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# First Amendment Limits on Libraries' Discretion to Manage Their Collections

Anne Klinefelter

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## First Amendment Limits on Library Collection Management\*

Anne Klinefelter\*\*

*First Amendment freedoms impose some limits on publicly funded libraries' discretion to manage their collections, but identifying those limits is difficult. The First Amendment law of libraries is murky territory, defined by three Supreme Court decisions that failed to produce majority opinions and lower court opinions that have employed a variety of doctrinal approaches. Libraries nonetheless must make sense of these cases to create and implement collection development and Internet access policies and procedures. This article surveys and analyzes the First Amendment law of library collections and finds that libraries' discretion is broad, but certain limitations apply. These can serve as a reminder to librarians of their ethical commitment to challenge censorship and provide access to all points of view.*

Introduction .....	344
The First Amendment and Library Collection Management—	
A Surprising Mismatch.....	345
Features of First Amendment Law Relating to Libraries .....	346
Conflict Between Collection Selectivity and Neutral	
Treatment of Speech .....	346
Other First Amendment Rights in Library Cases.....	348
Different First Amendment Law for Different Types of Libraries .....	349
The Right to Receive Information .....	350
Evidence and Judicial Workload Concerns Limit Judicial Review	
to Removal of Books.....	351
Proposals for Constitutional Protection of Libraries' Discretion .....	352
The U.S. Supreme Court Has Given Increasing Latitude to Libraries.....	354
Three Cases Demonstrate Variation in Facts and Analysis .....	354
Brown v. Louisiana.....	354

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\*\* Associate Professor of Law and Director of the Law Library, University of North Carolina at Chapel Hill School of Law, Chapel Hill, North Carolina.

Board of Education v. Pico . . . . .	357
United States v. American Library Ass'n . . . . .	360
The Lower Courts Fill in the Gaps . . . . .	363
Libraries as Limited Public Forums for the Right to Receive Information . . . . .	363
Nonpublic Forums and Procedural Due Process . . . . .	366
Status of First Amendment Protection for Libraries' Collection Decisions . . . . .	368
Nonpublic Forums Given Broad Discretion . . . . .	368
Unreasonable Content-Based Distinctions Prohibited . . . . .	369
Viewpoint Distinctions Versus Content Distinctions . . . . .	369
Viewpoint Distinctions Versus Invidious Viewpoint Discrimination . . . . .	370
Procedural Due Process for Internet Acceptable-Use Policies . . . . .	372
First Amendment Rights of Libraries . . . . .	372
Conclusion . . . . .	373

## Introduction

¶1 May a state law library adopt a policy to collect books written by Democrats but not Republicans? May a county law library decline to add to its collection donations of books arguing against voting rights for women? May a law school library refuse to disable Internet filters that block sites on breast cancer? May a law school library remove books because students complain that the books are racist?

¶2 The short answers are: almost certainly not, probably, maybe not, and probably not. The general answer is that law libraries, including publicly funded law libraries, have broad discretion to manage their collections, including controlling Internet access. If decisions are reasonable in light of the library's mission and not an attempt to prevent access to an idea, libraries should be safely within the boundaries of the First Amendment.

¶3 Truth be told, law librarians do not much discuss the implications of the First Amendment in law libraries. One reason for this omission is that few conflicts in law libraries lead to litigation. Librarians in private law libraries are not subject to First Amendment restrictions, and publicly funded law libraries rarely confront patron challenges or legislative restraints beyond requirements that collections be related to the law. Another reason that law librarians do not much discuss library First Amendment cases could be because these cases form a messy, largely incoherent body of law, including three Supreme Court decisions that failed to produce majority opinions. This case law is confusing and difficult for librarians to use as guidance in collection management.

¶4 But those of us in publicly funded law libraries could take some tips from our colleagues in public and school libraries, where First Amendment challenges are more common. Law libraries may have similar problems managing access to illegal and controversial materials on the Internet. Academic law libraries in particular could be targets for conservative or liberal groups who might demand addition or removal of materials from library collections.<sup>1</sup> And all law libraries are

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1. The organization called Students for Academic Freedom has promoted a greater representation of conservative viewpoints in higher education and might target campus libraries. *See*

subject to potential questions from a supervising authority about the inclusion or exclusion of particular viewpoints in the library's collection. Law librarians should understand the application of the First Amendment to help them make collection decisions and respond appropriately to the recommendations of library users and institutional supervisors.

¶5 This article explains why library cases are so difficult for courts and identifies the fuzzy boundaries of libraries' discretion in collection management that emerge from library cases. First Amendment boundaries of libraries' discretion are fairly remote and unlikely to interfere with most law libraries' collection decisions. But they probably prevent all publicly funded libraries from removing and perhaps excluding materials as an attempt solely to suppress access to the view expressed. And these First Amendment restrictions suggest that publicly funded law libraries should follow adequate procedures before enforcing policies that could interfere with library patrons' access to library resources.

¶6 A number of legal scholars and libraries themselves have argued that a solution to the messy and confusing First Amendment law of libraries is to give libraries absolute or nearly absolute discretion to manage their collections.<sup>2</sup> Law librarians Barbara Bintliff and Dick Danner have suggested that academic librarians' collection management could be protected from both institutional and external influence through academic freedom principles.<sup>3</sup> This article adds to the discussion by surveying Supreme Court and relevant lower court opinions to identify the existing boundaries of libraries' discretion under the First Amendment. This examination of library First Amendment cases has four goals: (1) to explain why library First Amendment law is complex and confusing; (2) to provide a current survey of Supreme Court and lower court cases; (3) to show that the First Amendment limits library collection development in situations that are, fortunately, unusual for law libraries; and finally, (4) to suggest how law libraries can protect themselves from potential challenges and use their broad discretion in support of institutional, ethical, and First Amendment goals.

### **The First Amendment and Library Collection Management—A Surprising Mismatch**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the

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Students for Academic Freedom, Academic Bill of Rights, <http://www.studentsforacademicfreedom.org/documents/1925/abor.html> (last visited May 3, 2010). The American Library Association passed a resolution denouncing this organization's efforts as counter to academic freedom. Am. Library Ass'n, Resolution in Support of Academic Freedom (adopted Jan. 25, 2006), <http://www.ala.org/ala/aboutala/offices/oif/statementspols/ifresolutions/academicfreedom.cfm>. Liberal trends to restrict hate speech have secured campus policies for public discourse at a number of universities that could target university and academic law libraries. Robert V. Labaree, *The Regulation of Hate Speech on College Campuses and the Library Bill of Rights*, 19 J. ACAD. LIBRARIANSHIP 372 (1994).

2. See *infra* ¶¶ 20–22.

3. Barbara Bintliff & Richard A. Danner, *Academic Freedom Issues for Academic Librarians*, LEGAL REFERENCE SERVICES Q., 2006, No. 4, at 13, 20. For more on the academic freedom aspect of the First Amendment question, see *infra* ¶ 22.

right of the people peaceably to assemble, and to petition the government for a redress of grievances.<sup>4</sup>

### Features of First Amendment Law Relating to Libraries

¶7 Library First Amendment law is a function both of constitutional doctrine and of the practice of library management. The following summaries of the special characteristics of the law and of library collection management show how the intersection between the two has aspects of a collision of interests rather than an artful intertwining of similar missions. These sections explain why the First Amendment law of libraries is so messy and provide context for the case analysis that follows.

#### *Conflict Between Collection Selectivity and Neutral Treatment of Speech*

¶8 Law librarians in publicly funded libraries may think of their collection management and other services as supporting First Amendment freedoms of speech and the press because these libraries increase access to information, largely without direct cost to the library user. Indeed, library associations promote ethical principles that encourage broad access to a diversity of ideas. The American Association of Law Libraries (AALL) endorses the Library Bill of Rights of the American Library Association, which asserts that libraries should “challenge censorship” and present “all points of view” in library collections.<sup>5</sup> This policy states that “library resources should be provided for the interest, information, and enlightenment of all people of the community . . . .”<sup>6</sup> The AALL Ethical Principles lead with the declaration that law libraries make it possible for individuals to participate fully in the democratic process.<sup>7</sup> These statements show that librarians, including law librarians, have as their professional goals many of the commonly attributed goals of the First Amendment—truth that emerges from the “market-place of ideas,”<sup>8</sup> individual expression and development,<sup>9</sup> and democracy.<sup>10</sup>

¶9 But libraries’ selectivity in collection management runs afoul of the standard tests for compliance with the First Amendment. Courts generally require government actors to treat speech in neutral ways to avoid abridging freedom of speech and of the press. One way courts measure First Amendment neutrality is through

4. U.S. CONST. amend. I.

5. AM. LIBRARY ASS’N COUNCIL, LIBRARY BILL OF RIGHTS (1996), available at <http://www.ala.org/ala/aboutala/offices/oif/statementspols/statementsif/librarybillofrights.pdf>; Am. Ass’n of Law Libraries, Government Relations Policy § V (Apr. 2008), available at [http://www.aallnet.org/about/policy\\_government.asp](http://www.aallnet.org/about/policy_government.asp).

6. AM. LIBRARY ASS’N COUNCIL, *supra* note 5.

7. See Am. Ass’n of Law Libraries, Ethical Principles (Apr. 5, 1999), available at [http://www.aallnet.org/about/policy\\_ethics.asp](http://www.aallnet.org/about/policy_ethics.asp).

8. William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 1 (1995). See also *Citizens United v. FCC*, 130 S. Ct. 876, 884 (2010); JOHN STUART MILL, ON LIBERTY 15–52 (Elizabeth Rapaport ed., Hackett Pub. Co. 1978) (1859).

9. See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

10. See, e.g., *Citizens United*, 130 S. Ct. at 898; Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 263.

skeptical review of government decisions that make distinctions based on the content of private speech.<sup>11</sup> But publicly funded libraries regularly select material for their collections based on the content of those materials. For example, a county law library in California might buy a guide to the law of oceanfront development, while a county law library in Iowa might not.

¶10 Courts are even more skeptical when government makes decisions based on the viewpoint expressed in private speech.<sup>12</sup> Public libraries arguably make these types of distinctions as well when they select materials based on quality and on the likely level of interest to the communities they serve. For example, a state supreme court law library might not add donations of books arguing against voting rights for women if the library found the views expressed were not related to the library's mission to manage limited resources through access to current primary law and practice guides.

¶11 As a philosophical matter, publicly funded libraries' selective support for speech and the press actually distorts the marketplace of ideas, providing greater access for some ideas over others. Selective support for information might also fail to support some individuals' reading interests and frustrate the First Amendment goal of individual expression and development. Further, if libraries' selection choices are seen as representing the government's view of what is the best information, libraries compromise two other goals commonly attributed to the First Amendment—citizen oversight of government<sup>13</sup> and the prevention of government's ability to make speech distinctions.<sup>14</sup> One might well argue that selectivity in law library collections, particularly if it applied to providing access to the law, would frustrate the First Amendment goal of democracy.

¶12 Selectivity in library collections, though, is unavoidable given the scarcity of resources for collections, staffing, facilities, and technology. Some would say that selectivity is not only a function of necessity due to scarce resources but also a function of design. Law libraries especially have a purpose or mission that requires them to make selections based on the content of materials. A number of public library librarians, however, promote a shift from the public community library's traditional purpose as moral and intellectual arbiter to a more neutral information manager.<sup>15</sup> These advocates sometimes seek court support for their efforts to provide access to controversial materials through enforcement of the First Amendment.<sup>16</sup>

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11. See, e.g., *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972) (applying strict scrutiny to content-based regulations).

12. See, e.g., *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806, 812–13 (1985) (remanding for determination of whether suppression of viewpoint was motivation for regulations).

13. See, e.g., *Rosenberger*, 515 U.S. at 835; Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 A.B.A. FOUND. RES. J. 521.

