Article

Mastering Eliot's Paradox: Fostering Cultural Memory in an Age of Illusion and Allusion

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Living organisms are monuments to natural history. Plants, animals, and microbes all bear the fingerprints of evolution.[1] Libraries likewise manifest the development of human culture. "Time present and time past / Are both perhaps present in time future, / And time future contained in time past."[2] The arrival of the University of Minnesota Law Library's millionth volume therefore provides an apt occasion on which to contemplate the librarian's craft and how it informs (or should inform) the law governing the acquisition, preservation, and transmission of knowledge.

This Article tackles this challenge in three stages. Drawing upon T. S. Eliot's works of literary criticism, Part I describes the contradictory role of cultural memory in a society saturated with new information. Even as the accumulation of information in a technologically explosive society heightens the value of the most prominent cultural landmarks, each distinct cultural expression commands an ever-diminishing amount of attention.

Parts II and III turn from literary theory to legal doctrine. After reviewing the Supreme Court's cases on library management, Part II endorses two basic principles within the law of li-

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1. *Cf.* DAVID M. RAUP, EXTINCTION: BAD GENES OR BAD LUCK? 41–42 (1991) (disputing the assumption that "living fossils" such as the coelacanth have somehow "survived unchanged for hundreds of millions of years" or "have ever evolved an immunity to extinction").

2. T. S. ELIOT, *Burnt Norton*, *in* FOUR QUARTETS 13, 13 (Harcourt Brace & Co. 1971) (1943).

brarianship as a branch of First Amendment jurisprudence. First, decisions to *acquire* material should lie beyond judicial challenge. Second, legislative mandates to *exclude* material should draw strict scrutiny and should be presumed unconstitutional. Part III concludes that uncertainty within the high Court's jurisprudence on librarianship should be resolved in favor of more liberal access to information.

I. BACK TO THE FUTURISTS: ELIOT'S PARADOX

When culture changes, law changes with it.[3] Changes in material and political reality dictate corresponding changes in the social understanding of the "majestic generalities" of the Constitution.[4] The pragmatic need to recalibrate constitutional doctrine has reached its apex in an age in which the "ratio of growth to order" in human knowledge and human population approximates that of "a brain tumor."[5] "Worthy normative and institutional ideas about constitutionalism remain of limited value unless we can demonstrate their suitability to our high-speed world."[6] To be sure, constitutions and other foundational laws are "intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."[7] Within any "covenant running from" generation to generation, however, "[e]ach generation must [reject] anew . . . ideas and aspirations" not fit to "survive more ages than one."[8] Even those human institutions that are designed to serve "an indefinite but presumably long future" will not endure in an age of speed, however, unless they consciously adapt in response to rapid and rampant change.[9]

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3. *Cf.* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 550 (1991) (O'Connor, J., dissenting) ("[W]hen the Court changes its mind, the law changes with it.").

4. Fay v. New York, 332 U.S. 261, 282 (1947); *accord* Katzenbach v. Morgan, 384 U.S. 641, 648–49 (1966).

5. STEPHEN JOHNSON, EMERGENCE: THE CONNECTED LIVES OF ANTS, BRAINS, CITIES, AND SOFTWARE 119 (2001). *See generally* JAMES R. BENIGER, THE CONTROL REVOLUTION: TECHNOLOGICAL AND ECONOMIC ORIGINS OF THE INFORMATION SOCIETY (1986); JAMES GLEICK, FASTER: THE ACCELERATION OF JUST ABOUT EVERYTHING (2000).

6. William E. Scheuerman, *Constitutionalism in an Age of Speed*, 19 CONST. COMMENT. 353, 387 (2002).

7. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

8. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 901 (1992).

9. Richard S. Kay, *Constitutional Chrononomy*, 13 RATIO JURIS 31, 33 (2000).

Seeking the signature characteristic by which to define modern society, John Dewey chose its "mania for motion and speed:"[10] "The fact of change has been so continual and so intense that it overwhelms our minds. We are bewildered by the spectacle of its rapidity, scope and intensity."[11] Our "knowledge derived from experience" appears and *is* "new in every moment / And every moment is a new and shocking / Valuation of all we have been."[12] Whether by design or by happenstance, human civilization has proceeded according to the aesthetic and political philosophy expressed by the early twentieth-century's futurist movement.[13] "[T]he splendor of the world has been enriched with a new beauty," proclaimed *The Futurist Manifesto* in 1909, "the beauty of speed."[14] Contemporary industrialized societies have affirmatively embraced "[s]peed [as] the form of ecstasy the technical revolution has bestowed on man."[15] But the quest for informational omniscience and technological control has pushed humanity beyond a threshold from which it cannot return: "A law of acceleration, definite and constant as any law of mechanics, cannot be supposed to relax its energy to suit the convenience of man."[16] The acceleration of history has triggered a correlative, awful responsibility: that of managing "omnipresent speed" on "the extreme promontory of the centuries."[17]

Modern societies take speed for granted and routinely assume its benevolence. Contemporary technologists often breathlessly predict that the ongoing "Information Revolution will trigger a . . . sweeping transformation" of our lives, mostly for the better.[18] In matters affecting communications policy, including constitutional protection for freedom of speech, "[n]ew technology

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10. JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 140 (1954).

11. JOHN DEWEY, LIBERALISM AND SOCIAL ACTION 57 (1935).

12. T. S. ELIOT, *East Coker*, *in* FOUR QUARTETS, *supra* note 2, at 23, 26.

13. *See generally* CINZIA SARTINI BLUM, THE OTHER MODERNISM: F.T. MARINETTI'S FUTURIST FICTION OF POWER (1996); STEPHEN KERN, THE CULTURE OF TIME AND SPACE, 1880–1918, at 119–23 (1983).

