Examining the constitutionality of Internet filtering in public schools: a US perspective

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The use of Internet filters in public classrooms in the USA has been intensely debated, both in terms of its effectiveness and legality. The debate pits concerns to protect students from indecent material against issues of unconstitutional censorship. This paper examines the legal issues addressed in various rulings by the US Supreme Court pertinent to issues raised in the debate over the constitutionality of filtering in the classroom. The rulings and opinions offer valuable insights into the legal issues raised in this debate.

Introduction

The introduction of new technology historically poses problems for society. One of these has been the problem of balancing the need to protect society from indecency and obscenity with the goal of preserving individual rights of expression. The increasing availability of information resulting from new print technologies such as the Gutenberg press and later the linotype machines, for example, raised concerns about the increased access to materials that could ‘deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort might fall.’ Radio and television raised similar issues in an even more complicated climate due to unique medium characteristics, such as pervasiveness and accessibility by children. Even the telephone has raised alarms. The Internet is the latest new technology to renew the societal debate about the extent of free speech protection that should be afforded sexually oriented materials.

Debate over Internet use and children has existed since the Internet was opened to the public (Wallace & Mangan, 1997; Heins, 2002). One particularly heated area of debate has been Internet filtering. Internet filters are software programs designed to block access to offensive sites. This is done by matching a user’s preferences to a list of sites previously rated by a third party or by checking for certain alphanumeric strings (i.e. ‘breast’) to identify objectionable incoming content and block it before it appears on the user’s screen (Drever, 1998; Kaiser, 2000).

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Criticisms of Internet filtering in schools often fall into one of the following arguments. Nearly all of them assume filtering amounts to nothing less than censorship. One argument sees filtering as akin to removing books from a giant library (Wallace, 1997; Baker, 2000; Kaiser, 2000). Another argument contends that filters constitute unlawful abdication of school authority to a third party (Willard, G. E. & Cooper, 1985; Wallace, 1997; Kaiser, 2000; Schneider, 2000; Electronic Frontier Foundation, 2003; American Library Association, 2004). Another chief criticism of filters has been their technical limitations, in particular overblocking and underblocking. Filters occasionally overblock unintended sites, such as health information sites containing flagged terms like ‘breast’ (Wallace, 1997; American Library Association, 2000; Kaiser, 2000; Rideout et al., 2002). Filters have also been known to underblock information the user wanted blocked (Rideout et al., 2002). Opponents argue that such errors demonstrate that filtering as a regulatory device is constitutionally problematic (Miltner, 2005). Proponents have contended that prevention of the potential damage to children outweighs these technical hurdles (Burt, 1997; Watson, 2003; Welch, 1999).

One area within this debate that has not received much attention from the communication field is the issue of Internet filters in schools. Much of the attention on the constitutionality of Internet filters has focused on libraries. Since 1996 Congress has made several attempts to protect children from the Internet. This has been met by fierce opposition from such groups as the American Civil Liberties Union (ACLU), the National Education Association, Internet Free Expression Alliance, several gay and lesbian groups and the American Library Association (ALA) (Newell, 1999). The most recent and significant ruling regarding this issue is United States v. American Library Association, a 2003 opinion in which the Supreme Court concluded that Congress’s most recent attempt to curtail Internet indecency, the Children’s Internet Protection Act (CIPA), is constitutional. While US v ALA dealt with whether or not the government could require filters in libraries, the case has implications for similar questions raised regarding the use of filters in classrooms.

Review of US v ALA with regard to classrooms is important for at least three reasons. First, the ALA case is historically linked to Internet filters. Furthermore, in addition to requiring Internet filters in public libraries, the law in question had a comparable requirement for filters in schools. Finally, the question of filtering revives a decades-old battle over the balance of student autonomy versus the inculcation responsibilities of schools.

