The public forum doctrine\(^1\) is broken. It is the unruly stepchild of First Amendment jurisprudence; it has no rules, no limits, and it rarely behaves.\(^2\) The doctrine has been unevenly applied by the courts,\(^3\) and it is the subject of much criticism from scholars.\(^4\) The classifications are unclear and poorly
defined at best. Yet, despite all this, the doctrine remains the best option for protecting expressive activity on government property and the go-to doctrine for protecting speech rights when jeopardized by government restriction.

The U.S. Supreme Court has refused to apply the doctrine to expressive activity that occurs in public libraries, though the lower courts have applied the public forum doctrine and found that the right to access information in a public library is a fundamental right protected under the public forum doctrine. It is the subject of this Article to call for a revisit of the Court’s


See, e.g., Rohr, supra note 4, at 300 (“More than twenty-five years after the United States Supreme Court, in Perry Education Ass’n v. Perry Local Educators’ Ass’n, purported to define and elucidate the components of its ‘public forum’ doctrine, the meaning—and legal significance—of the ‘limited public forum’ concept remains startling unclear.”); Ronnie J. Fischer, Comment, “What’s in a Name?”: An Attempt to Resolve the “Analytic Ambiguity” of the Designated and Limited Public Fora, 107 DICK. L. REV. 639, 639–40 (2003) (“As important as these names are, however, even public forum doctrine veterans disagree on the exact nature of these names. The words hardly explain themselves, and can easily mislead interpreters.”).

Dawn C. Nunziato, The Death of the Public Forum in Cyberspace, 20 BERKELEY TECH. L.J. 1115, 1144 (2005) (“This affirmative conception of the First Amendment finds its clearest judicial expression in the development of the public forum doctrine, under which courts impose on the government the affirmative obligation to dedicate certain publicly-held property for the use and benefit of individuals seeking to exercise their free speech rights.”).

Id. at 1147 (“Absent the public forum doctrine, individuals would be restricted to expressing themselves on their own private property or on property owned by others only if they could convince these other property owners to permit such speech on their property.”).


See, e.g., Doe v. Albuquerque, 667 F.3d 1111, 1130 (10th Cir. 2012) (a library is a designated public forum for a limited purpose subject to strict scrutiny); Neinast v. Bd. of Trs. of Columbus Metro. Library, 346 F.3d 585, 591 (6th Cir. 2003) (the library is a limited public forum, a type of designated public forum, subject to strict scrutiny for right to access information); Kreimer v. Bureau of Police, 958 F.2d 1242, 1261 (3d Cir. 1992) (finding the library to be a limited public forum afforded constitutional protection “only to expressive activity of a genre similar to those that government has admitted to the limited forum”) (emphasis in original); Lu v. Hulme, No. 12-11117-MLW, 2013 WL 1331028, at *5 (D. Mass. Mar. 30, 2013) (“A public library is often deemed to be a designated public forum. In a designated public forum, content neutral time, place and manner restrictions on protected First Amendment rights are permissible if ‘they are narrowly tailored to serve a significant
governmental interest, and . . . they leave open ample alternative channels for communication of the information.”) (citations omitted); Spreadbury v. Bitterroot Pub. Library, 862 F. Supp. 2d 1054, 1056 (D. Mont. 2012) (finding “[w]e all have a right to use our public libraries” under a limited public forum analysis); Jaffe v. Baltimore Cnty. Bd. of Library Trs., No. RDB-08-1437, 2009 WL 7083368, at *4 (D. Md. Mar. 25, 2009) (“As a limited public forum, the Defendant must ‘permit the public to exercise rights that are consistent with the nature of the Library and consistent with the government's intent in designating the Library as a public forum.’”) (citations omitted); Tronsen v. Toledo-Lucas Cnty. Pub. Library, No. 3:08CV148, 2008 WL 2622939, at *2 (N.D. Ohio June 30, 2008) (“[T]he right of public access to information is not without limits. Indeed, by its very nature, as a sanctuary for inquiry, study, learning and contemplation, a library is a not an unlimited public forum.”) (citations omitted); Hill v. Derrick, No. 4:05-CV-1229, 2006 WL 1620226, at *6 (M.D. Pa. June 8, 2006) (“Under First Amendment jurisprudence a public library is a limited public forum. Therefore, the Library ‘is obligated only to permit the public to exercise rights that are consistent with the nature of the Library and consistent with the government's intent in designating the Library as a public forum.’ Traditionally, libraries provide a place for ‘reading, writing, and quiet contemplation.’”) (citations omitted); Gay Guardian Newspaper v. Ohoopee Reg’l Library Sys., 235 F. Supp. 2d 1362, 1368 (S.D. Ga. 2002) (“As a limited public forum, ‘the Library is obligated to permit the public to exercise rights that are consistent with the nature of the Library and consistent with the government's intent in designating the Library as a public forum,’ but ‘other activities need not be tolerated.’”) (citations omitted); Armstrong v. D.C. Pub. Library, 154 F. Supp. 2d 67, 75 (D.D.C. 2001) (The library is a limited public forum opened up for the expressive activity of receiving information and ideas; and, there is a strong nexus between that right and the right to access public libraries); Sund v. Wichita Falls, Tex., 121 F.Supp.2d 530, 548 (N.D. Tex. 2000) (“The Wichita Falls Public Library, like all other public libraries, is a limited public forum for purposes of First Amendment analysis . . . . In a limited public forum, the government's ability to restrict patrons’ First Amendment rights is extremely narrow. Thus, the City cannot limit access to library materials solely on the basis of the content of those materials, unless the City can demonstrate that the restriction is necessary to achieve a compelling government interest and there are no less restrictive alternatives for achieving that interest.”) (citations omitted); Mainstream Loudoun v. Bd. of Trs. of Loudon Cnty. Library, 24 F. Supp. 2d 552, 563 (E.D. Va. 1998) (“We find that defendant intended to designate the Loudoun County libraries as public fora for the limited purposes of the expressive activities they provide, including the receipt and communication of information . . . .”); Brinkmeier v. City of Freeport, No. 93 C 20039, 1993 WL 248201, at *4 (N.D. Ill. 1993) (the library is a limited public forum, a sub-category of designated public fora, and subject to narrowly tailored restrictions that serve a significant governmental interest and leave open ample alternative channels for the communication of information).
analysis of the public forum doctrine in the public library, and, more specifically, to revisit the implementation of filtering software on internet access provided by public libraries.

The Supreme Court has labeled the public library as “the quintessential locus of the receipt of information.” The Library Bill of Rights states that “all libraries are forums for information and ideas, and...[l]ibraries should challenge censorship in the fulfillment of their responsibility to provide information and enlightenment.” Yet, today, most Google searches performed in a public library are blocked due to internet filters. Students have complained that websites as innocuous as the San Diego Zoo, webpages as harmless as a map of Canada, and documents as innocent as a “shop manual for 4-wheelers” are all blocked by internet filters in public libraries. The inability to obtain information from a public library is a departure from the historical perception of libraries.

When the Library Bill of Rights was adopted in 1939, a library was a physical building providing support and assistance to the community. In the advent of the internet and the integration of the physical library with a digital catalog, the “forum” of the library is in a fragile state. The concept of the physical building as a safe-harbor for ideas and information has been

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10 See discussion infra Part II.
11 See discussion infra Part II.D.
16 Kreimer, 958 F.2d at 1255.
17 AMERICAN LIBRARY ASSOCIATION, supra note 13.
18 See Neinast v. Bd. of Trs. of Columbus Metro. Library, 346 F.3d 585, 591 (6th Cir. 2003).
challenged. As the library moves into the digital realm, the protections for its content and patrons have become unclear.

The Supreme Court has discussed its views of libraries in a forum and their legally appropriate roles in two plurality opinions. The plurality opinions demonstrate the division of the Court and the difficulty in determining the libraries’ role. As methods of delivery and services for libraries continue to change, the lack of any definition from the Court makes it difficult to determine what rights a patron has when using the internet at a library and how much of their right to view content is protected when using a public computer.

In order to effectively discuss this problem, there must first be a forum analysis of the library. Next, there must be a forum analysis of the internet. Finally, there must be an examination of acceptable and unacceptable content restriction in libraries.

A. The Libraries View of Itself

The Library Bill of Rights states:

The American Library Association affirms that all libraries are forums for information and ideas, and that the following basic policies should guide their services.

I. Books and other library resources should be provided for the interest, information, and enlightenment of all people of the community the library serves. Materials should not be excluded because of the origin, background, or views of those contributing to their creation.

II. Libraries should provide materials and information presenting all points of view on current and historical issues. Materials should not be proscribed or removed because of partisan or doctrinal disapproval.


21 See discussion infra Part II.

22 See discussion infra Part III.

23 See discussion infra Part III.C.
III. Libraries should challenge censorship in the fulfillment of their responsibility to provide information and enlightenment.

IV. Libraries should cooperate with all persons and groups concerned with resisting abridgment of free expression and free access to ideas.

V. A person’s right to use a library should not be denied or abridged because of origin, age, background, or views.

VI. Libraries which make exhibit spaces and meeting rooms available to the public they serve should make such facilities available on an equitable basis, regardless of the beliefs or affiliations of individuals or groups requesting their use.24

The American Library Association’s fundamental policy on intellectual freedom is contained in the phrases above.25 Originally adopted in 1939, the Library Bill of Rights indicates that the library is a forum dedicated to the access of information in multiple formats available to anyone.26 As the Bill has been revised over time, the scope and dedication to access of information has expanded.27 The emphasis is on access to information regardless of viewpoint or format.28 Five of the six articles in the Bill relate to intellectual freedom and censorship;29 in fact, the third article explicitly warns against censorship, stating, “[l]ibraries should challenge censorship in the fulfillment of their responsibility to provide information and enlightenment.”30

This policy is reinforced with the Intellectual Freedom Manual published by the American Library Association (ALA).31 The manual opens with:

24 AMERICAN LIBRARY ASSOCIATION, supra note 13.
25 Id.
26 Id.
28 Id.
29 See AMERICAN LIBRARY ASSOCIATION, supra note 13.
30 Id.
31 AMERICAN LIBRARY ASSOCIATION, supra note 27, at 3.
The First and Fourteenth Amendments to the U.S. Constitution are integral to American librarianship. They are the basis of the concept librarians call intellectual freedom. Intellectual freedom accords all library users the right to seek and receive information on all subjects from all points of view without restriction and without having the subject of one’s interest examined or scrutinized by others.\(^{32}\)

The ALA views itself as an organization dedicated to freedom of expression, allowing patrons to simultaneously send and receive information in protection of constitutional freedoms.\(^{33}\)

In keeping with this philosophy, libraries have embraced new technologies and delivery formats and resisted censorship.\(^{34}\) The position of the ALA is that “[a] democratic society operates best when information flows freely and is freely available, and it is the library’s unique responsibility to provide open, unfettered, and confidential access to that information.”\(^{35}\) This is reiterated in the ALA’s position that libraries should not use filters to block access to constitutionally protected speech on the internet.\(^{36}\)

Coupled with the Library Bill of Rights is the Code of Ethics.\(^{37}\) The purpose of the Code of Ethics is to translate “the values of intellectual freedom that define the profession of librarianship into broad principles that may be used by individual members of that profession as well as by others employed in a library framework for dealing with situations involving

\(^{32}\) American Library Association, supra note 27, at 3.

\(^{33}\) Id. at 73 (“Freedom of expression is an inalienable human right and the foundation for self-government. Freedom of expression encompasses the freedom of speech and the corollary right to receive information. Libraries and librarians protect and promote these rights regardless of the format or technology employed to create and disseminate information.”).

\(^{34}\) See id. at 37–45.

\(^{35}\) Id. at 37.

\(^{36}\) Id. at 39 (“The use of filters in ways that block access to constitutionally protected speech compromises not only these constitutional freedoms but also the core values of librarianship, which support a person’s right to read and hear ideas without limitation and regardless of income, status, or age.”).

\(^{37}\) Id. at 303.
ethical conflicts.” The ALA Code of Ethics, in pertinent part, states, “In a political system grounded in an informed citizenry, [librarians] are

As members of the American Library Association, we recognize the importance of codifying and making known to the profession and to the general public the ethical principles that guide the work of librarians, other professionals providing information services, library trustees and library staffs.