14. Filippo Tommaso Marinetti, *Futurist Manifesto*, LE FIGARO, Feb. 20, 1909, at ¶ 4, *reprinted and translated in* ART OF OUR CENTURY: THE CHRONICLE OF WESTERN ART, 1900 TO THE PRESENT 99 (Jean-Louis Ferrier & Yann Le Pichon eds., Walter D. Glanze trans., 1988).

15. MILAN KUNDERA, SLOWNESS 2 (Linda Asher trans., 1997).

16. HENRY ADAMS, *A Law of Acceleration*, *in* THE EDUCATION OF HENRY ADAMS 489, 493 (Ernest Samuels ed., 1974) (1918).

17. Marinetti, *supra* note 14, at ¶ 8.

18. MICHAEL L. DERTOUZOS, WHAT WILL BE: HOW THE NEW WORLD OF INFORMATION WILL CHANGE OUR LIVES 9 (1997).

is the easy answer to everything."[19] Laws forged within this normative vision seek quite self-consciously to "keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances."[20] Through its assumption that new speech is an unalloyed good,[21] First Amendment jurisprudence implicitly prefers change. Though in retreat throughout much of American law, a romantic strain of libertarianism pervades the law of free speech.[22] First Amendment jurisprudence celebrates the "puny anonymities" whose rebellious utterances propel societal change.[23] "If in the long run the beliefs expressed [by unpopular speakers] are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."[24] Within contemporary First Amendment jurisprudence, "[t]echnological change . . . provides a singularly uncontroversial justification for modifying established doctrine."[25]

Postindustrial society generally embraces the futurist commitment to speed. Adaptation to speed breeds comfort in the inevitability of change and in the corrosively liberating power of "[c]onstant revolutionizing of production" and "uninterrupted disturbance of all social conditions" to sweep away "[a]ll fixed, fast-frozen relations, with their train of ancient and venerable prejudices and opinions."[26] Even so, the cultural and legal impact of the raw, awful beauty of speed demands careful examination. Speed simultaneously expands the amount of information that any culturally active individual must process and increases the

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19. Thomas W. Hazlett, *Predation in Local Cable TV Markets*, 40 ANTITRUST BULL. 609, 643 (1995); *see also* Fred H. Cate, *Telephone Companies, the First Amendment, and Technological Convergence*, 45 DEPAUL L. REV. 1035 (1996).

20. Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. 1, 9 (1877).

21. *See, e.g.*, Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

22. *Cf.* Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 UCLA L. REV. 949, 952–53 (1995) (characterizing free speech as one of the last bastions of laissez-faire libertarianism in contemporary legal culture).

23. Abrams v. United States, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting).

24. Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

25. Monroe E. Price & John F. Duffy, *Technological Change and Doctrinal Persistence: Telecommunications Reform in Congress and the Court*, 97 COLUM. L. REV. 976, 1008 (1997).

26. KARL MARX & FREDERICH ENGELS, THE COMMUNIST MANIFESTO 12 (New York Labor News Co. 1948) (1848).

cultural premium on ever-narrower portions of the informational bonanza. Libraries in particular embody this phenomenon. They are at once dynamic archives of human experience and sanctuaries where the exhausted may seek refuge among "the amblers of yesteryear," among "those loafing heroes of folk song, those vagabonds who roam from one mill to another and bed down under the stars."[27]

Librarianship helps an information-based society "find in motion what was lost in space."[28] Speed generates an extensive and ever greater backlog of information. One survey of a comprehensive Internet archive estimated that one billion Web pages as of July 2000 contained 33.5 terabytes (trillion bytes).[29] "Print, film, magnetic, and optical storage media produced about 5 exabytes of new information in 2002," enough to fill the Library of Congress's book collections 37,000 times.[30] Rife with "material about topics ranging from aardvarks to Zoroastrianism,"[31] Internet content "is as diverse as human thought."[32] "To explore the womb, or tomb, or dreams; all these are usual / Pastimes and drugs, and features of the press . . . ."[33] Online access has kept pace, at a minimum, with the real-world information explosion.[34] The relentless effort to post every cultural artifact of any significance has transformed the Internet into an electronic version of Jorge Luis Borges's fanciful "Map of the Empire whose size was that of the Empire" itself.[35]

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27. KUNDERA, *supra* note 15, at 3.

28. TENNESSEE WILLIAMS, THE GLASS MENAGERIE 97 (5th prtg. 1999) (1945).

29. *See* BERNARDO A. HUBERMAN, THE LAWS OF THE WEB: PATTERNS IN THE ECOLOGY OF INFORMATION 1 (2001).

30. *How Much Information? 2003* (making this calculation on the assumption that the seventeen million books in the Library of Congress, digitized with full formatting, contain roughly 136 terabytes of information), *at* http://www.sims.berkeley.edu/research/projects/how-much-info-2003/execsum.htm (Oct. 27, 2003). An exabyte is one quintillion bytes, perhaps more readily understood as one billion billion bytes or one billion gigabytes. *See id.*

31. Ashcroft v. ACLU, 535 U.S. 564, 566 (2002).

32. ACLU v. Reno, 929 F. Supp. 824, 842 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).

33. T. S. ELIOT, *The Dry Salvages*, *in* FOUR QUARTETS FOUR QUARTETS, *supra* note 2, at 35, 43.

34. *See, e.g.*, JOHNSON, *supra* note 5, at 117 (documenting the efforts of search engines such as Yahoo! and Google to organize the massive reservoirs of information the Internet contains).