The US v ALA decision addresses several questions relevant to Internet filters in public schools. Can the federal government dictate Internet filter use in schools through threats of withhold funding of the E-rate Program? How does US v. ALA inform us about the constitutionality of Internet filters in schools? In particular, is the Internet like a bookstore or a library? What is the Court’s opinion on the over/under-filtering problems of filters? How does the ALA case address the third party argument against filters? How does the public forum argument apply to the use of filters in the classroom? This article attempts to address these questions.
The debate over inculcation versus autonomy

While the issue of Internet filtering is recent, it must be recognized as part of a much larger debate of students’ rights versus school authority, which dates back two centuries. Thus, in order to understand the former it is important to recognize it within the context of the latter. Furthermore, many of the arguments against filters make reference to these cases. The issue is particularly difficult because both the principles of inculcation and autonomy are pedagogically and constitutionally sound (Teitelbaum, 1982). The rights of expression and access to ideas are essential underpinnings of the First Amendment (Mill & Spitz, 1975). On the other hand, experience and research demonstrate that some restrictions are necessary in order to provide a sound learning environment and inculcate those values necessary to maintain a civilized and functioning society (Olenquist, 1981; Hollingsworth et al., 1984). It must be kept in mind that the school’s inculcative function is not antithetical to autonomy. Not only should students be provided some degree of autonomy by virtue of the First Amendment, but autonomy is requisite in order for students to learn how to function in a society of free and open discourse (Hafen, 1987; Hafen & Hafen, 1995; Lane, 1995). Nevertheless, differing theories of childhood, dating back to the 17th century, ultimately engendered political and ideological positions, along with several court battles that have placed these two concepts at odds with one another (Dewey, 1963; Pulaski, 1980; Kohlberg, 1981; Feuerstein & Hoffman, 1982; Guidubaldi et al., 1982; Hart, 1982; Postman, 1994; Lane, 1995, p. 32). Four landmark cases illustrate the difficulty of balancing First Amendment ideals with the schools’ responsibility to inculcate values.

Though not the first instance on which the Supreme Court faced the issue of inculcation versus autonomy in the classroom, *Tinker v. Des Moines Independent Community School District* remains one of the landmark cases dealing with values inculcation versus autonomy rights. The case is noted for the Court’s famous statement regarding student autonomy: ‘It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate’. At the same time the Court emphasized the school’s inculcative authority: ‘On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the states and of school officials’.

Another landmark case, *Board of Education, Island Trees Union Free School District, No. 26 v Pico*, resulted from the local New York school board’s removing from school libraries several books described by a politically conservative parents group as ‘objectionable’ and ‘improper fare for school students’. The Court reversed the summary judgement in favor of the parents, saying that there were genuine issues of material fact as to whether the removal had violated the Constitution and that a trial should be held on the matter. Two important factors led to this decision. First, the Court found that the school board’s decision was politically motivated. Second, the board had incorrectly attempted to extend its inculcative authority ‘beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that their holds sway’. As in *Tinker*, the Court again reaffirmed...
not only the right but the duty of schools to inculcate community values. While the library might be off limits, the Court recognized the school’s authority within the classroom: ‘Petitioners might well defend their duty of absolute discretion in matters of curriculum’ within the ‘compulsory environment of the classroom’.8

Two other seminal cases require mentioning. Both cases dealt with students’ right to autonomy and expression, particularly when the views expressed are unpopular or divergent from prevalent sensibilities. In *Bethel School District v. Fraser*9 a student sued after being suspended for giving a lewd speech at a school assembly. *Hazelwood School District v. Kulhmeier*10 involved a school newspaper produced by the school’s Journalism II class, in which the principal ordered two objectionable stories removed. In both cases the Supreme Court ruled in favor of the schools’ inculcative authority.

Various factors played into the respective rulings. First, neither case involved issues of political speech, nor were the schools’ actions politically motivated. Furthermore, while students can lay some claim to the First Amendment, such rights are not necessarily coexistent with the rights of adults in other settings. As such, schools are not required to tolerate student speech ‘that is inconsistent with its “basic educational mission,” . . . even though the government could not censor similar speech outside the school’.11 In *Bethel* the Court noted:

> Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the ‘work of the schools.’ . . . The determination of what manner of speech in the classrooms or in the school assembly is inappropriate properly rests with the school board.12

These cases illustrate the unique environment of the classroom. The cases also illustrate the extreme difficulty of balancing two pedagogically and constitutionally sound yet conflicting principles. While these cases offer some insight into the balance the courts have attempted to strike between autonomy rights and values inculcation, the Internet offers unique challenges to this long-standing debate.

