that filters make an affirmative judgment about what content to exclude, rather than an affirmative judgment about what content to allow.⁷¹

4. *Prior Restraint Doctrine*

Prior restraint doctrine places a strong presumption of unconstitutionality on any government attempt to prevent speech beforehand, rather than sanctioning it after the fact. The theory is that such prior restraints have a "chilling effect,"⁷² potentially deterring speech that would be found lawful after a full judicial review. One result of this doctrine is that an otherwise impermissible ban on speech is generally still impermissible even if speakers are given the opportunity to petition to circumvent the ban.

In the Internet filtering context, courts have invoked prior restraint doctrine to hold that if filtering is impermissible, it remains so even if library patrons have the opportunity to request that individual pages be unblocked.⁷³ Often cited is *Lamont v. Postmaster General*, in which the Court struck down a provision requiring the postal service to separate out "communist political propaganda," and deliver it only on request.⁷⁴ Citing *Lamont*, both the *Loudoun* court and the *ALA I* court held that the library's unblocking policy did not cure any constitutional defects in the filtering policy, even if library staff had no discretion in deciding whether to fulfill a patron's request.⁷⁵

67. *Id.*

68. Nadel, *supra* note 64, at 1128-29.

69. *Id.*

70. *ALA I*, 201 F. Supp. 2d 401, 465 n.25 (E.D. Pa. 2002).

71. *Id.* at 464-65.

72. *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965).

73. *See ALA I*, 201 F. Supp. 2d at 486; *Loudoun I*, 2 F. Supp. 2d at 797.

74. 381 U.S. 301 (1943).

75. *ALA I*, 201 F. Supp. 2d at 486; *Loudoun I*, 2 F. Supp. 2d at 797.

II. THE SUPREME COURT DECISION

In *ALA II*, most of the members of the Court analyzed the constitutionality of CIPA in two parts. First, as an exercise of Congress' spending power, CIPA would be unconstitutional under *South Dakota v. Dole*⁷⁶ if it required states to violate the Constitution.⁷⁷ This inquiry is equivalent to asking whether libraries infringe the First Amendment rights of their patrons by installing filters, independently of CIPA. Second, CIPA would be unconstitutional if it conditioned federal funding on the surrender of First Amendment rights.⁷⁸ Whether libraries have First Amendment rights to surrender, or whether they can assert the rights of their patrons, is unclear, but while the plurality expressed some doubt about the existence of such rights, it ultimately assumed that the rights do exist.⁷⁹ This second inquiry then amounts to asking whether, even if a library could constitutionally filter Internet access, Congress can constitutionally require libraries to do so.

A. The Constitutionality of Library Filtering

Seven members of the Court held that libraries could constitutionally implement a filtering program under CIPA, though only four could agree on a rationale. Chief Justice Rehnquist, writing for the plurality, held that public forum doctrine was inapplicable to the case because "[a] public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak."⁸⁰ Justice Rehnquist held instead that as in *Forbes* and *Finley*, libraries have the right and responsibility to make discretionary judgments about the material provided to patrons, and that this judgment is subject to lenient judicial review.⁸¹ Furthermore, Justice Rehnquist rejected any distinction between selection and removal, holding that a library's decision to employ a filter was a reasonable exercise of its discretion.⁸² Finally, Justice Rehnquist suggested that there was no prior restraint problem, writing that "the Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment."⁸³

76. 483 U.S. 203 (1987).

77. *ALA II*, 123 S. Ct. 2297, 2303 (2003).

78. *Id.* at 2307.

79. *Id.*

80. *Id.* at 2305.

81. *Id.* at 2304.

82. *Id.* at 2306.

83. *Id.* at 2307.

Justice Souter, joined by Justice Ginsburg, dissented, arguing that a selection-removal distinction was defensible and should have been applied in this case. Justice Souter characterized the deference given to selection decisions as being administrative in nature, based in the difficulty of judicially reviewing the numerous resource-constrained decisions librarians make.⁸⁴ Justice Souter acknowledged that resources to provide Internet access might also be limited, but suggested that these limitations did not justify filtering.⁸⁵ Hence, Justice Souter argued that strict scrutiny applied to a library's decision to filter.⁸⁶ Filtering failed strict scrutiny, according to Justice Souter, because restricting only children to filtered access is a less restrictive means of achieving the interest in protecting children.⁸⁷

The remaining three members of the Court focused in one way or another on the unblocking provisions of CIPA. Justice Kennedy, citing no case law, argued that the need to request that pages be unblocked was not a constitutional burden of "any significant degree."⁸⁸ Justice Breyer argued for the novel proposition that the selection-removal debate should be resolved by applying intermediate scrutiny.⁸⁹ Under intermediate scrutiny, Justice Breyer found that the unblocking provisions ensured a reasonable fit between the filtering policy and the government's interest in protecting children.⁹⁰ Justice Stevens argued that library filtering was constitutional, despite characterizing CIPA as a prior restraint.⁹¹ For Justice Stevens, this characterization of CIPA indicated not that library Internet filtering was unconstitutional, but that it was unconstitutional for Congress to require such filtering.⁹²

B. The Constitutionality of Congress' Funding Condition

The plurality and Justice Stevens agreed that filtering was constitutional, and each went on to consider whether CIPA might nevertheless be unconstitutional. In dividing on this question, the two opinions took very different approaches to resolving two leading cases in the area: *Rust v. Sullivan*⁹³ and *Legal Services Corporation v. Velazquez*.⁹⁴ In *Rust*, the

84. *Id.* at 2324 (Souter, J., dissenting).

