UIC School of Law
UIC Law Open Access Repository

UIC Law Open Access Faculty Scholarship

1-1-2004

Institutions of Learning or Havens for Illegal Activities: How the Supreme Court Views Libraries, 25 N. Ill. U. L. Rev. 1 (2004)

Raizel Liebler
UIC John Marshall Law School, rliebler@uic.edu

Follow this and additional works at: https://repository.law.uic.edu/facpubs

 Part of the Computer Law Commons, Courts Commons, Entertainment, Arts, and Sports Law Commons, First Amendment Commons, Information Literacy Commons, Internet Law Commons, Law Librarianship Commons, Legal History Commons, Legal Writing and Research Commons, Privacy Law Commons, Science and Technology Policy Commons, Science and Technology Studies Commons, and the Supreme Court of the United States Commons

Recommended Citation

Raizel Liebler, Institutions of Learning or Havens for Illegal Activities: How the Supreme Court Views Libraries, 25 N. Ill. U. L. Rev. 1 (2004)

https://repository.law.uic.edu/facpubs/434

This Article is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Open Access Faculty Scholarship by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

Institutions of Learning or Havens for Illegal Activities: How the Supreme Court Views Libraries

RAIZEL LIEBLER*

TABLE OF CONTENTS

---

* J.D., DePaul University, 2001; M.S. in Library and Information Science, University of Illinois, 2003. I gratefully thank Mary Minow for all of her incisive comments and suggestions to improve this article and her graciousness to allow me to test my ideas as a contributing author of the LibraryLaw blog (http://blog.librarylaw.com/). I also thank all of the librarians that helped me write this article, especially those at the University of Illinois, where this article began as my master's thesis.

INTRODUCTION

The role of libraries in American society is varied: libraries act as curators and repositories of American culture's recorded knowledge, as places to communicate with others, and as sources where one can gain information from books, magazines and other printed materials, as well as audio-video materials and the Internet. Courts in the United States have called libraries "the quintessential locus of the receipt of information,"[1] places that are "dedicated to quiet, to knowledge, and to beauty,"[2] and "a mighty resource in the free marketplace of ideas."[3] These positive views of

1. Kreimer v. Bureau of Police of Morristown, 958 F.2d 1242, 1255 (3d Cir. 1992).
2. Brown v. Louisiana, 383 U.S. 131, 142 (1966).
3. Minarcini v. Strongsville (Ohio) City Sch. Dist., 541 F.2d 577, 582 (6th Cir. 1976).

libraries are often in sharp contrast with views by some courts that the materials contained in libraries are dangerous.

The tension between the concept of a library as a place for learning and the collector of the quality materials with that of the library as a place for illicit materials and behavior is a long-running one. Richard Brinsley Sheridan, a sixteenth century playwright made a reference to the apparent sinful danger of libraries: "[a] circulating library in a town is, as an ever-green tree of diabolical knowledge! It blossoms through the year! And depend on it . . . that they who are so fond of handling the leaves, will long for the fruit at last."[4] The idea that reading the leaves of pages will lead to sinful behavior; the forbidden fruit leads to bowdlerizing and other forms of censorship.[5] The United States Supreme Court has had three major cases in its history addressing the appropriate role of libraries and the activities allowed within library premises.[6] The Court has attempted to walk a fine line between viewing libraries as purveyors of high culture and dangerous places.[7]

This uncertainty about the role of libraries runs throughout the Supreme Court opinions as well as the subsequent court opinions that come after these important rulings. This article takes the position that the views of the Supreme Court often conflict with how librarians view themselves. These views of libraries by the courts have had a strong effect on patrons by limiting the information options of patrons, such as school library books, public library Internet-access, and the library profession, by forcing librarians to act in accordance to the Supreme Court's views of their appropriate role.

This article argues that the Supreme Court's views are frequently based on a limited understanding, which fails to recognize that libraries and the services they provide fall within the scope of a public forum. The lack of government understanding of the role of libraries and librarians can have extensive implications for institutions, their employees, and the public. For example, Chief Justice Rehnquist used descriptions from collection development texts from 1930 and 1980, both predating Internet use in

---

4. RICHARD BRINSLEY SHERIDAN, THE RIVALS act 1, sc. 2. (1775).

5. *See infra* Part III (discussing the history of censorship).

6. *See* Brown v. Louisiana, 383 U.S. 131 (1966); Board of Educ., Island Trees Union Free District No. 26 v. Pico, 457 U.S. 853 (1982); United States v. American Library Ass'n, 539 U.S. 194 (2003).

7. For example, "public libraries provide patrons with a vast amount of valuable information. But there is also an enormous amount of pornography on the Internet, much of which is easily obtained [and] the accessibility of this material has created serious problems for libraries." United States v. Am. Library Ass'n, 539 U.S. 194, 200 (2003).

libraries, to explain filtering the Internet as appropriate library collection development.[8]

These three cases discussed in detail in this article, *Brown v. Louisiana*,[9] *Island Trees Union Free District No. 26 v. Pico*,[10] and *United States v. American Library Ass'n*,[11] occurred at twenty-year intervals, with the last case coming down from the Court during the summer of 2003. The Supreme Court in these cases extensively discussed what it viewed and views to be legally appropriate roles of the libraries. The scope of the cases ranges from whether libraries are the appropriate space for silent protest, to whether school library books can be removed for objectionable material, to whether, as a condition of receiving federal funding, libraries can be forced to have filters on their Internet-use computers to try to weed out pornography.

These three cases have a very important commonality—all three are plurality decisions. The divided nature of these decisions helps to show the difficulty in determining a singular role for libraries, mirroring the difficulties in American societies in defining a role for libraries. All three cases helped shape the ways libraries have been perceived and changed the ways libraries themselves can act.

While other sources, especially law review articles, have interpreted each of these cases separately, this article places these cases within a larger context, allowing their commonality and differences to explain how viewpoints about libraries have changed over time.

I. FORUM ANALYSIS

A critical way that courts review First Amendment rights on government property is through forum analysis.[12] Forum analysis is concerned about where speech happens and analyzing the location or forum for the speech, all within the framework of the more speech allowed, the less control the government has over the speech.[13] The location of speech helps courts to determine whether the government restriction is constitutional.[14] In understanding how courts view libraries, forum analysis is important not only in viewing cases where it was applied, but

8. *Am. Library Ass'n*, 539 U.S. at 204.
9. 383 U.S. 131 (1966).
10. 457 U.S. 853 (1982).
11. 539 U.S. 194 (2003).
12. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).
13. *Id.*
14. *Id.*

also retrospectively to interpret how courts would have viewed a particular library setting if they had the present framework in hand.

Because courts created forum analysis over time, it was not discussed as such in either *Brown* or *Pico*, the first two cases this article discusses in detail. However, for the past twenty years, courts have used forum analysis to divide publicly owned property into three categories to determine if a government restriction on speech is constitutional.[15] The issues of what forum a library is or what the services it provides are were discussed in many of the lower court rulings following *Brown* and preceding *American Library Ass'n*, and in *American Library Ass'n* itself.[16]

The three types of classification of forums are the traditional public forum, the limited public forum, and the nonpublic forum.[17] Traditional public fora are "places which by long tradition or by government fiat have been devoted to assembly and debate," such as public parks and sidewalks.[18] If a forum is traditional, content-neutral restrictions, such as limits on noise, are generally acceptable, but any limitation on expression will trigger First Amendment analysis.[19] First Amendment analysis is a separate test, limiting the government to only make content-based restrictions on expressive activity if it can demonstrate a compelling state interest that is narrowly drawn to achieve that end; this is the highest standard for reviewing governmental action called strict scrutiny.[20] On the other hand, non-public forums are places that have not "by tradition or

---

15. *Id.* at 45-46. *See also* Steven D. Hinckley, *Your Money or Your Speech: The Children's Internet Protection Act and the Congressional Assault on the First Amendment in Public Libraries*, 80 WASH. U. L.Q. 1025 (2002) (discussing the appropriate forum analysis for libraries); Marilyn J. Maloney & Julia Morgan, *Rock and a Hard Place: The Public Library's Dilemma in Providing Access to Legal Materials on the Internet While Restricting Access to Illegal Materials*, 24 HAMLINE L. REV. 199 (2001) (analyzing the appropriate forum standing of libraries); Richard J. Peltz, *Use "The Filter You Were Born With": The Unconstitutionality Of Mandatory Internet Filtering for the Adult Patrons of Public Libraries*, 77 WASH. L. REV. 397 (2002) (discussing the appropriate forum analysis for libraries and how focusing specifically on Internet-use in libraries changes the analysis).

16. *See infra* Part IV.

17. Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 802 (1985). It is also important to consider the fourth missing type of forum – the non-forum. These are spaces that are not intended to have any public speech. Therefore, the government can either foreclose any speech or limit speech to government viewpoints. Courts do not often discuss speech as occurring in a non-forum; instead the court asks "whether public forum principles apply to the case at all," because some "government properties are either nonpublic fora or not fora at all." *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 672, 677 (1998).

18. *Perry*, 460 U.S. at 45.

19. *Id.*

20. *Id.* at 46.

designation" become "a forum for public communication;" therefore, content-based restrictions are acceptable in non-public forums.[21]

Standing between public fora and the non-public fora are limited public fora. Limited fora are places that the government has opened for use by the public "as a place for expressive activity,"[22] such as a school board meeting.[23] The government creates a limited or designated public forum when voluntarily it opens to the public a particular forum for speech.[24] The government can create a limited public forum for speech, but once the forum has been created, the government is limited in restricting it. The forum, whether it is a physical place or another type of forum, "is bound by the same standards as apply in a traditional public forum."[25] Part of a government property can be designated a limited public forum, such as a meeting room. If so, then regulations can limit speech outside of that space, but for speech inside, the government has a high burden to reach – the exact same one as for a traditional public forum. Courts also consider whether there are alternative means of achieving the same government goal.

Government regulation-based "time, place, and manner" and non-content based restrictions in public forums are easier to meet because the standard is lower: that of intermediate scrutiny.[26] According to this standard, the government action must be narrowly tailored to serve a significant government interest to be constitutional.[27]

The majority of cases regarding libraries and their elements, including meeting rooms and the Internet, have found that libraries are limited public fora.[28] The highest-level court to rule on forum analysis of a library, the

---

21. *Id.*
22. *Id.* at 45.
23. Mainstream Loudoun v. Bd. of Trs., 24 F. Supp. 2d 552, 562 (E.D. Va. 1998).
24. *Perry,* 460 U.S. at 45.
25. *Id.* at 46.
26. *Id.*
27. *Id.*
28. Kreimer v. Bureau of Police of Morristown, 958 F.2d 1242, 1259, 1261-62 (1992) ("[T]he Library constitutes a *limited* public forum, a sub-category of designated public fora" and "as a limited public forum, the Library is obligated only to permit the public to exercise rights that are consistent with the nature of the Library and consistent with the government's intent in designating the Library as a public forum."); Mainstream Loudoun v. Bd. of Trs., 24 F. Supp. 2d 552, 563 (E.D. Va. 1998) (stating that because a public library is a limited public forum designed for the "receipt and communication of information," any policy that "limits the receipt and communication of information through the Internet based on the content of that information, is subject to a strict scrutiny analysis."). *See also* Hawkins v. City & County of Denver, 170 F.3d 1281, 1287 (10th Cir. 1999) ("Examples of designated public fora include . . . public libraries."); Neinast v. Bd. of

Third Circuit Court of Appeals, held in *Kreimer* that the public library is a limited public forum open "to the public *for expressive activity*, namely 'the communication of the written word.'"[29] Therefore as "a limited public forum, the Library is obligated only to permit the public to exercise rights that are consistent with the nature of the Library and consistent with the government's intent in designating the Library as a public forum."[30] Another court has stated that a public library is a limited public forum designed for the "receipt and communication of information."[31]

In a lower court decision, *Sund v. City of Wichita Falls*, a case involving a resolution by the local city council giving adults with library cards the right to remove books from the children's area of the library and have them placed in the adult section, the court held that "The Wichita Falls Public Library, like all other public libraries, is a limited public forum for purposes of First Amendment analysis."[32] According to the court, "[i]n a limited public forum, the government's ability to restrict patrons' First Amendment rights is extremely narrow."[33]

The government could not "limit access to library materials solely on the basis of the content of those materials, unless the City can demonstrate that the restriction is necessary to achieve a compelling government interest and there are no less restrictive alternatives for achieving that interest."[34] Because the government interest was to create a type of parents' rights to limit the reading material of their children and there were better means to accomplish this, such as having parents accompany their children to the library and because "the right to receive information is vigorously enforced in the context of a public library, 'the quintessential locus of the receipt of information,'" the resolution was unconstitutional.[35]

Therefore, because governments have opened libraries for the use of informational materials, the ability of governments to limit the spread of

---

Trs. of Columbus Metro. Library, 190 F. Supp. 2d 1040, 1043 (S.D. Ohio 2002) ("[A] public library clearly is a limited public forum."); Armstrong v. D.C. Pub. Library, 154 F. Supp. 2d 67, 75 (D.D.C. 2001) ("The parties correctly assert that a public library is a limited public forum for purposes of constitutional analysis."); Sund v. City of Wichita Falls, 121 F. Supp. 2d 530, 548 (N.D. Tex. 2000) ("The Wichita Falls Public Library, like all other public libraries, is a limited public forum for purposes of First Amendment analysis" and that "[i]n a limited public forum, the government's ability to restrict patrons' First Amendment rights is extremely narrow.").

29. *Kreimer*, 958 F.2d at 1259.
30. *Id.* at 1261-62.
31. Mainstream Loudoun v. Bd. of Trs., 24 F. Supp. 2d 552, 563 (E.D. Va. 1998).
32. Sund v. City of Wichita Falls, 121 F. Supp. 2d 530, 548 (N.D. Tex. 2000).
33. *Id.* at 548.
34. *Id.*
35. *Id.* at 547-48, 554.

information, both the items contained within the library and the library premises, is severely limited. While this is true for lower court decisions, the Supreme Court discards the use of the public forum doctrine when the forum involved, as will be seen in *American Library Ass'n*, is the Internet services of a library and the government provides funding for those services.[36]

While the public forum doctrine will be discussed throughout, specific cases will also be discussed in detail in the conclusion to the *Brown v. Louisiana* section and the introduction to the *American Library Ass'n* section.

II. *BROWN V. LOUISIANA*

A. INTRODUCTION

In 1966, the Supreme Court in *Brown v. Louisiana*[37] analyzed whether a library could be used for a silent protest. This case took place at a time of great turmoil within the country when lines of segregation were being crossed. The Supreme Court not only commented on the "appropriate" role of libraries, but also about the state of the union.[38]

Brown occurred at a very important junction in American law and society. The *Brown* decision discussed here occurred twelve years after the other more famous Supreme Court civil rights "*Brown*" case, *Brown v. Board of Education*, which established that separate was not equal in the realm of public schools.[39] The year 1966, when *Brown v. Louisiana* was decided, was at the apex of the court-created civil rights "tipping point," allowing for "equal protection" to more clearly protect all Americans. *Brown v. Louisiana* was the fourth case in four years of challenges to Louisiana's breach of the peace statute in a civil rights context, [40] but was the first case involving libraries.

---

34. United States v. Am. Library Ass'n, 539 U.S. 194 (2003).

37. Brown v. Louisiana, 383 U.S. 131 (1966).

36. *Id.*

39. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

40. Cox v. Louisiana, 379 U.S. 536 (1965) (involving arrest of leader of peaceful protest in front of courthouse and jail); Taylor v. Louisiana, 370 U.S. 154 (1962) (involving a sit-in at a "whites-only" bus depot waiting room); Garner v. Louisiana, 368 U.S. 157 (1961) (involving sit-ins at "whites-only" lunch counters).

In *Brown v. Louisiana*, the Supreme Court confronted not only the changing social environment, but also what were appropriate actions in a library.[41] In addition, the opinions address what a library itself should ideally be.[42] The Court was divided, not only in its views on the breach of the peace statute, but also on the appropriate role of libraries. The Court did not agree upon an opinion, instead releasing four opinions: the plurality,[43] two concurrences,[44] and a dissent.[45] The fact that a majority opinion, with one basis of reasoning for the decision, could not be decided, shows how deeply divided the Court was.

B. FACTS

In *Brown v. Louisiana*, the facts demonstrate the extensive segregated status of libraries in the South.[46] As demonstrated in Tommie Dora Barker's *Libraries of the South*, a long history of racial segregation existed in libraries of many Southern states, with many library systems only providing services for white patrons.[47]

The library system at issue in *Brown v. Louisiana*, was the Audubon Regional Library with a segregated service model. The physical libraries, as well as borrowing privileges, were segregated by race.[48] The library system had bookmobiles, but they were color coded, with one bookmobile serving only white persons and the other bookmobile only serving African-Americans.[49] In addition to the bookmobiles, there were branch libraries, but according to the Court, it was clear that African-Americans were not

---

41. *Brown*, 383 U.S. at 139-41, 147-48, 150-51, 152-55, 158-61.

42. *Id.* at 142, 167-68.