14. See Ruth Walden, *A Government Action Approach to First Amendment Analysis*, 69 JOURNALISM Q. 65 (1992).

15. See, e.g., JAMES LARUE, *THE NEW INQUISITION: UNDERSTANDING AND MANAGING INTELLECTUAL FREEDOM CHALLENGES* (2007); OFFICE FOR INTELLECTUAL FREEDOM OF THE AM. LIBRARY ASS'N, *INTELLECTUAL FREEDOM MANUAL* (7th ed. 2006); LOUISE S. ROBBINS, *CENSORSHIP AND THE AMERICAN LIBRARY: THE AMERICAN LIBRARY ASSOCIATION'S RESPONSE TO THREATS TO INTELLECTUAL FREEDOM, 1939–1969* (1996).

16. See *United States v. Am. Library Ass'n (ALA II)*, 539 U.S. 194 (2003) (plurality opinion); John

As advances in information technology have diminished the impact of scarcity of library resources, some argue that courts should apply stricter standards for public libraries' First Amendment compliance.<sup>17</sup> But, whether based on scarcity alone or on both scarcity and design, selectivity continues to be a defining characteristic of all publicly funded libraries, including law libraries. Given this selectivity, and given the general societal consensus that libraries are an overall benefit, courts are wary of applying standard First Amendment analysis in library cases for fear that the entire library system could be found in violation of the First Amendment.<sup>18</sup>

### *Other First Amendment Rights in Library Cases*

¶13 In addition to collection management, a variety of other First Amendment rights can be at issue in library cases, and all of these may affect the law of library collections. Libraries have been challenged on free exercise and on establishment of religion grounds as well as infringement of association rights for restrictive policies on access to meeting rooms.<sup>19</sup> Libraries have been defendants in freedom of speech and press challenges to the removal<sup>20</sup> or relocation<sup>21</sup> of books, the filtering of the Internet,<sup>22</sup> and actions or policies that regulate users' behavior and thereby access to the library and the library's collection.<sup>23</sup> Some restrictions on user behavior have been found to violate the right of assembly and the right to petition the government for redress of grievances.<sup>24</sup> Libraries have challenged legislation on behalf of the library user's right to receive information through the rights of freedom of speech and of the press.<sup>25</sup> As libraries increase Internet services, patrons may challenge any policies or software filters that restrict library Internet use as interference

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N. Gathegi, *The Public Library as a Public Forum: The (De)Evolution of a Legal Doctrine*, 75 LIBR. Q. 1 (2005).

17. The mission of the public library relating to Internet access was at the core of the controversy in the *ALA* cases. For an examination of how the Supreme Court has struggled with understanding the role of libraries in society, see Raizel Liebler, *Institutions of Learning or Havens for Illegal Activities: How the Supreme Court Views Libraries*, 25 N. ILL. U. L. REV. 1 (2004).

18. Justice Breyer wrote, "To apply 'strict scrutiny' to the 'selection' of a library's collection . . . would unreasonably interfere with the discretion necessary to create, maintain, or select a library's 'collection' . . ." *ALA II*, 539 U.S. at 217 (Breyer, J., concurring in the judgment).

19. *Faith Ctr. Church Evangelistic Ministries v. Glover*, No. C 04-03111 JSW, 2009 WL 1765974 (N.D. Cal. June 19, 2009) (upholding library meeting room policy prohibiting use for pure religious worship as not viewpoint discrimination, but a category of content restriction consistent with purposes of the library as limited public forum); *Ethnic Employees of Library of Congress v. Boorstin*, Nos. 80-2163, 82-2264, 1987 WL 4804 (D.D.C. Jan. 16, 1987) (considering association rights of employees under policy of access to meeting rooms for employee organizations), *aff'd*, 865 F.2d 1329 (Table) (D.C. Cir. Jan. 25, 1989).

20. *Bd. of Educ. v. Pico (Pico III)*, 457 U.S. 853 (1982) (plurality opinion).

21. *Sund v. City of Wichita Falls*, 121 F. Supp. 2d 530 (N.D. Tex. 2000).

22. *ALA II*, 539 U.S. 194; *Miller v. Nw. Region Library Bd.*, 348 F. Supp. 2d 563 (M.D.N.C. 2004); *Mainstream Loudoun v. Bd. of Trs. (Loudoun I)*, 2 F. Supp. 2d 783 (E.D. Va. 1998); *Crosby v. S. Orange County Cmty. Coll. Dist.*, 172 Cal. App. 4th 433 (Cal. Ct. App. 2009).

23. See, e.g., *Neinast v. Bd. of Trs.*, 346 F.3d 585 (6th Cir. 2003); *Kreimer v. Bureau of Police*, 958 F.2d 1242 (3d Cir. 1992).

24. *Brown v. Louisiana*, 383 U.S. 131 (1966) (prevailing three-Justice opinion holding that punishing civil rights activists for a silent sit-in at a public library violated their First Amendment rights).

25. *Am. Library Ass'n v. United States (ALA I)*, 201 F. Supp. 2d 401, 450-51 (E.D. Pa. 2002), *rev'd*, 539 U.S. 194 (2003).

with a right to quiet expression on blogs and wikis or a right to petition the government through e-mail to officials.<sup>26</sup>

### *Different First Amendment Law for Different Types of Libraries*

¶14 A reasonable question is why the First Amendment, which begins “Congress shall make no law,” should apply to publicly funded libraries at all, particularly law libraries. Although the language of the First Amendment restricts only Congress’s power to make laws that interfere with certain rights, courts have extended the amendment’s application to actions of all branches of government and, through the Fourteenth Amendment, to the states and their subsidiaries.<sup>27</sup> With few exceptions, libraries that are largely publicly funded and open to the public are recognized by courts as government actors who must act within the boundaries of the First Amendment.<sup>28</sup> Some libraries at private institutions could possibly qualify as government actors if the court found that government is responsible for the challenged behavior, but this finding is rare and is unlikely to apply to law firm libraries, corporate law libraries, or other private libraries.<sup>29</sup>

¶15 In modern analysis, courts further divide government actors into types of forums to determine their level of obligation under the First Amendment. Government actors are categorized as traditional public forums, designated or limited public forums, and nonpublic forums. Traditional public forums, idealized as a public park, are those where First Amendment freedoms are most protected.<sup>30</sup> Designated or limited public forums must protect First Amendment freedoms

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26. This concern was central to the district court’s holding in the *American Library Ass’n* case. See *id.* at 469–70.

27. The Fourteenth Amendment includes the provision that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, §1. This restriction applies only to state actors. See, e.g., *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) (“It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state.” (citing *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94 (1973))); *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938) (“It is also well settled that municipal ordinances adopted under state authority constitute state action and are within the prohibition of the amendment.”).

28. The lower court in *American Library Ass’n* explained: “Because we find that the plaintiff public libraries are funded and controlled by state and local governments, they are state actors, subject to the constraints of the First Amendment, as incorporated by the Due Process Clause of the Fourteenth Amendment.” *ALA I*, 201 F. Supp. 2d at 450 n.20.

29. The New York Public Library was found not to be a state actor for civil rights claims because it is only partially supported with public funds and because by the terms of its contract with the state and by practice it maintains control over the library independent of the city or state. See *Gilliard v. N.Y. Pub. Library Sys.*, 597 F. Supp. 1069 (S.D.N.Y. 1984). The standard of “under color of state law” is used when plaintiffs file civil suits claiming violations of civil rights under 42 U.S.C. § 1983, and this standard is similar to that for a state actor. See *Hollenbaugh v. Carnegie Free Library*, 545 F.2d 382 (3d Cir. 1976).

30. Courts recognize as traditional public forums only those settings which have for “time out of mind, . . . been used for purposes of assembly, communication of thoughts between citizens, and discussing public questions,” and libraries have not met this standard. *ALA II*, 539 U.S. at 205 (quoting *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992)).



according to their commitments to do so,<sup>31</sup> and nonpublic forums must meet relatively minimal requirements under the First Amendment.<sup>32</sup> Library cases are all over the map in terms of forum analysis. Some library cases predate or ignore modern forum analysis; some have found public libraries to be designated public forums for the limited purpose of the right to receive information; and others, most notably *United States v. American Library Ass'n*, suggest forum analysis is inapplicable to public libraries' decisions about which private speech to make available to the public, indicating that the library is either a nonpublic forum or simply not a forum at all.<sup>33</sup>

¶16 Because law libraries have not been the subject of First Amendment litigation, law librarians must turn to cases about other publicly funded libraries for guidance about First Amendment law. Community public libraries and school libraries are the subjects of most challenges, but the law of these libraries may not map directly onto law libraries. Generally, courts will measure the library's compliance with the First Amendment by the conformity of the collection decisions to the library's mission, so differences in mission produce differences in legal obligations. Viewed along a continuum of obligations under the First Amendment, courts may require the most neutrality from public libraries with missions to serve entire communities, slightly less neutrality from law libraries with missions to serve particular patron groups' legal research needs, and even less neutrality from public school libraries whose mission is even narrower because of its link to the inculcative and curricular roles of schools.<sup>34</sup>

### *The Right to Receive Information*

¶17 The right most often raised in library First Amendment cases is the right to receive information as a function of freedom of speech and of the press. One of the principled problems of library First Amendment law relates to this right to receive information through the library.<sup>35</sup> Courts are reluctant to characterize the First Amendment as a positive right that requires the government to affirmatively do something, such as purchase a particular book or even keep it on the shelves. The "abridgment" language of the Amendment could mean that the right is only a negative right to prevent government regulation that diminishes or interferes with

31. To create a designated public forum, "the government must make an affirmative choice to open up its property for use as a public forum." *Id.* at 206. To create a limited public forum the government may designate a government property or program as a public forum "for certain groups or for the discussion of certain topics." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)).

32. Generally, courts have found that government properties or programs that are not traditional or designated public forums are by default nonpublic forums, but a relatively new fourth category of "not [a] for[um] at all" may also exist. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998).

33. See *ALA II*, 539 U.S. at 204.

34. In dissenting in *Pico*, Justice Rehnquist wrote, "Unlike university or public libraries, elementary and secondary school libraries are not designed for freewheeling inquiry . . ." *Bd. of Educ. v. Pico (Pico III)*, 457 U.S. 853, 915 (1982) (Rehnquist, J., dissenting).

35. See Susan Nevelow Mart, *The Right to Receive Information*, 95 LAW LIBR. J. 175, 2003 LAW LIBR. J. 11.

any of the protected activities. Under this view of the First Amendment, a library's removal of a book from the collection would leave a patron no worse off than if the library were never created or the book was never added to the library's collection. In contrast, a law that prohibited the community from reading that book would violate the negative right that prevents government from abridging the right to receive information. The distinction is one between government subsidies and government regulations. This view of the First Amendment as a negative right could mean that the First Amendment simply does not apply to government subsidies like public libraries. No matter what a library does—acquire, remove, or filter—the bottom line is that libraries can only make affirmative or positive contributions to the reading options of their communities, so they could not violate a negative right to receive information.

¶18 But modern courts have rejected this absolutist view of the First Amendment as a negative right inapplicable to subsidies like libraries.<sup>36</sup> Courts have characterized some library actions as abridgments<sup>37</sup> and at times have embraced the concept of a positive right of access to information through public libraries.<sup>38</sup> Once libraries make information available, courts have found that removal of that material must meet First Amendment doctrinal tests because that removal could constitute abridgment and violate negative First Amendment rights.<sup>39</sup> Some courts have found that libraries reflect a commitment to support the right to receive information, which in turn requires the library to protect access under the more stringent requirements for limited public forums.<sup>40</sup> Nonetheless, the library cases reveal significant judicial discomfort with the positive right implications of a First Amendment right to receive information.<sup>41</sup>

### *Evidence and Judicial Workload Concerns Limit Judicial Review to Removal of Books*

¶19 In some cases, courts have determined that the proper way to apply the First Amendment to libraries is to prohibit decisions based on intent to suppress access to particular ideas.<sup>42</sup> This approach requires judges to determine the intent of the librarian in acquiring, rejecting, or removing a book. However, traditional book selection presents evidentiary and workload challenges courts do not welcome.<sup>43</sup>

36. On the topic of government subsidies and free expression, see generally Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984); Martin H. Redish & Daryl I. Kessler, *Government Subsidies and Free Expression*, 80 MINN. L. REV. 543 (1996).

