

Filth, Filtering, and the First Amendment: Ruminations on Public Libraries' Use of Internet Filtering Software

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I. INTRODUCTION

When First Amendment lawyers wax eloquent about freedom of

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speech, they almost invariably turn to *New York Times v. Sullivan*,¹ a decision that unquestionably qualifies as a First Amendment icon. *Sullivan* involved a defamation claim against the *New York Times* and several civil rights leaders for an advertisement printed in the *Times* that condemned the conduct of the Montgomery, Alabama police force.² When free speech devotees mention *Sullivan*, they almost invariably quote the following passage from Justice Brennan's opinion for the Court:

[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.³

The *Sullivan* case dealt primarily with a mass media entity, the *New York Times*,⁴ and media organizations have been the most zealous guardians of *Sullivan* and its progeny—virtually every major United States Supreme Court defamation case has involved a media defendant. Discussions in the mass media, such as newspapers, television, radio, and magazines, may reflect a somewhat diverse array of perspectives, but most of these channels of communication are controlled by sizeable organizations.⁵ Size often leads to expression of conventional viewpoints, not the “uninhibited, robust, and wide-open” debate celebrated in *Sullivan*.⁶

1. 376 U.S. 254 (1964).

2. *Id.* at 256-59.

3. *Id.* at 270. Perhaps a precursor to this statement was the earlier observation that “it has long been a basic tenet of national communications policy that ‘the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.’” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 633 (1994) (quoting *U.S. v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972) (quoting *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945))). See Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 *FED. COMM. L.J.* 561, 563, 565 (2000) (highlighting the Supreme Court's statement in *Associated Press*).

4. There were non-media defendants involved in *Sullivan*, though they were only defendants because they had placed an advertisement in the *New York Times*. Of course, the case had implications for non-media entities and individuals even when they did not utilize the mass media. See Bernard W. Bell, *Byron R. White, Kennedy Justice*, 51 *STAN. L. REV.* 1373, 1405 (1999).

5. PATRICIA AUFDERHEIDE, *COMMUNICATIONS POLICY AND THE PUBLIC INTEREST* 88-94 (1999); Benkler, *supra* note 3, at 564-65; David Waterman, *CBS-Viacom and the Effects of Media Mergers: An Economic Perspective*, 52 *FED. COMM. L.J.* 531, 540-42 (2000); Paul Wellstone, *Growing Media Consolidation Must Be Examined to Preserve Our Democracy*, 52 *FED. COMM. L.J.* 551, 552 (2000) (“Today fewer than ten multinational media conglomerates—Time/Warner, Disney, Rupert Murdoch's NewsCorp, Viacom, Sony, Seagram, AT&T/Liberty Media, Bertelsmann, and GE—dominate most of the American mass media landscape.”).

6. See AUFDERHEIDE, *supra* note 5, at 94; BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* 37, 39, 41-43, 46-47, 103, 226 (1983); Benkler, *supra* note 3, at 564-65, 576. At least one scholar has theorized that a more concentrated broadcast market might provide greater programming diversity than would a more disaggregated industry. Peter O. Steiner,

The Internet has, in many ways, moved society closer to the ideal Justice Brennan set forth so eloquently in *Sullivan*. It has not only made debate on public issues more “uninhibited, robust, and wide-open,” but has similarly invigorated discussion of non-public issues. By the same token, the Internet has empowered smaller entities and even individuals, enabling them to widely disseminate their messages and, indeed, reach audiences as broad as those of established media organizations.⁷

For example, in April 2000, a wildly inaccurate summary of New York Mets Manager Bobby Valentine’s comments to a group of students at the Wharton School was posted on the Internet by one of the students. The student, who adopted “Brad34” as his Internet name, had no journalistic training nor work experience for any news organization that would attempt to ensure the accuracy of his material. Brad34’s concededly “inventive” summary of Valentine’s remarks caused such controversy that the Mets General Manager flew to Pittsburgh to confront Valentine regarding his alleged statements. Sportswriter George Vecsey succinctly described the incident’s denouement—“After four days, the Mets sorted out this foray into the wonderful world of the Web, where anybody with a mouse can be Matt Drudge.”⁸

A second example involved renowned fashion designer Tommy Hilfiger. Internet postings “reported” two appearances of the designer. During the first, an interview on CNN’s *Style With Elsa Klensch*, Hilfiger allegedly asserted that Asians did not look good in his clothes. During the second interview, which reportedly took place on an episode of *Oprah*,

Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting, 66 Q.J. ECON. 194 (1952); THOMAS G. KRATTENMAKER, TELECOMMUNICATIONS LAW AND POLICY 88-91 (2d ed. 1998).

7. *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (stating that “[t]hrough the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.”); Stephen C. Jacques, Comment, *Reno v. ACLU: Insulating the Internet, the First Amendment, and the Marketplace of Ideas*, 46 AM. U. L. REV. 1945, 1989 (1997) (internal citations omitted) (observing that “[t]he Internet, however, breaks down these barriers, offering an egalitarian form of communication where the cost is little or nothing and an opinion is instantaneously distributed worldwide. In many ways, the Internet embodies the essences of democracy: equal participation.”); Amy Harmon, *Ideas & Trends: Anarchic E-Commerce: Online Davids vs. Corporate Goliaths*, N.Y. TIMES, Aug. 6, 2000, § 4, at 1 (discussing individuals’ ability to “upset the status quo” with copyrights); *but see* *Los Angeles Times v. Free Republic*, No. CV 98-7840, 2000 U.S. Dist. LEXIS 5669, at *1 (C.D. Cal. Sept. 28, 1998) (granting summary judgment for plaintiffs, stating that defendant’s fair use defense would not apply to its copying of news articles onto its Web site).

8. George Vecsey, *Sports of The Times: Can a Fish Bring Peace to Metland?*, N.Y. TIMES, Apr. 19, 2000, at D1; *see also* Tyler Kepner, *Valentine’s Comments Prompt a Visit From Phillips*, N.Y. TIMES, Apr. 15, 2000, at D1.

Hilfiger allegedly made a similar comment regarding African Americans. Though the reports were widely disseminated and ultimately prompted a public denial by Hilfiger, it turned out that not only had Hilfiger not made the comments, but he had never appeared on either show.⁹

The very “uninhibited, robust, and wide-open” nature of the Internet illustrated by the previous episodes, as well as others,¹⁰ has provoked varied attempts to control speech on the Internet. Among such efforts is the promotion of filtering software,¹¹ for use not just by private individuals, but by public libraries as well.¹² The demand for filters mostly stems from

9. *Designer Hilfiger Disputes Net Rumors of Racism*, USA TODAY, Feb. 28, 1999, available at <http://www.usatoday.com/life/cyber/tech/cta109.htm>. Similarly, the theory that TWA 800 was destroyed by a missile fired from a military aircraft remained popular on the Internet, long after the traditional press had concluded that it had little credence. *Theory That Missile Brought Down TWA Flight 800* (ABC television broadcast, June 1, 2000) (reporting that for four years investigators have been pressured by persistent individuals who “use the Internet to promote their theory and to keep the issue visible”). See also Randal C. Archibald, *2000 Campaign: The Myth; Both Oppose E-Mail Tax Bill (Good, Because it Doesn't Exist)*, N.Y. TIMES, Oct. 9, 2000, at B5.

10. See *Planned Parenthood v. Am. Coalition of Life Activists*, 23 F. Supp. 2d 1182 (D. Or. 1998). See also Leslie Wayne, *Regulators Confront Web Role in Politics*, N.Y. TIMES, Apr. 21, 2000, at A16 (In “parsing the differences between Web campaigning and bricks-and-mortar electioneering,” the Federal Election Commission “is wading into the complex new world of the Internet, where the political reach is broad and costs are low.”); Lyrrisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 863-64 (2000) (“Although Internet communications may have the ephemeral qualities of gossip with regard to accuracy, they are communicated through a medium more pervasive than print.”).

11. There are a number of different types of filtering software. Some block out sites that contain certain words, some block out sites identified by reviewers who examine each site, and others allow access only to sites that reviewers have examined and found to be acceptable. For a more detailed description of the different types of filtering software, see 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, 1120 (2000).

12. There have been pressures placed on public libraries to install filtering software on terminals that provide access to the Internet. *Mainstream Loudoun v. Bd. of Trs. of the Loudoun Cty. Library*, 2 F. Supp. 2d 783 (E.D. Va. 1998) [*“Loudoun I”*]; see also Elisabeth Werby, *The Cyber-Library: Legal and Policy Issues Facing Public Libraries in the High-Tech Era*, in *FILTERS & FREEDOM: FREE SPEECH PERSPECTIVES ON INTERNET CONTENT CONTROLS* 143, 147-48 (Electronic Privacy Information Center ed., 1999) (discussing the efforts to censor the Internet in public libraries) [hereinafter *FILTERS & FREEDOM*]. Many libraries offer Internet access. Rolando José Santiago, *Internet Access in Public Libraries: A First Amendment Perspective*, 32 URB. LAW. 259, 260 (2000). Many libraries also employ filtering software. Congress has enacted federal legislation requiring use of filtering software by schools and libraries that receive federal funding. Children’s Internet Protection Act (“CHIP Act”) in the Consolidated Appropriations Act, 2001, Pub. L. No. 106-554 (2000). As of November 2000, at least five states had filtering legislation on the books, and another nineteen were considering similar initiatives. ABC News, *Coping With Filtering Law* (Nov. 6, 2000), at <http://www.abcnews.go.com/sections/tech/DailyNews/netmonitoring001106.html>.

concerns about sexually explicit material,¹³ even though filters have been developed for other uses, such as blocking sites containing racially and ethnically derogatory speech.¹⁴ The controversy swirling around the use of filtering software by public libraries raises issues that, as this Article will argue, have yet to be resolved satisfactorily.

In particular, this Article will argue that conventional approaches to analyzing the constitutional issues raised by public libraries' increasing use of Internet filtering software are flawed, because they focus on the interests of speakers rather than the interests of their audiences, and that the interests of recipients of information are paramount in the public library setting. This Article suggests that libraries are the preeminent audience forum, and that librarians should have limited power in precluding Internet access to materials that satisfy their patrons' intellectual interests. This Article contends, however, that libraries can place lesser value on materials that are not primarily focused on intellectual enlightenment, such as sexually explicit material directed toward the audience's prurient interests. Finally, this Article asserts that the courts should consider procedural protection of First Amendment freedoms in the public library context.

The pressures have not just been restricted to government computers owned by public libraries. There has been pressure on state universities to use filtering software to restrict access to all who use university computers, including faculty members and researchers. *Loving v. Boren*, 956 F. Supp. 953 (W.D. Okla. 1997). There have also been restrictions on the use of state-owned computers by state employees in general. *Urofsky v. Gilmore*, 167 F.3d 191 (4th Cir. 1999). Finally, there have also been pressures to place filters on elementary and secondary school terminals. Anemonia Hartocollis, *Board Blocks Student Access to Web Sites*, N.Y. TIMES, Nov. 10, 1999, at B1.

13. In 1998, the House of Representatives estimated that there were 28,000 such sites. Sarah E. Warren, *Filtering Sexual Material on the Internet: Public Libraries Surf the Legal Morass*, 73 FLA. B.J. 52 (Oct. 1999) (citation omitted).

Within sexually oriented speech, one must distinguish between obscene speech, which governments can constitutionally ban, and merely indecent speech, which government cannot. Speech is obscene, and thus may be prohibited if:

- (a) . . . 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) . . . the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) . . . the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24 (1973) (internal citations omitted).

14. See *What is HateFilter?*, at <http://www.adl.org/hate-patrol/info/> (last visited Feb. 7, 2001) (describing the Anti-Defamation League's ("ADL") HateFilter software); Christopher Wolf, *Racists, Bigots and the Law on the Internet*, at http://www.adl.org/internet/internet_law1.html (last visited Feb. 1, 2001). The ADL has developed HateFilter, which is designed for parents to use on home computers to filter out some of the most offensive hate sites. The software is primarily intended for use as an educational tool; it blocks access to sites and redirects the user to information about hate groups at the ADL homepage.

II. THE CONSTITUTIONAL CONTEXT

A. Government's Dual Role as Regulator and Proprietor¹⁵

Under the conception of government held by the Framers of the Constitution and the Bill of Rights, government primarily acted as regulator, limiting citizens' conduct for the public good.¹⁶ The founding generation assumed that citizens could live their lives largely without government assistance.¹⁷ Citizens primarily expected government to prevent others from interfering with their pursuit of happiness.¹⁸ The men who crafted the Constitution most feared government when it acted as regulator of private citizens' conduct.¹⁹

Since the framing of the Constitution and the Bill of Rights, the federal and state governments have grown into Goliaths that the founding generation could scarcely have envisioned.²⁰ As federal, state, and local

15. OWEN M. FISS, *THE IRONY OF FREE SPEECH* 27 (1996) (distinguishing the state as a regulator, which issues and enforces "commands and prohibitions," from the state as an allocator of government resources, a role which is "of growing importance in the twentieth century").

16. FEDERALIST No. 51, 322 (James Madison) (Clinton Rossiter ed., 1961) ("In framing a government which is to be administered by men over men, the great difficulty lies in this: *you must first enable the government to control the governed; and in the next place oblige it to control itself.*" (emphasis added)).

17. In his description of the early United States, Alexis de Tocqueville noted that voluntary private associations produced public projects that in other countries had to be undertaken by government. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 513-17 (J.P. Mayer ed. & George Lawrence trans., Anchor Books 1969) (original English translation Harper & Row 1966).

18. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* 21-22 (1969); Steven J. Heyman, *State-Supported Speech*, WIS. L. REV. 1119, 1148-49 (1999) ("Classical liberalism assumed, however, that so long as the rights of individuals were secure, they generally were capable of pursuing the good on their own. It was for this reason that the role of the state was largely limited to protecting private rights.").

19. *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 812 F.2d 298, 301 (7th Cir. 1987), *aff'd*, 489 U.S. 189 (1989); Heyman, *supra* note 18, at 1148-49; see JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 290 (1996). At least this is the conventional view of the Supreme Court. See *Daniels v. Williams*, 474 U.S. 327, 331-33 (1986); *DeShaney*, 489 U.S. at 195-96.