85. *Id.* at 2321 n.3 (Souter, J., dissenting).

86. *Id.* at 2324 (Souter, J., dissenting).

87. *Id.* at 2320 (Souter, J., dissenting).

88. *Id.* at 2310 (Kennedy, J., concurring in the judgment).

89. *Id.* at 2311 (Breyer, J., concurring in the judgment).

90. *Id.* at 2312 (Breyer, J., concurring in the judgment).

91. *Id.* at 2313 (Stevens, J., dissenting).

92. *Id.*

93. 500 U.S. 173 (1991).

94. 531 U.S. 533 (2001).

Court upheld a restriction preventing doctors receiving funding under a specific program from engaging in abortion counseling, while in *Velazquez*, the Court struck down a restriction preventing lawyers receiving funding under a specific program from challenging welfare laws. In upholding CIPA, Justice Rehnquist cited *Rust* for the general proposition that the government is allowed to dictate how its money will be spent, and distinguished *Velazquez* as a case in which the speech being funded was inherently anti-government.⁹⁵ In voting to strike down CIPA, Justice Stevens cited *Velazquez* for the general proposition that the government is not allowed to distort the usual functioning of a medium of expression, and distinguished *Rust* as a case in which the government used private actors to convey its own viewpoint.⁹⁶

III. ANALYSIS

What is most striking about the opinions in this case is that they demonstrate that the Court lacks a broad framework within which to understand the different First Amendment doctrines that might apply. Thus, the district court relied primarily on public forum doctrine,⁹⁷ but the plurality in the Supreme Court found such reliance “out of place in the context of this case,” invoking instead the cases on editorial discretion.⁹⁸ On the other hand, Justice Souter’s dissent relied on *Pico*, unmentioned by the plurality, while not addressing *Forbes* and *Finley*, and expressing no view on whether public forum principles applied to the case.⁹⁹ The other three opinions proposed entirely different approaches to the problem, largely without explaining why they rejected the application of other doctrines.¹⁰⁰

A satisfactory reconciliation of these different doctrines and lines of cases requires a broader First Amendment framework in order to understand what factors are relevant when applying the doctrines to any given case. Without such a framework, the Court’s opinions seem ad hoc, convincing only to those who share the same underlying assumptions. Exposing these assumptions at least clarifies any essential differences, and ideally also makes possible other arguments for reaching a particular conclusion in a case.

95. *ALA II*, 123 S. Ct. at 2307-08.

96. *Id.* at 2316-17.

97. *ALA I*, 201 F. Supp. 2d 401, 454-70 (E.D. Pa. 2002).

98. *ALA II*, 123 S. Ct. at 2304.

99. *See id.* at 2321 (Souter, J., dissenting).

100. *See id.* at 2309-10 (Kennedy, J., concurring in the judgment); *id.* at 2310-12 (Breyer, J., concurring in the judgment); *id.* at 2312-18 (Stevens, J., dissenting).

This Note suggests that in the context of restrictions on government spaces, courts should analyze two different institutional roles—that of the government entity making the restriction and that of the space being restricted—in order to apply First Amendment doctrines to the restriction. In analyzing the government entity, courts should consider whether the proposed restriction is consistent with the level and type of discretion entrusted to that entity. In analyzing the government space, courts should consider whether the restriction is consistent with the features and degree of openness of the space. In both cases, the question is whether the restriction comports with the social role played by the various institutions. Neither government entities nor government spaces exist in a vacuum; courts should look to the history of such entities and spaces, as well as their interaction with other institutions, in order to decide whether their nature supports or undermines the proposed restriction.

Many commentators have suggested that the Supreme Court's current First Amendment jurisprudence has become encumbered by doctrinal categories which, though based upon sound intuitions, now lack any underlying justifications.¹⁰¹ Professor Robert Post, in particular, has argued that the underlying intuitions are highly contextual, and that rather than seek principles that are context-independent, the Court should formulate principles that explicitly describe the ways in which social context matters.¹⁰² Looking to the history and nature of government entities and spaces describes one particular way in which context matters.

Part III.A describes Professor Post's theories and two contexts that matter in this case: the social role of the space and the role of the entity intervening in the space. Part III.B applies this framework to libraries' decisions to filter, arguing that an analysis of the role of libraries and of the features of the Internet suggests that library filtering should be unconstitutional. Part III.C applies this framework to the federal government's decision to impose a filtering condition on federal funding. Here again, the purpose of the Internet subsidy program and the role of the federal government in local libraries suggest that CIPA should be unconstitutional.

101. See, e.g., Robert C. Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249 (1995) [hereinafter Post, *Recuperating*]; Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767 (2001).

