PIECES OF PICO: SAVING INTELLECTUAL FREEDOM IN THE PUBLIC SCHOOL LIBRARY

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I. INTRODUCTION

For twenty years, Board of Education v. Pico (Pico) stood as the Supreme Court's leading pronouncement upon and against censorship in public libraries. But as a guiding light, Pico left much to be desired. The decision, concerning not the usual public library with which Americans interact routinely but a high school library, muddied the straightforward question of free expression law with the vagaries of juvenile law. Worse, Pico resulted in a fractured plurality decision led by Justice Brennan. The only member of the plurality still serving is Justice Stevens, the Court's eldest member. The dissenters—who generated four separate opinions in Pico, apart from the two concurrences—included Justice Rehnquist, now the Court's chief, and Justice O'Connor.

Other circumstances further complicated Pico's legacy. The Court's jurisprudence in the decades after Pico drifted away from the activist jurisprudence, born of the civil rights era (of plurality members Brennan, Marshall, and Stevens), and moved toward the more conservative jurisprudence of Rehnquist and O'Connor. Later in the 1980s, the Supreme Court distanced itself from its straightforward 1969 proposition that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." In the 1990s and 2000s, school authority eclipsed student civil rights in a broader range of contexts, not limited to the First Amendment area, consistent with the Rehnquist Court's new-federalist regard for local officials' discretion on local matters. Through the last decades of the twentieth century and

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into the twenty-first, the rights of young people in public schools fell from civil rights-era heights. Students today may be compelled to urinate for suspicionless drug tests as a prerequisite for choir, and school newspapers may be censored upon allegations of bias. To the present-day reader, Justice Brennan’s righteous declarations in *Pico* upon the importance of free inquiry for developing young minds might seem no more than a recitation of quaint platitudes.

The Court in 2003 revisited the role of libraries in American society. *United States v. American Library Association* (hereinafter *ALA*), looked at the general public library rather than the school. The shifts in jurisprudential tides over the last thirty years converged in a plurality decision permitting the federally mandated filtering of public library Internet terminals. Neither the four-Justice plurality opinion, authored by Chief Justice Rehnquist, nor a fifth concurrence by Justice Kennedy, made any mention of *Pico*. There was no effort to overrule, to distinguish, or even to harmonize the one Court decision that offered at least arguably controlling precedent in library law. Even Justice Stevens, one of three dissenters, did not cite *Pico*. In fact, Justice Stevens’s objection to mandatory Internet filtering was predicated on the federal rather than local character of the mandate, suggesting an affection for new-federalist deference to local authorities vis-à-vis children’s civil rights.

*ALA*, however, did not raise the question of government authority to filter young people’s Internet access in public school libraries, though the federal law reaches there too. But none of the justices, including the

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8. See generally Richard J. Peltz, Use “the Filter You Were Born With”: The Unconstitutionality of Mandatory Internet Filtering for the Adult Patrons of Public Libraries, 77 Wash. L. Rev. 397 (2002) (discussing, before court rulings, the interests at stake in the *ALA* litigation).
10. See id. at 220–31 (Stevens, J., dissenting).
11. See id. at 220 (Stevens, J., dissenting).
12. See Peltz, supra n. 8, at 399 n. 13. Before both *ALA* and the federal law therein at issue, Glenn Kubota posited that filtering student access to public school Internet terminals would contravene the constitutional mandate of *Pico*. Glenn Kubota, Public School Usage of Internet Filtering Software: Book Banning Reincarnated? 17 Loy. L.A. Ent. L.J. 687, 712–28 (1997) (“The freedom of choice enjoyed by students while browsing the Internet is analogous to students
dissenters in dicta, seemed troubled by the prospect of imposing filtering on underage computer users.

Unsurprisingly, and likely lawfully then, Internet filtering software has come into widespread use in school libraries. By way of example, I attended an educators’ conference in 2003 at which Baltimore County Public Schools (BCPS) library technology specialists encouraged Maryland school librarians to install filtering software on their Internet access terminals. The policy argument advanced to justify content-filtering of student Internet access was based on the notion that the library is an extension of the school curriculum and, presumably, no more. Thus school officials may control library content just as surely as they are empowered to determine what subjects are taught in the classrooms and what historical and geographical units are covered in social studies classes.

The BCPS policy plainly states, “No personal use of any kind [of library telecommunications equipment] is permitted.” Indeed, this distinction, between the curricular, or co-curricular, on the one hand, and the extracurricular, or non-curricular, on the other, was the animating principle of Hazelwood School District v. Kuhlmeier, a 1988 Supreme Court decision that endowed school principals with considerable discretion to engage in prior restraint and censorship of curricular student publications. Hazelwood imparted the strange result that untrained and unsupervised students engaged in the underground leafleting of amateurish draft (extracurricular) enjoy a minimally restrained liberty to write what they please, while student journalists aspiring to the professional norms of independence, balance, and truth (curricular) labor in the shadow of the Damoclean spike of the principal-censor.

searching the library and voluntarily choosing books of interest. Schools cannot claim to have any real curricular control over such an open-ended, free-wheeling, and unsupervised activity.”).


15. Id.


Whatever role filters should play in school libraries, as a matter of policy, this rationale based on the curricular model goes too far and poses a serious threat to the intellectual freedom of both students and the school librarians themselves. If the school library exists only to enhance the school curriculum, then students in the library are as tightly regulated there as they are in the classroom, where they may be told that only a certain topic is fit for inquiry. Worse, school librarians under this curricular model may be constrained in their professional discretion, just as teachers have been constrained in their classroom discretion since Hazelwood. In the end, the school library that is no more than an extension of the classroom may be drawn into narrow debates about what is appropriate or inappropriate for formal instruction. Ultimately, the school library may be deprived of its role as a place for students to experiment with wide-ranging intellectual exploration and development, and the school librarian may be deprived of the discretion that lies at the heart of what it means to be a librarian.

This curricular vs. extracurricular battle for the heart and soul of the public school library and librarian is a problem as old as the school library itself. Since the first school librarian was hired in 1900, librarians, teachers, and other educators have struggled to define the librarian’s role in the school community. In fact, school librarianship was born of both educators’ and librarians’ professional communities. Moreover, its mission has always incorporated a duality—a service to two masters who sometimes act in harmony and who sometimes act at odds. School administrators and teachers long looked jealously upon the growing resources of the school library and more than once threatened to subsume it within their authority. Professional librarians meanwhile guarded the institution’s autonomy, at first to nurture purely physical resources, and later to enhance intangible values such as professional status and intellectual freedom. Always pulled in these two directions, the school librarian relished incorporation into the curricular planning process and the administration of the school, but struggled to retain the distinct identity of the library. That identity came to equate with the principle of voluntary inquiry, a principle consistent with the broad educational mission of the school, but not so consistent with the compulsory nature of curriculum-based learning. The modern problem of Internet filtering again threatens to undermine the school library and librarian’s delicate position, and to collapse the dual identity of the school library, sacrificing the principle of voluntariness upon the altar of

18. See id. at 499–500 & n. 150.
19. See infra n. 81 and accompanying text.
compulsion.

This article does not contend that the curricular model has no place in public education. Clearly, an orderly and dependable education system requires that students undertake assigned readings, writings, and exercises, and engage in classroom discussions on assigned topics—all to the laudable aim of furnishing every student with the general knowledge and skills that our society deems essential. Moreover, the school library at times serves as a classroom for instruction in the use of information resources, or as a curricular adjunct for students to complete their assignments. The school library in these capacities is admittedly a place of compulsory curricular learning.

At the same time, however, the school library must be preserved, consistent with the intentions that animated its founding, as a place also for extracurricular learning based upon the principle of voluntary inquiry. The modern school library possesses and makes available to students a vast array of resources, including both fiction and nonfiction books, that are not assigned for reading in any class and that present content far exceeding the scope of the school curriculum. In the school library, students are routinely permitted to roam without restriction, outside the hours of structured classes, to explore, investigate, and discover. If the library is to continue as a place for students to engage in the sort of self-fulfillment or self-discovery that is the very objective of free expression as a natural-law right, then the freedom of thought and expression afforded students in the library in this extracurricular capacity must be of a different order than that afforded students in the curricular classroom, or in the library in its curricular capacity.

It thus becomes essential, to preserve the intellectual freedom of public school students and librarians, and in turn the intellectual freedom of all citizens educated in public schools, that the curricular and extracurricular capacities of the school library remain distinct, and the latter afforded an appropriately broader range of constitutional protection. Justice Brennan in Pico did not mistakenly fail to distinguish the school library from the community library; rather, he correctly recognized that the school and community libraries share objectives that are exclusive of the shared educational mission of the school classroom and school library. School librarians who eschew this similarity in favor of the curricular model risk surrendering any “pieces” of Pico-inspired intellectual freedom that might yet remain in the school library after ALA. This article contends, therefore, that school librarians must be vigilant in their policies and practices to maintain the school library as a forum for free, vigorous, and voluntary student exploration, and to safeguard the school library against utter usurpation by curricular
Part II of this article explores the peculiar history of the school library, demonstrating the origin, historical development, and continuing importance of its dual mission. Part III reviews the case law of intellectual freedom in the modern public library, particularly with reference to Pico and the key Supreme Court decisions, Brown v. Louisiana and ALA, that preceded and followed Pico. In light of the investigations of Parts II and III, Part IV of this article analyzes the legal and policy implications of school librarians' adoption of a curricular self-image. Considering Internet filtering as a case in point, the article ultimately suggests that the curricular image needlessly jeopardizes the intellectual freedom of both students and school librarians, recognized in Pico, and that to preserve that freedom—the remaining pieces of Pico—the librarians must preserve a distinction between the curricular and extracurricular capacities of the public school library. Part V concludes.

II. HISTORY OF THE PUBLIC SCHOOL LIBRARY

A. Introduction

To understand the legal status of the public school library, one is tempted to resort to history. Part III of this paper will explore the rubrics for legal analysis of free expression problems in schools, but suffice it to say for the moment, the case for free inquiry often turns on the crucial threshold question of whether the First Amendment activity occurs in an environment that is, on the one hand, curricular, or co-curricular, or on the other hand, extracurricular, or non-curricular. When the environment is the public school library, the question of its curricular or extracurricular character thus becomes salient. One might hope that historical inquiry would reveal its identity as one or the other. Historical inquiry reveals instead that the American public school library has always carefully straddled this line.

On the one hand, the school library clearly is an adjunct to the curriculum. Students are given curricular research assignments and expected to complete those assignments using the resources of the school library.


21. "Non-curricular" is perhaps more accurate than "extracurricular," as the former clearly suggests all that is outside the prescribed curriculum regardless of curricular ties. However, "non-curricular" might import a connotation of "not educational," which could not be more inaccurate when referring to the use of books and libraries. Therefore this article henceforth uses the term "extracurricular" to include expansively both organized activities outside the prescribed curriculum and all manner of informal and individual activity outside the prescribed curriculum.
The library is expected to maintain a collection that is suitable for this purpose. Moreover, students typically receive library skills instruction. This instruction often occurs in the library and is administered by the school librarian, who typically enjoys faculty privileges, including a voice in the formulation of school curriculum.

On the other hand, much goes on in the modern public school library that is extracurricular in character. The collection is typically available to students before and after school, and at free times during the school day. Students are permitted, in fact encouraged, to explore the library without particularized supervision, wholly outside the framework of any curricular undertaking. Indeed, school libraries typically develop their collections with students' extracurricular interests in mind, supplying books and magazines for entertainment and leisure reading not keyed to any curricular demand.

The history of the public school library is at once enlightening and confounding on this duality. The historical development of the public school library in America is marked by competition between curricular and extracurricular objectives. Founded upon the joint efforts of the professional teachers' and professional librarians' communities, the public school library abides two masters whose objectives sometimes overlap and sometimes diverge. Both aim to educate youth, but the curricular mission is characterized by compulsory student participation, while the extracurricular mission is characterized by voluntary inquiry.

There are few sources that focus exclusively on the history of public school libraries, and those that exist are aged and difficult to obtain. The two best sources obtained in preparation of this article are both unpublished master's theses: one by Stella McClenahan, for the Department of English at Colorado State Teachers College (today Northern Colorado University) in 1932, and a second by Rosemae Wells Campbell, for the Department of Education at Colorado College in 1953. Though the following historical account is based on accounts

22. The author was not able to obtain William F. Palzer, A Brief History of School Library Development in the United States (1966), or Alma Peck Rutherford, School Libraries in the United States, Their History from 1900 to 1925 (1954). There are a number of state-specific resources, e.g. Betty S. Johnson, The Public School Libraries of Arkansas: An Historical Overview (unpublished M.S. thesis, Univ. C. Ark. 1993) (copy on file with Univ. C. Ark. Sch. Lib.). For a broader view of the history of libraries generally, a number of sources are helpful. See e.g. Fred Lerner, The Story of Libraries: From the Invention of Writing to the Computer Age (Continuum Publg. Co. 1999).


contained in several longer works, the McClenahan and Campbell theses will be referenced textually and relied upon heavily, both because they contain abundant information squarely on point, and because their unpublished findings, meticulously researched and masterfully recorded, should not be lost to obscurity.

B. From Prehistory to the Renaissance

McClenahan superbly traced the early history of libraries into the mist of myth, observing that "libraries of the gods" are referenced in the Koran, the Talmud, and the Vedas. As early as the Stone Age, human record-keeping began in jewelry, body art, and petroglyphs, and any of these means of expression may be regarded as a prehistoric "library." Even if one wishes to quibble with this broad definition, McClenahan reported that clear indicia of librarianship quickly followed the advent of such record-keeping, as, for example, petroglyph authors developed shorthand symbols classed by subject category. Such records served to transfer tribal history from generation to generation. In this sense, the earliest libraries were indistinguishable in their service as educational tools for immature youth and as media for adult communication. Indeed, one can imagine that in the Stone Age, cultural education was a lifelong process, and that life was not very long.

The ancient development of the school library, since the prehistoric period, ran parallel to, but did not entirely overlap, the development of the library. According to McClenahan, "the very first library of which we have much definite specific information is a collection of cuneiform writings of the Assyrian king, Asurbanipal, and dates [to] 668-626 B.C." That collection included works, such as the laws of Hammurabi, dating at least to 2200 B.C. School libraries emerged contemporaneously, as "[c]onstructive conclusions seem to show that every temple had at least

this thesis is available only from Indiana University. Rosemae Wells Campbell became a noted librarian, historian, and writer of fiction and non-fiction. Her papers are collected in the Special Collections of the Tutt Library at Colorado College in Colorado Springs, where, at the time of this writing in April 2004, Ms. Campbell is alive and well in her mid 90s. The author is indebted to librarians Jessie Cranford and Laura Anderson of the Bowen Law School at the University of Arkansas at Little Rock for obtaining copies of the McClenahan and Campbell theses and for locating Ms. Campbell.