43. *Id.* at 133 (Plurality by Justice Fortas, joined by Chief Justice Warren and Justice Douglas).

44. *Id.* at 143 (Concurrence by Justice Brennan); *Id.* at 150 (Concurrence by Justice White).

45. *Id.* at 151 (Dissent by Justice Black, joined by Justice Clark, Justice Harlan, and Justice Stewart).

46. The Court uses the term "Negro," which will be used in quotes. The presently used term "African-American" will be used within the original text of this article.

47. TOMMIE DORA BARKER, LIBRARIES OF THE SOUTH: A REPORT ON DEVELOPMENTS, 1930-1935 (1936); *See also* PATTERSON TOBY GRAHAM, A RIGHT TO READ: SEGREGATION AND CIVIL RIGHTS IN ALABAMA'S PUBLIC LIBRARIES, 1900-1965 (2002); INTERNATIONAL RESEARCH ASSOCIATES, ACCESS TO PUBLIC LIBRARIES: A RESEARCH PROJECT PREPARED FOR THE LIBRARY ADMINISTRATION DIVISION, AMERICAN LIBRARY ASSOCIATION (1963); ANN ALLEN SHOCKLEY, A HISTORY OF PUBLIC LIBRARY SERVICES TO NEGROES IN THE SOUTH, 1900-1955 (1959).

48. *Brown*, 347 U.S. at 135-36.

49. *Id.* at 136.

allowed to use the branch libraries.[50] The specific library at issue was one of the small public branch libraries, the Audubon Regional Library branch at Clinton.[51]

The segregation prevented people of all races from using the entire library collection. The Audubon Regional Library permitted "registered borrowers" to browse the collection or to borrow books.[52] The library system was segregated by race. African-Americans were selected by the system as the "other" group: "The registration cards issued to Negroes were stamped with the word 'Negro'" and a "Negro in possession of such a card was entitled to borrow books, but only from the blue bookmobile."[53] The segregation went both ways: "A white person could not receive service from the blue bookmobile. He [sic] would have to wait until the red bookmobile came around, or would have to go to a branch library."[54]

This arrangement, sarcastically called a "tidy plan" by the plurality, was challenged by a silent protest.[55] On a Saturday morning in 1964, five African-American men, all residents of the library service area, went into the Clinton branch to protest peaceably what they considered the denial of their constitutional right to equal treatment in a public facility. One of the men requested a book, "The Story of the Negro" by Arna Bontemps. The library assistant, after checking the card catalogue, told him that the library did not have the book, but that "she would request the book from the State Library" and "that Brown would be notified upon its receipt."[56] Later, the book was mailed to Mr. Brown, with instructions to mail it back or deliver it to the library's "Blue" bookmobile, which "was obviously not designed to facilitate identification of the library vehicle" but to reinforce the segregated system.[57]

After making the book request, the men did not leave as expected. Both the assistant librarian and the librarian asked them to leave, but they did not, instead sitting down to protest the library's segregated system.[58] While protesting, the protesters "said nothing; there was no noise or boisterous talking."[59] During the time of the protest, the protesters

---

50. *Id.*
51. *Id.* at 135-36.
52. *Id.* at 135.
53. *Id.* at 136.
54. *Brown*, 347 U.S. at 136.
55. *Id.*
56. *Id.*
57. *Id.* at 137.
58. *Id.* at 136-37.
59. *Id.* at 136.

remained peaceful and did not creating a disturbance to the library's use by others.

The sheriff and deputies then arrived and asked the protesters to leave, but the protesters did not.[60] According to the Court, "when the sheriff arrived, there was no noise, no disturbance."[61] Before asking the protesters to leave the library, the sheriff did not ask the protesters what, if any, library materials they were interested in using, such as reference books.[62] The sheriff then arrested the protesters, who were later convicted of violating a statute making it a criminal offense to congregate in a public building with intent to provoke, or under circumstances that may occasion, a breach of the peace, and to refuse to move on when so ordered by an authorized person.[63] The protesters challenged their convictions, leading to the Supreme Court's decision.

C. APPROPRIATE AND INAPPROPRIATE USE OF LIBRARIES

The opinions vary greatly in what is considered normal and appropriate use of the library. According to the plurality, the protesters'

> deportment while in the library was unexceptionable. They were neither loud, boisterous, obstreperous, indecorous nor impolite. There is no claim that, apart from the continuation – for ten or fifteen minutes – of their presence itself, their conduct provided a basis for the order to leave, or for a charge of breach of the peace.[64]

Justice White's concurrence agreed with this view of the protesters. He stated that the protesters were making only normal and authorized use of the public library by remaining 10 minutes after ordering a book. Justice

---

60. *Brown*, 347 U.S. at 136.

61. *Id.* at 137.

62. *Id.* at 148 n.8 (Brennan, J., dissenting) (On cross-examination, the sheriff testified as follows:
Q. Prior to your asking these defendants to leave, did you ask each of them, all of them, whether or not they intended to use the reference-books at the Library? A. I didn't ask them what they intended to do, and they didn't state at that time what they were doing there.).
Id.

63. *Id.* at 137-38 (The use of segregated library cards continued after this incident and the branch library was closed, instead of opening up to the African-American residents of the community.).

64. *Id.* at 139.

White spent some time expanding on his reasoning, explaining that there is no reason to believe that

> the brief sojourn in this parish library departed so far from the common practice of library users. The petitioners were there but a very brief period before being asked to leave, they were quiet and orderly, they interfered with no other library users and for all this record reveals they might have been considering among themselves what to do with the rest of their day. I think that the petitioners were entitled to be where they were for the time that they remained, and it is difficult to believe that if this group had been white its members would have been asked to leave on such short notice, much less asked to leave by the sheriff and arrested, rather than merely escorted from the building, when reluctance to leave was demonstrated.[65]

Justice Black, the author of the four-justice dissent, argued that the entry and the sitting protest of the protesters clearly disturbed the normal functioning of the library. Justice Black viewed the entrance of several African-American men into a library and their subsequent silent, non-violent protest as shocking. He stated, "Short of physical violence, petitioners could not have more completely upset the normal, quiet functioning of the Clinton branch of the Audubon Regional Library."[66] The idea of a quiet protest as so fundamentally disturbing shows that Justice Black was more interested in keeping the status-quo of segregated (and presumably quiet and police-free) libraries intact than ensuring that all citizens would be able to visit and use the library.

Justice Black believed that the protesters' actions were a breach of the peace and criticized what he viewed as the leniency of the plurality, arguing that the plurality was stating that

> there can be no conviction unless persons who do not want library service stay there an unusually long time after being ordered to leave, make a big noise, use some bad language, engage in fighting, try to provoke a fight, or in some other way become boisterous. The argument seems to be that without a blatant, loud manifestation of aggressive hostility

---

65. *Brown*, 347 U.S. at 150-51 (White, J., concurring).
66. *Id.* at 163 (Black, J., dissenting).

> or an exceedingly long "sit-in" or "sojourn" in a public library, there are no circumstances which could foreseeably occasion a breach of the peace.[67]

The plurality did not think that there was a possibility of a breach of the peace arising from the actions of the protesters: "The library room was empty, except for the librarians. There were no other patrons. There were no onlookers except for the vigilant and forewarned sheriff and his deputies. Petitioners did nothing and said nothing even remotely provocative."[68]

Not only did Justice Black believe that the protesters did indeed violate the statute, he seemed to be concerned with the overall impact of protests on the fabric of American society:

> While soft words can undoubtedly turn away wrath, they may also provoke it. Disturbers of the peace do not always rattle swords or shout invectives. It is high time to challenge the assumption in which too many people have too long acquiesced, that groups that think they have been mistreated or that have actually been mistreated have a constitutional right to use the public's streets, buildings, and property to protest whatever, wherever, whenever they want, without regard to whom such conduct may disturb.[69]

Justice Black equated libraries with public streets (which would be later classified as "traditional fora"), not in a positive sense to show the equality between a protest in a library and one on the sidewalk, but instead to show what he viewed as a lack of decorum. Though this case predates the public forum doctrine; whether a library would later be viewed as a traditional or limited public forum, Justice Black's plurality and Justice White viewed the actions of the protesters as reasonable, falling within what would now be considered "acceptable use" of a library.

Justice Black did not settle the appropriate use of libraries; instead, courts and librarians are still discussing this issue. For a further discussion of the present debate, concerning library buildings and meeting rooms, see the conclusion to the *Brown* section.

---

67. *Brown*, 383 at 162 (Black, J., dissenting).
68. *Id.* at 140.
69. *Id.* at 162 (Black, J., dissenting).

D. ROLE OF LIBRARIANS

The opinions of the Court also reflect on the role of librarians. The plurality stated that the protesters received a "gesture of service,"[70] while Justice Black viewed the plurality opinion as "degrad[ing]" the courteous treatment given petitioners by the librarian.[71] These contrasting viewpoints help to demonstrate the differing views of not only the library service provided, but also a comment on the librarian herself.

In discussing the protest, the plurality stated that the protest itself was "enough to unnerve a woman in the situation Mrs. Reeves [assistant librarian] was in."[72] What exactly the distress of the library assistant was is never made clear, so whether it was due to dealing with non-whites, protesters, difficult patrons, patrons asking for material not in the library collection, or even enforcing racist rules is ambiguous. What is clear is that the plurality had sympathy for the position the library assistant was in.[73] The plurality, while sympathetic to the position of this librarian, was more interested in assuring the equal rights of the library patrons.

Justice Black was concerned about not only the specific librarian in the case at hand, but also the impact this case had on librarians in general, whose mission of law and order he viewed as essential. He believed that the plurality's view "means that the Constitution (the First and the Fourteenth Amendments) requires the custodians and supervisors of the public libraries in this country to stand helplessly by while protesting groups advocating one cause or another, stage 'sit-ins' or 'stand-ups' to dramatize their particular views on particular issues."[74]

The potentiality of libraries as places for dialogue and librarians as participants in the discourse was not acceptable to Justice Black. Instead, he considered the library services provided to the patrons in this case to be sufficient, if not complete.

Justice Black claimed that the unchallenged stated duty of the assistant librarian was "[t]o assist people who come into the Library to select their books; check out the books to them; to keep the shelves in order, and to keep a record of the circulation of the day."[75] The librarian, according to Justice Black, appropriately served the patron in her role by checking not

70. *Id.* at 141.
71. *Id.* at 161 (Black, J., dissenting).
72. *Id.* at 140.
73. *Brown,* 383 U.S. at 141.
74. *Id.* at 165 (Black, J., dissenting).
75. *Id.* at 154.

only the catalog, but also by ordering the book the patron seemed to have wanted. Justice Black mentioned that:

> [t]he note describing the book he wanted which petitioner Brown gave Mrs. Reeves read, "Wendall Arna, the Story of the Negro: Bontems." This information apparently described no printed book. The book which was obtained from the state library for petitioners' use was The Story of the Negro, by Arna Bontemps.[76]

There is no indication in the case that the librarian conducted a patron interview or did more than search for the stated requested material. Perhaps Justice Black's point in showing that the librarian found a similar item to send to the patron was an indication of her dedication to her profession, job, and patrons; this inclusion could also indicate that the librarian appropriately decided that the patrons did not belong because they were not knowledgeable enough to ask appropriately for information.

E. USE OF LIBRARIES BY EVERYONE – EQUAL PROTECTION

A related issue to that of the role of librarians and how they service patrons is whether the patrons themselves received equal treatment by the librarians and under the law. The plurality commences its discussion of the case with an opening salvo: that the protesters presence in the library was legal because African-Americans cannot be denied access to a public library in which white persons are welcome. According to the plurality, "it must be noted that petitioners' presence in the library was unquestionably lawful. It was a public facility, open to the public."[77] A group of people, here, African-Americans, could not be denied the right of access to the library when others were allowed to enter. This is an important civil rights statement as well as a statement about the purpose of libraries – to serve the whole of the public.

Justice White asked a very important question in his concurrence: "if the petitioners were making a use of the library normally permitted whites, why were they asked to leave the library? They were quiet, orderly, and exhibited no threatening or provocative behavior."[78] After restating the segregated nature of the library system, Justice White continued, "[o]n this

---

76. *Id.* at 160.
77. *Id.* at 138-39.
78. *Brown*, 383 at 151 (White, J., concurring).

record, it is difficult to avoid the conclusion that petitioners were asked to leave the library because they were Negroes."[79] In conclusion, Justice White stated that this uneven treatment in regards to use of the library denied the protesters equal protection of the law.

Justice Black believed that the protesters "were treated with every courtesy and granted every consideration to which they were entitled in the Audubon Regional Library."[80] Perhaps this view follows from his belief "that there was no racial discrimination practiced at [the] library, and . . . that there was no discrimination of any kind or character practiced against" the protesters.[81]

The difference in views about whether these particular library patrons received equal protection is very closely tied to the Justices' views of the library service provided: if the patrons had received appropriate service by the librarians, then they also received equal treatment under the law.

F. REGULATION OF LIBRARIES

The plurality did not foreclose the regulation of libraries, but stated that the regulations must be reasonable and nondiscriminatory. The state's regulations must be "equally applicable to all and administered with equality to all" thereby it "may not provide certain facilities for whites and others for Negroes."[82] In addition, regulations cannot be used "as a pretext for" punishing those who exercise their constitutional rights.[83]

Justice Black sharply disagreed about the role of regulations, viewing regulations as a way of both preventing protest and ensuring order as the highest priorities. He stated that "[p]ublic buildings such as libraries, schoolhouses, fire departments, courthouses, and executive mansions are maintained to perform certain specific and vital functions. Order and tranquility of a sort entirely unknown to the public streets are essential to their normal operation."[84]

Justice Black argued for a limitation on the idea of libraries as a public forum, with public spaces owned by the government, as separate from other spaces. Unfortunately for his viewpoint, but fortunately for people who wish to use libraries for silent protests, meeting rooms for divisive

---

79. *Id.*
80. *Id.* at 160 (Black, J., dissenting).
81. *Id.* at 161.
82. *Id.* at 143.
83. *Id.*
84. *Brown*, 347 U.S. at 157 (Black, J., dissenting).

viewpoints, and for other non-tranquil activities, the physical spaces of libraries continue to be the focus of debate.

G. SERVICES OF A LIBRARY

The Court discussed the services libraries provide. The dissent stated that "the librarians [have] lawful authority to keep the library orderly for the use of people who wanted to use its books, its magazines, and its papers,"[85] and that "public libraries [are] dedicated to reading and learning and studying."[86]

The dissent also stated Justice Black's belief that the protesters received the full scope of services to patrons. He stated that "here it seems to have made no difference whatever that the Audubon Regional Library, at least in this instance, satisfied its constitutional duty by giving these petitioners its services in full measure without regard to their race."[87]

H. USE OF A LIBRARY FOR PROTESTS

The plurality stated that the specific time and place of the protest were appropriate due to the segregation of the library. They stated, "[t]here is no dispute that the library system was segregated, and no possible doubt that these petitioners were there to protest this fact."[88] While the means for the protest were appropriate, if the library itself was not segregated, then perhaps the conclusion would have been different. Nevertheless, all of the breach of the peace cases decided by the Supreme Court at the time did indeed deal with protests directly against segregated institutions.

Justice Brennan's concurrence expanded upon the point regarding the appropriateness of the protest. The protesters' conduct "was engaged in to achieve desegregation of the library through a request for service and a protest, expressed by petitioners' continued presence."[89] This action was appropriate because they "were orderly and quiet. Their continued presence, for a relatively short period of time, did not interfere with the functioning of the library."[90] He then addressed the concerns of both the

---

85. *Id.* at 165.
86. *Id.* at 130.
87. *Id.* at 165.
88. *Id.* at 141.
89. *Id.* at 148 (Brennan, J., dissenting).
90. *Brown,* 383 U.S. at 148 (Brennan, J., dissenting).

librarians and the police. Justice Brennan stated that the presence of the protesters

> might have embarrassed and unnerved the librarians, who had in the past faithfully observed the policy of segregation; but such "vague disquietudes" do not take petitioners' conduct outside the appropriate limits. The sheriff gave petitioners no reason for the order to leave, and thus petitioners might have reasonably believed that they were being ejected only because they were Negroes seeking to exercise their constitutional rights.[91]

I. OVERALL ROLE OF LIBRARIES

In conclusion, both the plurality and Justice Black had overarching views of the appropriate role of libraries as public institutions. The varied Justices viewed the impact of the larger role of libraries differently, with the plurality saddened that libraries were a means of separation of people while Justice Black was concerned that outside societal issues not enter the libraries.

The plurality was disturbed that the locus of these events was a public library: a place dedicated to quiet, to knowledge, and to beauty. It is a sad commentary that this hallowed place in the Parish of East Feliciana bore the ugly stamp of racism. It is sad, too, that it was a public library which, reasonably enough in the circumstances, was the stage for a confrontation between those discriminated against and the representatives of the offending parishes.[92]

The plurality viewed the library as place that should remain quiet, without disturbance. Yet a protest at such a location was wholly appropriate, as the library itself was the object of the protest, with the intent to allow the knowledge and beauty to serve the entire population of the area, rather than just a limited number.

