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UNITED STATES v. AMERICAN LIBRARY ASSOCIATION

SUPREME COURT OF THE UNITED STATES
539 U.S. 194
June 23, 2003

I cannot believe this is not a unanimous decision, but at least the plurality hit a home run and reversed the lower court. Otherwise, this case would have given new meaning to your kids spending Saturday afternoon at the hometown library!

OPINION: Chief Justice Rehnquist/O'Connor/Scalia/ Thomas...To address the problems associated with the availability of Internet pornography in public libraries, Congress enacted the Children's Internet Protection Act (CIPA). Under CIPA, a public library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them. The District Court held these provisions facially invalid on the ground that they induce public libraries to violate patrons' First Amendment rights. We now reverse.

To help public libraries provide their patrons with Internet access, Congress offers two forms of federal assistance. First, the E-rate program established by the Telecommunications Act of 1996 entitles qualifying libraries to buy Internet access at a discount...Second, pursuant to the Library Services and Technology Act (LSTA), the Institute of Museum and Library Services makes grants to state library administrative agencies to

"electronically link libraries with educational, social, or information services," "assist libraries in accessing information through electronic networks," and "pay costs for libraries to acquire or share computer systems and telecommunications technologies." In fiscal year 2002, Congress appropriated more than $149 million in LSTA grants. These programs have succeeded greatly in bringing Internet access to public libraries...By connecting to the Internet, public libraries provide patrons with a vast amount of valuable information. But there is also an enormous amount of pornography on the Internet, much of which is easily obtained. The accessibility of this material has created serious problems for libraries, which have found that patrons of all ages, including minors, regularly search for online pornography. Some patrons also expose others to pornographic images by leaving them displayed on Internet terminals or printed at library printers...

Congress became concerned that [these] programs were facilitating access to illegal and harmful pornography. Congress learned that adults "use library computers to access pornography that is then exposed to staff, passersby, and children" and that "minors access child and adult pornography in libraries."

But Congress also learned that filtering software that blocks access to pornographic Web sites could provide a reasonably effective way to prevent such uses of library resources. By 2000, before Congress enacted CIPA, almost 17% of public libraries used such software on at least some of their Internet terminals, and 7% had filters on all of them. A library can set such software to block categories of material, such as "Pornography" or "Violence." When a patron tries to view a site that falls within such a category, a screen appears indicating that the site is blocked. **But a filter set to block pornography may sometimes block other sites that present neither obscene nor pornographic material, but that nevertheless trigger the filter.** To minimize this problem, a library can set its software to prevent the blocking of material that falls into categories like "Education," "History" and "Medical." A library may also add or delete specific sites from a blocking category and anyone can ask companies that furnish filtering software to unblock particular sites.

Responding to this information, Congress enacted CIPA. It provides that a library may not receive E-rate or LSTA assistance unless it has "a policy of Internet safety for minors that includes the operation of a technology protection measure...that protects against access" by all persons to "visual depictions" that constitute "obscenity" or "child pornography" and that protects against access by minors to "visual depictions" that are "harmful to minors." The statute defines a "technology protection measure" as "a specific technology that blocks or filters Internet access to material covered by" CIPA. CIPA also permits the library to "disable" the filter "to enable access for bona fide research or other lawful purposes." Under the E-rate program, disabling is permitted "during use by an adult." Under the LSTA program, disabling is permitted during use by any person.

Appellees are a group of libraries, library associations, library patrons, and Web site publishers, including the American Library Association (ALA) and the Multnomah County Public Library in Portland, Oregon (Multnomah). They sued the United States and the Government agencies and officials responsible for administering the E-rate and LSTA programs in District Court, challenging the constitutionality of CIPA's filtering provisions...