### Historical connections

Historical connections between filters in libraries and classrooms date back to the Telecommunications Act of 1996 (TA ’96). The act contained two provisions affecting libraries and schools. The Schools and Libraries Support Mechanism provided assistance to connect libraries and schools to the Internet through reduced connection fees and subsidies to buy computers. It has become known as the E-rate Program. The E-rate Program became a very useful means for schools and libraries to provide the benefits of new technologies to their respective constituents and was seen as a tool for bridging the growing information gap between larger, well-funded institutions and those serving smaller, poorer areas. The program has been hugely successful, with over 35,000 applications for funding processed each year (Trotter, 1998; Pike, 2004). The E-rate Program was established in 1996 to provide funding for high speed Internet to schools and libraries in the USA. The program is funded
through a universal service ‘fee’ or tax charged on companies that provide interstate or international telecommunications services. The program has proven both successful and controversial. Proponents argue that it has been essential in overcoming the technological and education divide (Trotter, 1998; Selwyn et al., 2001; Curtis, 2003; EdLinc, 2003; Pike, 2004). At the same time, it has been plagued by problems of mismanagement and misconduct (Goldstein & US Government Accountability Office, 2005; US Government Accountability Office, 2005).

A second, more controversial provision of TA ’96 was the Communication Decency Act (CDA). The CDA made it illegal to transmit through any telecommunication service any indecent or obscene image or communication knowing the recipient to be under 18 years old. The CDA was immediately challenged in court. The Supreme Court eventually overturned the law in Reno v. American Civil Liberties Union. The Court found that the statute was overly ambiguous, not narrowly tailored nor the least restrictive means available to accomplish the government’s goal to protect children (Heins, 2001; Rodden, 2003; Saunders, 2003).

Following the defeat of the CDA Congress crafted new legislation called the Children’s Online Protection Act (COPA). The language in COPA reveals Congress’s attempt to comply with the Court’s statements in Reno and avoid the vagueness and constitutional problems of the CDA (Rodden, 2003). Much of it is similar to language used by the courts in such cases as Ginsberg v. New York and Miller v. California. Ginsberg was a 1968 Supreme Court case in which the Court recognized the state’s interest in protecting children from sexually explicit materials by upholding a state’s ban on the sale of such materials to minors. Miller, meanwhile, was decided in 1973, but represents the Supreme Court’s most recent effort to define sexually oriented speech not protected by the First Amendment. The three part Miller test requires that: the material in question appeal, in the view of an average person applying contemporary community standards, to the prurient interest; depicts sexual conduct in a patently offensive way; lack serious literary, artistic, political or scientific value. COPA applied only to commercial communication and prohibited providing to minors any communication deemed harmful to them.

Despite being more narrowly tailored than CDA, COPA was also challenged in court as a restriction of First Amendment rights. The US District Court for the Eastern District of Pennsylvania held that the law should be enjoined from enforcement because it likely violated the First Amendment. After several rounds of appeals the Supreme Court eventually held in 2004, in Ashcroft v. ACLU, that the intermediate appellate court did not err in holding that the injunction should be imposed pending a trial on the merits, in part because filtering software could be a less speech-restrictive alternative to COPA. The Supreme Court said this about filters:

Filters are less restrictive than COPA. They impose selective restrictions on speech at the receiving end, not universal restrictions at the source. Under a filtering regime, adults without children may gain access to speech they have a right to see without having to identify themselves or provide their credit card information. Even adults with children
may obtain access to the same speech on the same terms simply by turning off the filter on their home computers. Above all, promoting the use of filters does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much diminished. All of these things are true, moreover, regardless of how broadly or narrowly the definitions in COPA are construed.

Filters also may well be more effective than COPA. First, a filter can prevent minors from seeing all pornography, not just pornography posted to the Web from America. The District Court noted in its factfindings that one witness estimated that 40% of harmful-to-minors content comes from overseas. ... COPA does not prevent minors from having access to those foreign harmful materials. That alone makes it possible that filtering software might be more effective in serving Congress’ goals.17

In February 1999 Senators John McCain (Republican, Arizona) and Ernest Hollings (Democrat, South Carolina) co-sponsored new legislation called the Internet School Filtering Act. The bill addressed reception (use of filters) instead of transmission. In addition, the bill was narrowly tailored to affect only those schools and libraries receiving E-rate Program funding. Nothing in the bill made reception of indecent material illegal per se, rather it made reception of funding contingent upon the use of filters in the library or school (Your School and the law, 1999). Opponents quickly railed against the bill (Stein, 1998; Newell, 1999). The bill never had to meet court muster since it died during budget negotiations (Your School and the law, 1999).