37. See *Pico III*, 457 U.S. 853 (plurality opinion).

38. *Kreimer v. Bureau of Police*, 958 F.2d 1242 (3d Cir. 1992).

39. See *Pico III*, 457 U.S. 853 (plurality opinion); *ACLU v. Miami-Dade County Sch. Bd.*, 557 F.3d 1177 (11th Cir.), cert. denied, 130 S. Ct. 659 (2009).

40. *Kreimer*, 958 F.2d 1242; *Neinast v. Bd. of Trs.*, 346 F.3d 585 (6th Cir. 2003).

41. See *Pico III*, 457 U.S. at 889 (Burger, C.J., dissenting) (arguing that recognition of a right to receive information was an improper creation of an affirmative right and would make a public library a “slavish courier of the material of third parties”).

42. *Id.* (plurality opinion); *ACLU v. Miami-Dade*, 557 F.3d 1177.

43. The same approach could apply to review of decisions about other tangible materials in a library's collection, although the decision to add or remove a subscription to a journal or a

Traditionally, librarians review and select new materials on a title-by-title basis, and the process can involve complex comparative assessments of potential purchases and local needs. The process does not usually produce evidence that would reveal intent to suppress a particular idea or viewpoint. These evidentiary and workload challenges have led courts to reject standard First Amendment review of library's acquisition decisions.<sup>44</sup> Book relocation or removal decisions, in contrast, are fewer in number and more often produce a trail of evidence that can be reviewed for discriminatory intent. Courts have noted that the lowered evidentiary and workload barriers make removal and relocation cases more appropriate for First Amendment judicial review.<sup>45</sup>

### *Proposals for Constitutional Protection of Libraries' Discretion*

¶20 Several scholarly proposals would give libraries constitutional protection based on the libraries' right to free speech, not just First Amendment accommodation for their discretion to manage their collections.<sup>46</sup> Libraries themselves have made this argument—in *American Library Ass'n* the libraries argued that Congress should not be permitted to condition federal subsidies on libraries' installation of Internet filters because those conditions would violate a library's First Amendment free speech right to manage its collection without interference.<sup>47</sup> In another case, a library argued that library patrons should not be able to interfere with the library's right to install Internet filtering software.<sup>48</sup>

¶21 So far, no court has held a public library's collection management constitutes protected speech under the First Amendment. The *American Library Ass'n* Court acknowledged that this argument would not be consistent with precedent,

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monographic series may in fact have a better record of evidence for a court to review, since these decisions are less numerous than decisions about individual books. Law libraries tend to have more subscriptions than book titles, and courts might be just as reluctant to review subscription decisions because of the complexity of the factors that go into decisions to add, cancel, or withdraw.

44. See *United States v. Am. Library Ass'n (ALA II)*, 539 U.S. 194, 241–42 (2003) (Souter, J., dissenting, joined by Ginsburg, J.); *Pico v. Bd. of Educ. (Pico II)*, 638 F.2d 404, 413–14 (2d Cir. 1980), *aff'd*, 457 U.S. 853 (1982).

45. *ALA II*, 539 U.S. at 242 (Souter, J., dissenting, joined by Ginsburg, J.) (citing the plurality's conclusion in *Pico III*).

46. David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U.L. REV. 1637 (2006) (proposing recognition as protected government speech based on relevance to the institutional mission and on positive impact on public discourse); Felix Wu, *United States v. American Library Ass'n: The Children's Internet Protection Act, Library Filtering, and Institutional Roles*, 19 BERKELEY TECH. L.J. 555 (2004) (arguing that libraries' discretion to filter the Internet is a form of speech activity deserving of First Amendment protection). *But see* Erwin Chemerinsky, *Moving to the Right, Perhaps Sharply to the Right*, 12 GREEN BAG 2d 413 (2009) (arguing that the government speech doctrine threatens protection of individuals' First Amendment rights); Andy G. Oree, *Identifying Government Speech*, 42 CONN. L. REV. 365 (2009) (stating that the *ALA II* and *Pico III* decisions show the Court is not willing to recognize library collections as government speech).

47. *ALA II*, 539 U.S. at 210–11.

48. The defendant library in *Bradburn v. North Central Regional Library District* argued that its "role as a public library carries with it the right and responsibility to make content-based judgments about what to include in the collection." Defendant's Opening Brief at 28, *Bradburn v. N. Cent. Reg'l Library Dist.*, 231 P.3d 166 (Wash. 2010).

but the Court also specifically declined to rule on the question in that case.<sup>49</sup> First Amendment status for a library's collection management authority could further complicate questions of the relative authority among those involved in library collection challenges. If libraries were to have government speech rights, then so might other government bodies that would regulate the library. As a result, conflicts among patrons, libraries, and library regulators could frame all of the parties' claims as First Amendment claims.

¶22 Other proposals would give libraries or librarians constitutional status as trustworthy experts in balancing both First Amendment and library management concerns.<sup>50</sup> Under this theory, libraries or librarians would have some First Amendment immunity from the challenges of library patrons and the regulatory authority of other government bodies. While courts have allowed libraries special accommodations under First Amendment law, courts have not granted libraries authority as First Amendment institutions. Another theory of protection for academic law librarians or law libraries as collection managers is academic freedom, but the constitutional status of academic freedom is largely unresolved.<sup>51</sup>

¶23 The survey of the library cases that follows demonstrates that courts have not accepted any proposal that would give libraries absolute discretion in book selection and Internet-access management. The boundaries of courts' willingness to defer to libraries are fuzzy, but even the deferential standard of the plurality in *American Library Ass'n* suggests limits, and lower courts have continued to treat libraries' discretion as limited.

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49. See *ALA II*, 539 U.S. at 210–11; but see *id.* at 226 (Stevens, J., dissenting) (“[A] library’s exercise of judgment with respect to its collection is entitled to First Amendment protection.”); *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 674 (1998) (“When a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity.”).

50. Proposals for institutional deference or even autonomy generally advocate this recognition for public libraries or offer guidelines that would encompass public libraries. See Lee C. Bollinger, *Public Institutions of Culture and the First Amendment: The New Frontier*, 63 U. CIN. L. REV. 1103 (1995); Bruce C. Hafen, *Hazelwood School District and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685; Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497 (2007); Frederick C. Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 115 (1998). Some proposals would extend protection to the decisions of librarians but not library boards. See Jim Chen, *Mastering Eliot’s Paradox: Fostering Cultural Memory in an Age of Illusion and Allusion*, 89 MINN. L. REV. 1361, 1379 (2005); Robert M. O’Neil, *Libraries, Librarians and First Amendment Freedoms*, 4 HUM. RTS. 295, 309 (1975); Rodney A. Smolla, *Freedom of Speech for Libraries and Librarians*, 85 LAW LIBR. J. 71, 73 (1993); Mark G. Yudof, *Library Book Selection and the Public Schools: The Quest for the Archimedean Point*, 59 IND. L.J. 527, 553–55 (1984).

51. See Bintliff & Danner, *supra* note 3; see also Gemma Devinney, *Academic Librarians and Academic Freedom in the United States: A History and Analysis*, 37 LIBRI 24 (1986). Academic freedom has not been afforded a clear status under the First Amendment. See J. Peter Byrne, *Neo-orthodoxy in Academic Freedom*, 88 TEX. L. REV. 143 (2009) (reviewing MATTHEW W. FINKIN & ROBERT C. POST, *FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM* (2009) and STANLEY FISH, *SAVE THE WORLD ON YOUR OWN TIME* (2008)).

## The U.S. Supreme Court Has Given Increasing Latitude to Libraries

### *Three Cases Demonstrate Variation in Facts and Analysis*

¶24 The Supreme Court has ruled on three cases considering the application of the First Amendment to libraries. Public community libraries were the subject of two cases, and a public school library was the context for the third. These cases provide thin guidance on how a library should manage its collection because none produced majority opinions with clear rules of First Amendment application to public libraries. In the first case, the majority applied a high level of scrutiny to breach of peace convictions for a public library sit-in protesting the library's policy of segregation, but only four Justices found First Amendment freedoms had been violated.<sup>52</sup> In the second case, a majority agreed a trial was necessary to discover the intent behind removal of books from school libraries, but only four Justices asserted that intent to suppress ideas would offend the First Amendment.<sup>53</sup> And in the third case, the majority upheld federal library subsidies that are conditioned on Internet filtering, but under three separate theories.<sup>54</sup> Although these decisions lack the clarity and authority of majority opinions, each contributes to an understanding of the current boundaries to libraries' discretion to manage their collections.

#### *Brown v. Louisiana*

¶25 The first time the Supreme Court considered the applicability of the First Amendment to a public library was in *Brown v. Louisiana*.<sup>55</sup> Only four Justices found the First Amendment applied, but a majority of the Court was unwilling to defer to local authorities on whether library patron behavior was consistent with the mission of the library. The case did not focus on the library's collection,<sup>56</sup> but the holding and discussion has influenced the First Amendment law of public library collection management.

¶26 *Brown v. Louisiana* was decided in 1966, more than a decade after the more famous *Brown* decision that led to integration of public schools.<sup>57</sup> In the library case, the Supreme Court reviewed the convictions of five young African American men under a state breach of peace statute for remaining quietly in a public library for about fifteen minutes after they had been asked by the library staff to leave. The small branch library in Clinton, Louisiana, was known locally to be a segregated facility serving the white community. The five young men tested the segregation policy through a planned visit that included a request for a book followed by a quiet sit-in.<sup>58</sup> Mr. Brown requested a book, and the library staff member identified

52. See *Brown v. Louisiana*, 383 U.S. 131 (1966) (plurality opinion).

53. See *Bd. of Educ. v. Pico (Pico III)*, 457 U.S. 853 (1982) (plurality opinion).

54. See *United States v. Am. Library Ass'n (ALA II)*, 539 U.S. 194 (2003) (plurality opinion).

55. *Brown v. Louisiana*, 383 U.S. 131.

56. Access to information was not directly at issue. The library staff member provided fairly extensive service. The facts are unclear as to which book was sought, whether it was a title by Booker T. Washington or by Arna Bontemps. A novel claim might have sought a right to access to "Negro Literature," which the whites-only Clinton branch was unlikely to have in its collection. See KARLA F.C. HOLLOWAY, *A Negro Library*, in *BOOKMARKS: READING IN BLACK AND WHITE: A MEMOIR* 28 (2006).

57. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

58. Actually, only one of the men, Quincy Brown, was able to sit, because only one chair was available for library patrons in the small branch library. The four other men stood beside Mr. Brown. *Brown v. Louisiana*, 383 U.S. at 135–36.

a similar title in the central library and arranged to have it mailed to Mr. Brown. He and his companions then remained quietly in the library and refused two requests by library staff to leave. Having received advance notice of the sit-in from its organizer, the Congress of Racial Equality, the sheriff and some officers arrived ten to fifteen minutes after the young men. When the men refused the sheriff's request to leave, the sheriff arrested them. All of the young men were convicted under the state breach of peace statute.<sup>59</sup>

¶27 The state breach of peace statute contained no avenue for appeal through state courts, so the convictions were appealed directly to the Supreme Court. The central disagreement on the Court was whether the actions of the library patrons were consistent with use of the library for library purposes. A majority of the Court declined to defer to the library staff or local law enforcement who maintained that the young men had violated library norms by remaining in the library after receiving library service. Justice Fortas authored the prevailing opinion and expressed regret that “a public library—a place dedicated to quiet, to knowledge, and to beauty” should be the stage for confrontation, but concluded that no peace was breached by the five men's behavior.<sup>60</sup> The opinion went further, finding that convictions violated the men's rights to silent speech, assembly, and petitioning the Government for redress under the First Amendment.<sup>61</sup> Fortas conceded that a state and its instrumentalities “may, of course, regulate the use of its libraries,” but added that the regulations must be nondiscriminatory in policy and as applied when individuals are exercising constitutional rights.<sup>62</sup>

¶28 Justice Brennan concurred in the judgment.<sup>63</sup> Justice White concurred only in the result, and based reversal of the convictions on the finding that “petitioners were making only a normal and authorized use of this public library . . . .”<sup>64</sup>

¶29 The dissent, written by Justice Black, found the sit-ins were not consistent with the purpose of public libraries and therefore could constitutionally be prohibited by state statute. The dissent said the Court's holding meant states were “paralyzed with reference to control of their libraries for library purposes . . . .”<sup>65</sup>

¶30 The four Justices' enforcement of First Amendment protections in *Brown* is particularly striking given that local authorities had closed the library after the sit-in.<sup>66</sup> In the library collection cases that came later, courts generally accommodated the library's management requirements and relaxed First Amendment requirements through deference to local authorities.<sup>67</sup> Underlying this accommodation is implicit recognition that standard First Amendment enforcement of neutral treatment of speech and the press would be impossible for the library due to its need to

59. *Id.* at 137–38.

60. *Id.* at 142.

61. *Id.* at 141–42.

62. *Id.* at 143.

63. *Id.* at 143 (Brennan, J., concurring). Justice Brennan preferred to overturn the convictions on the basis of a prior Court holding that the Louisiana breach of peace law was overbroad. *Id.* at 146–47.

64. *Id.* at 151 (White, J., concurring).

65. *Id.* at 165 (Black, J., dissenting, joined by Clark, Harlan, and Stewart, JJ.).

66. The library was still closed at the time of the *Brown* decision, almost two years after the sit-in. See *id.* at 151 (White, J., concurring).

67. See *infra* ¶¶ 33–44 for a discussion of *ALA II* and *Pico III*.

manage scarce resources, and the library would have no alternative but to close.<sup>68</sup> Even if somehow scarcity did not prevent the library's compliance with standard First Amendment requirements for neutral treatment of speech and the press, full enforcement might be inconsistent with the library's locally fashioned mission, and the library would have to change its purpose or close because its purpose was frustrated by the First Amendment.<sup>69</sup> So courts tend to adjust First Amendment standards for library collections to allow them to be selective, whether for reasons of scarcity or design. In *Brown* the Court faced this ultimate irreconcilability of First Amendment enforcement and the library's purpose, at least as that purpose was defined by local authorities. Rather than cope with additional sit-ins and presumably integration, the local authorities closed the library.<sup>70</sup> The Court's willingness to enforce First Amendment protections even against this backdrop of the discontinuation of library service was no doubt strengthened, if not dominated, by the force of interwoven equal protection concerns.<sup>71</sup> If the library had not been the target of the silent speech and petition activities, the Court may not have found the exercise of those rights was consistent with the purpose of the library.<sup>72</sup> Nonetheless, *Brown* established precedent for judicial review of rules for library patron behavior, and four Justices created persuasive authority for protection of First Amendment freedoms of silent speech, assembly, and petition in the public library setting.

¶31 Even though *Brown* did not address application of the First Amendment to the library's decisions about its collection, the opinion has influenced lower court cases about collection management. *Brown v. Louisiana's* three-Justice prevailing opinion is quoted in library cases for the characterization of a library as "a place dedicated to quiet, to knowledge, and to beauty."<sup>73</sup> As courts have developed doc-

68. See also *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 681–82 (1998) (avoiding application of standard First Amendment requirements because public broadcasters might choose—and indeed the Nebraska Educational Television Network did so in the state's 1996 U.S. Senate race—to cancel an election debate rather than provide time for all ballot-qualified candidates to participate).

69. The *American Library Ass'n* plurality opinion found that public libraries were selective in their collections as a matter of design. *United States v. Am. Library Ass'n (ALA II)*, 539 U.S. 194, 204–09 (2003).

70. One library journal report questioned the given motivation, saying that the closing came just a few weeks after the incident without any general public knowledge that plans for closing had already been in progress. "This plan is supposed to save lots of money, but mostly (and of course they don't admit this) it keeps Negroes safely out of any buildings . . ." *Lockouts and Arrests—Repeat Performance*, WILSON LIBR. BULL., Sept. 1964, at 22. The attorney for Louisiana explained in oral argument that the library was unable to find staff willing to keep the library open after the sit-in because of fears that there would "be trouble." Oral Argument, *Brown v. Louisiana* (No. 65-41), audio available at [http://www.oyez.org/cases/1960-1969/1965/1965\\_41](http://www.oyez.org/cases/1960-1969/1965/1965_41).

71. Courts have accepted this trade-off in the equal protection context. *Palmer v. Thompson*, 403 U.S. 217 (1971) (holding that the closing of public swimming pools rather than integrating them was facially racially neutral and therefore not in violation of the equal protection clause). But see Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513 (2004).

72. Mark Yudof suggested *Brown* may be "better understood as a race case than a First Amendment one." MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* 227 n.42 (1983).

73. *Brown v. Louisiana*, 383 U.S. 131, 142 (1966) (plurality opinion). The Third Circuit cited *Brown* as authority for finding a public library to be a limited public forum for the right to receive information. See *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1261 (3d Cir. 1992).

trine to identify the types of First Amendment rights protected in public libraries, the *Brown* decision has been authority for upholding patron behavior regulations that require use of the library to be quiet and for recognition of the library's role in supporting access to speech but not in facilitating direct expression.<sup>74</sup> Some of these, in turn, have formed the basis for judicial review of libraries' decisions to restrict access to particular books or Internet content.<sup>75</sup>

¶32 *Brown* also serves as a reminder to libraries that when equal protection issues are intertwined with First Amendment issues, courts may not extend as much deference to the library. For example, if an academic law library specifically excluded from its collection any materials on the history of slavery in the United States or rejected all donations of resources on the law of women's sports while collecting the law of men's sports, the library might be called upon to defend its decision as a function of something other than an intention to suppress access to certain ideas.

### *Board of Education v. Pico*

¶33 The second Supreme Court opinion that addressed a public library and the First Amendment was a challenge to school library book removal in *Board of Education v. Pico* in 1982.<sup>76</sup> The *Pico* Court was even more fractured than the *Brown* Court. The case produced opinions in the district court, circuit court, and Supreme Court. At the Supreme Court level, the decision included six separate opinions. The Supreme Court majority agreed only to reverse the district court's summary judgment in favor of the school system and remand for a trial for factual determinations. Four Justices from the majority also agreed on a standard for the trial court to determine whether the motivation in removal of books from school libraries was impermissible under the First Amendment. Despite the confusion of opinions and lack of binding authority of any of them, *Pico* has had an impact on lower court opinions involving both school<sup>77</sup> and public library collections,<sup>78</sup> and the local actors treated the Court's remand as a cue to restore the challenged books to library shelves.

¶34 The case arose in response to the Island Trees school board's decision to remove particular books from the school system's libraries. Members of the school board identified several books in the Island Trees high school and junior high school libraries as a "moral danger" to students and "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy . . ."<sup>79</sup> The board appointed a committee of parents

74. *Kreimer*, 958 F.2d at 1261; see also *Neinast v. Bd. of Trs.*, 346 F.3d 585, 591 (6th Cir. 2003) (stating that "[t]he First Amendment protects the right to receive information" and citing *Kreimer* for "the right to some level of access to a public library, the quintessential locus of the receipt of information").

75. See *Sund v. City of Wichita Falls*, 121 F. Supp. 2d 530, 547 (N.D. Tex. 2000); *Mainstream Loudoun v. Bd. of Trs. (Loudoun I)*, 2 F. Supp. 2d 783, 792 (E.D. Va. 1998).

76. *Bd. of Educ. v. Pico (Pico III)*, 457 U.S. 853 (1982) (plurality opinion).

77. See *ACLU v. Miami-Dade County Sch. Bd.*, 557 F.3d 1177, 1199–1200 (11th Cir.), *cert. denied*, 130 S. Ct. 659 (2009).

78. See *Kreimer*, 958 F.2d at 1253; *Sund*, 121 F. Supp. 2d at 547; *Loudoun I*, 2 F. Supp. 2d at 792.

79. *Pico III*, 457 U.S. at 857 (quoting *Pico v. Bd. of Educ. (Pico I)*, 474 F. Supp. 387, 390 (E.D.N.Y. 1979)). The books at issue were Kurt Vonnegut, Jr.'s *Slaughter House Five*, Desmond Morris's *The Naked Ape*, Piri Thomas's *Down These Mean Streets*, the Langston Hughes-edited *Best Short Stories*



and school staff to determine the books' "educational suitability," "good taste," "relevance," and "appropriateness to age and grade level."<sup>80</sup> The board rejected most of the committee's recommendations and returned only one book to the library without restriction and made one other available only with parental approval. Four high school students and one junior high school student filed suit for violation of state and federal free speech rights.

¶35 The district court ruled in favor of the school board's motion for summary judgment, holding that the board's decision did not meet the school library context standard of a "sharp and direct infringement of any first amendment right."<sup>81</sup> The plaintiffs appealed, and the Second Circuit overturned the district court's summary judgment and remanded for full factual determination of the basis of the school board's decisions.

¶36 The Island Trees school board appealed, and a majority of the Supreme Court affirmed the Second Circuit's reversal of summary judgment and remand for a trial. The three-Justice prevailing opinion declared that a school library collection required less judicial deference than the school curriculum. Quoting *Brown v. Louisiana*, Justice Brennan equated the school library to the public library as "a place dedicated to quiet, to knowledge, and to beauty."<sup>82</sup> In contrast with decisions about which books to acquire, the removal of books was found to be both more suspect as idea suppression and more easily reviewed for intent. The prevailing opinion also traced the evolution of a right to receive information and found that right could be at issue in the removal of school library books.

¶37 This limitation on the school libraries' collection discretion was supported by only four Justices, so no majority opinion in *Pico* set a standard for what is permissible or impermissible library book removal. Justice Blackmun concurred with the three-Justice prevailing opinion that the trial court should find the school book removal impermissible if the school board's intention was to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."<sup>83</sup> Because motivation might be a mixed bag of reasons, the district court was to determine whether denial of access to ideas was the "decisive factor," which the opinion further defined as a "substantial factor."<sup>84</sup> On the other hand, if the court determined that the decisive factor for the board was that the books were "pervasively vulgar" or lacking in "educational suitability," students challenging their removal had conceded that the action would be constitutional.

¶38 Justice White concurred only in the judgment and explained that the issue might be resolved on remand to the trial court without need to address issues of constitutional law if the court found the motivation was one that the parties had agreed was permissible.<sup>85</sup>

of *Negro Writers*, the anonymously authored *Go Ask Alice*, Oliver LaFarge's *Laughing Boy*, Richard Wright's *Black Boy*, Alice Childress's *A Hero Ain't Nothin' but a Sandwich*, and Eldridge Cleaver's *Soul on Ice*. *Id.* at 856 n.3.

80. *Id.* at 857.

81. *Pico I*, 474 F. Supp. at 397, *rev'd*, 638 F.2d 404 (2d Cir. 1980), *aff'd*, 457 U.S. 853 (1982).

82. *Pico III*, 457 U.S. at 868 (quoting *Brown v. Louisiana*, 383 U.S. 131, 142 (1966)).