In direct response to the plurality, Justice Black also lamented the location of the protests. He stated that:

> for this reason I am deeply troubled with the fear that powerful private groups throughout the Nation will read

---

91. *Id.* at 148-49.
92. *Id.* at 142.

> the Court's action, as I do -- that is, as granting them a license to invade the [tranquility] and beauty of our libraries whenever they have quarrel with some state policy which may or may not exist.[93]

Justice Black's concern with libraries being part of the battleground over civil rights did not transpire (as did not his overall fear of the collapse of American society). The boundaries of appropriate activities conducted in libraries and the limits to the appropriate use of libraries by controversial groups are still being negotiated.

J. CONCLUSION

Justice Black's fear that protests would eventually reach a fever pitch, as during the French Revolution, did not happen in the way he expected. Instead, African-Americans and other minority groups conducted primarily peaceful, non-violent protests to help achieve equal rights. Libraries did not become a focal point of protests; instead, libraries were yet another place where protests took place, both because they were public and because they were government institutions. The issues raised by *Brown* did not go away after the protests ended.

---

93. *Brown*, 347 U.S. at 167. Justice Black explains in an angry outburst about his views for the appropriate means for African-Americans to receive equal rights. He states that:

> It is an unhappy circumstance in my judgment that the group, which more than any other has needed a government of equal laws and equal justice, is now encouraged to believe that the best way for it to advance its cause, which is a worthy one, is by taking the law into its own hands from place to place and from time to time. Governments like ours were formed to substitute the rule of law for the rule of force. Illustrations may be given where crowds have gathered together peaceably by reason of extraordinarily good discipline reinforced by vigilant officers. 'Demonstrations' have taken place without any manifestations of force at the time. But I say once more that the crowd moved by noble ideals today can become the mob ruled by hate and passion and greed and violence tomorrow. If we ever doubted that, we know it now. The peaceful songs of love can become as stirring and provocative as the Marseillaise did in the days when a noble revolution gave way to rule by successive mobs until chaos set in. The holding in this case today makes it more necessary than ever that we stop and look more closely at where we are going.

Id. at 167-68.

Brown started the ball rolling for courts to consider the issue of libraries as public places and to question the appropriate use of libraries. The locus of appropriate library use has shifted since *Brown* on two fronts: first, the use of meeting rooms and other places, such as exhibit spaces, within a library, and second, on the appropriate behavior of patrons in libraries. The use of meeting rooms by groups, especially the use of these rooms for religious speech, hate speech, or controversial speech, has affected many libraries in a similar fashion to the library used for a political protest in *Brown*.

In several recent cases, library-imposed limitations on the types of speech allowed within the confines of the library have been struck down by courts based on the idea that if government space is opened for some ideas, it must be open to all ideas.[94] In *Concerned Women for America, Inc. v. Lafayette County*, the Fifth Circuit ruled that a library could not prevent groups with a religious or political viewpoint from using its meeting rooms after those rooms had been open to other groups.[95] In a more recent example, the Mayor of Anchorage, Alaska ordered the removal of a gay pride display at the Loussac Library. A court ordered its reinstallation.[96]

In *Brown*, protesters were asked to leave and arrested because they were the "wrong" type of patron: African-American. The issue of who can use a library and when their actions are inappropriate and can be halted has been an issue for libraries nationwide and has been addressed by several lower courts. For example, in *Kreimer*, the most influential case of its kind, a homeless patron of a public library was expelled from the library for violating its library code of conduct.[97] In this case, in a ruling reminiscent of *Brown*, the court ruled that the library in question may restrict the use of the library by its patrons, requiring them to follow the "Patron Policy," an "acceptable use policy."[98] The court upheld the restrictions included in the policy including requiring patrons to read,

---

94. See Int'l Soc'y of Krishna Consciousness, Inc. v. N.J. Sports and Exposition Auth., 691 F.2d 155, 160 (3d Cir. 1982) (dictum); Pfeifer v. City of W. Allis, 91 F. Supp 2d 1253 (E.D. Wis. 2000) (stating that a public library meeting room was a public forum). However, the *Pfeifer* court considered the library's regulation allowing nonprofit speech, including religious speech, and banning commercial speech and "partisan political speech" to be acceptable. *Id.* at 1265-66.

95. Concerned Women for Am., Inc. v. Lafayette County, 883 F.2d 32 (5th Cir. 1989).

96. MARY MINOW & TOMAS A. LIPINSKI, THE LIBRARY'S LEGAL ANSWER BOOK 228 (American Library Association 2003).

97. Kreimer v. Bureau of Police of Morristown, 958 F.2d 1242, 1247 (3rd Cir. 1992).

98. *Id.* at 1247, 1267-69.

study, or otherwise use library materials while in the library, prohibiting noisy or boisterous activities that might disturb other patrons, and permitting removal of patrons with offensive bodily hygiene rising to a nuisance to other patrons.[99]

According to the *Kreimer* court, the purpose of a library is to serve the public, but limitations are allowed. The court stated that:

> A library is a place dedicated to quiet, to knowledge and to beauty. Its very purpose is to aid in the acquisition of knowledge through reading, writing and quiet contemplation . . . [T]he [l]ibrary is obligated only to permit the public to exercise rights that are consistent with the nature of the [l]ibrary and consistent with government's intent in designating the [l]ibrary as a public forum.[100]

Patrons continue to push the boundaries of "acceptable behavior" and the limits of appropriate library behavior still is being defined by courts, as seen by a recent court decision stating that libraries can ban barefoot patrons.[101]

The overall conflict from the case progeny of *Brown* between allowing the greatest amount of use, both by individual users and by users as a whole, continues to be an important conflict within the library community. Libraries continue to be the focus of controversy, as seen in the following two cases, which, instead of asking questions concerning the role of others entering the library or other aspects of library space, discuss the items contained within the library. What constitutes the "nature of a library" is still being debated, especially with the addition of the Internet to some library collections, which will be discussed in the *American Library Ass'n* case section.

---

99. *Id.* at 1267-69.

100. *Id.* at 1261-62.

101. Neinast v. Bd. of Trs. of the Columbus Metro. Library, 346 F.3d 585, 598 (6th Cir. 2003).

III. *BOARD OF EDUCATION, ISLAND TREES UNION FREE DISTRICT NO. 26 V. PICO*

A. INTRODUCTION

Board of Education, Island Trees Union Free District No. 26 v. Pico,[102] a case concerning school library censorship, fits within a larger context of library censorship decisions by lower courts in the 1970s and early 1980s. While there had been earlier book censorship efforts, at that time school boards became very concerned with the items contained in school libraries.[103] In *Banned in the U.S.A: A Reference Guide to Book Censorship in Schools and Public Libraries*, in his analysis of school library censorship, Herbert N. Foestrel discussed how many of the cases that precede *Pico* focus not on library practices or even on the books themselves, but instead on the "authority of school officials to control the curriculum and the libraries as part of the process of inculcating and socializing students."[104] Frequently, parents and school board members challenged books based on ideological differences with the books, such as including a variety of religious perspectives, rather than determining if the books were educationally appropriate. The ability and responsibility of librarians to select appropriate books for their patrons, the schoolchildren, was often disregarded by censors or courts.

These cases occurred after the librarian profession and the American Library Association (ALA) had come to a professional decision to make intellectual freedom a priority. The journey of librarians and libraries to strongly opposing censorship is documented in the companion books, Evelyn Gellar's *Forbidden Books in American Public Libraries, 1876-1939*[105] and Louise S. Robbins' *Censorship and the American Library: The American Library Association's Response to Threats to Intellectual Freedom, 1939-1969*.[106] According to Louise S. Robbins, by 1969, the

---

102. 457 U.S. 853 (1982).

103. An excellent source of information about individual banned books is NICHOLAS J. KAROLIDES, MARGARET BALD, & DAWN B. SOVA, 100 BANNED BOOKS (Ken Wachsberger ed., Checkmark Books 1999).

104. HERBERT N. FOESTREL, BANNED IN THE U.S.A: A REFERENCE GUIDE TO BOOK CENSORSHIP IN SCHOOLS AND PUBLIC LIBRARIES 65 (Greenwood Press 1994).

105. EVELYN GELLAR, FORBIDDEN BOOKS IN AMERICAN PUBLIC LIBRARIES, 1876-1939 (Greenwood Press 1984).

106. LOUISE S. ROBBINS, CENSORSHIP AND THE AMERICAN LIBRARY: THE AMERICAN LIBRARY ASSOCIATION'S RESPONSE TO THREATS TO INTELLECTUAL FREEDOM, 1939-1969

American Library Association had taken a strong stand to support "the librarian's professional autonomy in the selection of books on all sides of controversial sides" leaving librarians in the often "peculiar position of saying that reading matters, that it entails risks, and at the same time, resisting any restrictions on access to books and other reading materials."[107]

By the time of the *Pico* decision, school library book challenges were occurring frequently, with many federal courts making decisions about the appropriateness of the censorship decisions.[108] The cases leading up to *Pico* involved both the purchase and removal of books from school and public libraries, though often the rulings discussed only the removal of items.[109] The federal circuit courts, the eleven federal courts that are one level below the Supreme Court, were split as to whether school libraries, librarians, and students had the right to keep or purchase items or whether school boards had a right to remove items from library collections. Some parts of the country, such as the Second Circuit (covering New York, Vermont, Connecticut, and Puerto Rico) allowed the removal of items,[110] while other parts of the country, such as the Sixth Circuit (covering Michigan, Kentucky, and Tennessee) did not allow such removal.[111] The Seventh Circuit (covering Wisconsin, Illinois, and Indiana) considered library censorship to be an issue, but was not sure if the students had the right to sue to return the items to the library.[112] To settle the split between the viewpoints of the circuit courts, the Supreme Court decided to rule in *Pico*, making a statement about library censorship.

(Greenwood Press 1996).

107. *Id.* at 151, 156.

108. Colin Campbell, *Book Banning In America*, N.Y. TIMES, Dec. 20, 1981, §7, at 1; Dena Kleiman, *Parents' Groups Purging Schools of 'Humanist' Books and Classes*, N.Y. TIMES, May 17, 1981, §1, at 1.

109. Non-circuit court cases on this issue include Right to Read Def. Comm. v. Sch. Comm. of Chelsea, 454 F. Supp. 703 (D. Mass. 1978) (ruling against school board's decision to ban a book from the high school library due to an "offensive" poem) and Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269 (D. N.H. 1979) (ruling against school board's removal of magazine from the high school library).

110. Bicknell v. Vergennes Union High Sch. Bd. of Dirs., 638 F.2d 438 (2d Cir. 1980) (upholding removal of library books by the school board); Presidents Council, Dist. 25 v. Cmty. Sch. Bd. No. 25, 457 F.2d 289 (2d Cir. 1972), *cert. denied*, 409 U.S. 998 (1972) (upholding the school board's action removing library book from collection).

111. Minarcini v. Strongsville (Ohio) City Sch. Dist., 541 F.2d 577 (6th Cir. 1976) (ruling against school board's removal of books from the library collection).

112. Zykan v. Warsaw (Ind.) Cmty. Sch. Corp. and Warsaw Sch. Bd. of Trs., 631 F.2d 1300 (7th Cir. 1980). In a case including the removal of a school library book, stated that school boards cannot promote orthodoxy, but that the right violated by removal was not worthy of federal court.

B. OVERVIEW OF RULING

In *Pico*, the Supreme Court ruled that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to determine the norm in politics, nationalism, religion or other matters of opinion.[113] The Court also connected *Pico* with its earlier case law of *Brown* stating "a school library, no less than any other public library, is 'a place dedicated to quiet, to knowledge, and to beauty.'"[114] The connection between the various Justices' understanding of public libraries in *Brown* and the somewhat different role of the school library in *Pico* is important to the core of *Pico*.

The Court held that school boards may not blindly remove materials from school libraries. Part of the reasoning for this decision came from the plurality view that "the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library."[115] The removals may not be due to disagreement with the ideas contained in the materials, but may take place if the materials are pervasively vulgar.[116] Explained in greater detail, "school officials may not remove books for the purpose of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by the officials' disapproval of the ideas involved."[117]

The Court was sharply divided with six opinions from the nine Justices, and with opinions joined in part or in whole.[118] In *Pico*, the Supreme Court's analysis created the acquisition/removal dichotomy for judicial consideration of library materials, though factually limited to school library collection development. In addition, the Court addressed the appropriate role of school libraries, school library materials, public libraries, and the issue of materials that are not appropriate in school library collections.

---

113. Bd. of Educ. Is. Trees Union Free Dist. No. 26 v. Pico, 457 U.S. 853 (1982).

114. *Id.* at 868 (quoting Brown v. Louisiana, 383 U.S. 131, 142 (1966)).

115. *Id.* at 866.

116. *Id.* at 870-71.

117. *Id.* at 879-80.

118. *Pico* has six opinions for the nine justices: Justice Brennan's plurality opinion (joined by Justices Marshall and Stevens, with a partial agreement from Justice Blackmun), Justice Blackmun's concurring opinion, Justice White's concurring opinion, Justice Burger's dissenting opinion (joined by Justices Powell, Rehnquist, and O'Connor), Chief Justice Rehnquist's dissenting opinion (joined by Justices Burger and Powell), and Justice O'Connor's dissenting opinion.

C. FACTS

A local school board for a district high school and junior high school, after describing ten books as "anti-American, anti-Christian, anti-Semitic, and just plain filthy," ordered the removal of several books from the school libraries.[119] After the removal of the books, several students from the schools sued, claiming that the board's actions were taken due to specific social, political, and moral viewpoints and denied the students' First Amendment rights.

D. DISTINCTION BETWEEN ACQUISITION AND REMOVAL

In *Pico*, the Supreme Court made an interesting distinction between the acquisition of materials and their removal. The plurality's decision forbade the removal of items from school libraries due to dislike of the ideas contained within. The plurality stated "nothing in our decision today affects in any way the discretion of a local school board to choose books to add to the libraries of their schools. Because we are concerned in this case with the suppression of ideas, our holding today affects only the discretion to remove books."[120] This acquisition/removal binary dichotomy was based on library principles, as described by Lester Asheim in *Not Censorship But Selection*.[121]

In supporting its argument, the plurality stated that:

> [a]s to library books, the action before us does not involve the acquisition of books. Respondents have not sought to compel their school Board to add to the school library shelves any books that students desire to read. Rather, the only action challenged in this case is the removal from

---

119. *Pico*, 457 U.S. at 856-57. The books in the high school library were: KURT VONNEGUT, JR., SLAUGHTER HOUSE FIVE; DESMOND MORRIS, THE NAKED APE; PIRI THOMAS, DOWN THESE MEAN STREETS; LANGSTON HUGHES, ED., BEST SHORT STORIES OF NEGRO WRITERS; ANONYMOUS, GO ASK ALICE; OLIVER LAFARGE, LAUGHING BOY; RICHARD WRIGHT, BLACK BOY; ALICE CHILDRESS, A HERO AIN'T NOTHIN' BUT A SANDWICH; and ELDRIDGE CLEAVER, SOUL ON ICE. The book in the junior high school library was JEROME ARCHER, ED., A READER FOR WRITERS. *Id.* at 856 n.3.

120. *Pico*, 457 U.S. at 872.

121. Lester Ashheim, *Not Censorship but Selection*, 28 WILSON LIBR. BULL. 63-67 (1953).

> school libraries of books originally placed there by the school authorities, or without objection from them.[122]

The plurality viewed the decision to purchase an item as a different type of decision than that of removing an item. The basis of the difference is found in a limiting of access of ideas, avoiding the "official suppression of ideas,"[123] though the plurality did not clarify why removing items is more problematic than that of not acquiring items in the first place.[124] The reasoning behind the incorporation of this dichotomy in the plurality's opinion is not made clear, though it took sharp criticism in Justice Burger's dissent.

Justice Burger did not understand or appreciate the theoretical distinction between acquisitions and removal. Justice Burger questioned the plurality's viewpoint, stating that "if the First Amendment commands that certain books cannot be removed, does it not equally require that the same books be acquired? Why does the coincidence of timing become the basis of a constitutional holding?"[125] Justice Burger continued, stating, "According to the plurality, the evil to be avoided is the 'official suppression of ideas.' It does not follow that the decision to remove a book is less 'official suppression' than the decision not to acquire a book desired by someone."[126]

Burger continued, stating "the plurality suggests that the Constitution distinguishes between school libraries and school classrooms, between removing unwanted books and acquiring books. Even more extreme, the plurality concludes that the Constitution requires school boards to justify to its teenage pupils the decision to remove a particular book from a school library."[127]

Justice Burger disagreed with the need to explain to students why materials are removed from school libraries.

Justice O'Connor squarely addressed and rejected the removal/acquisition debate. She plainly stated that:

> [i]f the school board can set the curriculum, select teachers, and determine initially what books to purchase for the school library, it surely can decide which books to

---

122. *Pico*, 457 U.S. at 862.
123. *Id.* at 871.
124. *Id.* at 869-75.
125. *Id.* at 892 (Burger, J., dissenting).
126. *Id.*
127. *Id.* at 893 (Burger, J., dissenting).