102. See Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603 (1990) [hereinafter Post, *Constitutional Concept*]; Post, *Recuperating*, *supra* note 101; Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151 (1996) [hereinafter Post, *Subsidized Speech*].

A. Forums, Funding, and the First Amendment

In the context of subsidized speech,¹⁰³ Professor Post has posited two contextual distinctions to separate government restrictions subject to strict scrutiny from those subject to a more lenient standard of review.¹⁰⁴ The first distinction is between regulations of public discourse and regulations in the managerial domain; the latter describes those regulations that affect speech as only a means to some legitimate government end.¹⁰⁵ For example, a school's decision to favor some papers over others (with better grades) is best seen as a means to achieve educational goals and not a restriction on students' speech; such a decision is subject to a lenient standard of review.¹⁰⁶ The second distinction is between regulations that constrain private conduct and regulations that provide internal directives to government agencies.¹⁰⁷ Hence, the decision to dedicate the Kennedy Center to performing arts, rather than political speech, receives deference as an internal directive, while a decision to dedicate the second-class mailing rate to only some kinds of magazines would receive scrutiny as a constraint on private conduct.¹⁰⁸

Applying these distinctions requires two normative characterizations: first, a characterization of the regulated speech, to determine whether it is within or outside public discourse; and second, a characterization of the government action, to determine whether it is directed internally or externally.¹⁰⁹ Professor Post recognizes that these characterizations must in turn depend on other factors, and he cites both Professor Seth Kreimer's baselines¹¹⁰ and Professor Kathleen Sullivan's distribution of rights¹¹¹ as appropriate factors.¹¹²

103. Subsidized speech refers to expressive activities for which the government provides funds. When the government attaches conditions to the speech it subsidizes, this raises line-drawing issues that are analytically similar to the other issues considered here. See *supra* note 8.

104. See Post, *Subsidized Speech*, *supra* note 102; see also Matthew Thomas Kline, *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, Note, 14 BERKELEY TECH. L.J. 347 (1999) (applying Post's framework to the *Loudoun* court's decision).

105. Post, *Subsidized Speech*, *supra* note 102, at 164.

106. *Id.* at 166.

107. *Id.* at 176.

108. *Id.* at 178-79.

109. *Id.* at 179.

110. See Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984) (describing the use of history, equality, and predictions about the future as baselines to determine whether government regulations are penalties or subsidies).

111. See Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413

This Note suggests a somewhat different method of characterization, one that focuses on relevant institutions.¹¹³ The idea is that institutions have histories and social roles, and that these histories and roles can be used to constrain judicial characterizations. In particular, characterization of the regulated speech should depend on a characterization of the space in which the speech resides, and characterization of the government action should depend on a characterization of the government actor. In analyzing the space, courts should consider its compatibility with and openness to speech, while in analyzing the government actor, courts should consider the level and type of discretion entrusted to it. These analyses will incorporate the history of these institutions and the ways in which they interact with other institutions. These histories and interactions provide a foundation for courts to apply First Amendment doctrine, dictating whether it is appropriate to invoke public forum doctrine, editorial discretion, or the selection-removal distinction. By referring to such evidence about social roles, courts can avoid the potential circularity or groundlessness of assertions based solely in doctrine—assertions that strike many as reflecting nothing more than personal opinions about the merits of the case at hand.

Characterizations of the space regulated and the actor regulating appear throughout the Court's First Amendment cases, but the Court rarely highlights the importance of such considerations to the result they reach. *Velazquez* demonstrates the need for the characterization of the government space to be consistent with the roles of related institutions.¹¹⁴ There the Court held that to prevent legal aid attorneys from challenging welfare laws was to distort the "usual functioning" of a medium of expression.¹¹⁵ To determine the "usual functioning," the Court must have looked to something other than the government legal aid program in question. Indeed, the Court noted that the legal aid program used "the State and Federal courts and the independent bar on which those courts depend" in order to accomplish the program's goals.¹¹⁶ Having established a program that was integrated into the legal system as a whole, Congress could not regulate the program in ways that were inconsistent with the features of the

(1989) (suggesting that courts should consider the effect of regulations on three types of distributions of rights: between the public and private realms, among rightholders, and among those with varying dependency on government benefits).

112. Post, *Subsidized Speech*, *supra* note 102, at 179-80.

113. See also Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998) (arguing that courts should develop institution-specific First Amendment doctrines).

114. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

115. *Id.* at 543.

116. *Id.* at 544.

