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Susan Nevelow Mart

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The Right to Receive Information*

Susan Nevelow Mart**

Ms. Mart examines the legal evolution of the right to receive information, particularly focusing on its application to libraries, beginning with the Supreme Court holding in Board of Education v. Pico, and followed by cases that have considered the meaning of Pico in a variety of library-related contexts.

¶1 Although the First Amendment to the Constitution guarantees the right to free speech, if you can't get access to the speech, the value of the guarantee diminishes. To address the issue of access, the United States Supreme Court developed the theory in *Martin v. Struthers*¹ that there is a constitutional right to receive information. Although this case was about door-to-door pamphleteers, many of the major battles over the right to receive information have arisen in the library context. Libraries have been the setting for legal battles about student access to books, removal or retention of "offensive" material, regulation of patron behavior, and limitations on public access to the Internet. The first Supreme Court case to consider the right to receive information in a library setting was *Board of Education v. Pico*.²

¶2 The right to receive information has evolved from its early place as a necessary corollary to the right of free speech³ or as a peripheral or penumbral right⁴ without which the primary right would be less secure.⁵ That evolution was severely impacted by *Pico*. When the Supreme Court was asked to balance the right to receive information in school libraries against the discretion of local school boards to direct the school's daily operations, the Justices were unable to reach any consensus. The sharply divided opinion left a fractured and incoherent jurisprudence.

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** Reference Librarian, University of California, Hastings College of Law Library, San Francisco, California.

1. 319 U.S. 141, 143 (1943).

2. 457 U.S. 853 (1982).

3. *Martin*, 319 U.S. at 143; *Thomas v. Collins*, 323 U.S. 515, 534 (1944).

4. *Griswold v. Connecticut*, 381 U.S. 479, 482, 483 (1964).

5. The development of corollary rights is perhaps an outgrowth of the early common law rules of construction, codified in some states as maxims of jurisprudence. See, e.g., CAL. CIV. CODE § 3522 (West 1997) ("One who grants a thing is presumed to grant also whatever is essential to its use."). Maxims of jurisprudence and rules of statutory construction are not inapplicable when wrestling with constitutional meaning. See Raoul Berger, "Government by Judiciary": Judge Gibbons' Argument *Ad Hominem*, 59 B.U. L. REV. 783, 804-06 (1979) (citing eminent jurists and commentators who believe such canons to be applicable to constitutional interpretation).

¶3 This article begins by examining the legal evolution of the right to receive information from its inception to *Pico*, the first case to consider it in a library context. It will then explore the post-*Pico* jurisprudence as it affects libraries. The plurality opinion in *Pico* has affected a stream of cases involving libraries, and the level of legal activity has accelerated with challenges to Internet use in libraries.

¶4 The level of scrutiny the courts will apply to content-based limitations on speech differs according to the nature of the forum. Public libraries are undergoing a slow constitutional metamorphosis and are being redefined as a public forum for the receipt of ideas, rather than as a limited public forum for the dissemination of ideas.⁶ The new definition may be one way to ensure continued access to a free flow of information in libraries.

¶5 All libraries that have government funding or that allow public access, including all law libraries, need to understand the evolving nature of their role as a public forum; one court has called libraries the “quintessential locus for the exercise of the right to receive information and ideas.”⁷ The constitutional definition will affect library autonomy in the provision of unfiltered Internet access, collection retention, and the scope of library rules that deal with the use of library facilities and with offensive behavior by library patrons.

The Right to Receive Information before *Pico*

¶6 The earliest direct reference to the right to receive information appears in 1943, in *Martin v. Struthers*,⁸ a case involving the right to receive unsolicited pamphlets from a door-to-door pamphleteer. The Supreme Court held that “the authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. This freedom embraces the right to distribute literature . . . and necessarily protects the right to receive it.”⁹ The scope of regulation permitted is only of “the time, place, and manner of distribution.”¹⁰ The value being encouraged in the first of the right to receive cases is the “vigorous enlightenment” of the populace.

¶7 *Martin* was followed by *Thomas v. Collins*.¹¹ The Supreme Court in *Thomas* held that a labor organizer’s right to speak and the rights of workers “to hear what

6. See Bernard W. Bell, *Filth, Filtering, and the First Amendment: Ruminations on Public Libraries’ Use of Internet Filtering Software*, 53 FED. COMM. L. J. 191 (2001). In *American Library Ass’n v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2002), *prob. juris. noted*, *United States v. Am. Library Ass’n*, 123 S. Ct. 551 (2002) (Mem.), the district court relied on the concept of the government as a facilitator of private speech in its analysis.

7. *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1256 (3d Cir. 1992).