35. JORGE LUIS BORGES, *On Exactitude in Science*, *in* COLLECTED FICTIONS 325, 325 (Andrew Hurley trans., 1998).

In that Empire, the Art of Cartography attained such Perfection that

In one sense, hastening the rate of change simply increases the raw amount of information without affecting the human capacity to digest or convey information. Although "the farmer since 1800 has become more productive in the United States by a factor of 36," "[i]t still takes . . . fifty minutes with a piece of chalk to convey the notion of comparative advantage."[36] By the same token, however, accelerated change places a premium on long-established, deeply entrenched sources of information. The proliferation of information increases the value of the "classics," which embody the tradition by which new talent must be measured. (And thanks to the Supreme Court's willingness to uphold seemingly interminable copyright extensions,[37] classics in the public domain have become in a very practical sense the only part of our cultural heritage that today's creators may exploit without fear of liability.) The persistence of time-tested cultural treasures breathes truth into one of the law's most hackneyed clichés: contemporary authors and inventors do indeed "stand on the shoulders of giants."[38]

An unlikely source of inspiration may help us better understand this paradox. Reactionary in temperament yet extremist in vision and voice, T. S. Eliot was not only the most deeply conservative English-language poet of the twentieth century but also a fitting prophet of our information-driven age. The usual criticism leveled at Eliot is that he lacked sufficient "interest in the great middle ground of human experience (as distinct from the ex-

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> the map of a single Province occupied the entirety of a City, and the map of the Empire, the entirety of a Province. In time, those Unconscionable Maps no longer satisfied, and the Cartographers Guilds struck a Map of the Empire whose size was that of the Empire, and which coincided point for point with it.

Id.

36. Donald McCloskey, *Bourgeois Virtue*, 63 AM. SCHOLAR 177, 177–78 (1994).

37. *See* Eldred v. Ashcroft, 537 U.S. 186 (2003).

38. *E.g.*, *In re* Alappat, 33 F.3d 1526, 1553 n.12 (Fed. Cir. 1994); *see, e.g.*, White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1515 n.15 (9th Cir. 1993) (Kozinski, J., dissenting from denial of hearing en banc); Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1238 n.33 (3d Cir. 1986); *In re* Bergt, 241 B.R. 17, 29 (D. Alaska 1999); Lotus Dev. Corp. v. Paperback Software Int'l, 740 F. Supp. 37, 77 n.3 (D. Mass. 1990); Zechariah Chafee, Jr., *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 511 (1945); Suzanne Scotchmer, *Standing on the Shoulders of Giants: Cumulative Research and the Patent Law*, 5 J. ECON. PERSP. 29, 29 (1991); *cf.* OASIS, STANDING ON THE SHOULDER OF GIANTS (Sony Records 2000) (extending the metaphor into the realm of rock 'n' roll music). *See generally* ROBERT K. MERTON, ON THE SHOULDERS OF GIANTS: A SHANDEAN POSTSCRIPT (1965) (tracing the origins of this metaphor in a letter from Isaac Newton to Robert Hooke).

tremes of saint and sinner)."[39] On the other hand, "his positive qualities" included "his poetic cunning, his fine craftsmanship, his original accent, his historical and representative importance as *the* poet of the modern Symbolist-metaphysical tradition."[40] In particular, Eliot's obsession with the frontiers of human experience equipped him superbly to describe the challenge of creating and conveying culture in an accelerated and overwhelmingly complex world.

In *Tradition and the Individual Talent*, Eliot observed: "No poet, no artist of any art, has his complete meaning alone. His significance, his appreciation is the appreciation of his relation to the dead poets and artists. You cannot value him alone; you must set him, for contrast and comparison, among the dead."[41] No poet can "surrender[ ] himself wholly to the work to be done" unless "he is conscious, not of what is dead, but of what is already living."[42] Contrary to the myth of the solitary creative genius, no novelist, artist, musician, or inventor draws her "craft out of thin air."[43] Constitutional jurisprudence has implicitly acknowledged the wisdom of America's greatest expatriate poet:

> In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.[44]

Contemporary observers recognize a variant of this phenomenon in "the oft-noted paradox of the Web": "the more information that flows into" a constantly accelerating information-based society's cultural "reservoirs, the harder it becomes to find any single piece of information in that sea."[45] Especially in the United States, or in any other society scarred by cataclysmic episodes in its past,

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39. 2 THE NORTON ANTHOLOGY OF ENGLISH LITERATURE 2163 (M. H. Abrams et al. eds., 3d ed. 1974) [hereinafter NORTON ANTHOLOGY]. *See generally* LYNDALL GORDON, T. S. ELIOT: AN IMPERFECT LIFE (1999); THE CAMBRIDGE COMPANION TO T. S. ELIOT (A. David Moody ed., 1994).

40. 2 NORTON ANTHOLOGY, *supra* note 39, at 2163.

41. T. S. ELIOT, *Tradition and the Individual Talent*, *in* THE SACRED WOOD 47, 49 (7th ed., 5th prtg. 1969).

42. *Id.* at 59.

43. Paul Goldstein, *Copyright*, 38 J. COPYRIGHT SOC'Y U.S.A. 109, 110 (1991).

44. Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4436) (Story, Cir. J.); *accord* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994).

45. JOHNSON, *supra* note 5, at 117.

tangible historical artifacts provide a crucial cultural link across the ages.[46]

At the same time, the absolute amount of accumulated information reduces the actual uses of these traditions, more often than not, to fleeting allusions. Eliot answered this challenge in *The Metaphysical Poets*: "Our civilization comprehends great variety and complexity, and this variety and complexity, playing upon a refined sensibility, must produce various and complex results. The poet must become more and more comprehensive, more allusive, more indirect, in order to force, to dislocate if necessary, language into his meaning."[47] The incredible accumulation of information forces contemporary culture into far more eclectic forms of expression, far more dependent on allusion to create the illusion of continuity with ever-receding traditions. Fusion cuisine and musical sampling feel like cultural pastiche because they are.