American legal system: in this case, with the autonomy given to lawyers to advance all reasonable arguments on behalf of their clients.¹¹⁷

The *Velazquez* Court also noted the application of this principle to public forum and editorial discretion cases, citing *Rosenberger* and *Forbes*.¹¹⁸ In *Rosenberger*, the Court held that a fund for university student newspapers created a limited public forum, from which the university could not exclude religious publications.¹¹⁹ The *Velazquez* Court noted as important to this result “the fact that student newspapers expressed many different points of view.”¹²⁰ This claim presumably reflects not an empirical fact, but rather a characterization of the space the university tried to regulate. Similar considerations can also inform the decision to reject public forum principles and instead follow cases such as *Forbes* and *Finley*, granting broad editorial discretion to government entities. Thus, the *Velazquez* Court referred to the result in *Forbes* as being based in “the dynamics of the broadcasting system.”¹²¹

Finley provides an example in which the characterization of the government actor mattered to the Court. In *Finley*, the Court held that because the NEA already had discretion to evaluate proposals according to standards of “artistic excellence,” it also had the discretion to consider the generic criteria of “decency and respect for the diverse beliefs and values of the American public.”¹²² Similarly, in *Pico*, the Court took into consideration the wide discretion granted to school boards.¹²³

Discretion in one area, however, does not imply discretion in every area. Courts should analyze the nature of the discretion carefully to determine whether it applies in new settings. Thus, in *Pico*, despite recognizing the right of school boards “to establish and apply their curriculum in such a way as to transmit community values,”¹²⁴ the plurality held that school libraries were different because, as libraries, they were places for inde-

117. Justice Rehnquist appears to have a different interpretation of *Velazquez*, namely, that the case stands for the proposition that the government may not restrict what is inherently speech pitted against the government. *ALA II*, 123 S. Ct. 2297, 2309 (2003). Such a reading, while not entirely consistent with the language quoted above, does fit into the framework developed here. Justice Rehnquist focuses not on the space, but on the actor, reasoning that it is inconsistent to characterize the government as having the discretion to restrict challenges to itself.

118. *Velazquez*, 531 U.S. at 543.

119. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

120. *Velazquez*, 531 U.S. at 543.

121. *Id.*

122. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 584 (1998).

123. *Bd. of Educ. v. Pico*, 457 U.S. 853, 863 (1982).

124. *Id.* at 864.

pendent intellectual inquiry.¹²⁵ Such a distinction reappears in *Forbes*, where the Court held that a public television station should generally be given broad discretionary control over its programming, but that a candidate debate on such a station should be considered a nonpublic forum.¹²⁶ The Court justified a general rule of discretion by referring to the need for the station to exercise “sound journalistic judgment.”¹²⁷ At the same time, it carved out an exception for candidate debates because such debates implicate political speech and the electoral process in a way that justified heightened First Amendment review.¹²⁸ Thus, the Court used the level of discretion entrusted to public broadcasters to label public broadcasting a non-forum, while using the role of the candidate debate in electoral politics to label it a nonpublic forum.

Resort to an institutional analysis allows courts to avoid potential circularities in their reasoning. Such circularity is particularly prominent when courts use government intent as a factor in their analysis, as the *Kreimer* and *Loudoun* courts did in finding the library a limited public forum.¹²⁹ These courts held that governments established libraries with the intent of promoting open access, and hence restrictions on this access were subject to strict scrutiny.¹³⁰ The problem is that the government can counter that CIPA and similar acts evince an intent to provide open access only to non-pornographic materials. What the courts mean to say here is that government and society jointly have created libraries to be a particular social institution, and the features of this institution, having been created, constrain the government’s future attempts at regulation. *Rosenberger* proves the same point. A university’s argument that it intended to fund only non-religious student publications should be unavailing against a characterization of student publications as providing a broad forum for student speech.¹³¹

Context can also suggest whether a distinction between selection and removal is appropriate. In some contexts, these might really be indistinguishable. For example, in most elections, the number of candidates is small enough that a decision about which candidates to include in a debate is essentially equivalent to a decision about which candidates to exclude.

125. *Id.* at 868.

126. *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 674-75 (1998).

127. *Id.* at 674.

128. *Id.* at 675-76.

129. *See Kreimer v. Bureau of Police*, 958 F.2d 1242, 1259 (3d Cir. 1992); *Loudoun II*, 24 F. Supp. 2d 552, 562-63 (E.D. Va. 1998).

130. *Kreimer*, 958 F.2d at 1259; *Loudoun II*, 24 F. Supp. 2d at 562-63.

131. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995).

In other contexts, however, selection and removal might not amount to the same thing. In particular, in the context of libraries, selection and removal decisions differ in the types of resource constraints faced and in the ability of courts to detect improper motives.¹³² These contextual differences may mean that the discretion to select does not imply the discretion to remove.

Thus, whether a restriction on a government space is a regulation of a limited public forum or an exercise of editorial discretion depends on the features and openness of the space and the discretion of the entity restricting the space. These, in turn, depend on whether restrictions and discretion are consistent with the histories and interactions of the relevant institutions. In applying these principles to CIPA, it is important to distinguish between the two different spaces and two different government entities at issue in the case. To determine whether libraries can constitutionally filter Internet content, we consider the discretion granted to libraries and the nature of library Internet access. To determine whether Congress can constitutionally require library filtering, we consider the discretion granted to Congress vis-à-vis libraries and the nature of federal subsidy programs for library Internet access. Each will be analyzed in turn.

B. The Constitutionality of Library Filtering

The framework developed above suggests that to determine the constitutionality of library filtering, courts should analyze the social role of libraries and of library Internet access. History provides a particularly useful window on the former, and the characteristics of the Internet as a whole inform our determination of the latter. Both the modern evolution of librarians from gatekeepers to information managers and the open and interactive nature of the Internet suggest that public forum doctrines apply, rather than editorial discretion cases, and that there is reason to label filtering decisions as removal decisions.¹³³

132. See *ALA II*, 123 S. Ct. 2297, 2321 (2003) (Souter, J., dissenting); *Loudoun I*, 2 F. Supp. 2d 783, 793 (E.D. Va. 1998).