Ethical dilemmas occur when values are in conflict. The American Library Association “Code of Ethics” states the values to which we are committed, and embodies the ethical responsibilities of the profession in this changing information environment.

We significantly influence or control the selection, organization, preservation, and dissemination of information. In a political system grounded in an informed citizenry, we are members of a profession explicitly committed to intellectual freedom and the freedom of access to information. We have a special obligation to ensure the free flow of information and ideas to present and future generations.

The principles of this Code are expressed in broad statements to guide ethical decision making. These statements provide a framework; they cannot and do not dictate conduct to cover particular situations.

I. We provide the highest level of service to all library users through appropriate and usefully organized resources; equitable service policies; equitable access; and accurate, unbiased, and courteous responses to all requests.

II. We uphold the principles of intellectual freedom and resist all efforts to censor library resources.

III. We protect each library user's right to privacy and confidentiality with respect to information sought or received and resources consulted, borrowed, acquired or transmitted.

IV. We respect intellectual property rights and advocate balance between the interests of information users and rights holders.

V. We treat co-workers and other colleagues with respect, fairness, and good faith, and advocate conditions of employment that safeguard the rights and welfare of all employees of our institutions.
members of a profession explicitly committed to intellectual freedom and the freedom of access to information. We have a special obligation to ensure the free flow of information and ideas to present and future generations.\textsuperscript{40}

The Code of Ethics illustrates the librarians’ commitment to the community, reiterates the concern with access to information, and echoes the resistance to censorship found in the Library Bill of Rights.\textsuperscript{41} Three of the eight provisions directly deal with access to information and freedom of information.\textsuperscript{42} The first provision emphasizes equal treatment and “equitable access,” as well as “unbiased” responses to requests.\textsuperscript{43} The second provision states librarians must “uphold the principles of intellectual freedom” and calls for resistance to “all efforts to censor library resources.”\textsuperscript{44} The third asks for “confidentiality with respect to information sought or received,” ensuring a person’s access to information goes unfettered, regardless of the type of information requested.\textsuperscript{45} All eight provisions deal with responsibility to the community in some manner.\textsuperscript{46} This illustrates the balance of a library: a responsibility to the public to uphold community standards and conduct, and, simultaneously, a need to preserve and distribute information while resisting censorship.

\begin{itemize}
\item [VI.] We do not advance private interests at the expense of library users, colleagues, or our employing institutions.
\item [VII.] We distinguish between our personal convictions and professional duties and do not allow our personal beliefs to interfere with fair representation of the aims of our institutions or the provision of access to their information resources.
\item [VIII.] We strive for excellence in the profession by maintaining and enhancing our own knowledge and skills, by encouraging the professional development of co-workers, and by fostering the aspirations of potential members of the profession.
\end{itemize}

\textsuperscript{40} Id.
\textsuperscript{41} See id.
\textsuperscript{42} See id.
\textsuperscript{43} Id.
\textsuperscript{44} Id. at 303.
\textsuperscript{45} Id. at 304.
\textsuperscript{46} See id. at 303–04.
B. Libraries and the Internet

As indicated above, libraries and librarians believe in access to information for their patrons.\(^{47}\) This access comes in the form of the right to receive and produce information, and it exists regardless of the “format or technology employed to create and disseminate information.”\(^{48}\) Libraries believe in empowering patrons by offering opportunities for accessing and sharing information in the broadest range possible.\(^{49}\) This goal has been enhanced by digital technology and access to the internet.

Many libraries have included access to the internet as part of their services provided to their patrons.\(^{50}\) While the internet offers many advantages by increasing information resources and services to a patron, community concerns exist regarding minors and their access to unblocked websites.\(^{51}\) These concerns manifested most prominently in a campaign for the mandated use of internet filtering software in libraries.\(^{52}\) Community activists believed that harms from censorship were irrelevant compared to potential harms to children accessing adult material.\(^{53}\) A string of cases litigated the role of internet filtering software in a public library context.\(^{54}\)

II. Forum Analysis of Libraries

A. Background

While the concept of the public forum is rooted in legal history and ancient tradition, the “public forum” analysis is a relatively new legal

\(^{47}\) Id.

\(^{48}\) Id. at 73.

\(^{49}\) Id.

\(^{50}\) See id.

\(^{51}\) Id. at 75.

\(^{52}\) See id. at 343–44.

\(^{53}\) See id. at 357–58 (balancing the harms from censorship against the potential harms to children accessing adult material).

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used of purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

While the text above illustrates the historical concept of parks and streets as a type of public forum, the term “public forum” in a First Amendment context did not appear in Supreme Court precedent until a dissenting opinion by Justice Marshall in 1972. In 1983, The Supreme Court expanded upon the subject and attempted to elucidate the components of a “public forum” in *Perry Education Ass'n v. Perry Local Educator's Ass'n*. Public forum classifications and distinctions have never been fully developed; while *Perry* attempted to clarify these distinctions, there are still general questions as to the application of the doctrine, and the doctrine has been the subject of much

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57 *Lloyd Corp. v. Tanner*, 407 U.S. 551, 572–73 (1972) (Marshall, J., dissenting) (“The question presented by this case is whether one of the incidents of petitioner's private ownership of the Lloyd Center is the power to exclude certain forms of speech from its property. In other words, we must decide whether ownership of the Center gives petitioner unfettered discretion to determine whether or not it will be used as a public forum.”). *But see* Farber & Nowak, *supra* note 4, at 1221–22, n.15 (finding “public forum” in Supreme Court precedent in a context outside of First Amendment analysis).

criticism.\textsuperscript{59} In \textit{Perry}, the Court established three categories of public property: public forum by tradition;\textsuperscript{60} public forum by designation;\textsuperscript{61} and, nonpublic forum.\textsuperscript{62} This created the framework for forum analysis, which must be performed to determine what restraints to access and what expressive activity is constitutionally permissible.\textsuperscript{63} Depending on the forum designation, there is a spectrum of rights granted to citizens and state limitations that restrict those rights.\textsuperscript{64}

In the first type of forum, the public forum, “the rights of the State to limit expressive activity are sharply circumscribed” due to the long history of being devoted to assembly and debate like a public park or sidewalk.\textsuperscript{65} These forums “are defined by the objective characteristics of the property” like the history and tradition surrounding the use of the property.\textsuperscript{66} These are quintessential public forums, and “the government may not prohibit all communicative activity.”\textsuperscript{67} “[T]raditional public fora are open for expressive activity regardless of the government’s intent.”\textsuperscript{68} “[A] principal purpose of traditional public fora is the free exchange of ideas.”\textsuperscript{69} For a content-based exclusion to be enforced by the State, “it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”\textsuperscript{70} Content-neutral restrictions—in the form of time, place, and manner restrictions—are permissible by the State

\begin{footnotesize}
\begin{itemize}
\item[59]\textit{See Rohr}, supra note 4, at 300; \textit{Day}, supra note 4, at 145; \textit{Farber & Nowak}, supra note 4, at 1223–25; \textit{Massey}, supra note 4, at 309–10; \textit{McGill}, supra note 1, at 938–42.
\item[60]\textit{Perry}, 460 U.S. at 45.
\item[61]\textit{Id.} at 45–46.
\item[62]\textit{Id.} at 46.
\item[63]\textit{Id.} at 45 (“The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place.”).
\item[64]\textit{Id.} at 44–45.
\item[65]\textit{Id.} at 45.
\item[66]\textit{Ark. Educ. Television Com’n v. Forbes}, 523 U.S. 666, 678 (1998). \textit{But see United States v. Kokinda}, 497 U.S. 720, 727 (1990) (“The mere physical characteristics of the property cannot dictate forum analysis.” Here the Supreme Court held that a postal sidewalk was not a public forum because “[i]t does not have the characteristics of public sidewalks traditionally open to expressive activity,” and the Postal Service did not expressly dedicate its sidewalks to expressive activity.).
\item[67]\textit{Perry}, 460 U.S. at 45.
\item[68]\textit{Forbes}, 523 U.S. at 678.
\item[70]\textit{Perry}, 460 U.S. at 45.
\end{itemize}
\end{footnotesize}
as long as they are “narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”71

The second forum, a designated public forum, is a public place that the State has opened up for expressive activity.72 The State must actively open up a designated public forum—“[T]he government does not create a public forum by inaction.”73 The State is forbidden to prohibit certain expressive activity “from a forum generally open to the public even if [the State] was not required to create the forum in the first place.”74 Unlike a traditional public forum, the “State is not required to indefinitely retain the open character” of the designated forum; but, “is bound by the same standards as apply in a traditional public forum” as long as the forum remains open.75 The Court will look to the policy and practice of the government to determine where a designated public forum has been created by looking at: “(1) the purpose of the forum; (2) the extent of use of the forum; and (3) the government’s intent in creating a designated public forum.”76 The State is subject to the same narrowly tailored, content-neutral restrictions of time, place, and manner that apply to a traditional public forum.77

Within the second forum, the designated public forum, is a sub-category designated by the Supreme Court as a “limited public forum.”78 A limited public forum occurs when the State “opens a nonpublic forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects.”79 In a limited public forum, “constitutional protection is afforded only to expressive activity of a genre similar to those that [the] government has admitted to the limited forum.”80 Therefore, the “government [may]

71 Id.
72 Id.
74 Perry, 460 U.S. at 45.
75 Id. at 46.
77 Perry, 460 U.S. at 46.
80 Id.
impose a blanket exclusion on certain types of speech.\(^{81}\) Once certain speech is allowed in, “it may not selectively deny access for other activities of that genre.”\(^{82}\) The Supreme Court has deemed this “confining a forum to the limited and legitimate purposes for which it was created . . . reserving it for certain groups or for the discussion of certain topics.”\(^{83}\) Here, the State may engage in content discrimination, meaning certain subjects may be excluded, but it may not engage in viewpoint discrimination.\(^{84}\) In a limited public forum, “[restrictions on expressive activity] must not discriminate against speech on the basis of viewpoint, and the restriction must be ‘reasonable in light of the purpose served by the forum.’”\(^{85}\)

The third forum, the nonpublic forum, is public property that is not by tradition or designation a forum for public communication.\(^{86}\) “Where the property is not a traditional public forum and the government has not chosen to create a designated public forum, the property is either a nonpublic forum or not a forum at all.”\(^{87}\) Along with time, place, and manner restrictions, the State may reserve the forum for its intended purposes so long as the regulation is reasonable and viewpoint neutral.\(^{88}\) The State may not suppress expression merely because public officials oppose the speaker’s view.\(^{89}\) However, the property may be reserved for the use in which it is lawfully intended, necessarily including content-based restrictions.\(^{90}\)

The First Amendment does not require equivalent access to all parts of a building in which expressive activity occurs.\(^{91}\) Within the same building, there may be multiple fora, depending on the access sought by the speaker and the government’s use of the building.\(^{92}\) In many instances, the forum may depend on the access sought by the speaker.\(^{93}\) When speakers seek general access to public property, the forum comprises the entire property.\(^{94}\)

\(^{81}\) Id.
\(^{82}\) Id.
\(^{84}\) Id. at 829–30.
\(^{86}\) Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 46 (1983).
\(^{88}\) Perry, 460 U.S. at 46.
\(^{89}\) Id.
\(^{90}\) Id.
\(^{91}\) Id. at 44.
\(^{92}\) Id.
\(^{94}\) Id.
Where limited access is sought, the perimeter of the forum must be ascertained within the confines of the governmental property. This analysis is used in a public library context and will be discussed later in the paper.

B. Brown v. Louisiana

During the Civil Rights Movement, the Supreme Court was confronted with four cases dealing with convictions of African-Americans for violating Louisiana’s breach of the peace statute. In all four cases, the Court found that the demonstration was orderly; the purpose of the demonstrations was to protest the denial of equal rights guaranteed by the State and to petition the government for a redress of grievances. Brown was the last of these cases and the only case involving libraries. The Supreme Court held that a public library may be a public forum, and, under certain circumstances, may be used as a stage for political expression. Brown was decided in 1966, before the Supreme Court adopted forum analysis. While the Court did not specifically label the library a public forum, the Court described the library conceptually as a public forum.

In Brown v. Louisiana, the Court confronted the appropriate role of a library when First Amendment speech rights are challenged. The Court did not agree upon an opinion, releasing a plurality opinion.