[T]he District Court ruled that CIPA was facially unconstitutional and enjoined the relevant agencies and officials from withholding federal assistance for failure to comply with CIPA. The District Court 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 acknowledged that "generally the First Amendment subjects libraries' content-based decisions about which print materials to acquire for their collections to only rational basis review." But it distinguished libraries' decisions to make certain Internet material inaccessible. "The central difference," the court stated, "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." Reasoning that "the provision of Internet access within a public library...is for use by the public...for expressive activity," the court analyzed such access as a "designated public forum." The District Court also likened Internet access in libraries to "traditional public fora...such as sidewalks and parks" because it "promotes First Amendment values in an analogous manner."

Based on both of these grounds, the court held that the filtering software contemplated by CIPA was a content-based restriction on access to a public forum, and was therefore subject to strict scrutiny. Applying this standard, the District Court held that, although the Government has a compelling interest "in preventing the dissemination of obscenity, child pornography, or, in the case of minors, material harmful to minors," the use of software filters is not narrowly tailored to further those interests. We...now reverse...To determine whether libraries would violate the First Amendment by employing the filtering software that CIPA requires, we must first examine the role of libraries in our society.

Public libraries pursue the worthy missions of facilitating learning and cultural enrichment...To fulfill their traditional missions, public libraries must have broad discretion to decide what material to provide to their patrons. Although they seek to provide a wide array of information, their goal has never been to provide "universal coverage." Instead, public libraries seek to provide materials "that would be of the greatest direct benefit or interest to the community." To this end, libraries collect only those materials deemed to have "requisite and appropriate quality."...

We have held in two analogous contexts that the government has broad discretion to make content-based judgments in deciding what private speech to make available to the public. In *Arkansas Ed. Television Comm'n v. Forbes,* we held that public forum principles do not generally apply to a public television station's editorial judgments regarding the private speech it presents to its viewers. "Broad rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations." Recognizing a broad right of public access "would [also] risk implicating the courts in judgments that should be left to the exercise of journalistic discretion."

Similarly, in *National Endowment for Arts v. Finley,* we upheld an art funding program that required the National Endowment for the Arts (NEA) to use content-based criteria in making funding

decisions. We explained that "any content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding." In particular, "the very assumption of the NEA is that grants will be awarded according to the 'artistic worth of competing applicants,' and absolute neutrality is simply inconceivable." We expressly declined to apply forum analysis, reasoning that it would conflict with "NEA's mandate...to make esthetic judgments, and the inherently content-based 'excellence' threshold for NEA support."

The principles underlying *Forbes* and *Finley* also apply to a public library's exercise of judgment in selecting the material it provides to its patrons. Just as forum analysis and heightened judicial scrutiny are incompatible with the role of public television stations and the role of the NEA, they are also incompatible with the discretion that public libraries must have to fulfill their traditional missions. Public library staffs necessarily consider content in making collection decisions and enjoy broad discretion in making them.

The public forum principles on which the District Court relied are out of place in the context of this case. Internet access in public libraries is neither a "traditional" nor a "designated" public forum. First, this resource--which did not exist until quite recently-- has 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." We have "rejected the view that traditional public forum status extends beyond its historic confines." The doctrines surrounding traditional public forums may not be extended to situations where such history is lacking.

Nor does Internet access in a public library satisfy our definition of a "designated public forum." To create such a forum, the government must make an affirmative choice to open up its property for use as a public forum. "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse." The District Court likened public libraries' Internet terminals to the forum at issue in *Rosenberger v. Rector.* In *Rosenberger*, we considered the "Student Activity Fund" established by the University of Virginia that subsidized all manner of student publications except those based on religion. We held that the fund had created a limited public forum by giving public money to student groups who wished to publish, and therefore could not discriminate on the basis of viewpoint.

The situation here is very different. A public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak. It provides Internet access, not to "encourage a diversity of views from private speakers," *Rosenberger,* but for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality...As Congress recognized, "the Internet is simply another method for making information available in a school or library." It is "no more than a technological extension of the book stack."