25. McClenahan, supra n. 23, at 1 (citation omitted). Underlying citations from McClenahan, supra n. 23, and Campbell, supra n. 24, will be frequently omitted because of the difficulty in obtaining the source materials for verification.
27. Id. at 13–14.
28. Id. at 13.
29. See generally Lerner, supra n. 22, at 13–23 (tracing ancient history of libraries).
30. McClenahan, supra n. 23, at 18.
one collection of school textbooks, and of reference works."^{31}

Excavations suggest other, older school libraries date to the Old Babylonian period—roughly the first half of the second millennium B.C. In the ancient city of Sippara, a school was found, and in one room of the school building was "a rectangular bin which was full of tablets of all sorts, Sumerian hymns, syllabaries, contracts, many of them dating back to Hammurabi, and giving evidence of having been used as exercises."^{32} Moreover, the absence of such tablets in adjoining rooms suggested that the tablets were deliberately collected in a school library.^{33}

Though overshadowed by the great Greek-Egyptian library at Alexandria, "the first building constructed specifically for library purposes was erected in Pergamon, [in present-day Turkey,] in connection with the temple of Athena."^{34} The library's fortunes rose and fell with those of the city in the first millennium B.C.^{35} School libraries by this time were entrenched: "[W]here ever there was a college or university, grammar school or athenaeum, there was always a library."^{36}

The Romans copied the Greeks, and "Rome [became] a city of libraries."^{37} But the decline of the Roman Empire in the middle of the first millennium A.D. brought the Dark Ages, and Europe would not again see such a sophisticated network of public libraries until the nineteenth century.^{38} Libraries largely retreated to monastic seclusion through the Dark Ages and Middle Ages,^{39} until the Renaissance, when libraries, soon fueled by movable type, reemerged in higher education.^{40}

C. American History and Melvil Dewey: 1640-1899

Renaissance libraries marked the standard for the first libraries in the New World; Harvard and Yale established libraries in 1638 and 1700.^{41} Meanwhile, at the primary level, the use of horn books—oak paddles sheathed in horn, dating to 1450, usually displaying "the alphabet, the

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31. Id. at 18–19.
32. Id. at 20.
33. Id. at 20–21.
34. Id. at 24.
35. See id. at 24–25. Though smaller than the Alexandria Library, the Pergamon Library still had 200,000 rolls at one time. However, because of jealousy, the King of Egypt cut off the supply of papyrus. Parchment was then invented and made the Pergamon Library famous. Id.
36. Id. at 26.
37. Id. at 27.
38. See id. at 28–30.
39. See id. at 30–35.
40. See id. at 37.
41. Id. at 41.
nine digits, and sometimes the Lord's Prayer was imported from England. Education in the colonies was "early fostered to a degree unknown elsewhere at the time," though primary education assumed a decidedly religious tone. The first book printed in New England, printed in fact in the house of the Harvard college president in 1640, compiled religious verses. The Bay Psalm Book was riddled with punctuation errors and, "after the fashion of the time... , apparently quite at random," capitalization and italicization, but nonetheless joined the horn book as a basic school text. Similar religious publications followed The Bay Psalm Book, and some secular educational material—the alphabet, syllabaries, and word lists—crept in as well.

In 1731, Benjamin Franklin founded the first American subscription library. Described as an "outgrowth of associations of gentlemen having interests and tastes in common," this library set an example for the modern public library. Responding to the success of subscription libraries, New Jersey and New Hampshire founded colonial libraries as early as 1770. Several state libraries were founded in the first decades of the nineteenth century, "enlarging the original conception into a far wider idea of [a state's] duty to the people."

In 1740, it was Franklin again who, first suggested school libraries for America, though his call was "little heeded by the headmasters of his day." In the late eighteenth and early nineteenth centuries, schools regarded libraries much as laboratories. Occasionally, a school catalogue mentioned "that the school had a library, but it was usually listed with special attractions such as chemical apparatus, petrifications, skeletons, melodeons, organs, and geological specimens—and was about as much used and as unavailable to the individual student."

Educator Horace Mann publicly advocated for school libraries in 1837. Mann's advocacy precipitated a wave of state legislative

42. Id. at 45.
43. Id. at 43.
44. Id. at 42-43
45. Id.
46. Id. at 44.
47. Id.
48. Id. at 44.
49. Id. at 46. McClenahan urged that the earlier unsuccessful work in the South of Dr. Thomas Bray, to establish a parochial library system, not be forgotten. See id. at 50-55.
50. Id. at 55-56.
51. Id. at 56 (citation omitted).
52. Campbell, supra n. 24, at 1 (citation omitted). Lerner dated the Franklin proposal to 1749 and offers more detail. See Lerner, supra n. 22, at 157.
53. Campbell, supra n. 24, at 1 (citation omitted).
54. Id.
appropriations in the middle-nineteenth century, as several states, beginning with New York in the 1830s, passed legislative appropriations for “district school libraries”: public libraries administered by local school districts, but serving adult district residents, not students. These libraries mark the birth of the American public library as it is known today. Nevertheless, by the last quarter of the nineteenth century, the district school library movement lost steam. For various reasons, including the legislative failure to provide for upkeep of libraries and legislatively permitted diversion of funds to other school purposes, the school district libraries failed.

At the same time, though, scholars within the National Education Association (NEA) were contemplating truly school libraries: libraries within schools serving students. “Even as late as 1890, when a start toward classroom libraries had been made, only 10 percent of the grammar schools considered books beyond the text necessary, even though educators had discovered that the reason why children did not learn to read was the meager supply of reading matter provided by the schools.” Building on an 1880 plea by Charles Francis Adams, which had “created quite a stir,” Melvil Dewey—father of the cataloging system familiar by name to modern primary school students—delivered an influential speech to the NEA in 1896, calling for recognition of the school library as a distinct and essential component of the education system.

Dewey had taken over as state librarian of New York in 1888, and discovered the school district libraries in a deplorable state of decline. He successfully pressed for legislation in New York that moved the remainder of those collections into the state and university library system, and specially funded the acquisition of “pedagogic and reference books for the use of teachers and pupils”. Though New York school libraries did not thenceforth grow without further political hindrance,
Dewey initiated the clear divergence of public school and public community libraries. Meanwhile, at this time, thirty-three states established state library commissions, many following New York’s example in developing a network of school libraries.64

Dewey’s efforts inaugurated the school library as an entity distinct from the community library, but even more importantly, Dewey inaugurated the school library as a component in the education system distinct from the classroom. Dewey’s petition to the NEA, which formed in 1857, had been prepared by J.C. Dana, president of the American Library Association, which formed in 1876.65 The petition stated in part:

“A collection of books in every schoolroom for everyday use is coming to be considered a most essential part of a school building’s furniture. These books introduce children to the best literature of the world; they interest them in other phases of any subject they may be studying than those set forth in their text-books: They arouse in them the love of reading, and give them a habit of reading; they waken and inspire the teacher, and make it essential that she, herself, shall go outside the text-book work if she would keep up with the advancement of her pupils; they familiarize the children with books and their use; and, in any subject, they permit the beginning of that laboratory method which is now considered so essential in all educational work.”66

The petition employed both curricular and extracurricular language. The references to furniture, to the teacher, and especially to “the laboratory method,” smack of curricular function. At the same time, the petition plainly emphasized the extracurricular function of the school library, referring to “other phases of any subject . . . than those set forth in their text-books,” and “the love of reading” and “habit of reading.”

This duality in word choice persisted in other statements of the time. For example, in 1897, NEA library section president J.H. Van Sickle addressed a joint meeting of the NEA and ALA, and stated that “[f]or some years, the laboratory or library method of studying literature and history has prevailed in the High School. An accessible collection of books for this purpose, as well as for entertainment, is coming to be an indispensable [sic] part of the equipment of every schoolroom.”67 Van Sickle proffered the word “library” as a substitute for “laboratory,” and plainly referenced extracurricular “entertainment,” but still regarded the

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64. Id. at 62–63.
65. Id. at 66–68.
66. Id. at 67 (citation omitted).
67. Id. at 71–72 (citation omitted).
collection as "equipment."

In essence, Dewey and Dana's petition asked the NEA to partner with the ALA to create something new—a creature with the extracurricular independence of a library that shared in the curricular mission of the school. They proposed a symbiotic relationship between a student's classroom-based stimulation and library-based exploration. Thus the ALA and NEA gave life to the modern school library. And, as if a product of genetic reproduction, the nascent school library bore a resemblance to each of its parents.

Dewey was clear, though, that the school library would remain primarily a library and not, in the fulfillment of the school's educational mission, be subsumed, and thus subverted, by the latter. Further describing the relationship between school and school library, he said,

"We can not do too much in bringing libraries and schools into the closest harmony and co-operation, but they should be co-workers each keeping its proper field and giving the co-operation and respect due to its associate, and not drifting into the traditional relation of the lion and the lamb that lie down together, with the lamb inside the lion."

Fresh from New York's failed experiment in which school district library resources were swallowed up by hungry schools, starving the libraries out of existence, Dewey viewed the school as the lion and the library as the lamb. He recognized the risk attending a library that serves none other than curricular function. Extracurricular purpose would sustain the library's financial freedom in the short term, and its intellectual freedom in the long term.

The NEA embraced the ALA's petition, and brought substantial force to the school library movement. By 1899, "all the New England states, and New York, Michigan, Wisconsin, Minnesota, New Jersey, Montana, and California, could boast of libraries in nearly every school." Such a "library," however, did not necessarily look like the school library of today. A turn-of-the-century school library might have consisted of no more than a collection of books divided and dispersed in various classrooms and scarcely supervised. The first decade of the twentieth century brought dramatic change to this state of affairs.

D. The Critical First Decade of the Twentieth Century

The first decade of the twentieth century tested the independent identity of school libraries in both respects that Dewey recognized as critical: first, the school library's relationship with the community library,
and second, the school library’s relationship with the school.

The former was a struggle over both resources and pedagogy. Clearly, the acquisition of the same books for both a school and public library might seem a waste of resources. In terms of pedagogy, disagreement surfaced about the use of books in school. As described by Campbell, one approach stressed “reading a few books carefully in the classical tradition rather than reading many books quickly.”\(^{70}\) Advocates of this approach, including the NEA’s Clarence E. Meleney, “felt that school libraries should contain only such books as were peculiarly schoolbooks and that the school should not duplicate the work of the public library.”\(^{71}\) Meleney et al. did not reject the “broader wisdom of general books” for young students, but believed that children—whose schooling typically ended before age twelve—would be better served by earlier familiarity with the community library.\(^{72}\) School districts adhering to this view solved the problems of finances and pedagogy at once by establishing traveling collections of books on loan from the community library to various classrooms.

Ultimately, the Meleney approach failed.\(^{73}\) The traveling collection was criticized for dispersing community library books too thinly;\(^{74}\) such dispersal was one of the reasons the school district library movement had failed in New York.\(^{75}\) The traveling collection further stimulated tensions between school and community library officials, who had responsibility for and authority over the books.\(^{76}\) These tensions largely related to power and fiscal accountability, but Dewey also recognized that disparate school and library missions aggravated the situation. “School duties are a task under a master at the best,” he wrote, “while library reading is a pleasure under a friend. One is required, the other voluntary.”\(^{77}\)

These pressures in time forced the traveling collection model to cede to a centralization model, by which the community library and the school parted ways, and each collected the books it owned in a central location.\(^{78}\) For the first time in the modern era, school library books were

\(^{70}\) Campbell, supra n. 24, at 6.

\(^{71}\) Id.

\(^{72}\) Id. at 6–7.

\(^{73}\) Id. at 7–8.

\(^{74}\) See supra n. 23, at 94–95.

\(^{75}\) Campbell, supra n. 24, at 8.

\(^{76}\) McClenahan, supra n. 23, at 94–95.

\(^{77}\) Id. at 95 (citation omitted).

\(^{78}\) Certainly, this shift was not instantaneous. McClenahan described four organizational models that reflected varying degrees of secondary-school library interdependence with the community library. See id. at 116–28 (School libraries were mainly activated in larger cities. The librarians were responsible for the books, while the schools were responsible for the physical
collected in one place. Physical location helped to shape the school library as an institution with its own identity. Initially collections were housed in an unused room, a hallway, or office. But as new schools were planned and constructed, the need for a dedicated space for the school library was apparent. In turn, independence of location reinforced the notion of independent function.

Furthermore, the presence of a school library, with books haplessly stacked about, demanded another critical innovation: the hiring of a trained school librarian (and library schools to do the training). New York hired the first professional school librarian, Mary A. Kingsbury, in 1900, for Erasmus Hall in Brooklyn. She was paid “the princely salary of $600 a year. She took over the box-like room with the ceiling-high shelves containing 600 books, and changed the place from a morgue-like museum to a living library. It was not long before the principal and superintendent were convinced of her value and called for more librarians.” The professionalization of the school librarian improved the school library as an educational resource, and therefore improved the quality of children’s education. But more importantly for the long-term health of the school library, the school librarian became an advocate for it as an institution independent from the community library and the classroom.

The advent of the centralized school library and the professional school librarian was both good and bad from the perspective of the traditional classroom teacher; thus conflict within the school became the second test of the school library’s independent identity. McClenahan quoted Arthur E. Bostwick describing the teacher-librarian relationship:

> It has doubtless partaken too much of the nature of an effort on the

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80. See id.
81. Id.; Lerner, supra n. 22, at 157; McClenahan, supra n. 23, at 110.
82. Campbell, supra n. 24, at 9–10 (citation omitted).
83. Margaret R. Marshall described the “disadvantage[]” of an ordinary doctrinal teacher serving as school librarian:

> The school student’s attitude to reading and the school library may be influenced by his attitudes to that teacher and his subject, by the apparent association between the class discipline and the kinds of restrictions that teacher is likely to impose in the library also . . . [s]uch a relationship may cause the student to presuppose, however unjustifiably, . . . that the library is an extension of the English department. However useful this might appear for the English department it is likely to undermine positive attitudes to reading in general and the use of books as tools of information in particular.

Margaret R. Marshall, Libraries and Literature for Teenagers 36 (Andre Deutsch Ltd. 1975).
part of librarians to induce teachers to recognize them as coworkers and to undertake certain additional work in the way of cooperation. Teachers, as a body, have not been particularly enthusiastic over the prospect thus held out, and have manifested little desire to meet the libraries halfway. . . . It may be doubted . . . whether the fact that the ultimate object of cooperation, is the betterment of public education, has been kept clearly enough before the minds of the two parties.