83. *Id.* at 872 (Blackmun, J., concurring) (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

84. *Id.* at 871 n.22 (plurality opinion).

85. *See id.* at 883 (White, J., concurring).

¶39 Justices Burger, Powell, Rehnquist, and O'Connor each wrote dissenting opinions. All of the dissenters would have extended broad judicial deference to school boards in the management of school library collections in support of their inculcative missions. Justice Rehnquist wrote, “[u]nlike university or public libraries, elementary and secondary school libraries are not designed for freewheeling inquiry . . . .”<sup>86</sup> But Justice Rehnquist’s dissent also indicates a widely shared agreement on the Court that school libraries do not have unlimited discretion in collection decisions. In response to Justice Brennan’s hypothetical examples of impermissible removal of all books favoring Republicans or of all books supporting racial equality, Justice Rehnquist wrote that he could “cheerfully concede” that the First Amendment would not support such suppression of ideas.<sup>87</sup>

¶40 After the Supreme Court’s remand for trial, the Island Trees Board of Education voted to return the books in question to the library shelves to avoid further litigation.<sup>88</sup> The four-Justice *Pico* standard for review of book removal from a school library is not binding authority, but it continues to serve as persuasive authority to the lower courts.<sup>89</sup> In addition, Justice Rehnquist’s dissent contributes an important indicator that a strong majority of the Court agreed that libraries’ discretion was limited even in the school library context.

¶41 The key lesson from *Pico* for libraries may be that book removal could be particularly suspect, and evidence of an intention to prevent access to an idea could raise First Amendment questions. Although the *Pico* standard addresses only book removal, a publicly funded library would be wise to avoid policies or practices that suggest an intent to suppress access to an idea. If a state law library collected only works by Republicans and not Democrats, even courts reluctant to review library collection decisions would probably rule that the practice violates the First Amendment. And if a county law library rejected books arguing against voting rights for women, the library might be called upon to explain that the books addressed legal issues beyond the scope of the limited resources and mission to acquire materials related to current practice needs in the community. Similarly, if an academic law library were to reject books about the influence of Christianity on the nation’s founders or books with racist views, the library might need to articulate reasons such as existing collection coverage of these arguments in order to avoid challenges of intent to suppress the ideas. Although courts would probably only review book removal decisions under the *Pico* plurality standard, the test can serve as a reminder to librarians during the selection process as well, so that the librari-

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86. *Id.* at 915 (Rehnquist, J., dissenting). However, in *American Library Ass’n*, Justice Rehnquist wrote for the plurality that public libraries have missions that require them to selectively provide access to content. See *United States v. Am. Library Ass’n (ALA II)*, 539 U.S. 194, 211 (2003) (plurality opinion).

87. *Pico III*, 457 U.S. at 907–08 (Rehnquist, J., dissenting) (“I would save for another day—feeling quite confident that that day will not arrive—the extreme examples posed in Justice Brennan’s opinion.”).

88. In a formal statement, the Board said it wanted to avoid a trial because that “would have the effect of surrendering local control of the schools to the courts.” Shawn G. Kennedy, *School Board on L.I. Votes to Restore 9 Banned Books*, N.Y. TIMES, Aug. 13, 1982, at B1.

89. See *ACLU v. Miami-Dade County Sch. Bd.*, 557 F.3d 1177, 1199–1200 (11th Cir.), cert. denied, 130 S. Ct. 659 (2009).

an's own distaste for an idea does not preclude the idea's representation in the collection.

### *United States v. American Library Ass'n*

¶42 The third case in which the Supreme Court addressed the First Amendment's application in libraries is the 2003 decision *United States v. American Library Ass'n*, where public library Internet filtering was at issue. Librarians may believe Internet management is different from collection management, but a plurality of the Supreme Court found that library Internet access is "no more than a technological extension of the book stack."<sup>90</sup> Thus, the holding in *American Library Ass'n* is an important indicator of how much discretion law libraries have in both of these areas.

¶43 Ironically, the Court's recognition of libraries' discretion in collection matters caused plaintiff libraries and library associations to lose their First Amendment challenge to the Children's Internet Protection Act (CIPA), which they claimed would induce libraries to violate the First Amendment rights of their patrons. The CIPA statute conditioned federal discounts on Internet access in public and school libraries on the installation of a "technology protection measure" to prevent access by all persons to "visual depictions" that are "obscene" or "child pornography" and to protect minors from access to "visual depictions" that are "harmful to minors."<sup>91</sup> The parties agreed that commercial filtering software overblocked and underblocked, and that even if technologically perfect, the statutory requirements for the filters would restrict adult viewers to content suitable for children. The Act required that filters be applied to all Internet access in libraries receiving federal funding and provided permissive but not mandatory conditions under which library staff might decide to disable the filters.<sup>92</sup>

¶44 Most law librarians have devoted little attention to the *American Library Ass'n* decision because law libraries and university libraries do not qualify as potential recipients of the funding and discounts available through CIPA. However, the decision has much to say about how law libraries might or might not be able to limit patrons' access to protected speech through the Internet or even how libraries might be able to edit or excerpt material from their print collections. While most law librarians—indeed most librarians—would not dream of hiding controversial books or taking a razor to pages containing objectionable but legitimate content, law librarians might consider Internet filtering in order to serve the same or similar purposes as the CIPA statute.<sup>93</sup>

¶45 By the time of the *American Library Ass'n* case, First Amendment doctrine had adopted public forum analysis to determine the level of judicial scrutiny for different contexts. The *American Library Ass'n* district court used forum analysis to

90. *United States v. Am. Library Ass'n (ALA II)*, 539 U.S. 194, 207 (2003) (plurality opinion) (quoting S. REP. NO. 106-141, at 7 (1999)).

91. Children's Internet Protection Act (CIPA), 47 U.S.C. § 254(h)(6)(B), (C) (2006); 20 U.S.C. § 9134(f)(1) (2006).

92. *Id.* §§ 254, 9134.

93. See Ruth A. Fraley, *Internet Filtering in the Workplace*, AALL SPECTRUM, Apr. 2001, at 10.

determine that public libraries' Internet access represented a dedicated public forum and failed to meet strict standards for conformity with the First Amendment principles of neutral treatment of speech and the press.

¶46 A provision in CIPA provided for appeal directly to the Supreme Court.<sup>94</sup> A five-Justice majority of the Court found that the high level of scrutiny was inappropriate for public library Internet filtering.<sup>95</sup> Yet the Court could not muster a majority opinion. The four-Justice plurality opinion, authored by Justice Rehnquist, held that public libraries require and merit broad discretion to make content-based decisions in collection and Internet management because their very purpose is to provide selective access to information.<sup>96</sup> Because the CIPA Internet filter categories were found to be content-based, CIPA did not induce libraries to go beyond their allowed discretion under the First Amendment. The Court likened the public library to two other institutions that had received similar deference: editorial discretion in public broadcasting as recognized in *Arkansas Educational Television Commission v. Forbes*<sup>97</sup> and aesthetic assessments in awarding of national funding for the arts as held in *National Endowment for Arts v. Finley*.<sup>98</sup>

¶47 The plurality opinion in *American Library Ass'n* does not discuss the limits of libraries' collection management discretion. The plurality only suggests that the content-based Internet filtering was reasonable in light of the library's purpose.<sup>99</sup> But the multiple opinions reveal a widely shared assumption among the Justices that if libraries did not disable the filters for patrons to gain access to protected speech, that refusal could be unreasonable in light of the libraries' mission.<sup>100</sup> Justice

94. 20 U.S.C. § 7001 note (2006).

95. See *ALA II*, 539 U.S. at 204–09 (plurality opinion); *id.* at 215–17 (Breyer, J., concurring).

96. *Id.* at 204–09 (plurality opinion). Rather than drawing on his *Pico* dissent, in which he wrote that public libraries were “designed for freewheeling inquiry,” Bd. of Educ. v. *Pico* (*Pico III*), 457 U.S. 853, 915 (1982) (Rehnquist, J., dissenting, joined by Burger, C.J., and Powell, J.), Justice Rehnquist wrote that the public library's mission was to provide only “material of requisite and appropriate quality for educational and informational purposes.” *ALA II*, 539 U.S. at 211.

97. *Id.* at 204 (citing *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 672–73 (1998)).

98. *Id.* at 205 (citing *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 585–86 (1998)).

99. Despite the determination that forum analysis was inappropriate, the prevailing opinion worked through and rejected both traditional and designated public forum status for public library Internet access. This analysis would normally imply that the public library's collection was a nonpublic forum, the default for government property rejected as traditional or designated public forums. In a nonpublic forum, content-based decisions are held to a standard of reasonableness in light of the purpose of the forum, but viewpoint-based decisions are still prohibited. The plurality equated libraries with public broadcasters, which the Court held to be nonpublic forums, and with federal arts awards, which the Court reviewed for viewpoint discrimination, a review consistent with nonpublic forum standards. *Forbes*, 523 U.S. at 680–82 (holding that a public television candidates' debate was a nonpublic forum in which viewpoint discrimination is forbidden and other content-based distinctions must be reasonable in light of the institutional purpose). See *Finley*, 524 U.S. at 580–81, 587 (finding decency criteria for arts awards to be merely advisory and so not viewpoint discrimination, but suggesting that a calculated attempt to suppress certain ideas or viewpoints would be unconstitutional). See *infra* ¶ 60 for a discussion of *Crosby v. S. Orange County Cmty. Coll. Dist.*, 172 Cal. App. 4th 433, 443 (Cal. Ct. App. 2009) (interpreting *American Library Ass'n* as finding libraries to be nonpublic forums).

100. The three dissenters and Justice Kennedy in his concurrence emphasized the potential unconstitutionality of permanent filters that block lawful speech. *ALA II*, 539 U.S. at 224 (Stevens, J., dissenting); *id.* at 233 (Souter, J., dissenting, joined by Ginsburg, J.); *id.* at 214–15 (Kennedy, J., concurring); *id.* at 219 (Breyer, J., concurring) (describing unblocking as “an important exception” to CIPA

Stevens would have given the policy of deference to libraries the weight of First Amendment protection, which would have made the CIPA conditions unconstitutional violations of the libraries' rights.<sup>101</sup> Justice Souter's dissent applied strict scrutiny to the actions a library could take under CIPA and found it "would simply be censorship."<sup>102</sup> In all, eight of the Justices found the ability of adult patrons to gain access to protected Internet speech to be important to the constitutionality of the library's use of Internet software filters.

¶48 The impact of *American Library Ass'n* continues to be measured. Lower courts continue to recognize some rights of access to information through public libraries, but they no longer categorize public libraries as limited public forums or apply strict scrutiny in library cases. Library literature is replete with conclusions that the *American Library Ass'n* decision directs libraries to disable filters for access to legal content upon request by adult patrons.<sup>103</sup> On the other hand, some states, counties, and municipalities have passed laws to require library Internet policies or CIPA-like filtering of the Internet in public libraries within their jurisdictions.<sup>104</sup> The first case to test *American Library Ass'n's* implicit requirement to disable filters for adults who request full access found that the Washington state constitution only requires a public library to unblock access to web sites that meet the library's mission, policy, and CIPA compliance.<sup>105</sup> Nonetheless, many public libraries have refused to apply for federal CIPA funding, citing both their refusal to filter the Internet and the burdensome application process for CIPA funds.<sup>106</sup> Law librarians

filtering requirements). Even the plurality implied that overblocking software might raise constitutional problems when Rehnquist wrote that "any such concerns are dispelled by the ease with which patrons may have the filtering software disabled." *Id.* at 209 (Rehnquist, C.J., joined by O'Connor, Scalia, and Thomas, JJ.).

101. *See id.* at 226 (Stevens, J., dissenting) (citing *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967)).