The District Court disagreed because, whereas a library reviews and affirmatively chooses to acquire

every book in its collection, it does not review every Web site that it makes available. Based on this distinction, the court reasoned that a public library enjoys less discretion in deciding which Internet materials to make available than in making book selections. We do not find this distinction constitutionally relevant. A library's failure to make quality-based judgments about all the material it furnishes from the Web does not somehow taint the judgments it does make. A library's need to exercise judgment in making collection decisions depends on its traditional role in identifying suitable and worthwhile material; it is no less entitled to play that role when it collects material from the Internet than when it collects material from any other source. Most libraries already exclude pornography from their print collections because they deem it inappropriate for inclusion. We do not subject these decisions to heightened scrutiny; it would make little sense to treat libraries' judgments to block online pornography any differently, when these judgments are made for just the same reason.

Moreover, because of the vast quantity of material on the Internet and the rapid pace at which it changes, libraries cannot possibly segregate, item by item, all the Internet material that is appropriate for inclusion from all that is not. While a library could limit its Internet collection to just those sites it found worthwhile, it could do so only at the cost of excluding an enormous amount of valuable information that it lacks the capacity to review. 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 they do make available has requisite and appropriate quality.

Like the District Court, the dissents fault the tendency of filtering software to "overblock"--that is, to erroneously block access to constitutionally protected speech that falls outside the categories that software users intend to block. Due to the software's limitations, "many erroneously blocked Web pages contain content that is completely innocuous for both adults and minors, and that no rational person could conclude matches the filtering companies' category definitions, such as 'pornography' or 'sex.'" **Assuming that such erroneous blocking presents constitutional difficulties, any such concerns are dispelled by the ease with which patrons may have the filtering software disabled. 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.** As the District Court found, libraries have the capacity to permanently unblock any erroneously blocked site and the Solicitor General stated at oral argument that a "library may...eliminate the filtering with respect to specific sites...at the request of a patron." With respect to adults, CIPA also expressly authorizes library officials to "disable" a filter altogether "to enable access for bona fide research or other lawful purposes." The Solicitor General confirmed that a "librarian can, in response to a request from a patron, unblock the filtering mechanism altogether" and further explained that a patron would not "have to explain...why he was asking a site to be unblocked or the filtering to be disabled." **The District Court viewed unblocking and disabling as inadequate because <u>some patrons may be too embarrassed to request them</u>.**

We actually have judges in this Country who believe it is "constitutionally" more important to avoid embarrassing "adults" who wish to view pornography at the local library than it is to insure that an 8 year old child not have access to pornography at the local library. Of course, the majority of this Supreme Court reversed the lower court and upheld "blocking" irrespective of potential "embarrassment." I am more concerned that there may well be a large number of our society who agree with the District Court. If you are one of those, I suppose we will just have to agree to disagree because I am confident the Founding Fathers never believed their handiwork could become the weapon used to support pornographers in our public libraries. Perhaps I am in the minority. At any rate, as I repeatedly state, at least all of us has more knowledge about this issue than we did before reading it. ELL Mission Accomplished!

But the Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment.

Appellees urge us to affirm the District Court's judgment on the alternative ground that CIPA imposes an unconstitutional condition on the receipt of federal assistance. Under this doctrine, "the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected...freedom of speech' even if he has no entitlement to that benefit." Appellees argue that CIPA imposes an unconstitutional condition on libraries that receive E-rate and LSTA subsidies by requiring them, as a condition on their receipt of federal funds, to surrender their First Amendment right to provide the public with access to constitutionally protected speech. The Government counters that this claim fails because Government entities do not have First Amendment rights. See *Columbia Broadcasting System, Inc. v. Democratic National Committee* ("The *First Amendment* protects the press *from* governmental interference; it confers no analogous protection *on* the government"); ("The purpose of the First Amendment is to protect private expression").

We need not decide this question because, even assuming that appellees may assert an "unconstitutional conditions" claim, this claim would fail on the merits. Within broad limits, "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust v. Sullivan*. In *Rust*, Congress had appropriated federal funding for family planning services and forbidden the use of such funds in programs that provided abortion counseling. Recipients of these funds challenged this restriction, arguing that it impermissibly conditioned the receipt of a benefit on the relinquishment of their constitutional right to engage in abortion counseling. We rejected that claim, recognizing that "the Government was not denying a benefit to anyone, but was instead simply insisting that public funds be spent for the purposes for which they were authorized."