At the same time, a separate case involving filters, Mainstream Loudoun v. Board of Trustees,18 was winding its way through the courts. Unlike previous cases challenging Internet decency laws, Loudoun resulted from a local statute. In 1997 The Board of Trustees of the Loudoun County Public Library enacted a policy requiring local libraries to place filters on library computers. A group of residents and civil liberties activists filed suit, challenging the constitutionality of the policy. In November 1998 the US District Court for the Eastern District of Virginia found in favor of the plaintiffs. Relying heavily on the 1982 Supreme Court case Pico,19 Judge Leonie M. Brinkema ruled that Internet filtering was equivalent to removing books from a library. Judge Brinkema further ruled that the Internet provides the receipt and communication of information and explicitly offers expressive activity, thus, the Internet was like a giant forum. Once the library had opened itself to the forum filtering would be akin to censoring public speech.20 The case was not appealed.

CIPA was the last of a long line of attempts by Congress to protect children from harmful materials on the Internet. In 1999 Senators McCain and Hollings reintroduced a bill similar to the Internet School Filtering Act, which had died in budget negotiations the previous year (Your School and the law, 1999). The Loudoun ruling may have helped galvanize support for the legislation (see Chavez, 1998; Norden, 2003). When CIPA came out opponents had every reason to believe they would prevail. After all, they had won rulings against the last two attempts by Congress to protect children from Internet pornography. Arguments against CIPA rested upon the Supreme Court and lower court holdings in several prior cases previously discussed in this manuscript. One critic wrote, ‘While Congress seemed to
be taking a step in the right direction by changing its focus from federal regulation to
empowering local communities, the reality is that Congress has failed the people by
1017). Following the ALA’s legal challenge of the law, another critic predicted, ‘It is
likely that the use of commercial, proprietary-protected, Internet filtering software in
schools will ultimately be deemed to be unconstitutionally restricting student access
to material on the Internet’ (Willard, N., 2002a).

CIPA provisions
Like the CDA and COPA, CIPA attempted to protect children from online obscenity
and indecency. It differed, however, in its approach. The CDA and COPA used a
broadcast regulation model by addressing the source. This had proven constitu-
tionally problematic in its application to the online environment. Rather than focus
on regulating the source of content, CIPA focused on the reception (Rodden, 2003).
Congress further insulated it from judicial scrutiny by narrowly defining its scope by
attaching the requirement to the reception of federal funding by public libraries and
schools contingent upon the use of filters.

The courts and CIPA
In adopting CIPA, which required public libraries and schools receiving E-rate
Program funding to block images constituting obscenity or child pornography,
Congress had concluded that filtering software functioned in a ‘reasonably effective
way’, in the words of the Supreme Court. At the time of the adoption of CIPA,
17% of all public libraries in the USA already used filtering software on at least some
of their computers with Internet access. A group of plaintiffs, including libraries,
library patrons, library associations, web site publishers and the American Library
Association, challenged the filtering provisions of CIPA as unconstitutional under
the First Amendment.

A three judge District Court panel held that in passing CIPA Congress had
exceeded its authority under the Spending Clause of the Constitution by requiring
libraries that received E-rate Program funding for Internet access to filter obscenity
and child pornography. The District Court viewed Internet access in public libraries
as akin to government owned property, such as sidewalks, streets and parks,
traditionally held open for the expression of a wide variety of private viewpoints.
Thus, Internet access in public libraries was held to be analogous to traditional
public fora, in which the government may regulate speech based on its content or the
message being expressed only if the government can show it has a compelling
justification for doing so and that its regulation is narrowly tailored to infringe no
more speech than is necessary.

Under this framework the District Court held that the government did have a
compelling interest in protecting library patrons, including children, from obscenity
and child pornography. However, the lower court held that the E-rate Program funding restriction was unconstitutional because it would require libraries to infringe more speech than was permissible under the narrow tailoring portion of the test. It was against this backdrop that the Supreme Court considered the issue in the spring of 2003.

Ultimately, six Supreme Court justices (Rehnquist, O'Connor, Scalia, Thomas, Kennedy and Breyer) agreed that the District Court judgement should be reversed, because the filtering provisions of CIPA did not violate the First Amendment. In a plurality opinion joined by three other justices, Chief Justice Rehnquist wrote that ‘the government has broad discretion to make content-based judgments in deciding what private speech to make available to the public’. The plurality opinion compared a public library’s provision of Internet access to its patrons with a public television station’s editorial judgements about what material to broadcast to its viewers. Internet access in libraries was also analogized to grant-making decisions by the National Endowment for the Arts. Thus, relying on the precedents of *Arkansas Educational Television Commission v. Forbes* and *National Endowment for the Arts v. Finley*, the Court concluded that ‘Public library staffs necessarily consider content in making collection decisions and enjoy broad discretion in making them’.