> discontinue or remove from the school library so long as it does not also interfere with the right of students to read the material and to discuss it.[128]

She did not see a distinction between the acquisition and removal of materials from a library and places the decision of the school board within a pedagogical context. She also failed to appreciate the concept of professional librarians, who also work within a model for selecting and retaining items for their school's libraries. This was a lost opportunity to demonstrate an understanding of librarians' role as separate from administrators and teachers, but also as parties interested in insuring that students learn.

E. ROLE OF SCHOOL LIBRARIES

The members of the Supreme Court spend much of their opinions discussing their varying views of the appropriate role of school libraries. The Justices disagree greatly in their views of the appropriate role of school libraries, ranging from the plurality's near equation of school libraries to public libraries, thereby limiting school libraries in their ability to limit materials, to Chief Justice Rehnquist's dissenting view of school libraries as part of the educational process, and thereby free to make any limitations on school library materials.

The plurality equated school libraries with public libraries, based on *Brown v. Louisiana*: "A school library, no less than any other public library, is a place dedicated to quiet, to knowledge, and to beauty."[129] School libraries play an even greater role for students. The plurality stated the "school library is the principal locus" of the freedom of students "to inquire, to study and to evaluate, to gain new maturity an understanding."[130] In a school library, "a student can literally explore the unknown, and discover areas of interest and thought not covered by the prescribed curriculum. . . . [The] student learns that a library is a place to test or expand upon ideas presented to him, in or out of the classroom."[131]

The plurality argued, "the special characteristics of the school library make that environment especially appropriate for the recognition of the

---

128. *Pico*, 457 U.S. at 921.
129. *Id.* at 868.
130. *Id.* at 868-69.
131. *Id.* at 869 (quoting Right to Read Def. Comm. v. Sch. Comm., 454 F. Supp. 703, 715 (D. Mass. 1978)).

First Amendment rights of students."[132] These special characteristics create a "unique role" for the school library.[133] While the "inculcative function of secondary education" is important, allowing schools "absolute discretion in matters of curriculum by reliance upon their duty to inculcate community values," this idea is not enough to go "beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway."[134]

The plurality also relied on the voluntary nature of the school library, allowing students the discretion to choose when to go to the library and what items to read.

> It appears from the record that use of the Island Trees school libraries is completely voluntary on the part of students. Their selection of books from these libraries is entirely a matter of free choice; the libraries afford them an opportunity at self-education and individual enrichment that is wholly optional.[135]

Libraries were considered by the plurality to be separate from, but equally important to, the school curriculum. Chief Justice Rehnquist sharply disagreed with the plurality's idea of a "unique role" for school libraries. In his dissent, Chief Justice Rehnquist stated, "the unique role referred to appears to be one of Justice Brennan's own creation. No previous decision of this Court attaches unique First Amendment significance to the libraries of elementary and secondary schools."[136] Chief Justice Rehnquist was highly critical of Justice Brennan's plurality opinion, stating that the authority cited above by Justice Brennan referred to public libraries and universities, concluding that his authority was "transparently thin:" he further explained, "his reasoning misapprehends the function of libraries in our public school system."[137]

Chief Justice Rehnquist viewed the role of school libraries as limited, focusing their materials on curricular activities, rather than on mind-expansion. Chief Justice Rehnquist focused on the indoctrinating nature of schools, the home of school libraries, which "serve as supplements to this

---

132. *Id.* at 868.
133. *Id.* at 869.
134. *Pico*, 457 U.S. at 869.
135. *Id.*
136. *Id.* at 914.
137. *Id.* at 914-15.

inculcative role."[138] A clear comparison was made between school libraries and other types of libraries: "[u]nlike university or public libraries, elementary and secondary school libraries are not designed for freewheeling inquiry; they are tailored, as the public school curriculum is tailored, to the teaching of basic skills and ideas."[139] Concluding, Chief Justice Rehnquist stated that the plurality was incorrect; that the Court "cannot rely upon the nature of school libraries to escape the fact that the First Amendment right to receive information simply has no application to the one public institution which, by its very nature, is a place for the selective conveyance of ideas."[140] In response, the plurality stated "the only books at issue in this case are library books, books that by their nature are optional rather than required reading. Our adjudication of the present case thus does not intrude into the classroom, or into the compulsory courses taught there."[141]

In addition to the sharp disagreement between the plurality and Chief Justice Rehnquist, Justice Blackman's concurrence had a view of school libraries, placing them within the overall educational role of schools, agreeing with Chief Justice Rehnquist. Justice Blackmun disagreed with the idea that school libraries have a special role which would allow greater rights for students, that rights are "somehow associated with the peculiar nature of the school library; if schools may be used to inculcate ideas, surely libraries may play a role in that process."[142]

The plurality and the opinions of Chief Justice Rehnquist and Justice Blackmun had wholly different ideas about the roles of libraries and their materials, with Chief Justice Rehnquist and Justice Blackmun viewing school libraries as limited in scope, focusing only on materials that promote the educational viewpoint of the school, while the plurality gave the library a wider scope, where students can receive information outside of the curriculum.

F. ROLE OF THE PUBLIC LIBRARY AND OTHER ALTERNATIVE SOURCES OF INFORMATION

The Court did not agree on the appropriateness of the books in the school library, but agreed that if the books were barred from the school

---

138. *Id.* at 915.
139. *Id.*
140. *Pico*, 457 U.S. at 915.
141. *Id.* at 862.
142. *Id.* at 878.

library, students nevertheless had a constitutional right to read them in other locations.[143] The plurality stated that libraries hold an important role in the lives of children: "student[s] learn[] that a library is a place to test or expand upon ideas presented . . . , in or out of the classroom."[144] The dissenters believed that there should be a line drawn between school library materials and materials more appropriately placed in other locations.

The dissenters were concerned with pointing out that other places for banned materials exist. Justice Burger continued by stating that once books are removed from school libraries "alternative sources" exist: "[b]ooks may be acquired from bookstores, public libraries, or other alternative sources unconnected with the unique environment of the local public schools."[145] Chief Justice Rehnquist also addressed the idea of alternative sources for these materials, stating that these "books may be borrowed from a public library, read at a university library, purchased at a bookstore, or loaned by a friend."[146]

The accessibility of these materials at public libraries seems to be a primary concern for the dissenting Justices. Because these books are available at the public library, a more acceptable place for these materials, according to Chief Justice Rehnquist and Justice Burger, the need for them to be at the school library is not nearly as important as if they were not available at all. This argument is disingenuous considering the limited accessibility of many of these books; the only connection some students have with books and library materials is at the school library.[147] Also, these books were award-winning, age-appropriate materials selected by the

---

143. *Id.* at 869.

144. *Id.* (quoting Right to Read Def. Comm. v. Sch. Comm., 454 F. Supp. 703, 715 (Mass. 1978)).

145. *Id.* at 892 (Burger, J., dissenting).

146. *Pico*, 457 U.S. at 915 (Rehnquist, C.J., dissenting).

147. However, others may continue to view the distinction as important – "between the school child who is in an inculcative relationship with the school, and the same child after school who is in the freewheeling library," as stated by Mary Minow. Interview with Mary Minow, Policy Analyst, California Association of Library Trustees and Commissioners, in Chicago, Ill. (Apr. 27, 2004).

> By accepting an otherwise illogical distinction between the classroom and the library - thus treating potentially like things differently - the Court resolved the dilemma of promoting contending norms simultaneously by "dividing" the school program into two theoretical units, with one serving a broad indoctrinative function and the other exhorting a student's right to receive a broad spectrum of information.

Stanley Ingber, *Twenty-Five Years After* Tinker*: Balancing Students' Rights: Liberty and Authority: Two Facets of the Inculcation of Virtue*, 69 ST. JOHN'S L. REV. 421, 451 (1995).

librarian and the fact that there were other sources of these materials should not detract from the professional collection development of librarians.

The dissenters considered students' access to books and other similar library material elsewhere as a reason for disagreeing with the plurality's position that removal of materials in a school library affects students' First Amendment rights. In these dissents, a great deal of focus was placed on another type of library; the public library, where students can go to receive a wider array of information. Justice Burger stated that the students were not prevented from receiving the same information in another context: "[t]hey are free to read the books in question, which are available at public libraries and bookstores; they are free to discuss them in the classroom or elsewhere."[148] While these alternative sources were mentioned, the most appropriate place for inquiry of banned materials, according to the dissents, is the public library.

Chief Justice Rehnquist's dissent viewed the public library as the appropriate place for children to explore materials considered inappropriate within a school library. He agreed that the students were free to read books at the public library even if those books had been disapproved by the school board and removed from the school library. He stated "the removed books are readily available to students and nonstudents alike at the corner bookstore or the public library."[149] Chief Justice Rehnquist also made it clear that the possibility of removed library materials appearing in public library collections does occur, because in this case, "the local public library put all nine books on display for public inspection. Their contents were fully accessible to any inquisitive student."[150] Interestingly, Chief Justice Rehnquist never questioned either this display or the need for it. It is likely that the public librarians decided to make a display because the materials were banned from the school library, perhaps as a "banned books" display. The idea of a possible banned book display used as an example of openness for materials truly stretches the imagination.

The other opinions, the plurality and concurrences, did not focus on whether a public library or other alternative sources would be the most appropriate location for controversial and subsequently banned material. The issue of banning books from a public library collection was a concern of the other justices, though not the issue in the case presented. Justice Blackmun's concurrence stated that "surely difficult constitutional problems would arise if a State chose to exclude 'anti-American' books from its public libraries — even if those books remained available at local

148. *Pico*, 457 U.S. at 886.
149. *Id.* at 913 (Burger, J., dissenting).
150. *Id.* at 915 (Rehnquist, C.J., dissenting).

bookstores."[151] Therefore, the extent of limiting or banning materials based on their viewpoint is limited in public libraries.

G. CONCLUSION

While, in an ideal world, *Pico* should have solved issues involving school library material censorship, it did not. The distinction made between acquiring and removing items made those that object to certain items protest sooner and perhaps have a stronger position when an item was removed.[152] In addition, the Supreme Court in *Pico* only created guidelines to be followed by future school boards, but did not end court challenges to school library removal decisions.

For example, two cases from 1995 illustrate the difficulty in applying the *Pico* standard. In *Case v. Unified School District*, after receiving a possible donation of the book, *Annie on My Mind*, a novel about a romantic relationship between two teenage girls, the Olathe, Kansas School Board decided to remove the copies of the book that had been on district school library shelves for over ten years. [153] The Court ruled that the stated reasoning of the school board: that the removal of the book was due to educational unsuitability, did not follow from the testimony of the school board members, instead it was removed due to its ideology.[154] In addition, the School Board had violated its own materials' selection and reconsideration policies.[155] This case illustrates both the ease with which a school board can violate its own policy and the importance of those who challenge school board decisions. School boards can experience significant change due to political appointments or elections. The second-guessing of librarian collection development decisions leads to an atmosphere where librarians are treated as glorified babysitters instead of as professionals.

Another case shows an even more difficult path in challenging a book removal decision. In *Campbell v. St. Tammany Parish School Board,* a public school district removed a book that discussed the history and practices of the voodoo and hoodoo religions from all district library

---

151. *Id.* at 881 (Blackmun, J., concurring).

152. According to Mary Minow, "When I was selecting books for the library, there is no feasible way a judge could look over my shoulder to see which books I chose and which I did not. Yet if I took a book off the shelf, it could feasibly be reviewed by a court." Interview with Mary Minow, Policy Analyst, California Association of Library Trustees and Commissioners, in Chicago, Ill. (Apr. 27, 2004).

153. Case v. Unified Sch. Dist. No. 233, 908 F. Supp. 864, 867 (D. Kan. 1995).

154. *Id.* at 868.

155. *Id.* at 872.

shelves.[156] At the district court level, the suing parents of students won, but the appellate court reversed because it was unclear what the reasoning of board members was in making the removal, and the court remanded the case for a full trial. In the decision, the court did mention evidence that some of the school board members had removed the book without having read it or having only read excerpts selected by the Louisiana Christian Coalition.[157] The court even stated that:

> in light of the special role of the school library as a place where students may freely and voluntarily explore diverse topics, the School Board's non-curricular decision to remove a book well after it had been placed in the public school libraries evokes the question whether that action might not be an unconstitutional attempt to 'strangle the free mind at its source.'[158]

Unfortunately, the answer to this question does not appear in recorded case history influencing future decisions as precedent because the school district and the parents settled the case; returning the books to the library, but allowing only students in grade eight or above with parental permission to read the book.[159]

The issue of removal of items from school library shelves and public libraries continues to be a significant issue for librarians. For example, in the professional association publication of the American Library Association (ALA), *American Libraries*, every issue has a section called "Censorship Watch" which tracks the censoring of items from libraries, primarily focusing on public and school libraries. In the next case discussed, *American Library Ass'n*, a new type of removal decision is discussed: the removal of Internet materials through using a filtering program. Unlike *Pico*, where the removal of a book physically leaves a space, one issue in *American Library Ass'n* is whether preventing patrons and library staff from viewing websites is "removing" part of the collection at all.

---

156. Campbell v. St. Tammany Parish Sch. Bd., 64 F.3d 184, 185 (5th Cir. 1995).

157. *Id.* at 190.

158. *Id.* (citing West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

159. Sara Shipley, *4-Year Book Suit Settled*, TIMES-PICAYUNE (New Orleans, La.), Apr. 2, 1996, at A1.

IV. *AMERICAN LIBRARY ASSOCIATION*

A. INTRODUCTION

In the 1990s, as part of their collection development practices, many libraries – including special libraries, public libraries, school libraries, and academic libraries – added Internet-use capabilities to the services offered to both their patrons and staffs. Many libraries created acceptable use guidelines for the use of the Internet or changed their previous policies to include statements about the appropriate use of the Internet on library computers. Some libraries choose to "filter" or limit the Internet use they provide in a variety of ways, including placing Internet filters on computers, limiting minors to view limited library-screened websites, and only allowing children to view the Internet with parental permission.

Arguments for filtering or limiting non-filtered computers to adults are based on the idea that there is a great deal of unimportant, unsavory, and illegal material on the Internet, from which children (and in some cases, adults) should be protected. Arguments against filters or limitations are based on First Amendment freedom of speech, including the right to speak as well as the right to read, considering that filters work like a sieve, preventing some information from being received while other information can be received.[160] Often filters prevent users from accessing information without allowing them to know anything has been blocked; the list of sites blocked is proprietary, with libraries unable to view a complete list of sites blocked or to know under what reasoning sites have been blocked, or libraries unable to de-select blocked sites by the filter.

Any action libraries took to respond to the availability of material led to lawsuits, both from those who supported filters and those who opposed filtering. In response to the filtering of Internet-use computers on all

---

160. For a variety of viewpoints on filtering in libraries, see William D. Araiza, *Captive Audiences, Children and the Internet*, 41 BRANDEIS L.J. 397 (2003); Gregory K. Laughlin, *Sex, Lies, and Library Cards: The First Amendment Implications of the Use of Software Filters to Control Access to Internet Pornography in Public Libraries*, 51 DRAKE L. REV. 213 (2003); Susan Nevelow Mart, *The Right to Receive Information*, 95 LAW LIBR. J. 175 (2003); Kiera Meehan, *Installation of Internet Filters in Public Libraries: Protection of Children and Staff vs. The First Amendment*, 12 B.U. PUB. INT. L.J. 483 (2003); David F. Norden, *Filtering Out Protection: The Law, the Library, and Our Legacies*, 53 CASE W. RES. L. REV. 767 (2003); J. Adam Skaggs, *Burning the Library to Roast the Pig? Online Pornography and Internet Filtering in the Free Public Library*, 68 BROOK. L. REV. 809 (2003).

public-use library computers in Loudoun County, a group of citizens sued, claiming that their First Amendment rights had been violated.[161] The court used the *Pico* distinctions between the acquisition and removal of information, and between adding an Internet connection and then filtering it.[162] Using the *Pico* analysis, the court held that *Pico* "stands for the proposition that the First Amendment applies to, and limits, the discretion of a public library to place content-based restrictions on access to constitutionally protected materials within its collection."[163] In addition, the court held that a public library was a limited public forum and stated that filtering was not a valid "time, place, or manner" regulation.[164] The library itself is a public forum due to its use as a place for the exchange of ideas, but also, specifically, the Internet-use computers were a distinct, limited public forum.

According to the court, placing filters on the computers would limit their content, and was unconstitutional because there was no compelling government interest and filtering was not narrowly tailored to the government interest. The court concluded, "the Library Board need not offer Internet access, but, having chosen to provide it, must operate the service within the confines of the First Amendment."[165] The library, therefore, could not be required to use filters, not even on its children's-use computers. This case was the first time a court had made a ruling concerning the legality of filters, and while it did not apply nationwide, this case was used as a justification for why filters could not be used on library computers, though many libraries were offering some type of choice on their Internet-filtered computers, such as turning off the filters.