The same is true here. The E-rate and LSTA programs were intended to help public libraries fulfill their traditional role of obtaining material of requisite and appropriate quality for educational and informational purposes. Congress may certainly insist that these "public funds be spent for the purposes for which they were authorized." Especially because public libraries have traditionally excluded pornographic material from their other collections, Congress could reasonably impose a

parallel limitation on its Internet assistance programs. As the use of filtering software helps to carry out these programs, it is a permissible condition under *Rust*...Justice Stevens asserts the premise that "[a] federal statute penalizing a library for failing to install filtering software on every one of its Internet-accessible computers would unquestionably violate [the First] Amendment." But-- assuming again that public libraries have First Amendment rights--CIPA does not "penalize" libraries that choose not to install such software, or deny them the right to provide their patrons with unfiltered Internet access. Rather, CIPA simply reflects Congress' decision not to subsidize their doing so. To the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance. "A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity. A legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Rust*...Because public libraries' use of Internet filtering software does not violate their patrons' First Amendment rights, CIPA does not induce libraries to violate the Constitution, and is a valid exercise of Congress' spending power. Nor does CIPA impose an unconstitutional condition on public libraries. Therefore, the judgment...is reversed.

CONCURRENCE: Justice Kennedy...There are, of course, substantial Government interests at stake here. The interest in protecting young library users from material inappropriate for minors is legitimate, and even compelling, as all Members of the Court appear to agree. Given this interest, and the failure to show that the ability of adult library users to have access to the material is burdened in any significant degree, the statute is not unconstitutional on its face. For these reasons, I concur in the judgment of the Court.

CONCURRENCE: Justice Breyer...[Not Provided.]

DISSENT: Justice Stevens..."To fulfill their traditional missions, public libraries must have broad discretion to decide what material to provide their patrons." Accordingly, I agree with the plurality that it is neither inappropriate nor unconstitutional for a local library to experiment with filtering software as a means of curtailing children's access to Internet Web sites displaying sexually explicit images. I also agree with the plurality that the 7% of public libraries that decided to use such software on all of their Internet terminals in 2000 did not act unlawfully. Whether it is constitutional for the Congress of the United States to impose that requirement on the other 93%, however, raises a vastly different question. Rather than allowing local decisionmakers to tailor their responses to local problems, the CIPA operates as a blunt nationwide restraint on adult access to "an enormous amount of valuable information" that individual librarians cannot possibly review. Most of that information is constitutionally protected speech. In my view, this restraint is unconstitutional...

I have a question for you, Justice Stevens. It is against the law to possess child pornography. If a library permits everything on the internet into its domain, isn't the librarian subject to criminal prosecution? Discuss.

Given the quantity and ever-changing character of Web sites offering free sexually explicit material, it is inevitable that a substantial amount of such material will never be blocked. Because of this

"underblocking," the statute will provide parents with a false sense of security without really solving the problem that motivated its enactment. Conversely, the software's reliance on words to identify undesirable sites necessarily results in the blocking of thousands of pages that "contain content that is completely innocuous for both adults and minors, and that no rational person could conclude matches the filtering companies' category definitions, such as 'pornography' or 'sex.'" In my judgment, a statutory blunderbuss that mandates this vast amount of "overblocking" abridges the freedom of speech protected by the First Amendment.

