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UNITED STATES v. AMERICAN LIBRARY ASSOCIATION, 123 S.Ct. 2297 (2003). [Congress enacted the Children's Internet Protection Act (CIPA), which forbids public libraries from receiving federal assistance for Internet access– discounted rates under the E-rate program and grants under the Library Services and Technology Act (LSTA)-- unless libraries install software to block obscene or pornographic images and to prevent minors from accessing material harmful to them. The Court, in a plurality opinion by Chief Justice Rehnquist, joined by Justices O'Connor, Scalia, and Thomas, upheld the restrictions. Justice Kennedy and Justice Breyer filed opinions concurring in the judgment:]

REHNQUIST, C.J.

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." . . .

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,* 523 U.S. 666 (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. "[B]road 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,* 524 U.S. 569 (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." In particular, "[t]he 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.

. . . 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." . . . In *Rosenberger* [*v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819 (1995)], 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, "[t]he 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."[a]

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[a]The dissents [argue] that less restrictive alternatives to filtering software would suffice to meet Congress' goals. But we require the Government to employ the least restrictive means only when the forum is a public one and strict scrutiny applies. [S]uch is not the case here. In deciding not to collect pornographic material from the Internet, a public library need not satisfy a court that it has pursued the least restrictive means of implementing that decision.

In any case, the suggested alternatives have their own drawbacks. Close monitoring of computer users would be far more intrusive than the use of filtering software, and would risk transforming the role of a librarian from a professional to whom patrons turn for assistance into a compliance officer whom many patrons might wish to avoid. Moving terminals to places where their displays cannot easily be seen by other patrons, or installing privacy screens or recessed monitors, would not address a library's interest in preventing patrons from deliberately using its computers to view online pornography. To the contrary, these alternatives would make it *easier* for patrons to do so.

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.

[T]he 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, "[m]any 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." 20 U.S.C. § 9134(f)(3) (disabling permitted for both adults and minors); 47 U.S.C. § 254(h)(6)(D) (disabling permitted for adults). 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 some patrons may be too embarrassed to request them. But the Constitution does not guarantee the right to acquire information at a public library without any risk of

embarrassment.[b]

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.

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,* 500 U.S. 173 (1991). 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

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[b]The dissents argue that overblocking will "reduce the adult population ... to reading only what is fit for children." (opinion of STEVENS, J.) (quoting *Butler v. Michigan,* 352 U.S. 380, 383 (1957) [and citing] *Ashcroft v. Free Speech Coalition,* 535 U.S. 234 (2002); *United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803 (2000); and *Reno v. American Civil Liberties Union,* 521 U.S. 844 (1997)). But these cases are inapposite because they addressed Congress' direct regulation of private conduct, not exercises of its Spending Power.

The dissents also argue that because some library patrons would not make specific unblocking requests, the interest of authors of blocked Internet material "in reaching the widest possible audience would be abridged. But this mistakes a public library's purpose for acquiring Internet terminals: A library does so to provide its patrons with materials of requisite and appropriate quality, not to create a public forum for Web publishers to express themselves.

Justice STEVENS further argues that, because some libraries' procedures will make it difficult for patrons to have blocked material unblocked, CIPA "will create a significant prior restraint on adult access to protected speech." But this argument, which the District Court did not address, mistakenly extends prior restraint doctrine to the context of public libraries' collection decisions. A library's decision to use filtering software is a collection decision, not a restraint on private speech. Contrary to Justice STEVENS' belief, a public library does not have an obligation to add material to its collection simply because the material is constitutionally protected.

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*.

Appellees mistakenly contend, in reliance on *Legal Services Corporation v. Velazquez,* 531 U.S. 533 (2001), that CIPA's filtering conditions "[d]istor[t] the [u]sual [f]unctioning of [p]ublic [l]ibraries." In *Velazquez,* the Court concluded that a Government program of furnishing legal aid to the indigent differed from the program in *Rust* "[i]n th[e] vital respect" that the role of lawyers who represent clients in welfare disputes is to advocate *against* the Government, and there was thus an assumption that counsel would be free of state control. The Court concluded that the restriction on advocacy in such welfare disputes would distort the usual functioning of the legal profession and the federal and state courts before which the lawyers appeared. Public libraries, by contrast, have no comparable role that pits them against the Government, and there is no comparable assumption that they must be free of any conditions that their benefactors might attach to the use of donated funds or other assistance.[c]

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 of the District Court for the Eastern District of Pennsylvania is

Reversed.

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[c]. . . Justice STEVENS argues mistakenly that *Rust* is inapposite because that case "only involved and only applies to ... situations in which the government seeks to communicate a specific message,"and unlike the Title X program in *Rust*, the E- rate and LSTA programs "are not designed to foster or transmit any particular governmental message.". . . *Velazquez* held only that viewpoint-based restrictions are improper "when the [government] does not itself speak or subsidize transmittal of a message it favors *but instead expends funds to encourage a diversity of views from private speakers*.". . . As we have stated above, public libraries do not install Internet terminals to provide a forum for Web publishers to express themselves, but rather to provide patrons with online material of requisite and appropriate quality.