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95 Id.
97 Brown, 383 U.S. at 133–35.
98 Id. at 131.
99 Id. at 142 (Fortas, J., plurality).
102 Brown, 383 U.S. at 135 (Fortas, J., plurality).
104 Id. (Fortas, J., plurality).
105 Id. at 133 (Fortas, J. plurality).
concurring opinions, and a dissenting opinion reflecting a deeply divided Court.

1. Facts

On Saturday, March 7, 1964, at approximately 11:30 a.m., five young African-American males went into a segregated adult reading room reserved for “white” patrons in the Audubon Regional Library in Clinton, Louisiana. Henry Brown requested a book, *The Story of the Negro*. He was informed by the librarian that the library did not have the book; the librarian said she would request it from the state library, and he could either pick up the book upon its arrival at a blue bookmobile reserved for “Negroes” or have it mailed to him. She then asked Brown and his companions to leave the library, but instead, they remained in the reading room. The men were asked to leave by a second librarian, and again the men remained in the reading room. The five men said nothing and made no noise while at the library. Ten to fifteen minutes later, the sheriff and deputies arrived and asked the men to leave. They again refused and were arrested on the Louisiana breach of the peace statute. The library mailed the requested book to Brown on March 28, 1964 with an accompanying card stating, “You may return the book either by mail or to the Blue Bookmobile.” The implication of the card was that he may not return to the segregated library and may only use the bookmobile reserved for African-Americans.

The text of the applicable Louisiana breach of the peace statute reads:

> Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby: (1) crowds or congregates with others . . . in . . . a . . . public place or building . . . and who fails or refuses to disperse and move on, or disperse or move

106 Id. at 143 (Brennan, J., concurring), 150 (White, J., concurring).
107 Id. at 151.
108 Id. at 136.
109 Id.
110 Id.
111 Id.
112 Id. at 137.
113 Id. at 136.
114 Id. at 137.
115 Id.
116 Id.
on, when ordered to do so by any law enforcement
officer . . . or any other authorized person . . . shall be guilty
of disturbing the peace.\textsuperscript{117}

2. \textit{The Plurality Opinion (Justice Fortas, Chief Justice Warren, and
Justice Douglas)}

In the plurality opinion, written by Justice Fortas, the Court was clear
that, “petitioners’ presence in the library was unquestionably lawful. It was
a public facility, open to the public. Negroes could not be denied access
since white persons were welcome. Petitioner’s deportment while in the
library was unexceptionable. They were neither loud, boisterous,
obstreperous, indecorous nor impolite.”\textsuperscript{118} This illustrates a view of the
library consistent with a designated public forum because the government
actively opened up a designated space for expressive activity.\textsuperscript{119}

The Court goes on to categorize the “sit-in” as an exercise in a “basic
constitutional right—the right under the First and Fourteenth Amendments
guaranteeing freedom of speech and of assembly, and freedom to petition
the Government for a redress of grievances.”\textsuperscript{120} Again, this classification is
consistent with a designated public forum subject to content-neutral
restrictions on time, place, and manner that are narrowly tailored to serve a
significant government interest, leaving open alternative channels of
communication.\textsuperscript{121} Here, the Court deemed the restriction on peaceful
assembly by African-Americans in a public library to be a violation of First
Amendment rights because, effectively, it was an inappropriate time, place,
and manner restriction in a public forum.\textsuperscript{122} The Court also discusses the
Louisiana breach of the peace statute, which was determined to “deliberately
and purposefully [apply] solely to terminate the reasonable, orderly, and
limited exercise of the right to protest the unconstitutional segregation of a

\textsuperscript{117} \textit{Id.} at 138 (quoting La. Rev. Stat. § 14:103.1 (Cum Supp. 1962)).

\textsuperscript{118} \textit{Id.} at 139.

\textsuperscript{119} \textit{See} Ark. Educ. Television Com’n v. Forbes, 523 U.S. 666, 667 (1998); Cornelius v.
Local Educator’s Ass’n, 460 U.S. 37, 45 (1983).

\textsuperscript{120} \textit{Brown}, 383 U.S. at 141.

\textsuperscript{121} \textit{See Perry}, 460 U.S. at 45.

\textsuperscript{122} \textit{See Brown}, 383 U.S. at 141–42 (1966) (“As this Court has repeatedly stated, these
[First Amendment] rights are not confined to verbal expression. They embrace appropriate
types of action which certainly include the right in a peaceable and orderly manner to protest
by silent and reproachful presence, in a place where the protestant has every right to be, the
unconstitutional segregation of public facilities.”).
public facility. Interference with this right, so exercised by state action is intolerable under our Constitution."\textsuperscript{123} This classification of the statute shows that it was not narrowly tailored to serve a significant government interest consistent with public forum analysis.\textsuperscript{124} The Court goes on to state:

\textit{Fortunately, the circumstances here were such that no claim can be made that use of the library by others was disturbed by the demonstration. \textit{Perhaps the time and method were carefully chosen with this in mind}. Were it otherwise, a factor not present in this case would have to be considered. Here, \textit{there was no disturbance of others, no disruption of the library activities, and no violation of any library regulations}.\textsuperscript{125}

With this statement, the Court holds that expressive activity permitted in a designated public forum cannot be prohibited in a public library as long as the conduct is consistent with library practices and consistent with a use of the library occurring at an appropriate time, in an appropriate manner, and without disturbance to library activities.\textsuperscript{126}

A related discussion is the Equal Protection argument that occurred in the case.\textsuperscript{127} While it is the purpose of this Article to discuss how the classification of the library is consistent with a designated public forum analysis, the argument remains that even if the library was private property, the African-American men would not have been guaranteed service by the librarian under the law because the library was open for service to white patrons. The Supreme Court addresses similar arguments under the Louisiana breach of the peace statute in \textit{Garner v. State of Louisiana}.\textsuperscript{128} There, the Court addressed whether or not a "sit-in" at a lunch counter

\begin{itemize}
\item \textsuperscript{123} \textit{Id.} at 142.
\item \textsuperscript{124} \textit{Id.} at 142.
\item \textsuperscript{125} \textit{Id.} at 142 (emphasis added).
\item \textsuperscript{126} See \textit{Perry}, 460 U.S. at 46. While discussing a designated forum:

\textit{Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.}

\textit{Id.}
\item \textsuperscript{127} See \textit{id.} at 54.
\end{itemize}
catering to white customers was a violation of the Louisiana breach of the peace statute.\textsuperscript{129} Ultimately, the Court held that the lower court’s convictions reflect “racially discriminatory administration of State criminal laws in contravention of the Equal Protection Clause of the Fourteenth Amendment.”\textsuperscript{130} While the Court may have reached a similar conclusion in \textit{Brown} based on Equal Protection without regard to the forum of the facility, the Court’s discussion and classification of the library was consistent with a designated public forum and as a traditional public forum in Justice Black’s dissenting opinion.\textsuperscript{131}

3. \textit{Justice Brennan’s Concurring Opinion}

In his concurring opinion, Justice Brennan challenged the constitutionality of the Louisiana state statute for being overly broad.\textsuperscript{132} Because the statute is considered invalid because it facially violates the First Amendment, the question of the forum in which the conduct occurred is not reached or analyzed.\textsuperscript{133} Justice Brennan draws a distinction from Justice Fortas’ opinion by stating:

\begin{quote}
Since the overbreadth of § 14:103.1 as construed clearly requires the reversal of these convictions, it is wholly unnecessary to reach, let alone rest reversal, as the prevailing opinion seems to do, on the proposition that even
\end{quote}

\textsuperscript{129} \textit{Id.} at 157.

\textsuperscript{130} \textit{Id.} at 162–63.

\textsuperscript{131} See \textit{Brown v. Louisiana}, 383 U.S. 131, 166–67 (Black, J., dissenting).

\textsuperscript{132} \textit{Id.} at 143 (Brennan, J., concurring).

\textsuperscript{133} \textit{Id.} at 146–47.

The danger posed by the Louisiana courts’ definition of “breach of the peace”—that it might sweep within its broad scope activities that are constitutionally protected—is no less present when read in conjunction with “public building” than when read with “public street” and “public sidewalk.” The constitutional protection for conduct in a public building undertaken to desegregate governmental services provided therein derives both from the First Amendment guarantees of freedom of speech, petition and assembly, and the Equal Protection Clause’s prohibition against racial segregation of governmental services and facilities. Overbreadth in the public building phase might inhibit the exercise of these constitutional rights by threatening punishment of the initial efforts to secure such desegregation.

\textit{Id.}
a narrowly drawn “statute cannot constitutionally be applied to punish petitioners’ actions in the circumstances of this case.”\textsuperscript{134}

4. Justice White’s Concurring Opinion

Justice White’s opinion focuses on the Equal Protection violation.\textsuperscript{135} He states that the conduct of the petitioners did not depart from the “common practice of library users”\textsuperscript{136} Even though the petitioners’ conduct “was for the purposes of a demonstration, [it] did not depart significantly from what normal library use would contemplate.”\textsuperscript{137} Finally, Justice White states that “it is difficult to avoid the conclusion that petitioners were asked to leave the library because they were Negroes . . . . [T]heir convictions deny them equal protection under the laws.”\textsuperscript{138}

5. Justice Black’s Dissenting Opinion (joined by Justice Clark, Justice Harlan, and Justice Stewart)

In a lengthy dissenting opinion, Justice Black articulated several reasons why the petitioners’ convictions should have been affirmed.\textsuperscript{139} In his opinion, it was “incomprehensible . . . that a State must measure disturbances in its libraries and on the streets with identical standards.”\textsuperscript{140} While the library was not discussed in a forum context, Justice Black was clear in his view that a library should not be treated as a public forum.\textsuperscript{141} He equated libraries with “beauty” and stated that libraries were not to be used for protest or expressive activity.\textsuperscript{142} Justice Black believed that the State has every right to regulate conduct within the walls of the library.\textsuperscript{143} He felt that the conduct of the petitioners disrupted the normal functioning of the library consistent with the breach of the peace statute.\textsuperscript{144} He believed that the prevailing opinion had gone too far, stating:

\begin{footnotes}
\item[134] Id. at 149–50.
\item[135] Id. at 151 (White, J., concurring).
\item[136] Id. at 150.
\item[137] Id. at 151.
\item[138] Id.
\item[139] See id. at 151–68 (Black, J., dissenting).
\item[140] Id. at 157.
\item[141] Id.
\item[142] Id. at 167.
\item[143] Id. at 160
\item[144] Id.
\end{footnotes}
This conclusion [of the prevailing opinion] appears to be based on the assumption that under the Louisiana statute properly construed, there can be no conviction unless persons who do not want library service stay there an unusually long time after being ordered to leave, make a big noise, use some bad language, engage in fighting, try to provoke a fight, or in some other way become boisterous. The argument seems to be that without a blatant, loud manifestation of aggressive hostility or an exceedingly long “sit-in” or “sojourn” in a public library, there are no circumstances which could foreseeably occasion a breach of the peace.\textsuperscript{145}

Justice Black believed the conduct of the petitioners far exceeded the scope of acceptable behavior in a library, implying that the plurality opinion gave a “group of persons the constitutional right to go wherever they want, whenever they please, without regard to the rights of private or public property or to state law.”\textsuperscript{146}

6. Conclusion

After \textit{Brown}, the question became whether or not the library could still properly be called a limited public forum. The “limited public forum” is a subsection of the “designated public forum.” If the library is a limited public forum, as some lower courts have held\textsuperscript{147} (and as the Supreme Court later stated in \textit{dicta}\textsuperscript{148}), then it is a designated public forum only for the purposes of the expressive activity for which the library has been specifically opened for.\textsuperscript{149} Lower courts have determined that the specific activity a public library has been opened for is access to information—the communication of the written word.\textsuperscript{150} That makes the library a designated public forum only for accessing information, meaning the library is subject to the same strict scrutiny test while its patrons do so. Any restriction on information access in the library must be content-neutral in the form of time, place, and manner,

\begin{footnotes}
\footnote{145} Id. at 161–62.
\footnote{146} Id. at 166.
\footnote{147} Kreimer v. Bureau of Police for Morristown, 958 F. 2d 1242, 1259 (3d Cir. 1992).
\footnote{148} \textit{See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.,} 473 U.S. 788, 815 (1985) (classifying \textit{Brown} as a case constructing the public forum doctrine giving an individual or group the right to engage in expressive activity on government property).
\footnote{149} Id. at 813 (Blackmun, J., dissenting) (summarizing the majority’s conclusions).
\footnote{150} Doe v. City of Albuquerque, 667 F.3d 1111, 1129 (10th Cir. 2012).
\end{footnotes}
and restrictions must be narrowly tailored to serve a significant
governmental interest and leave ample alternative channels for accessing
information.\textsuperscript{151} Other restrictions to expressive activity—like those related
to spoken words, assembly, or petition—are subject to reasonable,
viewpoint-neutral restrictions to keep the function of the library forum
intact.\textsuperscript{152}