102. *Id.* at 234–35 (Souter, J., dissenting, joined by Ginsburg, J.).

103. The American Library Association interpreted the decision to require libraries to disable filters or unblock particular sites for requesting adults. CIPA Decision Response: A Statement from ALA President Carla D. Hayden and the ALA Executive Board 1–2 (July 25, 2003), available at <http://0-www.ala.org.sapl.sat.lib.tx.us/Template.cfm?Section=archive&template=/contentmanagement/contentdisplay.cfm&ContentID=39847>; Mary Minow, *Lawfully Surfing the Net: Disabling Public Library Internet Filters to Avoid More Lawsuits in the United States*, FIRST MONDAY, Apr. 5, 2004, <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/1132/1052>.

104. *See, e.g.*, Danielle Sottosanti, *Oro Valley Council Gives Its Approval to Filtering of Internet Porn at Library*, ARIZ. DAILY STAR, Feb. 15, 2007, at 9 (describing library Internet filters as subject to discretionary unblocking by librarians on library computers but not to be disabled for library wireless Internet access); *see also* Nat'l Conference of State Legislatures, *State Internet Filtering Laws*, <http://www.ncsl.org/issuesresearch/telecommunicationsinformationtechnology/stateinternetfilteringlaws/tabid/13491/default.aspx> (last updated Dec. 28, 2009) (providing a chart showing that a minority of states have laws requiring public libraries to develop acceptable use policies).

105. *Bradburn v. N. Cent. Reg'l Library Dist.*, 231 P.3d 166 (Wash. 2010). This question was certified to the Washington State Supreme Court from the federal District Court for the Eastern District of Washington. Application of the state constitutional finding to the facts of the case was, at the time of this writing, pending with the district court. The federal constitutional questions were also pending with the district court. *See Bradburn v. N. Cent. Reg'l Library Dist.*, No. CV-06-0327-EFS, 2008 WL 4460018 (E.D. Wash. 2008).

106. In 2007, 43.8% of public libraries reported that they did not apply for federal E-Rate discounts for Internet access. Thirty-eight percent cited the complicated process, 36% cited the low value of the discount compared with time needed to participate, and 33.9% cited the need to comply

have not weighed in heavily on this subject, and most appear to continue to provide unfiltered access to the Internet.<sup>107</sup>

¶49 Law libraries can look to *American Library Ass'n* for authority that Internet filters designed to address problems of access to illegal content or even simply prioritize access to information in support of a collection policy are likely to be upheld. The safest approach, though, may be to provide procedures for unblocking particular web sites and disabling the filter upon request.

### The Lower Courts Fill in the Gaps

#### *Libraries as Limited Public Forums for the Right to Receive Information*

¶50 After *Pico* and before *American Library Ass'n*, the lower courts developed a line of opinions that increased the level of First Amendment scrutiny courts gave to libraries' decisions. These cases shaped recognition of libraries as limited public forums for the right to receive information. Several cases reviewed regulations of library patrons and found in favor of the libraries. In challenges to libraries' decisions to restrict access to particular materials through a Braille program, the Internet, or by relocation of books, courts held libraries had violated library users' rights to receive information.

¶51 *Playboy* magazine was the subject of conflict in a District of Columbia federal district court case of *American Council of the Blind v. Boorstin* in 1986.<sup>108</sup> Considering the case just a few years after *Pico*, the district court held that the Library of Congress practice of providing Braille copies of popular magazines through the Library's Program for the Blind and Physically Handicapped constituted a nonpublic forum in which viewpoint discrimination was not permitted. The case involved a challenge to the decision of the Librarian of Congress to discontinue the production of Braille copies of *Playboy* magazine after a Congressman was successful in securing a funding decrease for the program equal to the cost of providing the Braille copies of *Playboy*. The court found that the elimination of *Playboy* from the program was because of its sexually oriented content and was viewpoint discrimination, and the court directed the Librarian to reinstate the Braille production and distribution of the magazine. The court said, "[a]lthough individuals have no right to a government subsidy or benefit, once one is conferred, as it is here through the allocation of funds for the program, the government cannot deny it on a basis that impinges on freedom of speech."<sup>109</sup> The district court went to some effort to uncover the intent of the Librarian, including noting that he had overruled his staff's recommendations. The district court did not cite the *Pico* decision, but the focus on a factual determination of the basis for the removal of the title from the program was similar to the analysis in the *Pico* school book removal case.

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with CIPA's filtering requirements as reasons for not applying for the E-Rate discounts. John Carlo Bertot, Charles R. McClure & Paul T. Jaeger, *The Impacts of Free Public Internet Access on Public Library Patrons and Communities*, 78 LIBR. Q. 285, 294 (2008).

107. See Fraley, *supra* note 93, at 10.

108. *Am. Council of the Blind v. Boorstin*, 644 F. Supp. 811 (D.D.C. 1986).

109. *Id.* at 815.

¶52 The Third Circuit was the first court to recognize public libraries as limited public forums for the right to receive information. The court's opinion in *Kreimer v. Bureau of Police*,<sup>110</sup> ten years after *Pico*, did not concern the content of the library's collection, but rather regulations on user behavior and hygiene. Richard Kreimer, a homeless man who frequented the Morristown public library, challenged his ejection from the library for violating library policies that regulated user behavior and hygiene. Kreimer argued that the library's policies were impermissibly vague and overbroad and in violation of his First Amendment and due process rights under the Fourteenth Amendment.<sup>111</sup>

¶53 The Third Circuit reversed the district court's summary judgment for Mr. Kreimer. The circuit court embraced "the positive right of public access to information and ideas" and determined that although the right to receive information may be overcome by significant competing interests, it did include "the right to some level of access to a public library, the quintessential locus of the receipt of information."<sup>112</sup> The *Kreimer* court reviewed the *Pico* decision and distinguished the inculcative role of school libraries from the role of public libraries and concluded that the Morristown library was a limited designated public forum dedicated "to aid in the acquisition of knowledge through reading, writing and quiet contemplation."<sup>113</sup> The circuit court evaluated whether each challenged library patron rule prohibited activities that were within or beyond the purpose of the library as a limited public forum. Rules that prohibited behavior inconsistent with the library's purposes were upheld under a reasonableness standard. Personal grooming requirements were subjected to strict scrutiny because library users subject to this restriction could be using the library for its intended purpose and yet be in violation of the policy, but the court upheld these requirements as well.<sup>114</sup>

¶54 In 1998, a federal district court in Virginia cited *Kreimer* as the only case to have examined whether a public library constituted a limited public forum. In two connected decisions, the Virginia federal district court in *Mainstream Loudoun v. Board of Trustees* considered the constitutionality of Internet filtering in the public library.<sup>115</sup> The Loudoun County library board of trustees had adopted a "Policy on Internet Sexual Harassment" in order to install commercial Internet-filtering software and prevent access to child pornography, obscenity, and material considered harmful to juveniles.<sup>116</sup> A local nonprofit group and individuals from the county sued for violation of their First Amendment rights to receive protected speech, both because the software blocked beyond the library board's categories and because adults were restricted to content suitable for minors. Procedures for dis-

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110. *Kreimer v. Bureau of Police*, 958 F.2d 1242 (3d Cir. 1992).

111. *Id.* at 1249.

112. *Id.* at 1255.

113. *Id.* at 1261.

114. *See id.* at 1262-64.

115. *Mainstream Loudoun v. Bd. of Trs. (Loudoun I)*, 2 F. Supp. 2d 783 (E.D. Va. 1998) (denying the defendant's motion to dismiss and for summary judgment); *Mainstream Loudoun v. Bd. of Trs. (Loudoun II)*, 24 F. Supp. 2d 552 (E.D. Va. 1998).

116. The filtering also prevented access to e-mail and chat rooms, and all computers were positioned to be in full view of library staff. These provisions, however, were not at issue in the *Mainstream Loudoun* case. *Loudoun II*, 24 F. Supp. 2d at 556.

abling were also challenged as burdens on First Amendment rights. The library board argued that the library “could constitutionally prohibit access to speech simply because it was authored by African-Americans, or because it espoused a particular political viewpoint, for example pro-Republican.”<sup>117</sup>

¶55 The *Mainstream Loudoun* court found that the library board intended to create county libraries “for the limited purposes of the expressive activities they provide, including the receipt and communication of information through the Internet.”<sup>118</sup> The court determined that Internet access did not present the same scarcity and inculcative mission factors that justified broad deference to secondary school libraries in *Pico*.<sup>119</sup> The court applied strict scrutiny to the content-based restrictions of the Internet and found the policy failed because it did not serve a government interest that was compelling, and also that it was not narrowly tailored to serve that interest. The library did not produce empirical evidence to support its argument that full access to the Internet created a hostile or harassing environment for employees or library users, and the library had not employed a number of less restrictive approaches to limiting unwanted access to harmful or illegal content. The court also found that the Internet filter was a prior restraint on speech because the policy provided inadequate standards and procedural safeguards to the library staff to determine when and how to disable the filter.

¶56 Two years later, a federal district court in Texas cited language in *Pico*, *Kreimer*, and even *Brown v. Louisiana* in holding that “[t]he right to receive information is vigorously enforced in the context of a public library . . . .”<sup>120</sup> In *Sund v. City of Wichita Falls*, the court reviewed community members’ challenge to a library board resolution that allowed library card holders to petition for the relocation of offensive books from the children’s section of the library to the section for adults. Two books in the library’s children’s collection, *Heather Has Two Mommies* and *Daddy’s Roommate*,<sup>121</sup> had been the subject of much debate within the community. The resolution specified that 300 signatures out of the community of 100,000 residents would trigger the relocation of a book within the library.<sup>122</sup> The *Sund* court held that the public library was a limited public forum for the right to receive information. The court applied strict scrutiny to the resolution and found that it burdened speech on the basis of both content and viewpoint. The court said that evidence clearly showed the purpose of the resolution was to suppress access to the two controversial books. The court held that the resolution did not serve a compelling government interest and was not narrowly tailored, and it entered a permanent injunction against the library board resolution.

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117. *Loudoun I*, 2 F. Supp. 2d at 792.

118. *Loudoun II*, 24 F. Supp. 2d at 563.

119. This determination was made in the first opinion in the case, *Loudoun I*, 2 F. Supp. 2d at 795.

120. *Sund v. City of Wichita Falls*, 121 F. Supp. 2d 530, 547 (N.D. Tex. 2000).

121. *Id.* at 532. Both books dealt with homosexual parents.

122. *Id.* at 534. The court made much of the interference of the board with the ability of the library administrator to perform her duties “as a trained, skilled, and very competent professional.” The court noted Ms. Hughes’s master’s degree in library science and her adherence to a code of ethics that the court described as governing professional librarians. *Id.* at 541.