133. Despite the opinions of Justices Kennedy, Breyer, and Stevens, this case cannot turn on the unblocking provisions and prior restraint doctrine. On the one hand, *Lamont* holds that individuals cannot be required to affirmatively request access to protected speech, and therefore suggests that patrons should not be required to request unblocking of pages they have a right to see. See *ALA I*, 201 F. Supp. 2d 401, 486-89 (E.D. Pa. 2002). On the other hand, almost any exercise of editorial discretion functions as a prior restraint as to those materials not selected, but courts have never viewed this as a problem.

1. *The Role of Libraries*

The plurality in *ALA II* focused on reconciling the result in the case with the deference given to library book selection policies.¹³⁴ The trouble with this approach is that deference is consistent with two different views of the role of the library, and this approach does not provide a principled way to choose between them. On the one hand, society might defer to library collection judgments because it is the role of libraries to guide society's morals; on the other hand, courts might defer to such judgments simply because it is too difficult for them to separate proper from improper motives in the making of such judgments.¹³⁵

The history of libraries suggests that while in the nineteenth and early twentieth centuries librarians may have been expected to provide moral guidance to patrons, deference to librarians today is rooted mainly in procedural concerns.¹³⁶ Where librarians were once information gatekeepers, they are now information managers. Modern librarians see their role as helping patrons to find the most appropriate material for their needs.¹³⁷ The modern rise of schools of "information management," to replace schools of "library science," reflects this change.¹³⁸ The writings of librarians themselves also points to a changed role. Noticeably the quotation cited by the plurality that most suggests a moral purpose for libraries dates from 1930.¹³⁹ The American Library Association's current position is that "library materials 'should not be proscribed or removed because of partisan or doctrinal disapproval.'"¹⁴⁰

The plurality's characterization of libraries seems inconsistent with the role the public expects libraries to play, namely that of providing access to information. The plurality characterized libraries as having "broad discretion," and suggested that public libraries have an editorial role analogous

134. See *ALA II*, 123 S. Ct. at 2304.

135. See *id.* at 2321 (Souter, J., dissenting).

136. See Gregory K. Laughlin, *Sex, Lies, and Library Cards: The First Amendment Implications of the Use of Software Filters to Control Access to Internet Pornography in Public Libraries*, 51 *DRAKE L. REV.* 213, 219-34 (2003).

137. *ALA I*, 201 F. Supp. 2d at 420-21.

138. See Katherine S. Mangan, *In Revamped Library Schools, Information Trumps Books*, *CHRON. OF HIGHER EDUC.*, Apr. 7, 2000, at A43; Kate Murphy, *Moving From the Card Catalogue to the Internet*, *N.Y. TIMES*, Jan. 6, 1997, at D5.

139. *ALA II*, 123 S. Ct. at 2304 (quoting F. Drury, *Book Selection* at xi (1930) ("It is the aim of the selector to give the public, not everything it wants, but the best that it will read or use to advantage.")).

140. *ALA I*, 201 F. Supp. 2d at 420 (quoting the American Library Association's ("ALA") Library Bill of Rights, which the ALA adopted in 1948).

to that of public television stations.¹⁴¹ However, while society needs librarians to make certain inevitably content-based judgments, it is not at all clear that libraries have the sort of discretion that television stations have. For example, suppose a public television station refused to broadcast programs on the abortion debate, whatever the viewpoint, claiming that such programs are too controversial. *Forbes* suggests that such a decision would be well within the discretion of the station,¹⁴² and viewers would probably accept both the decision and the explanation. Now suppose a public library refused to acquire books about the abortion debate for the same reason. This decision seems inconsistent with the library's role in providing access to information in a way that the television station's equivalent decision does not conflict with its more selective role.

Of course, the library might fail to acquire books about the abortion debate in the course of filling its shelves with other books. This result could be consistent with the library's role, since in the face of limited resources, the library must choose to provide access to some materials over others. The difference is that in making this type of decision, the library makes a comparative judgment about the relative value of different material, while in refusing to collect books on certain topics, the library makes an absolute value judgment. In focusing on the evaluation of individual materials, rather than on collection decisions as a whole, the plurality made a subtle and unwarranted shift from approving comparative judgments to approving absolute judgments.¹⁴³ Resource constraints make comparative judgments necessary, since in order to fulfill the goal of providing access to information, libraries must develop their collections within the applicable constraints in some systematic way. Absolute judgments are not consistent with this goal, however, since such judgments deny access to some information without also providing access to other information.¹⁴⁴

141. *ALA II*, 123 S. Ct. at 2304.

142. *See* Ark. Educ. Television Comm'n v. *Forbes*, 523 U.S. 666, 682 (1998).