8. 319 U.S. 141 (1943).

9. *Id.* at 143 (citation omitted).

10. *Id.*

11. 323 U.S. 515 (1945).

he had to say,” without first applying for a license from the state, were protected by the First Amendment.¹² The right to receive the information was “necessarily correlative” to the rights guaranteed by the First Amendment.¹³ In Justice Jackson’s concurrence, he stated: “The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.”¹⁴ The principle protected in *Thomas* is the autonomy of the individual from a paternalistic governmental hegemony of ideas.

¶8 The first case in which the recipient of the speech sought to invalidate a law as violating the recipient’s First Amendment rights was *Lamont v. Postmaster General*.¹⁵ In *Lamont*, a federal statute required the post office to detain and destroy unsealed mail from foreign countries determined to be communist political propaganda unless the recipient returned a reply card requesting that the mail be delivered. Justice Douglas’s opinion was terse and relied in part on Justice Holmes’s concept of the post office: “The United States may give up the post-office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues.”¹⁶ Justice Brennan’s concurrence spoke more generally to the framework of the right to receive information:

It is true that the First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful. (citations omitted) I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.¹⁷

¶9 This concept of the marketplace of ideas and its buyers and sellers has had a long life in the history of the right to receive information, and has been quoted over and over again. But there must be a seller to “buy the ideas,” just as the right to speak must exist if the right to receive is to be seen as a corollary of that right. The disjunction between the rights of the speakers and the rights of the recipients has caused much confusion. The foreign governments in *Lamont* had no right to speak.¹⁸ But sometimes the right to receive will be upheld regardless of the right to speak, and sometimes the lack of a right to speak will be dispositive.¹⁹

12. *Id.* at 534.

13. *Id.* at 530.

14. *Id.* at 545 (Jackson, J., concurring).

15. 381 U.S. 301 (1965).

16. *Id.* at 305 (quoting *Milwaukee Soc. Democratic Publ’g Co. v. Burleson*, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting)).

17. *Id.* at 308 (citations omitted) (Brennan, J., concurring).

18. Justice Brennan expressly addressed the difference in the position of senders versus receivers when he observed that the question posed would be more troubling “if the addressees predicated their claim for relief upon the First Amendment rights of the senders.” *Id.* at 307 (Brennan, J., concurring). The addressees had grounded their argument, however, in a personal right to receive information.

19. See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

¶10 In *Griswold v. Connecticut*,²⁰ the Court, in a plurality opinion, again upheld the existence of a right to receive information. Planned Parenthood and other appellants had given information and instruction to married persons concerning contraception, in contravention of Connecticut statutes that criminalized preventing conception or assisting, abetting, counseling, or otherwise helping a person prevent conception. “[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . and freedom of inquiry, freedom of thought, and freedom to teach. . . . Without those peripheral rights the specific rights would be less secure.”²¹ This “penumbral” right is necessary to ensure the fullest exercise of First Amendment rights.²² In this case, the right to receive information exists independent of any right of the speaker to disseminate information.

¶11 In *Red Lion Broadcasting v. FCC*,²³ the Supreme Court upheld the fairness doctrine of the Federal Communications Commission, which was intended to promote public access to a diversity of information from broadcasting. In another frequently quoted passage, Justice White wrote: “It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.”²⁴ The collective right of citizens to receive information from a “scarce resource” is the principle in *Red Lion*.²⁵

¶12 Although possibly more properly designated a right to privacy case, the Supreme Court relied heavily on the right to receive information in *Stanley v. Georgia*,²⁶ a case involving a criminal conviction for the private possession of obscene material. In overturning the conviction, Justice Marshall stated that “the right to receive . . . ideas, regardless of their social worth, . . . is fundamental to our society”²⁷ and that “[w]hatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person’s private thoughts.”²⁸ The right to receive information where the information is obscene does not create any correlative rights on the parts of producers, distributors, or importers.²⁹ But by

20. 381 U.S. 479 (1965).

21. *Id.* at 482–83.

22. *Id.*

23. 395 U.S. 367 (1969).

24. *Id.* at 390 (citations omitted).

25. However, all resources (up to the World Wide Web) have been scarce in the sense of being limited. Not all books get published, not every letter to the editor makes the cut. And in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Supreme Court rejected a claim that the government has an obligation to ensure newspapers present a variety of views.

26. 394 U.S. 557 (1969).

27. *Id.* at 564 (citations omitted).

28. *Id.* at 566.

29. *See, e.g., United States v. Thirty-Seven Photographs*, 402 U.S. 363, 376 (1971).

1969, the right to receive information has become a fundamental right, and the principle in the case harks back to the right of each citizen to be free of any paternalistic imposition of approved viewpoints, first articulated in *Martin v. Struthers*.