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.

The District Court, in its "Preliminary Statement," did say that "the unblocking may take days, and may be unavailable, especially in branch libraries, which are often less well staffed than main libraries." That statement, however, does not appear to be a specific finding. It was not the basis for the District Court's decision in any event, as the court assumed that "the disabling provisions permit public libraries to allow a patron access to any speech that is constitutionally protected with respect to that patron."

If some libraries do not have the capacity to unblock specific Web sites or to disable the filter or if it is shown that an adult user's election to view constitutionally protected Internet material is burdened in some other substantial way, that would be the subject for an as-applied challenge, not the facial challenge made in this case.

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.

[I]n 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. Typically the key question in such instances is one of proper fit. See, *e.g., Board of Trustees of State Univ. of N.Y. v. Fox,* 492 U.S. 469 (1989); *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC,* 518 U.S. 727 (1996) (plurality opinion); *Turner Broadcasting System, Inc. v. FCC,* 520 U.S. 180 (1997) (BREYER, J., concurring in part); *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367 (1969).

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. . . . This approach does not substitute a form of "balancing" for less flexible, though more speech-protective, forms of "strict scrutiny." Rather, it *supplements* the latter with an approach that is more flexible but nonetheless provides the legislature with less than ordinary leeway in light of the fact that constitutionally protected expression is at issue.

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." As the District Court found, software filters "provide a relatively cheap and effective" means of furthering these goals. 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." 20 U.S.C. § 9134(f)(3) (permitting library officials to "disable a technology protection measure ... to enable access for bona fide research or other lawful purposes"); 47 U.S.C. § 254(h)(6)(D) (same).

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. Perhaps local library rules or practices could further restrict the ability of patrons to obtain "overblocked" Internet material. See, *e.g., In re Federal- State Joint Board on Universal Service: Children's Internet Protection Act,* 16 FCC Rcd. 8182, 8183, ¶ 2, 8204, ¶ 53, 2001 WL 327640 (2001) (leaving determinations regarding the appropriateness of compliant Internet safety policies and their disabling to local communities). But we are not now considering any such local practices. We

here consider only a facial challenge to the Act itself.

Given the comparatively small burden that the Act imposes upon the library patron seeking legitimate Internet materials, I cannot say that any speech-related harm that the Act may cause is disproportionate when considered in relation to the Act's legitimate objectives. I therefore agree with the plurality that the statute does not violate the First Amendment, and I concur in the judgment.

Justice STEVENS, dissenting.

. . . 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 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.

I

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. . . Given the quantity and ever-changing character of Web sites offering free sexually explicit material,[a] 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

[a]The percentage of Web pages on the indexed Web containing sexually explicit content is relatively small. Recent estimates indicate that no more than 1-2% of the content on the Web is pornographic or sexually explicit. However, the absolute number of Web sites offering free sexually explicit material is extremely large, approximately 100,000 sites.

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,* 535 U.S. 234 (2002).

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:

> [L]ess 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 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, "[a]ssuming 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."

II

[The statute] impermissibly conditions the receipt of Government funding on the restriction of significant First Amendment rights. . . . 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." . . . 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.

Our cases holding that government employment may not be conditioned on the surrender of rights protected by the First Amendment illustrate the point. It has long been settled that "Congress could not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.' " *Wieman v. Updegraff,* 344 U.S. 183 (1952). Neither discharges, as in *Elrod v. Burns,* 427 U.S. 347 (1976), nor refusals to hire or promote, as in *Rutan v. Republican Party of Ill.,* 497 U.S. 62 (1990), are immune from First Amendment scrutiny. Our precedents . . . draw no distinction between the penalty of discharge from one's job and the withholding of the benefit of a new job. The abridgment of First Amendment rights is equally unconstitutional in either context. See *Sherbert v. Verner,* 374 U.S. 398 (1963) ("Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine .... It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege").

The issue in this case does not involve governmental attempts to control the speech or views of its employees. It involves the use of its treasury to impose controls on an important medium of expression. In an analogous situation, we specifically held that when "the Government seeks to use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning," the distorting restriction must be struck down under the First Amendment. *Legal Services Corporation v. Velazquez,* 531 U.S. 533 (2001). The question, then, is whether requiring the filtering software on all Internet-accessible computers distorts that medium. As I have discussed above, the over- and underblocking of the software does just that.

Rust [*v. Sullivan*] only involved and only applies to instances of governmental speech--that is, situations in which the government seeks to communicate a specific message. 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.