143. *Compare ALA II*, 123 S. Ct. at 2304 (“[L]ibraries collect only those materials deemed to have ‘requisite and appropriate quality.’”) (quoting *ALA I*, 201 F. Supp. 2d at 421), *with ALA I*, 201 F. Supp. 2d at 421 (“[L]ibrarians . . . build, develop and create collections that have certain characteristics, such as balance in its coverage and requisite and appropriate quality.”).

144. Of course, libraries can (and must) make absolute judgments in eliminating obscenity and child pornography, but the categorization of some speech as illegal is itself the absolute judgment upon which the library bases its action. *Cf.* Laughlin, *supra* note 136, at 264-65 (arguing that librarians must make the sometimes hard decision about whether specific material is obscene, child pornography, or harmful to minors).

Thus, the real distinction in the context of libraries is not between selection decisions and removal decisions, but between resource-constrained failures to acquire, which involve comparative judgments, and refusals to acquire and outright removals, which involve absolute judgments.¹⁴⁵ Viewed in this light, it does not matter whether we characterize the blocking of a Web page as a failure to acquire the page or a removal of the page. In either case, the filter makes an absolute judgment about the page's value (or lack thereof). Even if libraries face a resource constraint in allocating time on Internet-accessible computers,¹⁴⁶ this constraint does not justify such absolute judgments. A library's decision about how best to fill its patrons' time on the Internet is different from its decision about how best to fill its book shelves. The latter is in furtherance of its goal of providing information to its patrons, while the former puts the library back in its now disclaimed position as arbiter of society's morals.¹⁴⁷

2. *The Characteristics of the Internet*

The difference in the type of resource constraints faced provides at least one reason why library book collection policies and Internet filtering policies need not be treated alike under the First Amendment. Indeed, the Court has cautioned repeatedly that different media have different characteristics, leading to different results for First Amendment purposes.¹⁴⁸ It is important to consider how the features of the Internet determine the possibilities for the characterization of library Internet access.

In discussions about library filtering, courts often conceive of the Internet as the world's master library, a storehouse of information from which either libraries or patrons can choose.¹⁴⁹ Under this view, Web pub-

145. The argument here is that this distinction separates judgments that are consistent with the library's role from those that are not. Whether the distinction is judicially manageable is a separate issue. Considerations of judicial manageability may support drawing the line between selection and removal in the context of book collections.

146. See *supra* notes 68-69 and accompanying text.

147. See Peltz, *supra* note 18, at 465 ("Librarianship, after all, is about helping people access and sift information and ideas; librarianship, ideally, is not about deciding what information people may access and what they may not.")

148. See *ALA II*, 123 S. Ct. at 2305 n.3 ("We are wary of the notion that a partial analogy in one context, for which we have developed doctrines, can compel a full range of decisions in such a new and changing area.") (quoting *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 749 (1996)). Compare *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (upholding regulation of indecent radio broadcast), with *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989) (striking down regulation of indecent dial-a-porn).

149. See, e.g., *ALA II*, 123 S. Ct. at 2305 ("[The Internet] is 'no more than a technological extension of the book stack.'") (quoting S. REP. NO. 106-141, at 7 (1999)); *Lou-*

lishers, and their First Amendment interests, lie outside the library. This view, however, minimizes one of the greatest assets of the Internet: its interactive nature. In a library's book stacks, the line between speaker and listener is clear, but on the Internet, the line becomes blurred. Publication on the Internet is relatively cheap and easy, so that library patrons now have the ability to add to the "library" themselves by setting up their own Web pages, which can then be accessed by other patrons and everyone else. The recent rise in blogging, the creation of online journals, is expanding the universe of Internet authors even more.¹⁵⁰

More importantly, much of the Internet is designed to integrate the speech of many different participants so that each is simultaneously speaker and listener. Personal Web pages invite visitors to comment in guestbooks, which other visitors can then read. Auction sites invite buyers and sellers to post feedback, which is then read by other potential buyers and sellers. Online forums provide places where communities can gather to discuss issues; in such a setting, it is hard to imagine a line between authors and readers. The existence and proliferation of online forums particularly suggests that even as an information gathering tool, the Internet is different from a book collection. By allowing individuals to ask and answer questions and to post running commentary, online forums invite users to participate more actively in the process of finding information (by asking questions), and to contribute more directly to the store of information (by answering questions or posting comments).

All of this suggests that even if library Internet access is not a "public forum for Web publishers to express themselves,"¹⁵¹ at least when "Web publishers" refers to people outside the library, it may well be a public forum for library patrons to express themselves.¹⁵² When the library filters out personal Web pages or (the aptly named) online forums, it restricts not only its patrons' ability to access information, but also their ability to provide information and to participate in discussions.¹⁵³

doun I, 2 F. Supp. 2d 783, 793-94 (E.D. Va. 1998) ("The Internet therefore more closely resembles plaintiffs' analogy of a collection of encyclopedias from which defendants have laboriously redacted portions deemed unfit for library patrons.").

150. See Pamela LiCalzi O'Connell, *Online Diary: Blog Bog*, N.Y. TIMES, Oct. 23, 2003, at G3 (citing a study predicting 5.86 million active blogs in 2004).

151. *ALA II*, 123 S. Ct. at 2305.