¶13 In *Kleindienst v. Mandel*,³⁰ however, the speaker's lack of a First Amendment right was crucial. At the request of the potential recipients, the Supreme Court reviewed the State Department's decision to deny another visa to a known communist activist. While asserting that "[i]t is now well established that the Constitution protects the right to receive information and ideas,"³¹ the Court limited its discussion to the narrow issue of whether or not the listeners' desire to hear a certain person conferred on them the ability to compel the State Department to let that person in. The Court upheld the denial, asserting that the State Department asserted a "facially legitimate and bona fide reason" for denying the visa.³²

¶14 The decision was criticized on First Amendment "right to receive" grounds by the dissent. Justice Douglas found that the State Department had used its discretion in an unconstitutional way by basing its decision on the content of the ideas held by the alien.³³ Justice Marshall's dissent took the position that the denial of the visa deprived the public of the right to receive and debate the excluded alien's ideas, and asserted that the government can only exclude an alien if there is a compelling governmental interest.³⁴

¶15 The theme that the nature of the ideas being regulated were irrelevant and that the interest of the recipients of information was paramount surfaced again in *Virginia State Board of Pharmacy v. Virginia Citizen's Consumer Council*,³⁵ a case where the speaker's right to speak was pivotal. The case involved consumers of prescription drugs who sought to invalidate a state statute prohibiting pharmacists from advertising the price of drugs. The threshold issue was the standing of the consumers, and Justice Blackmun stated that where a willing speaker exists, the First Amendment protects both the speaker and the recipient, so that an audience member can assert a violation of his or her right to receive information.³⁶ Although the right to receive the information did not exist in the absence of the right of the speaker to say it, the fact that the audience had an interest in receiving the speech made it possible for the Court to find that purely commercial speech was protected by the First Amendment.³⁷ The State's interest in protecting consumers from the baneful effects of advertising was paternalistic.

30. 408 U.S. 753 (1972).

31. *Id.* at 763-64 (quoting *Stanley*, 394 U.S. at 564).

32. *Id.* at 771.

33. *Id.* at 774 (Douglas, J., dissenting).

34. *Id.* at 775, 777 (Marshall, J., joined by Brennan, J., dissenting).

35. 425 U.S. 728, 757 (1976). For a current application of this doctrine, see *Conant v. Walters*, 309 F.3d 629, 645-46 (9th Cir. 2002), where the court balanced the government's interest in regulating the right of the speakers to speak to their patients about the medicinal use of marijuana with the need of the patients to receive the information. As in *Virginia State Board of Pharmacy*, the needs of the recipients prevailed.

36. *Va. State Bd. of Pharmacy*, 425 U.S. at 756.

37. *Id.* at 763, 765.

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. If they are truly open, nothing prevents the "professional" pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer. But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.³⁸

¶16 The principle at issue in this case is once again citizen autonomy from a paternalistic government. While there is no clear consensus in this group of cases as to the contours of the right to receive, or whether it exists independently of the right of the speaker to speak, concern for a vigorous debate of ideas runs through even those cases, like *Kleindienst*, where a prohibition on the receipt of ideas is upheld.

***Board of Education v. Pico*:³⁹ Access to Information in the School Library**

¶17 The *Pico* decision was supposed to resolve a conflict among the circuit courts as to whether or not local school boards had unlimited discretion to order books removed from public school libraries.⁴⁰ The case involved a school board's removal of "filthy" books from a public school library. Affected students sued, and the Supreme Court held that they had a right to a trial on the merits of their allegations that the school board had violated the students' First Amendment rights by removing the books. In the plurality opinion, Justice Brennan (joined by Justices Marshall and Stevens) wrote that while "courts should not 'intervene in the resolution of conflicts which arise in the daily operation of school systems' unless basic constitutional values are directly and sharply implicate[d],"⁴¹ the right to receive information did implicate the students' free speech rights. He observed that the First Amendment protects not only the right to self-expression, but also guarantees "public access to discussion, debate, and the dissemination of information and ideas."⁴² Moreover, the "right [to receive information] is an inherent corollary

38. *Id.* at 770.

39. 457 U.S. 853 (1982).

40. In *Presidents Council, District 25 v. Community School Board 25*, 457 F.2d 289 (2d Cir. 1972), and *Bicknell v. Vergennes Union High School Board of Directors*, 475 F. Supp. 615 (D. Vt. 1979), the courts found that there was no First Amendment right to receive information that would prevent removal of "offensive" books in a school library. But *Minarcini v. Strongsville City School District*, 541 F.2d 577 (6th Cir. 1976), *Right to Read Defense Committee v. School Committee of Chelsea*, 454 F. Supp. 703 (D. Mass. 1978), and *Salvail v. Nashua Board of Education*, 469 F. Supp. 1269 (D. N.H. 1979), all upheld the students' right to receive information.

