

SOUTER, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 02–361

UNITED STATES, ET AL., APPELLANTS *v.* AMERICAN
LIBRARY ASSOCIATION, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

[June 23, 2003]

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins,
dissenting.

I agree in the main with JUSTICE STEVENS, *ante*, at 6–12 (dissenting opinion), that the blocking requirements of the Children’s Internet Protection Act, 20 U. S. C. §§9134(f)(1) (A)(i) and (B)(i); 47 U. S. C. §§254(h)(6)(B)(i) and (C)(i), impose an unconstitutional condition on the Government’s subsidies to local libraries for providing access to the Internet. I also agree with the library appellees on a further reason to hold the blocking rule invalid in the exercise of the spending power under Article I, §8: the rule mandates action by recipient libraries that would violate the First Amendment’s guarantee of free speech if the libraries took that action entirely on their own. I respectfully dissent on this further ground.

I

Like the other Members of the Court, 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

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“compelling,” *Reno v. American Civil Liberties Union*, 521 U. S. 844, 869–870 (1997), 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.

Nor would I dissent if I agreed with the majority of my colleagues, see *ante*, at 11–12 (plurality opinion); *ante*, at 5 (BREYER, J., concurring in judgment); *ante*, at 1 (KENNEDY, J., concurring in judgment), 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, see Tr. of Oral Arg. 4–5, 11, 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 Federal Communications Commission, 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. See *In re Federal-State Joint Board on Universal Service: Children’s Internet Protection Act*, 16 FCC Rcd. 8182, 8204, ¶53 (2001) (“Federally-imposed rules directing school and library staff when to disable technology protection measures would likely be overbroad and imprecise, potentially chilling speech, or otherwise confusing schools and libraries about the requirements of the statute. We leave such determinations to the local communities, whom we believe to be most knowledgeable about the varying circumstances of schools or libraries within those communities”). 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.” 201 F. Supp. 2d 401, 411 (ED Pa. 2002); see *id.*, at 487–488 (same).

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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. 20 U. S. C. §9134(f)(3); see 47 U. S. C. §254(h)(6)(D). In addition, it allows unblocking only for a “bona fide research or other lawful purposes,” 20 U. S. C. §9134(f)(3); see 47 U. S. C. §254(h)(6)(D), 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, see, *e.g.*, *Connecticut Nat. Bank v. Germain*, 503 U. S. 249, 253 (1992) (“[C]ourts should disfavor interpretations of statutes that render language superfluous”). 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. Cf. *Forsyth County v. Nationalist Movement*, 505 U. S. 123, 130 (1992) (noting that the First Amendment bars licensing schemes that grant unduly broad discretion to licensing officials, given the potential for such discretion to “becom[e] a means of suppressing a particular point of view” (internal quotation marks omitted)).¹

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

¹ If the Solicitor General’s representation turns out to be honored in the breach by local libraries, it goes without saying that our decision today would not foreclose an as-applied challenge. See also *ante*, at 5–6 (BREYER, J., concurring in judgment); *ante*, at 1 (KENNEDY, J., concurring in judgment).

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of text and pictures harmful to no one. As the plurality concedes, see *ante*, at 11, 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, see 201 F. Supp. 2d, at 408 (“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. See *id.*, at 422–427. 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. See *id.*, at 413 (quoting 16 FCC Rcd., at 8196, ¶30).

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

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(and whatever else the indiscriminating 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*, 421 U. S. 809, 829 (1975) (internal quotation marks and brackets omitted).

II

The Court's plurality does not treat blocking affecting adults as censorship, but chooses to describe a library's act in filtering content as simply an instance of the kind of selection from available material that every library (save, perhaps, the Library of Congress) must perform. *Ante*, at 11 ("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

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source”). But this position does not hold up.²

A

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. See *Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U. S. 853, 870–871 (1982) (plurality opinion). 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.

²Among other things, the plurality’s reasoning ignores the widespread utilization of interlibrary loan systems. See 201 F. Supp. 2d 401, 421 (ED Pa. 2002). With interlibrary loan, virtually any book, say, is effectively made available to a library’s patrons. If, therefore, a librarian refused to get a book from interlibrary loan for an adult patron on the ground that the patron’s “purpose” in seeking the book was not acceptable, the librarian could find no justification in the fact that libraries have traditionally “collect[ed] only those materials deemed to have ‘requisite and appropriate quality.’” *Ante*, at 6–7. In any event, in the ensuing analysis, I assume for the sake of argument that we are in a world without interlibrary loan.

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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.³ In the instance of the Internet, what the library acquires is electronic access, and the choice to block is a choice to limit access that has already been acquired. Thus, deciding against buying a book means there is no book (unless a loan can be obtained), but blocking the Internet is merely blocking access purchased in its entirety and subject to unblocking if the librarian agrees. The proper analogy therefore is not to passing up a book that might have been bought; it is either to buying a book and then keeping it from adults lacking an acceptable “purpose,” or to buying an encyclopedia and then cutting out pages with anything thought to be unsuitable for all adults.

B

The plurality claims to find support for its conclusions in the “traditional missio[n]” of the public library. *Ante*, at 8; see also *ante*, at 5 (BREYER, J., concurring in judgment)

³Of course, a library that allowed its patrons to use computers for any purposes might feel the need to purchase more computers to satisfy what would presumably be greater demand, see Brief for Appellants 23, but the answer to that problem would be to limit the number of unblocked terminals or the hours in which they could be used. In any event, the rationale for blocking has no reference whatever to scarcity.