The effect of the overblocking is the functional equivalent of a host of individual decisions excluding hundreds of thousands of individual constitutionally protected messages from Internet terminals located in public libraries throughout the Nation. **Neither the interest in suppressing unlawful speech nor the interest in protecting children from access to harmful materials justifies this overly broad restriction on adult access to protected speech**. "The Government may not suppress lawful speech as the means to suppress unlawful speech." *Ashcroft v. Free Speech Coalition*.[1]

Agree or disagree, I simply do not want to let anyone be misled. Let's review the decision of one of your Supreme Court Justices. (1) As the plurality points out, libraries are free to totally avoid the requirement of blocking. They don't get the money, but they didn't "get the money" before Congress acted. They can opt out of the program and do whatever they wish. (2) Adults are free to gain access to whatever internet filth they wish – at a location other than the public library. In spite of the ready availability of all internet sites to anyone by any number of means, Justice Stevens says that the "interest in protecting children from access to harmful materials does NOT justify the restrictions imposed by Congress" — in other words, does not justify embarrassing "adults." Aside from the abject horror of such beliefs on the High Court, if an "adult" is not embarrassed by asking permission to unblock, then, apparently Justice Stevens would not have a problem. If an adult "is" so embarrassed, perhaps there is good reason. I consider this dissent to be an absolute outrage and I am confident that nearly all of our citizens do not have a clue it is on the books. If Justice Stevens had won out, dropping your 8 year old child off to study at the hometown library could have been his introduction into the "adult" world of pornography. Is that the America the Framers envisioned? Is it the America you envision? Let no one doubt that, right or wrong, the Supreme Court sets the tone for the entire Country.

Although CIPA does not permit any experimentation, the District Court expressly found that a variety of alternatives less restrictive are available at the local level:

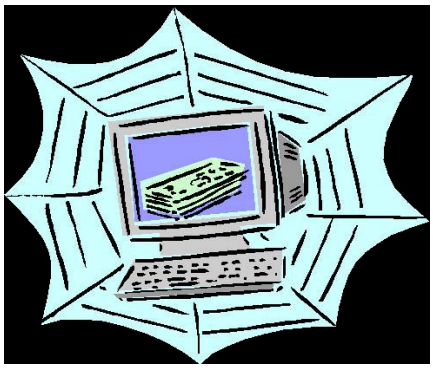
> "Less restrictive alternatives exist that further the government's legitimate interest in preventing the dissemination of obscenity, child pornography, and material harmful to minors, and in preventing patrons from being unwillingly exposed to patently offensive, sexually explicit content. To prevent patrons from accessing visual depictions that are obscene and child pornography, public libraries may enforce

[1]Case 1A-S-44 on this website.

> Internet use policies that make clear to patrons that the library's Internet terminals may not be used to access illegal speech. Libraries may then impose penalties on patrons who violate these policies, ranging from a warning to notification of law enforcement, in the appropriate case. Less restrictive alternatives to filtering that further libraries' interest in preventing minors from exposure to visual depictions that are harmful to minors include requiring parental consent to or presence during unfiltered access, or restricting minors' unfiltered access to terminals within view of library staff. Finally, optional filtering, privacy screens, recessed monitors, and placement of unfiltered Internet terminals outside of sight-lines provide less restrictive alternatives for libraries to prevent patrons from being unwillingly exposed to sexually explicit content on the Internet."

Those findings are consistent with scholarly comment on the issue arguing that local decisions tailored to local circumstances are more appropriate than a mandate from Congress. The plurality does not reject any of those findings. Instead, "assuming that such erroneous blocking presents constitutional difficulties," it relies on the Solicitor General's assurance that the statute permits individual librarians to disable filtering mechanisms whenever a patron so requests. In my judgment, that assurance does not cure the constitutional infirmity in the statute.

Until a blocked site or group of sites is unblocked, 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. Some curious readers would in time obtain access to the hidden materials, but many would not. Inevitably, the interest of the authors of those works in reaching the widest possible audience would be abridged. Moreover, because the procedures that different libraries are likely to adopt to respond to unblocking requests will no doubt vary, it is impossible to measure the aggregate effect of the statute on patrons' access to blocked sites. Unless we assume that the statute is a mere symbolic gesture, we must conclude that it will create a significant prior restraint on adult access to protected speech. A law that prohibits reading without official consent, like a law that prohibits speaking without consent, "constitutes a dramatic departure from our national heritage and constitutional tradition."