41. *Pico*, 457 U.S. at 866 (citation omitted).

42. *Id.* (citation omitted).

of the rights of free speech and press that are explicitly guaranteed by the Constitution, in two senses. First, the right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them. . . . More importantly, the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom.”⁴³ Because access to books and ideas prepares students for “active and effective participation” in the “contentious society” of which students will one day be members, school libraries are an important place to safeguard the right to receive information.⁴⁴

¶18 Two aspects of the plurality opinion are important in developing the right to receive: both the right to receive information and the right to send information are conceived of as parts of the constitutional right of access identified by previous opinions, and the right to receive information is a corollary of the right to send ideas.⁴⁵ This means that where there is no right to send information, there is no right to receive it. As pointed out in the dissent of Justice Rehnquist, there is no right to have information in the library, so only confusion is created by viewing the rights of the recipients as dependent on the rights of the senders.⁴⁶ In the plurality view, the principle being protected is the preparation of citizens for vigorous participation in the democratic debate. To that end, you can remove books for a proper motive (respondents had conceded it would be proper to remove books because of educational suitability) but not for an improper motive, such as preventing access to ideas.⁴⁷

¶19 Justice Blackmun concurred with the result in *Pico* but did not agree that students had a First Amendment right to receive ideas in the school library; the school board's discretion should only be limited by “an intentional attempt to shield students from certain ideas that officials find politically distasteful.”⁴⁸ He did not deny that there was a First Amendment right to receive information; the dispute was as to its applicability to the public school library. Justice White did not even reach this question; he merely wanted to affirm the judgment that there was an unresolved factual issue and send the case back for trial.⁴⁹ Three separate dissents were filed, bemoaning the potential for injection of federal judges' opinions into the educational decision-making process. The *Pico* decision, however, has been used as a statement of the contours of the right to receive information in a variety of contexts more far-reaching than the public school library. It is therefore frustrating that the opinion left the rights of the recipients “ineluctably” intertwined with the rights of the senders of information.

43. *Id.* at 867 (citation omitted).

44. *Id.* at 868.

45. The right to receive ideas is slightly more important, as receipt of information is necessary for the recipient's own exercise of the rights of free speech, press, and political freedom. *Id.* at 867.

46. *See id.* at 912 (Rehnquist, J., dissenting).

47. *See id.* at 871, 874.

48. *Id.* at 882 (Blackmun, J., concurring).

49. *Id.* at 883 (White, J., concurring).

Post-*Pico*: The Right to Receive Information in the Library

Limits on Library Autonomy—Internet Filtering and Problem Patrons

¶20 The constitutionality of Internet filtering software on library computer terminals and the struggle to regulate the behavior of the problem patron are two (sometimes interrelated) areas of the law affecting libraries where *Pico* has continued vitality. Although the lack of a majority opinion in *Pico* has meant that lower courts can only look to it for guidance, the plurality opinion continues to shape the law. In *Mainstream Loudoun v. Board of Trustees of Loudoun County Library*,⁵⁰ the issue was whether a public library could, without violating the First Amendment, enforce content-based restrictions on access to Internet speech by filtering. The court adopted the distinction made in *Pico* between acquiring information (adding the Internet connection) and removing it (filtering the Internet connection).⁵¹ In analyzing *Pico*, it cobbled together a majority holding about First Amendment rights to receive information in *public* libraries and held that *Pico*, to the extent applicable, “stands for the proposition that the First Amendment applies to, and limits, the discretion of a *public library* to place content-based restrictions on access to constitutionally protected materials within its collection.”⁵² *Mainstream Loudoun* also held that the public library was a limited public forum and rejected the argument that Internet filtering was a valid “time, place, or manner” regulation.⁵³

¶21 *Mainstream Loudoun*’s accentuation of the difference between the acquisition and removal of information affirmed the rule that the government has no duty to provide information (no duty to transmit information) but once it accepts that duty, it must do so in a constitutional manner (must limit discretion to prevent receipt of information).⁵⁴ Such an analysis is one step on the way to recognizing the right to know as a legal right independent of the more traditional right of the speaker to communicate. There are good reasons to recognize a separate right. “The interests of the listener may not always coincide with the interests of the communicator. The communicator may not always be in a position to assert his rights. The admitted interests of the recipients will be entitled to greater weight when they are based upon an independent legal foundation, rather than being merely derivative of the rights of the communicator.”⁵⁵

¶22 The dissemination of information in libraries is a function of the government in its role of expending “funds to encourage a diversity of views from private speakers,” where courts prohibit viewpoint discrimination and closely scrutinize

50. 2 F. Supp. 2d 783 (E.D. Va. 1998).