In short, Eliot observed that the rapid accumulation of information places a premium on the best, most enduring cultural artifacts and expressions.[48] He also predicted, quite accurately in retrospect, that even the most prominent aspects of culture would command progressively less attention.[49] Occasions such as the Law Library's acquisition of its millionth volume thus commemorate both the static achievement of this milestone and the dy-

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46. *See, e.g.*, Sanford V. Levinson, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES (1998); ALEXANDER STILLE, THE FUTURE OF THE PAST 41–45 (2002); A. Dan Tarlock, *Slouching Toward Eden: The Eco-Pragmatic Challenges of Ecosystem Revival*, 87 MINN. L. REV. 1173, 1187–89 (2003), *reprinted in* THE JURISDYNAMICS OF ENVIRONMENTAL PROTECTION: CHANGE AND THE PRAGMATIC VOICE IN ENVIRONMENTAL LAW 145 (Jim Chen ed., 2003); Sanford Levinson, *They Whisper: Reflections on Flags, Monuments, and State Holidays, and the Construction of Social Meaning in a Multicultural Society*, 70 CHI.-KENT L. REV. 1079 (1995); John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339 (1989); *cf.* Joseph L. Sax, *Heritage Preservation as a Public Duty: The Abbé Grégoire and the Origins of an Idea*, 88 MICH. L. REV. 1142 (1990) (describing environmental protection as a variation on a broader theme of historic preservation); Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992 (2003) (arguing that the Rehnquist Court's "'monumentalist' historical consciousness" exalts certain principles of federalism established at the founding even as it systematically diminishes the exertion of national power over the states first established during the Civil War and Reconstruction).

47. T. S. Eliot, *The Metaphysical Poets*, *in* THE HOGARTH ESSAYS 212, 221 (1928).

48. *See id.*

49. *See* T. S. Eliot, *The Waste Land*, *in* 2 NORTON ANTHOLOGY, *supra* note 39, at 2171.

namic mandate to maintain the collection's relevance in an information-driven society whose speed and complexity promise never to abate.

II. LIBRARIANSHIP AS A CONSTITUTIONALLY PRIVILEGED ENTERPRISE

These abstractions take us only so far. In *The Metaphysical Poets*, Eliot explained how the accelerated flow of *scientific* knowledge prevents modern poets from keeping *artistic* pace with "Racine or Donne" merely by looking into the heart.[50] Although forcing poetry and art to "look into the cerebral cortex, the nervous system, and the digestive tracts"[51] does not come naturally to a literary culture of "natural Luddites" who "have never tried, wanted, or been able to understand the industrial revolution, much less accept it,"[52] a realistic, hard look at the human condition shows that life is still "solitary, poore, nasty, brutish, and short."[53] Confronted with the harsh truth that "[m]ost of our fellow human beings . . . are underfed and die before their time," most observers fall into the tempting "moral trap" of "sit[ting] back, complacent in one's unique tragedy, and let[ting] the others go without a meal."[54] Even though the stakes in controversies over librarianship are rarely this stark, tempering the inherent romanticism of literary culture with a dose of cold scientific realism heightens the value of thorough if quotidian legal analysis. A proper legal understanding of libraries as repositories and engines of culture thus demands careful attention to doctrinal details.

The Supreme Court of the United States has decided two cases implicating librarianship as a constitutionally protected form of expression. First, the 1982 case of *Board of Education v. Pico*[55] involved a public school board's decision to remove politically controversial books such as *Slaughterhouse Five*, *The Naked*

50. Eliot, *supra* note 47, at 223.

51. *Id.*

52. C. P. SNOW, THE TWO CULTURES: AND A SECOND LOOK 22 (1965); *cf. id.* at 70 (identifying the rise of "something like a third culture," a community of social scientists "concerned with how human beings are living or have lived," whose sensibilities fall somewhere between the industrialism of the scientific community and the Luddite romanticism of the humanistic community).

53. THOMAS HOBBES, LEVIATHAN 89 (Richard Tuck ed., Cambridge University Press 1996) (1651).

54. SNOW, *supra* note 52, at 6–7.

55. 457 U.S. 853 (1982).

Ape, and *A Hero Ain't Nothin' but a Sandwich* from high school and junior high school libraries. Justice Brennan's plurality opinion distinguished between the exercise of a "school Board's discretion to prescribe the curricula of [local] schools" (which reviewing courts are presumably loath to restrain) and the constitutionally suspect "removal from school libraries of books originally placed there by . . . school authorities, or without objection from them."[56] Justice Brennan readily perceived how "the removal of books from [library] shelves" might "directly and sharply" threaten "the First Amendment rights of students."[57] Indeed, he emphasized how "the special characteristics of the school library make that environment especially appropriate for the recognition of the First Amendment rights of students."[58] Recognizing "the unique role of the school library" in providing students the freedom to exercise a "completely voluntary" and unstructured "opportunity at self-education and individual enrichment," Justice Brennan rejected the school board's "claim of absolute discretion" that would otherwise subjugate "the school library and the regime of voluntary inquiry that there holds sway."[59]

Justice Brennan thereupon proposed that the First Amendment's guarantee of freedom of speech should constrain a public library's "discretion to remove books," but not necessarily its "discretion . . . to choose books to add."[60] Although Justice Blackmun denied "that the right at issue" in *Pico* was "somehow associated with the peculiar nature of the school library,"[61] he helped Justice Brennan's plurality respond to Justice Powell's objection in dis-

56. *Id.* at 862 (plurality opinion) (emphasis omitted). To be sure, the Supreme Court has not hesitated to strike down state laws regulating curricular choices when such laws have offended the Establishment Clause or substantive due process. *See* Edwards v. Aguillard, 482 U.S. 578 (1987) (invalidating as an unconstitutional establishment of religion a statute requiring the teaching of creationism alongside evolution); Epperson v. Arkansas, 393 U.S. 97 (1968) (invalidating an outright ban on the teaching of evolution); Bartels v. Iowa, 262 U.S. 404 (1923) (invalidating a ban on the teaching of foreign languages as a substantive due process violation); Meyer v. Nebraska, 262 U.S. 390 (1923) (same); *see also* Farrington v. Tokushige, 273 U.S. 284 (1927) (using a Fifth Amendment theory of substantive due process to invalidate what was then the Territory of Hawaii's ban on education in any language besides English or Hawaiian); *cf.* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (invalidating a law requiring students to attend public schools to the exclusion of private schools).