The plurality incorrectly argues that the statute does not impose "an unconstitutional condition on public libraries." On the contrary, it impermissibly conditions the receipt of Government funding on the restriction of significant First Amendment rights.

The plurality explains the "worthy missions" of the public library in facilitating "learning and cultural enrichment." It then asserts that in order to fulfill these missions, "libraries must have broad discretion to decide what material to provide to their patrons." Thus the selection decision is the

province of the librarians, a province into which we have hesitated to enter:

> "A library's need to exercise judgment in making collection decisions depends on its traditional role in identifying suitable and worthwhile material; it is no less entitled to play that role when it collects material from the Internet than when it collects material from any other source. Most libraries already exclude pornography from their print collections because they deem it inappropriate for inclusion. We do not subject these decisions to heightened scrutiny; it would make little sense to treat libraries' judgments to block online pornography any differently, when these judgments are made for just the same reason."

As the plurality recognizes, we have always assumed that libraries have discretion when making decisions regarding what to include in, and exclude from, their collections. That discretion is comparable to the "business of a university...to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." As the District Court found, one of the central purposes of a library is to provide information for educational purposes: "Books and other library resources should be provided for the interest, information, and enlightenment of all people of the community the library serves." Given our Nation's deep commitment "to safeguarding academic freedom" and to the "robust exchange of ideas," a library's exercise of judgment with respect to its collection is entitled to First Amendment protection.

A federal statute penalizing a library for failing to install filtering software on every one of its Internet-accessible computers would unquestionably violate that Amendment. I think it equally clear that the First Amendment protects libraries from being denied funds for refusing to comply with an identical rule. An abridgment of speech by means of a threatened denial of benefits can be just as pernicious as an abridgment by means of a threatened penalty...This Court should not permit federal funds to be used to enforce this kind of broad restriction of *First Amendment* rights...I would affirm the judgment of the District Court.

DISSENT: Justice Souter/Ginsburg...I have no doubt about the legitimacy of governmental efforts to put a barrier between child patrons of public libraries and the raw offerings on the Internet otherwise available to them there, and if the only First Amendment interests raised here were those of children, I would uphold application of the Act. We have said that the governmental interest in "shielding" children from exposure to indecent material is "compelling" and I do not think that the awkwardness a child might feel on asking for an unblocked terminal is any such burden as to affect constitutionality.

Oh, for heaven's sake, no one is concerned about the awkwardness of a "child" in seeking an unblocked terminal. But, seriously, Justice Souter, are you about to express concern for an adult's awkwardness?

Nor would I dissent if I agreed with the majority of my colleagues...that an adult library patron could,

consistently with the Act, obtain an unblocked terminal simply for the asking. I realize the Solicitor General represented this to be the Government's policy and if that policy were communicated to every affected library as unequivocally as it was stated to us at argument, local librarians might be able to indulge the unblocking requests of adult patrons to the point of taking the curse off the statute for all practical purposes. But the FCC, in its order implementing the Act, pointedly declined to set a federal policy on when unblocking by local libraries would be appropriate under the statute ...Moreover, the District Court expressly found that "unblocking may take days, and may be unavailable, especially in branch libraries, which are often less well staffed than main libraries."

In any event, we are here to review a statute, and the unblocking provisions simply cannot be construed, even for constitutional avoidance purposes, to say that a library must unblock upon adult request, no conditions imposed and no questions asked. First, the statute says only that a library "may" unblock, not that it must. In addition, it allows unblocking only for a "bona fide research or other lawful purposes" and if the "lawful purposes" criterion means anything that would not subsume and render the "bona fide research" criterion superfluous, it must impose some limit on eligibility for unblocking...There is therefore necessarily some restriction, which is surely made more onerous by the uncertainty of its terms and the generosity of its discretion to library staffs in deciding who gets complete Internet access and who does not...