51. *Id.* at 794.

52. *Id.* (emphasis added).

53. *Id.*

54. “Similarly, in this case, the Library Board need not offer Internet access, but, having chosen to provide it, must operate the service within the confines of the First Amendment.” *Id.* at 797.

55. Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. L. Q. 1, 2.

other content-based limitations on speech.⁵⁶ The public library's role is as a "facilitator rather than [a] channel for government speech," so the government should not have strict control over the material it makes available to patrons of a public library.⁵⁷ Public libraries are more analogous to universities as settings for wide-ranging, free inquiry.⁵⁸ Bell analogizes the role of libraries for listeners to the role of streets and parks for speakers. Libraries are archetypal traditional government-funded loci for acquiring knowledge, just as streets and parks are archetypal government-funded loci for speaking.⁵⁹

¶23 *Kreimer v. Bureau of Police* offered a view of the library as "the quintessential locus of the receipt of information"⁶⁰ and a place for the "exercise of the right to receive information."⁶¹ In *Kreimer*, the circuit court wrestled with the manner in which libraries could regulate patron behavior without denying access to information protected by the patron's constitutional right to receive information. Initially finding that a First Amendment issue was raised by the regulations, the court held that:

Our review of the Supreme Court's decisions confirms that the First Amendment does not merely prohibit the government from enacting laws that censor information, but additionally encompasses the positive right of public access to information and ideas. *Pico* signifies that, consistent with other First Amendment principles, the right to receive information is not unfettered and may give way to significant countervailing interests. At the threshold, however, this right, first recognized in *Martin* and refined in later First Amendment jurisprudence, includes the right to some level of access to a public library, the quintessential locus of the receipt of information.⁶²

56. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995). In *Rosenberger*, a university student organization which published a newspaper with a Christian editorial viewpoint brought action against the university challenging its denial of funds from a fund created by the university to defray the printing costs of publications of student groups. The university's argument that viewpoint discrimination was proper where the university was expending "funds to encourage a diversity of views" was soundly rejected by the Court. *Id.*

57. Bell, *supra* note 6, at 220.

58. Both have been referred to in these terms. See, e.g., *Bd. of Educ. v. Pico*, 457 U.S. 853, 915 (1982) (Rehnquist, J., dissenting) ("Unlike university or public libraries, elementary and secondary school libraries are not designed for freewheeling inquiry"); *Rosenberger*, 515 U.S. at 840 ("[S]tudent life . . . includes the necessity of wide-ranging speech and inquiry and . . . student expression is an integral part of the University's educational mission.").

59. Bell, *supra* note 6, at 220. This analysis was adopted by the district court in *American Library Ass'n v. United States*, 201 F. Supp. 2d 401, 466–67 (E.D. Pa. 2002), *prob. juris. noted*, *United States v. Am. Library Ass'n*, 123 S. Ct. 551 (2002) (Mem.), discussed *infra* ¶ 27.

60. 958 F.2d 1242, 1255 (3d Cir. 1992).

61. *Id.* at 1256.

62. *Id.* at 1255. See also *Neinast v. Bd. of Trustees*, 190 F. Supp. 2d 1040, 1043–44 (S.D. Ohio 2002) (citing *Kreimer* and upholding the library's eviction of a barefoot patron on the ground that the library's eviction procedures regulating patrons not wearing shoes was a reasonable "time, place, and manner restriction"). But see *Armstrong v. D.C. Public Library*, 154 F. Supp. 2d 67, 77–78 (D.C. 2001) (applying a "narrowly tailored" standard of review to invalidate an appearance regulation as unconstitutionally vague; the regulation deprived a homeless person of all access to the library without informing the patron of the standard of appearance that would assure access).

¶24 That access right is protected in differing ways depending on the nature of the public space involved.⁶³ After analyzing *Perry*, the *Kreimer* court found that the public library was a limited public forum which “‘the state has opened for use by the public as a place for expressive activity.’ Although the government is not required to open or indefinitely retain the open nature of these fora, once it does so the government is bound by the same limitations as exist in the traditional public forum context . . . where only ‘reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.’”⁶⁴ Traditional forum analysis is directed at the speaker’s interest: the traditional public fora (streets, parks, and public sidewalks) are protected places for public assembly where the government’s attempts to restrict speech are severely curtailed and prior restraint of content is prohibited.⁶⁵