20. Heyman, *supra* note 18, at 1142-43. In the period since the Civil War, the functions of government have expanded far beyond those performed by the classical state. CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 18-24 (1990). In addition to undertaking extensive social and economic regulation, the modern state provides a wide range of benefits, including public education, welfare payments, job training, retirement benefits, medical care for the indigent and elderly, subsidies for business and agriculture, support for the arts, sciences, and humanities, and many others. *Id.* at 18-24 (citing President Franklin D. Roosevelt, Message to Congress on the State of the Union (Jan. 14, 1944), in 13 *PUBLIC PAPERS OF FRANKLIN D. ROOSEVELT* 41 (1969)); Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733, 734-39 (1964).

governments have expanded, so have the resources—money, property, and employees—at their command. In 1789, government expenditures were miniscule.²¹ Today, government expenditures comprise twenty-nine percent of the gross domestic product.²² Government allocation of resources and use of property have a much greater impact on the lives of private citizens today than in our nation’s formative years.²³

Justice Oliver Wendell Holmes illustrated the early judicial reaction to government wielding its resources in ways that affected citizens’ constitutional rights in a quip found in his short majority opinion for the Massachusetts Supreme Judicial Court in *McAuliffe v. Mayor of New Bedford*.²⁴ McAuliffe, a police officer, had been discharged for engaging in political activities during his off-duty hours. He claimed that by discharging him, the city had infringed upon his right to free speech. Holmes’s reply was succinct and memorable: “A person may have a right to talk politics, but not to be a police officer.”²⁵ In other words, the First Amendment placed limits on government control over conduct of private citizens who use their own private resources, but it permitted the government to decide who it will employ and how it will use public money and property. Indeed, as Holmes further observed: “There are a few employments for hire in which the servant does not agree to suspend the constitutional right of free speech as well as [the constitutional right] of idleness by the implied terms of his contract.”²⁶

The obvious problem with Holmes’s approach quickly manifested itself after government expanded in the first half of the twentieth century. Once government largesse becomes important to citizens, the government can subvert constitutional rights by conditioning distribution of that largesse on citizens relinquishing those rights. For example, if a government adopts a policy of making unannounced visits to the homes of

21. For example, the federal government’s expenditures from 1789-1791 were approximately \$4.27 million. 2 BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, *HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970* 1104 (1976).

22. A CITIZEN’S GUIDE TO THE FEDERAL BUDGET: BUDGET OF THE UNITED STATES GOVERNMENT FISCAL YEAR 2000 2, at <http://w3.access.gpo.gov/usbudget/fy2000/pdf/guide.pdf> (last visited Feb. 1, 2001).

23. Reich, *supra* note 20, at 734-39. Reich combined some regulatory and proprietary functions. He discussed licensing as well as government grants and employment. Licensing is regulatory (at least in most instances—the licensing of drivers perhaps constituting an exception), because the government is limiting private citizens’ ability to exercise dominion over their own resources.

24. 29 N.E. 517 (Mass. 1892).

25. *Id.* at 517.

26. *Id.* at 517-18; see CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 294-97 (1993) [hereinafter *THE PARTIAL CONSTITUTION*].

public assistance recipients to verify their continued eligibility for the program, those recipients' Fourth Amendment rights become meaningless.²⁷ Aid recipients can protect their rights to prevent government officials from entering their homes without a warrant or probable cause only at the expense of refusing desperately needed aid. As more and more people become dependent on various forms of government aid—through grants-in-aid, government programs, government employment, and the like—the pressure placed upon the exercise of rights increases.²⁸

The Supreme Court has not crafted a coherent approach for resolving the issues that arise when government penalizes the exercise of constitutional rights by the manner in which it distributes its resources.²⁹ The government should have the power to use its resources in ways that support its objectives. If courts constrained the government's use of public resources to the same extent that they limit governmental regulatory authority, government could not operate. At times, the Court allows government to take actions in its proprietary capacity that it would forbid the government from taking in its regulatory capacity.³⁰ For example, the government can refuse to provide Medicaid funding for indigent women who use it to pay for abortions, because the government operates in its proprietary capacity in determining the way public funds can be used, and can reserve its medical assistance funding for the potential recipients it

27. *Wyman v. James*, 400 U.S. 309, 317-18 (1971); *see S.L. v. Whitburn*, 67 F.3d 1299 (7th Cir. 1995). *See Reich, supra* note 20, at 761-62. As the Court explained in *Wyman*:

We note, too, that the visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be. There is no entry of the home and there is no search.

400 U.S. at 317.

28. *Reich, supra* note 20, at 760-64.

29. *Heyman, supra* note 18, at 1119 ("No coherent pattern or doctrine emerges from . . . decisions [involving state-supported speech]."). After struggling with the issue for nearly two decades, the Court appears no closer to resolving it. As Justice Blackmun once remarked, state-supported speech appears to present an "intractable problem." *Id.* at 1120 (quoting *Rust v. Sullivan*, 500 U.S. 173, 205 (1989) (Blackmun J., dissenting)). For a general discussion of this problem, see Michael Wells & Walter Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1124-25 (1980).

30. *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (noting that "government as employer indeed has far broader powers than does the government as sovereign"); *U.S. v. Kokinda*, 497 U.S. 720, 732 (1990); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *O'Connor v. Ortega*, 480 U.S. 709 (1987) (criminal procedure case involving government employees); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984); *see also Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (holding that while a state may not prefer its own citizens in regulating commerce, it may do so when acting as a participant in the market, buying and selling goods and services itself).

deems most worthy.³¹ Government, however, may not prohibit women from using their own resources to obtain abortions in the first trimester of pregnancy, because in doing so it acts as a regulator, and thus infringes upon women's privacy rights as established in *Roe v. Wade*.³²

Conversely, on some occasions, the Court invokes the "unconstitutional conditions" doctrine, and refuses to accord government greater power when it is acting in its proprietary capacity.³³ The Court asserts that government cannot condition provision of a benefit on recipients' agreements to refrain from exercising their constitutional rights. For example, a state may terminate an untenured college professor, but it may not do so because of a disagreement with her political statements.³⁴ At other times, to put it simply, the Court is confused and fractured. The question of public libraries' use of filters falls squarely in the middle of this jurisprudential quagmire, in which the courts struggle with the question of the Bill of Rights's application to governments' proprietary activities.

It is clear, especially after the Supreme Court's invalidation of the Communications Decency Act of 1996³⁵ in *Reno v. ACLU*,³⁶ that the government can rarely prohibit private parties from posting material on the Internet or prevent private individuals from accessing the Internet using their own computers.³⁷ The First Amendment's commitment to "uninhibited, robust, and wide-open" debate prohibits the government from restricting communications between private parties on the Internet.

Public libraries, however, do not regulate private individuals' use of their own resources, as Congress had attempted to do in the Communications Decency Act. Rather, public libraries control government resources, such as books purchased with government money and, more

31. *Harris v. McRae*, 448 U.S. 297 (1980); *Williams v. Zbaraz*, 448 U.S. 358 (1980); *Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977).

32. 410 U.S. 113, 164-65 (1973); *see also* *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

33. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 680-82, 686, 871-84, 969-70 n.1018 (2d ed. 1988); Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 *HARV. L. REV.* 84, 102-04 (1998); Kathleen Sullivan, *Unconstitutional Conditions*, 102 *HARV. L. REV.* 1413 (1989). *See also* THE PARTIAL CONSTITUTION, *supra* note 26, at 291-301.

34. *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) ("For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons . . . [the Government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."); *Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977).

35. Pub. L. No. 104-104, 110 Stat. 133.

36. 521 U.S. 844 (1997).

37. *Id.* at 884.

importantly, government-owned computer terminals that allow users to access the Internet. A private individual could exert dominion over his own computer terminal by placing a filter on that terminal. Indeed, in *Reno v. ACLU*, the Court suggested just such a course of action to parents concerned about sexually explicit material on the Internet.³⁸ The constitutional argument against the use of filters in public libraries may appear weak; government is entitled, like any other property owner, to control use of its own property. As Justice Holmes might say, a person may have a right to see dirty photos, but he has no right to access them from a government computer.

B. Forum Analysis

To address the use of government property by citizens exercising their free speech rights, the Supreme Court has developed distinctions among types of government property, categorizing them as either traditional public, limited public, or non-public fora.³⁹ Traditional public fora are government properties that have been dedicated to speech “by long tradition or by government fiat.”⁴⁰ Streets and parks provide the prime examples of such public fora.⁴¹ Thus, though the government owns streets and parks, and can therefore legitimately claim that it acts in a proprietary capacity when restricting access to such public property, the courts have held that government must allow the full range of speech protected by the First Amendment in those arenas.⁴² The Court seems to rely heavily on the history of a site’s openness to the public in determining whether that site qualifies as a public forum.⁴³

The Court essentially requires the government to relinquish its

38. *Id.* at 855.

39. *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677 (1998); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983); CASS SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 101 [hereinafter *DEMOCRACY AND THE PROBLEM OF FREE SPEECH*]; *TRIBE*, *supra* note 33, at § 12-14, 986-87.

40. *Perry Educ. Ass’n*, 460 U.S. at 45; *see also Forbes*, 523 U.S. at 677; *DEMOCRACY AND THE PROBLEM OF FREE SPEECH*, *supra* note 39, at 101; *TRIBE*, *supra* note 33, at § 12-14, 986-87.

41. *Perry Educ. Ass’n*, 460 U.S. at 45; *see also Lehman v. Shaker Heights*, 418 U.S. 298, 303 (1974); *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939) (Roberts, J., concurring).

42. *Forbes*, 523 U.S. at 677.

43. *See Lee v. Int’l Soc’y for Krishna Consciousness, Inc.*, 505 U.S. 830 (1992).

Such focus on historical analysis is not unique to public forum jurisprudence. In determining whether judicial proceedings should be open to the public, one of the two major factors is the history of openness regarding such proceedings. *See Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 10-11 (1986); Bernard W. Bell, *Secrets and Lies: News Media and Law Enforcement Use of Deception as an Investigative Tool*, 60 U. PITT. L. REV. 745, 766 nn.92-94 (1999).

prerogatives as proprietor, derived from its ownership of property, and limits it to regulating speech as if the speaker using the government-owned property were not using government resources at all.⁴⁴ It is hardly surprising, then, that few government properties exclusively devoted to communications qualify as traditional public fora. Often, traditional public fora are uniquely suited to provide a means of communication to the general public. These public fora are in some sense monopolies—most speakers have few alternative means to reach a large audience. Few effective, low-cost alternatives to public demonstrations or public leafleting in streets and parks are available to those who seek to reach a mass audience.⁴⁵ The need for effective, low-cost communication explains some states' expansion of public forum doctrine to privately owned property. Thus, for instance, some courts, such as the New Jersey Supreme Court, have accepted the argument that their states' constitutions require private shopping centers to allow leafleting in their facilities.⁴⁶ One major rationale underlying such decisions can be captured by paraphrasing the popular, but apocryphal quip commonly attributed to bank robber Willie Sutton. When asked why he robbed banks, Sutton allegedly responded, because "that's where the money is."⁴⁷ Shopping centers must allow communication

44. To use a telecommunications analogy, in such situations the government becomes a "common carrier" that controls the conditions for access to the medium, but not the content communicated in the medium, much like telephone companies, who own the means of telephony but are barred from editing content communicated by telephone. The content of the phone communications, like the content of communication that occurs in a public forum, is determined by the non-owners who use the phone lines or the forum.

45. *Martin v. Struthers*, 319 U.S. 141, 146 (1943); *TRIBE*, *supra* note 33, at 987 ("The 'public forum' doctrine holds that restrictions on speech should be subject to higher scrutiny when . . . that speech occurs in areas playing a vital role in communication . . . especially because of how indispensable communication in this places is to people who lack access to more elaborate (and more costly) channels."); see Lee Rudy, Note, *A Procedural Approach to Limited Public Forum Cases*, 22 *FORDHAM URB. L.J.* 1255, 1286 (1995). Courts often mention in their analysis that alternative means of expression exist. *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1262, 1264 (1992); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984); Randall P. Bezanson, *The Government Free Speech Forum: Forbes and Finley and Government Speech Selection Judgments*, 83 *IOWA L. REV.* 953, 983 (1998).

46. *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757, 777-80 (1994); *Lloyd Corp v. Tanner*, 407 U.S. 551, 580-81 (1972) (Marshall, J., dissenting), *quoted in New Jersey Coalition*, 650 A.2d at 778 ("The only hope that these people have to be able to communicate effectively is to be permitted to speak in those areas in which most of their fellow citizens can be found. One such area is the business district of a city or town or its functional equivalent. And this is why respondents have a tremendous need to express themselves within Lloyds Center.").

47. *Willie Sutton, Famous Cases*, at <http://www.fbi.gov/yourfbi/history/famcases/sutton/sutton.htm> (last visited Feb. 2, 2001); Steven Cocheo, *The Bank Robber, the Quote, and the Final Irony*, available at http://www.banking.com/aba/profile_0397.htm (last visited Feb. 1, 2001).

because that's where the people are.⁴⁸ In *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*,⁴⁹ the New Jersey Supreme Court held that "where private ownership of property that is the functional counterpart of the downtown business district has effectively monopolized significant opportunities for free speech, the owners cannot eradicate those opportunities by prohibiting it."⁵⁰

Limited public fora (sometimes referred to as "designated public fora") are government-owned properties reserved for a limited set of communicative purposes.⁵¹ Thus, unlike traditional public fora, the government may, in its discretion, close the forum. Government agency inter-office mail and public museums are examples of such fora.⁵² Designated public fora may be limited to discussion of particular subjects or use by designated groups. While the courts will scrutinize content-based limitations, "[t]he necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for . . . the discussion of certain topics."⁵³

For instance, in *Rosenberger v. Rector & Visitors of the University of Virginia*, the Supreme Court suggested that a university could fund student publications but exclude from the subsidy program any publication that addressed the subject of religion.⁵⁴ Though the government may define the

48. Of course, the existence of a monopoly does not characterize designated public fora.

49. 650 A.2d 757 (1994).

50. *Id.* at 777. The Court also quoted approvingly Justice Marshall's statement that: [T]he owner of the modern shopping center complex, by dedicating his property to public use as a business district, to some extent displaces the "State" from control of historical First Amendment forums, and may acquire a virtual monopoly of places suitable for effective communication. The roadways, parking lots, and walkways of the modern shopping center may be as essential for effective speech as the streets and sidewalks in the municipal or company-owned town.

Id. (quoting *Hudgens v. NLRB*, 424 U.S. 507, 539-40 (Marshall, J., dissenting)).