152. See Bell, *supra* note 64, at 207 (suggesting that for the *receipt* of information, libraries are at least limited public forums, and are perhaps even traditional public forums); Peltz, *supra* note 18, at 463 (same).

153. It makes no difference that the library provides only the conduit and not the space on which the speech resides. We would never allow the post office to filter mail under the theory that it is merely a conduit for the speech and that private alternatives

Libraries might assert that the interactive features of the Internet are beyond the scope of what they intend to provide their patrons. Indeed, some libraries restrict or prohibit the use of Internet access for email, chat groups, or online games, and many such restrictions may be constitutional because they are content-neutral.¹⁵⁴ Other libraries might provide access to online databases through an Internet connection, but not provide general Internet access.¹⁵⁵ A library cannot, however, provide general Internet access and then claim that it does not intend for its patrons to speak. It cannot claim that it intends for its patrons to retrieve information from the Internet, but not to post to online forums. Such distinctions are not consistent with the nature and functioning of the Internet;¹⁵⁶ on the Internet, posting to online forums is an integral part of information retrieval.

Thus, regardless of how a library might characterize its intent, library Internet access is, at least in part, a forum for its patrons' speech. Because this speech is integral to the public discourse on the Internet as a whole, this forum constitutes a limited public forum, and restrictions on it should be subject to strict scrutiny.¹⁵⁷ Where government venues intersect with existing media, the characteristics of the media matter, and the government is not free to define its venues in any way it sees fit.

C. The Constitutionality of Congress' Funding Condition

The framework developed in Part III.A can also be used to address the question of whether CIPA might be unconstitutional even if library filtering were constitutional. The focus of the inquiry, however, is different. We are no longer concerned with the role of libraries as regulators of the Internet, but rather with their role as targets of federal regulation. In both cases, courts should consider the institutional role of libraries, but they should be asking different questions, because in the one case, the library is the government entity, and in the other case, the library is a participant in the government space. Clearly delineating between these two views of libraries is crucial to avoiding a strange irony of the plurality opinion. That opinion celebrates the role of libraries in making independent editorial judgments in order to demonstrate the constitutionality of a federal program that constrains those judgments.

exist to accomplish the same result.

154. See Laughlin, *supra* note 136, at 260.

155. See Peltz, *supra* note 18, at 402-03.

156. See *supra* note 115 and accompanying text.

157. Mandatory library filtering for adults cannot pass strict scrutiny, since there are many less restrictive alternatives that serve the government's interests. See *ALA I*, 201 F. Supp. 2d 401, 471-84 (E.D. Pa. 2002); see also Peltz, *supra* note 18, at 466-68 (arguing that even if filtering were the least restrictive means, it would not be narrowly drawn).

To begin to untwist the logic, recall that if library filtering is itself unconstitutional, then CIPA is also unconstitutional. Hence, for the purposes of this section, we will assume that library filtering is constitutional. Although there are multiple ways the Court could have reached this finding,¹⁵⁸ the most likely route, and the one the Court actually used, involves first determining that libraries have a broad discretion that encompasses the decision to filter Internet access. If libraries do have such broad discretion, however, they must also have some form of First Amendment rights, and the Court should have held that CIPA unconstitutionally conditions funding on the surrender of these rights.¹⁵⁹

First, if libraries have sufficient editorial discretion to decide whether or not to filter Internet access, that discretion should be protected under the First Amendment. In *Forbes*, the Court held that “[w]hen a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity.”¹⁶⁰ If a library has similar discretion in its selection decisions, as the plurality found,¹⁶¹ then it should follow that the library’s selection decisions are also a form of speech activity. Likewise, the Court has held that the “editorial control and judgment” that a newspaper exercises in deciding what to print is a form of speech protected by the First Amendment.¹⁶² Any editorial judgment that the library exercises over what to provide its patrons should be similarly protected.

Furthermore, if the library’s decisionmaking can be properly analogized to that of a newspaper, *Rosenberger* should have guided the Court in *ALA II*.¹⁶³ In *Rosenberger*, the Court held that a university fund to subsidize student newspapers was a limited public forum, and that therefore, the university could not refuse to subsidize religious publications.¹⁶⁴ Viewed differently, the Court essentially struck down the university’s re-

158. For example, the Court could have applied strict scrutiny, but then determined that library filtering passes strict scrutiny.

159. See also R. Polk Wagner, *Filters and the First Amendment*, 83 MINN. L. REV. 755, 802-04 (1999) (arguing that libraries’ editorial rights have First Amendment status and that under “current unconstitutional conditions doctrine,” the Court would be unlikely to allow Congress to require filters on library computers purchased with non-federal funds).

160. *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 674 (1998).

161. See *ALA II*, 123 S. Ct. 2297, 2304 (2003).

162. See *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974) (holding that a newspaper could not be compelled to print a political candidate’s reply to an attack previously printed in the newspaper).

163. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

164. *Id.* at 834-37.

quirement that funding recipients not publish religious content. The federal subsidy programs constrained by CIPA, like the university subsidy program at issue in *Rosenberger*, provides funds with which individual libraries can determine what content to make available to their patrons, much as the student newspapers determined what content to make available to their readers.¹⁶⁵ In both cases, the funding programs established limited public forums, and courts should subject to strict scrutiny any restrictions on the content that funding recipients can make available. The government should not be allowed to condition access to a limited public forum on the surrender of editorial discretion.

The plurality asserted that *Rosenberger* was inapplicable because, once again, “public libraries do not install Internet terminals to provide a forum for Web publishers to express themselves.”¹⁶⁶ This claim, besides being suspect for the reasons noted above,¹⁶⁷ confuses the role of libraries as regulators with the role of libraries as targets of regulation. In analyzing the constitutionality of CIPA under the assumption that library filtering is constitutional, the question is not how to characterize a library’s decision to install Internet terminals, but how to characterize Congress’ decision to subsidize Internet access. It is the latter question that sheds light on the relevant issue of whether the federal subsidy programs established a limited public forum.¹⁶⁸ Congress has made it clear that the goal of federal subsidies for library Internet access is to expand public access to the resources available on the Internet, and to help bridge the digital divide.¹⁶⁹ Such programs are thus designed to facilitate private speech and encourage public discourse, key attributes of limited public forums.

The plurality’s argument that CIPA should be viewed as merely bounding the scope of the federal programs¹⁷⁰ is inconsistent with the respective roles of the federal government and of local libraries. To the extent that libraries make editorial judgments, constraints on these judgments are not consistent with the federal government’s social role, and thus should be seen as external to federal subsidy programs, not an integral part

165. *See id.*

166. *ALA II*, 123 S. Ct. at 2309 n.7.

167. *See supra* Part III.B.2.

168. Indeed, by assuming that library filtering is constitutional, we are essentially assuming that library Internet access is not a limited public forum. *See supra* note 157 and accompanying text.

169. *See* 20 U.S.C. § 9121 (2000); *see also ALA I*, 201 F. Supp. 2d 401, 411-12 (E.D. Pa. 2002); Steven D. Hinckley, *Your Money or Your Speech: The Children’s Internet Protection Act and the Congressional Assault on the First Amendment in Public Libraries*, 80 WASH. U. L.Q. 1025, 1025-27 (2002).

170. *See ALA II*, 123 S. Ct. at 2307-08.

of defining the programs' scope.¹⁷¹ Considering a hypothetical statute will help clarify this point. Suppose Congress established a subsidy program to allow libraries to purchase newspapers, but then required all funded libraries to exclude newspapers that print comics.¹⁷² Such a requirement might be perfectly rational, but one imagines that courts would see this as an intrusion upon libraries' discretion to choose newspaper subscriptions. If Congress' decision to condition funding on the content provided through library newspapers should be subject to strict scrutiny, so should its decision to condition funding on the content provided through library Internet access.¹⁷³ In both cases, restrictions should be suspect because Congressional discretion is inconsistent with the role of the federal government in local libraries.

IV. CONCLUSION

In order to determine the constitutionality of regulations on government spaces, courts must draw lines between spaces for public discourse and spaces for government speech, and between constraints on government and constraints on private speakers. This line drawing involves inevitably normative judgments, but an analysis of institutions can expose these judgments for further debate and should constrain them. The social roles of relevant spaces and relevant government entities limits the plausible characterizations that a court might give to the speech and the regulation at issue. An understanding of the roles of libraries, of Internet access, and of the federal government suggests that library filtering is unconstitutional and that such filtering cannot be a constitutional condition of federal funding, contrary to the result in *ALA II*.

The need for institutional analysis is particularly keen in the context of regulation of the Internet. Appeals to precedent invite courts to minimize the differences between new media and old. The Internet becomes nothing more than a very large library, or perhaps a very comprehensive encyclo-

171. See Bell, *supra* note 64, at 231 (suggesting that courts should prefer to insulate library professionals from political pressure).

172. That is, if a library took any funds, it could not subscribe to any such newspapers, using these or other funds.

173. One might argue that the restriction on Internet access is for a more compelling reason than the restriction on newspapers, but this is relevant only to the application of strict scrutiny, not the decision to apply strict scrutiny in the first place. Whether the federal funding condition can pass strict scrutiny essentially depends on whether library filtering would pass strict scrutiny, since any means less restrictive than filtering would also provide a less restrictive funding condition. See *supra* note 157.

pedia.¹⁷⁴ Courts must be careful to notice the differences, to discuss them, and to consider the ways in which they matter. If courts fail to engage in this analysis, at best, they may make rulings that are inconsistent with the social roles of relevant institutions, and at worst, they risk undermining these roles in hidden ways. As Professor Lawrence Lessig points out, the Internet has no inherent nature, it is what we make of it.¹⁷⁵ The plurality in *ALA II* crafts its holding under the assumption that the Internet is a one-way conduit of information subject to centralized control. If courts continue to uphold Internet regulation under the same assumption, this assumption may become reality. While the merits of such a shift are certainly open to debate, at the very least, courts and society should engage the debate in an open and transparent manner. After all, that is what the First Amendment is about.

174. See *supra* note 149.

175. See LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 5-6 (1999).