Teachers have gladly learned of the readiness of libraries to furnish special books for themselves and their pupils, to offer facilities for the preparation of lessons, and to avoid interference with school tasks. They have welcomed such aid with a pardonable feeling that it should be accepted at the expense of as little added trouble and effort as possible.

On the other hand, librarians anxious to extend the sphere and increase the usefulness of their new educational machinery, and seeing clearly how important an alliance with the schools might be to them, have made all possible bids for it, and have regarded privileges offered to teachers as so many inducements to them to look kindly on the work of the library and to assist it in any possible way.

There has, unfortunately, been reason in the past, if not in the present, for librarians to fear that the influence of teachers would be exerted against them. . . . [T]here is still too strong a feeling on the part of both teachers and librarians that cooperation is a game of give and take, and that it is legitimate to try to get as much and give as little as may be.84

This complicated dynamic is a natural consequence of Dewey-inspired separatism. If the school library is primarily a library, not a classroom, and the school librarian a professional librarian, not a professional schoolteacher, there is necessarily a tension between the school and the school library. The NEA and the ALA, parents of the school library, are not identical twins. While educators and librarians share goals, such as the education of child patrons, they diverge as to methods. The classroom teacher operates in a curricular environment: seats are assigned, discussion is directed, content is prescribed. The school library is, at least in part, an extracurricular environment: students roam at will, they consume as they choose, and content is diverse. A teacher or librarian might be understandably suspicious of the other’s departure from familiar norms.

Insofar as this tension, described by Bostwick a century ago, persists, it is an indication that the school library lamb remains alive and well, unconsumed by the school lion, as Dewey admonished. But Bostwick's

84. McClenahan, supra n. 23, at 91–92 (citation omitted; paragraph breaks added).
still salient warning echoed Dewey: the librarian must be ever on guard against the undue influence of the teacher. Thus the extracurricular-curricular divide has been a hallmark of school-school library relations since the latter came into being.

The prevailing view at the close of the first decade of the twentieth century was "that education as it belonged to the school consisted of two parts which were more or less equal, the library and the school." This "newer view," propagated by the NEA and the ALA, replaced the old idea that the library was a reservoir into which was gathered material for use for a narrow range. In its place was the modern view that the library was a fountain sending out as well as gathering for itself. 'A modern library is not only the storehouse of knowledge, but its distributing point, and we cannot find a depot more ideal or more logical than a high school.'

E. The Twentieth Century from 1911

After the first decade of the twentieth century, American school libraries continued their slow and steady growth. Conflicts between traditional pedagogical philosophies and pro-library reformers persisted in hindering the development of the school library, but library advocates persevered.

In the early 1900s, library advocates recognized the need for school libraries to serve students of all ages, including both the very young and the newly recognized segment of "junior" high schoolers. Literature targeting these age groups was not abundant—pre-nineteenth-century "children's literature was concerned with the salvation of the soul." However, nineteenth century "adventure stories and fairy tales," such as Lewis Carroll's *Alice's Adventures in Wonderland*, published in 1865, set precedents for entertaining reading for youth.

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85. Id. at 98-99.
86. Id. (quoting 1911 NEA address by Ethelwyn H. Fagge; citation omitted).
87. For an overview of the development of children's library services in the non-English speaking world, see Lerner, supra n. 22, at 160-62.
88. The Great Depression stalled the growth of primary school libraries, but such libraries became common after World War II. Lerner, supra n. 22, at 157.
90. Lerner, supra n. 22, at 154-55. Lerner provides additional detail on the brief history of "Sunday school" religious lending libraries in America. Id. Community public libraries did not begin serving children until the 1890s. Id. at 155. As school libraries and children's services in community libraries became more common, their demands in turn fueled an increasing supply of children's literature. Id. at 164. The ALA inaugurated the John Newberry Medal for children's literature in 1922. Id. These developments in children's literature and librarianship are part of the broader revolution in thinking that social historians call the "discovery of childhood," meaning the
Librarians continued to butt heads with teachers, complaining that the latter underused the school library or did not know how to incorporate the school library into schoolwork. This conflict continued to reflect the disparate methods of the school and the library. For example, Campbell recounted that a 1910 NEA paper by William McAndrew complained of high school teachers' focus on a narrow range of unchanging Latin works that "were dissected rather than read," their cultural value subordinated to critical routine. Teachers who "had not learned to love books in their childhood" felt that "browsing among books was abhorrent." In contrast, librarians held "the modern belief that reading should be fun." In fact, according to the latter view, teachers were overly concerned with the merits of reading selections, incognizant that the student who reads at all, unlike the student who does not, "can always be led to better things." Facing similar barriers with administrators, libraries and librarians struggled for physical space and resources in competition with physical education and home economics programs.

The work of professional associations and researchers was instrumental in overcoming the political obstacles to school library development. Influential NEA reports in 1916 and 1918 led to the adoption of meaningful standards for public school libraries on matters such as the professional qualifications for librarians and the physical situation of the school library. A 1923 Carnegie Corporation report led

91. Campbell, supra n. 24, at 20–21.
92. Id. at 21 (citation omitted).
93. Id. (citation omitted).
94. Id. (citation omitted).
95. Id. at 21 (citation omitted). See also Marshall, supra n. 83, at 74 (observing "a teacher's remark that pupils should not be given much time in the library because 'they'll sit there just reading'" (citation omitted)).
96. Marshall described several "misuse[s]" of the library:

The library is frequently the place to which students are only directed if it is raining in the lunch break... making an imposition of being in the library. It is common for the teacherless class to be sent to the library....

It is considered a suitable punishment for wayward pupils to be sent to sit and read a book in the library... the punishment thereby confirming yet again [the pupil's] dislike of books and libraries.

The library is used as a classroom space when space is limited... distorting its image as a service agency over and above subject department categorization and outside the jurisdiction of the teacher.

Marshall, supra n. 83, at 75.
97. See Campbell, supra n. 24, at 21–22.
98. See id. at 25–27 (citations omitted). Marshall lamented the unfortunate historical tendency of architects to "tend to place [the school library] either in an inaccessible part of the campus... or
to the establishment of an education board within the ALA, which also exerted upward influence on school library standards.99 Similarly, pro-library reports emerged from the National Society for the Study of Education and from Columbia University in 1943 and 1946.100 By 1940, "some educators had the vision of a library centered school."101 In the 1940s, even school librarians’ struggles with teachers eased, as librarians received invitations to serve on the faculty and even on the curriculum committee.102 A researcher in 1950 observed that "[u]nifying, correlating, [and] integrating the entire school program is an important function of the present day librarian."103 Indeed, by the time Campbell wrote her 1953 thesis, school librarianship well resembled its current state of integration into the school. Functional norms were established with regard to conditions such as adequate lighting, book cataloging, and the availability of audiovisual material.104

Today, the modern school library maintains a dual identity. Campbell described the library in 1953 as a "laboratory" that "must be well equipped." The librarian's participation in curricular development suggests a library identity tied to curriculum support. The school librarian remains an educator who teaches students about the use of books.105 Simultaneously, the library maintains an extracurricular capacity in allowing students to explore and develop according to their individual tastes and talents. In Campbell’s words, the library in this second role, "of equal or greater importance," "fosters the spirit of democracy in that it offers equal opportunities for all. The individual's capacity alone determines how much he can grasp."106 Quoting researcher G.H. Reavis, Campbell wrote that "[t]hrough the organization of the library as a social institution [the librarian] can do much to make boys and girls conscious of the rights citizenship bestows and of the obligations it demands in return."107

Undeniably, however, Campbell’s thesis reflects a curiously inconsistent explication of this latter identity of the school library. On the
one hand, Reavis, as quoted, described “the obligations” of citizenship in terms of “[t]he proper care of library furniture and equipment, prompt return of library materials borrowed, etc.” On the other hand, in the very next paragraph, Campbell trumpeted the triumph of the modern school librarian as a professional rather than a mere clerical worker. She closed the chapter apparently rejecting Reavis’s position. She criticized the school board that would regard the librarian as merely a facilities administrator, equating that view with an outmoded focus “on the hocus-pocus of circulation, hidebound classification, and pedantic cataloguing.”

Campbell began her next chapter, entitled “Aim of the Modern School Library,” with recognition of the library’s function to “enrich[] the curriculum” and “train[] in good citizenship.” But then, Campbell suggested a role for the library much broader in scope than the endowing youth with respect for books and furniture. “By teaching them book-using skills,” Campbell explained,

the librarian helps the students recognize that in the reservoir of inspiration and information that is the school library, even authorities differ, that there is no one supreme, unchallengeable source of information. When this is accomplished and the students can formulate their own opinions from the sum of other opinions[, ] the function of the modern school library can be considered fulfilled, and there need be no fear that bias will lead the students to espouse foreign ideologies.

The school library should provide books on all levels on a large variety of subjects, political and other. In general, censorship defeats the overall aim of the modern school library: to provide that elusive but important element called background, against which the facts and theories presented in a single text may be properly evaluated.

In her concluding chapter, Campbell accordingly summarized the development of the school library from the classroom book collection to the modern service provider, as the institution’s role grew to encompass social, instructional, and vocational services, not to mention “development of the pupil’s leisure hour tastes.” The latter-day librarian, Campbell concluded, guides fellow educators in curricular modeling and guides “boys and girls, through books, to find solutions for life problems.” She reiterated that the foremost purpose of the school library is to provide a context for youth to assess opinion in informed

108. Id. at 51.
109. Id. at 52.
110. Id. at 52-53 (citation omitted).
111. Id. at 55.
112. Id. at 57-58.
fashion.¹¹³

Campbell’s thesis concocts an image of the modern school library maintaining the dual identity born of its historical development—at once committed to curricular support for classroom learning and to extracurricular support for individual social and intellectual development. There is ambiguity on the latter score. Campbell relies on authorities that suggest an understanding of the extracurricular identity constrained by authoritarian notions of “good citizenship.” But Campbell herself seems committed to a much broader view of the extracurricular role, apparently accounting for modern notions of intellectual freedom. The broader view should be given greater weight when Campbell’s thesis is taken in context. After all, the 1953 thesis is a contemporary of Joseph McCarthy,¹¹⁴ “separate but equal” public education, and the Beaver’s parents sleeping in separate beds. That Campbell even remotely expressed a view reflecting later-developed notions of intellectual freedom is astonishing. With the benefit of hindsight, references such as those to the “laboratory” nature of the school library seem more an unsurprising employment of the vocabulary of the times, while Campbell’s paean to diversity of thought and her condemnation of censorship seem more the thrust of her thesis.

No source subsequent to the McClenahan and Campbell theses clearly updates the development of the public school library to the present, but bits and pieces of subsequent research suggest that Campbell’s 1953 portrait is easily recognized in today’s schools. The growth of school libraries continued apace with American investment in public education, boosted not long after Campbell’s thesis, when the Soviet Union launched the first manmade satellite, Sputnik, in 1957.¹¹⁵

The school libraries’ dual identity persists, tied to curricular and extracurricular roles, with intellectual freedom underpinning the latter. No sooner had libraries become firmly entrenched in the schools than the tension amid these competing roles motivated censorship. The historical paradigm pits the curriculum-driven teacher-disciples of the NEA against the intellectual-freedom-inspired librarian-disciples of the ALA but real life is unsurprisingly more complicated than the paradigm.

A renowned 1959 study of censorship in school and community public libraries found that librarians routinely manipulated selection

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¹¹³ Id. at 58.


¹¹⁵ Lerner, supra n. 22, at 157–58.
processes to exclude controversial material. 116 "Librarians in the Fiske study tended to resist pressures from outside the library or school and to submit to those from within." 117 Studies in the 1970s confirmed these findings, as "[a] steady stream of censorship cases as related to young adults [was] reported in the news media and the library literature," 118 at an increasing rate. 119

School librarians were tugged in different directions. In 1976, fifty-eight percent of school officials surveyed statewide in Wisconsin reported objections to textbooks or library materials in the prior three or four years, and eighty-four percent of objections originated outside the school. 120 National organizations coordinated their attacks on content they found distasteful. 121 Such censorship was fueled in part by "the paperback revolution[, which] brought into the public schools a wide variety of the realistic literature of the twentieth century." 122

Meanwhile, intellectual freedom advocates organized. 123 School librarians were urged to "put their own house in order. . . . [A]lmost all librarians assert their belief in the concept of intellectual freedom. What they practice may indeed be something else." 124 At a meeting in 1953 (the same year Campbell finished her thesis), the Board of Directors of the American Association of School Librarians, an entity under the umbrella of the ALA, first moved for a policy statement on selection. 125

116. Mary L. Woodworth, Intellectual Freedom and the Young Adult, in Libraries and Young Adults: Media, Services, and Librarianship 54-55 (1979); see also Lee Burress, Battle of the Books: Literary Censorship in the Public Schools, 1950-1985, at 33-34 (Scarecrow Press Inc. 1989) (describing Fiske findings). Marshall emphasized the dual objectives of selection in the school library. Selection "is basically geared to the school curriculum," but at the same time, "[g]eneral reading and recreational reading for the teenage student are important selection aspects in that these are the areas of strongest personal motivation and interest and may well attract the reluctant reader."

117. Woodworth, supra n. 116, at 55.

118. Id.; see also id. at 55-57 (describing reports).

119. See Burress, supra n. 116, at 50-52 (describing an apparent increase in censorship since 1950). See generally id. at 70-87 (describing twelve reasons for increasing censorship).

120. Id. at 55 (citation omitted).

121. See Burress, supra n. 116, at 31-37.

122. Burress, supra n. 116, at 29; see also id. at 37-49 (describing works censored), 72-76 (detailing effect of paperback revolution); Marshall, supra n. 83, at 80-81 (responding to traditional objections to paperback collection by observing that though "the paperback will wear out more quickly, the primary object of having books—that they should be read—will be achieved"). Proliferating periodicals also can attract young readers, though Marshall observed that "[t]here is often a very low correlation between the periodicals actually preferred by students and those provided by the library." Marshall, supra n. 83, at 81.

123. See Burress, supra n. 116, at 34-35.

124. Woodworth, supra n. 116, at 57.

Ultimately, the ALA adopted a broader School Library Bill of Rights. However, in 1967, the ALA amended its principle document concerning intellectual freedom, the Library Bill of Rights, “to oppose discrimination against library users by age,” rendering the School Library Bill of Rights “largely redundant.” For fear that the existence of a separate document for schools “served only to detract attention from and, hence, to weaken the impact of the Association’s most basic document on intellectual freedom,” the School Library Bill of Rights was withdrawn in 1976.

In 1986, the ALA further adopted an “Interpretation” of the Library Bill of Rights entitled, “Access to Resources and Services in the School Library Media Program.” As most recently revised, the Interpretation stakes out a clear position favoring wide-ranging intellectual freedom.