¶57 The Sixth Circuit in 2003 considered a First Amendment and due process challenge to a public library's one-day ejection of a patron for violation of a library policy requiring the wearing of shoes.<sup>123</sup> *Neinast v. Board of Trustees* was decided three months after *American Library Ass'n*, but the Sixth Circuit did not cite the Supreme Court opinion or make use of its rejection of forum analysis for public libraries. The Sixth Circuit found the library was a limited public forum for the right to receive information but upheld the district court's summary judgment in favor of the Columbus library. The circuit court found the library's policy and process did not directly burden the right to receive information and met the applicable standard for rationality.<sup>124</sup> The court cited *Kreimer* for the conclusion that a right to receive information included "the right to some level of access to a public library, the quintessential locus of the receipt of information."<sup>125</sup> The court then cited *Kreimer*, *Sund*, and *Mainstream Loudoun* as support for its determination that the library is a limited public forum for the right to receive information.<sup>126</sup>

### *Nonpublic Forums and Procedural Due Process*

¶58 Since *American Library Ass'n*, lower courts have largely avoided use of the limited public forum designation that formed the basis for the line of precedent established by *Kreimer*, *Loudoun*, *Sund*, and *Neinast*. However, a First Amendment right to receive information through a public library survived to form the basis for First Amendment and due process challenges to patron regulations and Internet use policies. The *Pico* standard for school library book removal also survived as nonbinding but useful authority. One court considered *American Library Ass'n* authority for application of nonpublic forum status to a community college library's Internet content policies, and another maintained *Kreimer* was authority for limited public forum analysis for review of patron regulations.<sup>127</sup>

¶59 A right to receive information through public library Internet access was entitled to procedural due process protection, according to a 2004 federal district court in North Carolina. In *Miller v. Northwest Region Library Board*, the court said the *American Library Ass'n* case made clear that public libraries are entitled to restrict access to Internet sites containing visual obscenity or child pornography, but that "*American Library Association* does not stand for the proposition that no constitutional protections apply to Internet computers at public libraries."<sup>128</sup> The North Carolina district court cited *Kreimer* and *Neinast* for the proposition that the First Amendment includes the "positive right of public access to information and ideas" and "the right to some level of access to a public library . . ."<sup>129</sup> Based on these cases, the district court held that the plaintiff, who viewed Internet pornog-

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123. *Neinast v. Bd. of Trs.*, 346 F.3d 585 (6th Cir. 2003).

124. *See id.* at 591–92.

125. *Id.* at 591 (quoting *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1255 (3d Cir. 1992)).

126. *Id.*

127. *Crosby v. S. Orange County Cmty. College Dist.*, 172 Cal. App. 4th 433 (Cal. Ct. App 2009); *Hill v. Derrick*, No. 4:05-CV-1229, 2006 WL 1620226 (M.D. Pa. Jun. 8, 2006) (applying a reasonableness standard to library regulations prohibiting corporal punishment because rules did not directly impact the patron's right to receive information and upholding the regulations).

128. *Miller v. Nw. Region Library Bd.*, 348 F. Supp. 2d 563, 569–70 (M.D.N.C. 2004).

129. *Id.* at 570 (quoting *Kreimer*, 958 F.2d at 1255).

raphy in violation of library policy, was entitled to due process before being banned from the library system's Internet computers. Because issues of fact remained unresolved, the *Miller* court also denied the plaintiff's motion for summary judgment.

¶60 In 2009, in *Crosby v. South Orange County Community College District*, a California district court applied a reasonableness standard of review to the community college library's Internet use policy. The college's policy restricted campus Internet service, including in the college library, to "appropriate academic, professional and institutional purposes."<sup>130</sup> The policy also prohibited viewing or sending of "obscene, indecent, profane, lewd, or lascivious material or other material which explicitly or implicitly refers to sexual conduct . . ."<sup>131</sup> A college student challenged the policies after a campus police officer asked him to stop viewing MySpace images the officer said were pornographic. The district court found that the college library was analogous to a public library and cited *American Library Ass'n* in determining that library Internet use was not a traditional or designated public forum.<sup>132</sup> The court reviewed the library Internet use policies as a nonpublic forum, and determined that they met standards for reasonableness and were not intended to suppress a particular viewpoint.<sup>133</sup>

¶61 A challenge to a library's refusal to disable Internet filters was filed in *Bradburn v. North Central Regional Library District*. The Washington Supreme Court ruled that state constitutional protections for speech did not require the library to disable the filter or unblock web sites for access to all constitutionally protected speech. The court did find that the library would be required to unblock access to sites inadvertently overblocked by the filtering software if the web site content was consistent with the library's mission, collection policy, and any applicable CIPA-compliance requirements.<sup>134</sup> Using the standards for a nonpublic forum, the court held that the state constitution would be upheld as long as the library's filtering policy "is reasonable when measured in light of the library's mission and policies, and is viewpoint neutral."<sup>135</sup> The application of the facts to both Washington State and federal law remain within the jurisdiction of the federal district court, where the case was still pending at the time of this writing.

¶62 The four-Justice *Pico* standard for review of book removal in a school library was accepted as persuasive authority in 2009 in the Eleventh Circuit upholding of the removal of a book from the Miami-Dade County school libraries.<sup>136</sup> Neither the district court nor the Court of Appeals found the *American Library Ass'n* opinion relevant enough to merit distinguishing. *ACLU v. Miami-Dade County School Board* involved a challenge to the school board's withdrawal of

130. *Crosby*, 172 Cal. App. 4th at 436 (quoting the District Board's policy).

131. *Id.* at 438 (quoting the District Board's policy).

132. *Id.* at 443 (citing *United States v. Am. Library Ass'n (ALA II)*, 539 U.S. 194, 205–06 (2003)).

133. *Id.* (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)).

134. *Bradburn v. N. Cent. Reg'l Library Dist.*, 231 P.3d 166, ¶ 46 (Wash. 2010).

135. *Id.* at ¶ 65.

136. The Eleventh Circuit accepted the *Pico* standard only as nonbinding authority. "With five different opinions and no part of any of them gathering five votes from among the nine justices—only one of whom is still on the Court—*Pico* is a non-decision so far as precedent is concerned. It establishes no standard." *ACLU v. Miami-Dade County Sch. Bd.*, 557 F.3d 1177, 1200 (11th Cir.), *cert. denied*, 130 S. Ct. 659 (2009).

multiple copies of the children's book *Vamos a Cuba* after some parents objected to its portrayal of work and school life in Cuba as being like work and school in the United States. A parent and two organizations challenged the removal under the First and Fourteenth Amendments. The district court found that the decisive factor in the removal of the book was the school board's intention to prevent access to ideas with which it disagreed and found that the board's claim of inaccuracies was a pretext for political orthodoxy. The Eleventh Circuit, in reviewing the facts *de novo*, held that prevention of access to factual inaccuracies was the motivation for the book's removal and, under the *Pico* standard, that motivation was legitimate. Even though members of the school board who were Cuban-American may have had an interest in the book's removal, the court of appeals found that their interest did not impugn their motive.<sup>137</sup>

## Status of First Amendment Protection for Libraries' Collection Decisions

### Nonpublic Forums Given Broad Discretion

¶63 The Supreme Court's *American Library Ass'n* decision interrupted the lower courts' line of precedent applying high standards of scrutiny to libraries' Internet and collection management as limited public forums for the right to receive information. But some boundaries to libraries' discretion are implicit in *American Library Ass'n* and explicit in other library cases. One of the ambiguities of the *American Library Ass'n* plurality opinion is whether the library's collection represents a nonpublic forum or whether it is not a forum at all.<sup>138</sup> If library collections are nonpublic forums, courts would not allow content-based distinctions unless they were reasonable in light of the library's purpose. In addition, viewpoint distinctions would not be permitted. But, if library collections are simply not forums at all, discretion might be limited only at the point that it becomes invidious viewpoint discrimination. The bottom line is, publicly funded law and other types of libraries have either broad discretion to manage their collections or very broad discretion to manage their collections.

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137. *Id.* at 1227.

138. The plurality points to public broadcasters and federal arts awards as "two analogous contexts" in which "the government has broad discretion to make content-based judgments in deciding what private speech to make available to the public." *United States v. Am. Library Ass'n (ALA II)*, 539 U.S. 194, 204 (2003) (citing *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 672-73 (1998); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998)). In *Forbes*, the Court outlined the usual public forum categories and included a fourth category for properties that are "not fora at all." *Forbes*, 523 U.S. at 677. Although the *Forbes* Court found the candidate debate at issue was a nonpublic forum, the Court suggested that most other television programming decisions would not be held to even the low standards of the nonpublic forum because the editorial decisions of broadcasters could not be expected to be viewpoint neutral. *See id.* at 679-82. In *Finley*, the Court found federal arts awards based on excellence necessarily were content-based decisions and absolute neutrality would not be possible. The Court characterized the awards criteria of excellence as content- but not viewpoint-based and suggested that invidious viewpoint discrimination might present constitutional problems. *See Finley*, 524 U.S. at 585-87.

### Unreasonable Content-Based Distinctions Prohibited

¶64 The *American Library Ass'n* decision may be seen as holding public libraries to the nonpublic forum standards that require content-based distinctions to be reasonable in light of the library's purpose. The Court's widely shared concern that libraries should unblock web sites to allow access to protected speech indicates that libraries' discretion has limits. One explanation would be that the library was held to the low standards for nonpublic forums, which would require content restrictions to be reasonable in light of the library's purpose.<sup>139</sup> The district court in *Crosby* interpreted the *American Library Ass'n* decision in this way when it upheld a community college library's Internet use policy as reasonable.<sup>140</sup>

¶65 This reasonableness standard might allow a library discretion to decide to filter the Internet in an attempt to prioritize access to categories of content most likely to support its collection development policy as a way to manage limited computer and bandwidth resources. Similarly, a court might uphold as reasonable a law library's removal of all computer manuals, older textbooks, and foreign law from a jurisdiction no longer taught or studied by the faculty in order to regain shelf space for newer publications. But, if an academic law library were to remove all books on the legal history of slavery or filter web sites about women's health but not men's, a court might well find the decision to be a content-based distinction that was unreasonable in light of the library's purpose and therefore in violation of speech and press freedoms under the First Amendment. Particularly if the content restriction raised equal protection questions of race or gender discrimination, a court might take the approach of *Brown v. Louisiana* and determine that a library had exceeded the boundaries of its First Amendment discretion. Law libraries are unlikely to violate the law, though, as they develop collections to meet the needs of their patrons.

### Viewpoint Distinctions Versus Content Distinctions

¶66 If library collections and Internet access are nonpublic forums, courts would also hold libraries to standards of viewpoint neutrality. Libraries would be prohibited from making collection decisions based on the viewpoint expressed in a book, journal, or Internet site.<sup>141</sup>

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139. See, e.g., *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678–79 (1992) (outlining qualities of traditional and dedicated public forums and then characterizing the rest by default as nonpublic forums). “Finally, there is all remaining public property. Limitations on expressive activity conducted on this last category of property must survive only a much more limited review. The challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view.” *Id.*

140. See *Crosby v. S. Orange County Cmty. Coll. Dist.*, 172 Cal. App. 4th 433 (Cal. Ct. App. 2009).

141. See, e.g., *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (“Although a speaker may be excluded from a nonpublic forum . . . the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.” (citations omitted)); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 48–49 (1983) (“[T]he school mail system is not a public forum . . . [H]owever, the access policy adopted by the . . . schools favors a particular viewpoint . . . and consequently must be strictly scrutinized . . .” (citation omitted)).

¶67 The complexity of the collection management process and the malleability of content and viewpoint categories, though, could make viewpoint neutrality review difficult. Viewpoint distinctions may be just as unavoidable as content distinctions in a library's collection management process.<sup>142</sup> Because content and viewpoint are not clearly differentiated, some distinctions that might be considered viewpoint-based could receive more deferential treatment if a court defined those distinctions as content-based. For example, graphic sexual content was at issue in both *American Library Ass'n* and in *American Council of the Blind v. Boorstin*.<sup>143</sup> In *American Library Ass'n*, the Supreme Court treated graphic sexual images as content, which courts allowed libraries broad discretion to exclude.<sup>144</sup> But in the *Boorstin* case, the district court treated graphic sexual content as viewpoint, which the court would not give the library discretion to exclude.<sup>145</sup>

¶68 Realistically, courts are unlikely to interfere with law libraries' title-by-title collection decisions, even when they turn on distinctions between viewpoints. Courts do not like to review complex library collection decisions that balance a multiplicity of factors such as quality of publisher, scholarly stature of the author, relevance to local practice habits or curricular needs, cost, currentness, etc. But if a law library were to collect only materials that advocated protection for school prayer and excluded materials that argued against protection for school prayer, a court could find the library's practice offensive to the First Amendment using non-public forum standards prohibiting viewpoint distinctions.