57. *Pico*, 457 U.S. at 866 (plurality opinion).

58. *Id.* at 868 (emphasis omitted).

59. *Id.* at 869.

60. *Id.* at 871–72 (emphasis omitted).

61. *Id.* at 878 (Blackmun, J., concurring in part and concurring in the judgment).

sent that courts could scarcely distinguish a "challenge [to] a school board's decision to remove a book" from "a like challenge to a . . . decision not to purchase that identical book."[62] Justice Blackmun identified a "profound practical and evidentiary distinction between" the "removal of a book and [the] failure to acquire a book": "'There are many reasons why a book is not acquired, the most obvious being limited resources, but there are few legitimate reasons why a book, once acquired, should be removed from a library not filled to capacity.'"[63] In this view, removal decisions are presumptively unconstitutional. In the absence of "sufficiently compelling reasons," removal of books already committed to a library's collection suggests that the government is unconstitutionally attempting to "suppress exposure to ideas—for the sole purpose of suppressing exposure to [the] ideas" at issue.[64]

Twenty-one years after *Pico*, the Supreme Court gained another opportunity to "examine the role of libraries in our society."[65] Once again, however, the Court reached no consensus regarding the First Amendment limitations on the regulation of librarianship. The 2003 case of *United States v. American Library Ass'n*,[66] contested the constitutionality of the Children's Internet Protection Act (CIPA),[67] which conditioned public libraries' receipt of federal subsidies on the installation of Internet filters designed to block sexually explicit content. Whereas *Pico* had involved a local school board's decision to remove politically controversial library books, *American Library Ass'n* involved local libraries' objection to conditions on federal financial support. The government enjoys far greater ability to withhold subsidies from disfavored speech than to ban it outright.[68] Moreover, to the extent that "differences in the characteristics of new media justify

62. *Id.* at 895 (Powell, J., dissenting); *see also id.* at 917–18 (Rehnquist, J., dissenting).

63. *Id.* at 878–79 n.1 (Blackmun, J., concurring in part and concurring in the judgment) (quoting Pico v. Bd. of Educ., 638 F.2d 404, 436 (2d Cir. 1980) (Newman, J., concurring in the result), *aff'd*, 457 U.S. 853 (1982)).

64. *Id.* at 877 (emphasis omitted).

65. United States v. Am. Library Ass'n, 539 U.S. 194, 203 (2003) (plurality opinion of Rehnquist, C.J.).

66. *Id.* at 194.

67. Pub. L. No. 106-554, 114 Stat. 2763A (2000) (codified at 20 U.S.C. § 9134(f)(1)(A)–(B) (2000); 47 U.S.C. § 254(h)(6)(B)–(C) (2000)).

68. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173 (1991); *cf.* South Dakota v. Dole, 483 U.S. 203, 209 (1987) ("[T]he constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly.").

differences in the First Amendment standards applied to them,"[69] the transition from conventional books in *Pico* to the Internet might have affected the Supreme Court's approach in *American Library Ass'n*. Nevertheless, *American Library Ass'n* resembled *Pico* insofar as both cases contested the extent to which the government may remove or restrict library materials.

A splintered Court upheld the CIPA. Speaking for a plurality of Justices, Chief Justice Rehnquist emphasized the need to grant "public libraries . . . broad discretion to decide what material to provide to their patrons."[70] Insofar as libraries forgo "'universal coverage'" in favor of a more limited quest for "materials 'that would be of the greatest direct benefit or interest to the community,'" the Chief Justice characterized librarianship as a selective enterprise of "collect[ing] only those materials deemed to have 'requisite and appropriate quality.'"[71] Libraries and their staffs, in sum, "necessarily consider content in making collection decisions and enjoy broad discretion in making them."[72]

To the Chief Justice, the Internet's presence made no difference. He echoed the Senate's sentiment that the Internet, as "'simply another method for making information available in a school or library,'" was nothing "'more than a technological extension of the book stack.'"[73] Chief Justice Rehnquist accordingly refused to distinguish public library Internet access from the provision of "other library resources" in the hope of "facilitat[ing] research, learning, and recreational pursuits" with "materials of requisite and appropriate quality."[74] In his view, a "library's need to exercise judgment in making collection decisions depends on

69. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969); *cf.* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 781 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) (advocating the analysis of laws affecting new communications technologies "by reference to existing elaborations of constant First Amendment principles"); Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J., concurring) (describing each medium of speech as "a law unto itself": "The moving picture screen, the radio, the newspaper, the handbill, the sound truck, and the street corner orator have differing natures, values, abuses, and dangers"). *See generally* Jim Chen, *Conduit-Based Regulation of Speech*, 54 DUKE L.J. (forthcoming April 2005); Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245 (2003).

70. *Am. Library Ass'n*, 539 U.S. at 204 (plurality opinion of Rehnquist, C.J.).

71. *Id.* (quoting Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 421 (E.D. Pa. 2002), *rev'd*, 539 U.S. 194 (2003)).

72. *Id.* at 205.

73. *Id.* at 207 (quoting S. REP. NO. 106-141, at 7 (1999)).