51. *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

52. *Perry Educ. Ass'n*, 460 U.S. at 46.

53. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995); *see also Cornelius v. NAACP Legal Def. and Educ. Fund*, 473 U.S. 788, 818 (1985) (citation omitted) ("Restrictions based on the subject matter of the speech, for example, will almost never be justified in a public forum such as a park, but will more often be justified as necessary to reserve the limited public forum to expressive activity compatible with the property."); *Perry Educ. Ass'n*, 460 U.S. at 46 n.7; *City of Madison Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm'n*, 429 U.S. 167, 174-76 (1976); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974); *Travis v. Owego*, 927 F.2d 688, 692 (2d Cir. 1991); *Calash v. City of Bridgeport*, 788 F.2d 80, 82 (2d Cir. 1986).

54. *Rosenberger*, 515 U.S. at 831. The Court did not suggest how one might administer such an exclusion. It determined that the University of Virginia had acted impermissibly because it had engaged in viewpoint discrimination against religiously based views on

subject matter to be discussed in the forum, courts will scrutinize the government's substantive description of the forum's scope. The court will review exclusions from the forum to ensure that the government applies its definition to the forum consistently.⁵⁵ It is not clear, however, whether a limited public forum may exclude a category of speech, such as commercial speech, merely because the category of speech enjoys diminished constitutional protection.⁵⁶

Non-public fora are government properties dedicated to non-communicative uses, such as prisons and military bases, where government can exclude all rallies, marches, leafleting, and the like.⁵⁷ Government must be free to reserve the property for the non-communicative uses that the property has been designated to serve. This is true even though the setting may provide uniquely effective means for reaching some segment of the public.⁵⁸

Recently, even government fora dedicated to some communicative activities have been classified as non-public fora where the government has not affirmatively opened up the fora to general participation. For example, in *Cornelius v. NAACP Legal Defense and Education Fund*,⁵⁹ the Court found that the Combined Federal Campaign, a program that allows federal employees to make charitable contributions to select, listed organizations, constituted a non-public forum. The Court explained that even though the

secular matters. *Id.* at 835-36.

55. "Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum.'" *Id.* at 829 (quoting *Cornelius*, 473 U.S. at 804-06).

56. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). There, the City of Cincinnati allowed newsracks, but limited the content of such newsracks to newspapers, prohibiting commercial handbills. The city had concluded that newsracks created aesthetic problems and that it would at least ameliorate the problem somewhat by prohibiting newsracks containing speech entitled to diminished constitutional protection. The Court rejected that approach. The Court did not focus on public forum analysis, so it did not clearly indicate whether it viewed potential newsrack locations on public sidewalks as traditional public fora or limited public fora. Of course, one implication of the Court's apparent view that it did not need to address this question is that the city's approach would have been inappropriate regardless of whether the sidewalks were a traditional or limited public forum. *See also* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384-90 (1992) (requirement of content-neutrality applies, in somewhat modified form, even to laws that prohibit some, but not all, constitutionally unprotected speech).

57. *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998); *Perry Educ. Ass'n*, 460 U.S. at 47; DEMOCRACY AND THE PROBLEM OF FREE SPEECH, *supra* note 39, at 101-02.

58. *Greer v. Spock*, 424 U.S. 828, 836 (1976). The Court has noted, however, that a non-public forum will rarely provide the only means of reaching a particular audience. *Cornelius*, 473 U.S. at 809.

59. 473 U.S. 788.

federal government facilitated communication by some private groups, it did so by specific invitation rather than a general invitation to all interested parties.⁶⁰

In none of the three types of fora—public, limited, and non-public—can government engage in viewpoint discrimination.⁶¹ That is, the government cannot limit speech on the basis of the viewpoint expressed. For example, the government cannot allow Republicans to speak, but not Democrats, or allow expression of pro-choice views on abortion, but not pro-life views.

This tripartite forum analysis has been subjected to cogent scholarly criticisms;⁶² nevertheless, the Supreme Court has not abandoned it. Accordingly, courts and commentators have used the Court's tripartite analysis to review public libraries' powers to prevent their patrons from accessing certain Internet sites. The major case addressing the issue of a public library's use of filtering software, *Mainstream Loudoun v. Board of Trustees*,⁶³ relied upon just such an approach. *Loudoun* arose out of the Loudoun Public Library's Board of Directors's order that the library staff install filters on all of the library's computers so as to preclude patrons from accessing sexually explicit Web sites. The District Judge categorized public libraries as limited public fora, citing the Third Circuit opinion, *Kreimer v. Bureau of Police*,⁶⁴ involving a patron's right to enter a public library despite his habitually offensive body odor.⁶⁵ The *Loudoun* court, asserting that government could not make content distinctions in designated public fora, prohibited the library from using filtering software. The *Loudoun* court did not, however, address the government's ability to limit the subject matter of a designated public forum.

Public forum doctrine might ultimately prove useful in analyzing public libraries' powers to employ filtering software on their computers, but the doctrine cannot be applied to public libraries in the conventional way. Conventional forum analysis focuses on the interests of the speakers.⁶⁶

60. *Id.* at 804-05.

61. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993); *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835-36 (1995); *Cornelius*, 473 U.S. at 811; DEMOCRACY AND THE PROBLEM OF FREE SPEECH, *supra* note 39, at 102.

62. *E.g.*, Schauer, *supra* note 33, at 98-100. An analysis of those criticisms is beyond the scope of this Article.

63. 2 F. Supp. 2d 783 (E.D. Va. 1998), *summary judgment granted by* 24 F. Supp. 2d 552 (1998) [*"Loudoun I"*].

64. 958 F.2d 1242 (1992).

65. *Id.*; *but see AFSCME Local 2477 v. Billington*, 740 F. Supp. 1 (D.D.C. 1990) (holding that the Library of Congress is not a public forum).

66. Indeed, Burt Neuborne has explained that free speech law has generally been

Groups that wish to disseminate their views to their fellow citizens need parks, streets, and the like to reach the general public at modest cost.⁶⁷ The audience for such demonstrations, on the other hand, might just as soon wish to use parks and streets undisturbed.⁶⁸ Indeed, law enforcement officials have a constitutional obligation to protect a speaker from a hostile crowd, even if the officers could keep the peace with substantially less effort and risk by preventing the speaker from continuing.⁶⁹ Virtually every Supreme Court public forum case has been brought by speakers, not those who seek to receive ideas. Even cases in which the Supreme Court has ultimately characterized the government property as a designated public forum or a non-public forum have been initiated by speakers, and the Court's analysis has focused on the speakers' interests.

Public libraries, however, do not primarily exist to assist those who wish to express their ideas; rather, public libraries have been established to facilitate citizens' access to ideas.⁷⁰ The person most harmed when a library bans a book is not the author of the book, but the library patron who wishes to read it. Thus, any complaint by a Web site owner that his interests have been harmed because library blockage of his Web site prevented him from communicating with patrons presents a fairly weak First Amendment claim. The Web site owner's claim is surely much less substantial than a patron's claim that her attempt to access the site has been frustrated.

speaker-centered rather than listener-centered until relatively recently. Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 BROOK. L. REV. 5 (1989).

67. Rudy, *supra* note 45, at 1286.

68. *Martin v. Struthers*, 319 U.S. 141, 143 (1943) (observing that the Framers "knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance"). As Laurence Tribe has said in his treatise: "Outside the home, the burden is generally on the observer or listener to avert his eyes . . . [from the] 'offensive' intrusions which increasingly attend urban life." TRIBE, *supra* note 33, at 948; *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211, 212 (1975); *Cohen v. California*, 403 U.S. 15, 21 (1971).

69. See *Feiner v. New York*, 340 U.S. 315, 320 (1951) ("We are well aware that the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker."); see also *Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123 (1992) (holding that a city may not charge a fee for police protection that varies depending on the content of speech).

70. Arthur W. Hafner & Jennifer Sterling-Folker, *Democratic Ideals and the American Public Library* 18, in *DEMOCRACY AND THE PUBLIC LIBRARY* (Arthur W. Hafner ed., 1993) ("The public library is the only agency in American society that makes knowledge, ideas, and information freely available to all citizens."); AM. LIBRARY ASS'N, AM. LIBRARY ASS'N POLICY MANUAL ¶ 53.1, available at <http://www.ala.org/alaorg/policymanual/> (last modified Nov. 23, 1999); Council for the Am. Library Ass'n, *Libraries: An American Value* (1999) (statement adopted on Feb. 3, 1999), at http://www.ala.org/alaorg/oif/liv_val.html (last modified Oct. 10, 2000).

For example, patrons of the Loudoun Public Library had a much stronger First Amendment claim against the library for using blocking software than did the Web site owners whose sites were allegedly blocked by the filters.⁷¹ Indeed, the Web site owners' position did not differ materially from that of the charities complaining of the exclusion from the Combined Federal Campaign in *Cornelius*.⁷² Public libraries, like the Combined Federal Campaign, are non-public fora, at least from the speaker's perspective. Librarians should be free to provide the content they believe is in the best interest of their patrons without the constraint of considering the interests of the creators of expressive materials.

The somewhat odd nature of the analysis in both *Kreimer* and *AFSCME Local 2477 v. Billington*,⁷³ a second case involving a patron's claim of a right of access to a government library, stems from the failure to recognize that claims of people seeking information might differ from those of speakers, and thus might require a different analysis. In *Kreimer*, the court noted that the public library was the quintessential locus for the exercise of the right to receive information, suggesting a presumption that public libraries should qualify as traditional public fora.⁷⁴ The court then retreated, deciding that the public library could not be considered a traditional public forum because allowing library patrons to engage in expressive activities, such as addressing their fellow patrons, would disrupt the library.⁷⁵ *Kreimer*, however, did not wish to present a lecture to his fellow patrons; he merely desired access to the quintessential place to receive information so that he could read. The question was whether he could do so given his deleterious hygiene. In *AFSCME Local 2477*, the

71. Several Web site owners successfully intervened in *Loudoun II* on the grounds that their free speech rights had been blocked by the library's decision to use a software filter. 24 F. Supp. 2d 552, 557 (E.D. Va. 1998). The court held that such interveners had standing. *Id.* at 557-60. Of course, standing might be appropriate given that perhaps Web site owners are injured and could invoke the rights of patrons under a third-party standing theory, regardless of whether they personally have any First Amendment interest that has been infringed. *TRIBE*, *supra* note 33, at 134-45.

72. In *Cornelius*, inclusion in the Combined Federal Campaign would have aided plaintiff organizations in obtaining support from federal employees who were interested in participating in the Campaign. The Court said, however, that the federal government had not offered a general invitation to organizations to participate in the Campaign. 473 U.S. at 803-04. The Court also noted that employee preferences about participating in a campaign that encompassed political organizations justified the government's selection of the organizations to participate in the program. Although being accessible from a public library's computer would help Web site owners communicate with willing Internet users, the government need not offer a general invitation to all Web site owners and should be able to give primary consideration to the interests and preferences of users.

73. 740 F. Supp. 1 (D.D.C. 1990).

74. *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1256 (1992).

75. *Id.*

court appeared to conclude that the Library of Congress was a non-public forum because it was not open for expressive activity.⁷⁶ Again, this conclusion would make sense if a patron wanted to use the library to give a speech or distribute leaflets. If, however, a patron merely desires access to obtain information, the sounder conclusion would be that the public library is at least a limited public forum (and perhaps even a traditional public forum for receiving information).

We must at least consider whether the tripartite analysis the Court has employed when the concerns of speakers predominate remains appropriate when the needs of audiences assume paramount importance. The Supreme Court has recognized a citizen's interest in receiving ideas as a right protected by the First Amendment,⁷⁷ but only in a few relatively unusual cases,⁷⁸ and often merely as a corollary to the rights of speakers.⁷⁹ As the Court has said on occasion, "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."⁸⁰ This has led to the view that if no potential speaker has a First Amendment right, then no potential listener can have a corresponding First Amendment right. Justice Powell's dissent in *Board of Education v. Pico*⁸¹ exemplifies this view. In *Pico*, the Court faced the question of whether a public secondary school violated its students' rights when it removed certain books from the school library. Justice Powell argued that student patrons of school libraries could have no First Amendment right to prevent school authorities from removing library books, because authors and publishers had no corresponding First Amendment right to demand that books remain on school library shelves.⁸²

76. *AFSCME Local 2477*, 740 F. Supp. at 7 (dismissing the argument that rooms of the Library of Congress were a public forum).

77. *TRIBE*, *supra* note 33, at 944-55; *Kleindeinst v. Mandel*, 408 U.S. 753, 762-65 (1972).

78. *Virginia State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (commercial speech); *Kleindeinst*, 408 U.S. 753 (upholding denial of visa for communist speaker). *See Stanley v. Georgia*, 394 U.S. 557 (1969) (reversal of conviction of defendant for possessing pornographic material inside his home); *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

79. *TRIBE*, *supra* note 33, at 944 ("A right to know at times means nothing more than a mirror of such a right to speak, a listener's right that government not interfere with a willing speaker's liberty."); C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 *IOWA L. REV.* 1, 8 (1976) (arguing that a right to know is never more than a right to have government not interfere with a willing speaker's liberty).

80. *Lamont*, 381 U.S. at 308 (Brennan, J., concurring); *see also Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982); *Houchins v. KQED, Inc.*, 438 U.S. 1, 32 n.22 (1978).

81. 457 U.S. 853.

82. *Id.* at 912.

There is a place, however, for a focus on citizens as listeners as well as speakers. As James Madison eloquently observed, and the Court has sometimes acknowledged: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both."⁸³ Indeed, on occasion, speakers and listeners might have somewhat incongruent interests. With regard to regulation of the electromagnetic spectrum, for example, the Supreme Court has recognized the potential conflict between listeners and speakers, and declared the listener's interests paramount. The Court has thus allowed the federal government to create and enforce obligations on broadcasters that subordinate speakers' customary power to decide the content of their speech to the public's broader need for "suitable access to social, political, esthetic, moral, and other ideas and experiences."⁸⁴ Such conflicts between speakers and listeners are particularly likely to arise when there is more than one speaker involved in the communication, as in the library and broadcast situations. In such scenarios, a secondary speaker (like a library) selects from among a group of primary speakers (like authors) who wish to communicate with the secondary speaker's audience.

Thus, using conventional public forum analysis in the library setting presents difficulty; a "listener" perspective rather than a "speaker" perspective is required.