The American Association of School Librarians reaffirms its belief in the Library Bill of Rights of the American Library Association. Media personnel are concerned with generating understanding of American freedoms through the development of informed and responsible citizens. To this end the [AASL] asserts that the responsibility of the school library media center is:

To provide a comprehensive collection of instructional materials selected in compliance with basic written selection principles, and to provide maximum accessibility to these materials;

To provide materials that will support the curriculum, taking into consideration the individual’s needs, and the varied interests, abilities, socioeconomic backgrounds, and maturity levels of the students served;

To provide materials for teachers and students that will encourage growth in knowledge, and that will develop literary, cultural, and aesthetic appreciation, and ethical standards;

To provide materials which reflect the ideas and beliefs of religious, social, political, historical, and ethnic groups and their contribution to the American and world heritage and culture, thereby enabling students to develop an intellectual integrity in forming judgments;

To provide a written statement, approved by the local boards of education, of the procedures for meeting the challenge of censorship of materials in school library and media centers; and

To provide qualified professional personnel to serve teachers and students.

The age provision generated an Interpretation, adopted in 1972, entitled, “Free Access to Libraries for Minors.” That Interpretation primarily concerns the even-handed access of minors and adults to public school community libraries, which are designed to accommodate both. According to the Interpretation, parents alone “have the right and the responsibility to restrict the access of their children—and only their children—to library resources.”

126. Id. at 108. The document as initially adopted in 1955 and revised in 1969 read:

To provide a comprehensive collection of instructional materials selected in compliance with basic written selection principles, and to provide maximum accessibility to these materials;

127. Id. at 109. Article V of the Library Bill of Rights states that "[a] person’s right to use a library should not be denied or abridged because of origin, age, background, or views." Id. at 152. The age provision generated an Interpretation, adopted in 1972, entitled, "Free Access to Libraries for Minors." Id. at 152, 156. That Interpretation primarily concerns the even-handed access of minors and adults to public school community libraries, which are designed to accommodate both. According to the Interpretation, parents alone “have the right and the responsibility to restrict the access of their children—and only their children—to library resources.” Id. at 153.

128. Id. at 109.

129. Id.

130. Id.
over directed curricular study. The Interpretation does recognize the "unique role"\(^{131}\) of the school library, but it sets ground rules to shield the willing school librarian from curricular as well as outside pressures.\(^{132}\) The Interpretation begins with a simple statement recognizing the duality: "The school library... serves as a point of voluntary access to information and ideas and as a learning laboratory for students as they acquire critical thinking and problem solving skills needed in a pluralistic society."\(^{1133}\) The Interpretation recognizes that "the educational level and program of the school necessarily shapes the resources and services of a school library media program," but follows up that recognition with a clear statement of intellectual freedom: "School library media professionals assume a leadership role in promoting the principles of intellectual freedom within the school by providing resources and services that create and sustain an atmosphere of free inquiry."\(^{134}\) The Interpretation acknowledges that school librarians and teachers "work closely... to integrate instructional activities," but the aim of this integration is described as "the free and robust debate characteristic of a democratic society."\(^{135}\) The library collection must be designed on the one hand "to support the curriculum and [be] consistent with the philosophy, goals, and objectives of the school district,"\(^{136}\) and on the other to "represent diverse points of view on current as well as historical issues."\(^{137}\) Selection must turn on "educational criteria... unfettered by... personal, political, social, or religious views."\(^{138}\) Access to the collection similarly may not be constrained on the basis of "personal, partisan, or doctrinal disapproval."\(^{139}\) School librarians are to "resist efforts by individuals or groups to define what is appropriate for all students or teachers to read, view, hear, or access via electronic

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131. Id. at 105.
132. The predecessor School Library Bill of Rights similarly respected the dual identity of the school library, but its text is less explicitly protective of intellectual freedom than the Library Bill of Rights and the Interpretation. Drafted initially in 1955, the School Library Bill of Rights, like the Campbell thesis of the same time period, supra note 24, represents the interest of intellectual freedom more with reference to the "individual's needs" than the individual's liberties. See supra n. 126.
134. Id.
135. Id.
136. Id. The collection must also be "appropriate to the developmental and maturity levels of students." Id.
137. Id. Omitted from this discussion is a paragraph added in 1990 which admonishes school libraries to accommodate students for whom English is a second language. Id. at 106, 111.
138. Id. at 106.
139. Id.
means."¹⁴⁰ "Policies, procedures, and rules related to the use of resources and services [must] support free and open access to information."¹⁴¹

III. PICO AND THE CASE LAW

Three decisions, spanning the decades from the civil rights movement to the present day, mark modern Supreme Court pronouncements in library law: *Brown v. Louisiana*, *Pico*, and *United States v. American Library Association*, although only *Pico* concerned school libraries specifically.¹⁴² *Brown* was a civil rights-era decision resisting segregation in the public library. Despite the limitations of *Pico* as a plurality ruling, abundant lower court opinions subsequently applied the precedent uniformly to distinguish curricular from extracurricular contexts in the school, the library generally being located in the latter. At the same time, the mosaic of lower court opinions that resulted from the plurality ruling leave many questions about the legal status of school libraries unanswered.

A. *Brown v. Louisiana*

The High Court’s first significant decision concerning public libraries came in the civil rights era and did not concern censorship in the usual sense. In *Brown v. Louisiana*, the Court reversed the convictions of five African-American men convicted of breach of peace for refusing to leave a segregated public library.¹⁴³ The case arose in the context of repeated appeals to the High Court from Louisiana convictions in similar circumstances: protest sit-ins at segregated lunch counters, in a segregated bus depot, and near a courthouse and jail.¹⁴⁴ *Brown* nevertheless proved an uneasy successor to those cases, as the justices disagreed over where to strike the balance between expressive freedom and the orderly management of the public library.

The Court majority, per Justice Fortas, lamented that the events had transpired in a public library, “a place dedicated to quiet, to knowledge,
and to beauty,” a “hallowed place.” The Court ultimately voted to reverse the lower court’s convictions because the protest resulted in “no disturbance of others, no disruption of library activities, and no violation of any library regulations.” At the same time, the Court acknowledged the state power to regulate public libraries, as any public facilities, “in a reasonable and nondiscriminatory manner.” Justices Brennan and White concurred without further elaboration on the nature of public libraries.

In dissent, Justices Clark, Harlan, and Stewart joined the opinion of Justice Black. The dissenting opinion focused on the incompatibility of expressive assembly, “sitting and standing,” and the functional role of the public library for reading and circulating books, magazines, and papers. Justice Black echoed the majority’s “quiet... knowledge... beauty” lamentation, but opined that permissiveness of demonstration threatens those library qualities because “[t]he crowd moved by noble ideals today can become the mob ruled by hate and passion and greed and violence tomorrow.”

Brown therefore asked to what extent constitutionally protected, but non-library related, expressive activity may intrude upon library space. Majority and dissent agreed on the primary function of the public library, and they seemed to agree that activity disruptive of that primary function would have been punishable. Brown established that nondiscriminatory access to a public library is a right of constitutional dimension, but the decision is unenlightening as to the scope of that right when library-related activity is at issue.

B. Board of Education v. Pico

Sixteen years after Brown, the censorship question was presented in Board of Education, Island Trees Union Free School District No. 26 v. Pico. A Court plurality favored the plaintiff-respondent students over the school board, as discussed in the following part III.B.1. The clarity of the plurality opinion was clouded by the six separate opinions in the case.

146. Brown, 383 U.S. at 143.
147. Id.
148. See id. at 143–51 (Brennan & White, JJ., concurring).
149. Id. at 151.
150. Id. at 154; see id. at 164–65.
151. Id. at 167.
152. 457 U.S. 853 (1982). For a more thorough discussion of Pico, see Peltz, supra n. 8, at 441–449. That discussion elaborates upon and provides further support for conclusions presented here. Accordingly, this discussion is somewhat cursory.
discussed in part III.B.2. Subsequently, the scope of any effective ruling in *Pico* was challenged by the later emergence of a new doctrine in school law and of the public forum doctrine. The survival of *Pico* and its harmonization with those two doctrines are the subject of parts III.B.3 and III.B.4, and borne out by the cases discussed in the following part III.C.

1. **Facts and Plurality Decision**

   Responding to complaints by conservative parents, a New York school board ordered that a high school library remove nine books deemed “anti-American, anti-Christian, anti-Semitic, and just plain filthy.”[^153] The books included the anonymous *Go Ask Alice*, the Langston Hughes-edited *Best Short Stories of Negro Writers*, and Kurt Vonnegut’s *Slaughter House Five*.[^154] Because the complainants were denied access to these texts, the case called on the Court to address directly the use of a public library for its intended purpose.

   Justice Brennan wrote for a Court plurality in remanding, an outcome that favored the students. The plurality initially dispensed with a number of issues that muddied the censorship question. Emphasizing that school libraries and community public libraries share the *Brown* characteristics of “quiet,” “knowledge,” and “beauty,” the plurality rejected any diminution of constitutional interests arising from the complainants’ youth, from the library’s school locus, or from any distinction between the affirmative right to expression and its corollary right to receive free expression.[^155]

   The plurality further rejected the primacy of local autonomy in school administration, observing that local authorities must yield to federal judicial oversight when “basic constitutional values” are “directly and sharply implicate[d].”[^156] Justice Brennan opined upon the importance of the public school library to students’ maturation:

   “[S]tudents must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding.” The school library is the principal locus of such freedom. . . . “[I]n the school library] a student can literally explore the unknown, and discover areas of interest and thought not covered by the prescribed curriculum. . . . The student learns that a library is a place to test or expand upon ideas presented to

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[^154]: *Id.* at 857 n. 3.
[^155]: *Id.* at 866–68 (quoting *Brown*, 383 U.S. at 142).
[^156]: *Id.* at 866 (quoting *Epperson v. Ark.*, 393 U.S. 97, 104 (1968)).
him, in or out of the classroom."\textsuperscript{157}

Tinkering with this open realm of ideas to further a single, officially sanctioned mode of thinking would contravene the First Amendment rights of the library patrons. For example,

\textit{\textsuperscript{[i]f a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books. The same conclusion would surely apply if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration. Our Constitution does not permit the official suppression of ideas.\textsuperscript{158}}

Books with racially sensitive content were among those banned, suggesting that the school district had engaged in the sort of viewpoint discrimination against which Justice Brennan admonished.\textsuperscript{159} School officials testified that they were motivated by "personal values, morals and tastes," and patriotism.\textsuperscript{160} However, the evidence was conflicting, and the case advanced on appeal upon the trial court's failure to resolve the factual question of the board's motivation.\textsuperscript{161} The plurality thus remanded for that factual determination.\textsuperscript{162}

The litigation in \textit{Pico} ended there, however, as the parties reached a settlement favoring the students' position. The school board disfavored a full trial "both because of the added expense and also because residents of Island Trees, after all the publicity about the case, were beginning to feel embarrassed at being taken for a bunch of backwoods know-nothings."\textsuperscript{163} The school board agreed to restore the books to the school library.\textsuperscript{164} Initially the school district designed a plan by which parents would be notified if their children checked out any one of the challenged books.\textsuperscript{165} But the New York Civil Liberties Union refused that compromise, objecting to "the stigmatizing of books,"\textsuperscript{166} and so the

\begin{itemize}
\item \textsuperscript{157} Id. at 868–69 (notes, citations, and quotation marks omitted).
\item \textsuperscript{158} Id. at 870–71 (emphasis original).
\item \textsuperscript{159} See id. at 874.
\item \textsuperscript{160} Id. at 872.
\item \textsuperscript{161} Id. at 875.
\item \textsuperscript{162} Id.
\item \textsuperscript{163} Nat Hentoff, \textit{Censorship Did Not End at Island Trees: A Look Ahead}, in \textit{New Directions for Young Adult Services} 81, 84–85 (Ellen V. Libretto ed., R.R. Bowker 1983) (parentheses omitted).
\item \textsuperscript{164} Id. at 85.
\item \textsuperscript{165} Id.
\item \textsuperscript{166} \textit{Cf. Counts v. Cedarville Sch. Dist.}, 295 F. Supp. 2d 996, 999, 1004–1005 (W.D. Ark. 2003) (recognizing impermissible stigma in requiring signed parental permission slip for student's access to books).
\end{itemize}
books were restored without restriction.\textsuperscript{167}

2. \textit{The Separate Opinions in Pico}

\textit{Pico} generated two concurrences and four dissents. In concurrence, to reach the same conclusion as the plurality, Justice Blackmun focused on the wrongful suppression of ideas rather than on a student’s right to receive.\textsuperscript{168} Justice White would have remanded for development of the record on the facts.\textsuperscript{169}

All four dissenting justices rejected the plurality’s distinction between the library and the classroom.\textsuperscript{170} Accordingly, they would have left curricular matters, such as the library collection, to local authorities.\textsuperscript{171} Justice Rehnquist in particular viewed the problem as one of “government as... educator,” like “government as employer [or] property owner,”\textsuperscript{172} foreshadowing later developments in school law on the Rehnquist Court.\textsuperscript{173} Rehnquist criticized Brennan’s confusing dictum permitting censorship for “educational suitability” as inconsistent with prohibiting value-based censorship.\textsuperscript{174}

Arguably, a plurality of the Court departed from the Brennan opinion and regarded administration of the school library as a curricular matter, or, in the modern parlance, a question of nonpublic-forum regulation. Justice White took no position on that point, and Justice Blackmun confined his opinion to the prohibition on viewpoint discrimination, which would constrain even government as educator. The four dissenters therefore outnumbered Brennan’s plurality less Blackmun on the subject of the viewpoint-neutral, content-discriminatory government regulations that distinguish nonpublic from public forums. A key question in \textit{Pico} was thus left the murkiest of all.

3. \textit{Emergence of the Tinker-Hazelwood Dichotomy}

The precise scope of the right protected in \textit{Pico} was not clear. Besides the decision’s mere plurality support, later developments in constitutional law, especially with regard to the rights of public school

\textsuperscript{167} Hentoff, supra n. 1634, at 85.
\textsuperscript{168} \textit{Id.} at 877–78 (Blackmun, J., concurring).
\textsuperscript{169} \textit{Id.} at 883–84 (White, J., concurring).
\textsuperscript{170} \textit{Id.} at 892–93 (Burger, C.J., dissenting); \textit{Id.} at 895 (Powell, J., dissenting); \textit{Id.} at 910 (Rehnquist, J., dissenting); \textit{Id.} at 921 (O'Connor, J., dissenting).
\textsuperscript{171} \textit{Id.} at 889, 891 (Burger, C.J., dissenting); \textit{Id.} at 909–10 (Rehnquist, J., dissenting); \textit{Id.} at 921 (O'Connor, J., dissenting).
\textsuperscript{172} \textit{Id.} at 920 (Rehnquist, J., dissenting); \textit{see infra} part III.B.3.
\textsuperscript{173} \textit{See generally} Baker, supra n. 4.
\textsuperscript{174} \textit{Id.} at 916–17 (Rehnquist, J., dissenting).
students, complicated the vitality of Pico.

