Supplementary Material

Chapter 11: The Contemporary Era—Democratic Rights/Free Speech/Public Property, Subsidies, Employees, and Schools

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United States v. American Library Association, Inc., 539 U.S. 194 (2003)

The American Library Association (ALA) is the leading professional organization for librarians in the United States. Members objected vigorously when Congress passed the Children's Internet Protection Act of 2000 (CIPA). That measure prohibited public libraries from receiving federal funds for Internet access unless the library also installed filters that blocked obscenity and pornography. The ALA sued the United States, claiming that this condition violated the First Amendment, as incorporated by the due process clause of the Fourteenth Amendment. A local federal district court agreed that CIPA was unconstitutional. The United States appealed to the Supreme Court.

The Supreme Court by a 6–3 vote reversed the lower federal court. Chief Justice Rehnquist and three other justices maintained that because public libraries were not public forums, government officials could make content-based discriminations when deciding what materials to subsidize. Justice Kennedy and Justice Breyer determined that the government interest in preventing minors from having access to obscenity justified the policy, particularly because they thought the burdens imposed on adults were slight. Why did the plurality opinion think that libraries were not public forums? Was that analysis correct? How did the different opinions balance the governmental and private interests? Which balance was correct? All the justices agreed that no library had an obligation to purchase a book that librarians believed obscene. If this is correct, why might libraries not have a right to block Internet access to that same book?

CHIEF JUSTICE REHNQUIST announced the judgment of the Court and delivered an opinion, in which JUSTICE O'CONNOR, JUSTICE SCALIA, and JUSTICE THOMAS joined.

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Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives. But Congress may not "induce" the recipient "to engage in activities that would themselves be unconstitutional." 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.

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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* (1998), 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. . . . Similarly, in *National Endowment for the Arts v. Finley* (1998), 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 "[a]ny content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding."

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.

. . . 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." . . .

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. . . . 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," 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.

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. . . 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.

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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* (1991). 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.

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JUSTICE KENNEDY, concurring in the judgment.

If, on the request of an adult user, a librarian will unblock filtered material or disable the Internet software filter without significant delay, there is little to this case. The Government represents this is indeed the fact. . . .

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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.

JUSTICE BREYER, concurring in the judgment.

In ascertaining whether the statutory provisions are constitutional, I would apply a form of heightened scrutiny, examining the statutory requirements in question with special care. The Act directly restricts the public's receipt of information. And it does so through limitations imposed by outside bodies (here Congress) upon two critically important sources of information—the Internet as accessed via public libraries. For that reason, we should not examine the statute's constitutionality as if it raised no special First Amendment concern—as if, like tax or economic regulation, the First Amendment demanded only a "rational basis" for imposing a restriction. Nor should we accept the Government's suggestion that a presumption in favor of the statute's constitutionality applies.

At the same time, in my view, the First Amendment does not here demand application of the most limiting constitutional approach—that of "strict scrutiny." The statutory restriction in question is, in essence, a kind of "selection" restriction (a kind of editing). It affects the kinds and amount of materials that the library can present to its patrons. And libraries often properly engage in the selection of materials, either as a matter of necessity (i.e., due to the scarcity of resources) or by design (i.e., in accordance with collection development policies). To apply "strict scrutiny" to the "selection" of a library's collection (whether carried out by public libraries themselves or by other community bodies with a traditional legal right to engage in that function) would unreasonably interfere with the discretion necessary to create, maintain, or select a library's "collection" (broadly defined to include all the information the library makes available).

Instead, I would examine the constitutionality of the Act's restrictions here as the Court has examined speech-related restrictions in other contexts where circumstances call for heightened, but not "strict," scrutiny—where, for example, complex, competing constitutional interests are potentially at issue or speech-related harm is potentially justified by unusually strong governmental interests.

In such cases the Court has asked whether the harm to speech-related interests is disproportionate in light of both the justifications and the potential alternatives. It has considered the legitimacy of the statute's objective, the extent to which the statute will tend to achieve that objective, whether there are other, less restrictive ways of achieving that objective, and ultimately whether the statute works speech-related harm that, in relation to that objective, is out of proportion.