C. Prior Restraint

Another First Amendment doctrine that some have utilized in analyzing the constitutionality of public libraries' use of filtering software is the prohibition on prior restraints.⁸⁵ A legal requirement that speakers submit their expressive material to a government official for approval before disseminating the materials to the general public constitutes a prior restraint. The Defense Department's system for reviewing correspondents' dispatches from combat zones provides one example of such a system of prior restraint.⁸⁶ Since *Near v. Minnesota*⁸⁷ was decided in 1931, the courts

83. *Pico*, 457 U.S. at 867 (plurality opinion); see also *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 18 (1986) (Stevens, J., dissenting). Thomas Jefferson even more succinctly expressed a similar sentiment: "If a nation expects to be ignorant and free . . . it expects what never was and never will be." Letter from Thomas Jefferson to Col. Charles Yancy, Jan. 6, 1816, *quoted in* *Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles*, 680 So.2d 400, 409 (Fla. 1996) (Overton, J., concurring).

84. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

85. Junichi P. Semitsu, *Burning Cyberbooks in Public Libraries: Internet Filtering Software vs. the First Amendment*, 52 STAN. L. REV. 509, 529-32 (2000); see also *Loudoun II*, 24 F. Supp. 2d 552, 570 (E.D. Va. 1998); *Loudoun I*, 2 F. Supp. 2d 783, 797 (E.D. Va. 1998).

86. For a discussion of censorship during military conflict, see TED GALEN CARPENTER,

have also categorized judicial injunctions as prior restraints.⁸⁸ As the Supreme Court has observed on several occasions, a prior restraint is the most serious and least tenable infringement on First Amendment rights.⁸⁹ Prior restraints are presumptively unconstitutional,⁹⁰ and, thus, almost never upheld. Courts have, however, permitted the use of prior restraints to prohibit the distribution of obscene material, so long as the procedures established by the government satisfy rigorous criteria.⁹¹ In *Loudoun*, the court viewed the public library's use of filtering software as a prior restraint and accordingly found the use of such software unconstitutional (primarily because the manner in which the library used the filtering software did not satisfy procedural guidelines that a system of prior restraints must incorporate to be constitutional).⁹²

Traditionally, the courts have applied the prior restraint doctrine to governmental regulatory actions. If the doctrine applies to actions governments take in their proprietary capacities, it applies in a less rigorous manner. Governments can often further the public good by using their resources to engage in speech. If governments are either to communicate with citizens or effectively operate government programs designed primarily to facilitate private citizens' speech, government must have the power to consider content in selecting the speech it will fund with public resources. For example, the government must have the authority to determine the contents of government reports and publications. Likewise, the federal government must possess the power to consider content in deciding which among numerous competing proposals to support with grants from the National Endowment for the Arts ("NEA"), and local governments must have the power to consider content in selecting art for display in public museums.

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87. 283 U.S. 697 (1931).

88. *Alexander v. U.S.*, 509 U.S. 544, 550 (1993); *New York Times Co. v. U.S.*, 403 U.S. 713 (1971); *Near*, 283 U.S. at 723. There has been some discussion about whether injunctions should be considered prior restraints. John Calvin Jeffries, *Rethinking Prior Restraints*, 92 *YALE L.J.* 409 (1983).

89. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) ("The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."); accord *Gentile v. State Bar*, 501 U.S. 1030, 1056 (1991); *Bantham Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *Near*, 283 U.S. 697.

90. *New York Times Co.*, 403 U.S. at 714 ("Any system of prior restraints on expression comes to this Court bearing a heavy presumption against its constitutional validity") (quoting *Bantham Books Inc.*, 372 U.S. at 70).

91. *Freedman v. Maryland*, 380 U.S. 51 (1965).

92. *Loudoun II*, 24 F. Supp. 2d 552, 570 (E.D. Va. 1998); *Loudoun I*, 2 F. Supp. 2d 783, 797 (E.D. Va. 1998).

The Supreme Court has at most applied an extremely limited version of its prior restraint doctrine to actions governments take in their proprietary capacity. Three cases—*Alexander v. United States*,⁹³ *Snepp v. United States*,⁹⁴ and *Gentile v. State Bar*⁹⁵—illustrate the Court’s refusal to apply its conventional prohibitions on prior restraint when the government acts in its proprietary capacity. In *Alexander*, the federal government gained title to a bookstore and its contents pursuant to the Racketeering Influenced and Corrupt Organization Act (“RICO”),⁹⁶ on the grounds that the owner had repeatedly used the store to sell obscene books in violation of the applicable obscenity laws. Rather than selling the books to some third party, the government destroyed the books,⁹⁷ including some that, while pornographic, were not obscene, and thus were entitled to First Amendment protection.⁹⁸

To the majority, the question of whether the Constitution prohibited the federal government’s destruction of books once it had gained title to them did not even warrant serious discussion. Chief Justice Rehnquist, for the majority, observed off-handedly in a footnote: “Not wishing to go into the business of selling pornographic materials—regardless of whether they were legally obscene—the Government decided that it would be better to destroy the forfeited expressive materials than sell them to members of the public.”⁹⁹ The majority went on to hold that even the application of the civil RICO statute to allow forfeiture of protected books because some of the books were not protected did not qualify as a prior restraint.¹⁰⁰ The dissenters primarily expressed concern about the potential impact of such government use of RICO upon free speech, expounding upon the First

93. 509 U.S. 544 (1993).

94. 444 U.S. 507 (1980).

95. 501 U.S. 1030 (1991).

96. Pub. L. No. 91-452, Title IX, § 901(a), 84 Stat. 941 (codified at 18 U.S.C. §§ 1961-68 (1994)).

97. *Alexander*, 509 U.S. at 548 n.1.

98. *Id.*

99. *Id.* This theme was echoed in *General Media Comms., Inc. v. Cohen*, 131 F.3d 273, 285 (2d Cir. 1997), *as amended at* 1997 U.S. App. LEXIS 40571 at *36 (2d Cir. Mar. 25, 1998). In *General Media*, the publishers of *Penthouse* magazine challenged a federal statute that prohibited military post exchanges, commonly referred to as PXs, from stocking sexually explicit materials. The Court, in upholding the Act, explained that the statute was not overbroad in relation to its purpose because “[t]he problem the Act seeks to address, in short, is that the military should not be in the business of selling sexually explicit materials, and the solution embodied in the Act is to forbid the military from doing so.” In other words, as in *Alexander*, the federal government could refuse to sell sexually explicit books without having to cite any instrumental value that the ban served—it was sufficient that the government did not want to sell such material.

100. *Alexander*, 509 U.S. at 549-55.

Amendment implication of allowing the government to forfeit an entire bookstore because the owner knew that *some* of his inventory was obscene.¹⁰¹

*Snepp v. United States*¹⁰² also illustrates the prior restraint doctrine's limited applicability when the government acts as a proprietor controlling its own resources rather than as a regulator seeking to control private entities' use of their own money. In *Snepp*, the Court allowed the Central Intelligence Agency ("CIA") to establish a system of prepublication review.¹⁰³ As a condition of employment, individuals joining the CIA must sign an agreement requiring them to submit certain manuscripts they have authored to the CIA for review prior to general publication.¹⁰⁴ In particular, any manuscript discussing the author's activities at the CIA required clearance.¹⁰⁵ Not only did the Court uphold the CIA's system of prepublication review, it even allowed the CIA to enforce the system by imposing a constructive trust upon any profits earned on works authors had not submitted for clearance.¹⁰⁶ Indeed, the Court permitted the CIA to invoke the constructive trust remedy even though the Agency conceded that the defendant's book did not reveal any classified information.¹⁰⁷

The contrast with the Court's holding nine years earlier in *New York Times Co. v. United States* (the "Pentagon Papers" case)¹⁰⁸ could hardly be sharper. The Court refused to enjoin the *New York Times* and the *Washington Post* from publishing leaked classified defense documents, despite the government's argument that publication of the documents would substantially damage the United States's interests.¹⁰⁹ Because the

101. *Id.* The majority's opinion does seem extreme. When the government acquires protected materials, the First Amendment has at least some implications for the power of the government to destroy such materials. Government officials should perhaps lack the power to simply destroy such expressive materials unless the cost of selling them exceeds the amount their sale is likely to net or unless there is some other substantial reason to destroy them. There is no indication that either was the case in *Alexander*. The majority was unmoved, although the dissent suggested that the destruction of the books violated the Constitution. *Id.* at 576 (Kennedy, J., dissenting) ("Quite apart from the direct bearing that our prior restraint cases have on the entire forfeiture that was ordered in this case, the destruction of books and films that were not obscene and not adjudged to be so is a remedy with no parallel in our cases.").

102. 444 U.S. 507 (1980).

103. *Id.* at 513.

104. *Id.* at 508.

105. *Id.*

106. *Id.* at 515-16.

107. *Id.* at 516 (Stevens, J., dissenting).

108. *New York Times Co. v. U.S.*, 403 U.S. 713, 714 (1971).

109. At least two of the Justices who voted to deny the injunction believed that publication of the classified documents would do substantial damage to the public interest.

government could not demonstrate the type of immediate and serious harm resulting from publication of the purloined documents that would justify imposing a prior restraint, the Court denied the injunction.¹¹⁰ The starkly contrasting results in *Snepp* and the Pentagon Papers case reflect the difference in the government's role in the two cases. In *Snepp*, the government acted as a proprietor, exercising its right to impose terms of employment on its employees. In the Pentagon Papers case, the government attempted to regulate the conduct of private entities—the *New York Times* and the *Washington Post*.

The constraints that the Supreme Court has allowed the federal and state judiciaries to impose upon lawyers, when contrasted with the severe limitations the Court has placed on judicial efforts to control media reporting about trials, also demonstrate that the prior restraint doctrine either does not apply to the government in its proprietary capacity, or, at the very least, applies much less rigorously. In *Gentile v. State Bar*,¹¹¹ the Court upheld restraints on the speech of defense attorneys, allowing the Nevada Supreme Court to enforce a code of conduct proscribing attorney speech that “ha[s] a substantial likelihood of materially prejudicing an adjudicative proceeding.”¹¹² By contrast, in *Nebraska Press Association*,¹¹³ the Court prohibited entry of injunctions barring the press from publishing matters that could prevent fair trials. Indeed, the Court suggested that limiting the press's power to publish information regarding pending or potential criminal litigation could rarely be justified.¹¹⁴ The differences between the two cases reflect a broader pattern, in which the treatment of various trial “participants” turns on the capacity in which the government can exercise control over them. Courts and governmental entities can impose the fewest restraints on the press, more restraints on defense attorneys, and even more restraints on prosecutors, law enforcement officers, and court personnel. Reporters, as private individuals over whom the government has no authority in its proprietary capacity, generally enjoy immunity from prior restraints, because the government's regulatory power to limit truthful speech about crimes and trials is quite limited.¹¹⁵ Prosecutors, on the other hand, are public officers over whom the government unquestionably has authority in its proprietary capacity. Thus, the government can restrict prosecutors' statements regarding pending or

403 U.S. at 731 (White, J., concurring); *id.* at 730 (Stewart, J., concurring).

110. *New York Times Co.*, 403 U.S. at 714 (per curiam).

111. 501 U.S. 1030 (1991).

112. *Id.* at 1033 (quoting Nevada Supreme Court Rule 177(1)).

113. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

114. *Id.* at 569-70.

115. *Id.* at 562-70.

potential litigation, particularly statements made while on the job.¹¹⁶ Defense attorneys are subject to an intermediate range of limitations.¹¹⁷ They are private citizens, yet at the same time they also have official responsibilities, a status captured by the term “officer of the court.” Thus, the level of government control corresponds to the extent to which the government exercises its proprietary rather than regulatory powers.¹¹⁸

Public forum doctrine, however, alters the government’s powers as a proprietor to engage in prepublication review of speech. Though government can claim that it acts in its proprietary capacity in regulating public property, the designation of a piece of government property as a traditional public forum strips the government of its proprietary powers to control the content of speech in that forum (much as it does with respect to shopping center owners). Thus, the prior restraint doctrine, which applies with full force to regulatory actions, limits government exercise of content controls in public fora. For example, the government may not review the content of speech or make content determinations before approving permits for parades and demonstrations.¹¹⁹ Moreover, the approval process is permissible only if clear noncommunicative effects of speech will interfere with the noncommunicative uses of the traditional public forum.¹²⁰

Assuming a public library might be characterized as a traditional public forum, the need to view it as a forum for recipients of information instead of speakers may have implications for prior restraint analysis. Prior restraint doctrine would impose restrictions not on the governmental choice of materials, as it would if it were a speaker forum, but instead on government review of individuals’ interests in obtaining materials. For

116. See *Connick v. Meyers*, 461 U.S. 138, 147-48 (1983).

117. See *Gentile*, 501 U.S. at 1074-75; *id.* at 1081-82 (O’Connor, J., concurring); *Nebraska Press Ass’n*, 427 U.S. at 601 n.27 (Brennan, J., concurring) (“As officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice.”). Though *Gentile* itself does not distinguish between defense attorneys and prosecutors, employee speech cases, like *Waters v. Churchill*, 511 U.S. 661, 674 (1994), appear to permit greater restrictions on government employees than the Court was willing to allow merely because attorneys are officers of the court. *Gentile*, of course, also pointed to attorneys’ special access to information as a justification for limiting attorney speech. 501 U.S. at 1057.

118. This raises a particularly difficult question with regard to jurors. Jurors are private citizens—precisely the reason they have a role in the trial process. On the other hand, private citizens acting as jurors exercise governmental power and, thus, controls over their speech might be characterized as deriving from the government’s proprietary powers.

119. *Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 134-36 (1992); *Cox v. La.*, 379 U.S. 536, 553-57 (1965); *Saia v. New York*, 334 U.S. 558 (1948); see *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750 (1988) (dealing with newsracks).

120. *Plain Dealer Publ’g Co.*, 486 U.S. at 762-63.

instance, considerations similar to those governing prior restraint doctrine would suggest that libraries may not require users to seek permission on an individual basis to unblock certain Web sites or establish a system in which library staff act as monitors empowered to order patrons to desist if they begin viewing “inappropriate” sites. Many of the harms of censorship regimes noted in *Freedman v. Maryland*¹²¹ would exist in such circumstances. If libraries are fora that primarily function as resources for individual citizens, such an approach is impermissible.