Principally, the plurality's rejection of a distinction based on the complainants' youth was predicated in part on the Court's 1969 decision in Tinker v. Des Moines Independent Community School District. Tinker arose amid a student protest of the Vietnam War wherein protesting students wore prohibited black armbands. Employing language and reasoning typifying the civil rights-era reverence for individual liberty, Justice Fortas authored the majority opinion favoring the students. He famously declared that "[n]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The Court, adopting a stringent test for restrictions on speech in public schools, held that a school may only squelch student expression to avert "material and substantial interference with schoolwork or discipline," or to avert an "invasion of the rights of others." Undifferentiated fear or apprehension of disturbance does not suffice, even if school officials need not await the eruption of misconduct. Accordingly, school officials in Pico violated students' rights by censoring absent any evidence of a pending or actual disruption of schoolwork, or of an invasion of rights resulting from the presence of the challenged books in the school library.

Tinker safeguarded students' rights—de jure if not de facto—for almost twenty years. But the High Court changed its tune in 1988 when it decided Hazelwood School District v. Kuhlmeier. A high school principal censored pages from a student newspaper with stories concerning teen pregnancy, parental divorce, and other controversial subjects. No actual disruption occurred—the pages were pulled before publication—and no evidence suggested that disruption would result. There was some dispute about whether the stories jeopardized students'
or parents' privacy or reputations, and whether the principal had time to pursue a course less drastic than the wholesale removal of pages. Nevertheless, the Court allowed the censorship without applying the *Tinker* standard of disruption or invasion. *Tinker*, the Court clarified, controlled circumstances beyond the curricular realm—the metaphorical "forum" of student armband expression—as opposed to the classroom or class laboratory, which is within the curricular sphere. The newspaper, a project for class credit financed by the school and supervised by a faculty adviser, was within the curricular sphere and thus subject to greater school control. Specifically, the administration would be justified in any action "reasonably related to legitimate pedagogical concerns," which may range from preserving a primary schooler's belief in Santa Claus to correcting a high school writer's grammar—not to mention squelching "advocacy of conduct ... inconsistent with 'the shared values of a civilized social order.'" The Court rejected the argument that students, especially student journalists, would better learn about free expression rights by having them than by being denied them—a point not lost on Justice Brennan's dissent—preferring, as was the Court's wont by the late 1980s, to defer to local authorities on questions typically of local character, as in the area of education.

*Hazelwood* seems at first blush to strike a serious blow against *Pico*. Clearly, the Court's notion of student liberties in the public schools changed, and the sentiments of the *Pico* dissenters prevailed. Nevertheless, the 5-3 majority in *Hazelwood* refrained from going so far as to overrule *Tinker*, instead carving a curricular sphere out of the *Tinker* universe. Of all the difficulties in construing the present-day import of the *Pico* plurality opinion, this "*Tinker*-Hazelwood dichotomy" is far from the least surmountable.

Justice Brennan clearly distinguished curricular from extracurricular
library functions, resting the plurality ruling in the latter realm. He observed that student "use of the Island Trees school libraries is completely voluntary," and that "[t]heir selection of books from these libraries is entirely a matter of free choice."\(^{193}\) In contrast, the school district "might well defend their claim of absolute discretion in matters of curriculum by reliance upon their duty to inculcate community values."\(^{194}\) The language of "inculcat[ing] community values" underpinned the Hazelwood decision six years later.\(^{195}\) Thus to view Justice Brennan's opinion with the benefit of hindsight, he placed the school library in Tinker territory, out of Hazelwood's reach.\(^{196}\)

Troublesomely, Brennan reported with seeming approval that the respondent students in Pico conceded that the school board action would have been "perfectly permissible" if predicated on "educational suitability" or "pervasive[] vulgar[ity]."\(^{197}\) That statement is difficult to reconcile with the extracurricular-curricular dichotomy that otherwise pervades the plurality opinion. Dissenting, Justice Rehnquist seized on this inconsistency, observing that "educational suitability" is "based as much on the content of the book as determinations that the book espouses pernicious political views."\(^{198}\)

Pico, then, survives Hazelwood just as Tinker does. When the library is not used as a classroom, a curricular use, or as direct adjunct to a class activity, a co-curricular use, but rather used as an extracurricular or non-curricular forum, characterized by voluntary student inquiry, then Pico and Tinker remain the controlling authorities.

\(^{193}\) Id. at 869.

\(^{194}\) Id. Indeed, subsequently to the settlement upon remand in Pico, the Island Trees School Board banned from the curriculum one of the censored books, Bernard Malamud's The Fixer (Farrar Strauss & Giroux 1966), which had been required curricular reading when initially challenged in the library. Hentoff, supra n. 1634, at 85.

\(^{195}\) See Hazelwood, 484 U.S. at 267, 272 (noting that the school must have the authority to refuse to "advocate ... conduct inconsistent" with community values).

\(^{196}\) E.g. Theresa Chmara, School Libraries and the Courts, in Off. Intell. Freedom, supra n. 110, at 313 ("[Hazelwood and Fraser] do not directly implicate school libraries, which provide students with both curricular and extracurricular materials."); Kubota, supra n. 12, at 723 (concluding that browsing and some messaging activity "is open-ended," so "schools cannot claim to have any real curricular control over such a free-form, unsupervised activity").

\(^{197}\) Pico, 457 U.S. at 871 (plurality opinion not joined by J. Blackmun).

\(^{198}\) Id. at 916–17 (Rehnquist, J., dissenting). Rehnquist ascribed the "educational suitability" position to Brennan, not to the quoted respondents, but the statement is better understood as dictum: recognition of a question placed outside the scope of the Court's review because of the respondents' concession. The "pervasive[] vulgar[ity]" statement might be reconciled with the Tinker-Hazelwood dichotomy in accordance with Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986). The Court in Fraser, before Hazelwood, upheld sanction of a student for a lewd speech at a school assembly. Id. at 677–78. Fraser is ordinarily regarded as a sort of vulgarity exception to Tinker. But that reconciliation still fails to justify censorship based on "educational suitability" in Tinker environs.
4. Emergence of the Public Forum Doctrine

In the 1980s and 1990s, the Court developed its tripartite framework of nonpublic, limited public, and traditional public forums. This framework, the public forum doctrine, delineates the power of government to regulate speech by private actors on public property. The level of scrutiny applied by the Court is a function of the nature of the forum on the one hand, and the nature of the regulation on the other—whether content neutral or content discriminatory, and viewpoint neutral or viewpoint discriminatory.

In none of the forums are viewpoint-discriminatory government regulations permitted. Within the realm of viewpoint-neutral government regulation, a further distinction is drawn between regulations that are content-neutral and content-based, the latter triggering more stringent judicial inquiry. Analyses range from mere rationality review for expression in a non-public forum, to intermediate scrutiny for content-neutral regulations in either type of public forum, to strict scrutiny for content-based regulations in a public forum.

Students' private speech in the government forum of the public school seems to trigger the public forum doctrine, raising the question of whether the Tinker-Hazelwood dichotomy or the public forum doctrine controls, or whether the two may be harmonized. Indeed, the two may be harmonized, for the Tinker-Hazelwood dichotomy, distinguishing the extracurricular from the curricular, is analogous to the public forum doctrine, which distinguishes the public from the nonpublic. Retrofitting Tinker with the public forum doctrine, one may perceive that the metaphorical forum of student protest expression is a limited or traditional public forum within the school. The school's ban on protest armbands was a content-based regulation, which triggered strict scrutiny. Adapted to the special case of the school environment—modified, per Hazelwood, according to the age of the students—strict scrutiny is rendered as a "material and substantial interference" or an "invasion of the rights of others." Retrofitting Hazelwood similarly, the curricular

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199. E.g. Intl. Socy. for Krishna Consciousness v. Lee, 505 U.S. 672, 678–79 (1992) (outlining a "forum based" approach when examining restrictions that apply to the regulation of speech or government property, the designated public forum, and all remaining public property).

200. E.g. Cornelius v. NAACP Leg. Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985) (indicating that expression in a nonpublic forum may be restricted as long as the restriction does not follow because the "public official... oppose[s] the speaker's view").


202. E.g. id. at 45–46.

203. Hazelwood, 484 U.S. at 265.

204. Hazelwood, 484 U.S. at 274 n. 4.
environment of the journalism classroom was a nonpublic forum. The principal's content discriminatory censorship of the student newspaper was subject in that forum to a permissive test, rendered in school terms as "legitimate pedagogical concerns."

On the face of its holding, Pico fails to analyze the public school library according to the later-developed public forum doctrine. However, the same omission in Tinker has not stopped courts from construing the Tinker-Hazelwood dichotomy in harmony with the public forum doctrine. Applying the doctrine in retrospect, the Pico Court properly remanded for a factual determination on viewpoint discrimination, which is permissible in none of the three forums opened for public expression.\(^\text{205}\)

In Brennan's view, then, the public school library, insofar as it plays host to students' voluntary explorations, would be a limited public forum or a traditional public forum, but certainly not a nonpublic forum.

C. Pico in the Interim

Though the Supreme Court did not revisit the troubles of Pico for the remainder of the twentieth century, the lower courts had ample opportunity to apply the precedent.\(^\text{206}\) And as nature abhors a vacuum, so lower courts abhor arbitrariness. Whatever its vigor in light of subsequent case law and the limitation of plurality agreement on legal rationales, Brennan's opinion in Pico carried sway because it set an example for problem-solving in a particular factual context.\(^\text{207}\) The plurality opinion had substantial impact in the lower courts, which interpreted Pico in harmony with the Court's public school and public forum jurisprudence. Importantly, the lower courts uniformly recognized the public school library as an extracurricular enterprise, apart from curricular classroom space.

Pico is cited in a broad range of federal court decisions concerning state action in public school libraries, in public libraries outside schools,

\(^\text{205}\) Admittedly, the problem of viewpoint discrimination in a Hazelwood forum is a thorny one when harmonizing the Tinker-Hazelwood dichotomy with the public forum doctrine, as the Hazelwood Court did not clearly disallow viewpoint discrimination and arguably might have tolerated it. One can go round and round on this point, so it will not be made a sticking point in this discussion. A recent explication of the problem is nonetheless available in Susannah Barton Tobin, Divining Hazelwood: The Need for a Viewpoint Neutrality Requirement in School Speech Cases, 39 Harv. Civ. Rights-Civ. Libs. L. Rev. 217, 219 (2004). See also Peltz, supra n. 17, at 506–08.

\(^\text{206}\) Certainly Pico's ambiguities did not shut the door on subsequent censorship. See generally Hentoff, supra n. 1634, at 81–92.

\(^\text{207}\) E.g. Susan Nevelow Mart, The Right to Receive Information, 95 L. Lib. J. 175, 187 (2003) ("Pico has continued to have enormous vitality; later courts have looked to bits and pieces of it to cobble together a viewpoint that applies to the facts actually before the deciding court.").
in public schools outside libraries, and in public universities. The library cases uniformly recognize the Pico principle that children, and therefore certainly adults, enjoy a First Amendment right to receive information and ideas in the library.\textsuperscript{208} The school cases harmonize Pico with public school and public forum jurisprudence, asking in each case whether the state action occurred in a public Tinker forum, characterized by voluntary student inquiry, or in a nonpublic Hazelwood forum, characterized by compulsory student participation. These cases generally employ Pico language from both the plurality opinion and the Rehnquist dissent to situate public school libraries and community public libraries within the public forum class. Government action is most constrained in schools by Tinker's standard of "material and substantial interference," or "invasion of the rights of others"; in public libraries by strict scrutiny for content-based regulations; and in any case by a prohibition on viewpoint discrimination. Less constraining than the public forum class, the nonpublic forum class controls government action in schools by Hazelwood's elastic standard of "legitimate pedagogical concerns"\textsuperscript{209} and in public libraries by the reasonableness test of intermediate scrutiny.\textsuperscript{210}

1. **Public School Libraries**

A Fifth Circuit case exemplifies Pico's endurance. In *Campbell v. St. Tammany Parish School Board*, parents challenged the board's decision to remove a book about voodoo from parish school libraries.\textsuperscript{211} Following Pico, the court denied summary judgment for the parents and remanded for a factual determination of the board's motive.\textsuperscript{212} The appeals court recognized nonetheless that Pico survived Hazelwood, because the voodoo book was not "required reading" and not "a curricular matter" that "the public might reasonably perceive to bear the imprimatur of the school."\textsuperscript{213} The court opined that "the Pico plurality opinion does not constitute binding precedent," but found that Pico even on its narrowest grounds supported "constitutional limitations on school officials' discretion to remove books from a school library."\textsuperscript{214} The court

\textsuperscript{208} See generally Mart, supra n. 2078.
\textsuperscript{209} Hazelwood might or might not include a viewpoint-neutrality requirement. See supra n. 2056; see also Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003, 1011 n. 2 (9th Cir. 2000) (noting circuit split).
\textsuperscript{210} See Kreimer v. Bureau of Police, 958 F.2d 1242, 1262 (1992) (explaining that the library is "subject to the 'reasonableness' standard of review.").
\textsuperscript{211} 64 F.3d 184, 185 (5th Cir. 1995).
\textsuperscript{212} Id.
\textsuperscript{213} Id. at 189 & nn. 29-30 (citing Pico, 457 U.S. at 866-68; in latter instance quoting Hazelwood, 484 U.S. at 271-72).
\textsuperscript{214} Campbell, 64 F.3d at 189.
cast *Pico* as distinguishing the public school library, where student use is "voluntary," from school "curricular matters," where "a high degree of deference [is] accorded educators' decisions." And "[t]he *Pico* plurality stressed," the court observed, "the 'unique role of the school library' as "'the principal locus'" of student freedom "'to inquire, to study and to evaluate, [and] to gain new maturity and understanding.'" Thus the public school library was described as a public forum warranting the "fundamental constitutional safeguards" of *Tinker*.

Three district court decisions are further illustrative of *Pico*’s application to school libraries. First, *Roberts v. Madigan* implicated both expression and religion clauses of the First Amendment, as school officials in Colorado sought to remove "religiously oriented books" from a "classroom library." Allowing the removal, the court specifically distinguished the curricular "classroom library"—inside the classroom, where students are "captive"—from the *Pico* school library. Adding to quotations from *Pico* and *Brown*, the court commented eloquently in dicta upon the sanctity of the latter:

> The school library is a mirror of the human race, a repository of the works of scientists, leaders, and philosophers. It is the locus where the past meets tomorrow, embellished by the present. The school library offers the student a range of knowledge, from the world's great novels and plays to books on hobbies and how-to-do-it projects. The importance of the school library is summed up by the inscription above the entry to the University of Colorado's Norlin library: "Who knows only his child remains always a child."