74. *Id.* at 206.

its traditional role in identifying suitable and worthwhile material . . . no less . . . when it collects material from the Internet than when it collects material from any other source."[75]

The outcome in *American Library Ass'n* drew two bitter dissents. Justice Stevens condemned the plurality opinion as "'a dramatic departure from our national heritage and constitutional tradition.'"[76] For him, discretion in the librarian's craft favored freedom from CIPA's financial restraints rather than Congress's power to demand the installation of software filters. Indeed, he compared libraries' "discretion . . . regarding what to include in, and exclude from, their collections" with the constitutionally privileged "'business of a university . . . to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'"[77]

For his part, Justice Souter focused his dissent on the practical difference between *acquisition* and *removal* decisions. Conceding the "necessary and complex" nature of selectivity "to be selective with an eye to demand, quality, and the object of maintaining the library as a place of civilized enquiry," Justice Souter admitted that "[r]eview for rational basis is probably the most that any court could conduct" in any attack on a library's "myriad particular selections."[78] Complexity and "sheer volume" thus render acquisition decisions "poor candidates for effective judicial review."[79] In stark contrast from Chief Justice Rehnquist, however, Justice Souter believed that Internet filtering and blocking, "[a]t every significant point," "defies comparison to the process of acquisition."[80] "Whereas traditional scarcity of money and space require [sic] a library to make choices about what to acquire," Justice Souter observed, "blocking . . . is not necessitated by scarcity of either money or space."[81] "In the instance of the Internet," he wrote, "what the library acquires is electronic access, and the choice to block is a choice to limit access that has already been acquired."[82]

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75. *Id.* at 208.

76. *Id.* at 225 (Stevens, J., dissenting) (quoting Watchtower Bible & Tract Soc'y, Inc. v. Vill. of Stratton, 536 U.S. 150, 166 (2002)).

77. *Id.* at 226 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the result)).

78. *Id.* at 236 (Souter, J., dissenting).

79. *Id.* at 241–42.

80. *Id.* at 236.

81. *Id.* at 236–37.

82. *Id.* at 237.

Limiting Internet access demands an affirmative expenditure of library resources. Among library resources, Internet access is unusual in that complete acquisition is far cheaper than partial acquisition. As Justice Kennedy observed the Term before *American Library Ass'n*, "it is easy and cheap to reach a worldwide audience on the Internet . . . but expensive if not impossible to reach a geographic subset."[83] The partitioning required under the CIPA was content based rather than geographic, but comprehensive Internet access remains cheaper than its filtered alternative. Because leaving Internet access unblocked remains the cost-free option, "selective blocking by controversial subject matter," even more so than the book removal at issue in *Pico*, "is not a function of limited resources" and almost surely does not reflect constitutionally protected "assessment[s] of esthetic or scholarly merit."[84]

III. THE EMBODIMENT OF CULTURAL MEMORY AND PLATFORM FOR FUTURE INNOVATION

What, then, is the constitutional status of the library as an engine of democratic values? As a fountain of literary, artistic, and scientific inspiration? As a battleground for First Amendment disputes? The library as embodiment of cultural memory and platform for future innovation is all these things and more: it is "touchstone, threat and guiding star."[85] The fractured Courts in *Pico* and *American Library Ass'n* agreed on at least one point: "Public libraries pursue the worthy missions of facilitating learning and cultural enrichment."[86] As public officials regulate librarians' efforts to fulfill those "worthy missions," the legal response should hinge upon the impact of such regulation on the simultaneous but contradictory roles of libraries and other cultural resources in a world of speed: to provide a historical framework by which all innovation must be judged and to supply the ever briefer and more ethereal strands by which such innovation will be woven. The "important, delicate, and highly discretionary functions" of library management deserve legal respect and judi-

83. Ashcroft v. ACLU, 535 U.S. 564, 595 (2002) (Kennedy, J., concurring in the judgment) (citations omitted).

84. *Am. Library Ass'n*, 539 U.S. at 242 (Souter, J., dissenting).

85. RALPH ELLISON, JUNETEENTH: A NOVEL 16 (John F. Callahan ed., 2000).

86. *Am. Library Ass'n*, 539 U.S. at 203 (plurality opinion of Rehnquist, C.J.).

cial deference, but librarians and politicians alike must "perform within the limits of the Bill of Rights."[87]

Modern information technology has placed a premium on access to information, but it has simultaneously driven down the cost of such access. Under prevailing economic and technological conditions, the line between unreviewable expertise and unlawful discrimination is the precise distinction between the dismal science of acquiring new material and the politics of blocking, removal, and censorship. "Quite simply," wrote Justice Souter in his *American Library Ass'n* dissent, "we can smell a rat when a library blocks material already in its control . . . . Content-based blocking and removal tell us something that mere absence from the shelves does not."[88]

The Supreme Court's library cases do express a contrary vision, one arguably more consonant with T. S. Eliot's *Tradition and the Individual Talent* than with *The Metaphysical Poets.* That vision fell into dissent in *Pico* but commanded a plurality in *American Library Ass'n.* As then-Justice Rehnquist wrote in *Pico*: "Education consists of the selective presentation and explanation of ideas," upon "an orderly exposure to relevant information."[89] Elementary and secondary schools as communitarian institutions operating *in loco parentis* do indeed prepare pupils "for participation as citizens" and "inculcat[e] fundamental values necessary to the maintenance of a democratic political system."[90] But even then-Justice Rehnquist distinguished the inculcating function of public schools from "the broad-ranging inquiry available to university students"[91] and presumably also to adults in general.[92]

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87. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943); *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969) (acknowledging "the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools," but stressing that the exercise of such authority must be "consistent with fundamental constitutional safeguards").

88. *Am. Library Ass'n*, 539 U.S. at 241 (Souter, J., dissenting).

89. Bd. of Educ. v. Pico, 457 U.S. 853, 914 (1982) (Rehnquist, J., dissenting).

90. Ambach v. Norwick, 441 U.S. 68, 76–77 (1979); *accord Pico*, 457 U.S. at 864 (plurality opinion of Brennan, J.). *See generally* Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131 (1995) (exploring the "possible constitutional bases" for a right to education).