Thus, courts cannot facilely apply prior restraint doctrine to the issues raised by public libraries’ use of filtering software. Not only does this difficulty have implications with regard to public libraries’ ability to block access to some Internet sites, it also has an impact on the procedures public libraries can employ in carrying out their policies, as this Article discusses. Moreover, to the extent that prior restraint doctrine does apply, an audience perspective, rather than a speaker perspective, is appropriate.

D. Pico

Board of Education v. Pico,¹²² perhaps the Supreme Court case most directly relevant to the constitutionality of public libraries’ use of filtering software, provides a prime illustration of the Court’s sometimes fractured and confused nature when assessing actions governments take in their proprietary capacity. *Pico* involved school libraries serving a public high school and junior high school in a Long Island, New York school district. At the insistence of school board members, the libraries removed eleven “dangerous” books from library shelves, including *Slaughterhouse Five* by Kurt Vonnegut, *Black Boy* by Richard Wright, and *Soul on Ice* by Eldridge Cleaver.¹²³ The Board’s concern about the books stemmed from three boardmembers’ attendance at a conference sponsored by a politically conservative organization of parents.¹²⁴ At the meeting, the members obtained lists of books deemed “objectionable” or “improper fare for school students.”¹²⁵ A few months thereafter, the Board issued an unofficial directive to remove ten of those books from library shelves and submit them to the Board for review.¹²⁶ When the Superintendent advised the Board that it had departed from established procedures for considering whether books should be removed from library shelves, the Board

121. 380 U.S. 51 (1965).

122. 457 U.S. 853 (1982).

123. *Id.* at 856 n.3.

124. *Id.* at 856.

125. *Id.*

126. *Id.* at 857.

persisted.¹²⁷ Relenting somewhat at its next meeting, however, the Board appointed an advisory panel to read all of the books and determine their suitability for high school students.¹²⁸ When the advisory committee concluded that many of the books should be retained, the Board disregarded the committee's determination and ordered permanent restrictions placed on all but one of the books.¹²⁹ The Supreme Court failed to produce a majority opinion, and thus the case produced no holding that serves as binding precedent. Worse still, the case resulted in six separate opinions.¹³⁰ The three-Justice plurality, acknowledging school authorities' power to remove books on grounds of "educational suitability," held that educational authorities could not remove books from school libraries merely because those books offended authorities' views of "what shall be orthodox in politics, nationalism, religion, or other matters of opinion."¹³¹ The fact that the school was operating in its proprietary capacity when it removed the books did not exempt it from First Amendment constraints, but educators were nonetheless afforded substantial discretion based on their educational judgment.¹³² The plurality pointedly expressed concern that elected officials, not professional educators, had made the decision to remove the books.¹³³

The four dissenters took up the mantra of Justice Holmes circa 1892, arguing that the First Amendment simply did not constrain educators' decisions about how they would use a school's resources, including its books.¹³⁴ They noted that students could gain access to such books by other means—ironically mentioning public libraries as one source for such books.¹³⁵

The parallel between removing library books and installing filtering

127. *Id.* at 857 n.4.

128. *Id.* at 857.

129. *Id.* at 858.

130. The Court did do better than the Second Circuit, however, where a panel of three judges produced three different opinions. *Pico v. Bd. of Educ.*, 638 F.2d 404 (2d Cir. 1980).

131. *Pico*, 457 U.S. at 871-72.

132. *Id.*

133. *Id.* at 874 (observing that "[t]his would be a very different case if the record demonstrated that petitioners had employed established, regular, and facially unbiased procedures for the review of controversial materials" and concluding that exactly the opposite was true because "petitioners ignored 'the advice of literary experts,' . . . librarians and teachers . . . , the Superintendent of Schools, and the guidance of publications that rate books for junior and senior high school students") (internal citations omitted); Schauer, *supra* note 33, at 115 ("Consideration of the role of library professionals in the selection and de-selection processes might explain the source of the First Amendment worry that the Court noted, but left unresolved, in *Board of Education v. Pico*.").

134. *Pico*, 457 U.S. at 889 (Rehnquist, J., dissenting).

135. *Id.* at 892.

systems on library computers is obvious. When a library secures Internet access, it gains access to all Internet sites. A filter removes some of the Web sites to which the library has a right of access.¹³⁶ In effect, the library has acquired a set of materials and then refused to make some of those materials available to its patrons.¹³⁷

Moreover, the role of the public library differs from that of the school library in ways that make the former's filtering decision more difficult to justify. First, as every Supreme Court Justice recognized in *Pico*, primary and secondary schools exist, in part, to instill certain values in children. Fulfilling that function requires educators' discretionary selections of content with respect to books in the school library as well as with respect to curriculum.¹³⁸ Public libraries do not seek to inculcate values in the same way.¹³⁹

Second, children form the dominant part of the audience in the school library setting at issue in *Pico*, while patrons of public libraries include large numbers of adults as well as children. Government may undoubtedly take actions to shield children from sexually explicit material, even though it may not seek to shield adults from the same material. Indeed, where audiences include both children and adults, courts allow government to restrict speech in ways that would ordinarily be prohibited if the speech only reached adults.¹⁴⁰ Certainly, some of the justifications for public library use of filtering software relate to protecting children from sexually explicit and other forms of speech that may harm a child's emotional and

136. See *Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965) (“[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.”).

137. Lawrence Lessig, *What Things Regulate Speech?: CDA 2.0 v. Filtering*, 38 JURIMETRICS J. 629, 657 (1998) (“My sense is that using software to block sites may seem more like the removal of books, rather than a choice not to subscribe.”); Brigitte L. Nowak, Note, *The First Amendment Implications of Placing Blocking Software on Public Library Computers*, 45 WAYNE L. REV. 327, 350, 354 (1999); see Julia M. Tedjeske, Note, *Mainstream Loudoun and Access to Internet Resources in Public Libraries*, 60 U. PITT. L. REV. 1265, 1284 (1999).

138. *Pico*, 457 U.S. at 869-70. The Court also discussed this “socialization” function of the schools in *Amback v. Norwick*, 441 U.S. 68, 78 n.8, 80 (1979) (upholding state statute prohibiting noncitizens from being teachers). In *Amback*, the Court said, “[A] State properly may regard all teachers as having an obligation to promote civic virtues and understanding in their classes, regardless of the subject taught.” *Id.* at 80. In many ways, the dispute among the Justices in *Pico* centered on whether school libraries have only this inculcation mission. Compare *Pico*, 457 U.S. at 869 (Brennan, J., plurality opinion), with *id.* at 914-15 (Rehnquist, J., dissenting).

139. AM. LIBRARY ASS'N, *supra* note 70, ¶ 53.1.4 (only parents should decide which library material is available to their children). Compare paragraph 53.1.4 with the preceding paragraph of the Policy Manual that addresses school libraries. *Id.* ¶ 53.1.

140. *FCC v. Pacifica Found.*, 438 U.S. 726, 749-51 (1978).

psychological development.¹⁴¹ The problem of shielding children from inappropriate sexual material, however, could be solved at least in larger public libraries by designating separate terminals for children and adults.¹⁴² Libraries could employ other methods to effect such a separation.¹⁴³ If separation is possible, maintaining filters on terminals accessible only to adults could not be justified by the potential effects of the unfiltered terminals on children.¹⁴⁴ Government may not restrict adults to the level of reading material fit for children.¹⁴⁵

The response to this argument might be that librarians have always had to decide which materials would be available to readers. Moreover, while the Internet still requires librarians to fill that role, it has only substituted one form of scarcity—limited acquisition budgets and spatial constraints—for another form that is no less real—time at the available computers. That is, if libraries do not have terminals to satisfy the demands of all who want to use them, librarians will have to find some way to ration available computer time. Thus, arguably, librarians retain the authority to decide which inquiries are most worthwhile in order to prioritize the use of scarce computer time.¹⁴⁶

III. PUBLIC LIBRARIES: A NEW TYPE OF FORUM

A. *Dual Roles of Government-Supported Speech*

Government may act as a conventional speaker, attempting to communicate a particular message in order to further a government

141. Special limitations on speech can be established to protect children. The government's interest in safeguarding the physical and psychological well-being of minors is "compelling" and may serve as a justification for limiting constitutionally protected speech. *U.S. v. Playboy Entm't Group*, 529 U.S. 803, 881 (2000) (cable scrambling); *Sable Comms. v. FCC*, 492 U.S. 115, 126 (1989) ("We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors."); *New York v. Ferber*, 458 U.S. 747, 757 (1982); *Pacifica Found.*, 438 U.S. at 757-58 (Powell, J., concurring).

142. Santiago, *supra* note 12, at 278; *Loudoun II*, 24 F. Supp. 2d at 552, 567; Warren, *supra* note 13, at 55.

143. Mem. from Jenner & Block to the Am. Library Ass'n 11-12 (Feb. 4, 2000), available at <http://www.ftrf.org/internetfilteringmemo.html> (discussing the use of smart cards, which contain patron-specific information that automatically imposes a particular level of filtering on that patron's Internet access).

144. See *Playboy Entm't Group*, 529 U.S. at 881; *Sable Comms.*, 492 U.S. at 126-28; *Ginsberg v. State of New York*, 390 U.S. 629, 634-35 (1968); *Butler v. Michigan*, 352 U.S. 380 (1957); see also *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74-75 (1983); see *Pacifica Found.*, 438 U.S. 758 (1978) (Powell, J., concurring) (importance of ability to limit speech reaching children "without also limiting willing adults' access to it").

145. *Butler*, 352 U.S. at 383.

146. Nadel, *supra* note 11, at 1128.

program. The communication could provide largely factual information, such as safety statistics regarding the airlines,¹⁴⁷ or could state an opinion, for example, that visitors to national parks should not feed bears or that citizens should conserve energy.¹⁴⁸ Sometimes, however, the government funds expressive activity not to communicate its own message, but to encourage citizens' self-expression. Programs such as the NEA provide examples of the latter type of government program. Courts have recognized this distinction in at least two contexts.

The Supreme Court has distinguished government as speaker from government as facilitator in considering governments' powers to make content judgments in allocating funding for expressive activities. In *Rosenberger v. Rector & Visitors of the University of Virginia*, the Court noted that when the government seeks to communicate its own message by funding private speakers, it may impose content-based limits on the private speech with government money and may make content-based distinctions in deciding which private speakers to fund.¹⁴⁹ In other words, "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."¹⁵⁰ The Court referred to its ruling in *Rust v. Sullivan*.¹⁵¹ The program at issue in *Rust*, the Court observed, provided an example of government use of private speakers to convey the government's message. The *Rosenberger* majority explained that the Court had upheld the regulation at issue in *Rust v. Sullivan*, prohibiting doctors from discussing the option of abortion, because that regulation was part of a government effort to communicate its own message.¹⁵² The government was not seeking to facilitate the speech of medical personnel. The means the government chooses to deliver its own message should not, said the Court, limit the government's control over its message.¹⁵³ When government "expends funds to encourage a diversity of views from private speakers," however, courts prohibit viewpoint discrimination and closely scrutinize other content-based limitations on speech.¹⁵⁴

147. Ralph Vartabedian & Edwin Chen, *FAA to Provide Safety Reports on the Internet*, L.A. TIMES, Jan. 20, 1997, at A1.

148. Lars Noah, *Administration Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 WIS. L. REV. 873, 890-91 (discussing agency use of adverse publicity as a regulatory tool); Ernest Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 HARV. L. REV. 1380 (1973).

149. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995).

150. *Id.* at 833 (citing *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)).

151. *Id.* at 833; see *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 612 (1998); *Rust*, 500 U.S. at 194.

152. *Rosenberger*, 515 U.S. at 833.

153. *Id.*; see *Finley*, 524 U.S. at 612; *Rust*, 500 U.S. at 194.

154. *Rosenberger*, 515 U.S. at 833. The plurality in *Pico* relied on an analogous

The distinction between speaking and facilitating others' speech has a much longer tradition in the defamation area.¹⁵⁵ Courts have traditionally distinguished publishers from distributors in setting standards for defamation liability.¹⁵⁶ Publishers communicate their own ideas and can be held liable for the defamatory nature of their assertions, even if they have merely repeated others' defamatory statements. Distributors, such as bookstores, newsstands, and libraries, serve a very different function. They make the expressive materials of others available to the broader public. Moreover, given their role as a conduit connecting publishers to readers, entities like bookstores, newsstands, and libraries cannot reasonably be expected to ensure that a publication is not defamatory before they offer it to the public.¹⁵⁷ Thus, courts have recognized that distributors deserve greater protection from liability for defamation.¹⁵⁸ Indeed, Congress has by statute accorded online service providers complete immunity from liability

distinction to differentiate classroom curriculum, over which educational officials could exercise plenary content control, and school libraries, where such content-based determinations should be more closely reviewed. *Bd. of Educ. v. Pico*, 457 U.S. 853, 869 (1982) (stating that special characteristics of the school library make the environment especially appropriate for the First Amendment rights of students, because the library, unlike the school classroom, is a place for voluntary inquiry and study).

155. The distinction also has a long history in the regulation of telecommunications. Telephone companies have long been regulated as common carriers that serve as mere conduits for the subscribers' messages. They own the means of communication but can exercise essentially no control over its content. In contrast, broadcasters are regulated as "public trustees" who primarily communicate their own messages or the messages of others selected at their discretion, but operate under some constraints with regard to content. See Jerome A. Barron, *The Telco, the Common Carrier Model and the First Amendment—The "Dial-A-Porn" Precedent*, 19 RUTGERS COMPUTER & TECH. L.J. 371, 381-85 (1993).

156. *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 139-40 (S.D.N.Y. 1991); RESTATEMENT (SECOND) OF THE LAW OF TORTS § 581; 1 ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 7.3.1 (3d ed. 2000).

157. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 113, at 810-12 (5th ed. 1984); RESTATEMENT (SECOND) OF THE LAW OF TORTS §§ 581, 612; SACK, *supra* note 156, § 7.3.1. Indeed, the Supreme Court announced just such an approach with regard to obscenity when it overturned an ordinance that criminalized the sale of obscene books regardless of the lack of scienter of the bookseller. *Smith v. California*, 361 U.S. 147 (1960). Justice Brennan, writing for the Court, explained:

[I]f the bookseller is criminally liable without knowledge of the contents. . . he will tend to restrict the books he sells to those he has inspected . . . "Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience." And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which the proprietors had made an inspection, they might be depleted indeed.

Id. at 153 (internal citation omitted).