The Supreme Court plurality opinion rejected the District Court’s use of public forum principles. Internet access in public libraries was not seen as a traditional public forum because such access, which was relatively new at the time, had not ‘immemorially been held in trust for the use of the public and, time out of mind, . . . been used for purposes of assembly, communication of thoughts between citizens, and discussing public questions’. Likewise, the Court said, public library Internet access was not a designated public forum because the government had not made the affirmative decision to open a forum ‘for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak’. Instead, public libraries provided Internet access in order to facilitate research, learning and recreation.

Given the broad discretion it afforded public libraries to make decisions about what materials were appropriate for its collections, the Court held that libraries would not infringe patrons’ constitutional rights by installing filtering software to screen out obscenity and child pornography. Such material had already been traditionally excluded from libraries’ paper collections, so a parallel restriction on electronic materials did not constitute a constitutional violation. Also, the plurality opinion noted that CIPA did not punish libraries that chose not to receive E-rate Program funding and declined to install filtering software, but instead only reflected Congress’s decision not to subsidize libraries that chose that route.

**Applying ALA v. USA to classrooms**

Some of the challenges raised by filtering in schools include: whether filtering is more like the unconstitutional removal of books from a library or the permissible decision
to merely decline to purchase a book; the public forum merits of the Internet in classrooms; the technical failings of filters; the problem of third parties. ALA may have settled one constitutional question raised by CIPA (with regard to its library provisions), but another aspect of the same law was not addressed in the case: the question of filters in classrooms. Yet the Supreme Court’s opinion in ALA provides a basis on which to draw conclusions about the appropriateness of requiring Internet filters in public school classrooms.

**Bookstore or library**

The use of analogies is very important to jurisprudence, especially with new technology. The courts often rely on precedent. With new technology such a precedent generally does not exist. Thus, analogy serves as a vehicle for rendering decisions. The question, then becomes one of what analogy best fits. This question lies at the heart of the debate over filters in libraries and the classroom. One of the primary questions regarding the constitutionality of filters has been whether the Internet is like a giant bookstore or a library (Baker, 2000). If it is a library (or an extension of the library) then the use of filters may be like removing a book and thus censorship. If it is a bookstore then filtering is akin to school officials exercising their professional discretion in choosing not to purchase a book for their collection, a responsibility well within their purview. The *Loudoun* decision relied on the library analogy of the Internet.

We conclude the defendants have misconstrued the nature of the Internet. By purchasing Internet access, each Loudoun library has made all Internet publications instantly accessible to its patrons. Unlike an interlibrary loan or outright book purchase, no appreciable expenditure of library time or resources is required to make a particular publication available to a library patron. In contrast, a library must actually expend resources to restrict Internet access to a publication that is otherwise immediately available. In effect, by purchasing one such publication, the library has purchased them all. The Internet more closely resembles plaintiff’s analogy of a collection of encyclopedias from which the defendants have laboriously redacted portions deemed unfit for library patrons.

The fact that filtering is an ‘active, rather than passive exclusion’ gave the court a further rationale not to view filtering as a ‘selection’ activity analogous to refusing to purchase a book.

However, the library (vis-à-vis the bookstore) is a poor analogy. Purchasing should not be viewed as a defining action since neither schools nor libraries are required to accept material, even if it is free or donated. To do so would place them at the mercy of any third party peddling its wares by donating them to a public institution (*Pico*, dissenting opinion). Taken to its ultimate conclusion, the Internet-as-library analogy would hold that libraries, whether public or academic, are precluded from exercising the same professional discretion in the online world that they are entitled—and expected—to exercise in the brick and mortar world.
In *ALA* the lower courts adopted the analogy that Internet filtering was like removing books from a library. However, the Supreme Court disagreed. The plurality opinion viewed a public library’s blocking of pornographic material not as a decision to remove material from its collection but rather as a decision not to include such material in its collection in the first place. As noted by the dissent in *Pico*, libraries should not be at the mercy of book donors who want to define the content of the library’s collection. Likewise, the *ALA* plurality concluded that libraries should not be at the mercy of web publishers who want to define the content of the library’s collection. Instead, the plurality repeatedly stressed that “To fulfill their traditional missions, public libraries must have broad discretion to decide what material to provide to their patrons.”