¶25 If the view of the recipient of information is analyzed, then the library as the “quintessential public forum for the receipt of information” is directly analogous to the park or the street, and from the recipient’s point of view, is a traditional, not a limited public forum.⁶⁶ By defining the library as the “quintessential” locus, *Kreimer* has set the stage for just such an analysis.⁶⁷

¶26 So ingrained a part of constitutional lore has the right to receive information become that in striking down certain provisions of the Communications Decency Act of 1996,⁶⁸ the Supreme Court in *Reno v. ACLU*⁶⁹ discussed an adult’s “right to receive” information protected by the First Amendment without so much as a citation:

We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.⁷⁰

¶27 In *American Library Ass’n v. United States*,⁷¹ a First Amendment chal-

63. *Perry Educ. Ass’n v. Perry Local Educator’s Ass’n*, 460 U.S. 37, 44–45 (1983).

64. *Kreimer*, 958 F.2d at 1255–56 (quoting *Perry Educ. Ass’n*, 460 U.S. at 45, 46).

65. *Id.* at 1255.

66. Bell, *supra* note 6, at 220–21.

67. See Marilyn Maloney & Julia Morgan, *Rock and a Hard Place: The Public Library’s Dilemma in Providing Access to Legal Materials on the Internet While Restricting Access to Illegal Materials*, 24 *HAMLIN L. REV.* 199, 215–16 (2001). The authors suggest that the *Kreimer* analysis is useful in mediating Internet use in the library. By regulating behavior (rather than content), inappropriate or illegal Internet acts in the library can be regulated as inappropriate activities in the library have always been regulated.

68. Pub. L. No. 104-104, § 502, 110 Stat. 56, 133 (1996) (codified at 47 U.S.C. §§ 223(a)(1), 223(d) (2000)).

69. 521 U.S. 844 (1997).

70. *Reno*, 521 U.S. at 874.

71. 201 F. Supp. 2d 401 (E.D. Pa. 2002), *prob. juris. noted*, *United States v. Am. Library Ass’n*, 123 S. Ct. 551 (2002) (Mem.).

lenge to those provisions of the Children's Internet Protection Act (CIPA) requiring a public library to install Internet filtering software as a condition of receiving certain federal funds,⁷² the district court adopted *Reno's* strict scrutiny analysis for the library setting:

Where the state provides access to a "vast democratic forum[...]," . . . open to any member of the public to speak on subjects "as diverse as human thought," the state's decision selectively to exclude from the forum speech whose content the state disfavors is subject to strict scrutiny, as such exclusions risk distorting the marketplace of ideas that the state has facilitated. Application of strict scrutiny finds further support in the extent to which public libraries' provision of Internet access uniquely promotes First Amendment values in a manner analogous to traditional public fora such as streets, sidewalks, and parks, in which content-based restrictions are always subject to strict scrutiny.⁷³

The district court in *American Library Ass'n* did not adopt the view of the library as the place where information is received, but likened the Internet to the sidewalk or park where speech is promoted, specifically holding that "[i]n providing its patrons with Internet access a public library creates a forum for the facilitation of speech" open to any member of the public.⁷⁴ Because filters both overblock legitimate protected speech and underblock some sexually explicit speech that is not protected, filtering the Internet violates the First Amendment.⁷⁵ Although the ruling in the lawsuit enjoined enforcement of the CIPA provisions linking federal funding to Internet filtering, the message was clear: libraries have a number of less restrictive methods to enforce rules prohibiting patrons from accessing illegal content than complete Internet filtering, and must use them.⁷⁶

Book Removal and Board Control

¶28 *Pico* has continued to play a pivotal role in the public library setting. In *Sund v. City of Wichita Falls, Texas*,⁷⁷ the court invalidated a library board resolution directing the removal of several childrens' books to the adult section as violating the plaintiffs' federal and state constitutional rights to receive information.⁷⁸ It

72. Pub. L. No. 106-554, §§ 1712(a)(2), 1712(b), 114 Stat. 2763, 2763A-340, 2763A-346-49 (2000) (codified at 20 U.S.C. § 9134(f), 47 U.S.C. § 254(h)(6) (2000)).

73. *Am. Library Ass'n*, 201 F. Supp. 2d at 409 (quoting *Reno*, 521 U.S. at 868, 870).

74. *Id.* at 464.

75. *Id.* at 495-96. The Supreme Court has noted probable jurisdiction in the appeal taken from this case, and by the time this article is published, the decision in *American Library Ass'n* may be vacated. Nevertheless, its analysis of the current state of First Amendment jurisprudence is still instructive. The boundaries have been drawn, and the discussion will focus on the nature of the library as a forum, the distinctions between collection and removal of material, and the level of scrutiny required for limitations on access to information.