The court emphasized "the voluntary nature of choice" in that context, critical to both the free expression and the Establishment Clause inquiry.

Second, the court in *Case v. Unified School District No. 233* emulated the Fifth Circuit's reliance on *Pico* and disapproved of the removal of a school library book concerning homosexuality. Following the *Pico* plurality, the court "expressly rejected ... '[Kansas school officials'] claim of absolute discretion beyond the compulsory environment of the

215. *Id.* at 188.
216. *Id.* at 188 nn. 16–17 (quoting *Pico*, 457 U.S. at 868–69 (plurality)).
217. *Id.* (citing *Tinker*, 393 U.S. at 505–07).
219. *Id.* at 1513–14.
220. *Id.* at 1512–13.
221. *Id.* at 1513–14, 1518–19.
classroom, into the school library and the regime of voluntary inquiry that there hold[s] sway.\textsuperscript{223}

Third, the court in \textit{Counts v. Cedarville School District} recently condemned an attempt by officials in Arkansas to restrict access to books in the \textit{Harry Potter} fantasy series to students with signed parental permission slips.\textsuperscript{224} Recognizing a stigma arising from restricted access sufficient to constitute injury to students and their parents,\textsuperscript{225} the court likened school officials' fears about indoctrination into the occult to officials' impermissible attempts in \textit{Pico} to prescribe political, national, or religious orthodoxy.\textsuperscript{226} \textit{Tinker} provided the proper framework for analysis, according to the court, and the school district demonstrated no reasonable evidence to support a forecast of material and substantial disruption.\textsuperscript{227}

\section{Public Schools Outside the Library}

Decisions of the Ninth and Eleventh Circuits and of several district courts incorporated \textit{Pico}'s observance of the extracurricular-curricular distinction into school contexts outside the library, such as clashes of official regulation with the interests of students, parents, and teachers. Though the Sixth Circuit, in a footnote, doubted the viability of \textit{Pico} as a three-Justice plurality decision,\textsuperscript{228} the court nevertheless recognized that the \textit{Pico} plurality ruling on the school library excluded the classroom from its scope.\textsuperscript{229}

The Ninth Circuit twice considered \textit{Pico}'s significance to school contexts outside the library, once finding \textit{Pico} pertinent despite the distinction, and once distinguishing the \textit{Pico} school library from another context. In \textit{Monteiro v. Tempe Union High School District}, the court noted that \textit{Pico} was "particularly helpful" even though the case involved curricular issues and was an equal protection, not a First Amendment, challenge.\textsuperscript{230} \textit{Pico} roles were reversed in \textit{Monteiro}, as a parent sued tenacious school officials to obtain removal of \textit{Huck Finn} from the curriculum, on grounds of racist profanity.\textsuperscript{231} The court noted that

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\textsuperscript{223} \textit{Id.} at 876 (quoting \textit{Pico}, 457 U.S. at 869 (plurality)).
\textsuperscript{224} 295 F. Supp. 2d 996, 1005 (W.D. Ark. 2003).
\textsuperscript{225} \textit{Id.} at 999.
\textsuperscript{227} \textit{Id.} at 1005.
\textsuperscript{229} \textit{Id.} (citing \textit{Pico}, 457 U.S. at 862, 869).
\textsuperscript{230} 158 F.3d 1022, 1027 n. 5 (9th Cir. 1998).
\textsuperscript{231} \textit{Id.} at 1023.
students enjoy a *Pico* right to receive even in the curricular context; in fact, the court concluded, the right to receive "is particularly relevant in the classroom setting" because "'[t]he classroom is peculiarly 'the marketplace of ideas.'" Ultimately, the court decided that students' right to receive literary expression even in the curricular context bolstered the school board's refusal to alter the curriculum to protect the interests of a minority of students.

Despite the extension of *Pico* entertained in *Monteiro*, the Ninth Circuit in *Downs v. Los Angeles Unified School District* recognized the distinction drawn in *Pico* between "the compulsory environment of the classroom" and "the regime of voluntary inquiry that... holds sway" in the school library. The school district in *Downs* prevailed against a teacher who sought access to a school bulletin board to post materials contrary in viewpoint to postings commemorating gay and lesbian awareness month. The court ultimately determined that it was unnecessary to classify the school bulletin boards as "curricular" in nature, or simply as the affirmative speech of government, because in neither case would the bulletin boards be subject to a right of access by the plaintiff teacher. That decision accorded with *Pico*, the court explained, which involved "optional rather than required reading."

The Eleventh Circuit plainly acknowledged the extracurricular-curricular distinction in applying *Hazelwood*'s then-recent "legitimate pedagog[y]" standard to permit a school board's withdrawal of a humanities textbook from classroom use. A Florida school board, displeased with the sexual content of Aristophanes's *Lysistrata* and Geoffrey Chaucer's *The Miller's Tale*, sought to withdraw the text from classroom use. Though "seriously question[ing] how young persons just below the age of majority can be harmed by these masterpieces of Western literature," the court in *Virgil v. School Board of Columbia County* ruled that the school board's decision passed constitutional muster. In a footnote, the court limited *Pico* to "the 'unique role of the school library' as a repository for 'voluntary inquiry.'"
District court decisions have similarly recognized the extracurricular-curricular distinction suggested by Pico, arguably sustaining Pico as a Tinker case distinguishable from Hazelwood’s curricular doctrine. Though the decision predated Hazelwood by three years, the court in Bowman v. Bethel-Tate Board of Education relied substantially on Pico in ruling in favor of third-grade students and their right to perform a play, because the production was a voluntary, extracurricular activity.\(^{242}\) The court in Bell v. U-32 Board of Education reached a contrary decision one year later in a dispute over a high school production.\(^{243}\) Admittedly, the court in Bell indicated that it would rule in favor of school officials regardless of whether the play was a curricular or an extracurricular undertaking.\(^{244}\) Nevertheless, the court discussed Pico’s exclusion for curricular discretion, quoting Justice Brennan’s opinion at length,\(^{245}\) and observed that the play’s curricular character—the play was “read and discussed in the school’s humanities course”—was not challenged.\(^{246}\)

District court decisions after Hazelwood retained Pico as valid precedent. One year after Hazelwood, the court in Romano v. Harrington remanded for a factual determination of whether a student newspaper was a curricular or an extracurricular project.\(^{247}\) The court viewed Pico as “counsel[ing] against broadening Hazelwood’s reach,” even though the school library may maintain “voluntary and required [reading] selections . . . side by side on the school library’s shelf,” and even though school funding may support the voluntary and extracurricular as well as the required and curricular.\(^{248}\) One year later, in a high school teacher’s civil rights and termination case, the court lamented that Pico applicable, the plurality ruling condoned censorship not predicated on “opposition to the content of ideas expressed in the disputed materials.” Id. (citing Pico, 457 U.S. at 871–72) (emphasis added). That distinction seems strange because the school board based its decision on opposition to sexual content. But it must be remembered that Virgil closely followed Hazelwood in time, and Pico and Hazelwood were not yet firmly incorporated into the public forum rubric, where content and viewpoint discrimination must be contrasted. Elsewhere in Virgil, the court cited Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986), in conjunction with Pico, 457 U.S. at 871, parenthetically observing the latter’s exception for the “pervasively vulgar” or “educationally[ly] [un]suitab[le],” Virgil, 862 F.2d 1521–22. That exception better explains the court’s further reliance on Pico as expressed in Virgil’s footnote 8. Virgil, 862 F.2d 1517.

244. Id. at 944.
245. See id. at 942–44.
246. Id. at 944. The court ultimately decided that school sponsorship was dispositive, not curricular involvement, id., but failed to reconcile that standard with Pico, which clearly concerned a school-sponsored library.
248. Id. at 690 & n. 4.
“highlighted” the difficulty of “reach[ing] a uniform opinion on the
proper balancing of interests in the sensitive area of First Amendment
rights at the high school academic level.” Nevertheless, in ruling in
favor of school officials, the court in Ward v. Hickey found
“circumstances” controlling in the clearly curricular context of a
classroom discussion about “a taboo word [written] on the
blackboard.” The court in Borger v. Bisciglia also ruled in favor of
school officials, applying the Hazelwood pedagogy standard to sustain a
school district’s refusal to include the R-rated film Schindler’s List in the
high school curriculum. The court observed the curricular connection
explicitly, distancing the case from Pico but also suggested that Pico’s
prohibition on ideological favoritism pertained.

3. Public Libraries Outside the School

Pico has made occasional appearances in cases arising in public
libraries outside schools altogether. It stands to reason that if children in
public schools have a First Amendment right to receive free expression,
then so must adults in community libraries. That right has been
recognized in three federal cases: Kreimer v. Bureau of Police for Town of
Morristown, Mainstream Loudoun v. Board of Trustees of Loudoun
County Library, and Sund v. City of Wichita Falls, Texas.

The Third Circuit in Kreimer analyzed and upheld patron conduct
rules employed to punish a homeless man for disruption of a public
library. The court relied in part on Pico—including Justice
Rehnquist’s dissent—and applied the children-therefore-adults logic
to determine that the public library is a designated public forum. That
holding later supported the court’s conclusion in Mainstream Loudoun
that the mandatory imposition of filters violated the constitutional rights

250. Id. at 76.
251. 888 F. Supp. 97, 98–100 (E.D. Wis. 1995).
252. Id. at 99–100.
253. See id. at 100 (“This is a viewpoint-neutral, non-ideological reason for a facially
neutral policy and a viewpoint-neutral application of that policy[:] . . . keep[ing] harsh language, violence,
and nudity out of the history or government classroom curriculum.”)
254. 958 F.2d 1242 (3d Cir. 1992).
256. 121 F. Supp. 2d 530 (N.D. Tex. 2000).
257. 958 F.2d at 1246–47.
258. “Unlike universities or public libraries, elementary and secondary schools are not
designated for freewheeling inquiry; they are tailored, as the public school curriculum is tailored, to
the teaching of basic skills and ideas.” Pico, 457 U.S. at 915 (Rehnquist, J., dissenting) (emphasis
added) (quoted in Kreimer, 958 F.2d at 1255).
of patrons.259

The Mainstream Loudoun decision concerned filtering prior to its mandatory imposition by the federal government through the Children’s Internet Protection Act (hereinafter CIPA). The CIPA and the Supreme Court decision upholding it, United States v. American Library Association,260 will be discussed in the following Part III.D; it suffices to say here that ALA substantially vitiated the reasoning of Mainstream Loudoun. It is nonetheless instructive to observe that the Mainstream Loudoun court adopted the acquisition-removal distinction of Pico and, recognizing that the public library patrons must enjoy at least as much First Amendment freedom as public school students, applied strict scrutiny to content-based removal decisions in public libraries.261

The court in Sund struck down a municipal library policy that allowed 300 petitioning patrons to have selected books, because of their content, removed from the children’s section to the adult section of the library. The court relied on Kreimer and Pico to recognize the right of the patron, whether child or parent, to receive free expression, and to distinguish, again, school libraries from community libraries, asserting that “[t]he principles set forth in Pico—a school library case—have even greater force when applied to public libraries.”262 Since the Supreme Court in ALA departed from the clear logic of the Mainstream Loudoun decision, more questions have been raised than answered concerning the proper analysis of First Amendment problems in community libraries. Nevertheless, lower courts may be expected to continue to observe Pico in the school context, because decisions in the community library context have distinguished the special circumstances of schools. As long as Pico is permitted to govern the school context, the distinction between the curricular and extracurricular will retain vitality. Such divergent lines of thinking might have the odd result of protecting the public school library with the generous terms of a Brennan decision, while eroding First Amendment freedom in the community public library by limiting Rehnquist language. Even so, public school students will, for the time being, retain more First Amendment latitude in the school library than in the school classroom.

259. 24 F. Supp. 2d at 562.
261. See Mainstream Loudan, 2 F. Supp. 2d at 793–95 (finding that adult library patrons have “fundamental” rights that allow them to “pursue their personal intellectual interests” at the library); Mainstream Loudan, 24 F. Supp. 2d at 561 & n. 10.
4. Public Universities

_Pico_ has appeared in two 1986 federal court decisions concerning collegiate academics. Considering that the public community library and the public school library are distinguished by the peculiar mission of the school to inculcate social values in children, the university library is unsurprisingly viewed on par with the community library. The university library is principally patronized by adults. Still, public universities entertain an educational mission. They are characterized by classrooms and activities at which, similar to the public school, student attendance is compulsory. Thus the extracurricular-curricular distinction has emerged in higher education.

Two decisions exemplify this distinction. In _Martin v. Parrish_, the Fifth Circuit upheld a public college instructor’s discharge for using profanity in the classroom. In a footnote, the court cited _Pico_ and _Fraser_ to assert a school’s “historically... acknowledged” authority to “determin[e]... what manner of speech _in the classroom_... is inappropriate... .” Meanwhile, a federal judge held that University of Nebraska officials ran afoul of the First Amendment when they cancelled an art theater showing of the film _Hail Mary_, a Christ story. While finding _Pico_ problematic for its array of separate opinions “point[ing] in all directions,” the court in _Brown v. Board of Regents_ nevertheless found the rights of would-be theatergoers encompassed within _Pico_’s protection of the First Amendment right to receive. Significantly, the court specified two reasons that the instant facts demanded even stronger First Amendment protection than the _Pico_ plurality afforded students. First, _Pico_ must apply with greater force to a college campus than to a high school library. Second, unlike the school library in _Pico_, the university art theater was open to the public, so the government’s role as educator was “slight.”

To rephrase the latter rationale in _Brown_, the government’s interests as educator are inversely proportional to the degree of voluntary

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263. As both decisions predate _Hazelwood_, the application of _Hazelwood_ at the collegiate level was not at issue. See _Hazelwood_, 484 U.S. 273 n. 7 (“We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.”); Peltz, _supra_ n. 17, at 508–12.
264. 805 F.2d 583, 583 (5th Cir. 1986).
266. _Id._ (quoting _Bethel Sch. Dist. v. Fraser_, 478 U.S. 675, 683 (1986)) (emphasis added).
268. _Id._ at 678 (quoting _Pico_, 457 U.S. at 867).
269. _Id._ at 680.
270. _Id._
attendance and inquiry that occur in the forum. Thus while the art theater was a place for even greater freedom to receive expression than the Pico school library, the Brown decision reinforced the Pico distinction between voluntary inquiry and compulsory education. Moreover, the distinction is consistent with Martin, which focused on expression in the classroom. In that context, the degree of voluntary inquiry afforded to forum participants is minimized and government’s leeway as educator is maximized.