The Court observed that “The fact that a library reviews and affirmatively chooses to acquire every book in its collection, [but] does not review every Web site that it makes available” is not a constitutionally relevant distinction. The alternative would be for libraries to allow only sites they deemed suitable. Given the fluidity of the Internet, such an option would be impracticable and would result in the exclusion of enormous amounts of valuable information. “Given that tradeoff, it is entirely reasonable for public libraries to reject that approach and instead exclude certain categories of content, without making individualized judgments that everything made available has requisite and appropriate quality.”

The question of whether Internet filtering in public school classrooms poses constitutional problems, however, may not be entirely resolved by analogies with libraries and bookstores. Instead, the analysis must take into account the unique environment of public schools, which is reflected in the school speech cases previously mentioned, such as *Hazelwood*, *Tinker* and *Bethel*. The next section examines some of the constitutional questions surrounding public schools’ use of filtering software in compliance with CIPA.

**Constitutionality of filter requirements in CIPA**

To address the question of whether Congress acts unconstitutionally when it requires filtering in public schools as a condition of federal funding it is necessary first to understand the limits of Congress’s authority under the Spending Clause of the Constitution, the scope of private speech rights on government property and the parameters of government’s own right to define and express its message. In discussing the interplay among those three important concepts the following section addresses the fundamental questions raised at the beginning of this manuscript.

With respect to the E-rate Program funding limitation requiring installation of filtering software, the analysis for public schools is no different than it was for public libraries in *ALA*. In that case the Supreme Court noted that Article I, section 8, clause 1 of the US Constitution grants Congress authority to spend money in furtherance of the exercise of its delegated powers. Under the Spending Clause
‘Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives’. 34

Thus, when Congress exercises its Spending Clause authority to require public schools receiving E-rate Program funding to install filters that block pornographic material that congressional conduct is not properly viewed as a ‘requirement’ on public schools. In other words, as the Supreme Court noted in ALA, ‘CIPA does not directly regulate private conduct; rather, Congress has exercised its Spending Power by specifying conditions on the receipt of federal funds’. 35 So, properly framed, the question is not whether Congress may require public schools to filter out obscenity and child pornography, but instead the question is whether the schools themselves, by filtering such material, would infringe the First Amendment freedoms of either purveyors of pornography to distribute such material or of school patrons, primarily students, to receive such material.

In the use of its Spending Clause power Congress may not impose conditions on funding recipients that would cause the recipients to violate the Constitution. However, public schools would not violate anyone’s First Amendment speech rights by filtering out pornographic materials from their Internet terminals. Under Miller v. California the Supreme Court had already sanctioned the government in restricting altogether the distribution of materials that meet the legal definition of obscenity. The Court had also stated that child pornography may not be protected by the First Amendment. So it is clear that CIPA requires public schools receiving E-rate Program funding to do only what the law already allows them to do, restrict access to obscenity and child pornography. There is no right to distribute pornographic materials in public schools nor is there a right for students to receive such materials.

With respect to sexually oriented materials that do not meet the legal definition of obscenity, however, the analysis becomes somewhat more involved. Bethel raised substantial doubt that public forum principles are even appropriate in the public school context. However, assuming that portions of school property and programs could constitute public fora, Internet access in school classrooms likely would not meet the definition of a traditional nor designated public forum. Government property may be categorized as a traditional public forum when the property in question has long been held open to encourage expression of a variety of viewpoints. Public school curricula generally, however, do not have the purpose of encouraging the expression of a variety of viewpoints but rather of educating students in accordance with an admittedly content-based program that has been determined to be necessary and beneficial for individuals and their communities.

One scholar put it this way:

[Although] the public school is an institution largely designed for concerns similar to those of the first amendment, [society] strictly controls [the] ideology [and] content of public school teaching. . . . [Value inculcation], rather than value neutrality, has been the tradition of public education since the beginning. (Diamond, 1981)

If public schools have not traditionally been held open as public fora, then neither have public schools been specifically designated by government as a place for a wide
variety of views to be expressed. Perhaps, as with a student newspaper, public schools may sometimes open portions of their operations for expression of viewpoints by students. But even in that case, those designated public fora are not held open for expression of viewpoints by outside publishers of sexually oriented materials. Thus, the fact that a school desires to provide students access to material on the Internet that will assist their learning in accordance with established curricula does not mean that the school has invited everyone who publishes on the Internet to express whatever message they wish within the school setting.