\textit{Brown} was the first case to look at the library as a forum for expressive
activity. The plurality opinion has been cited to prove both that a library is a
public forum and that the library is a designated public forum.\textsuperscript{153} Because
courts often position themselves between these two terms, confusion exists

\begin{itemize}
\item \textsuperscript{151} Id. at 1116 (“[E]ven in a public forum the government may impose reasonable
restrictions on the time, place, or manner of protected speech, provided the restrictions are
justified without reference to the content of the regulated speech, that they are narrowly
tailored to serve a governmental interest, and that they leave open ample alternative channels
for communication of the information.”) (citing Ward v. Rock Against Racism, 491 U.S. 781,
791 (1989)).
\item \textsuperscript{152} Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 46 (1983).
\item \textsuperscript{153} City of Albuquerque, 667 F.3d at 1129 (“That the government opens up a library to
the public to engage in myriad ways to receive information suggests that a library constitutes
a designated public forum.”); U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns, 453
U.S. 114, 137–38 (1981) (“Our cases have recognized generally that public properties are
appropriate fora for exercise of First Amendment rights.”); Cnty. Hills Christian Church v.
Unified Sch. Dist. No. 512, 560 F. Supp. 1207, 1214 (1983) (“A public library may be a
public forum . . . .”); United Mine Workers of Am. Int’l Union by Trumka v. Parsons, 305
S.E.2d 343, 350 (W. Va. 1983) (“Places which have been held by the United States Supreme
Court to constitute public forums include: streets, parks, and sidewalks; statehouse grounds;
a public library; a military reservation; a municipal theater; a school board meeting; university
meeting facilities; and public sidewalks forming the perimeter of the United States Supreme
Court grounds.”) (citations omitted); Spartacus Youth League v. Bd. of Trs., 502 F. Supp.
789, 798 (N.D. Ill. 1980) (“Other public areas, such as a bus terminal, welfare office, and a
public library have also been characterized as public forums for First Amendment purposes.”)
(citations omitted); E. Conn. Citizens Action Grp. v. Powers, 723 F.2d 1050, 1054 (2d Cir.
1983) (showing that public libraries have been found to serve “a function akin to streets and
parks as an area for discussion”) (citations omitted); Muir v. Ala. Educ. Television Comm’n,
688 F.2d 1033, 1042 n.24 (Former 5th Cir. 1982) (“The nature of facilities held to constitute
public forums may be gleaned from the cases: municipal auditoriums; bus terminals; airports;
high school auditoriums; public libraries; shopping centers; and welfare offices.”) (citations
omitted).
\end{itemize}
amongst the lower court and, at times, even the Supreme Court.\textsuperscript{154} Based on later precedent discussed below,\textsuperscript{155} it appears that the library is a public forum for certain types of expressive activity.\textsuperscript{156} Because the library is not a sidewalk, park, or “quintessential public forum,” it is most likely a designated public forum, leaving it subject to the same First Amendment strict scrutiny as a public forum. A four-part test must be used to determine whether or not the limitations of expressive activity by the government are constitutional: (1) the regulation must be narrowly tailored; (2) to serve a significant governmental interest; (3) leaving open ample alternative channels for expressive activity; and (4) time, place, and manner restrictions must be content-neutral.\textsuperscript{157}

\textbf{C. Public Forum Decisions Regarding Libraries Since Brown}

\textbf{1. Kreimer v. Bureau of Police for the Town of Morrison}\textsuperscript{158}

In \textit{Kreimer}, the Third Circuit Court of Appeals was forced to resolve questions concerning the breadth of a public library’s authority to enforce regulations governing the use of the building and facilities.\textsuperscript{159} Richard Kreimer, a frequent library patron, was a homeless man banned from the Morristown, New Jersey Public Library for disrupting patrons with his behavior and personal hygiene—both of which were offensive to patrons and distracting to library staff trying to perform their duties.\textsuperscript{160} The library had written rules outlining permitted uses of the library and expected behavior, included: “[p]atrons be engaged in normal activities . . . reading, studying, or using library materials”; “[p]atrons shall respect the rights of other patrons and shall not annoy others through noisy or boisterous activities”; and “[p]atron dress and personal hygiene shall conform to the standard of the community for public places.”\textsuperscript{161} Kreimer claimed that he had a First Amendment right to “receive information and ideas” and

\begin{itemize}
  \item \textsuperscript{154} Rohr, \textit{supra} note 4, at 300; see Summun v. Callaghan, 130 F.3d 906, 914–16 (10th Cir. 1997) (describing inconsistent use of the terms “designated public forum” and “limited public forum”).
  \item \textsuperscript{155} See discussion \textit{infra} Part II.C.
  \item \textsuperscript{156} Although, there is an argument that the library should be classified as a traditional public fora. See John N. Gathegi, \textit{The Library as a Public Forum: The (De)Evolution of a Legal Doctrine}, 75 \textit{The Library Q.} 1, 2 (2005).
  \item \textsuperscript{157} See \textit{Perry}, 460 U.S. at 46.
  \item \textsuperscript{158} Kreimer v. Bureau of Police, 958 F.2d 1242 (3rd Cir. 1992).
  \item \textsuperscript{159} \textit{Id.} at 1242.
  \item \textsuperscript{160} \textit{Id.} at 1247.
  \item \textsuperscript{161} \textit{Id.}
recognized the public library as promoting that right.\textsuperscript{162} The library claimed that First Amendment analysis was inapplicable to the facts at hand, stating the right to receive information had only been found in “content-based censorship.”\textsuperscript{163} The Third Circuit found that the First Amendment “like other constitutional guarantees, encompassed the ‘penumbral’ right to receive information to ensure its fullest exercise.”\textsuperscript{164} The court further stated, “[The First Amendment] includes the right to some level of access to a public library, the quintessential locus of the receipt of information.”\textsuperscript{165}

After the Third Circuit recognized this First Amendment right and the role that the public library plays in the receipt of information, the court engaged in a forum discussion of the public library.\textsuperscript{166} Relying on \textit{Perry}, the court stated:

\begin{quote}
It is clear to us that a public library, albeit the ‘quintessential’ locus for the exercise of the right to receive information and ideas, is sufficiently dissimilar to a public park, sidewalk or street that it cannot reasonably be deemed to constitute a traditional public forum. Obviously, a library patron cannot be permitted to engage in most traditional First Amendment activities in the library, such as giving speeches or engaging in any other conduct that would disrupt the quiet and peaceful library environment.\textsuperscript{167}
\end{quote}

After concluding that the library was not a traditional public forum, the court went on to determine the type of forum of the library.\textsuperscript{168} The court acknowledged that the government, the Town of Morristown, “intended to open a non-traditional forum for expressive activity.”\textsuperscript{169} The court determined that the government intended to create a forum for a certain kind of expressive activity, “namely ‘the communication of the written word.’”\textsuperscript{170}

The library’s rules make clear that the library is open for only the specified purposes of reading, studying, and using library materials; and, therefore the library has not opened its doors for all First Amendment

\textsuperscript{162} \textit{Id.} at 1251.
\textsuperscript{163} \textit{Id.}
\textsuperscript{164} \textit{Id.} at 1252.
\textsuperscript{165} \textit{Id.} at 1255.
\textsuperscript{166} \textit{Id.}
\textsuperscript{167} \textit{Id.} at 1256.
\textsuperscript{168} \textit{Id.}
\textsuperscript{169} \textit{Id.} at 1259.
\textsuperscript{170} \textit{Id.}
Finding the purpose of the library is to acquire knowledge through reading, writing, and quiet contemplation, the court determined that the library was a limited public forum. Because the library is a forum suited for quiet contemplation and not opened up for oral First Amendment rights, the library is afforded constitutional protection “only to expressive activity of a genre similar to those that government has admitted to the limited forum.”

Essentially, the library is a public forum for access to information; but, the library must specifically authorize other forms of expressive activity protected by the First Amendment. Under Kreimer, expressive activity, and behavior, may be limited by the library under a strict scrutiny analysis that applies to the fundamental right of access to information. Kreimer has since been expanded upon, and many lower courts have adopted the Kreimer analysis applying a strict scrutiny analysis to a patron’s right to access information.

2. Problems with the Limited Public Forum Doctrine and Cases that Adopt Kreimer

There have been inconsistencies in the way in which the test for a limited public forum is used. Recently, there has been a shift in the Supreme Court’s interpretation of “limited public forum” creating two separate tests under the

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171 Id. at 1260.
172 Id. at 1261.
173 Id. (quoting Travis v. Owego-Apalachin School Dist., 927 F.2d 688, 692 (2d Cir. 1991)).
174 Kreimer, 958 F.2d at 1259, 1262.
same classification. In *Widmar v. Vincent*, the Supreme Court held that the University created a “limited public forum”, but applied the strict scrutiny test, also known as the test for the public forum. The Court stated:

In order to justify discriminatory exclusion from a public forum based on the religious content of the group’s speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.

Therefore, in *Widmar*, the term limited public forum was used to carve out a sub-category of the designated public forum doctrine, where the strict scrutiny test applies to the expressive activity that the forum has been specifically opened up to accommodate.

In additional cases, however, the Supreme Court has applied a “reasonableness test” to the “limited public forum” making it a sub-category of the non-public forum. In *Rosenberger*, the Court held the state university created a “limited public forum” by allowing a variety of registered student groups to access a student activities fund. The Court applied a reasonableness test to the University’s decision to exclude a

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176 See generally Rosenberger v. Rector & Visitors, 515 U.S. 819, 893 (1995) (a limited public forum, subject to the reasonableness test, was created when a variety of student groups were allowed to access a student fund); Lamb’s Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 390 (1993) (a limited public forum that did not rise to the level of a designated public forum was created when various private organizations were allowed to access a public school’s property); United States v. Kokinda, 497 U.S. 720, 721 (1990) (stating that a postal sidewalk was a non-public forum, as opposed to a designated forum, even though it had been opened up to some expressive activity); Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 805–06 (1985) (articulating the distinctions in forum classifications); Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45–46 (1983) (defining three types of fora: public forum, designated public forum, and non-public forum); Widmar v. Vincent, 454 U.S. 263, 269 (1981) (a limited public forum, subject to strict scrutiny, was created when a university opened up its facilities to student groups).

177 Id. at 269–70.

178 Id.

179 Id.


182 Id. at 830.
Christian student news publication from receiving money from the fund, in contrast to the *Widmar* analysis.\(^{183}\) The reasonableness test was again applied to a “limited public forum” by the Supreme Court in *Lamb’s Chapel*,\(^{184}\) where a school district allowed various private organizations access to the school and a church was excluded from showing a film on school property.\(^{185}\) Looking at both the *Lamb’s Chapel* and *Rosenberger* decision, it appears that the term “limited public forum” is applied to a non-public forum that have not been sufficiently opened up to become a designated public forum therefore making it more akin to a non-public forum than a public forum.\(^{186}\) In *Christian Legal Society*,\(^{187}\) the Court stated:

> [G]overnmental entities create designated public forums when government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose”; speech restrictions in such a forum “are subject to the same strict scrutiny as restrictions in a traditional public forum. . . . [G]overnmental entities establish limited public forums by opening property limited to use by certain groups or dedicated solely to the discussion of certain subjects. . . . [I]n such a forum, a governmental entity may impose restrictions on speech that are reasonable and viewpoint-neutral.\(^{188}\)

The statement above further shows the inconsistency applied by the Supreme Court; simultaneously showing the recent trend to treat “designated public fora for a limited purpose” separate and distinct from “limited public fora.” This inconsistency by the Court has created much confusion in the lower courts in the correct test for the “limited public forum.”\(^{189}\)

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\(^{183}\) Id. at 829–30; *Widmar*, 454 U.S. at 269–70.