158. KEETON ET AL., *supra* note 157, § 113, at 810-11.

for materials posted by others on their systems.¹⁵⁹ Such online service providers are a new type of distributor. This distinction between government as speaker and government as facilitator can assist the analysis of the status of public libraries.

B. Public Libraries' Roles and Traditions

By establishing and maintaining public libraries, the government acts as a facilitator of patrons in obtaining access to speech, not as a speaker seeking to communicate its speech to library patrons. Courts should view public libraries as places for wide-ranging inquiry that should make available to the public the widest possible array of knowledge.¹⁶⁰ Public libraries are the archetypal institutions where citizens can access information on the range of human endeavors.¹⁶¹ Indeed, this has long been the mission of public libraries. The first libraries in the colonies that would later become the United States were not public libraries in the sense of being funded by the government, but were subscription libraries that served as facilitators. In 1731, Benjamin Franklin founded the first subscription library in the colonies, and, as he noted in his autobiography, this library:

was the mother of all the North American subscription libraries, now so numerous. It is become a great thing itself, and continually increasing. These libraries have improved the general conversation of the Americans, made the most common tradesmen and farmers as intelligent as most gentlemen from other countries, and perhaps have contributed in some degree to the stand so generally made throughout the colonies in defense of their privileges.¹⁶²

Given the public library's role as facilitator rather than channel for government speech, the government should not have the plenary control over the material it makes available to patrons of a public library in the same way that it may control fora in which the government seeks to communicate its own message. In some ways, libraries are analogous to

159. 47 U.S.C. § 230 (Supp. IV 1998); *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997); *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998). A similar approach has been adopted with regard to defamation of cable system public access channels. By statute—the Cable Television Consumer Protection and Competition Act of 1992—franchising authorities are immune from liability for the defamatory nature of broadcasts on public access channels. *Caprotti v. Town of Woodstock*, 681 N.Y.S.2d 911 (3d Dep't 1998) (citing 47 U.S.C. § 555(a) (1994)).

160. AM. LIBRARY ASS'N, *supra* note 70, ¶ 53.1.

161. Hafner & Sterling-Folker, *supra* note 70, at 18; AM. LIBRARY ASS'N, *supra* note 70, ¶ 53.1.

162. BENJAMIN FRANKLIN, *THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN* (1793), available at <http://earlyamerica.com/lives/franklin/chapt7/text.html> (last visited Jan. 15, 2001). Public libraries in their modern form started in the mid-1800s and developed from a wide variety of privately run libraries and collections.

universities as loci for wide-ranging, free inquiry.¹⁶³ More generally, the role of libraries for listeners may be analogized to the role of streets and parks for speakers. Libraries are the archetypal traditional government-funded loci for acquiring knowledge, just as streets and parks are by tradition archetypal government-funded loci for speaking.¹⁶⁴ If public libraries should be viewed as settings for wide-ranging inquiry, the First Amendment should greatly restrain public libraries from blocking the availability of Internet sites.

The recognition that public libraries have a constitutional obligation to provide a forum for wide-ranging inquiry should not, however, mean that librarians can exercise no discretion when making public resources available. If the only permissible basis for imposing restrictions were instrumentalist—reasons related to the harm that unrestricted access would cause—libraries could advance few persuasive justifications for installing blocking software on all Internet terminals. Several instrumentalist reasons can be envisioned, including: (1) protecting children from inappropriate materials; (2) preventing offense to other patrons and library staff; (3)

163. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995) (“In the University setting . . . the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition[.]”); *Rust v. Sullivan*, 500 U.S. 173, 200 (1991) (“[W]e have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government’s ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and over breadth doctrines of the First Amendment[.]”); *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 803 (1985) (“[A] university campus, at least as to its students, possesses many of the characteristics of a traditional public forum.”); *Bd. of Educ. v. Pico*, 457 U.S. 853, 915 (1982) (Rehnquist, J., dissenting) (university or public libraries are “designed for freewheeling inquiry”); *Healy v. James*, 408 U.S. 169, 180-81 (1972); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)).

164. Granted, libraries, unlike traditional public fora, might not be uniquely suited to communication between speakers and the general public. If examined from the speakers’ point of view, the argument that public libraries are a critical channel of communication, in general, or one with respect to material on the Internet in particular, clearly lacks merit. Most Internet access takes place outside of public libraries. At most, a small segment of a Web site’s audience will access the site from libraries rather than from home or work. Even when examined from the perspective of library users—the more appropriate perspective—the argument as to the library’s uniqueness still fails. Many individuals have access to the Internet at work, at home, or at both locations. C. RICHARD NEU ET AL., *SENDING YOUR GOVERNMENT A MESSAGE: E-MAIL COMMUNICATION BETWEEN CITIZENS AND GOVERNMENT* 119-48 (1999). Thus, for most people, being blocked from a site in the public library does not mean that the site becomes inaccessible. Large elements of society, however, do not have access to the Internet for recreational use outside the library. *Id.* Presumably, many people who seek to access the Internet in public libraries do not have access at home. Nevertheless, the argument that public libraries play a central role in communications in the same way that streets and parks do seems strained.

precluding harmful secondary effects; and (4) enabling patrons to use the Internet more efficiently.

As noted earlier, a library's interest in protecting children from exposure to inappropriate materials probably provides the most compelling instrumentalist justification for employing filters in a manner that blocks children's access to sexually explicit sites.¹⁶⁵ If the library can restrict children's access to sexually explicit Internet sites while allowing adults unfiltered access, however, the interest in protecting children cannot justify installation of filters that limit every patron's access to sexually explicit Internet sites.¹⁶⁶

A second instrumentalist argument contends that filters can prevent Internet users from exposing library staff and other patrons to offensive materials. Patrons may observe the content of a nearby computer screen and may find that content offensive. Library officials could arrange the physical layout of the library and placement of computers so that the computer screens are not visible to other patrons. Alternatively, libraries could install privacy screens, which preclude everyone but the user from seeing a computer screen.¹⁶⁷ Such efforts probably constitute an adequate response to the concern about patrons' unwanted exposure to images being viewed by their fellow patrons.¹⁶⁸

Library employees' concern about unwanted exposure to sexually explicit Web sites might, in some ways, present a more difficult problem. A patron using the Internet might seek the assistance of a librarian, and the librarian, in rendering such assistance, might have to view a screen that contains offensive, sexually explicit material. The patron who requests assistance might or might not intend to cause the librarian offense. Ultimately, however, even the library staff problem does not justify installing filters on library computers. First, any patron who places a sexually explicit image on the screen that would offend most people and then calls a librarian over to assist him for the purpose of offending the

165. See *supra* notes 133-34 and accompanying text.

166. See *supra* note 137 and accompanying text.

167. Warren, *supra* note 13, at 55.

168. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975) (ordinance limiting showing of sexually explicit scenes at drive-in theaters held unconstitutional because the "ordinance seeks only to keep these films from being seen from public streets and places where the offended viewer readily can avert his eyes."); see also *Cohen v. California*, 403 U.S. 15, 21 (1971); *TRIBE*, *supra* note 33, at 948 ("Outside the home, the burden is generally on the observer or listener to avert his eyes or plug his ears against the verbal assaults, lurid advertisements, tawdry books and magazines, and other 'offensive' intrusions which increasingly attend urban life."). Privacy screens may make the screen so dark that elderly patrons or others who have sight limitations have difficulty reading the contents of the screen.

librarian may be disciplined for intentionally causing distress to the library staff. Second, the library could institute a rule that patrons must blank out the screen or go to a screen without images before the library staff will assist them. Ultimately, however, if none of these approaches fully ensures that library staff will not find themselves confronted with offensive images, patrons' ability to examine Web sites of their choice should take precedence over the desire to spare library staff from suffering offense. Such potential exposure to offensive material should be viewed as an unavoidable aspect of the librarian's job.¹⁶⁹

The Supreme Court's doctrine upholding zoning restrictions on sexually explicit commercial enterprises suggests a potential third instrumentalist argument in support of installing Internet filters. The Supreme Court has held that a local government may regulate speech, especially sexually explicit speech, to combat the speech's secondary effects.¹⁷⁰ Thus, the Court has allowed localities to use zoning laws to control the location of businesses that offer sexually explicit materials because such businesses tend to have negative effects on the surrounding neighborhoods—effects which include increasing crime, producing blight, and reducing property values.¹⁷¹

Librarians might reasonably fear that the availability of Internet pornography could change the character of the library. Instead of a place visited by a broad cross-section of the community, the library might become a publicly funded "peep show" for those interested in sexually explicit material. Indeed, people uninterested in sexually explicit material might come to view the library as a place to be avoided, just as a wide segment of the public avoids the "red-light" districts that exist in many cities. In short, if sexually explicit materials can be accessed at a public library, the library's clientele might change in undesirable ways.

A secondary effects argument in the library context, however, seems strained. A public library might find it difficult to demonstrate that making sexually explicit material available to patrons will either produce criminal activity in or around the library or adversely affect the library's aesthetic

169. There may be other, more technical reasons that such a suit will fail. *Application of "Community Standards" Component of Legal Obscenity Test to Librarians' Internet Communications*, Mem. from Jenner & Block to the Am. Library Ass'n, *supra* note 143, at 16-18.

170. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976).

171. *Renton*, 475 U.S. at 48, 54; *Young*, 427 U.S. at 55, 71 n.34. See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* (5th ed. 1995); David L. Hudson, Jr., *The Secondary Effects Doctrine: "The Evisceration of First Amendment Freedoms,"* 37 WASHBURN L.J. 55 (1997).

qualities.¹⁷² Moreover, the library can presumably address any concrete harms by implementing specific rules directed at those harms. More fundamentally, a secondary effects argument based on concern about the exodus of patrons offended by the availability of sexually explicit materials in the library parallels secondary effects arguments that the Supreme Court has rejected in the past.¹⁷³ In *Boos v. Barry*,¹⁷⁴ the Supreme Court overturned a decision upholding a District of Columbia ordinance that prevented the display of signs “bring[ing] a foreign government into public odium or public disrepute” within 500 feet of foreign embassies.¹⁷⁵ The District of Columbia Circuit had upheld the ordinance using the secondary effects rationale.¹⁷⁶ The Supreme Court explained, however, that its secondary effects doctrine could not justify the ordinance because the reactions of people to speech and the emotive impact of speech on audiences cannot be considered secondary effects of speech.¹⁷⁷ *Boos* suggests that a secondary effects argument would be rejected in the public library context. In particular, any exodus from the library as a result of the availability of sexually explicit material via the Internet would ultimately result from the reactions of some patrons to communications between Web site owners and willing library patrons.¹⁷⁸

As a fourth instrumentalist justification, libraries could assert that Internet filters may further public libraries’ mission of helping the readers

172. In *Reno v. ACLU*, the Court rejected a similar argument. There, the government argued that it could restrict sexually explicit speech to foster the growth of the Internet by making sure that countless citizens were not driven away from the medium because of the risk that they would expose themselves or their children to such sexually explicit material. 521 U.S. 844, 885 (1997). The Court had earlier rejected the government’s argument, which was explicitly based on *Renton*. *Id.* at 867.

173. *Forsyth Co., Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *Boos v. Barry*, 485 U.S. 312 (1988). In particular, the argument that offensive speech will lead to an exodus of people really focuses on listeners’ reactions to speech and the emotive impact of the speech on the audience.

174. 485 U.S. 312.

175. *Id.* at 316.

176. *Finzer v. Barry*, 798 F.2d 1450, 1469 n.15 (D.C. Cir. 1986), *rev’g Boos*, 458 U.S. 312.

177. *Id.* at 321 (O’Connor, J., plurality opinion); *id.* at 334 (Brennan, J., concurring) (“I also join Part II-A to the extent it concludes that even under the analysis set forth in [*Renton*], the display clause constitutes a content-based restriction on speech that merits strict scrutiny. Whatever ‘secondary effects’ means, I agree that it cannot include listeners’ reactions to speech.”).

178. Granted, the relevant impact is not that on the audience to whom the speech is directed, but on those who may be unintentionally confronted by the speech. This difference, however, should not be dispositive. Rather, bystanders should be expected to avert their eyes from offensive speech. Moreover, it is far from clear that people who might find themselves confronted by the potentially offensive materials would leave the vicinity.

negotiate a vast array of materials on subjects that vary greatly in quality.¹⁷⁹ Librarians have traditionally assisted patrons in negotiating a wealth of materials on various subjects. Some have suggested that this function will become more, not less, critical with the Internet's arrival.¹⁸⁰ There is little reason, however, to prevent those who wish to access the Internet without filters from doing so if filters are justified only as a means for assisting patrons in winnowing material.

A public library should not be restricted to such instrumentalist justifications for employing filtering software. Even public librarians should possess the authority to prefer speech regarding intellectual inquiry to sexually explicit speech because of their conception of the library as a forum, regardless of whether librarians can point to any concrete injury that would result from reconceptualizing the library's mission. Libraries engage in a wide range of activities. Sexually explicit materials may differ from traditional library materials in a way that should simply allow librarians to prefer traditional materials. Historically, libraries have been viewed as places that offer material to provide intellectual stimulation and enlightenment, although this view may contain some elements of myth. Certainly, contemporary public libraries contain materials other than those dedicated to intellectual inquiry. Libraries seek to provide entertainment by offering materials embodying popular culture, such as videotapes of popular movies and romance novels—materials not necessarily intended to enlighten or stimulate the intellect.¹⁸¹ Indeed, some have suggested that libraries' efforts to cater to popular tastes undermine the vital role of libraries in a democracy.¹⁸² That debate need not be resolved to conclude that libraries should be allowed to prefer intellectual inquiries to the satisfaction of other patron interests.

Librarians should have the discretion to decide that the library is committed to intellectual inquiry, not to the satisfaction of the full range of human desires.¹⁸³ They should also have the authority to decide that scarce

179. Nadel, *supra* note 11, at 1137.

180. *Id.*

181. Jeannette Allis Bastian, *Filtering the Internet in American Public Libraries: Sliding Down the Slippery Slope*, available at http://www.firstmonday.org/issues/issue2_10/bastian/index.html (last visited Feb. 1, 2001).

From the early days of the public library, librarians sought on the one hand to elevate public thought, and on the other, to meet public demand[;] [t]he role of the librarian as arbiter of good reading and social values versus that of mass market distributor is a thread that continues to run through the professional literature.

Id.