### Viewpoint Distinctions Versus Invidious Viewpoint Discrimination

¶69 Courts might hold libraries to an even more lenient standard that prohibits only viewpoint distinctions that are "invidious discrimination" against the viewpoint. Eugene Volokh has suggested that quality-based selective subsidies of private speech might be bound by this standard.<sup>146</sup> With this more generous extension of judicial deference, publicly funded libraries might be permitted to make distinctions based on viewpoint but could not discriminate against a viewpoint due to hostility toward the view or toward those who hold the view.<sup>147</sup>

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142. "[I]t is hardly clear that the line between viewpoint and other forms of content discrimination can be sustained, except possibly in extreme cases. Many subject matter restrictions (or standards of quality) will mask or reflect viewpoint distinctions . . ." Schauer, *supra* note 50, at 105 (1998). Schauer has suggested that librarians might appropriately make some viewpoint distinctions and wrote that few would disagree "with the ability of a librarian to select books accepting that the Holocaust happened to the exclusion of books denying its occurrence." *Id.* at 106.

143. *United States v. Am. Library Ass'n (ALA II)*, 539 U.S. 194, 200–01 (2003); *Am. Council of the Blind v. Boorstin*, 644 F. Supp. 811 (D.D.C. 1986).

144. *See ALA II*, 539 U.S. at 208.

145. *See Boorstin*, 644 F. Supp. at 816.

146. EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS* 411–12, 429 (3d ed. 2008). The *Finley* Court does not rest its holding on this distinction but says, "[W]e have no occasion here to address an as-applied challenge . . . shown to be the product of invidious viewpoint discrimination. If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998).

147. *Black's Law Dictionary* defines "invidious discrimination" as "[d]iscrimination that is offensive or objectionable, esp. because it involves prejudice or stereotyping." *BLACK'S LAW DICTIONARY* 535 (9th ed. 2009). The *Oxford English Dictionary* defines "invidious" as "[e]ntailing odium or ill-will

¶70 Justice Souter's dissent in *American Library Ass'n* suggests that a majority of the Court would agree that clear evidence of a library's viewpoint discrimination would offend the First Amendment. Justice Souter wrote that "in extreme cases" the evidence will be available for judicial determination that a public library was excluding material for "impermissible reasons (reasons even the plurality would consider to be illegitimate), like excluding books because their authors are Democrats or their critiques of organized Christianity are unsympathetic."<sup>148</sup>

¶71 The *Pico* plurality's standard for reviewing school library book removal is similar. Intent to suppress access to ideas may be the same as invidious viewpoint discrimination. The *Pico* plurality summarized: "[W]e hold 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 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'"<sup>149</sup> Justice Blackmun, in concurring, wrote "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."<sup>150</sup> Blackmun noted widespread support for this limit on library discretion among the plurality and the dissent: "[A]s the plurality notes, it is difficult to see how a school board, consistent with the First Amendment, could refuse for political reasons to buy books written by Democrats or by Negroes, or books that are 'anti-American' in the broadest sense of that term. Indeed, Justice Rehnquist appears 'cheerfully [to] concede' this point."<sup>151</sup> The Eleventh Circuit applied the *Pico* standard in *Miami-Dade* but upheld the school book removal, finding that the impermissible intent was not the sole motivation.<sup>152</sup> *Miami-Dade* shows that this low standard for impermissibility presents difficult evidentiary challenges. When other criteria coexist with impermissible motivation, determination of what is pretext and what is motivation is elusive.<sup>153</sup>

¶72 The hypotheticals at the beginning of this article—a collection of Democratic but not Republican authors, rejection of donated books arguing against voting rights for women, filtering of web sites on women's breast health, and removal of racist publications—present a range of potential invidious viewpoint

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upon the person performing, discharging, discussing, etc." 8 OXFORD ENGLISH DICTIONARY 50 (2d ed. 1989). Martin Redish describes invidious viewpoint discrimination as that which targets the speaker because of hostility toward the speaker's "pre-existing ideological and political expressive associations." Martin Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 117 (2007).

148. *ALA II*, 539 U.S. at 236 (Souter, J., dissenting) (citing *Bd. of Educ. v. Pico (Pico III)*), 457 U.S. 853, 870–71 (1982) (plurality opinion)).

149. *Pico III*, 457 U.S. at 872 (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

150. *Id.* at 879–80 (Blackmun, J., concurring in part and concurring in the judgment).

151. *Id.* at 878.

152. *ACLU v. Miami-Dade County Sch. Bd.*, 557 F.3d 1177, 1207 (11th Cir.), *cert. denied*, 130 S. Ct. 659 (2009).

153. Joelle C. Achtman, Note, *Pico Takes a Visit to Cuba: Will Pretext Become Precedent in the Eleventh Circuit?*, 63 U. MIAMI L. REV. 943 (2009) (reviewing public school library book removal challenges).

discrimination practices. A successful justification for the first, the systematic favoring of one major political party over another, would be difficult to imagine. As discussed above, the rejection of donated books on a topic might be considered either content or viewpoint distinctions and might be justified by current collection coverage, limited shelf space, or even irrelevance to a small county law library's collection plan. In most cases, a plaintiff would have a difficult burden to prove that a library rejected the books solely with the intent to prevent access to the ideas expressed. The filtering of web sites with the term "breast" might exclude a great deal of women's health information, but even a law library with the broader mission to support a law school might be able to justify the restriction on the basis of specific health information not being relevant to the law school's curricular priorities. The removal of materials because they express a racist perspective is by definition a removal based on suppression of access to the viewpoint, so a library might have a difficult time defending the action if challenged.<sup>154</sup> If the book was not appropriate for other reasons, such as not supporting an updated collection development policy or not being a priority when shelf space is tight, the coexistence of intent to suppress access to the idea could survive a *Pico*-type test. Despite the invalidation of some campus hate speech codes as offensive to the First Amendment, some campuses still have such codes, so law school libraries might encounter conflict between campus imperatives and the First Amendment.<sup>155</sup>

### Procedural Due Process for Internet Acceptable-Use Policies

¶73 When libraries create Internet use policies that limit patrons' access to illegal or low-priority content in keeping with the library's collection policy and mission, the *American Library Ass'n* decision makes clear that libraries are probably within their discretion under the First Amendment. However, when patrons are found in violation of the library's policies, the *Miller* district court opinion stands as an indication that the library may be held to some procedural due process requirements, such as an appeals process, before the patron is denied access to library resources.<sup>156</sup> The Internet itself is a powerful tool and sometimes a unique resource for legal information, so policies about use and enforcement of those policies are now integral to law libraries' collection management.

### First Amendment Rights of Libraries

¶74 The library plaintiffs in *American Library Ass'n* argued that their authority to make collection decisions should have First Amendment speech status and therefore be immune to the regulatory and even conditional funding efforts of Congress. Justice Stevens, in dissent, embraced this argument and wrote that CIPA offends the First Amendment because it impairs the ability of local libraries to truly

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154. "The U.S. approach to regulation of racist speech is one of broad protection, with the exception of situations in which such speech is coupled with violence." Jeannine Bell, *Restraining the Heartless: Racist Speech and Minority Rights*, 84 IND. L.J. 963 (2009); see *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

155. See Bell, *supra* note 154, at 975 (citing *Doe v. Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989) and *UMW Post v. Bd. of Regents of Univ. of Wis.*, 774 F. Supp. 1163 (E.D. Wis. 1991)).

156. See *Miller v. Nw. Region Library Bd.*, 348 F. Supp. 2d 563 (M.D.N.C. 2004).

employ their own discretion and acts “as a blunt nationwide restraint on adult access . . . .”<sup>157</sup> The libraries’ claim was noted by the plurality as an argument that ran counter to First Amendment precedent, yet the plurality specifically left the issue open.<sup>158</sup>

¶75 Academic freedom could be recognized as a basis for academic law libraries’ First Amendment authority to manage collections without institutional or external governmental interference. Currently, though, the law of academic freedom is underdeveloped, and the application of any such protections to academic librarians or other librarians is unclear.<sup>159</sup>

## Conclusion

¶76 This survey of the First Amendment law of library collections shows that law libraries and other publicly funded libraries have broad discretion to make collection decisions, including decisions about Internet access. Good collection management practices will tend to conform to First Amendment law, since librarians are likely to make choices that are reasonable in light of their library’s purpose, and because librarians generally uphold the library profession’s commitment to robust discourse and noncensorship. Libraries should take care that policies on access to information though the library’s Internet support the library’s mission, and if restrictions are enforced, the library should follow procedures that allow patrons an appeals process before library information resources are denied.

¶77 The First Amendment could provide some protection to librarians’ collection decisions, perhaps shielding them from authorities lacking librarians’ expertise and commitment to ethical principles of robust access to information. Currently, however, libraries and librarians do not have this type of First Amendment insulation. But the boundaries of libraries’ First Amendment discretion can protect librarians’ efforts to provide access to information, even when that information is controversial. If institutional interference or external forces threaten to limit the collection in some way, librarians can take refuge not only in library professional ethics and the logic of supporting libraries’ missions, but also in the boundaries of discretion under the First Amendment. Fortunately, law library directors generally report to judges, boards of local attorneys, or law school deans, many of them experts in the First Amendment and generally protective of librarians’ role as collection managers. Even so, the test of robust access to information is tolerance for unpopular views, so law librarians should be alert not only to the external threats but also to their own inclinations to shape collections to reflect their own interests

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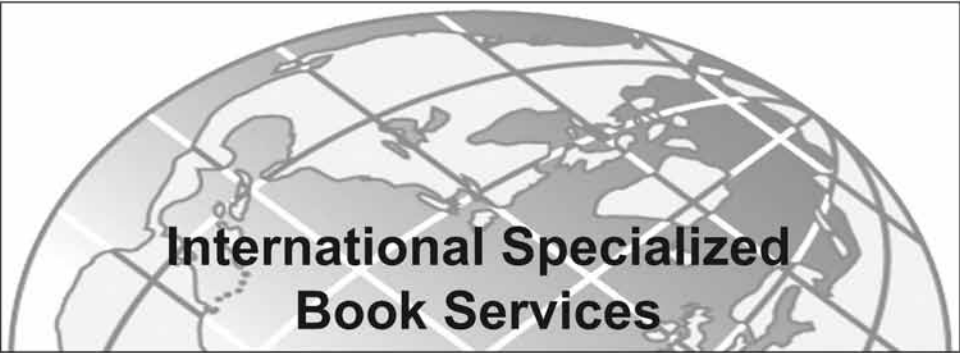
157. *United States v. Am. Library Ass’n (ALA II)*, 539 U.S. 194, 220 (2003) (Stevens, J., dissenting) (rejecting the constitutional conditions doctrine’s recognition of a distinction between indcement through restrictions on benefits and outright prohibitions).

158. *See id.* at 211 (plurality opinion).

159. *See, e.g.,* Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 *GEO. L.J.* 945 (2009); Neal H. Hutchens, *A Confused Concern of the First Amendment: The Uncertain Status of Constitutional Protection for Individual Academic Freedom*, 36 *J.C. & U.L.* 145 (2009); Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 *U. COLO. L. REV.* 907 (2006).



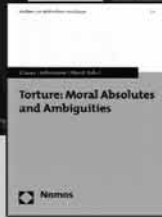
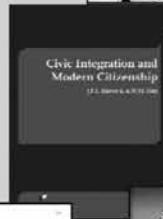
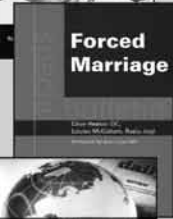
or tolerances. Law librarians are the primary custodians of libraries' broad First Amendment discretion and should exercise that discretion with awareness that collection management can support library institutional missions, librarians' ethical principles, and a number of the important goals of the First Amendment.



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