91. *Pico*, 457 U.S. at 914 (Rehnquist, J., dissenting).

92. *Cf.* Lorillard Tobacco Co. v. Reilly, 533 U.S 525, 564 (2001) (observing that "the governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults" (quoting Reno v. ACLU, 521 U.S. 844, 875 (1997))); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74 (1983) (refusing to limit the "level of dis-

Our culture having embraced the ethos and aesthetic of speed, the "great variety and complexity" of contemporary civilization demands complete access to the Alexandrian storehouse of artifacts and ideas needed to keep pace with the "more and more comprehensive, more allusive, more indirect" expressions of our varied and complex lives. Eliot insisted: "The possible interests of a poet are unlimited; the more intelligent he is the better; the more intelligent he is the more likely that he will have interests: our only condition is that he turn them into poetry, and not merely meditate on them poetically."[93] If we must choose one half of T. S. Eliot's paradox over the other, *The Metaphysical Poets* should prevail over *Tradition and the Individual Talent.*

America's "hazardous freedom," its commitment to social and scientific "openness" over the comfort of "absolute regimentation," has been "the basis of our national strength and of the independence and vigor of Americans who grow up and live in this . . . often disputatious society."[94] Not for naught has the Supreme Court described the "right to speak freely and to promote diversity of ideas and programs" as "one of the chief distinctions that sets us apart from totalitarian regimes."[95] Speech, "often provocative and challenging" and invariably free by law, is intended "to invite dispute," particularly "when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[96] Free speech "may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea."[97]

Aggressive protection against political interference in library management would unite the constitutional law of librarianship with the First Amendment's "deep commit[ment] to safeguarding academic freedom" as a "transcendent value."[98] As "a special con-

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course reaching a mailbox . . . to that which would be suitable for a sandbox"); Butler v. Michigan, 352 U.S. 380, 383 (1957) (declining to "reduce the adult population . . . to reading only what is fit for children").

93. Eliot, *supra* note 47, at 220–21.

94. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508–09 (1969); *accord Pico*, 457 U.S. at 866 (plurality opinion of Brennan, J.).

95. Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949).

96. *Id.*

97. *Id.*

98. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967); *see also id.* (observing the United States' societal desire for a "robust exchange of ideas which discovers truth 'out of a multitude of tongues'" (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943))).

cern of the First Amendment,"[99] academic freedom most effectively fosters the "robust exchange of ideas"[100] when governments and universities respect the individual "right . . . to seek, teach, and write the truth."[101] Such "constitutional protection [as] is afforded by the First Amendment extends as readily to the scholar in the laboratory as to the teacher in the classroom."[102] The American research university, which is already the envy of its counterparts in other countries and which in time may rank alongside democratic constitutionalism among the United States' greatest contributions to global civilization, has methodically enshrined academic freedom—defined as the "right to speak, to write, and to teach freely"—as a "precious right . . . central to the very identity of the university in the modern world."[103] Our astoundingly accelerated society, in which "a minute" provides ample "time / For decisions and revisions which a minute will reverse," demands unimpeded access to the full spectrum of ideas so that makers of culture truly can "dare [to] / Disturb the universe."[104]

As between inculcation of the impressionable and experimentation among the experienced, the constitutional jurisprudence of librarianship should treat libraries, museums, and other cultural archives and resources not as ancillary components of elementary or secondary education, but as extensions of the greatest research university of them all.[105] Empowering researchers, scientists, scholars, and teachers with the "[f]reedom to reason and freedom for disputation on the basis of observation

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99. *Id.*; *accord* Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226 (1985); *see also* J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251 (1989).

100. *Keyishian*, 385 U.S. at 603; *accord* United States v. Am. Library Ass'n, 539 U.S. 194, 226 (2003) (Stevens, J., dissenting); Healy v. James, 408 U.S. 169, 180 (1972).

101. Julius G. Getman & Jacqueline W. Mintz, *Foreword: Academic Freedom in a Changing Society*, 66 TEX. L. REV. 1247, 1247 (1988).

102. Dow Chem. Co. v. Allen, 672 F.2d 1262, 1275 (7th Cir. 1982).

103. JOHN W. BOYER, ACADEMIC FREEDOM AND THE MODERN UNIVERSITY: THE EXPERIENCE OF THE UNIVERSITY OF CHICAGO 95 (2002), *quoted in Am. Library Ass'n*, 539 U.S. at 226 n.4 (Stevens, J., dissenting).

104. T. S. ELIOT, *The Love Song of J. Alfred Prufrock*, *in* 2 NORTON ANTHOLOGY, *supra* note 39, at 2164.

105. *Cf.* Rust v. Sullivan, 500 U.S. 173, 200 (1991) (acknowledging that "the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment"); *Keyishian*, 385 U.S. at 603–04.

and experiment" provides "the necessary conditions for the advancement of scientific knowledge."[106] Freedom to research matters even more to scholars in the arts, the humanities, and the social sciences, for the absence of "accepted . . . absolutes" raises the risk that politically powerful actors will place vulnerable speakers in ideological "strait jacket[s]."[107] Even "[p]rogress in the natural sciences" demands "unfettered" freedom to engage in the "hypothesis and speculation" needed to convert "findings made in the laboratory" into enduring "[i]nsights into the mysteries of nature."[108] Creative conjecture is the mother of experimentation and the grandmother of discovery. The physicist Hermann Weyl's observation in this regard bears remembering: "My work always tried to unite the true with the beautiful but when I had to choose one or the other, I usually chose the beautiful."[109] Or, as John Keats expressed the point, "'Beauty is truth, truth beauty,'—that is all / Ye know on earth, and all ye need to know."[110]

Even those who favor the more dogmatic, "elementary school" model of the *Pico* dissenters over the university model of academic freedom should pause before embracing any constitutional approach that would subject the librarian's craft to political

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106. Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the result) (citation omitted); *cf. id.* (recognizing four separate elements of "academic freedom": the ability of the university "to determine for itself on academic grounds [1] who may teach, [2] what may be taught, [3] how it shall be taught, and [4] who may be admitted to study") (citation omitted).