182. Hafner & Sterling-Folker, *supra* note 70, at 28, 34.

183. National Coalition Against Censorship, *The Cyber-Library: Legal and Policy Issues Facing Public Libraries in the High-Tech Era*, reprinted in *FILTERS & FREEDOM*, *supra* note

computer resources should be devoted to intellectual inquiry rather than the pursuit of entertainment. Thus, a librarian can decide that he wishes to reserve Internet terminals for intellectual inquiry, rather than for engaging in electronic communication with other individuals, shopping, playing computer games, or satisfying prurient interests.

Libraries should be able to limit recreational uses as a symbolic matter, without showing any kind of nonspeech danger the library seeks to avoid. With regard to recreational materials, public libraries should have the power to limit such material simply because that is the way in which the polity wishes to define the forum, much like the federal government could decide, in *Alexander*, that it did not wish to sell sexually explicit material that had been forfeited to the federal government, or, as in *General Media*, that it would not sell sexually explicit material in military post-exchanges.¹⁸⁴ Libraries should be required to treat all materials for intellectual inquiry equally (at least in terms of allowing patrons to access such materials on the Internet), but be permitted to treat some or all categories of recreational material less favorably by precluding patrons from using valuable computer time to engage in such recreational pursuits.

Within the sphere of material that provides knowledge or intellectual stimulation, public libraries should be required to justify limitations on the range of inquiry. Thus, unlike designated public fora, where the government can set the substantive bounds of the debate,¹⁸⁵ public libraries should presumptively be open to all intellectual inquiries. Because libraries are the archetypal fora for listeners, library patrons should have access to any speech protected by the First Amendment, just as speakers can access streets or parks to engage in any expressive activity protected by the First Amendment. Such a presumption is consistent with the history of public libraries in this country.

Moreover, perhaps counterintuitively, courts should take a much more jaundiced view of library policies that block Internet access to a very limited array of subjects than they take of library policies that reserve Internet terminals for very limited use. Intuitively, the fewer restrictions on the intellectual inquiries that can be pursued by use of the Internet-accessible terminals, the better. For example, a policy that allows access to everything except sites devoted to discussion of religious doctrine may seem much less objectionable than a policy that reserves Internet-accessible terminals to those who wish to access government information.

12, at 150-51.

184. See *supra* note 99 and accompanying text.

185. Supreme Court doctrine merely requires a government entity to consistently follow its own definition of the forum. See *supra* notes 56-61 and accompanying text.

The more widespread the limitation on Internet use in public libraries, however, the more likely that political processes will ensure that the limitations on such use are no broader than necessary. In particular, in the second situation posited above (in which Internet-accessible terminals could be used only to access government Web sites), a large portion of the general public is treated unfavorably with respect to the subjects they wish to explore by way of the Internet. Thus, it will take a strong justification for the library to maintain a severely restrictive policy governing use of Internet-accessible computers because of the wide scope of unfavorable treatment. On the other hand, if patrons can explore all of the subjects that they wish to explore by Internet-accessible terminals, and only a small segment of the public is denied use of the Internet terminals for their preferred inquiries, political pressure from such a small segment of patrons will likely have less effect.

Indeed, the Supreme Court has noted in several contexts that requiring the general application of rules intended to apply only to small segments of the populace provides a particularly practical and effective method of discouraging arbitrary and unreasonable restrictions on political minorities.¹⁸⁶ Supreme Court doctrine regarding taxation of the news media reflects just such an approach. The Court has held that the news media may be subjected to taxes applicable to business enterprises in general, but that states may not tax media entities more heavily than other business entities, nor may states single out a small segment of the media for heavier taxation than the remainder of the media.¹⁸⁷ Yet, at the same time, the Court has permitted states to accord especially favorable treatment to a small segment of the media by exempting that segment from a general tax paid by most businesses, including many other media entities.¹⁸⁸ Allowing favorable treatment of only a small segment of the media resembles a library's policy

186. *See* *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1944) (observing that "[t]he framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally").

187. *Leathers v. Medlock*, 499 U.S. 439, 445-46 (1991).

188. *Id.* at 450-53. In particular, the Court allowed Arkansas to exempt newspapers and magazines from its sales tax. *See* *Mabee v. White Plains Publ'g Co.*, 327 U.S. 178, 184 (1946); *Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186, 194 (1946). *Regan v. Taxation with Representation*, 461 U.S. 540 (1983), may provide another example of the Court's greater acceptance of treating a small group especially favorably rather than especially unfavorably. There, the Court upheld a statute that allowed tax-exempt veterans groups to involve themselves in lobbying Congress, even though in general groups holding tax-exempt status cannot engage in lobbying activities. *Id.* at 545-50. It is unlikely that the Court would have upheld a statute allowing all tax-exempt groups except veterans groups to lobby.

of providing a very limited range of access to the Internet. In both circumstances, a limited range of speech interests are favored, and such favoritism is not troubling because of the political constraints on such favoritism.¹⁸⁹

IV. WHO DECIDES AND HOW?: PROFESSIONALISM, INSULATION, DELEGATION, AND PROCESS

Government may further constitutional principles not only through the application of substantive doctrines, such as the listener-focused “public forum” doctrine, but by structural and procedural requirements limiting the manner in which government adopts actions that have implications for constitutional rights.¹⁹⁰ This section of the Article explores structural and procedural constraints that courts might consider placing upon libraries that seek to employ filtering software on their computers. The question of the authority to determine which sites warrant blocking merits analysis. The contours of the process by which a patron can seek to unblock a site also merit attention.

Any government effort to limit undesirable speech will likely produce at least one of two consequences. First, the government may inadvertently prohibit some speech that does not actually bear the relevant deleterious characteristics. Second, in an effort to make more refined judgments that reduce the blockage of appropriate speech, the government may rely on discretionary, case-by-case judgments to distinguish permissible from impermissible speech. Such judgments carry the risk of inconsistent or potentially biased decisionmaking. Often the government’s effort to limit speech will suffer from both of the above maladies. Such problems may become magnified in the filtering context because of imperfections in current filtering software. Filters will invariably be overinclusive; they will block some sites that do not produce the relevant harms.¹⁹¹ For instance, filters designed to block only pornographic sites also block numerous sites that in no way appeal to the prurient interest. If the standards for blocking

189. In circumstances where there are likely to be fewer constraints on such favoritism, such as where elected officials exempt themselves or political allies from generally applicable obligations, taking a permissible approach toward favoritism is more problematic. *See* Bell, *supra* note 43, at 809 n.293.

190. Henry D. Monaghan, *First Amendment “Due Process,”* 83 HARV. L. REV. 518, 518 (1970) (stating that “courts have lately come to realize that procedural guarantees play an equally large role in protecting freedom of speech indeed, they assume an importance fully as great as the validity of the substantive rule of law to be applied”).

191. Electronic Privacy Information Center, *Faulty Filters: How Content Filters Block Access to Kid-Friendly Information on the Internet*, reprinted in FILTERS & FREEDOM, *supra* note 12, at 53-66; The Connorsware Project, *Censored Internet Access in Utah Public Schools and Libraries*, reprinted in FILTERS & FREEDOM, *supra* note 12, at 1151-52.

sites are narrowly tailored so that few sites are erroneously blocked, the software also will likely permit access to many sexually explicit sites that the library seeks to block. In short, any filtering program designed to block sexually explicit sites will almost certainly prove substantially underinclusive or overinclusive. At the same time, many filtering programs involve blocking sites on the basis of some person's or group's determination that the sites are inappropriate. This, of course, means that highly fact-specific determinations are made on a case-by-case basis—determinations subject to significant hidden biases.

Someone must make substantive decisions about the contents of the public library. At first glance, it may appear that librarians would determine the sites that will be filtered out and set the standards for making such determinations. The locus of decisionmaking power is somewhat more diffuse, and identifying the true locus of decisionmaking power requires consideration of the role of filtering software providers, as well as the elected officials to whom the head librarians report.

Currently, software providers play a large role in deciding which sites patrons may not access using libraries' computers. Almost invariably, private entities make the decisions regarding the methodology used to determine which sites are blocked because they create and design the blocking software.¹⁹² Moreover, such companies often express hesitancy about divulging the methodologies that they have incorporated into the software, or even divulging the particular sites that their software packages block.¹⁹³ Library officials make the initial decision to purchase a particular filtering software from among competing products and could decide to change software at any time. Otherwise, the specific blocking decisions are made by software producers, not library staff, unless library officials retain the power to unblock sites by overriding the filtering software.

Frequently, library officials' decisions regarding filtering software reflect pressure from another source, namely the influence of elected officials expressing either their own concerns or those of their constituents regarding the materials available in publicly funded libraries. It is noteworthy that decisionmaking by elected officials, rather than unelected librarians, troubled the *Pico* plurality.¹⁹⁴ More generally, much of the pressure to remove books, use filters, or prohibit art exhibitions comes not

192. Warren, *supra* note 13, at 56.

193. ACLU, *Is Cyberspace Burning?: How Rating and Blocking Proposals May Torch Free Speech on the Internet*, reprinted in *FILTERS & FREEDOM*, *supra* note 12, at 15; Lessig, *supra* note 137, at 654; Nadel, *supra* note 11, at 1149 n.167; Santiago, *supra* note 12, at 266.

194. Bd. of Educ. v. Pico, 457 U.S. 853, 874-75 (1982). See Tedjeske, *supra* note 137, at 1292.

from professional librarian-curators, but from elected officials seeking to ensure that government resources do not support expressive materials that conflict with community values (or at least the official's conception of those community values). Thus, the pressure for filters in the Loudoun and Boston Public Libraries—the settings of two celebrated filtering controversies—came not from librarians, but from elected officials.¹⁹⁵ The pressure to limit the use of other government-owned computers also originates from elected officials, not lower-level administrators. Thus, the limitation on computer use by university faculty in Oklahoma and the statewide restriction on use of computers by government employees in Virginia began with pressure from elected leaders.¹⁹⁶ The conflict between Mayor Rudolph W. Giuliani and the curators of the Brooklyn Museum with regard to the “Sensations” exhibit provides another dramatic example outside of the library context.¹⁹⁷ Similarly, the attacks on the exhibition of Robert Mapplethorpe's works and the NEA's financial support for such exhibitions came largely from elected officials, rather than professional artists and museum curators.¹⁹⁸

Two values compete for dominance in this and other First Amendment contests: insulation and political accountability. Sometimes the normal political process will produce unsound decisions, either because public officials refuse to pursue the public interest rather than their own divergent electoral interests, or because popular majorities prove insensitive to important interests. Insulating decisionmaking from the influence of elected officials can diminish this democratic pathology. The majority's tendency to undervalue the rights of minorities suggests one reason to adopt such an approach; the electorate establishes governmental institutions to protect those rights. The most obvious example of such an institution is the federal judiciary, which the Constitution insulates from political pressure by granting judges life tenure and salary protection, so judges may determine the rights of private citizens without being influenced either by the interests of elected officials or majoritarian concerns.¹⁹⁹ Similarly, by statute and custom, law enforcement officials

195. Bastian, *supra* note 181.

196. *Loving v. Boren*, 956 F. Supp. 953 (W.D. Okla. 1997); *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000).

197. *Brooklyn Inst. of Arts & Sciences v. City of New York*, 64 F. Supp. 2d 184, 191 (E.D.N.Y. 1999); Heyman, *supra* note 18, at 1194-97.

198. FISS, *supra* note 15, at 29-33 (discussing Helms's Amendment to prohibit the NEA from giving funds to Mapplethorpe and the prosecution of a museum director in Cincinnati under an obscenity statute for displaying Mapplethorpe's work).

199. U.S. CONST. art. III; FEDERALIST No. 78, 470-71 (Alexander Hamilton) (“[The] inflexible and uniform adherence to the rights of the Constitution, and of individuals, . . . can certainly not be expected from judges who hold their offices by a temporary

enjoy considerable insulation from elected officials on both a national and state level. Such insulation frustrates attempts to use law enforcement processes, which have a significant effect upon the lives of individuals, for political purposes, and limits the effect of public passions upon the exercise of law enforcement discretion.²⁰⁰

Professor Mark G. Yudof has made the argument that government speech should receive some insulation. He argues that giving teachers greater independence than other government employees, by granting them tenure, ensures that government's power to indoctrinate primary and secondary school students cannot be used for political gain.²⁰¹ Courts will almost certainly refuse to compel the political branches of government to insulate library professionals so that those professionals may make their decisions regarding public libraries' filtering software absent political pressure. Courts, however, could adopt the less dramatic approach of according special deference to the decisions of library professionals while viewing with skepticism those decisions reflecting exertion of political pressure on library professionals. Indeed, the Court, in a somewhat oblique fashion, has on at least one occasion noted that the importance of colleges and universities in ensuring wide diffusion of knowledge depends on the relative autonomy the faculties have in making hiring and tenure decisions.²⁰² Moreover, scholars have suggested that recent First Amendment cases involving government-funded speech may reflect a view that insulated decisions merit more deference, and many applaud this

commission."); see also JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 290 (1996).

200. GEORGE L. KELLING & CATHERINE M. COLES, FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES 176 (1996) (The capacity of *local government* to shape police discretion is limited by the success of police reformers during the first half of the twentieth century to define virtually any political influence over policy as *corrupt* influence.); GREGORY HOWARD WILLIAMS, THE LAW AND POLITICS OF POLICE DISCRETION 104-07 (1984); Bell, *supra* note 43, at 816. For example, the director of the Federal Bureau of Investigation has a guaranteed ten-year term. Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, § 1101, 82 Stat. 197, 236 (1968), *as amended by* Crime Control Act, Pub. L. No. 94-503, § 203, 90 Stat. 2407, 2427 (1976). Similarly, the New Jersey Attorney General is appointed by the Governor for a fixed five-year term and thus is not removable at the Governor's discretion, insulating the Attorney General from political pressure.

201. Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 876-82 (1979).

202. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985).

Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself. Discretion to determine, on academic grounds, who may be admitted to study, has been described as one of "the four essential freedoms" of a university.

Id. at 226 n.12 (internal citations omitted).

trend.²⁰³ In the public library context, this would suggest that courts focus on whether elected officials or patrons have exerted political influence, rather than whether a librarian has properly exercised discretion, and on whether the library has established and followed routine procedures for identifying sites that patrons cannot access. Decisions in *Pico* and the *American Council of the Blind v. Boorstin*²⁰⁴ suggest that courts might be particularly reticent about upholding politically inspired book-banning or use of Internet-filtering software.