In contrast, another library was sued for not installing filters at all. In *Kathleen R.*, a mother sued a public library because her twelve-year old son downloaded sexually explicit pictures from the unfiltered library computers.[166] The court ruled that libraries do not place children in danger

---

161. The *Mainstream Loudoun* case consists of two different rulings on the same facts. The final decision, *Mainstream Loudoun v. Bd. of Trs.*, 24 F. Supp. 2d 552 (E.D. Va. 1998) [hereinafter *Mainstream Loudoun II*] was released on November 23, 1998. In the earlier ruling, issued on April 7, 1998, *Mainstream Loudoun v. Bd. of Trs.*, 2 F. Supp. 2d 783 (E.D. Va. 1998) [hereinafter *Mainstream Loudoun I*], the plaintiffs' First Amendment claims were recognized.

162. *Mainstream Loudoun I*, 2 F. Supp. 2d at 794.

163. *Id.*

164. *Id.*

165. *Id.* at 796.

166. Kathleen R. v. City of Livermore, 87 Cal. App. 4th 684 (Cal. Ct. App. 2001). However, the major reason the library won was Section 230 of the Telecom Act that trumped the state law claims, Pub. L. 104-104, 110 Stat. 56 (1996).

by having unfiltered Internet access, and that, considering that the library policy stated that patrons use the Internet at their own risk and minors are not supervised by librarians while using the Internet, the library was not liable.[167] *Kathleen R.* and the threat of being sued for "inappropriate use" of the Internet became a concern of libraries and librarians.

Around the same time of *Mainstream Loudoun* and *Kathleen R.*, the Supreme Court made an important ruling on the type of forum the Internet is. In *Reno v. ACLU*,[168] the Court struck down large portions of the Communications Decency Act of 1996 (CDA) that was created with the intent to protect children from the dangers of the Internet by criminalizing "indecent" material that might be displayed to minors.[169] In holding that the CDA unconstitutionally restricted online speech, the Court noted that "[s]ystems have been developed to help parents control the material that may be available on a home computer with Internet access."[170] The Court even analogized the Internet to a library, stating that to a reader, it is "a vast library including millions of readily available and indexed publications . . . ."[171] In *Ashcroft v. ACLU*, the Court issued a very limited ruling, stating that community standards may determine the boundaries of obscenity for the purposes of a "harmful to minors" proposed law (the Children's Online Protection Act (COPA)), and sent the case to a lower court for further proceedings, preventing the implementation of the law.[172]

---

167. *Id.* at 700-02.

168. Reno v. ACLU, 521 U.S. 844, 885 (1997).

169. The Communications Decency Act, 47 U.S.C. § 223 (2000). The CDA was also Title V of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996).

170. *Reno*, 521 U.S. at 854–55.

171. *Id.* at 853.

172. Ashcroft v. ACLU, 535 U.S. 564, 579 (2002) (on remand at ACLU v. Ashcroft, 322 F.3d 240 (3d Cir. 2003)). After the case reached the Supreme Court again, the Court stated that the Third Circuit was correct to affirm the district court's ruling that enforcement of COPA should be enjoined because the statute likely violates the First Amendment. (Remanded by Ashcroft v. ACLU, 124 S. Ct. 2783 (2004)). Part of the Court's reasoning was that filtering was a better solution than COPA to the problem of children accessing "harmful to minors" materials online. *Id.* at 2792-93.

A federal court has also struck down a similar law, the Internet Child Pornography Act of Pennsylvania, which required Internet service providers to disable access to specified child pornography items "residing on, or accessible through, its service" after receiving notification from the Pennsylvania Attorney General. Many sites without objectionable material were being blocked. Tom Zeller, *Court Rules Against Pennsylvania Law that Curbs Child-Pornography Sites*, N.Y. TIMES, Sept. 11, 2004, at C14. More information about this case is found at Center for Democracy and Technology, Pennsylvania Web Blocking Law, *available at* http://www.cdt.org/speech/pennwebblock (last visited Sept. 13, 2004).

These cases show that while courts consider curbing the spread of child pornography to be important – the net of prevention should not be cast so wide to prevent expression of

While the Supreme Court, in *Reno* and *Ashcroft,* had not "consider[ed] the question of government-mandated content filtering, . . . almost immediately thereafter, however, the debate over Internet filtering software centered on whether such filters should be required at the principal public institutions that provide Internet access—public libraries and schools," according to Robert Corn-Revere, the lead attorney in the *Mainstream Loudoun* cases.[173]

In an attempt to stave what it believed to be a wave of obscene and "pornographic" uses of the Internet, specifically in libraries, Congress took further action. According to Steven D. Hinckley,

> [s]tung by the debacle of the CDA and COPA challenges, and recognizing just how difficult it would be to directly control Internet content, those members of Congress bent on bringing governmental control to online speech devised what they believe is an ingenious and constitutionally invulnerable strategy to accomplish this goal through indirect means.[174]

To do so, schools and public libraries became Congress' "battleground [in] a fight against smut on the Internet."[175] Congress passed the Children's Internet Protection Act (CIPA), which requires all libraries and schools that receive federal government funds for Internet access to install and use filters to prevent the access of images that are obscene, child pornography, or harmful to minors.[176] The *American Library Ass'n* case is based on a constitutional challenge to this act.

---

protected speech.

173. Robert Corn-Revere, United States v. American Library Ass'n: *A Missed Opportunity for the Supreme Court to Clarify Application of First Amendment Law to Publicly Funded Expressive Institutions* 105, 106-07, *in* CATO SUP. CT. REV.: 2002-2003 (James L. Swanson ed., 2003), *available at* http://www.cato.org/pubs/scr2003/publiclyfunded.pdf.

174. Steven D. Hinckley, *Your Money Or Your Speech: The Children's Internet Protection Act and the Congressional Assault on the First Amendment in Public Libraries,* 80 WASH. U. L.Q. 1025, 1053 (2002).

175. *Id.* at 1055.

176. Children's Internet Protection Act, Pub. L. No. 106-554, 114 Stat. 2763 (codified at 20 U.S.C. 9134; 47 U.S.C. § 254 (2000)).

B. OVERALL RULING

In *United States v. American Library Ass'n*, a divided Supreme Court has for the second time in its history, decided what can be removed from or limited to a library's collection.[177] In this case, the Supreme Court avoided an opportunity to follow any of the opinions of *Pico*, which, at its core, attempted both to protect community standards and free speech rights. Instead, the Court was primarily concerned about funding, specifically the limits Congress can make on the money it disburses. By focusing on funding, the Court avoided both the general free speech arguments, such as that the government-installed filters will prevent the use of the Internet to the fullest, and also important, but less mentioned, the fact that the imposition of the filters are not imposed by local government, but by the national one. The Court also implied that it was possible for filters to be turned off for "bona fide research or other lawful purpose," but does not help to define when this occurs, adding an additional area of concern for libraries and their staffs.[178]

The Court also seemed to be concerned with preventing library patrons from viewing "pornography," a vague term with no legal definition,[179] unlike child pornography, obscenity, and other forms of

---

177. United States v. Am. Library Ass'n, 539 U.S. 194 (2003). For analysis of this case by others, see Christopher Harne, *Filtering Software in Public Libraries: Traditional Collection Decision or Congressionally Induced First Amendment Violation?*, 55 MERCER L. REV. 1029 (2004); Leah Wardak, *Internet Filters and the First Amendment: Public Libraries After* United States v. American Library Association, 35 LOY. U. CHI. L.J. 657 (2004). For analysis of this case in context of larger issues, see Susan Hanley Kosse, *Try, Try Again: Will Congress Ever Get It Right? A Summary of Internet Pornography Laws Protecting Children and Possible Solutions*, 38 U. RICH. L. REV. 721, (2004); Alice G. McAfee, *Creating Kid-Friendly Webspace: A Playground Model for Internet Regulation*, 82 TEX. L. REV. 201 (2003); Todd A. Nist, *Finding the Right Approach: A Constitutional Alternative for Shielding Kids from Harmful Materials Online*, 65 OHIO ST. L.J. 451 (2004); Dawn C. Nunziato, *Toward a Constitutional Regulation of Minors' Access to Harmful Internet Speech*, 79 CHI.-KENT. L. REV. 121 (2004); Janelle A. Weber, *The Spending Clause: Funding a Filth-Free Internet or Filtering Out the First Amendment?*, 56 FLA. L. REV. 471 (2004); Emily Vander Wilt, *Considering COPA: A Look at Congress's Second Attempt to Regulate Indecency on the Internet*, 11 VA. J. SOC. POL'Y & L. 373 (2004).

178. *Am. Library Ass'n*, 539 U.S. at 209.

179. Justice Stewart's famous quote concerning pornography, "I know it when I see it," did not set a legal standard to judge pornography. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). He stated that "under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so." *Id.*

unprotected speech that have been defined by the Supreme Court.[180] The plurality's concern about appropriate use of the Internet focuses on the views of Congress, rather than the views of libraries.

Throughout the opinions, the abilities of libraries and librarians to make appropriate choices – for collection development, their patrons, and free speech – are minimized by the Justices. In addition, strangely, the interests of libraries throughout are often equated with the goals of Congress (e.g. both groups support filters), but this equivalency is not addressed directly.

The Court itself was split. Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Thomas joined in the plurality opinion. Justices Kennedy and Breyer had separate concurring opinions. Justice Stevens had his own dissenting opinion; Justices Souter and Ginsburg shared another.

C. ROLE OF LIBRARIES

While this case revolves around the use of filtering in libraries, the starting point of arguments about the legality of this action surround the purpose of libraries in American society. A large part of the plurality's opinion concerned the traditional role of libraries. The plurality based its argument in the "traditional mission" of the public library.[181] The plurality viewed libraries' role as providing limited, appropriate materials. In addition, Justice Breyer's concurrence was also concerned with following "traditional library practices."[182] Justice Souter's dissent strongly disagreed with the viewpoint of the plurality, spending a considerable portion of his dissent on this issue. Justice Souter described the view of the plurality as arguing that "the traditional responsibility of public libraries has called for

---

180. The Supreme Court has determined that certain categories of expression are outside of appropriate First Amendment protection, including obscenity, defined as material that: (1) "the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (2) depicts or describes in a patently offensive way sexual conduct specifically defined by the applicable state law; and (3) taken as a whole, lacks serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15, 24 (1973). Some speech, including sexually explicit speech, can be regulated in regards to children, preventing expression that is "harmful to minors." Ginsberg v. New York, 390 U.S. 629, 638 (1978). The Supreme Court has also found that child pornography of real children is not protected speech, due to the impact the production has on the lives of real children. Osborne v. Ohio, 495 U.S. 103, 108-11 (1990); Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

181. *Am. Library Ass'n*, 539 U.S. at 204.

182. *Id.* at 219 (Breyer, J., concurring).

denying adult access to certain books, or bowdlerizing the content of what the libraries let adults see."[183]

Though Justice Breyer mentioned traditional library practices, two opinions in sharp contrast on the role of libraries are the plurality's "traditional mission" view and Justice Souter's changing-over-time view. These divergent perspectives exemplify two different models of library service: providing classic materials in both senses, traditional types of materials and the classics, and providing materials without distinction based on the audience. The collection development viewpoints that further shape the opinions are based on opinions about the overall role of public libraries.

D. "TRADITIONAL MISSION": THE PLURALITY

The plurality's "traditional" view of libraries is one of high ideals. According to the plurality, "[p]ublic libraries pursue the worthy missions of facilitating learning and cultural enrichment."[184] Quoting from ALA's Library Bill of Rights, the plurality stated "libraries should provide 'books and other . . . resources . . . for the interest, information, and enlightenment of all people of the community the library serves.'"[185]

The plurality took this idea in a limiting, instead of expansive, direction. According to the plurality, "[t]o 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.'"[186] The plurality, unlike Justice Souter, made statements about the traditional roles of libraries, but, with the exception of briefly discussing collection development decisions of libraries, did not include a historical perspective of the role of American libraries. Instead, the plurality assumed not only that its statements about present-day library roles were correct, but also that, retrospectically, the role of libraries had not changed over time. The lack of understanding of a changing role of libraries prevented the plurality from understanding that inclusion of the Internet may indeed serve the present role of libraries.

---

183. *Id.* at 237 (Souter, J., dissenting).
184. *Id.* at 203.
185. *Id.* at 226 (Stevens, J., dissenting).
186. *Id.* at 204.

E. "EVIDENCE OF THE DOG THAT DID NOT BARK": JUSTICE SOUTER'S HISTORICAL PERSPECTIVE

In his dissent, Justice Souter strongly disagreed with the plurality's conception of the "traditional role" of the library. He understood not only that the "traditional role" of libraries is a misnomer, but also that libraries and librarians generally view the role of libraries as inclusive, information-providing bodies without limitation on perspectives. Justice Souter stated that:

> 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.[187]

Justice Souter believed that there was no support for library Internet blocking in the historical development of library practice.

In disputing the plurality's view of the "traditional mission" of libraries, Justice Souter laid out a highly different view of libraries.[188] His analysis started with a historical perspective from the nineteenth century and moved into the present. Justice Souter stated that the "[i]nstitutional 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."[189] He has a nuanced understanding of what access means, stating that while "libraries commonly limit access on content-neutral grounds to, say, rare or especially valuable materials," this does not raise "First Amendment concerns, because they have nothing to do with suppressing ideas."[190]

Justice Souter stated that "freedom of choice was apparently not within the inspiration for the mid-nineteenth century development of public libraries" and that "in the infancy of their development a 'moral censorship' of reading material was assumed."[191] By "the early twentieth century, the legitimacy of the librarian's authority as moral arbiter was

---

187. *Am. Library Ass'n*, 539 U.S. at 237 (Souter, J., dissenting).
188. *Id.* at 205.
189. *Id.* at 238 (Souter, J., dissenting).
190. *Id.* at 238 n.4.
191. *Id.*

coming into question," as stated in an American Library Association (ALA) president's address from 1926, "the true public library must stand for the intellectual freedom of access to the printed word."[192] Justice Souter stated that "by the end of the 1930s, librarians' 'basic position in opposition to censorship [had] emerged,'" and that there was "a growing understanding that a librarian's job was to guarantee that 'all people had access to all ideas.'"[193] Justice Souter cited to Gellar, the preeminent expert on the history of librarians and censorship.[194] This shows a detailed effort by Justice Souter to understand librarians through their own experiences.

After discussing European fascism as a reason for librarian opposition to censorship, Justice Souter made a quick jump to a time of American censorship – McCarthyism. He stated that by the time of McCarthyism, the ALA had a Library Bill of Rights making strong statements against censorship and an ongoing Intellectual Freedom Committee to ensure that "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" outside of obscenity laws.[195]

Justice Souter stated that the ALA's views seem to have "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."[196] Still, adults might have needed "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."[197] Justice Souter did not view these limits on direct, immediate access as censorship and claims that there are not records from this time of libraries precluding patrons from collections except for minors. He concluded by addressing the requirement that libraries determine when to "turn off" the filters stating that 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

192. *Id.* at 238.

193. *Am. Library Ass'n*, 539 U.S. at 238 (Souter, J., dissenting).

194. EVELYN GELLER, FORBIDDEN BOOKS IN AMERICAN PUBLIC LIBRARIES, 1876-1939, 156 (1984).

195. *Am.Library Ass'n*, 539 U.S. at 238 (Souter, J., dissenting).

196. *Id.* at 239.

197. *Id.*

evaluate the basis for a particular request."[198] Justice Souter was right that librarians do not make such distinctions, instead providing the information requested by their patrons.

Justice Souter also discussed the changes implemented by the ALA during the latter half of the twentieth century to further oppose censorship. These changes included the further interpretation of Library Bill of Rights, such as opposing the labeling of controversial materials as such, opposing general circulation and viewing limitations, and opposing restrictions on access to library materials by minors by anyone but a parent. Justice Souter stated that the ALA opposed these practices, though at the time they were "common to many libraries in the United States" 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."[199] Justice Souter, citing to the ALA, viewed these content-based materials as censorship, "[w]hile 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."[200]

Justice Souter was primarily concerned with what is missing from ALA statements; "[t]here 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."[201] Interestingly, Justice Souter gave the ALA credit in addressing all possible issues involving libraries. He stated that if a practice of limiting adult access "had survived into the latter half of the [twentieth] 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."[202]

According to Justice Souter, the lack of an ALA statement on this issue meant "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."[203] Justice Souter also considered the fact that the ALA had adopted statements opposing limitations on adult patrons' use of the Internet in response to Internet

198. *Id.*
199. *Id.*
200. *Id.*
201. *Am. Library Ass'n*, 539 U.S. at 239 (Souter, J., dissenting).
202. *Id.*
203. *Id.* at 241.

filtering in libraries. Justice Souter believed that the ALA's position supporting free use of materials by all adults as the perspective of librarians was sufficient as an argument for not allowing filters on computers used by adults.

F. COMPARING THE NEW WITH THE OLD: JUSTICE STEVENS

In discussing filtering, Justice Stevens made an interesting analogy between the blocked sites on the Internet, an example of a newer type of library material, and books, the traditional library material. Due to the ways in which filters work, library patrons may never know what information they are prevented from viewing. This "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."[204]

In conclusion, Justice Stevens stated that reading, one of the traditional activities conducted in a library, will be limited: [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."[205]

G. COLLECTION DEVELOPMENT

One of the most important elements of libraries and their role is their collections. How libraries create collection development policies and what materials they choose to collect became a related issue to the role of libraries in this case. One of the most important distinctions between the plurality and the other opinions is the appropriate scope and depth of collection development by libraries. The opinions of this case have varied views on collection development, as carried out by libraries. The plurality and the dissents hold sharply divergent views on collection development. Unfortunately, the plurality opinion holds the greatest weight and also has the most antiquated view of library collection development.