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(considering “traditional library practices”). 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.

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.⁴ To be sure, this freedom of choice was apparently not within the inspiration for the mid-19th century development of public libraries, see J. Shera, *Foundations of the Public Library: The Origins of the Public Library Movement in New England, 1629–1855*, p. 107 (1949), and in the infancy of their development a “[m]oral censorship” of reading material was assumed, E. Geller, *Forbidden Books in American Public Libraries, 1876–1939*, p. 12 (1984). But even in the early 20th century, the legitimacy of the librarian’s authority as moral arbiter was coming into question. See, *e.g.*, Belden, *President’s Address: Looking Forward*, 20 *Bull. Am. Libr. Assn.* 273, 274 (1926) (“The true public library must stand for the intellectual freedom of access to the printed word”). And the practices of European fascism fueled the reaction

⁴That is, libraries do not refuse materials to adult patrons on account of their content. Of course, libraries commonly limit access on content-neutral grounds to, say, rare or especially valuable materials. Such practices raise no First Amendment concerns, because they have nothing to do with suppressing ideas.

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against library censorship. See M. Harris, *History of Libraries in the Western World* 248 (4th ed. 1995). The upshot was a growing understanding that a librarian's job was to guarantee that "all people had access to all ideas," Geller, *supra*, at 156, and by the end of the 1930s, librarians' "basic position in opposition to censorship [had] emerged," Krug & Harvey, *ALA and Intellectual Freedom: A Historical Overview*, in *Intellectual Freedom Manual*, pp. xi, xv (American Library Association 1974) (hereinafter *Intellectual Freedom Manual*); see also Darling, *Access, Intellectual Freedom and Libraries*, 27 *Library Trends* 315–316 (1979).

By the time McCarthyism began its assaults, appellee American Library Association had developed a Library Bill of Rights against censorship, Library Bill of Rights, in *Intellectual Freedom Manual*, pt. 1, p. 7, 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." *Freedom to Read*, in *id.*, pt. 2, p. 8; see also Krug & Harvey, in *id.*, at xv. 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.⁵

⁵See, e.g., M. Fiske, *Book Selection and Censorship: A Study of*

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But aside from the isolated suggestion, see, *e.g.*, Born, Public Libraries and Intellectual Freedom, in *id.*, pt. 3, pp. 4, 9, 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, see *id.*, pt. 1, p. 13, 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 "advocat[ing] or favor[ing] communism," the ALA in 1957 adopted a "Statement on Labeling," opposing it as "a censor's tool." *Id.*, pt. 1, pp. 18–19. 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." *Id.*, pt. 1, p. 16. 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

School and Public Libraries in California 69–73 (1959); Moon, "Problem" Fiction, in Book Selection and Censorship in the Sixties 56–58 (E. Moon ed. 1969); F. Jones, Defusing Censorship: The Librarian's Guide to Handling Censorship Conflicts 92–99 (1983); see also The Censorship of Books 173–182 (W. Daniels ed. 1954).

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services.” *Id.*, pt. 1, p. 17.

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. See *id.*, pt. 1, p. 42. The statement conceded that “‘closed shelf,’ ‘locked case,’ ‘adults only,’ or ‘restricted shelf’ collections” were “common to many libraries in the United States.” *Id.*, pt. 1, p. 43. 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.” *Ibid.*⁶

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.⁷ 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.

⁶For a complete listing of the ALA’s Interpretations, see R. Peck, *Libraries, the First Amendment and Cyberspace: What You Need to Know* 148–175 (2000).

⁷Thus, it is not surprising that, with the emergence of the circumstances giving rise to this case, the ALA has adopted statements opposing restrictions on access to adult patrons, specific to electronic media like the Internet. See *id.*, at 150–153, 176–179, 180–187.

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C

Thus, there is no preacquisition 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 be 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

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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*, 457 U. S. 853 (1982), that removing classics from a school library in response to pressure from parents and school board members violates the Speech Clause.

III

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.⁸ On that

⁸I assume, although there is no occasion here to decide, that the originators of the material blocked by the Internet filters could object to the wall between them and any adult audience they might attract, although they would be unlikely plaintiffs, given that their private audience would be unaffected by the library's action, and many of them might have no more idea that a library is blocking their work than the library does. It is for this reason that I rely on the First and Fourteenth Amendment rights of adult library patrons, who would experience the more acute injury by being denied a look at anything the software identified as apt to harm a child (and whatever else got blocked along with it). In practical terms, if libraries and the National Government are going to be kept from engaging in unjustifiable adult censorship, there is no alternative to recognizing a viewer's or reader's right to be free of paternalistic censorship as at least an adjunct of the core right of the speaker. The plurality in *Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U. S. 853 (1982), saw this and recognized the right of students using a school library to object to the removal of disfavored books from the shelves, *id.*, at 865–868 (opinion of Brennan, J.). By the same token, we should recognize an analogous right on the part of a library's adult Internet users, who may be among

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ground, the Act's blocking requirement in its current breadth calls for unconstitutional action by a library recipient, and is itself unconstitutional.

the 10% of American Internet users whose access comes solely through library terminals, see 201 F. Supp. 2d, at 422. There should therefore be no question that censorship by blocking produces real injury sufficient to support a suit for redress by patrons whose access is denied.