D. United States v. American Library Association

The advent of the Internet at last occasioned an opportunity for the High Court to consider censorship in the community public library. Just as technology challenges authors, booksellers, and readers to reconsider fundamental notions about publishing—from business models to intellectual property rights—the information age forces the library to reexamine its fundamental mission. The Internet makes a vast array of resources available to the public at the press of a few buttons, and libraries wisely embrace the technology to bring information to patrons with unprecedented practical and economic efficiency. But the Internet is non-discriminating by nature, and so libraries that invite computers into their public spaces find that they have opened the door to nuisance, reckless falsity, and obscenity. This tension between the good and bad of library electrification was at the heart of United States v. American Library Association.\(^\text{271}\)

Writing for a Court plurality, Justice Rehnquist, joined by Justices O'Connor, Scalia, and Thomas, upheld CIPA—Congress’s third attempt at Internet regulation.\(^\text{272}\) Whereas previous Congressional attempts to regulate the Internet for at least the purported purpose of protecting children ran into trouble in the courts—parts of the Communications Decency Act of 1996 were struck down in 1997,\(^\text{273}\) and the Children's Online Protection Act of 1998, early troubled in the lower courts, ultimately failed in the Supreme Court in 2004\(^\text{274}\)—Congress in CIPA tried two new strategies to cope with potential constitutional infirmities: (1) regulating as a condition of federal funding, rather than regulating directly; and (2) regulating Internet communication at the user, or “listener,” end, rather than at the transmitter, or “speaker”

\(^{271}\) 539 U.S. 194 (2003).
The first strategy was promising because the Rehnquist Court had afforded the Government as financial sponsor greater latitude in speech regulation than the Government as regulator. The second strategy was promising because previous statutes had stumbled on the chilling effect imposed on Internet speakers who, by the unique nature of the medium, could not know who was listening.

Both strategies worked. First, the plurality analogized the public library to government-funded projects such as public television and the National Endowment for the Arts, in which public officials' jobs necessarily entail substantial content-based discretion in editorial and aesthetic judgments. Second, the plurality analogized end-user filtering to library book selection.

The latter analogy, Internet filtering to book selection, did not by itself end the analysis and need not by itself have diminished the pertinence of Pico. Because Justice Brennan recognized the censorship in Pico as a problem of book removal—conveniently susceptible to judicial review because of its evidentiary transparency—he did not have to decide the degree of scrutiny appropriate to the library selection process. In characterizing filtering as a selection problem, the Court in ALA placed the problem outside Pico and was therefore free to fashion its own approach. The Court could have followed the plurality view of Pico and applied a similar bar on viewpoint discrimination. The Court could also have followed Pico further, through the advent of public forum doctrine, and applied strict scrutiny to the clearly content-based, arguably viewpoint-neutral library selection decisions inherent in Internet filtering.

The ALA plurality chose a different course, and there the analogy to...

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275. For a brief explication of the CIPA and the litigation prior to court rulings on the merits, see Peltz, supra n. 8, at 425–33. See generally Gregory K. Laughlin, Sex, Lies, and Library Cards: The First Amendment Implications of the Use of Software Filters to Control Access to Internet Pornography in Public Libraries, 51 Drake L. Rev. 213 (2003); Steven D. Hinckley, Your Money or Your Speech: The Children's Internet Protection Act and the Congressional Assault on the First Amendment in Public Libraries, 80 Wash. U. L.Q. 1025 (2002).


279. Id. at 205–09.

280. I argued prior to the ALA decision that this approach was the correct one, given that library selection processes are guided by objective standards. See Peltz, supra n. 8, at 455–68.
aesthetic and editorial judgments came into play. The plurality regarded library selection as an inherently content-discriminatory process, necessarily entitled to greater latitude than strict scrutiny would afford. In this realm of permissible content discrimination, the public forum doctrine does not apply. Rather, administrative decisions are subject to review, at the most stringent, for mere reasonableness, much as if the library were a nonpublic forum. The plurality recognized the library's "traditional role of obtaining material of requisite and appropriate quality for educational and informational purposes." Indeed, the term "requisite and appropriate quality" appears six times in the plurality opinion. Within the scope of this traditional role, the library conducts itself quite reasonably, the plurality concluded, in not selecting Internet web sites with potentially offensive sexual content, notwithstanding the constitutionally protected status of excluded content, and notwithstanding the imprecision inherent in the filtering mechanism.

The Rehnquist plurality decision is not necessarily inconsonant with Pico. ALA may be regarded as a decision about Internet, or book, selection, and Pico as a decision about book removal. But the Chief Justice did not do Justice Brennan the courtesy of harmonizing the decisions. Astonishingly, the Rehnquist plurality opinion in ALA made not a single citation to Pico (nor, for that matter, to the earlier Brown decision), and utterly ignored the Court's key precedent in library law. Rehnquist and O'Connor, of course, dissented from Pico.

ALA thus left Pico on uncertain terms. Is the omission of a reference to Pico an acknowledgement of the apparent distinction between selection and removal? Or does the Rehnquist plurality mean to imply that Pico has no vitality as precedent? Surely, no distinction lies between the two decisions as between the school and the community context; such a distinction might infer the odd result that student library patrons enjoy more protection against censorship than adult library patrons. The language of the Rehnquist plurality opinions certainly smacks of the Rehnquist dissent in Pico. Justice Rehnquist in 1982 was untroubled by censorship—or the exclusion of certain ideas—when government acts in "the role of educator, as compared with the role of government as

281. ALA, 539 U.S. at 205-07.
282. The plurality did not state a clear standard but observed that the libraries were "entirely reasonable" in filtering and were due "broad discretion." Id. at 204, 207.
283. Id. at 211.
284. See id. at 204, 206, 208, 209 n. 4, 211, 213 n. 7.
285. Id. at 208.
286. See id. at 198-214.
Chief Justice Rehnquist in 2003 emphasized "public libraries[']... worthy missions of facilitating learning and cultural enrichment," and "educational and informational purposes." Justice Rehnquist in 1982 refused to see the Pico problem as one of students' right to receive—"a curious entitlement." Chief Justice Rehnquist in 2003 refused to see the ALA problem as one of patrons' right to receive, considering only whether the library is a "forum for the authors of books to speak," and held that it is not. But if Chief Justice Rehnquist perceived ALA as a long-awaited opportunity for his dissenting view in Pico to carry the day, why not overrule the older decision? One might infer that the Rehnquist plurality was not strong enough to go so far.

Justices Kennedy and Breyer concurred with the result reached by the Rehnquist plurality, but each on different grounds. Justice Kennedy seized on a vital concession by the Solicitor General in the course of oral arguments: that librarians would disable Internet filters at any time upon an adult patron's request. Because that concession—inconsistent with the language of the CIPA—obviated any real threat of censorship, Justice Kennedy saw no need to inquire further, and his short opinion did not cite Pico.

Justice Breyer agreed with the Rehnquist plurality that filtering was a selection process, but Breyer rejected both the plurality's minimal standard of scrutiny and the framework of the public forum doctrine. Instead, he fashioned a form of heightened scrutiny based on a line of First Amendment cases in broadcasting, where strict scrutiny is relaxed to accommodate the peculiar characteristics of the medium. Breyer cited Pico nominally, but in a compelling fashion. To support the assertion that the CIPA implicated a First Amendment right of patrons to receive information and ideas in the public library, Breyer cited two sources: (1) parts of the plurality opinion, such as Rehnquist's discussion of the public library functions to inform and enlighten the public; and (2) Rehnquist's dissent in Pico, "describing public libraries as places 'designed for freewheeling inquiry.'" Considering that, in both his

288. ALA, 539 U.S. at 203.
289. Id. at 226.
291. ALA, 539 U.S. at 206.
292. Id. at 214 (Kennedy, J., concurring).
293. Id. at 215 (Kennedy, J., concurring); see id. at 214–15 (Kennedy, J., concurring).
294. Id. at 215–17 (Breyer, J., concurring).
295. Id. at 217–20 (Breyer, J., concurring).
296. Id. at 216 (Breyer, J., concurring) (citing Pico, 457 U.S. at 915 (Rehnquist, J., dissenting)).
Pico and ALA opinions, Rehnquist ultimately disregarded any patron right to receive, one wonders whether Breyer was not jabbing Rehnquist with the latter's own foil.

Justices Stevens, Souter, and Ginsburg dissented. Justice Stevens did not cite Pico, but neither did he necessarily depart from the plurality's endorsement of filtering in public libraries. The question for Justice Stevens was not whether to censor or select, but rather where that authority lies. Analogizing to the university context and citing authority for academic freedom, Stevens would have placed the power of filtering and content selection with librarians rather than with Congress. Thus although Justice Stevens allied ostensibly with the librarian respondents in ALA, his tangential analogy to the university context does little to preserve the position that the Pico students won against their school board.

The other dissenters, Justices Souter and Ginsburg, believed that Internet filtering was a removal process subject to strict scrutiny. Justice Souter extensively reviewed the history of public libraries, undermining Justice Rehnquist's "traditional[ist]" position by observing both that historically, libraries did favor moral paternalism over education and enlightenment, and that in the modern era, libraries do not value distinctions of "appropriate quality" over the primacy of nondiscriminatory patron access. Faced with a removal problem, Justice Souter would have obliterated CIPA by applying "conventional strict scrutiny."

In his analysis, Justice Souter cited Pico three times. First, he cited Pico to support the statement that courts must be cautious in reviewing selection decisions because of the necessity and complexity of content discrimination in selection. Parenthetically, Souter observed that "even the plurality" would reject selection decisions clearly based on viewpoint, e.g., distaste for Democrat authors or for content hostile to Christianity. The parenthetical suggests at least that Souter did not take the plurality opinion to supersede Pico entirely. Second, Souter cited Pico textually, observing again that selection and removal must be distinguished—"a perception that underlay the good sense of the [Pico]

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297. See id. at 220–31 (Stevens, J., dissenting).
298. See id. at 225–26 (Stevens, J., dissenting) (citing inter alia Keyishian v. Bd. of Regents of St. Univ. of N.Y., 385 U.S. 581, 603 (1967)).
299. Id. at 242 (Souter, J., dissenting).
300. Id. at 237–41 (Souter, J., dissenting).
301. Id. at 242–43 (Souter, J., dissenting).
302. Id. at 236 (Souter, J., dissenting) (citing Pico, 457 U.S. at 870–71).
303. Id. (Souter, J., dissenting).
plurality's conclusion.\textsuperscript{304} Though this reference does not reveal whether Souter would ever disapprove of a library's viewpoint-neutral but content-discriminatory selection decision, it again shows that Souter believes \textit{Pico} to authorize strict scrutiny of removal decisions. Finally, Souter cited \textit{Pico} in a footnote, explaining why he grounded his decision in the rights of patrons rather than the rights of Internet publishers.\textsuperscript{305} Describing "a viewer's or reader's right to be free of paternalistic censorship as at least an adjunct of the core right of the speaker," Souter observed the inconsistency in recognizing such a right on the part of high school students but not adult patrons of the community public library.\textsuperscript{306}

It appears, then, that \textit{Pico} has life yet. By characterizing \textit{ALA} as a selection rather than removal case, and by shunning \textit{Pico} in so doing, the Rehnquist plurality left \textit{Pico} intact as a ban on viewpoint discrimination in resource removal, likely effective in both the public school and community library. Moreover, Justice Souter's dissent, joined by Justice Ginsburg, fuels the speculation, indulged by the lower courts, that \textit{Pico} survived both the retirement of Justice Brennan and the advent of public forum doctrine. If this latter-day \textit{Pico} does, as Justice Souter suggests, implicate the "conventional strict scrutiny" in cases of content-discriminatory removal decisions, then the library may well be a traditional or limited public forum with respect to patrons' First Amendment rights.

IV. THE "CURRICULAR CHOICE" AND ITS DANGEROUS IMPLICATIONS

A. \textit{The ALA Position on Filtering}

As evidenced by the American Library Association's position as named plaintiff in the \textit{ALA} litigation over the Children's Internet Protection Act, the association opposed the mandatory imposition of filters in public libraries.\textsuperscript{307} Notwithstanding the \textit{ALA} plurality's insistence that librarians routinely make decisions about "requisite and appropriate quality," the professional librarians' community found a qualitative distinction between the selection process and the automated exclusion of constitutionally protected speech. The latter violated the Library Bill of Rights, the \textit{ALA} decided, and the association issued a

\begin{itemize}
  \item \textsuperscript{304} \textit{Id.} at 242 (Souter, J., dissenting) (citing \textit{Pico}, 457 U.S. 853).
  \item \textsuperscript{305} \textit{Id.} at 242 n. 8 (Souter, J., dissenting) (citing \textit{Pico}, 457 U.S. at 865--68).
  \item \textsuperscript{306} \textit{Id.} (Souter, J., dissenting).
  \item \textsuperscript{307} \textit{Id.} at 201--202.
\end{itemize}
resolution and statement to that effect in 1997.\textsuperscript{308} The CIPA's particular application to child patrons bolstered the ALA's position, contravening the Library Bill of Rights guarantee of equal access for all ages,\textsuperscript{309} as interpreted to charge parents with responsibility for their children's library use. The ALA did not approve of the CIPA's application in schools, but reserved that issue for future litigation, hoping first for a clean victory on the adult-patron question.\textsuperscript{310}

The ALA well knew, however, that not every librarian agreed with its position.\textsuperscript{311} Heated debate erupted within the ALA over the filtering resolution, and the association's Intellectual Freedom Committee acknowledged that no position on filtering "would... please everyone."\textsuperscript{312} Librarians' objections ranged from simple fear of an untenable position should filtering be mandated by legal authority,\textsuperscript{313} as later occurred, to genuine support for filtering to prevent the misuse of library resources and the endangerment of library staff and patrons when computers were used to view pornography.\textsuperscript{314} These objections do not necessarily represent hostility to ALA values. Many librarians, especially in smaller branch libraries, find themselves caught between ALA ideals and the realities of their jobs. A librarian in a rural branch might be the library's only full-time staff person, responsible not just for circulating books and offering reference aid, but for ensuring security. Despite library rules and ALA principles, working parents might leave children unattended in the library, and the librarian may be held accountable by the library board and local officials for the children's welfare. The "real world" does not always allow the luxury of honoring principle over necessity.