107. *Id.* at 250 (plurality opinion of Warren, C.J.); *cf. id.* at 261–62 (Frankfurter, J., concurring in the result) ("[T]he respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities.").

108. *Id.* at 261–62 (Frankfurter, J., concurring in the result). For a sampling of the extensive literature on scientific research as an activity protected by the First Amendment, see Richard Delgado & David R. Millen, *God, Galileo, and Government: Toward Constitutional Protection for Scientific Inquiry*, 53 WASH. L. REV. 349 (1978); James R. Ferguson, *Scientific and Technological Expression: A Problem in First Amendment Theory*, 16 HARV. C.R.-C.L. L. REV. 519 (1981); James R. Ferguson, *Scientific Inquiry and the First Amendment*, 64 CORNELL L. REV. 639 (1979); Gary L. Francione, *Experimentation and the Marketplace Theory of the First Amendment*, 136 U. PA. L. REV. 417 (1987); Robert M. O'Neil, *Scientific Research and the First Amendment: An Academic Privilege*, 16 U.C. DAVIS L. REV. 837 (1983); John A. Robertson, *The Scientist's Right to Research: A Constitutional Analysis*, 51 S. CAL. L. REV. 1203 (1977).

109. EDWARD O. WILSON, BIOPHILIA 61 (1984) (quoting Hermann Weyl, "the perfecter of quantum and relativity theory").

110. JOHN KEATS, *Ode on a Grecian Urn*, *in* COMPLETE POEMS 282, 283 (Jack Stillinger ed., 1982).

control. Invidious decisions to remove books and other items from the intellectual palette threaten to "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[111] Librarianship is a subtle and complex craft, but no more challenging than "such fields as economics, science, technology and psychology," which routinely require judges to "acquire the learning pertinent to complex technical questions."[112] "Restraint, yes, abdication, no."[113] To surrender all meaningful review of legislative control over librarianship risks making a "splendid bauble" of the constitutional promise of free speech.[114]

As in all other questions of constitutional law and democratic governance, the risk of error haunts this choice. All law is an experiment, as "all life is an experiment."[115] "Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge."[116] As we brace for inevitable errors in judgment on matters of free speech, we should err in favor of and not against the right to speak. An unflinching commitment to "free trade in ideas" rests on the belief that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[117] In this marketplace of ideas, the "forum where ideas and information flourish," it is "the speaker and the audience, not the government, [who] assess the value of the information presented."[118] "We shall not cease from exploration / And the end of all our exploring / Will be to arrive where we started / And know the place for the first time."[119]

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111. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943); *accord* Bd. of Educ. v. Pico, 457 U.S. 853, 865 (1982) (plurality opinion of Brennan, J.); *id.* at 879 (Blackmun, J., concurring in part and concurring in the judgment).

112. Ethyl Corp. v. EPA, 541 F.2d 1, 69 (D.C. Cir. 1976) (en banc) (Leventhal, J., concurring), *cert. denied*, 426 U.S. 941 (1976); *cf.* Kassel v. Consol. Freightways Corp., 450 U.S. 662, 670 (1981) (plurality opinion) (expressing a willingness to invalidate "marginally" effective and "substantially" obtrusive state laws despite state officials' claimed expertise over regulations designed "to promote the public health or safety").

113. *Ethyl Corp.*, 541 F.2d at 69 (Leventhal, J., concurring).

114. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 420–21 (1819) (Marshall, C.J.); *accord In re* Neagle, 135 U.S. 1, 87 (1890) (Lamar, J., dissenting); *accord* The Civil Rights Cases, 109 U.S. 3, 48 (1883) (Harlan, J., dissenting).

115. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

116. *Id.*

117. *Id.*

118. Edenfield v. Fane, 507 U.S. 761, 767 (1993); *accord* Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 195 (1999).

119. T. S. ELIOT, *Little Gidding*, *in* FOUR QUARTETS, *supra* note 2, at 49, 59.

"If we would guide by the light of reason, we must let our minds be bold."[120] Favoring access to information over legislative discretion to control library management represents a sound exercise in democratic self-governance. Allowing the government too much power to "tell[ ] us what to say or hear for our own good" places us squarely on the road toward "deforming the entire democratic process,"[121] on the road to serfdom.[122] Resistance to official control of the means and manifestations of imaginative expression represents the brightest of "fixed star[s] in our constitutional constellation."[123] Especially in our harried, hurried age of speed and informational overload, libraries remain "hallowed place[s]," special public spaces "dedicated to quiet, to knowledge, and to beauty."[124] At the law library at the University of Minnesota or any other institution dedicated to fostering cultural memory and inspiring future innovation in our age of illusion and allusion, we might well glimpse "[s]ome of the beautiful things that Heaven bears, / . . . and once more [see] the stars."[125]

120. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

121. Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 651 (2004).

122. *See generally* F. A. HAYEK, THE ROAD TO SERFDOM (Milton Friedman intro., 1994).

123. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

124. Brown v. Louisiana, 383 U.S. 131, 142 (1966) (plurality opinion of Fortas, J.); *accord* Bd. of Educ. v. Pico, 457 U.S. 853, 868 (1982) (plurality opinion of Brennan, J.).

125. DANTE ALIGHIERI, THE INFERNO OF DANTE, canto XXXIV, *ll.* 139–40, at 373 (Robert Pinsky trans., 2d prtg. 1995) (n.d.).