\(^{184}\) *Lamb’s Chapel*, 508 U.S. at 392–93.

\(^{185}\) Id. at 390.

\(^{186}\) See *Rosenberger*, 515 U.S. at 829–30); *Lamb’s Chapel*, 508 U.S. at 392–93 (“With respect to public property that is not a designated public forum open for indiscriminate public use for communicative purposes, we have said that ‘control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.’” (quoting *Cornelius*, 473 U.S. at 806)).


\(^{188}\) Id.

\(^{189}\) See cases cited infra note 191.
While many cases have adopted *Kreimer*, the lower courts have used the terms “designated public forum for a limited purpose” and “limited public forum” interchangeably, but have all applied strict scrutiny to the right to access information in a public library. As recently as 2012, the Tenth Circuit found the library to be a designated public fora and noted:

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190 See cases cited infra note 191.

191 See, e.g., Doe v. City of Albuquerque, 667 F.3d 1111, 1130–31 (10th Cir. 2012) (a library is a designated public forum for a limited purpose subject to strict scrutiny); Neinast v. Board of Trs., 346 F.3d 585, 591 (6th Cir. 2003) (the library is a limited public forum, a type of designated public forum, subject to strict scrutiny for right to access information); Lu v. Hulme, No. 12-11117-MLW, 2013 WL 1331028, at *5 (D. Mass. Mar. 30, 2013) (“A public library is often deemed to be a designated public forum. In a designated public forum, content neutral time, place and manner restrictions on protected First Amendment rights are permissible if they are narrowly tailored to serve a significant governmental interest, and . . . they leave open ample alternative channels for communication of the information.”) (citations omitted); Spreadbury v. Bitterroot Pub. Library, 862 F. Supp. 2d 1054, 1056 (D. Mont. 2012) (finding “we all have a right to use our public libraries” under a limited public forum analysis); Jaffe v. Baltimore Cnty Bd., No. RDB-08-1437, 2009 WL 7083368, at *4 (D. Md. Mar. 25, 2009) (“As a limited public forum, the Defendant must permit the public to exercise rights that are consistent with the nature of the Library and consistent with the government's intent in designating the Library as a public forum.”) (citations omitted); Tronsen v. Toledo-Lucas Cnty. Pub. Library, No. 3:08CV148, 2008 WL 2622939, at *2 (N.D. Ohio June 30, 2008) (“[T]he right of public access to information is not without limits. Indeed, by its very nature, as a sanctuary for inquiry, study, learning and contemplation, a library is a not an unlimited public forum.”) (citations omitted); Hill v. Derrick, No. 4:05-CV-1229, 2006 WL 1620226, at *6 (M.D. Pa. June 8, 2006) (“Under First Amendment jurisprudence a public library is a limited public forum. Therefore, the Library is obligated only to permit the public to exercise rights that are consistent with the nature of the Library and consistent with the government's intent in designating the Library as a public forum. Traditionally, libraries provide a place for ‘reading, writing, and quiet contemplation.’”) (citations omitted); Gay Guardian Newspaper v. Ohooppe Reg’l Library Sys., 235 F. Supp. 2d 1362, 1368 (S.D. Ga. 2002) (“As a limited public forum, the Library is obligated to permit the public to exercise rights that are consistent with the nature of the Library and consistent with the government's intent in designating the Library as a public forum, but other activities need not be tolerated.”) (citations omitted); Armstrong v. D.C. Pub. Library, 154 F. Supp. 2d 67, 75 (D.D.C. 2001) (The library is a limited public forum opened up for the expressive activity of receiving information and ideas; and, there is a strong nexus between that right and the right to access public libraries.); Sund v. City of Wichita Falls, 121 F. Supp. 2d 530, 548 (N.D. Tex. 2000) (“The Wichita Falls Public Library, like all other public libraries, is a limited public forum for purposes of First Amendment analysis. . . . In a limited public forum, the government's ability to restrict patrons' First Amendment rights is extremely narrow. Thus, the City cannot limit access to library materials solely on the basis of the content of
Our conclusion is in accord with those courts that have considered the categorization of public libraries for the purpose of forum analysis. Although many of these courts used the term “limited public forum,” they each applied the standard applicable to designated public fora in reviewing regulations that restricted permitted expressive activity (reading, writing, and quiet contemplation) in the library. Indeed, these courts each relied on Kreimer, which used the term “limited public forum” to denote a “sub-category of designated public fora.” Thus, these courts did not apply a reasonableness standard applicable to “limited public fora,” as that term has now been defined, but in fact used the analysis appropriate to a designated public fora. The confusion in terminology can be explained by the general confusion in terminology among many courts as the Supreme Court has only recently clarified the terminology of “designated” and “limited” public fora.192

While there seems to be agreement among the lower courts that the library is a public forum with regard to access to information,193 there remains a question of the ability to limit the right in regard to internet access... The Supreme Court had the opportunity to determine the breadth of a patron’s right to access information in a public library via the internet in United States v. American Library Association.194 Instead of answering the forum constitutional question, the Court focused instead on the Congressional Spending Power while leaving the forum of a public library as an unanswered question.195

those materials, unless the City can demonstrate that the restriction is necessary to achieve a compelling government interest and there are no less restrictive alternatives for achieving that interest.”) (citations omitted); Mainstream Loudoun v. Bd. of Trs. of Loudon Cnty. Library, 24 F. Supp. 2d 552, 563 (E.D. Va. 1998) (“We find that defendant intended to designate the Loudoun County libraries as public fora for the limited purposes of the expressive activities they provide including the receipt and communication of information . . . .”); Brinkmeier v. City of Freeport, No. 93 CV 20039, 1993 WL 248201, at *4 (N.D. Ill. July 2, 1993) (the library is a limited public forum, a sub-category of designated public fora, and subject to narrowly tailored restrictions that serve a significant governmental interest and leave open ample alternative channels for the communication of information).

192 City of Albuquerque, 667 F.3d at 1130.
193 Hulme, 2013 WL 1331028, at *5.
195 Id. at 196–97.
D. United States v. American Library Association

1. Background

In the 1990s Congress began trying to regulate objectionable content on the internet. The first attempt, the Communications Decency Act,\textsuperscript{196} was struck down on First Amendment grounds in *Reno v. American Civil Liberties Union*,\textsuperscript{197} discussed later in this paper.\textsuperscript{198} The second attempt, the Child Online Protection Act (COPA),\textsuperscript{199} was a direct response to the Supreme Court’s rationale in *Reno*.\textsuperscript{200} COPA was narrower in application, but the Supreme Court upheld an injunction on enforcement of the Act, ruling that the law was likely to be unconstitutional.\textsuperscript{201} The third attempt by Congress to regulate sexually explicit material on the internet was the Children’s internet Protection Act (CIPA).\textsuperscript{202} CIPA approached the problem of content regulation differently. As opposed to imposing a broad prohibition on content that Congress considered offensive, CIPA required public libraries and public schools to use internet filtering software or “technological protection measures” as a condition of receiving certain federal funding.\textsuperscript{203} This would prevent library patrons in public schools and public libraries from accessing objectionable sexual content over the internet, and survive a facial First Amendment challenge\textsuperscript{204} in Court.

2. Facts

There are two forms of federal assistance to help public libraries provide patrons with internet access: (1) discounted rates under the E-rate program\textsuperscript{205}; and, (2) grants under the Library Services and Technology Act

\textsuperscript{196} Communications Decency Act of 1996, 47 U.S.C § 230 (2012).
\textsuperscript{197} Reno v. ACLU, 521 U.S. 844 (1997).
\textsuperscript{198} See discussion infra notes 320–21 and accompanying text.
\textsuperscript{199} Child Online Protection Act, 47 U.S.C § 231 (2000) (invalidated by Ashcroft v. ACLU, 542 U.S. 656 (2004)).
\textsuperscript{201} Ashcroft v. ACLU, 542 U.S. 656, 656 (2004).
\textsuperscript{203} Id. § 1711.
\textsuperscript{204} Id.
By the year 2000, 95% of the libraries in the United States provided public internet access. Congress enacted the Children’s internet Protection Act (CIPA) believing that library patrons regularly search the internet for pornography and expose others to those images by leaving them displayed on public internet terminals or printed on library printers. The purpose of CIPA is to forbid public libraries from receiving federal assistance for internet access unless they install software to block obscene or pornographic images and to prevent minors from accessing this type of harmful material. The American Library Association, joined by patrons, Website publishers, and related parties sued the Government challenging the constitutionality of CIPA’s mandatory filtering provisions. The lower court ruled that CIPA was facially unconstitutional because the CIPA filtering software constituted a content-based restriction on access to a public forum that is subject to strict scrutiny. Although the government has a compelling interest in preventing the dissemination of obscenity and material harmful to minors, the use of filtering software is not narrowly tailored to further that interest.

3. The District Court Opinion

The district court ruled that CIPA was facially unconstitutional and enjoined the officials from withholding federal assistance for failure to comply with the CIPA law. The district court also held that Congress had exceeded its authority under the Spending Clause, because “any public library that complies with CIPA’s conditions will necessarily violate the First Amendment.”

The court went into an extensive forum analysis, noting that “the Supreme Court has held that the relevant forum is defined not by the physical limits of the government property at issue, but rather by the specific access that the plaintiff seeks.” Thus, the relevant inquiry is not the general

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208 Id. at 199.
209 Id. at 194.
210 Id.
211 Id.
213 Id. at 476.
214 Id. at 411.
215 Id. at 453.
216 Id. at 455.
forum of the library, but the specific forum created when the library provides the internet itself.\textsuperscript{217} While an internet does not consist of physical space conventionally associated with fora, the First Amendment protections still attach to the metaphysical space.\textsuperscript{218} “[T]he purpose of a public library in general, and the provision of internet access within a public library in particular, is ‘for use by the public . . . for expressive activity,’ namely, the dissemination and receipt by the public of a wide range of information.”\textsuperscript{219}

The internet in a public library is a designated public forum.\textsuperscript{220}

The district court went on to state that based on collection development criteria, content-based decisions about which print materials to acquire is subject to only rational review.\textsuperscript{221} Libraries are permitted to reflect patrons’ demand for certain materials over others and evaluate quality of the selection.\textsuperscript{222} While the government tries to equate collection management with internet filters, “the central difference . . . is that by providing patrons with even filtered internet access, the library permits patrons to receive speech on a virtually unlimited number of topics, from a virtually unlimited number of speakers, without attempting to restrict patrons’ access to speech that the library, in the exercise of its professional judgment, determines to be particularly valuable.”\textsuperscript{223} Essentially, because the library does not evaluate the content accessed on the internet for value or quality before it is available to the patron, there is not the editorial discretion that is apparent when a library is acquiring its collection.\textsuperscript{224} “[W]hen public libraries provide their patrons with internet access, they intentionally open their doors to vast amounts of speech that clearly lacks sufficient quality to ever be considered for the library’s print collection.”\textsuperscript{225} Because of the vast amount of information available to the patron once the internet is available, any attempt to exclude on the basis of content is subject to strict scrutiny.\textsuperscript{226} “These exclusions risk fundamentally distorting the unique marketplace of ideas that


\textsuperscript{218} Am. Library Ass’n, 201 F. Supp. 2d at 456.

\textsuperscript{219} Id. at 457 (citations omitted).

\textsuperscript{220} Id.

\textsuperscript{221} Id. at 462.

\textsuperscript{222} Id.

\textsuperscript{223} Id.

\textsuperscript{224} Id. at 462–64.

\textsuperscript{225} Id. at 463.