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The Act's restrictions satisfy these constitutional demands. The Act seeks to restrict access to obscenity, child pornography, and, in respect to access by minors, material that is comparably harmful. These objectives are "legitimate," and indeed often "compelling." . . . Due to present technological limitations, however, the software filters both "overblock," screening out some perfectly legitimate material, and "underblock," allowing some obscene material to escape detection by the filter. But no one has presented any clearly superior or better fitting alternatives.

At the same time, the Act contains an important exception that limits the speech-related harm that "overblocking" might cause. As the plurality points out, the Act allows libraries to permit any adult patron access to an "overblocked" Web site; the adult patron need only ask a librarian to unblock the specific Web site or, alternatively, ask the librarian, "Please disable the entire filter."

The Act does impose upon the patron the burden of making this request. But it is difficult to see how that burden (or any delay associated with compliance) could prove more onerous than traditional library practices associated with segregating library materials in, say, closed stacks, or with interlibrary lending practices that require patrons to make requests that are not anonymous and to wait while the librarian obtains the desired materials from elsewhere. . . .

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JUSTICE STEVENS, dissenting.

. . . [T]he Children's Internet Protection Act (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.

The unchallenged findings of fact made by the District Court reveal fundamental defects in the filtering software that is now available or that will be available in the foreseeable future. Because the software relies on key words or phrases to block undesirable sites, it does not have the capacity to exclude a precisely defined category of images. 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."

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. . . .

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A federal statute penalizing a library for failing to install filtering software on every one of its Internet-accessible computers would unquestionably violate th[e] [First] 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.

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. . . The discounts under the E-rate program and funding under the Library Services and Technology Act (LSTA) program involved in this case do not subsidize any message favored by the Government. As Congress made clear, these programs were designed "[t]o help public libraries provide their patrons with Internet access," which in turn "provide[s] patrons with a vast amount of valuable information." These programs thus are designed to provide access, particularly for individuals in low-income communities to a vast amount and wide variety of private speech. They are not designed to foster or transmit any particular governmental message.

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Further, like a library, the NEA experts in *Finley* had a great deal of discretion to make judgments as to what projects to fund. But unlike this case, Finley did not involve a challenge by the NEA to a governmental restriction on its ability to award grants. Instead, the respondents were performance artists who had applied for NEA grants but were denied funding. If this were a case in which library patrons had challenged a library's decision to install and use filtering software, it would be in the same posture as *Finley*. Because it is not, *Finley* does not control this case.

Also unlike *Finley*, the Government does not merely seek to control a library's discretion with respect to computers purchased with Government funds or those computers with Government-discounted Internet access. CIPA requires libraries to install filtering software on every computer with Internet access if the library receives any discount from the E-rate program or any funds from the LSTA program. . . . But under this statute, if a library attempts to provide Internet service for even one computer through an E-rate discount, that library must put filtering software on all of its computers with Internet access, not just the one computer with E-rate discount.

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JUSTICE SOUTER, with whom JUSTICE GINSBURG joins, dissenting.

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[W]e 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. . . .

We therefore have to take the statute on the understanding that adults will be denied access to a substantial amount of nonobscene 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.

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 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. . . .

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Public libraries are indeed selective in what they acquire to place in their stacks, as they must be. There is only so much money and so much shelf space, and the necessity to choose some material and reject the rest justifies the effort to be selective with an eye to demand, quality, and the object of maintaining the library as a place of civilized enquiry by widely different sorts of people. Selectivity is thus necessary and complex, and these two characteristics explain why review of a library's selection decisions must be limited: the decisions are made all the time, and only in extreme cases could one expect particular choices to reveal impermissible reasons (reasons even the plurality would consider to be illegitimate), like excluding books because their authors are Democrats or their critiques of organized Christianity are unsympathetic. . . . Review for rational basis is probably the most that any court could conduct, owing to the myriad particular selections that might be attacked by someone, and the difficulty of untangling the play of factors behind a particular decision.

At every significant point, however, the Internet blocking here defies comparison to the process of acquisition. Whereas traditional scarcity of money and space require a library to make choices about what to acquire, and the choice to be made is whether or not to spend the money to acquire something, blocking is the subject of a choice made after the money for Internet access has been spent or committed. Since it makes no difference to the cost of Internet access whether an adult calls up material harmful for children or the Articles of Confederation, blocking (on facts like these) is not necessitated by scarcity of either money or space. . . .

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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.