Delegating filtering decisions to private software providers arguably increases the insulation of those decisions from elected officials.²⁰⁵ Delegations of government power to private individuals, however, may be problematic.²⁰⁶ Courts have noted that the federal Constitution and many

203. Schauer, *supra* note 33, at 115 (“These library-specific principles might conclude that this process, when made by a certain cadre of professionals, is constitutionally permissible, but might conclude as well that external influence in this process by non-professionals raises First Amendment problems.”); Rodney A. Smolla, *Freedom of Speech for Libraries and Librarians*, 85 LAW LIBR. J. 71, 73 (1993) (stating that the best hope for combating censorship in public libraries is adoption of a “professionalism principle” under which “decisions concerning the content of speech in institutions such as libraries or art galleries should be insulated from partisan political influence by committing them to the sound discretion of professionals in the field”).

204. 644 F. Supp. 811 (D.D.C. 1986). *American Council of the Blind* involved a challenge by the Library of Congress to discontinue production of Braille editions of *Playboy* magazine. The Library of Congress, through the National Library Service’s Program for the Blind and Physically Handicapped, reproduced books and magazines in Braille and recorded editions for the visually impaired. *Id.* at 813. The National Library Service (“NLS”) staff selected the books and magazines to be reproduced using specific criteria and enlisted advisory committees representing a variety of interests to assist in applying those criteria. *Id.* A member of Congress asked the Library of Congress to discontinue production of *Playboy*, and, after two internal reviews, the Library concluded that the Library could not justify discontinuation of *Playboy* under its criterion. *Id.* The Congressman then succeeded in getting the House to pass an amendment reducing the budget for the Program by the amount of money it took to produce copies of *Playboy*. *Id.* at 813-14. Thereafter, the Librarian of Congress announced that he would discontinue production of Braille copies of *Playboy*. *Id.* at 814. The Court concluded that the program was a non-public forum, *id.* at 815, but that the decision to discontinue *Playboy* was viewpoint-based discrimination, *id.* at 816, the only type of distinction impermissible in the non-public forum. The Court focused on the fact that the Librarian of Congress’s decision overruled his staff, and that the decision resulted from congressional pressure to eliminate a magazine even though it met the selection criteria for the program. *Id.* The Court characterized the context as “emotionally charged.” *Id.*

205. In this context, however, one might not expect that filtering software providers would be particularly attuned to First Amendment issues because the software is for use in households, which are not limited by the First Amendment, as well as in public libraries.

206. Mark S. Nadel, author of one of the leading articles on the constitutionality of Internet-filtering software use by public libraries, takes this position. Nadel, *supra* note 11, at 1146-51 (Granted, Nadel’s primary concern is that delegation to private authorities may frustrate courts’ abilities to enforce the substantive First Amendment principle that viewpoint distinctions may not be made in public fora, by allowing such decisions to be

state constitutions may limit delegations of governmental power to private entities,²⁰⁷ even though several scholars have argued, to the contrary, that both federal and state governments regularly delegate power to private entities without any constitutional challenge.²⁰⁸ Indeed, the federal government has delegated substantial decisionmaking authority to private entities regarding one important public resource—the electromagnetic spectrum.²⁰⁹ The authority granted to broadcasters is particularly striking because the First Amendment insulates broadcasters from government pressure to a certain extent. In this way, broadcasters act as private entities exercising both free speech rights and power over public property delegated to them by the federal government.²¹⁰

Political accountability lives in tension with insulation as a means for furthering constitutional values. Sometimes political accountability and public pressure may well enhance liberty. For example, the Supreme Court relies on the political process to constrain taxation of mass media outlets in a way the judiciary would find difficult to do directly. The Court merely requires that any tax applicable to the media apply broadly to nonmedia entities as well.²¹¹ The Court presumes that broadly applicable taxes are unlikely to impose unnecessarily harsh burdens because the large segments of the public to whom the tax applies will exert political pressure to keep such taxes to a reasonable level.²¹² A similar principle can be discerned in the jurisprudence regarding media access to official proceedings and governmental institutions. The primary protection springs not from a substantive doctrine under which courts identify the specific proceedings

made by private entities not subject to judicial review.) Particularly on the federal level, the conventional view of the delegation doctrine is that it largely limits delegation of “legislative” authority to private entities and groups. *Yakus v. U.S.*, 321 U.S. 414, 424 (1944) (explaining that delegation to Schechter Poultry was invalidated, in part, because “[t]he function of formulating the codes was delegated not to a public official responsible to Congress or the Executive, but to private individuals engaged in the industries to be regulated”); *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495, 537 (1935) (invalidating section 3 of the National Industrial Recovery Act as an unconstitutional delegation of legislative authority).

207. See David M. Lawrence, *Private Exercise of Governmental Power*, 61 *IND. L.J.* 647 (1986).

208. Jody Freeman, *The Private Role in Public Governance*, 75 *N.Y.U. L. REV.* 543 (2000); Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assigning Federal Power to Non-federal Actors*, 50 *RUTGERS L. REV.* 331 (1998); Lawrence, *supra* note 207.

209. *CBS, Inc. v. FCC*, 453 U.S. 367, 394-96 (1981); *CBS, Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 117-18, 121, 125 (1973); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389-90 (1969).

210. *FCC v. League of Women Voters*, 468 U.S. 364, 478 (1984).

211. See *supra* note 187 and accompanying text.

212. See *supra* notes 186-89 and accompanying text.

and institutions open to the press, but rather a requirement that the government treat the press no worse than it would treat the general public. The courts then rely upon the political process to ensure that government carefully considers limiting citizens' rights to gain access to proceedings and institutions.²¹³

One legitimate criticism of the ethos of noninterference with law enforcement rests on the argument that majoritarian influence can, in some instances, enhance liberty.²¹⁴ As long as the electorate seeks to exert influence at the level of broad policies rather than particular situations, the majoritarian process may have a constraining effect on law enforcement. For example, some of the limitations on police officers' authority to engage in intrusive and harmful activities that threaten citizen's life and liberty, such as the use of life-threatening force, the high-speed pursuit of lawbreakers, and the conduct of strip searches when arrestees are placed in detention facilities, have resulted, at least in part, from political pressure.²¹⁵

At times, the Court may require elected officials to make certain decisions because those officials will likely prove more protective of rights than the appointed officials to whom the elected officials have delegated decisionmaking power. For example, in *Hampton v. Mow Sung Wong*,²¹⁶ several resident aliens challenged a regulation barring noncitizens from federal government employment, asserting that the regulation violated the Equal Protection and Due Process Clauses. The Court acknowledged that the federal government's power over aliens is "subject only to narrow judicial review,"²¹⁷ because of "the political character of the power over immigration and naturalization."²¹⁸ The Court also acknowledged that the Civil Service Commission "ha[s] identified several interests which the Congress or the President might deem sufficient to justify the exclusion of non-citizens from the federal service."²¹⁹ Nevertheless, the Court invalidated the provision, reasoning that only Congress or the President could invoke the interests justifying such an exclusion from employment,

213. Bell, *supra* note 43.

214. Herman Goldstein, *Confronting the Complexity of the Police Function, in DISCRETION IN CRIMINAL JUSTICE: THE TENSION BETWEEN INDIVIDUALIZATION AND CONFORMITY* 53 (Lloyd Olin & Frank J. Remington eds., 1993); GREGORY HOWARD WILLIAMS, *THE LAW AND THE POLITICS OF POLICE DISCRETION* 114-22, 139-40 (1984); Bell, *supra* note 43, at 815.

215. Bell, *supra* note 43, at 815 n.320.

216. 426 U.S. 88 (1976).

217. *Id.* at 101 n.21.

218. *Id.* at 101 (citation omitted).

219. *Id.* at 103-04. These interests included the President's use of employment as a bargaining tool in negotiating treaties and encouraging aliens to seek citizenship. *See id.* at 104.

and that the Civil Service Commission could point to no congressional or presidential consideration of the issue.²²⁰ Moreover, the Civil Service Commission's responsibilities did not include the type of foreign affairs and naturalization concerns that could justify such a limitation on employment.²²¹ The Court concluded that:

[s]ince these residents were admitted as a result of decisions made by the Congress and the President, implemented by the Immigration and Naturalization Service acting under the Attorney General of the United States, due process requires that the decision to impose th[e] deprivation of an important liberty interest [in potential federal employment] be made at a comparable level of government or, if it is to be permitted to be made by the Civil Service Commission, that it be justified by reasons which are properly the concern of the agency.²²²

Thus, in an area where substantive constitutional doctrines provided little vindication of constitutional principles²²³ (because the issues involved political questions dedicated to other branches of government), the Court encouraged adherence to those principles by requiring Congress and the President to explicitly consider the need to contravene those principles. Similarly, the Supreme Court views federal agencies' preemption of state law much more skeptically than congressional preemption of state law.²²⁴ Some commentators and jurists have long held the view that the primary protections of state authority lie not in substantive constitutional law, but in the political protections provided by virtue of Congress's composition.²²⁵ Indeed, prior to recent efforts to reinvigorate substantive constitutional limits on congressional power vis-à-vis the states, much of the Supreme

220. *Id.* at 104-14.

221. *See id.* at 104-05, 114-15.

222. *Id.* at 116 (citation omitted).

223. The Court had already held, for instance, that a state cannot ban noncitizens from state employment. *Sugarman v. Dougall*, 413 U.S. 634, 646 (1973). It had also ruled that a state could not preclude noncitizens from admission to the bar. *In re Griffiths*, 413 U.S. 717, 729 (1973).

224. *Hillsborough Cty. v. Automated Medical Labs, Inc.*, 417 U.S. 707, 713, 717, 721 (1985). *See* David A. Herrman, Comment, *To Delegate or Not to Delegate—That Is Preemption: The Lack of Political Accountability in Administrative Preemption Defies Federalism Constraints on Government Power*, 28 *PAC. L.J.* 1157, 1182 (1997).

225. Herbert Weschler long ago suggested the difficulty of crafting neutral principles to cabin Congress's Commerce Clause power. Rather, he maintained, the political processes in which states are fully represented could better protect states than judicially created principles enforced by litigation. *See* Herbert Weschler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *COLUM. L. REV.* 543 (1954); Herbert Weschler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1, 23-24 (1959). Jesse Choper has since expanded the argument. *See* JESSEE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 175-254 (1980); *see also* ERWIN CHEMERINSKY, *INTERPRETING THE CONSTITUTION* 104-05 (1987).

Court's approach to federal-state relations consisted of ensuring that the states' political protections worked effectively by requiring Congress to address federalism issues in a highly visible manner.²²⁶ Agency structure and composition would appear to provide states with substantially less political protection. Courts' reluctance to grant agencies broad authority to interpret statutes in ways that mandate or allow preemption of state law could in part be attributed to a judicial concern that agencies bear much less accountability to states than Congress (and, thus, that the scope of preemption will be far more constrained if Congress must explicitly provide for preemption than if agencies can construe ambiguous statutes as preemptive).²²⁷

This principle would suggest a limitation on delegation of authority to private entities. The kinds of political constraints that cabin public officials' actions do not similarly constrain actions by private entities. Moreover, private entities may use public resources for their own private purposes,²²⁸ and inhibit speech in ways that serve those private purposes, thus posing no less of a threat to First Amendment values than do public actors. Overall, it seems most likely that courts' encouragement of librarians to make decisions about blocked sites will protect libraries' ability to accommodate wide-ranging inquiry. Courts provide such encouragement by giving librarians' judgments greater deference when there is no evidence of political or patron pressure and by requiring libraries to learn filtering software providers' methodology for determining which sites to block. Courts could also require public libraries to retain the power to unblock sites by overriding the filtering software altogether.²²⁹

226. See *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (“[I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress’ Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise.”); see also NOWAK & ROTUNDA, *supra* note 171, § 4.10, at 192-93.

227. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331 (2000).

228. Lawrence, *supra* note 207, at 659-62, 682-87 (Courts are reticent about delegation of governmental power to private persons because of a concern that the delegated governmental power will be used to further the interests of the private actor rather than the public interest, and such a conflict of interest in the decisionmaker can be considered a violation of due process.).

229. Courts, however, cannot expect libraries to act with the independence that other autonomous agencies display, even though the American Library Association urges libraries to resist such pressures. AM. LIBRARY ASS’N POLICY MANUAL, *supra* note 70, ¶ 53.1.1; see also *id.* ¶¶ 53.1, 53.1.15. Libraries, as service agencies, depend to a greater extent on the citizenry than other institutions that exercise some autonomy. For example, police departments have available to them coercive powers and are thus less dependent upon pleasing the citizenry. Moreover, citizens are hardly likely to abolish a police department even if they are dissatisfied with its policies. Similarly, the courts and the Federal Reserve have either coercive powers or regulatory powers that make them much less vulnerable to

Another procedural issue arises primarily because of the fallibility of filters. The First Amendment might grant some leeway to a public library in blocking sites that do not pose the relevant problems, but there must be some way in which patrons can learn which sites are blocked and contest the legitimacy of the blocking. Part of the “delegation” problem, a lack of public accountability, stems from the fact that allowing a library to purchase blocking software without securing the power to remove the block threatens to prevent a patron from getting inappropriate blocks removed.

A private software provider’s decision to design its product to block certain sites may not constitute state action, constrained by the demands of the First Amendment. Moreover, a software provider is not necessarily focused on First Amendment concerns, because households, as well as public libraries, use such software. Heads of households are not subjected to the same First Amendment analysis as public libraries. The courts could hold that blocking decisions should be considered governmental decisions constrained by the First Amendment even when they are made for a public library by private software providers, and thus allow patrons to contest the software provider’s blocking decisions. The courts, however, would then be in the business of addressing questions of the correctness of blocking decisions in the first instance. Requiring libraries to learn the methodologies underlying filtering software and to determine the validity of specific blocking reduces judicial involvement, and, at the same time, places such determinations in the hands of those who can reasonably be expected to make sound decisions.

V. CONCLUSION

Constitutional constraints on public libraries’ installation of Internet filtering software confronts the courts yet again with a dilemma that has long bedeviled the federal judiciary—the precise contours of government power when the government affects popular behavior by the manner in which it expends resources. The traditional approach to resolving this issue, at least with regard to speech on government property, must be reevaluated in the context of public libraries. Libraries represent a unique type of forum heretofore unrecognized by the courts. They are a forum for the receipt of information, not for speaking. Courts must recognize the constitutional implications of this difference, and only when they do so can they properly address the issues raised by Internet access in public libraries.

the displeasure of a substantial portion of the populace.