\textsuperscript{226} Id. at 465.
public libraries create when they open their collections, via the internet, to
the speech of millions of individuals around the world on a virtually limitless
number of subjects.”227

Interestingly, the court goes on to analogize the public library and the
internet with traditional public fora, stating:

We acknowledge that the provision of internet access in a
public library does not enjoy the historical pedigree of
streets, sidewalks, and parks as a vehicle of free expression.
Nonetheless, we believe that it shares many of the
characteristics of these traditional public fora that uniquely
promote First Amendment values and accordingly warrant
application of strict scrutiny to any content-based restriction
on speech in these fora. Regulation of speech in streets,
sidewalks, and parks is subject to the highest scrutiny not
simply by virtue of history and tradition, but also because
the speech-facilitating character of sidewalks and parks
makes them distinctly deserving of First Amendment
protection. Many of these same speech-promoting features
of the traditional public forum appear in public libraries’
provision of internet access.228

Under the district court’s analysis, while the internet does not have the
traditional characteristics of a public fora, it shares the speech promoting
qualities of traditional fora, and in many ways exceeds the ability to facilitate
speech of a traditional public fora.229 While the architecture of physical
space limits the audience of a speaker, the internet transcends geography
promoting First Amendment values and deserving heightened scrutiny.230
The court calls for “[a] faithful translation of First Amendment values” by
subjecting restrictions on internet access in public libraries “to the same
exacting standards of First Amendment scrutiny as content-based
restrictions on speech in traditional public fora.”231

Under a strict scrutiny analysis, the court found that CIPA was not
narrowly tailored to promote a compelling Government interest.232 While
there is a well-established government interest in preventing the

227 Id.
228 Id. at 466.
229 Id. at 468.
230 Id. at 468–70.
231 Id. at 470.
232 Id. at 476.
dissemination of obscenity and child pornography to minors, the internet filters are not narrowly tailored to further those interests.233

4. Chief Justice Rehnquist’s Plurality Opinion

With the stroke of a pen, Chief Justice Rehnquist ignored years of precedent protecting the library as a designated forum for a limited purpose. He used the opinion as an opportunity to legislate from the bench, ignoring the forum considerations and focusing on the congressional spending power. While similar legislation, and CIPA in the lower court, was found to be facially unconstitutional, Rehnquist was not persuaded by the precedent.234

To even address the issue of internet filters in public libraries, Rehnquist had to overcome two challenges. The first challenge: precedent treated libraries as a public forum of the expressive activity of access to information subjecting any content-based restriction on access to information to strict scrutiny.235 The second challenge: the congressional spending power may not “induce the States to engage in activities that would themselves be unconstitutional.”236

To overcome the first obstacle, Rehnquist focused on the “traditional mission” of libraries in society.237 Looking at the ALA’s Library Bill of Rights, Rehnquist focused on the segment, “libraries should provide books and other resources for the interest, information, and enlightenment of all people of the community.”238 It should be noted that the American Library Association brought the suit against the Government,239 and it should also be noted that the American Library Association has strong opinions on censorship and access to information which are discussed above in the paper.240 Ignoring this, Rehnquist focused on collection management and content acquisition as a traditional function of libraries, stating, “[T]o this end, libraries collect only those materials deemed to have requisite and appropriate quality.”241 Based on this discretion of the library in acquisition and collection management, the public forum doctrine does not apply to libraries because it is incompatible with the fulfillment of the libraries’

233 Id. at 471, 479.
235 See Am. Library Ass’n, 201 F. Supp. 2d at 457.
237 Am. Library Ass’n, 539 U.S. at 204.
238 Id. at 203 (internal quotations omitted).
239 Id. at 201.
240 See discussion supra Part I.A.
241 Am. Library Ass’n, 539 U.S. at 204 (internal quotations omitted).
“traditional role”. The district court was incorrect in its finding because “internet access . . . is neither a traditional nor a designated public forum.”

In a very strict construction of the Constitution and of First Amendment values, Rehnquist found that a traditional public forum may not be found where the history is lacking. The internet is also not a designated public forum, because the government did not make an affirmative choice to open up its property for use as a public forum. Rehnquist further ignored the library’s role in access to information by trivializing the nature of the internet and the potential opportunities for expressive activity consistent with the historical role of libraries. Rehnquist categorized the internet as a means only to “facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality.” Additionally, the internet is not supplied to patrons to encourage speech or expressive activity; it is simply another means for making information available in a school or library. The use of filters by a library to prevent genres of material is no different from decisions to exclude other materials, and these decisions are not subject to strict scrutiny. The concern about over-blocking by the filters is dissuaded by “the ease with which patrons may have the filtering software disabled.” Rehnquist overlooks that many patrons may not know that they are allowed to remove the filter, and is unmoved by their potential embarrassment.

To overcome the second obstacle, Rehnquist again focused on the traditional role of libraries. He stated that “[t]he E-rate and LSTA programs were intended to help public libraries fulfill their traditional role to obtaining material of requisite and appropriate quality for educational and informational purposes.” Because librarians have traditionally kept pornographic content out of their library collections, Congress can impose a

242 Id. at 205.
243 Id.
244 Id. at 206.
245 Id.
246 Id.
247 Id.
248 Id. at 206–07.
249 Id. at 207–08.
250 Id. at 209.
251 Id.
252 Id. at 211.
253 Id.
parallel limitation on the internet assistance programs.254 Overlooking that 95% of libraries provided internet access,255 and most relied on the government subsidies to provide the service to their patrons, Rehnquist finds that CIPA simply reflects Congress’ decision not to subsidize a libraries decision not to install internet filtering software.256 As a result, CIPA is a constitutional exercise of the congressional spending power.

This plurality opinion focused almost exclusively on the libraries acquisition management, classifying it only in terms of “quality” and “education”.257 The opinion completely overlooked the libraries’ role in providing entertainment in the form of movies, best-sellers, and gossip magazines. The opinion also overlooked the features of the internet that a traditional periodical or book cannot provide: real-time access to live educational programming, streaming services, chat rooms where educational contributions may be found and made by and with people around the world.258 The plurality opinion is a very narrow view of the “traditional” role of libraries, and an exceptionally strict construction of the First Amendment principles making it out of touch with the modern library and the application of internet use.259

Another point overlooked by Rehnquist’s opinion is that filtering technology in Public Libraries is inherently unreliable. First, the technology is proprietary, meaning librarians do not have input or decision-making abilities over the online acquisition decisions.260 That is left to the algorithms created and implemented by the proprietor. 261 Librarians who use this internet filtering software do not have choices over the library’s collection development policies like they would if they were to acquire physical books or other resources, and by using internet filtering software, they are giving up this choice and leaving it up to the software companies which do not disclose their standards for redacting material.262

254 Id. at 212.
255 Id. at 199.
256 Id.
257 Id. at 196.
259 Id. at 40.
260 Id. at 34.
262 Smith, supra note 261, at 80.
issue with filtering software is the inability to determine the content of images and determine the difference between fine art and pornography. Further, the right to access and disseminate information in a public library applies because a library is an autonomous institution which protects the acquisition decisions of librarians from government intervention. Under this principle, librarians, and not the filtering software should be making acquisition decisions for the content of their collections.

5. Justice Kennedy’s Concurring Opinion

Justice Kennedy opens with, “If, on request of an adult user, a librarian will unblock filtered material or disable the internet software filter without significant delay, there is little to this case.” In Kennedy’s view, as long as an adult patron was able to unblock constitutionally protected speech without substantial burden, the government interest of protecting minors from inappropriate material was sufficient to find CIPA constitutional.

6. Justice Breyer’s Concurring Opinion

Justice Breyer agrees with the plurality that the public forum doctrine is inapplicable and that CIPA is constitutional, but reaches the decision in a different way. Breyer agreed with the plurality that the selection of materials for a library should not be treated with strict scrutiny; however, he believed the statute should be treated with heightened scrutiny, because CIPA directly restricts the public’s receipt of information. He calls for examination of CIPA’s restrictions as “speech-related restrictions . . . call[ing] for heightened, but not “strict,” scrutiny—where, for example, complex, competing constitutional interests are potentially at issue or speech-related harm is potentially justified by unusually strong

263 Id. at 81.
264 Id. at 85.
267 Id. at 215.
268 Id. at 215–16 (Breyer, J., concurring).
269 Id. at 216.
270 Id.
governmental interests.” Under heightened scrutiny, the question becomes whether or not the harm to the speech-related interests is disproportionate in light of the justifications and potential alternatives. Under this approach, the legitimacy of the statute’s objective, the extent to which the statute achieves that objective, consideration of less restrictive means, and the weighing of the speech-related harm are all taken into account.

Breyer finds that the statute passes this test. CIPA’s objective of restricting children’s access to obscenity is legitimate. The filtering software is cheap and effective and provides access to improperly blocked constitutionally protected speech by allowing adults to have the filter disabled. CIPA, therefore, achieves this objective without significant burden to the patron. Therefore, there is no disproportionate speech-related harm derived from the statute, which makes it constitutional.

7. Justice Steven’s Dissenting Opinion

In his dissenting opinion, Justice Steven’s stated that while it is not unconstitutional for libraries to decide to implement filtering software to meet the needs of their communities, it is unconstitutional for Congress to force libraries to install that software creating “a blunt nationwide restraint on adult access to an enormous amount of valuable information . . . most . . . [of which] is constitutionally protected speech.” Stevens finds a fundamental flaw in the software, noting that the filters reliance on key words and phrases does not have the capacity to exclude a “precisely defined category of images.” The lack of technological capacity creates the “overblocking” and “underblocking” issue where a substantial amount of obscene material will never be blocked because the software does not identify the key word or phrase, and, conversely, the software’s reliance on those keywords will block content completely innocuous for both adults and minors. This not only creates a false sense

271 Id. at 217.
272 Id.
273 Id. at 217–18.
274 Id. at 218.
275 Id. at 219.
276 Id. at 219–20.
277 Id. at 220.
278 Id.
279 Id. at 221 (Stevens, J., dissenting).
280 Id. at 221–22.
of security among parents believing their children are protected, but
unconstitutionally excludes “hundreds of thousands of individual
constitutionally protected messages from internet terminals located in public
libraries throughout the Nation.”

Stevens further points out that less restrictive means are available that
allow local decisions tailored to local circumstances to be made by the
library. While the statute allows for patrons to ask for the unblocking of
sites, there still remains the issue that:

a patron is unlikely to know what is being hidden and
therefore whether there is any point in asking for the filter
to be removed. It is as though the statute required a
significant part of every library’s reading materials to be kept in unmarked, locked rooms or cabinets, which could
be opened only in response to specific requests . . . .
Inevitably, the interest of the authors of those works in
reaching the widest possible audience would be abridged.

This would not only create a significant prior restraint on speech, but
would create an aggregate effect impossible to measure.

Justice Stevens avoids the public forum doctrine by focusing on both the
prior restraint of speech, and by rebutting the plurality’s opinion that CIPA
imposes restrictions similar to collection selection. Stevens agrees that a
library has the right to exercise its judgment with respect to its collection,
however, penalizing a library for failing to install filtration software on every
one of its internet-accessible computers “would unquestionably violate” the
First Amendment.