Even if we were to construe the passage of CIPA as modifying the E-rate and LSTA programs such that they now convey a governmental message that no " 'visual depictions' that are 'obscene,' 'child pornography,' or in the case of minors, 'harmful to minors,' " should be expressed

or viewed, the use of filtering software does not promote that message. As described above, all filtering software erroneously blocks access to a substantial number of Web sites that contain constitutionally protected speech on a wide variety of topics. Moreover, there are "frequent instances of underblocking," that is, instances in which filtering software did not prevent access to Web sites with depictions that fall within what CIPA seeks to block access to. In short, the message conveyed by the use of filtering software is not that all speech except that which is prohibited by CIPA is supported by the Government, but rather that all speech that gets through the software is supported by the Government. And the items that get through the software include some visual depictions that are obscene, some that are child pornography, and some that are harmful to minors, while at the same time the software blocks an enormous amount of speech that is not sexually explicit and certainly does not meet CIPA's definitions of prohibited content. As such, since the message conveyed is far from the message the Government purports to promote--indeed, the material permitted past the filtering software does not seem to have any coherent message--*Rust* is inapposite.

The plurality's reliance on *National Endowment for Arts v. Finley,* 524 U.S. 569 (1998), is also misplaced. . . . Unlike this case, the Federal Government was not seeking to impose restrictions on the administration of a nonfederal program. . . . 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.[b] If a library has 10 computers paid for by nonfederal funds and has Internet service for those computers also paid for by nonfederal funds, the library may choose not to put filtering software on any of those 10 computers. Or a library may decide to put filtering software on the 5 computers in its children's section. Or a library in an elementary school might choose to put filters on every single one of its 10 computers. 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. . . .

Justice SOUTER, with whom Justice GINSBURG joins, dissenting.

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[b]Thus, respondents are not merely challenging a "refusal to fund protected activity, without more," as in *Harris v. McRae,* or a "decision not to subsidize the exercise of a fundamental right," as in *Regan v. Taxation With Representation of Wash.* They are challenging a restriction that applies to property that they acquired without federal assistance.

I agree in the main with Justice STEVENS that the blocking requirements of the Children's Internet Protection Act 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

[I]f the only First Amendment interests raised here were those of children, I would uphold application of the Act. . . . 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 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. 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 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, 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. 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.

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."

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.[a]

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

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[a][W]ith 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.'" [I]n the ensuing analysis, I assume for the sake of argument that we are in a world without interlibrary loan.

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 (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.

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.[b] 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. 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.[c]

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[b]Of 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, 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.

[c]That 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

[B]y 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. . . . And in 1973, the ALA adopted a policy opposing the practice . . . of keeping certain books off the open shelves, available only on specific request. . . .

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 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

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valuable materials. Such practices raise no First Amendment concerns, because they have nothing to do with suppressing ideas.

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

Discussion

1. *Asking politely*. The result in *American Library Association* seems to turn on the ease with which adult patrons can get access to unfiltered Internet access. Relying on assurances from the Solicitor General, the plurality and concurring Justices argue that a library patron merely has to ask. What if the patron wishes to view pornographic materials in a room where children might be present?

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[d] I 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 . . . *Pico* saw this and recognized the right of students using a school library to object to the removal of disfavored books from the shelves. By the same token, we should recognize an analogous right on the part of a library's adult Internet users, who may be among the 10% of American Internet users whose access comes solely through library terminals. 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.

2. *Refusal to fund or penalty?* What response can the plurality give to Justice Stevens' point that funding is withdrawn even if some of the computers hooked up to the Internet were not purchased by the government, and do not make use of subsidized Internet access? Is it enough to answer that the answer that it would not violate the First Amendment for the Federal Government to mandate directly that all libraries install filtering software?

In footnote b Rehnquist notes various cases holding that government may not "reduce the adult population . . . to reading only what is fit for children," but argues that "these cases are inapposite because they addressed Congress' direct regulation of private conduct, not exercises of its Spending Power." Why should that be?

3. *Content based censorship or interference with professional judgment?* The dissenters acknowledge that librarians inevitably make selective judgments in what books to include in their collections, and their judgments may include issues of quality as well as cost and upkeep. If a library can make restrictions based on subject matter (for example, a music library), why can't it also exclude pornographic materials using a filtering program? And if it can do so constitutionally, why can't the government choose to provide subsidized computer and Internet services only to libraries that make these sorts of exclusions in Internet access?

Is the answer that when the Federal government does so, it is impinging on first amendment rights of public librarians which are akin to the academic freedom enjoyed by public universities? Under this line of reasoning, the issue is not federalism but professionalism: Even federal public libraries would have some degree of freedom from Congressional attempts to dictate how they organize their collections or provide Internet access. Compare this to the (unsuccessful) argument in *Rust* that the real vice of the gag rule is that it interferes the professional judgment of physicians or the (successful) argument in *Velazquez* that restrictions on legal aid lawyers interfere with their professional judgment and that of the judges before whom they argue. Why does the professionalism argument succeed in one case but not the other? Should it succeed here?