76. *Id.* at 483-84 (suggesting that providing patrons the option of using a filtered or unfiltered terminal, providing separate filtered and unfiltered terminals, using privacy screens, or using the "tap-on-the-shoulder" request to stop viewing improper material are all less intrusive alternatives).

77. 121 F. Supp. 2d 530 (N.D. Tex. 2000).

78. Citing *Reno* and *Pico*, the court held that the First Amendment and the Texas Constitution "indisputably protect the right to receive information." *Id.* at 547 (citations omitted).

found that the library was a limited public forum, citing *Kreimer*, and that *Pico* applied “with even greater force” in the public library.⁷⁹

In the school library context, both *Case v. Unified School District No. 233*⁸⁰ and *Virgil v. School Board*⁸¹ used *Pico* for guidance. *Case* involved a decision to remove books, and *Pico*, though not binding, still persuaded the court to find the book removal unconstitutional.⁸² *Virgil* involved a curricular decision, not a school library decision, and the court felt that the decision in *Hazelwood School District v. Kuhlmeier*⁸³ trumped *Pico*,⁸⁴ and extended the holding in *Kuhlmeier* to the decision to use a particular textbook. In *Kuhlmeier*, which involved the removal by school authorities of materials from a high school journalism class’s newspaper, the Court held:

[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns. . . . It is only when the decision to censor a school-sponsored publication, theatrical production or other vehicle of student expression has no valid educational purpose that the First Amendment is so “directly and sharply implicated” as to require judicial intervention to protect students’ constitutional rights.⁸⁵

¶29 The right to receive information does not mean that citizens have unlimited access to all the information the government possesses.⁸⁶ Even in cases involving an otherwise willing or available source of information, the Supreme Court has upheld restrictions on the public’s right of access.⁸⁷ But in *Student Press Law Center v. Alexander*,⁸⁸ student journalists successfully argued that the Family Educational Rights and Privacy Act (FERPA), authorizing withdrawal of federal funding from any university that discloses to the public personally identifiable information contained in campus police reports, violated even the limited conception of the scope of constitutional protections *Pico* afforded the right to receive information. “In light of the universities’ willingness (absent coercion to the contrary) to release campus crime reports in full, the Government must assert some

79. *Id.* at 548 (citations omitted).

80. 895 F. Supp. 1463 (D. Kan. 1995).

81. 677 F. Supp. 1547 (M.D. Fla. 1988).

82. *Case*, 895 F. Supp. at 1468.

83. 484 U.S. 260 (1988). The right to receive information is only discussed by the dissent in *Kuhlmeier*. *Id.* at 278 (Brennan, J., dissenting).

84. *Virgil*, 677 F. Supp. at 1551 (citation omitted) (“In light of the recent decision . . . in *Hazelwood School District v. Kuhlmeier* . . ., this Court need not decide whether the plurality decision in *Pico* may logically be extended to optional curriculum materials. *Kuhlmeier* resolves any doubts as to the appropriate standard to be applied whenever a curriculum decision is subject to first amendment review.”).

85. *Kuhlmeier*, 484 U.S. at 273 (citations omitted).

86. See *Zemel v. Rusk* 381 U.S. 1, 17 (1965).

87. See, e.g., *Pell v. Procunier*, 417 U.S. 817 (1974) (upholding a restriction against interviewing prison inmates).

88. 778 F. Supp. 1227 (D.D.C. 1991).

interest that outweighs the public's First Amendment right to receive the information.”⁸⁹

¶30 In *Brown v. Board of Regents of University of Nebraska*,⁹⁰ a suit was filed against the University of Nebraska contesting the cancellation of a controversial movie by the director of a state-operated art theater on campus. The district court held that the cancellation of the film violated the constitutional rights of those who wished to see it. The court's reliance on *Pico* was based on two additional facts that added weight to the plurality view. First, the denial of information in this instance occurred on a college campus, rather than in a junior or senior high school library. Second, in separate dissents in *Pico*, both Justice Rehnquist⁹¹ and Justice O'Connor⁹² noted the special role of government when it was acting as educator. In *Brown*, the facts showed only a slight involvement of the government as an educator on a college campus. The involvement was slight because the theater showings were for the public at large and were not part of the academic program of the university. The intrusion by the government as a sovereign was direct.⁹³

¶31 So *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.

Conclusion

¶32 The right to receive information has arisen in more contexts than can be covered in one article.⁹⁴ Even in the context of public and school libraries, it is clear there is no consensus view on the scope of the right to receive information or the standard of review that will apply to the right. But the constitutional right to receive information has only received increased vitality in the context of cyberspace.⁹⁵

¶33 The problem for First Amendment analysis created by the fractured case law might be partially resolved by reference to the theory advanced by Robert C. Post and applied to the Internet access cases by Matthew Kline.⁹⁶ The appropriate

89. *Id.* at 1234.