Classifying the denial of benefits as an abridgment of speech, Stevens
relates the filtering software as a distortion of the internet as a medium of
expression. He closes with the statement that “[t]his Court should not
permit federal funds to be used to enforce this kind of broad restriction of
First Amendment rights, particularly when such a restriction is unnecessary
to accomplish Congress’ stated goal. The abridgment of speech is equally

281 Id. at 222.
282 Id. at 223.
283 Id. at 224–25.
284 Id. at 225.
285 See id.
286 Id. at 226.
287 Id. at 228–29.
obnoxious whether a rule like this one is enforced by a threat of penalties or by a threat to withhold a benefit.\footnote{288}

8. Justice Souter’s Dissenting Opinion

Justice Souter, like the other Justices, believes that the government has a legitimate government interest in protecting children from obscene material.\footnote{289} Focusing on the text of the statute, Souter believes that CIPA is an impermissible restriction on protected First Amendment speech.\footnote{290} The statute reads: “An administrator, supervisor, or other authority \textit{may} disable a technology protection measure under paragraph (1) to enable access for \textit{bona fide research or other lawful purposes}.\footnote{291} Drawing attention that the language is “may” instead of “must” for “bona fide research or other lawful purposes,” Souter draws the conclusion that the legislation creates discretion on behalf of librarians to assess whether or not the request to unblock a filter is lawful and for bona fide research creating a limitation on eligibility for unblocking.\footnote{292} He states, “We . . . have to examine the statute on the understanding that the restrictions on adult internet access have no justification in the object of protecting children.”\footnote{293} Showing that children could be restricted to blocked terminals while adults have access to unblocked terminals; and, the statute could provide for unblocking for adult access with “no questions asked,”\footnote{294} Souter classifies CIPA as a content-based restriction rising to the level of censorship.\footnote{295}

Souter then moved on to discuss why the restriction is censorship as opposed to content selection focusing on the history of libraries and the strong positions of the American Library Association.\footnote{296} First, internet blocking is not acquisition.\footnote{297} Acquisition applies to decisions based on physical space limitations, budgeting, and needs of the community.\footnote{298} Unlike acquisition decisions that require a complicated balancing of needs,
blocking internet access is a choice to limit access to something already acquired.299 “The proper analogy therefore is not to passing up a book that might have been bought; it is either to buying a book and then keeping it from adults lacking an acceptable ‘purpose,’ or to buying an encyclopedia and then cutting out pages with anything thought to be unsuitable for all adults.”300

Second, Souter points out “the plurality’s conception of a public library’s mission has been rejected by the libraries themselves.”301 Looking at the history of libraries, Souter shows “an evolution toward a general rule, now firmly rooted, that any adult entitled to use the library has access to any of its holdings.”302 Citing the *Intellectual Freedom Manual*, he shows the libraries’ basic opposition to censorship.303 Souter also looks to the *Library Bill of Rights* for practical examples of the libraries opposition to censorship citing: a “Statement on Labeling”;304 a “statement against any restriction on access to library materials by minors”;305 and finally, the policy opposing the practice of keeping certain books off the open shelves only available by request because the ALA viewed it these practices as forms of censorship.306

Amidst these and other ALA statements from the latter half of the 20th century, however, one subject is missing. There is not a word about barring requesting adults from any materials in a library's collection, or about limiting an adult's access based on evaluation of his purposes in seeking materials. If such a practice had survived into the latter half of the 20th century, one would surely find a statement about it from the ALA, which had become the *nemesis of anything sounding like censorship of library holdings*, as shown by the history just sampled. The silence bespeaks an American public library that gives any adult patron any material at hand, and a history without support for the plurality’s reading of the First Amendment as tolerating a public

299 *Id.* at 236–37.
300 *Id.* at 237.
301 *Id.*
302 *Id.* at 238.
304 *Am. Library Ass’n*, 539 U.S. at 240 (Souter, J., dissenting).
305 *Id.*
306 *Id.* (internal citations omitted).
library’s censorship of its collection against adult enquiry.  

After showing the ALA’s vigilant stance against censorship, Souter then stated:

Quite simply, we can smell a rat when a library blocks material already in its control, just as we do when a library removes books from its shelves for reasons having nothing to do with wear and tear, obsolescence, or lack of demand. Content-based blocking and removal tell us something that mere absence from the shelves does not.

Blocking constitutionally protected speech on the internet by broad filters is censorship and does not meet the strict scrutiny test.

9. Conclusion

Like Brown, the ALA case reflects a deeply divided Court. While the plurality went out of its way to avoid the forum discussion, none of the concurring or dissenting opinions approached the subject either, instead focusing on the facial challenge to the statute. The Supreme Court left open the determination of what type of forum classification the library falls under, and showed a fracturing of the public forum analysis. While the Brown decision has been interpreted to stand for the proposition that the library is a public forum dedicated to access of information, the Supreme Court has never directly held that to be true. In addition, the Supreme Court has left open for interpretation where the library falls in the public forum spectrum, and what is the appropriate test for the extent of government regulation of expressive activity. While the public forum doctrine began as a noble endeavor to protect speech rights under the ideals of the democratic theory embodied in the First Amendment, the current application of the

\[\text{Notes:}\]

307 Id. at 240–41 (emphasis added).
308 Id. at 241 (emphasis added).
309 Id. at 242.
311 See Steven G. Gey, Reopening the Public Forum—From Sidewalks to Cyberspace, 58 Ohio St. L.J. 1535, 1555 (1998) (“The post-Perry public forum doctrine may not be the most fractured area in modern constitutional law, but it comes close.”).
312 Wachs, supra note 310, at 452.
public forum doctrine has shown a divergence from these goals.\footnote{313} The
doctrine has become excessively formalistic.\footnote{314} The focus has become too
narrow, allowing for only the consideration of geography and government
regulation,\footnote{315} moving away from the concept that access by the speaker
determines forum not geography.\footnote{316} This distracts from the very simple
original purpose of the doctrine--to protect first amendment speech rights on
public property.\footnote{317}

\textit{ALA} provided a wonderful opportunity for the Supreme Court to lay out
what expressive activity was protected in libraries and the extent of that
protection; but, the Court dodged the question. Instead, the plurality opinion
of the Court focused on collection management,\footnote{318} which showed a lack of
understanding of the complexities of acquisition and ignored the changing
nature of the library due to opportunities that the internet and digital delivery
systems provide. Overall, the plurality opinion appears out of touch with
the modern library,\footnote{319} and did not seem to understand the implications and
wide-spread use of the internet in the modern library system.

86 \textit{Iowa L. Rev.} 1377, 1381 (2001) (calling the Supreme Court approach to forum analysis
“an edifice now so riven with incoherence and fine distinctions that is on the verge of
collapse” and calling their recent approaches “stuck in an endless circle, at the edge of a
chasm between government speech and the public forum”).

\footnote{314} David S. Ardia, \textit{Government Speech and Online Forums: First Amendment

\footnote{315} Farber & Nowak, supra note 4, at 1266 (1984) (“Unless the Supreme Court transcends
its geographical approach to the first amendment and abandons formal public forum analysis,
it will continue to hand down decisions that fail to analyze thoughtfully the nature and role
of first amendment principles in our society.”).

\footnote{316} Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. 788, 801
(1985).

\footnote{317} Ardia, supra note 314.


\footnote{319} Bernard W. Bell, \textit{Filth, Filtering, and the First Amendment: Ruminations on Public
the “government acts as a facilitator of patrons in obtaining access to speech . . . . Courts
should view public libraries as places for wide-ranging inquiry that should make available to
the public the widest possible array of knowledge.”).
III. Forum Analysis of the Internet

When the Supreme Court decided United States v. American Library Association, the Court ignored its own statements and precedents to reach its conclusion. Importantly, it overlooked the emerging technology of the internet, and the vast communicative power that the internet represented. In the first major Supreme Court ruling regarding government regulation of materials on the internet, Reno v. American Civil Liberties Union, the Court likened the internet with a traditional public forum, stating:

[T]he internet can hardly be considered a “scarce” expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds. . . . This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through 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. As the District Court found, “the content of the internet is as diverse as human thought.” We agree with its conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.

By articulating that the internet has more power to communicate “than any soapbox” and comparing the distribution of a webpage to “a pamphleteer,” the Court is showing that the internet can (and arguably does) have more power to communicate than a traditional public fora like a sidewalk, park, or street where the soapbox or pamphleteer would be located. This taken in conjunction with the idea that a forum is not

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322 Id. at 870 (citations omitted).
323 See id.
constrained by physical space\textsuperscript{324} or historical confines\textsuperscript{325} creates a compelling argument that the internet is a public forum. Despite this argument, the Court has failed to treat the internet as a public forum taking a strict construction of the public forum doctrine and placing an emphasis on the “tradition” and “history” of the traditional public forum thereby making the internet ineligible for consideration due to its recent appearance in American culture and communication.\textsuperscript{326}

In addition, the Court has analogized the internet with a “vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services.”\textsuperscript{327} While the Supreme Court never directly held the proper forum of the internet, the lower courts have established that the library is a tradition public forum for the expressive activity of access to information and receipt of information.\textsuperscript{328} Thus, a parallel argument is that even if the internet is not a public forum because it

\textsuperscript{324} See Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 830 (1995) (noting government fora is not confined to “spatial” or “geographic” space and may be “metaphysical”); United States v. Kokinda, 497 U.S. 720, 727 (1990) (“The mere physical characteristics of the property cannot dictate forum analysis.”).


The Court ignores the fact that the purpose of the public forum doctrine is to give effect to the broad command of the First Amendment to protect speech from governmental interference. The jurisprudence is rooted in historic practice, but it is not tied to a narrow textual command limiting the recognition of new forums. In my view the policies underlying the doctrine cannot be given effect unless we recognize that open, public spaces and thoroughfares that are suitable for discourse may be public forums, whatever their historical pedigree and without concern for a precise classification of the property. There is support in our precedents for such a view. Without this recognition our forum doctrine retains no relevance in times of fast-changing technology and increasing insularity. In a country where most citizens travel by automobile, and parks all too often become locales for crime rather than social intercourse, our failure to recognize the possibility that new types of government property may be appropriate forums for speech will lead to a serious curtailment of our expressive activity.

\textit{Id.} (citations omitted).

\textsuperscript{326} See Am. Library Ass’n, 539 U.S. at 206.

\textsuperscript{327} Reno v. ACLU, 521 U.S. 844, 853 (1997).

\textsuperscript{328} See cases cited \textit{supra} note 9.
is limited by its lack of history and tradition, it should be a designated public forum and treated as a digital library.

Despite this argument, the lower courts have adopted the Court’s analysis of the internet and its regulation in public libraries finding that the internet is entitled to First Amendment protection and therefore prohibitions must pass facial challenges, but the internet is not entitled a forum analysis.329

A. The Supreme Court’s Analysis of the Internet

1. Reno v. American Civil Liberties Union330

Reno v. American Civil Liberties Union was the first major Supreme Court ruling regarding government regulation of materials on the internet. When Congress initially tried to censor the internet during the mid to late nineties, their first attempt was the Communications Decency Act of 1996 (CDA).331 The CDA was buried inside the Telecommunications Act of 1996332 where the major components did not deal with the internet, dealing instead with telephone service and the multichannel video market;333 but, the CDA was placed into the Act after the hearings were concluded in executive committee meetings or placed as amendments.334 The CDA attempted to regulate both “indecent” and “patently offensive” communications on the

329 See Am. Library Ass’n, 539 U.S. at 206.
333 See Reno, 521 U.S. at 857.
334 Id. at 858.
The pertinent parts of the statute were constitutionally challenged in *Reno v. ACLU*.  

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(a) Whoever—

(1) in interstate or foreign communications—

(2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18, or imprisoned not more than two years, or both.”

The second provision, § 223(d), prohibits the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age. It provides:

(d) Whoever—

“1) in interstate or foreign communications knowingly—

(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or

(B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or
The Supreme Court stated that the internet, as a medium of communication, deserves first amendment protection and is entitled to the same protection as alternate media such as print media. In a carefully constructed opinion, Justice Stevens lays out the similarities and differences between internet communication and other forms of media previously considered by the court. He states,

We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.

Thus, after Reno it is decided that digital media has the same protection as print media—the format does not determine the extent of protection. The holding in Reno is reinforced in Ashcroft v. American Civil Liberties Union, which dealt with the second attempt by Congress to regulate

(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18, or imprisoned not more than two years, or both.

The breadth of these prohibitions is qualified by two affirmative defenses. One covers those who take “good faith, reasonable, effective, and appropriate actions” to restrict access by minors to the prohibited communications. The other covers those who restrict access to covered material by requiring certain designated forms of age proof, such as a verified credit card or an adult identification number or code.

(internal citations and quotation marks omitted).

338 Id. at 885.
340 Id. at 874.
341 See id. at 885 (explaining that the internet speech, “[a]s a matter of constitutional tradition,” is not beyond First Amendment protection).
“harmful” material on the internet. Here, it was reinforced that the internet is protected by the First Amendment.

As indicated in the discussion of United States v. American Library Association, Inc., the Supreme Court revisited congressional regulation of the internet later, finding it to be constitutional when analyzed in conjunction with the Congressional Spending Power. In that case, the Court found that when forum analysis is applied to the internet in a public library, it is neither a public forum nor a designated public forum—it is merely “a technological extension of the book stack.”

B. The Lower Court’s Application of that Analysis

After, United States v. American Library Association, Inc., the lower courts adopted the rationale that the internet is neither a public forum nor a limited public forum when offered by a public library.

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343 Id. at 567–68.
344 See id. at 585–86.

The scope of our decision today is quite limited. We hold only that COPA’s reliance on community standards to identify “material that is harmful to minors” does not by itself render the statute substantially overbroad for purposes of the First Amendment. We do not express any view as to whether COPA suffers from substantial overbreadth for other reasons, whether the statute is unconstitutionally vague, or whether the District Court correctly concluded that the statute likely will not survive strict scrutiny analysis once adjudication of the case is completed below. While respondents urge us to resolve these questions at this time, prudence dictates allowing the Court of Appeals to first examine these difficult issues.