If school-sponsored Internet access is not a public forum, then the strict scrutiny required when government engages in content-based regulation in public fora does not apply in this context. In other words, the schools must be given some deference in their choice to restrict access to pornographic materials and in the methods they choose to accomplish that objective. However, there is another issue increasingly cropping up in First Amendment jurisprudence that bears discussion here. In recent years in particular the federal courts have constructed the legal principle that when the government chooses to express its own message it is entitled to define the content of that message virtually without restriction.

This principle is embodied in the case *Rust v. Sullivan*, in which Congress provided funds for family planning services but restricted use of those funds to clinics that did not counsel abortion as a method of family planning. The funding restriction was challenged as a First Amendment violation of family planning doctors who would like to use the funds but would also like to be free to discuss abortion with their clients. The Supreme Court, however, upheld the funding restriction as an appropriate exercise of Congress’s Spending Clause power. A majority of the Supreme Court held in that case that ‘when the Government appropriates public funds to establish a program it is entitled to define the limits of that program’. The principle that came out of *Rust* was discussed by the Supreme Court in *ALA* with respect to public libraries and may also come into play in any court case challenging public schools’ filtering of pornographic materials. The plurality in *ALA* discussed situations in which the government acts as a facilitator of speech, such as public broadcasting or public grants for the arts, and concluded that in those situations the government may make content-based choices without the need to establish a compelling justification and in the absence of less restrictive alternatives. It seems that in *ALA*, then, the Court suggested a category of government-filtered speech that draws on *Rust* and the government speech doctrine embodied in the 2005 case *Johanns v. Livestock Marketing Association* to say that government may choose the content of speech for which it will be held accountable. While *Pico* recognized that school libraries differ from classrooms in terms of educators’ inculcative authority, *Hazelwood* clarified that school authority to inculcate basic values was not restricted to the limits of the classroom walls.

The right of government to speak as it chooses was advanced by the opponents of CIPA as part of their argument that Congress could not forbid libraries from providing public access to constitutionally protected speech. The plurality, however, noted that it did not reach this issue in the case because, even assuming the issue was
properly raised in this context, it failed because Congress did not directly force libraries to suppress sexually oriented speech, but instead Congress merely provided E-rate Program funding for Internet access but restricted use of that funding to public schools and libraries that installed software filters.

In summary, a court analyzing the constitutionality of the filtering provisions of CIPA in public schools would largely mirror the analysis of the *ALA* plurality, but would be even more likely to conclude that public schools, compared with public libraries, do not open up a public forum when they choose to connect to the Internet. Additionally, the government’s right to choose the content of its own speech in public schools appears stronger than the government’s right to choose the content of public library collections. Thus, any court analyzing the issue would have to give broad deference to Congress and public schools in this area. For these reasons, any constitutional challenge to the CIPA requirement of filtering for schools receiving E-rate Program funding would be unlikely to succeed.

**Concerning overblocking and underblocking**

In *ALA* the Supreme Court also addressed the issue of overfiltering and underfiltering. A similar discussion is appropriate with respect to filtering in public schools. The effectiveness of filtering comes into play within the narrow tailoring portion of the constitutional analysis. In other words, conceding that the government has a sufficient interest in preventing schoolchildren from accessing obscenity and child pornography on school computers with Internet access, there remains the question of whether filtering infringes too much speech in serving that government interest.

As previously noted, the Supreme Court characterized software filtering in *ALA* as ‘reasonably effective’.\(^4^0\) The plurality opinion reasoned that even though overblocking might constitute a constitutional problem because too much speech may be restricted in attempting to serve the government’s interest, those constitutional concerns were ‘dispelled by the ease with which patrons may have the filtering software disabled’.\(^4^1\) In other words, ‘When a patron encounters a blocked site, he need only ask a librarian to unblock it or (at least in the case of adults) disable the filter’.\(^4^2\) Further, libraries under CIPA could permanently disable a filter with respect to a given site or even temporarily disable a filter altogether on a given computer terminal at a patron’s request.

In the public school context the problems of underblocking and overblocking might pose a more vexing problem than in the public library context. With respect to public libraries the *ALA* plurality dismissively wrote off concerns about overblocking due to the reality that adult patrons, at least, could have the filtering software programs disabled. In the context of public schools, however, the problems might not be so easily dismissed. Schoolteachers would be unlikely to disable software filters at the request of a student who wants to access a site with pornographic materials or materials that might deal with sex-related topics, even if innocuous. In
the public school setting underblocking poses the risk of demonstrating that software filtering is not an effective way of furthering the government’s interest in preventing children from accessing obscenity, whereas overblocking poses the risk of demonstrating that the method chosen by Congress to serve that interest is not narrowly tailored.