B. Dissent from the ALA Position in School Libraries

School librarians dissenting from the ALA position make an especially compelling case. The ALA at once endorses the acquisition of

\begin{footnotesize}
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\item[309.] \textit{Id.} at 109.
\item[310.] See Peltz, \textit{supra} n. 8, at 398–99 n. 13.
\item[311.] \textit{Cf. supra} n. 1246 and accompanying text.
\item[312.] \textit{Id.} at 253.
\item[313.] \textit{Id.} at 253–54.
\item[314.] I found these objections, as further expounded in the sentences that follow this footnote, consistently asserted by a minority of librarians whom I addressed in presentations at the annual conferences of the Arkansas Library Association in 1999, 2000, 2001, and 2002. The same objections, as further expounded in the next paragraph after this footnote, were prevalent among school librarians whom I addressed at the annual conferences of the Arkansas Association for Instructional Media in 2001 and 2002. Such views and experiences no doubt motivate the dissenting minority within the national association.
\end{enumerate}
\end{footnotesize}
"resources appropriate to the developmental and maturity levels of students" and disapproves of "imposing age or grade level restrictions on the use of resources." 315 Surely objective material might guide a librarian to assemble a collection suitable for unrestricted access by, say, students in grades ten to twelve. But what happens when economically motivated school consolidation forces the school library to serve primary and secondary school students together? Must the primary school students be permitted unrestricted access to material on homosexuality deemed educationally sound for post-pubescent readers? Or must the secondary school students be reduced to reading only that which is fit for small children? Can this stratification not occur over a narrower age range, say, if a middle school is merged with a high school? Or simply within a four-year high school? Add to this state of affairs the sort of branch-library understaffing problem referenced in the previous paragraph, and the expectations placed on the school librarian by administrators and parents. Very quickly the case is constructed for an automated librarian's aid, the software filter, which restricts computer access according to the user's age and without the need for individualized human oversight. This school librarian's position must engender sympathy from even the most ardent advocate of intellectual freedom.

The school librarian's position is supported moreover by his qualifications as an educator. The modern school librarian typically holds qualifications in common with a teacher, besides qualifications as a professional librarian, and sits on the school curriculum committee. 316 This person speaks with authority about educational models. Indeed, this person speaks with an authority to which even well educated outsiders and courts of law, per Hazelwood, defer when the question is of a curricular nature. This person speaks in the context of rampant public fear and confusion over media-hyped school shootings in Littleton, Jonesboro, Paducah, Columbine, and elsewhere. If this highly qualified school librarian for whatever reason declares that society ought to be "better safe than sorry" in imposing constitutionally overbroad restraints on a student's computer use at school, no one in the community is well positioned to object.

If economic limitations do not compel a school librarian to get behind filtering, why else might he dissent from the ALA position? Especially when the decision rests in administrators' hands, as it well may, and is transmitted to the school library by mandate, the answer might be as simple as "the path of least resistance." Just as some schools

316. See supra part I.E.
surely found after the *Scopes* trial\textsuperscript{317} that teaching *neither* creationism nor evolution engendered less community outrage than teaching *either*, and just as school principals after *Hazelwood* found that cheerleading school news provoked fewer reader complaints than student muckraking, regardless of truth or merit, school officials surely realized that teaching either creationism or evolution engendered less community outrage than teaching *either*, and just as school principals after *Hazelwood* found that cheerleading school news provoked fewer reader complaints than student muckraking, regardless of truth or merit, school officials surely realized that free and robust student inquiry online, through the school library’s new virtual window on the world, caused trouble, while filtering quelled it. Public officials are seldom champions of individual liberties, because freedom is reliably costly, while suppression is usually expedient. One student gaining access to a pornographic image can result in a publicly embarrassing, financially draining, and potentially career-breaking, even if unsuccessful, lawsuit by an angry parent.\textsuperscript{318} Meanwhile, any ill effects arising from the subtle dampening of voluntary inquiry during students’ extracurricular time are difficult to detect at best and non-verifiable at worst. At the end of the day, it’s just easier to filter.

C. *Support for Filtering and Baltimore County’s “Curricular Choice”*

The drive to filter student computer access in public school libraries, whether motivated by genuine good intentions or underhanded expedience, might have contributed to a decreased vigor in the civil liberties community to fight the battle over school libraries. We will never know, because the battle was lost first on adult turf. In any event, this drive certainly helps to explain the conflicted feelings of school librarians on the subject of youth, intellectual freedom, and Internet access, despite the firm public position of the ALA.

This state of affairs well explains what I saw in Maryland in May of 2003. I attended a “citizen law-related education program,” in other words, a legal program geared to non-lawyers, sponsored by the Maryland Bar Association. Two librarians with the Baltimore County Board of Education presented a program, complete with Baltimore County Public Schools (BCPS) policies, explaining the technical, political, and legal dynamics of Internet filtering in public schools.\textsuperscript{319} It appeared that Baltimore County was well in compliance with the CIPA, as the presenters clearly advocated filtering, and much of the presentation concerned how to do it and how to justify it, in law and policy, against complaints. The Supreme Court’s ALA decision had not yet come out—it was published on June 23, 2003—so the straightforward and rather bulletproof argument, “the Supreme Court said we can” was

\textsuperscript{317} Scopes v. State, 289 S.W. 363 (Tenn. 1927).
\textsuperscript{318} See *e.g.* Kathleen R. v. City of Livermore, 104 Cal. Rptr. 2d 772 (App. 1st Dist. 2001).
\textsuperscript{319} See Mellenkopf, supra n. 14.
not yet available. Instead, the centerpiece of both the law and policy defenses of Internet filtering in Baltimore County was that the filtering in the library is a curricular choice.

The BCPS Acceptable Use Policy presented at the program stated, "For students telecommunications use in the [BCPS] is for educational purposes, such as accessing curriculum-related information, sharing resources, and promoting innovation in learning. NO PERSONAL USE OF ANY KIND IS PERMITTED."\(^{320}\)

It was the presenters' desire that the curricular argument for Internet filtering in the public school library, ideally as embodied in the Baltimore County policy, be adopted by other Maryland school systems. The Internet program plainly excluded the traditional, indeed historical, use of the school library for individual exploration and leisure reading.

**D. Dangerous Implications of the Curricular Choice, or, "[F]orgive them; for they know not what they do"\(^{321}\)**

The problem with casting student Internet surfing as a curricular choice is that when the activity is voluntary, that is, not conducted in the context of an organized exercise of curricular character, the activity is extracurricular. Labeling the extracurricular as curricular erases the line between the two, effectively characterizing all library use as curricular. Upon that characterization, the public school library cedes that half of its traditional dual identity that historically afforded practical autonomy and that in the modern era has safeguarded intellectual freedom. The effects may be far reaching, diminishing not only the educational opportunities of youth, but the academic freedom of the school librarian, and, potentially, the vigor of free inquiry in society at large.

Justice Brennan founded his decision in *Pico* on the simple proposition that the library is principally a place for the exercise of a constitutional liberty—specifically, the freedom of patrons to read. Notwithstanding the confounding dictum regarding "educational suitability," it made no difference to Justice Brennan in the end that the library was located inside a school, as long as the students' use of the library was analogous to adults' voluntary inquiry in the community public library, and no substantial disruption of school operations resulted.\(^{322}\)

The plurality opinion in *Pico* implicitly recognized that more goes on

\(^{320}\) See Mellenkopf, *supra* n. 14 (handout marked "Series 6166, Form A," copy on file with author).


\(^{322}\) See *supra* part III.B.1.
in the library than the completion of class assignments, and this recognition accords with the history of the school library in America. The American Library Association and National Education Association recognized in a joint meeting no later than 1897 the importance of reading books for leisure. Even earlier, library advocates recognized that books were critical to the development of reading skills, and children did not have to be limited to the books necessary for class work.

With the emergence of the *Tinker-Hazelwood* dichotomy after 1988, *Tinker* preserved *Pico* by analogy, and the lower courts set the school library apart from the classroom in the fashion of the extracurricular-curricular distinction. This adaptation again well served the school library’s interests in that it perpetuated the library’s identity independent of the school’s curricular mission, even while the library aids in that mission. To use Melvil Dewey’s metaphor, the library lamb, as an extracurricular creature, is permitted its freedom, which is to say that under the *Tinker-Hazelwood* dichotomy, student patrons are allowed to employ library resources with the higher degree of freedom afforded by the *Tinker* standard. The lamb may not be eaten by the school lion, which is permitted to infringe substantially more on students’ freedom in the interests of furthering their curricular instruction. Giving students in the library the range of freedom afforded by *Tinker* serves their educational interests because, as scholars recognized long ago, students must be interested and engaged in reading to make the most of educational opportunities. Accordingly, it is better that a student “reads trash” than nothing at all, “because a reader can always be led to better things.”

The retrofitting of the *Tinker-Hazelwood* dichotomy with public forum doctrine remains consistent with the continuing vitality of *Pico* and only enhances the dual identity of the school library. Public forum doctrine hardened the extracurricular-curricular distinction, insulating the library’s autonomy against economic or other pressures that might press library resources into curricular service. With language dating to *Brown v. Louisiana* and the Third Circuit’s public forum ruling in *Kreimer*, the community library’s public forum identity has matured, bolstering the image of the school library as a place apart from the

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323. See supra part II.C.
324. See id.
325. See supra part III.B.3.
326. See supra part III.C.
327. See supra part II.C.
328. See supra part II.C.
329. Campbell, supra n. 24, at 21; see supra part III.E.
classroom, and as a place specially dedicated to the exercise of constitutionally protected liberties. Surely ALA dealt a serious blow to that notion, focusing as it did on authors' rather than patrons' activities in the libraries to find the place something less than a public forum, if within the public forum doctrine at all. But ALA did not necessarily gut Pico, as explained in Part III.D. There may yet be circumstances when official discretion is limited because patrons' rights provide the proper frame of reference.

Whatever the effect of ALA on Pico, and only time will tell, the latter-day application of public forum doctrine highlights the problem in mischaracterizing the school library as a curricular endeavor. A problem with the public forum retrofit of the Tinker-Hazelwood dichotomy has arisen in a small number of public college and university cases. Looking to the majority opinion in Hazelwood, there is little reason to believe that the Court's reasoning, which emphasized the inculcative nature of youth education, would apply to adults attending college. But in an enigmatic footnote, the Hazelwood Court specifically declined to address the free expression rights of college students, fueling speculation that Hazelwood is not limited to youth. The public forum doctrine unfortunately bolsters this speculation because of its threshold emphasis on whether the government has deliberately opened a forum for public expression. Thus in the case of a college yearbook, a Sixth Circuit panel—later reversed upon rehearing en banc—consulted stated school policy to decide that Kentucky State University had not opened the student-edited yearbook to free student expression, and thus retained a considerable Hazelwood power of censorship. Furthermore, courts in at least five circuits have determined that Hazelwood provides the operative standard to analyze problems of teachers' free expression rights in the grade schools, reasoning that schools have not deliberately afforded teachers any measure of academic freedom. The courts' emphasis on written policy in such cases, to the near exclusion of factors such as actual practice, historical practice, or public policy interests, raises the specter that the government might as a matter of course retain over various aspects of adult life an authority akin to that which school officials exercise in the high school classroom.

That Hazelwood has damaged high school journalism education has

330. Hazelwood, 484 U.S. at 273 n. 7.
332. See Peltz, supra n. 17, at 500.
333. See id. at 508–12.
been demonstrated. The data amply demonstrates that school administrators have widely abused the Hazelwood prerogative to suppress legitimate and entrepreneurial student journalistic inquiry into matters of public interest, including official misconduct. Preliminary research findings logically suggest that this repression of student initiative might subdue students' inclinations to challenge authority later in life. The potentially further-reaching effects of repressing teachers' academic freedom are untold. College education is likely highly effective at reversing such damage, making it all the more imperative that an ill-advised extension of Hazelwood, as occurred in the Sixth Circuit before reversal, not be repeated. To this end, I have previously argued that college student publications should establish clearly their public forum status, or in other words, rigorously resist classification as curricular activities.

A similar conclusion pertains to the public school library. Dewey and Brennan recognized the potential injury to students' education that might result from the usurpation of library resources or the censorship of controversial content. The school librarian must enjoy professional autonomy even while aiding in the school's curricular mission. Characterizing the library as a curricular endeavor annihilates that autonomy, jeopardizing both the library's tangible resources and intangible intellectual freedom. The same potential for abuse that resulted in the high schools after Hazelwood, and that threatens colleges should Hazelwood be imprudently extended there, could empower the school-lion to devour the library-lamb. Young people's "free[dom] to inquire, to study and to evaluate, to gain new maturity and understanding" could be subject to the whim of the school administration. The student's desire to engage in active and independent learning beyond the scope of the school curriculum could be curtailed merely because the school board deemed the subject inappropriate for study. The school librarian could be brought under the thumb of the principal and the library collection policy subject to the direction of the teaching faculty. The public school's singular bastion of inspiration for self-directed learning could be reduced to a vehicle for the authoritarian inculcation of majoritarian values—hardly what the National Education Association or the American Library Association envisioned in the

334. See id. at 496–99.
335. See id. at 497–498, nn. 131–135
336. See id. at 496 n. 122.
337. See id. at 533–37.
338. See id. at 542–48.
nineteenth century.

That outcome must not be allowed. Public school librarians must know their obligations to their students, to their communities, and to themselves, the special responsibility that makes them different from teachers and different from school administrators, indeed unique in the school. They must hold the line against ever increasing pressures from inside and outside the school to seize control of the library, both as a physical resource and a metaphysical forum for the exercise of constitutionally protected liberties. The tradition of curricular control may not serve as grounds for the school librarian to justify library access policies that tread on patrons’ liberty interests, regardless of the age of the patron. If the modern school librarian wishes, to reprise the case in point, to filter students’ Internet access, another rationale must serve, be it economic constraint, moral protectionism, or plain legal duty.

V. CONCLUSION

This article does not mean to draw a bright line defining the proper scope of freedom to be afforded students in the public school library. That would be a daunting task given the myriad variables at play in the equation.

Instead, the narrow aim of this work is to discourage the justification of restrictions on student library use, such as the imposition of software filters on Internet access, with analogical reference to the school’s curricular prerogative. Especially in light of the ALA decision and its failure to recognize the constitutional function of the library, and in light of the continuing diminution in legal recognition of minors’ constitutional freedoms, it is imperative that the public school library recall Melvil Dewey’s admonition not to lay down with the lion. To forget now that the public school library was born of two movements, one in education and another in librarianship, would surely invite the erasure of the extracurricular-curricular distinction that has allowed intellectual freedom to flourish for school library patrons of all ages. Upon the disappearance of that legal distinction, predicated on the Tinker-Hazelwood dichotomy and since embraced by the lower courts, not only student-patrons would lose a measure of constitutional freedom, but the academic freedom of the school librarian and the autonomy of the school library as an institution would be placed in jeopardy, threatening far-reaching injury to our democratic society. Only by recognition and preservation of the school library’s dual identity will the legal system and the public mind be inspired to save the remaining pieces of Pico.