Id.

346 Id. at 214.
347 Id. at 206–07.
348 See, e.g., Bradburn v. N. Cent. Reg’l Library, Dist., 231 P.3d 166, 178–79 (Wash. 2010) (adopting the US v. Am. Library Ass’n analysis and stating that the “public library is not a traditional public forum” and “internet access in a public library is not a designated public forum’’); Putnam Pit, Inc. v. City of Cookeville, 221 F.3d 834, 843–44 (6th Cir. 2000) (focusing on the need for history and tradition in the application of the designated public forum doctrine, and explaining that the internet is not a public forum nor is it a limited public forum because the government did not actively open up the forum for a specified group of users and did not allow free and open dialogue between users); Parents, Families, and Friends of Lesbians and Gays, Inc. v. Camdenton R-III Sch. Dist., 853 F. Supp. 2d 888, 899 (W.D.Mo.
The problem then becomes recognizing how a designated public forum, such as library, that is subject to strict scrutiny for the expressive activity of access and receipt of information can then be treated as a non-public forum when it comes to internet use to access information from a terminal at a public library. By using a strict construction of the public forum doctrine (which itself is a relatively young legal doctrine) the Supreme Court, and lower courts that adopt the analysis, reject the notion that new media which presents unique possibilities for promoting First Amendment values should be considered traditional public fora because they lack the requisite history.349 By refusing to apply the traditional public forum classification to the internet, the Court has rejected a faithful translation of First Amendment values and replaced it with a microscopic focus on the language of a judicially created doctrine which has been subject to continual change since its creation. As the Supreme Court has pointed out, “[m]inds are not changed in streets and parks as they once were. To an increasing degree, the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media.”350

C. Application of Forum Doctrine of the Internet Outside the Public Library Context

There has been legal commentary that the internet is an architecture protecting free speech rights by providing non-centralized, free, diverse communications.351 The internet has been compared to the original printing press,352 and called a new form of “direct democracy”.353 The internet has

349 See discussion supra notes 337–46 and accompanying text.
351 LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 185 (1999).
353 See, e.g., D. Wes Sullenger, Silencing the Blogosphere: A First Amendment Caution to Legislators Considering Using Blogs to Communicate Directly with Constituents, 13 RICH.

also been called, a “place”, a “bulletin board”, an “information superhighway”, and it has been argued that the internet is a public forum. Despite this, the internet is largely privatized; and, it is difficult to say that the internet in its entirety is a public forum. Much of the public discourse that occurs on the internet occurs on privately owned spaces that are governed by user-agreements allowing private parties to

J.L. & TECH. 1, 58–59 (2007) (applying the public forum doctrine to a hypothetical “blog” created by a public official to directly communicate with constituents).


During the Clinton Administration, the United States government essentially acceded to these calls for privatization, undertook measures to turn over many aspects of the internet to private entities, and convinced Congress to do the same. With the government’s withdrawal from management of the internet, private entities assumed control. The end result is that the vast majority of speech on the internet today occurs within private places and spaces that are owned and regulated by private entities such as internet service providers (ISPs) like America Online (AOL) and Yahoo!, internet access providers like employers and universities, content providers like washingtonpost.com and nytimes.com, and pipeline providers like Comcast and Verizon. In contrast to real space (which enjoys a mixture of privately- and publicly-owned places in which speech occurs) and in contrast to media channels such as broadcast and cable television (which enjoy publicly-subsidized and public forums), speech in cyberspace occurs almost exclusively within privately-owned places. The public/private balance that characterizes real space and renders the First Amendment meaningful within it is all but absent in cyberspace.

Id.

360 Id.
determine the subject and limitations of speech on their internet websites.\textsuperscript{361} As a result, the courts have focused on webpages as opposed to the internet as a whole in their forum analysis of the internet.\textsuperscript{362} Circuit, district, and state courts have applied public forum analysis to individual webpages and made a forum determination based on the access and openness of the specific pages.\textsuperscript{363} When the government has provided internet services to employees

\textsuperscript{361} Ardia, supra note 314, at 1991 (discussing private censorship on viewpoint-based decisions due to the terms of use agreements on private websites); Seth F. Kreimer, \textit{Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link}, 155 U. Pa. L. Rev. 11, 28 (2006) (noting the difficulty of self-censorship due to distinctions between protected and unprotected speech along with third party providers by indicating “every prospect of liability or other sanction can chill speech, but intermediaries have a peculiarly fragile commitment to the speech that they facilitate”).

\textsuperscript{362} See Sutliffe v. Epping Sch. Dist., 584 F.3d 314, 333 (1st Cir. 2009); Putnam Pit, Inc. v. City of Cookeville, 221 F.3d 834, 843 (6th Cir. 2000).

\textsuperscript{363} See, e.g., Sutliffe, 584 F.3d at 333 (applying public forum analysis to the town’s website and finding that it did not meet the test for public forum or designated public forum); \textit{Putnam Pit, Inc.}, 221 F.3d at 843 (a city’s webpage did not meet the test for traditional public fora); Gilabert v. Logue, No. CV 13-578-GHK (RZx), 2013 WL 6804663, at *3 (C.D. Cal. Dec. 20, 2013) (stating webpages on the internet may be a public forum); Farrah v. Esquire Magazine, Inc., 863 F. Supp. 2d 29, 38 (D.D.C. 2012) (blog comments on an internet website open to the public was a public forum); Kinderstart.com, LLC v. Google, Inc., No. C 06-2057 JF (RS), C06-2057JFRS, 2007 WL 831806, at *14–*15 (N.D. Cal. Mar. 16, 2007) (rejecting the argument that Google search engine rises to the level of a public forum, stating “KinderStart cites no authority suggesting that a search engine is a public forum for speech simply because it allows consumers to find speech on the internet’’); New.Net, Inc. v. Lavasoft, 356 F. Supp. 2d 1090, 1107 (C.D. Cal. 2004) (“Under its plain meaning, a public forum is not limited to a physical setting, but also includes other forms of public communication such as electronic media like the internet.”) (citation omitted) (internal quotation marks omitted); Global Telemedia Int’l, Inc. v. Doe 1, 132 F. Supp. 2d 1261, 1264–65 (C.D. Cal. 2001) (finding internet chat rooms are public fora); Cahill v. Texas Workforce Comm’n, 121 F. Supp. 2d 1022, 1025–26 (E.D. Tex. 2000) (electronic bulletin boards offered by Texas Workforce Commission were a “nonpublic forum” because there was no general access or use by general public); Nat’l A-1 Adver., Inc. v. Networks Solutions, Inc., 121 F. Supp. 2d 156, 172 (D.N.H. 2000) (applying public forum analysis to second-level portion of internet addresses and acknowledging chat rooms and electronic bulletin boards are public forums); Barret v. Rosenthal, 146 P.3d 510, 514 n. 4 (Cal. 2006) (Internet newsgroups are public forums); ComputerXpress, Inc. v. Jackson, 113 Cal. Rptr. 2d 625, 638 (Cal. Ct. App. 2001) (electronic bulletin board postings on the internet may be a public forum). \textit{But see} Nikolas v. Fletcher, No. 3:06-CV-00043 KKC, 2007 WL 1035012, at *5 (E.D. Ky. Mar. 30, 2007) (finding that internet on state computers provided to state employees was not a traditional public forum due to the use restrictions applied by the state); Loving v. Boren, 956
and university students, the courts have found that the restriction of use policies make them poor candidates for public forums or designated public forums. This narrow analysis has further stripped the application of the public forum doctrine to the internet, bringing the focus again to narrow constructions of the doctrine like the tangible, geographical characteristics of traditional public fora.

There is an argument that the public forum doctrine does not cover any online public spaces and that they are outside of the purview of the public forum analysis. Under this view, the original purpose of the public forum doctrine is eroded by “refusing to consider the public function of private property” leaving the court with “no means to protect speech rights in U.S. media, which play a crucial role in public democratic processes even though they are privately held.” In addition, the strict adherence to the historical nature of the traditional public forum excludes new media, such as the internet, from ever being considered as a traditional public forum.

However, there is also a call for the Court to expand the classification of the “metaphysical” public forum to apply to the internet and creating a

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F. Supp. 953, 955 (W.D. Okla. 1997) (articulating that the internet provided by the University of Oklahoma was not a public forum, because it was not “open to the general public or use for public communication” and were only for “academic and research” purposes).


366 Id. at 8.

367 See id.

fourth category of public fora doctrine. Under this theory, the internet forums would receive strict scrutiny under the public forum doctrine.

IV. CONCLUSION

As noted above, the privatization of the internet makes application of the public forum doctrine to the internet as a whole unrealistic. Under the current doctrine, the public forum doctrine will not attach to privately owned space, and therefore makes the public forum doctrine inapplicable to the internet in many online fora like Twitter, Facebook, Blogger, and any other privately owned fora.

The Court should restore the public forum doctrine, and bring it back to its original intent to protect First Amendment expressive activity. In the context of the public library, the Court should vigorously protect the patron’s right to access information and disseminate information in a library. Under the current view that the internet in a library is a metaphysical extension of

369 See, e.g., Gey, supra note 314, at 1538–39 (arguing that traditional public fora should extend to “metaphysical” fora); Lyrissa Lidsky, Public Forum 2.0, 91 B.U. L. REV. 1975, 1995 (2011) (applying the public forum doctrine to the “metaphysical” space of social media (quoting Rosenberger, 521 U.S. at 830)); Alissa Ardito, Social Media, Administrative Agencies, and the First Amendment, 65 ADMIN. L. REV. 301, 360–62 (2013), available at http://politicalscience.yale.edu/sites/default/files/ardito_alissa_socmediaadminagenciesandfirstamend.pdf (“Given these precedents applying the public forum doctrine to ‘metaphysical’ or intangible communicative fora, it is reasonable to conclude that the public forum doctrine would be extended to social media sites.”); Julie J. Geng, When Forums Collide: The San Francisco BART as a Battleground for the First Amendment in the internet Era, 10 I/S: J.L. & POL’Y FOR INFO. SOC’Y 127, 177 (2014) (applying First Amendment public forum analysis to the internet as a “metaphysical” public forum (quoting Rosenberger, 521 U.S. at 885)); John D. Inaza, Virtual Assembly, 98 CORNELL L. REV. 1093, 1125 (exploring constitutional protection for online groups and noting the application of the “metaphysical” public forum to the internet (quoting Rosenberger, 521 U.S. at 885)); Smith, supra note 15, at 65.

370 Smith, supra note 15, at 88.

371 See discussion supra note 359 and accompanying text.

372 Nunzianto, supra note 359, at 1116.

373 Caplan, supra note 2, at 647–48 (noting the origin of the public forum doctrine was “a way of explaining why the government cannot engage in prior restraint or content discrimination with regard to speaking, picketing, or leafleting on city parks and sidewalks,” but equating it with kudzu—stating it has outgrown these locations and become “so pervasive that courts frequently assert that all government property must be some type of forum”).
the library, the internet access should be viewed as a designated public forum. Internet access in a public library should be governed under the “terms of use” policies created by the library, making it a public forum for the receipt of information. Taking into account the ALA’s strong views on censorship, access to information, and freedom to read, the Court should extend that view to the public internet access in the public library and remove the censors, or internet filtering software which prevent the librarians from having control over their acquisitions, and prevent the patrons from receiving the information that they are searching for. Since the Court has already articulated the internet is an extension of the library, it should be further extended to apply the designated public forum doctrine to the internet in a public library.

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374 United States v. Am. Library Ass’n, 539 U.S. 194, 206–07 (2003) (Rehnquist equates the internet (as used in CIPA) as an “extension” of the means to make information available in a school or library (quoting S. REP. NO. 106-141, at 7 (1999))).

375 Smith, supra note 15, at 88–89.

376 Id. at 88 (“While an inherent or metaphysical public forum in a public library setting would support the mission of public libraries and focus on the rights of the receiver, patrons still would need to agree to the library’s policies regarding behavior and online content being accessed, just as they do now at many libraries.”).

377 See, e.g., AMERICAN LIBRARY ASSOCIATION, supra note 27, at xi–xii; also AMERICAN LIBRARY ASSOCIATION, supra note 39; AMERICAN LIBRARY ASSOCIATION, supra note 13.