We therefore have to take the statute on the understanding that adults will be denied access to a substantial amount of non-obscene material harmful to children but lawful for adult examination, and a substantial quantity of text and pictures harmful to no one. As the plurality concedes, this is the inevitable consequence of the indiscriminate behavior of current filtering mechanisms, which screen out material to an extent known only by the manufacturers of the blocking software ("The category lists maintained by the blocking programs are considered to be proprietary information, and hence are unavailable to customers or the general public for review, so that public libraries that select categories when implementing filtering software do not really know what they are blocking").

We likewise have to examine the statute on the understanding that the restrictions on adult Internet access have no justification in the object of protecting children. Children could be restricted to blocked terminals, leaving other unblocked terminals in areas restricted to adults and screened from casual glances. And of course the statute could simply have provided for unblocking at adult request, with no questions asked. The statute could, in other words, have protected children without blocking access for adults or subjecting adults to anything more than minimal inconvenience, just the way (the record shows) many librarians had been dealing with obscenity and indecency before imposition of the federal conditions. Instead, the Government's funding conditions engage in overkill to a degree illustrated by their refusal to trust even a library's staff with an unblocked terminal, one to which the adult public itself has no access.

Perhaps there are alternatives; however, I would prefer them to be the subject of political debate. Go to your Congressman, suggest change, but, in the meantime, protect the kids!

The question for me, then, is whether a local library could itself constitutionally impose these restrictions on the content otherwise available to an adult patron through an Internet connection, at a library terminal provided for public use. The answer is no. A library that chose to block an adult's Internet access to material harmful to children (and whatever else the undiscriminating filter might interrupt) would be imposing a content-based restriction on communication of material in the library's control that an adult could otherwise lawfully see. This would simply be censorship. True, the censorship would not necessarily extend to every adult, for an intending Internet user might convince a librarian that he was a true researcher or had a "lawful purpose" to obtain everything the library's terminal could provide. But as to those who did not qualify for discretionary unblocking, the censorship would be complete and, like all censorship by an agency of the Government, presumptively invalid owing to strict scrutiny in implementing the Free Speech Clause of the First Amendment. "The policy of the First Amendment favors dissemination of information and opinion, and the guarantees of freedom of speech and press were not designed to prevent the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential." *Bigelow v. Virginia*.

...The plurality claims to find support for its conclusions in the "traditional mission" of the public library. The plurality thus argues, in effect, that the traditional responsibility of public libraries has called for denying adult access to certain books, or bowdlerizing the content of what the libraries let adults see. But, in fact, the plurality's conception of a public library's mission has been rejected by the libraries themselves. And no library that chose to block adult access in the way mandated by the Act could claim that the history of public library practice in this country furnished an implicit gloss on First Amendment standards, allowing for blocking out anything unsuitable for adults.

I just cannot contemplate this argument, for, short of obscenity and child pornography, the only logical result is a duty on the part of every library to purchase every publication in the world. Libraries cannot do that. They **must** decide what **not** to purchase!

Institutional history of public libraries in America discloses an evolution toward a general rule, now firmly rooted, that any adult entitled to use the library has access to any of its holdings. To be sure, this freedom of choice was apparently not within the inspiration for the mid-19th century development of public libraries and in the infancy of their development a "moral censorship" of reading material was assumed. But even in the early 20th century, the legitimacy of the librarian's authority as moral arbiter was coming into question. And the practices of European fascism fueled the reaction against library censorship. The upshot was a growing understanding that a librarian's job was to guarantee that "all people had access to all ideas" and by the end of the 1930s, librarians' "basic position in opposition to censorship [had] emerged."

By the time McCarthyism began its assaults, appellee American Library Association had developed a Library Bill of Rights against censorship...and an Intellectual Freedom Committee to maintain the position that beyond enforcing existing laws against obscenity, "there is no place in our society for extra-legal efforts to coerce the taste of others, to confine adults to the reading matter deemed

suitable for adolescents, or to inhibit the efforts of writers to achieve artistic expression." So far as I have been able to tell, this statement expressed the prevailing ideal in public library administration after World War II, and it seems fair to say as a general rule that libraries by then had ceased to deny requesting adults access to any materials in their collections. The adult might, indeed, have had to make a specific request, for the literature and published surveys from the period show a variety of restrictions on the circulation of library holdings, including placement of materials apart from open stacks, and availability only upon specific request. But aside from the isolated suggestion, I have not been able to find from this period any record of a library barring access to materials in its collection on a basis other than a reader's age. It seems to have been out of the question for a library to refuse a book in its collection to a requesting adult patron, or to presume to evaluate the basis for a particular request.