---

204. *Id.* at 224 (Stevens, J., dissenting)
205. *Id.* at 225.

H. COLLECTION DEVELOPMENT – GENERAL

The plurality explained the "worthy missions" of the public library in facilitating "learning and cultural enrichment."[206] According to the plurality, "libraries must have broad discretion to decide what material to provide to their patrons."[207] According to Justice Stevens, this "selection decision is the province of the librarians, a province into which we [courts] have hesitated to enter."[208] The plurality, at least in part agreed:

> 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 [strict] 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.[209]

The *plurality* equated more traditional practices of libraries with the use of the Internet, twisting logic to avoid stating that a library or its Internet-use computers are a limited public forum. Instead, the plurality stated that public forum analysis does not apply in the library context due to librarian discretion. Libraries are entitled to make collection development decisions; professional decisions based on discretion. But that is not what the Supreme Court was allowing. Instead, Congress is making the decision. Many libraries under CIPA will be blocking pornography and other legal materials, not through a collection development decision, but through a practical one, based on funding.

According to the plurality, the center of this control regarding collections rests in the libraries themselves, and more specifically, in the staff of the library. A public library "exercise[s] judgment in selecting the material it provides to its patrons."[210] The plurality stated that "[p]ublic library staffs necessarily consider content in making collection decisions

---

206. *Id.* at 203.
207. *Am. Library Ass'n*, 539 U.S. at 204.
208. *Id.* at 225 (Stevens, J., dissenting).
209. *Id.* at 225-26.
210. *Id.* at 205.

and enjoy broad discretion in making them."[211] While the plurality gave library staff lip service in regards to collection development decisions, the plurality only considered these decisions relevant if the material collected is of the highest quality.

Overall, in discussing collection development, the plurality used a "separating the chaff from the grain" model of collection development; that there is quality and not-quality, two distinctive categories. The role of libraries is to collect only quality. The opinion stated that "public libraries seek to provide materials 'that would be of the greatest direct benefit or interest to the community' . . . libraries collect only those materials deemed to have 'requisite and appropriate quality.'"[212] To support this position, the plurality cited to two collection development texts, both of which predate dramatically the use of the Internet, using these text to exemplify all library collection development:

> W. Katz, Collection Development: The Selection of Materials for Libraries 6 (1980) ("The librarian's responsibility . . . is to separate out the gold from the garbage, not to preserve everything"); F. Drury, Book Selection xi (1930) ("It is the aim of the selector to give the public, not everything it wants, but the best that it will read or use to advantage.").[213]

There is also no discussion of the fact that public libraries do supply their patrons with materials that are not necessarily those of the high standard referenced by the plurality, such as bestsellers, celebrity influenced magazines, music by popular artists, and DVDs of popular movies. No effort is made in the plurality opinion to discuss the cost differential between supplying the public traditional services, such as books and periodicals, where the more information provided equals greater cost versus open access to the Internet, which instead of definitively costing more to provide more information can cost more to limit information via filters.[214]

---

211. *Id.*

212. *Id.* at 204.

213. *Am. Library Ass'n*, 539 U.S. at 204.

214. However, it can be argued that it does cost some libraries a great deal to have non-filtered access of the Internet or no "appropriate use policy" – through patrons that are using library resources to look at pornography, not a traditional item in the collection of public libraries, thereby using limited resources, which is costly to everyone.

In contrast to the plurality, Justice Stevens viewed the collection development decisions as important as other types of academic freedom and should be given wide discretion. As Justice Stevens stated, "we have always assumed that libraries have discretion when making decisions regarding what to include in, and exclude from, their collections."[215] Justice Stevens viewed libraries as educational institutions for the public. First, he compared library discretion to the decision-making power of universities. Second, Justice Stevens quoted the lower court's findings that "one of the central purposes of a library is to provide information for educational purposes: '[b]ooks and other library resources should be provided for the interest, information, and enlightenment of all people of the community the library serves.'"[216] Justice Stevens' quote is from the ALA's Library Bill of Rights, an important acknowledgement of the profession's own viewpoints, in tandem with the plurality's quote from the same source. Justice Stevens concluded, "[g]iven 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."[217]

Justice Souter went a step further than Stevens' academic freedom model of library collection development by stating that these decisions should not be overruled in courts. Justice Souter believed that there are elements of library acquisition decisions that prevent courts from adequately reviewing them. The first reason for difficulty is the "complexity [of these decisions], 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."[218] In making acquisition decisions, a "librarian should consider likely demand, scholarly or esthetic quality, alternative purchases, relative cost, and so on."[219] Secondly, there are so many acquisition decisions and "courts cannot review the administration of every library with a constituent disgruntled that the library fails to buy exactly what he wants to read."[220] In reviewing acquisition of traditional materials, Justice Souter concluded, "[r]eview 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

---

215. *Am. Library Ass'n*, 539 U.S. at 226 (Stevens, J., dissenting).
216. *Id.*
217. *Id.* at 226 (Internal citations omitted).
218. *Id.* at 241 (Souter, J., dissenting).
219. *Id.* at 241-42.
220. *Id.* at 242.

difficulty of untangling the play of factors behind a particular decision."[221] Collection development decisions should be left to the discretion of librarians (and appropriate boards) according to Justice Souter.

In addition to generalized views on the inapproachability of the complexity of collection development decisions, Justice Souter made a distinction between Internet-based materials and traditional library materials, due to space limitations. Justice Souter had a library-centered approach to how libraries do collection development for traditional materials:

> 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.[222]

Justice Souter's dissent even made a point about how library collections are no longer limited to only the physical limits of a library building even if the Internet (and online databases) is not being considered. He stated that "among other things, the plurality's reasoning ignores the widespread utilization of interlibrary loan systems."[223] Interlibrary loan allows for "virtually any book [to be] effectively made available to a library's patrons."[224] This ability to receive books from other libraries limits any individual library to censor:

> 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 "collected only those materials deemed to have "'requisite and appropriate quality.'"[225]

The actual experience of interlibrary loan has changed the library process at public libraries. Many public libraries are part of larger

---

221. *Am. Library Ass'n*, 539 U.S. at 236 (Souter, J., dissenting).
222. *Id.* at 236
223. *Id.* at 235 n.2.
224. *Id.*
225. *Id.*

collective systems or consortia, allowing for the free flow of interlibrary loan materials among member libraries.

I. COLLECTION DEVELOPMENT DIFFERENCES BETWEEN BOOKS AND THE INTERNET

The lower court attempted to make a distinction between the acquisition of traditional materials and Internet-based materials allowing a library less discretion in choosing Internet-based materials. This distinction was based on the idea that a library reviews and chooses to include all of the traditional materials in its collection, such as books and periodicals, while Websites are (often) not individually reviewed before being made available. The plurality dismissed this argument as constitutionally irrelevant:

> 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.[226]

The plurality viewed the impossibility of reviewing Internet materials by libraries as a "failure" – allowing outside forces, Congress and filter manufacturers, to make the decisions about what are appropriate library materials. The discretion regarding appropriate traditional materials, such as books, is left in the hands of librarians.

Justice Souter agreed with the plurality that public libraries must make collection development decisions, but disagreed with the impact of these decisions on library use of the Internet. Justice Souter believed that the plurality's view to lump all collection decisions together, both those

---

226. *Id.* at 208.

regarding traditional materials and Internet materials, to be foolhardy. He stated that while

> 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.[227]

Cost and space are issues when considering purchasing traditional materials, but the Internet does not cause such scarcity problems for a library with Internet access.

Souter made an argument that in regards to

> 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.[228]

Souter believed that the

> proper analogy . . . 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.[229]

---

227. *Am. Library Ass'n*, 539 U.S. at 236 (Souter, J., dissenting).
228. *Id.* at 237.
229. *Id.*

J. COLLECTION DEVELOPMENT OF THE INTERNET

The plurality stated that it understood "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."[230] The plurality also stated that the materials blocked by the filters are appropriately covered within the context of the collection development decision of libraries. The concern with including filtering within the context of collection development by the plurality went far enough to state that any information that is blocked is irrelevant: "A library's decision to use filtering software is a collection decision, not a restraint on private speech."[231] The plurality stated that "[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."[232]

Justice Souter viewed blocking that affects adults as censorship, dismissing the plurality's description of "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."[233]

The plurality also believed that "true" collection development of the Internet by librarians cannot be accomplished, and the Court's own view of appropriate collection development of the Internet applied. The plurality stated that "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."[234] The plurality continued, commenting on library collection development of the Internet, "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."[235]

Therefore, "[g]iven that tradeoff, it is entirely reasonable for public libraries to reject that approach and instead exclude certain categories of

---

230. *Am. Library Ass'n*, 539 U.S. at 209 n.4.
231. *Id.*
232. *Id.* at 208.
233. *Id.* at 235 (Souter, J., dissenting).
234. *Id.*
235. *Id.*

content, without making individualized judgments that everything they do make available has requisite and appropriate quality."[236]

The ability of libraries to make a distinction between all of the Internet, certain selected sites, and categories of Internet-based information might be a valid collection development decision if indeed made by librarians, but, as demonstrated below, the collection development decision about the Internet is being made by Congress – not by librarians!

K. CONGRESS VERSUS LIBRARIES: WHO HAS THE CONTROL?

Another area of contention between the Justices concerns the decision-making power of Congress over library decisions, with the plurality Justices taking a strong federal stance in contrast to their usual states' rights stance. In contrast, one of the most important elements of Justice Stevens' opinion is his insistence that filtering decisions be made locally by library boards or, indeed, librarians themselves. Justice Stevens believed that Congressional imposition rather than local control is the major problem with CIPA.[237] Though this viewpoint was derided by the plurality, the idea of local control fits within the Supreme Court's own precedent.

Justice Stevens preferred local control, stating that "[r]ather than allowing local decision makers 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."[238]

In contrast, the plurality viewed the control issue purely as a funding case under Congress' spending power: the case is asking merely "whether the condition that Congress requires 'would . . . be unconstitutional' if performed by the library itself."[239]

Justice Stevens' insistence on local control followed scholarly comments cited in his opinion. He included a long quote from a law review article, Gregory K. Laughlin's *Sex, Lies, and Library Cards: The First Amendment Implications of the Use of Software Filters to Control Access to Internet Pornography in Public Libraries*, stating that the focal point of decisions about whether library computers should be filtered to protect children should be left to local government bodies, rather than

---

236. *Am. Library Ass'n*, 539 U.S. at 208.
237. *Am. Library Ass'n*, 539 U.S. at
238. *Id.* at 220 (Stevens, J., dissenting).
239. *Id.* at 235.

states or the federal government.[240] The quote states that the issue of filtering varies regionally in the United States, with libraries "in rural communities, for instance, have reported much less of a problem than libraries in urban areas. A library in a rural community with only one or two computers with Internet access may find that even the limited filtering advocated here provides little or no additional benefit."[241] Instead, libraries should be left to discover solutions to the problem of protecting children and the First Amendment on their own, but with government support;

> [b]y allowing the nation's public libraries to develop their own approaches, they may be able to develop a better understanding of what methods work well and what methods add little or nothing, or are even counter-productive. Imposing a mandatory nationwide solution may well impede developing truly effective approaches that do not violate the First Amendment. The federal and state governments can best assist this effort by providing libraries with sufficient funding to experiment with a variety of constitutionally permissible approaches.[242]

Justice Stevens was focused on the idea of local control, with local librarians and library boards making the decision to or not to filter, as had been done before the ruling in *American Library Ass'n*.243

In sharp contrast to Justice Stevens, the plurality dismissed the idea of local control over the decision whether to install filters on library computers. Instead, the plurality continued its argument that the CIPA focused on Congress' use of its spending power by specifying conditions on the receipt of federal funds, instead of considering local alternatives to the stated problem. First, the plurality stated its view of the legislation: "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."[244] Because Congress was releasing funds, it could place limits on these funds. The plurality then stated that "especially because public libraries have traditionally excluded pornographic material from their other collections, Congress could reasonably impose a parallel limitation on its Internet

---

240. *Id.* at 224 n.3 (Stevens, J., dissenting) (citing Laughlin *supra* note 160, at 279).
241. *Id.*
242. *Id.* at 224.
243. *See Am. Library Ass'n*, 539 U.S. 194 (2003).
244. *Id.* at 211.

assistance programs."[245] While giving the plurality credit for sticking to its viewpoint that this case revolves around a funding issue rather than a First Amendment issue, the plurality once again focused on the exclusion of "pornography," which is not defined or banned by the statute.

L. CAN LIBRARIANS TURN OFF THE FILTERS?

A very interesting issue is dealt with quite quickly in the plurality decision – whether libraries can indeed turn off the filters for patrons. The plurality never discussed directly whether it would be unconstitutional for there to be no option to turn off the filters.[246] Instead, "assuming that such erroneous blocking presents constitutional difficulties," the plurality focused on the statements of the Solicitor General:

> 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." . . . 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."[247]

However, the plurality did make one mention of the statute itself, "[w]ith 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.'"[248] Justices Breyer and Kennedy agreed with the plurality that an adult library patron would easily be able to use an unblocked library computer.[249]

While most of the Justices believed that the Solicitor General's statement was not sufficient, Justice Souter and Justice Ginsberg disagreed. Justice Souter stated:

---

245. *Id.* at 212.
246. *Id.* at 209.
247. *Id.*
248. *Id.* at 209. *See* 20 U.S.C. § 9134(f)(3) (2003); 47 U.S.C. § 254(h)(6)(D) (2002).
249. *Am. Library Ass'n*, 539 U.S. at 214 (Kennedy, J., concurring), *id.* at 216 (Breyer, J., concurring).

> 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. [250]

Instead, Justice Souter's interpretation of the statute was that "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."[251] Because unblocking is only for

> "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.[252]

Therefore, while the rest of the court views the means of turning off filters as easy, a mere inconvenience, Justices Souter and Ginsberg view the discretion to turn of the filters based on uncertain standards and an unquestioning trust of the Solicitor General.

While some commentators believe that the plurality's comments imply that a library must turn off filters upon request,[253] the statute itself uses the term "may,"[254] and the Solicitor General's statements will likely

---

250. *Id.* at 232 (Souter, J., dissenting) (internal citations omitted).

251. *Id.* at 233.

252. *Id.*

253. *See* Mary Minow, *Lawfully Surfing the Net: Disabling Public Library Internet Filters to Avoid More Lawsuits in the United States*, 9 FIRST MONDAY 4 (April 2004), *at* http://firstmonday.org/issues/issue9_4/minow/index.html.

254. *See* 20 U.S.C. § 9134(f)(3) (2003); 47 U.S.C. § 254(h)(6)(D) (2002).

not prevent the extremes of some libraries never turning off the filters for any reason and some libraries making disabling filters extremely easy. State laws similar to CIPA, as discussed in the conclusion, are adding an additional level of complexity for libraries.

M. CONTENT-BASED BLOCKING AND REMOVAL VERSUS ACQUISITION

The idea of a separate analysis for acquisition and removal, as created in *Pico*, did not appear in the plurality opinion, but did make an appearance in Justice Souter's dissent. Justice Souter continued the duality between acquisition and removal in his dissent. He started out his analysis of content-based limitations with a bang:

> 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.[255]

The reason for the difference, according to Justice Souter, is once a library has acquired the material, the possible reasons for not including the item originally are removed. Removing "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."[256] According to Justice Souter, because "removal (and blocking) decisions [are] 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."[257] In conclusion, Justice Souter cited to the "good sense" of the plurality in *Pico* that removing items from libraries due to outside pressure violates the First Amendment.[258]

---

255. *Am. Library Ass'n*, 539 U.S. at 241 (Souter, J., dissenting).
256. *Am. Library Ass'n*, 539 U.S. at 242.
257. *Id.*
258. *Id.* at 242.

N. ALTERNATIVE MEANS: THE EFFECTS ON LIBRARIES

One of the most interesting aspects of the opinion occurs when the Justices face off on "alternative means" of preventing library patrons from viewing "pornography" on library computers.

In discussing the alternatives to filtering, the plurality stated that "[c]lose 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."[259] According to the plurality, librarians are professionals – ready, willing, and successful at helping patrons. However, the plurality acknowledged that this helpfulness should not move into intrusiveness by limiting the reading and viewing choices of patrons.

The plurality continued with a somewhat different view of the employer of librarians, the libraries themselves. The plurality stated that

> [m]oving 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.[260]

The alternatives to filtering will lead to more use of library computers for viewing pornography, which the apparently monolithic library the plurality is considering thinks to be so important that filtering is the only appropriate means.