Ultimately, however, these concerns would be unlikely to result in CIPA being declared unconstitutional as it applies to public school Internet filtering. Concerns about underblocking and overblocking would only become important in examining the fit between the state interest in regulating obscenity and the means chosen to do so. Given a compelling interest in preventing schoolchildren from accessing pornographic materials, the government does not have to demonstrate a perfect fit between the end and the means. In other words, some underblocking and overblocking would be allowed because of the importance of the interest being served. Any court considering this issue would be likely to rely on cases such as Bethel to hold that the unique nature of the public school environment would justify some government conduct that might otherwise be viewed as infringing First Amendment rights:

> The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech... would undermine the school’s basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue [and] it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech [is] wholly inconsistent with the ‘fundamental values’ of public school education.33

### Third parties

Filter opponents have also raised concerns over filtering companies that maintain the stop lists (Electronic Frontier Foundation, 2003). They see this as the illegal delegation of school officials' curricular oversight authority to a third party (Willard, G. E. & Cooper, 1985; Wallace, 1997; Kaiser, 2000). Furthermore, they are particularly concerned by the subjective nature of such lists and the risk of inappropriate bias they pose (Kaiser, 2000; Schneider, 2000; Willard, N., 2002b; Electronic Frontier Foundation, 2003; American Library Association, 2004). The Court did not address the issue of third party stop lists in ALA. At the same time, it might be assumed that they were implicitly accepted since the Court did not see this as a problem in its acceptance of filtering as a reasonable means for the state to achieve its legitimate interest in protecting children from pornography. It might also be argued that this is similar to the editorial control of publishers of class textbooks. As an alternative, based on the Court’s ruling in ALA, it may be concluded that by not filtering schools may in essence be allowing third parties (i.e. web sites) to supersede school officials in determining what is best for the instruction of their students, since to do so would only make schools the ‘slavish courier[s] of the
material of third parties’. Still, the courts have not discussed the specific issue of third party control of stop lists in schools.

Conclusion

This paper has focused on how the ALA ruling would apply to the classroom. In ALA the Supreme Court held that requiring libraries to filter the Internet as a condition to receiving federal funding was not a First Amendment violation. With respect to federal funding requirements, there is no reason to suppose schools cannot be held to the same requirements as public libraries. The controversy over the use of Internet filters in the classroom adds to the debate of autonomy versus values inculcation. Filters raise unique issues concerning the latter. While the recent case of US v. ALA focused on public libraries, the ruling offers useful insight into the issue of filters in the classroom. In particular, it helps address questions such as: can the federal government dictate Internet filter use in schools through threats to withhold funding of the E-rate Program; do Internet filters in the classroom violate students’ First Amendment rights; in particular, is the Internet like a bookstore or a library; what is the Court’s opinion of the technical limitations of filters; how does the ALA case address the third party argument against filters; how does the public forum argument apply to the use of filters in the classroom?

With respect to Congress’s spending authority, Congress may attach strings to its funding decisions as long as those strings do not require recipients to violate the Constitution in order to receive federal money. In ALA the Court upheld Congress’s authority under the Spending Clause of the US Constitution to place whatever requirements on federal spending it saw fit to impose. Furthermore, it saw filters as a practical means for the state to achieve its legitimate interest in protecting children from pornography. The technical limitations of the filters were not seen as imposing an undue burden on the realization of the state’s goal to protect children.

Nothing in case law related to the free speech rights of students would indicate that a constitutional challenge to the software filtering requirement in public schools might succeed. While Pico is often used to support the argument that filtering is like unconstitutionally removing books from a giant virtual library, the Court rejected this argument. Filters may be the only practical means for libraries to accomplish in the cyberworld what they do in the brick and mortar world, namely selectively choose what may or may not be included in their collections. While the US v ALA ruling deals with public libraries, there is no legal rationale to suppose that its principles and conclusions are not applicable to school libraries, or even school classrooms. Under several applicable precedents the classroom setting affords school officials even more inculcative authority than they might possess in the school library setting.
Notes

1. The Queen v. Hicklin, L.R. 3 Q.B. 360 (Queen’s Bench 1868).
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References


*Your School and the Law* (1999) Bill linking E-rate funds to Internet filtering reintroduced, 29(3).