90. 640 F. Supp. 674 (D. Neb. 1986).

91. *Pico*, 457 U.S. at 908–09 (1982) (Rehnquist, J., dissenting).

92. *Id.* at 921 (O'Connor, J., dissenting).

93. *Brown*, 640 F. Supp. at 680.

94. Other areas of law affected by the “right to know” theory include, *inter alia*, cases on English-only legislation (e.g., *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995)); the right to access to government information (e.g., *New York Times Co. v. United States*, 403 U.S. 713 (1971)); and the right to receive abortion information (e.g., *Rust v. Sullivan*, 500 U.S. 173 (1991)).

95. See, e.g., Bell, *supra* note 6, at 220–21 (arguing that cases involving Internet access in libraries must focus on the recipient's right as a primary, separable right and that this analysis results in finding the library is a new type of “traditional” public forum); *supra* ¶ 27 (discussing challenge to Children's Internet Protection Act requirement that library install Internet filtering software as a condition to receipt of certain federal funds).

96. Matthew Thomas Kline, *Mainstream Loudon v. Board of Trustees of the Loudon County Library*, 14 BERKELEY TECH. L. J. 347, 357–65 (1999), citing Robert C. Post, *Subsidized Speech*, 106 YALE L. J. 151, 178–79 (1996).

level of scrutiny to be applied to library filtering cases can be based on a distinction between the managerial domain and the public discourse domain.⁹⁷

The first inquiry involves characterizing the speech and determining whether it is part of the democratic social domain called “public discourse,” or whether it is “located in a different kind of social formation, which may be termed the ‘managerial domain.’” The second inquiry focuses on the government regulation involved and distinguishes between two different types of such action: “‘conduct rule[s]’ for the government of citizens,” which can be understood as limits on public discourse, and “‘decision rules’ for the internal direction of government officials,” which can be understood as “a form of state participation in the marketplace of ideas.”⁹⁸

¶34 The result of each inquiry has different implications for First Amendment analysis. “Because the democratic legitimacy of the state depends on public discourse, ‘the First Amendment jealously safeguards public discourse from state censorship.’”⁹⁹ The democratic, First Amendment value, which the speech promotes, trumps governmental will. “In contrast, ‘[w]ithin managerial domains, the state organizes its resources so as to achieve specified ends.’ Content-based regulations of speech within those managerial domains do not violate the First Amendment, . . . ‘so long as they are necessary to accomplish legitimate managerial ends.’”¹⁰⁰

¶35 According to Kline, *Reno* and *Pico* can also be understood, in part, as falling on either side of the public discourse/managerial domain divide. “In *Reno*, the CDA constrained an important ‘site for the forging of an independent public opinion to which democratic legitimacy demands that the state remain perennially responsive.’ Thus, the regulation merited strict judicial scrutiny, and the Internet communication [needed] ‘jealous safeguarding from state censorship.’”¹⁰¹ The district court decision in *American Library Ass’n v. United States* fits easily into this analysis: providing Internet access falls on the public discourse end of the spectrum and merits strict scrutiny.

¶36 In *Pico*, on the other hand, the “school board’s legitimate managerial authority to inculcate [the] nation’s children” would justify the board’s decision “to establish a curriculum and remove books that could undermine it.”¹⁰² Kline cites Justice O’Connor’s dissent for this proposition, and so sidesteps the lack of a majority on this issue.¹⁰³ It is fair to say, however, that the school’s undoubted managerial role caused the split in opinion, and that, as to schools, the debate is still going on.

97. *Id.* at 357.

98. *Id.* (citations omitted).

99. *Id.* (quoting Post, *supra* note 96, at 153).

100. *Id.* at 358 (quoting Post, *supra* note 95, at 164, 170).

101. *Id.* (quoting Post, *supra* note 96, at 153).

102. *Id.* (citing Post, *supra* note 96, at 165–67 & 165 n.92; Bd. of Educ. v. Pico, 457 U.S. 853, 862–75 (1982)).

103. *Id.* (citing *Pico*, 457 U.S. at 921 (O’Connor, J., dissenting)).

¶37 What *Pico* means for public libraries as providers of open access to information and for law libraries as providers of open access to legal information is still being decided. But until the Supreme Court issues its final word, the constitutional right to receive information limits a library's right to filter the Internet, to remove "offensive" books, to bar "offensive" speakers or films, and to have anything other than a carefully crafted, content-neutral policy on patron behavior and dress.