Strangely, the plurality's view of librarians and libraries and their relation to patrons as a whole as stated above is contradictory. The plurality views librarians as kind people who want to help patrons regardless of their interests, and while libraries want to prevent the spread of pornography, the means used by libraries are only helping the spread of illegal materials. So librarians, according to the plurality, should continue to be fully approachable by patrons, but librarians should not stop patrons from viewing "pornography" or try to prevent its viewing by second-hand patrons – after all, that should be left to computer programs, not people!

---

259. *Id.* at 207 n.3.
260. *Id.*

Justice Stevens focused a great deal of the discussion on alternative means that still 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. Most of these solutions were local, with a large percentage directly involving library policy. One alternative allowed "public libraries [to] enforce Internet use policies that make clear to patrons that the library's Internet terminals may not be used to access illegal speech," with enforcement including penalties, such as informing police.[261] Other alternatives included limits on minors, such as parental consent, parental monitoring, or library staff monitoring. A final alternative was changing the physical structure of Internet use computers by "optional filtering, privacy screens, recessed monitors, and placement of unfiltered Internet terminals outside of sight-lines."[262]

Justice Stevens used examples of types of filtering options by libraries, ranging from no filtering to all filtering of the Internet to show problems with the imposition of filtering on all computers. While accepting that filters may indeed have value, Justice Stevens acknowledged the discretionary authority of libraries and librarians. He stated that

> [i]f 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.[263]

Unlike the examples stated above, "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."[264] This lack of discretion for local libraries to make their own decisions regarding filtering, and thereby what their collections will contain, is an important aspect of Justice Stevens' conclusion that CIPA was unconstitutional.

---

261. *Am. Library Ass'n*, 539 U.S. at 223 (Stevens, J., dissenting).
262. *Id.*
263. *Id.* at 230-31 (Stevens, J., dissenting).
264. *Id.* at 231 (emphasis in original).

Justice Souter viewed the restrictions on adult Internet access as inapplicable to the protection of children. He considered other means libraries have or could use to protect children, without limiting adult access: "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."[265]

Congress could "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."[266]

Libraries had been taking a variety of approaches to the use of the Internet by their patrons, including no filtering at all, filtering children's use computers, limiting children only to use the Internet with a parent, and filtering all public access computers. As Justice Stevens stated, if a library receives federal funding, they must filter, removing the ability of that library to decide how to serve its patron population.

Both Justices Stevens and Souter were concerned about the impact of filtering on library staff. Justice Stevens also made clear the limitations that CIPA puts not only on Internet use by the public, but also on the use of the Internet by library staff, including librarians. Congress "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."[267] Instead, it "requires libraries to install filtering software on *every* computer with Internet access if the library receives *any*" subsidy.[268] Justice Souter viewed CIPA as Congress' way of not only imposing conditions, but also mistrusting or not trusting librarians to make important decisions for their own libraries, patrons, and staff. He argued that "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."[269] The government is also restricting librarians, which is perhaps part of the purpose of the legislation, but still strange. According to the overall finding of the Court, librarians who work for the government, by working for public libraries and schools, are limited in the information they can

265. *Am. Library Ass'n,* 539 U.S. at 234 (Souter, J., dissenting).
266. *Id.*
267. *Id.* at 230.
268. *Id.*
269. *Id.* at 234 (Souter, J., dissenting).

access because another branch of government, not in their own state, but the federal government, wants to and can limit them.[270]

O. WHAT FORUM IS THIS? INTERNET IN LIBRARIES

In discussing public forum doctrine, the plurality discussed the application of this doctrine separately to public libraries as a whole and to the use of the Internet in the library. In addressing whether libraries as a whole are subject to public forum doctrine, the plurality focused on issues of funding, stating that "the government has broad discretion to make content-based judgments in deciding what private speech to make available to the public."[271]

The plurality used two analogous cases involving government providing private speech to the public, one case involving private editorial content on broadcast public television[272] and the other about the selection of art for funding based on content-based criteria.[273] However, these cases both involved media with different discretionary standards than libraries; that of journalism and art. In a limited space, a selector, often an editor or selection board necessarily chooses the best or most appropriate journalism or art. This stands in sharp contrast to the virtually unlimited Internet.[274]

The plurality stated that in these situations, public forum principles do not apply. In *Forbes*, the Court held that "a public television station's editorial judgments regarding the private speech it presents to its viewers" do not fall under public forum analysis.[275] In *Finley*, the Court upheld an art funding program by the National Endowment for the Arts (NEA) requiring it to use content-based criteria in making funding decisions, stating that "the very assumption of the NEA is that grants will be awarded

---

270. *See Am. Library Ass'n*, 539 U.S. 194 (2003).

271. *Am. Library Ass'n*, 539 U.S. at 204. Interestingly, the plurality also uses the term "broad discretion" to describe the freedom of choice given to libraries: "To fulfill their traditional missions, public libraries must have broad discretion to decide what material to provide to their patrons" and "[p]ublic library staffs necessarily consider content in making collection decisions and enjoy broad discretion in making them." *Id.* at 204-05.

272. Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998).

273. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998).

274. This is not, of course to say that journalism or art placed on the Internet is not held to some standard. Traditional journalism has recently made a partial transition to the web, complete with journalistic standards, ethics, and editors.

275. *Am. Library Ass'n*, 539 U.S. at 204 (referring to Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 672-673 (1998)).

according to the 'artistic worth of competing applicants,' and absolute neutrality is simply inconceivable."[276]

In that case, as the plurality was concerned about in *American Library Ass'n*, the focus of the governmental body should be on supporting the cream of the crop: "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.'"[277] Therefore, the plurality stated that

> [t]he 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.[278]

The plurality seems to be concerned only with the items in a library, rather than the possibility of the whole of a library as a place; the potentiality of the whole of a library as a public forum. This focus on the collection development decisions of libraries, compared to spaces in libraries such as meeting rooms and bulletin boards, coupled with the focus on government funding limits the possibility that these statements are arguing directly that a public library is a non-public forum. Also, the analogous cases used by the plurality shows that it is primarily focused on library-provided Internet services, where non-governmental speech is occurring, within the context of a governmental body – the public library.

However, it can be argued that by stating that public forum analysis is incompatible with library tradition missions, the plurality has stated that libraries are not a public forum. Considering that the cases discussed by the Court on this issue and even the specific facts here revolve around funding, this argument, while strong, is still faulty because the analysis of public forum doctrine is limited to drawing a parallel to government

---

276. *Id.* at 205 (quoting Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 585 (1998)).

277. *Id.*

278. *Id.*

funding cases and the detailed public forum analysis is focused only on Internet use in a library.

The plurality emphatically stated its belief that Internet use in libraries is not a public forum. Based on its view that forum analysis is "incompatible with the broad discretion that public libraries must have to consider content in making collection decisions,"[279] the plurality stated that "Internet access in public libraries is neither a 'traditional' nor a 'designated' public forum."[280] The basis for this statement is that because the use of the Internet in libraries has not been used from "time immemorial" and because the historical background of libraries being used as a public forum is not present, it cannot be a traditional public forum.[281] The Court stated that "the doctrines surrounding traditional public forums may not be extended to situations where such history is lacking."[282] Therefore, while libraries have traditionally been places where alternative viewpoints have been discussed, both in text and through discussion, they do not count as traditional public fora.

In addition, the plurality concluded that because the government, here the library, had not opened up its property for use as a limited public forum for Internet-related speakers, a limited public forum does not exist either.[283] The plurality stated that Internet access in a public library is not a "designated public forum" because for a designated public forum to exist "the government must make an affirmative choice to open up its property for use as a public forum."[284] The plurality rejected the appellate court's analogy of public libraries' Internet terminals to the forum in *Rosenberger*,[285] stating that in that case, the issue was one of funding equally and that the fund at issue "had created a limited public forum by

279. *Id.* at 195.

280. *Id.*

281. *Am. Library Ass'n*, 539 U.S. at 205-06. The plurality stated that "[f]irst, 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'" and that "[w]e have 'rejected the view that traditional public forum status extends beyond its historic confines.'" *Id.*

282. *Id.* at 206.

283. *Id.* at 207. The plurality also stated that "even if appellees had proffered more persuasive evidence that public libraries intended to create a forum for speech by connecting to the Internet, we would hesitate to import 'the public forum doctrine . . . wholesale into' the context of the Internet." *Id.* at 207 n.3 (citing Breyer's opinion in Denver Area Ed. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 749 (1996)).

284. *Id.*

285. Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995).

giving public money to student groups who wished to publish and therefore could not discriminate on the basis of viewpoint."[286]

Instead, the plurality stated that "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."[287] The plurality stated that a public library "provides Internet access, not to 'encourage a diversity of views from private speakers' . . . but for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality."[288] The plurality concluded by stating that "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.'"[289]

The plurality did not consider that the forum may not be for those who speak, but instead, for those who read, watch, or listen. Considering that a library serves as a conduit between speakers, the producers of information, and readers, the receivers and interpreters of information, the plurality does not understand the library setting as a forum. According to Bernard Bell, "[p]ublic libraries, however, do not primarily exist to assist those who wish to express their ideas; rather, public libraries have been established to facilitate citizens' access to ideas."[290]

Strangely enough, the other opinions did not directly address the limited issue of whether Internet use in a public library is a public or limited public forum. The only exception is Justice Breyer, who made a passing statement that the public forum doctrine does not apply in this case.[291]

Perhaps the other Justices believed that their raising of other First Amendment issues was sufficient, but the absence is still strange because

---

286. *Am. Library Ass'n*, 539 U.S. at 207.

287. *Id.*

288. *Id.*

289. *Id.* (citing S. Rep. No. 106-141, p. 7 (1999)).

290. Bernard W. Bell, *Filth, Filtering, and the First Amendment: Ruminations on Public Libraries' Use of Internet Filtering Software*, 53 FED. COMM. L.J. 191, 205 (2001).

291. *Am. Library Ass'n*, 539 U.S. at 215 (Breyer, J., dissenting). It is unclear through this brief mention if he believes that public forum doctrine does not apply to libraries as a whole, or rather to Internet use in libraries. Considering Justice Breyer's concern with public receipt of information in his opinion, this distinction is likely to be important in future cases involving filtering of the Internet on non-federal fund supported computers.

forum issues are often central to First Amendment cases.[292] The lack of detailed forum analysis shows how strongly the Supreme Court, especially the plurality, was intent on viewing this case as a funding case, rather than as a case involving the limiting of speech. However, due to the combination of votes of the plurality and Justice Breyer's agreement with the plurality's analysis,[293] according to the plain text of the decision, the Court had decided that public libraries are not a public forum.

P. DO LIBRARIES HAVE FIRST AMENDMENT RIGHTS?

Another important, related First Amendment issue is whether libraries themselves have first amendment rights. The Justices tackled this issue from many different perspectives, with the dissents seemingly stating that libraries do indeed have First Amendment rights, and the majority stating that it really does not matter either way for this case.

Justice Stevens argued 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."[294] In response, the plurality stated that "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."[295] Justice Stevens "think[s] 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

---

292. According to Robert Corn-Revere, who was the lead attorney in the Mainstream Loudoun cases, the lack of focus on forum issues was due to the court's concern elsewhere. He states that

> [a] key factor in the plurality and concurring opinions was the Solicitor General's claim at oral argument that any adult patron could have the filters turned off without having to explain to the librarian 'why he was asking to have a site unblocked or the filtering . . . disabled.' In fact, this reading of the statute could be considered necessary to sustain CIPA's constitutionality because the prevailing opinions suggested that libraries failing to unblock sites upon request or disable filters could be subject to as-applied challenges under the Act.

Corn-Revere, *supra* note 173, at 129 (2003).

293. *Am. Library Ass'n*, 539 U.S. at 215-16. ("the plurality first finds the 'public forum' doctrine inapplicable, and then holds that the statutory provisions are constitutional. I agree with both determinations").

294. *Id.* at 226.

295. *Id.* at 212.

abridgment by means of a threatened penalty."[296] Instead, according to the plurality, this is only a funding issue, "[t]o the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance."[297]

Justice Souter, taking a different position from the other opinions, believed that not only is CIPA unconstitutional, but it "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."[298] Justice Souter viewed the important constitutional question in this case as "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."[299] His answer was no, because this would be censorship, a "library that chose to block an adult's Internet access to material harmful to children . . . would be imposing a content-based restriction on communication of material in the library's control that an adult could otherwise lawfully see."[300]

Q. OTHER IMPORTANT FIRST AMENDMENT ISSUES

Justice Stevens has an interesting perspective on the use of filters, combined with the under- and over-blocking of unwanted images. He stated that "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."[301] This statement leads to the unfortunate dual conclusion that Justice Stevens believed that libraries support all of the speech contained in their materials, whether on the Internet or in other forms, and that patrons will trust that messages of websites viewed in libraries, whether or not they are filtered, are supported by libraries.

The plurality also stated that, the libraries that argued that filtering would "distort the usual functioning of public libraries," were similar to attorneys that argue against the government.[302] The plurality concluded that "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

---

296. *Id.* at 226-27.
297. *Id.* at 212.
298. *Am. Library Ass'n*, 539 U.S at 231.
299. *Id.* at 234.
300. *Id.*
301. *Id.* at 229.
302. *Id.* at 213 (citing Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001)).

of donated funds or other assistance."[303] However, libraries do have a role that is in contrast to the overall governmental role: they include materials that disagree with the government's position on a variety of issues.

In addition, libraries and the government have different goals, which have come into sharp relief during the protests against the U.S.A. Patriot Act. The government argues that it wants to find terrorists and traitors wherever they may lurk, including in libraries; libraries argue that their goal is to promote the exchange of information, and to achieve this goal, the privacy of their patrons must be respected.[304] The plurality failed to see how similar lawyers and librarians employed by the government can be, when promoting the positions that can diverge from government held positions.

R. REFERENCES TO PREVIOUS SUPREME COURT CASES IN *AMERICAN LIBRARY ASSOCIATION*

One of the most interesting elements of this case is what is missing: any reference to the Supreme Court's earlier decisions focusing on the role of libraries. In *American Library Ass'n*, the Supreme Court did not spend much time citing its previous library cases—with no references at all within any of the Court's opinions to *Brown*.[305]

No references to *Pico* appear in the plurality opinion, and only two of the other opinions include a reference to *Pico*.[306] Justice Breyer's concurrence includes only a passing reference in a string citation to Chief Justice Rehnquist's description of public libraries as places "designed for freewheeling inquiry."[307] Only Justice Souter's dissenting opinion directly addressed *Pico*.[308] He stated that *Pico*'s plurality was correct in making a

---

303. *Id.*

304. The efforts of protecting free speech rights by librarians have been contrasted to that of journalists. "Contrast media response to such demands for secrecy with the outrage expressed by librarians over provisions in the Patriot Act. . . . Librarians participated in rallies, challenging Attorney General John Ashcroft when his road show promoting the Patriot Act came to some towns in the summer of 2003. They expect to collect one million signatures by the end of September [2004] to support amending the act. This from *librarians*." Trudy Lieberman, *Homeland Security: What We Don't Know Can Hurt Us*, COLUM. JOURNALISM REV., Sept./Oct. 2004 *available at* http://www.cjr.org/issues/2004/5/lieberman-homeland.asp (emphasis in original) (last visited Oct. 10, 2004).

305. *Am. Library Ass'n*, 539 U.S. at 215.

306. *Id.*

307. *Id* (Breyer, J., concurring).

308. *Id* (Souter, J., dissenting).

sharp constitutional distinction between the removal of items and the purchase of items to support his contention that filters are a form of censorship, similar to the removal of books from a library.[309]

The lack of building on the precedent of the Court can mean three very different things. First, the Supreme Court seems to be unwilling to view this case as a First Amendment case and does not address directly whether a library, its meeting rooms, or its Internet-use is a public forum. Therefore, issues concerning filtering on library computers that do not receive federal government funding will still be fought in court. Second, it could mean that the preceding cases are too old and too different to be important in this case. The opinions of all of the Justices cite to a wide variety of cases from different years, often with strikingly different factual situations and many without any reference to libraries or library practices. Third, these cases may be considered not to be relevant to the issue of filtering on library computers. But what could be more relevant to present views of library practices than past library practices?

S. CONCLUSION

The overall impact on libraries of the *American Library Ass'n* decision is unclear.[310] A few libraries decided to filter all computers.[311] Some libraries have decided not to install filters, either due to financial considerations or due to a strong desire to support the First Amendment.[312] The cost of installing filters has negatively affected some libraries, with the amount received from government subsidies not enough to make installing filters a sound financial decision.[313] These library decisions have the possibility of preventing many library patrons from being able to use the Internet, vastly limiting the scope of information available.[314] Other

---

309. *Id.*

310. For a range of different approaches to CIPA implementation, *see American Library Association, CIPA: Advice and Resources: From the Field*, available at http://www.ala.org/ala/washoff/WOissues/civilliberties/cipaweb/adviceresources/fromthefield.htm (last viewed Oct. 9, 2004).

311. Brandon Smith, *Phoenix may end up in court after banning Internet porn in libraries*, JURIST, Sept. 9, 2004, *available at* http://jurist.law.pitt.edu/paperchase/2004/09/phoenix-may-end-up-in-court-after.php.

