Washington Court Finds Public Library Internet Filters do not Violate State Constitution

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Ruling on a question certified by a federal district court, the Supreme Court of Washington found that its state constitution did not prohibit public libraries from filtering internet websites even when adult patrons requested that the libraries turn off the internet filters.

The plaintiffs in *Bradburn v. North Central Regional Library District* included several library patrons and a gun rights advocacy group that operated a website, womenandguns.com They argued that the regional library policy of filtering websites, particularly when an adult had requested that the library disable the filters, violated the Washington constitution. More specifically, they argued that the internet policy was so overbroad as to rise to the level of a prior restraint.

Article I, section 5 of the Washington State Constitution provides that "[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." The Washington Supreme Court had previously found article I, section 5 more protective of speech than the First Amendment to the United States Constitution in many cases, including cases involving time, place, and manner restrictions in public fora, and cases involving prior restraints. But article I, section 5 affords, no greater protection to obscenity, speech in nonpublic forums, commercial speech, and false or defamatory statements.

Relying on the U.S. Supreme Court's decision in *United States v. American Library Ass'n,* 539 U.S. 194 (2004) ("ALA") the court found that the restriction did not serve as a prior restraint. In *ALA*, the Supreme Court, in interpreting the Children's Internet Protection Act, termed it a mistake to extend "prior restraint 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." Furthermore, the Washington court noted that libraries have broad discretion when selecting material for their book and periodicals collections, similarly,

> Even if one were to assume a public library with unlimited funds and space, that library would be under no obligation to make all constitutionally protected printed materials available. For example, regardless of its resources a library need not place pornographic materials on its

> shelves, although such materials are constitutionally protected. It need not place children's comic books on its shelves, although these, too, are constitutionally protected. As another example, if a private collector offered a library a collection of books at an attractive set price for the entire collection and the library purchased the collection, it would not have to include all of the books in its own collection and would not have to make them all available to its patrons.

The court also concluded that the filtering policy did not constitute an unconstitutional content based restriction. Again relying on *ALA*, the court found that internet access is neither a traditional nor designated public forum. The court did note, however, that the Third and Sixth Circuits have held that a library is a limited public forum "insofar as the library must permit the public to exercise the right to receive information and ideas consistent with the nature of the library as a place for reading, writing, and quiet contemplation." Yet, this right, according to the court, would "still exist only with respect to the materials that are actually in a library's collection. A patron would not have a right to receive information in a public library if that information was not part of the library's collection. And a patron does not have the constitutional right to force a public library to acquire a particular book or type of book. Analogously, this right would not exist with respect to Internet sites that have been added to a library's collection."

A concurring justice said that the majority "overcomplicates the analysis." He found that the text of the Washington Constitution applies only to the right to "speak, write, and publish," and does not afford a right to "access" information. Because the restriction was rationally related to the state interest of "[p]rotecting patrons from obscene material and increasing the library's capacity to provide literary, scientific, historic, and other materials," it satisfied constitutional muster.

Three justices dissented recalling that much of the free speech jurisprudence has involved cases where government entities have used the "laudable goal" of protecting children as a pretext to chill speech that they considered undesirable. The dissent also disputed the majority's claim that *ALA* supported its decision:

> I respectfully disagree with the majority that [*ALA*] supports upholding the policy's constitutionality under either the federal or state constitution. Even accepting for the moment that these libraries are not a limited public forum, eight justices found the ability of a patron to disable the filter constitutionally critical. Writing for a four justice plurality upholding CIPA, Justice Rehnquist noted constitutional concerns about the software blocking "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." Justice Kennedy was even more pointed, beginning his concurrence by saying, "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." Justice Breyer also agreed that because a library patron could ask to have the filter disabled, the limitation on First Amendment activity was too slight to be of concern. Justice Stevens alone thought the ability of an adult patron to have the filter removed was constitutionally irrelevant and even with that escape hatch, the CIPA was flatly unconstitutional. "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.'"

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