This take on the postwar years is confirmed by evidence of the dog that did not bark. During the second half of the 20th century, the ALA issued a series of policy statements, since dubbed Interpretations of the Library Bill of Rights, commenting on library administration and pointing to particular practices the ALA opposed. Thus, for example, in response to pressure by the Sons of the American Revolution on New Jersey libraries to place labels on materials "advocating or favoring communism," the ALA in 1957 adopted a "Statement on Labeling," opposing it as "a censor's tool." Again, 10 years later, the ALA even adopted a statement against any restriction on access to library materials by minors. It acknowledged that age restrictions were common across the Nation in "a variety of forms, including, among others, restricted reading rooms for adult use only, library cards limiting circulation of some materials to adults only, closed collections for adult use only, and interlibrary loan for adult use only." Nevertheless, the ALA opposed all such limitations, saying that "only the parent...may restrict his children--and only *his* children--from access to library materials and services."

And in 1973, the ALA adopted a policy opposing the practice already mentioned, of keeping certain books off the open shelves, available only on specific request. The statement conceded that "'closed shelf,' 'locked case,' 'adults only,' or 'restricted shelf' collections" were "common to many libraries in the United States." The ALA nonetheless came out against it, in these terms: "While the limitation differs from direct censorship activities, such as removal of library materials or refusal to purchase certain publications, it nonetheless constitutes censorship, albeit a subtle form."

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 library's censorship of its collection against adult enquiry.

Thus, there is no pre-acquisition scarcity rationale to save library Internet blocking from treatment as censorship, and no support for it in the historical development of library practice. To these two reasons to treat blocking differently from a decision declining to buy a book, a third must be added. 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.

I have already spoken about two features of acquisition decisions that make them poor candidates for effective judicial review. The first is their complexity, the number of legitimate considerations that may go into them, not all pointing one way, providing cover for any illegitimate reason that managed to sneak in. A librarian should consider likely demand, scholarly or esthetic quality, alternative purchases, relative cost, and so on. The second reason the judiciary must by shy about reviewing acquisition decisions is the sheer volume of them, and thus the number that might draw fire. Courts cannot review the administration of every library with a constituent disgruntled that the library fails to buy exactly what he wants to read.

After a library has acquired material in the first place, however, the variety of possible reasons that might legitimately support an initial rejection are no longer in play. Removal of books or selective blocking by controversial subject matter is not a function of limited resources and less likely than a selection decision to reflect an assessment of esthetic or scholarly merit. Removal (and blocking) decisions being so often obviously correlated with content, they tend to show up for just what they are, and because such decisions tend to be few, courts can examine them without facing a deluge. The difference between choices to keep out and choices to throw out is thus enormous, a perception that underlay the good sense of the plurality's conclusion in *Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico*[2], that removing **classics** from a school library in response to pressure from parents and school board members violates the Speech Clause.

I cannot believe Justice Stevens has the gall to refer to the books listed for removal in *Pico* as "classics." This is just utterly outrageous. Find it on this website at 1A-S-31.

There is **no good reason**, then, to treat blocking of adult enquiry as anything different from the censorship it presumptively is. For this reason, I would hold in accordance with conventional strict scrutiny that a library's practice of blocking would violate an adult patron's First and Fourteenth Amendment right to be free of Internet censorship, when **unjustified (as here) by any legitimate interest in screening children from harmful material**. On that ground, the Act's blocking requirement in its current breadth calls for unconstitutional action by a library recipient, and is itself unconstitutional.

[2]Case 1A-S-31 on this website.