312. George Eberhart, *Libraries Choose to Filter or Not to Filter As CIPA Deadline Arrives*, 35 AMERICAN LIBRARIES, Aug. 2004, at 17.

313. Susan DiMattia, *Maine To Replace CIPA Losses*, LIBRARY JOURNAL, June 1, 2004 at 22.

314. Justice Stevens analogized the filtering to "a significant part of every library's reading materials to be kept in unmarked, locked rooms or cabinets, which could be opened

libraries have decided not to receive the subsidy as a protest.[315] Most, if not all, of these libraries will continue to provide Internet access to their patrons.[316] It remains to be seen if there is an economic or locality differential between libraries that accept and do not accept the subsidy.

Also, the ALA did not protest the decision by releasing an angry press release or pushing for new legislation; instead, it pragmatically helped libraries decide whether to use filters and, if they decided to do so, helped them choose a filtering program.[317] It remains to be seen if the addition of filters will indeed prevent library patrons (and staff) from viewing pornography, or even obscene materials or material that is harmful to minors; perhaps it will. Nevertheless, it is much more likely to prevent library patrons and library staff from viewing acceptable—by any standard – material, much of which they will not even know has not been viewed.[318] Libraries can avoid this problem by wisely choosing filters that are minimal, alerting the user when sites are blocked, and disabling filters permanently on staff computers.[319]

Since the Supreme Court's *American Library Ass'n* decision, an additional level of complexity has been added by the action of several

---

only in response to specific requests. Some curious readers would in time obtain access to the hidden materials, but many would not." *Am. Library Ass'n*, 539 U.S. at 224 (Stevens, J., dissenting).

315. Eberhart, *supra* note 312, at 17.

316. *Load Filters, Turn Them Off*, 34 AMERICAN LIBRARIES, Nov. 2003, at 17.

317. AMERICAN LIBRARY ASSOCIATION, *Advice and Resources* (2004), *at* http://www.ala.org/ala/washoff/WOissues/civilliberties/cipaweb/adviceresources/advicereso urces.htm (last visited Oct. 2, 2004).

318. "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." *Am. Library Ass'n*, 539 U.S. at 222 (Stevens, J., dissenting). The lower court decision of *American Library Ass'n* was focused on the issue of overblocking. *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401, 406-10, 435-37 (E.D. Pa. 2002).
During oral arguments, Justice Ginsberg was concerned with "substantial overblocking." *See* Norman Oder, *Supreme Court Justices Appear Highly Divided in CIPA Case*, LIBRARY JOURNAL, Apr. 1, 2003, at 16; *Am. Library Ass'n*, 539 U.S. 194 (Transcript of Oral Argument), 2003 U.S. TRANS LEXIS 20, 46-47; Oyez: *U.S. Supreme Court Multimedia, Am. Library Ass'n Audio Resources, available at*
http://www.oyez.org/oyez/resource/case/1578/audioresources (last visited Oct. 9. 2004).

319. Mary Minow discusses the ways that libraries can select and use filters that fits both within the *American Library Ass'n* decision and allows for the greatest degree of First Amendment speech. *See* Mary Minow, *Lawfully Surfing the Net: Disabling Public Library Internet Filters to Avoid More Lawsuits in the United States*, 9 FIRST MONDAY 4 (Apr. 2004), *available at* http://firstmonday.org/issues/issue9_4/minow/index.html (last visited Oct. 12, 2004).

states to enact or consider legislation of "mini-CIPA"s.[320] The state legislation often goes further than simply following the Supreme Court's interpretation or copying the language of CIPA by adding additional conditions and terms for library Internet access.[321] Therefore, the issues of preemption will likely be decided by courts in the future.

The Supreme Court has left librarians in the difficult position as the arbiters of legality, leaving them to determine whether patrons' activities (or their own activities) are within the realm of a legal purpose,[322] allowing for the removal of filters.[323] Most of the state legislation building on the *American Library Ass'n* decision requires a demonstration of "bona fide research or other legal purpose" by a patron to have the filters disabled.[324] The Supreme Court avoided the issue of what is "bona fide research" by impliedly focusing on the "or other lawful purpose," requiring librarians to disable filters by adults on request.[325]

The Supreme Court has recognized the difficulty for libraries to determine "bona fide" research: to do so would be near impossible even with a legal description.[326] The plurality in *American Library Ass'n* was wary of direct oversight of librarian patrons' research, stating that the role of librarians should not be transformed "from a professional to whom patrons turn for assistance into a compliance officer whom many patrons might wish to avoid."[327] Librarians will need to walk a careful line

---

320. *See* AMERICAN LIBRARY ASSOCIATION, *State Legislation* (2004), *at* http://www.ala.org/ala/oif/ifissues/inthestates/statelegislation.htm (last visited Oct. 2, 2004); National Conference of State Legislatures, *Children and the Internet: Laws Relating to Filtering, Blocking and Usage Policies in Schools and Libraries*, at http://www.ncsl.org/programs/lis/CIP/filterlaws.htm (last updated Jan. 9, 2004). *See also* Raizel Liebler, *Beware of the Mini CIPAs*, 35 AMERICAN LIBRARIES, Aug. 2004, at 39.

321. *CIPA Fallout Filters Down to States*, AMERICAN LIBRARIES, Apr. 2004, at 12-13.

322. Or within a "bona fide research" purpose as some overly cautious commentators believe.

323. For an analysis of this issue, see Mary Minow, *Lawfully Surfing the Net: Disabling Public Library Internet Filters to Avoid More Lawsuits in the United States*, 9 FIRST MONDAY 4 (Apr. 2004), *at* http://firstmonday.org/issues/issue9_4/minow/index.html.

324. *See* AMERICAN LIBRARY ASS'N, *State Legislation* (2004), *at* http://www.ala.org/ala/oif/ifissues/inthestates/statelegislation.htm (last visited Oct. 2, 2004).

325. See *supra* Section L.

326. *See* People v Woodward, 116 Cal. App. 4th 821, 822 (2004) for a discussion of what "bona-fide" research likely means, based primarily on California law. The court states, "A reasonable jury would not have found defendant's involvement with, and long-term possession of, child pornography to be legitimate scientific or educational research." *Id.* at 822.

327. United States v. Am. Library Ass'n, 539 U.S. 194, 205-06 (2003). Leaving aside all of the other issues, Florida's bill (S.B. 1552, 2004 Leg., Reg. Sess. (Fla. 2004)) in

between the Scylla and Charybdis of intruding into the research questions of patrons and fully complying with the *American Library Ass'n* decision, the federal standards for CIPA compliance, and the new state laws.

An additional issue raised by the Court's opinion is whether libraries – and their materials – are truly not public forums. It is highly unfortunate that the Court declined to clarify this situation for the many libraries that will now have to navigate the fine line between protecting First Amendment rights and following the *American Library Ass'n* decision.

V. CONCLUSION

As discussed throughout this article, the Supreme Court has alternated between viewing libraries as purveyors of high culture and viewing them as dangerous places. At some times, as seen in the plurality opinion of *American Library Ass'n*, these two viewpoints can exist together. The plurality wanted libraries to promote only the best materials, thereby limiting the ability of all people within the library to use the Internet.[328] Much has changed since the time of *Brown* when confrontations with patrons concerned silent protest, to the present confrontations with patrons who wish to be barefoot in the library. However, the issues surrounding the role of libraries remain similar, focused around both forum analysis and

---

particular has a most disturbing aspect. It allows patrons to sue libraries for allowing through unwanted materials through the filters: "a resident may bring a civil cause of action . . . to seek injunctive relief to enforce compliance." Therefore, unlike CIPA, where the federal government determines if there has been compliance, under this bill any person could sue a library for nonconformity. For example, if patrons are bothered by ancient Greek art with nudes on a filtered computer, they might sue, even if the same images in a book in the library's collection would not allow them to sue the library. This double standard is appalling, especially in light of the fact that libraries have less control over the materials filtered than those selected for the shelf. Those shocked by any image that happens to slip by the filters will fill courts with lawsuits, suing libraries despite their good faith efforts. While these suits will likely just be thrown out of court, they will waste the time and money of libraries.

After all, CIPA only requires that the filters "protect against access" to unwanted materials; it does not require prevention. The implication of a prevention requirement would be that librarians would need to act as both exemplary computer programmers and attorneys, determining which websites would and would not violate this law. As the Supreme Court stated in *American Library Ass'n*, librarians cannot evaluate each and every website available "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." Even using the best filters on the market, it is likely that some unwanted materials will slip through the sieve. Librarians are professionals who make decisions and should not be held to an impossible standard.

328. *Am. Library Ass'n*, 539 U.S. at 204.

professional standards: what can people do in a library and what items should a library collect?

There is also an unstated question throughout most of the Supreme Court decisions. Who gets to decide? Courts decide because they are handed the question, but the issue of who should decide about library policies is skirted in most of the opinions. Justice Souter in *American Library Ass'n* answered this question by stating that the ALA's policies speak for the profession.[329] But there is still a more important and more individual answer: librarians themselves. Librarians are members of a profession who make professional judgments, such as determining what items belong in a library's collection.

Libraries frequently do collect high culture and they also are dangerous places, often because they include information about controversial ideas. In *Revolting Librarians Redux*, a collection of essays by self-professed radical librarians, librarians write about the importance of providing information to their patrons, even if that information is controversial.[330] This idea of promoting intellectual freedom has become a central principle to librarianship.[331] Libraries continue to provide their patrons with a wide scope of materials, some within the paradigm of "only the best" and other materials within the "give them what they want" mold. For example, in the University of Illinois Champaign-Urbana library system (the largest public university library collection and one of the most renowned library collections in the world), the collection not only includes the traditional, important scholarly works, but also a sizable collection of popular works, including bodice-ripper romance novels and science-fiction fantasy pulp novels.[332]

While the Justices in *American Library Ass'n* addressed the issue of the type of forum libraries are, lower courts have answered the question differently by saying libraries are limited public forums.[333] While at one time public parks, a traditional public forum, were a source of information, people now turn to libraries. While not all libraries are government-

---

329. United States v. Am. Library Ass'n, 539 U.S. 194, 239-41 (2003).

330. REVOLTING LIBRARIANS REDUX: RADICAL LIBRARIANS SPEAK OUT (Katia Roberto & Jessamyn West eds., 2003).

331. LOUISE S. ROBBINS, CENSORSHIP AND THE AMERICAN LIBRARY: THE AMERICAN LIBRARY ASSOCIATION'S RESPONSE TO THREATS TO INTELLECTUAL FREEDOM, 1939-1969, at 151-63 (1996).

332. For example, the library has several Jackie Collins novels and BRIAN DALEY, HAN SOLO AT STARS' END (1979), described in the library catalog as "Neither Han nor Chewbacca could foresee the incredible twists of fate that would pit them against ruthless enemies and drive them to a place of rocky desolation."

333. See *supra* Section I for discussion.

controlled, they serve a similar purpose for their patrons. Also, considering the Supreme Court's continued focus on "time immemorial" for inclusion in those places that are "traditional public" fora, it is highly surprising that public libraries are not included, or discussed.[334] "From time immemorial," as with many constitutional principles, seems to evolve from ancient Greek and Roman civilization.

Unfortunately for the plurality opinion's dismissal of public forum ideals in libraries in *American Library Ass'n*, there were ancient Greek and Roman "public" libraries.[335] For example, the first public library was founded in Rome in approximately 39 B.C.E.[336] According to Claire Elizabeth Craig, "At the peak of the Roman Empire, there were no fewer than twenty-eight public libraries in its capital city alone. These libraries were publicly owned and available to anyone who could read, including members of the upper classes as well as the slave population."[337]

Libraries have also traditionally played an important role in American society. According to Gregory K. Laughlin, "Libraries in the United States are nearly as old as the colonization of North America."[338] One of the founding fathers, Benjamin Franklin, in 1731 organized the Library Company, a predecessor to a public library.[339] The first truly public library

---

334. *Am. Library Ass'n*, 539 U.S. 203-06.

335. ASS'N FOR COMPUTER AIDED DESIGN IN ARCHITECTURE (ACADIA), *Library Time Line*, *at* http://www.acadia.org/competition-98/sites/integrus.com/html/library/time.html (last modified Oct. 2, 2004); Barbara Krasner-Khait, *Survivor: The History of the Library*, HISTORY MAGAZINE, Oct./Nov. 2001, *available at* http://www.history-magazine.com/libraries.html. *See also* MATTHEW BATTLES, LIBRARY: AN UNQUIET HISTORY (2003); LIONEL CASSON, LIBRARIES IN THE ANCIENT WORLD (2001); DON HEINRICH TOLZMANN ET AL., THE MEMORY OF MANKIND: THE STORY OF LIBRARIES SINCE THE DAWN OF HISTORY (2001).

336. Claire Elizabeth Craig, *"Lending" Institutions: The Impact of the E-Book on the American Library System*, 2003 U. ILL. L. REV. 1087, 1090 nn. 21-22 (2003) (referring to ELMER D. JOHNSON, COMMUNICATION: AN INTRODUCTION TO THE HISTORY OF WRITING, PRINTING, BOOKS AND LIBRARIES 35 (4th ed. 1973)).

337. *Id.*

338. Laughlin, *supra* note 160, at 219.

339. EVELYN GELLER, FORBIDDEN BOOKS IN AMERICAN PUBLIC LIBRARIES, 1876-1939: A STUDY IN CULTURAL CHANGE 4 (1984). *See also* BENJAMIN FRANKLIN, THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN (1793), *available at* http://earlyamerica.com/lives/franklin/chapt7/ (Franklin's own description of creating the library and its impact).

was founded in Boston in 1854.[340] Subsequently, public libraries became an important part of the American experience.[341]

Libraries have become the epicenter of a physical space for public discourse, both through the items in the library and through library meeting rooms, and when Internet access is added to libraries, they serve an even more important role for the free exchange of ideas.[342] Libraries have become the place within American society where people can consider the wide array of information available.[343] The Third Circuit Court of Appeals has held that the public library is a limited public forum designated for the "communication of the written word."[344] It seems antithetical to the role of libraries in our society that the Supreme Court in *American Library Ass'n* seems to exclude libraries from being considered government-owned places of public discourse.[345]

The importance of the library for public discourse should not be minimized. Bernard W. Bell "analogizes the role of libraries for listeners to the role of streets and parks for speakers. Libraries are archetypal traditional government-funded loci for acquiring knowledge, just as streets and parks are archetypal government-funded loci for speaking."[346] He states that if "a patron merely desires access to obtain information, the sounder conclusion would be that the public library is at least a limited public forum (and perhaps even a traditional public forum for receiving information)."[347] Under this analysis, the fact that patrons use a library to

---

340. Laughlin, *supra* note 160, at 220 n.43 (citing C. SEYMOUR THOMPSON, EVOLUTION OF THE AMERICAN PUBLIC LIBRARY 1653-1876, at 186 (1952)).

341. Laura N. Gasaway, *Values Conflict in the Digital Environment: Librarians Versus Copyright Holders*, 24 COLUM.-VLA J.L. & ARTS 115, 126-29 (2000).

342. "Public libraries have traditionally functioned in the United States as important educational institutions and vehicles of distributive justice." William W. Fisher III, *Property and Contract on the Internet*, 73 CHI.-KENT. L. REV. 1203, 1251 (1998);

> The historic role of the public library is to provide the citizens of our country access to the information that they need to successfully participate in our society, to make our democracy work, and to be able to pursue inquiries and interests in diverse subjects without fear of reprisal or loss of privacy.

Nadine Strossen, *Should Cyberspace Be A Free Speech Zone?: Filters, "Family Friendless," And The First Amendment*, 15 N.Y.L. SCH. J. HUM. RTS. 1, 21 (1998).

343. *Id.*

344. Kreimer v. Bureau of Police of Morristown, 958 F.2d 1242, 1259 (3d Cir. 1992).

345. *See* Mart, *supra* note 158, at 175 (2003) (for more about the First Amendment right to information).

346. *Id.* at 183 (referring to Bell, *supra* note 285, at 220 (2001)).

347. Bell, *supra* note 285, at, 207.

acquire information should be appreciated, especially if that library is government funded.

Instead, the Supreme Court uses government funding as a chokehold to limit speech. As Bernard Bell states:

> Given the public library's role as facilitator rather than channel for government speech, the government should not have the plenary control over the material it makes available to patrons of a public library in the same way that it may control fora in which the government seeks to communicate its own message.[348]

If the Supreme Court has indeed stated that the library is not ever a public forum, then the Court's decision in *Brown* is in question, for if libraries are not "the quintessential locus of the receipt of information,"[349] then they are not the appropriate place for silent protest, either. If libraries are not the appropriate place for everyone to freely receive information, then there is no remaining American mainstay of the rights of free inquiry.[350]

---

348. *Id.* at 220.

349. *Kreimer*, 958 F.2d at 1255.

350. *See* JOHN E. BUSCHMAN, DISMANTLING THE PUBLIC SPHERE: SITUATING AND SUSTAINING LIBRARIANSHIP IN THE AGE OF THE NEW PUBLIC PHILOSOPHY (2003) (discusses the societal role of libraries within the context of Jurgen Habermas' idea of the public sphere).