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Reshelving the First Amendment: Board of Education, Island Trees Union Free School District No. 26 v. PICO

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RESHELVING THE FIRST AMENDMENT: *BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT NO. 26 v. PICO*

> Perhaps no single event has more evocative power to signal the suppression of free speech than the burning of a book.[1]

I. INTRODUCTION

The silence of the Constitution on the subject of education, coupled with the language of the tenth amendment,[2] has given states extensive power to establish systems for public school administration.[3] This authority is often expressed in the form of statutory enactments which require local school boards to prescribe appropriate educational materials for students in their districts.[4] With few exceptions, the judiciary has been reluctant to intervene in the resolution of conflicts which arise in the daily operation of school systems[5] and has afforded broad deference to the discretion and judgment of school officials.[6] Such judgments are not, however, sacrosanct and, with increasing frequency, federal courts have intervened to review the actions of educators which "directly and sharply implicate basic constitutional values."[7]

Recent challenges to school officials' autonomy have involved the selective removal of library books.[8] At issue has been the extent to

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1. Pico v. Board of Educ., Island Trees Union Free School Dist. No. 26, 638 F.2d 404, 432 (2d Cir. 1980) (Newman, J., concurring), *aff'd*, 457 U.S. 853 (1982) (plurality opinion).

2. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

3. Project, *Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373, 1375-76 n.4 (1976) [hereinafter cited as Project]. *See also* Stallings, *Legal Factors Pertaining to School Board Membership in Municipalities Over 100,000 Population*, in LEGAL ISSUES IN EDUCATION 283, 284 (Edward Claude Bolmeier ed. 1970).

4. *See generally* Project, *supra* note 3, at 1375.

5. *See, e.g.*, East Hartford Educ. Ass'n v. Board of Educ., 562 F.2d 838, 857 (2d Cir. 1977) (en banc) (on petition for rehearing).

6. Epperson v. Arkansas, 393 U.S. 97, 104 (1968); Pico v. Board of Educ., Island Trees Union Free School Dist. No. 26, 638 F.2d 404, 425 (2d Cir. 1980).

7. Epperson v. Arkansas, 393 U.S. 97, 104 (1968). Although it is true that the responsibility for public education lies primarily with the states, like all state power it must be exercised consistently with the federal Constitution. Cooper v. Aaron, 358 U.S. 1, 19 (1958); *see also* Morgan v. McDonough, 548 F.2d 28, 32 (1st Cir. 1977). Moreover, the Supreme Court has stressed that the "protection of constitutional freedoms is nowhere more vital than in the community of American schools." Shelton v. Tucker, 364 U.S. 479, 487 (1960).

8. *See, e.g.*, Bicknell v. Vergennes Union High School Bd. of Directors, 638 F.2d 438

which local authorities can restrict the flow of information to the school community without infringing upon the first amendment rights of students and faculty.[9] Contradictory federal court decisions have reflected the judiciary's uncertainty regarding the extent of constitutional protection afforded students and the limitations to be imposed on local school board authority.[10]

In 1980, the Second Circuit held that while public school officials have the authority to remove books from district libraries under certain circumstances, the "unusual and irregular intervention in the school libraries' operations by persons not routinely concerned with such matters" establishes a prima facie constitutional violation warranting judicial intervention.[11] In *Board of Education, Island Trees Union Free School District No. 26 v. Pico*,[12] (*Pico*) one of the most deeply divided decisions in the Burger Court's history,[13] the United States Supreme Court affirmed the Second Circuit's decision.[14] In so doing, a plurality of the Court recognized for the first time a distinct constitutional right to receive information within a school forum.[15]

This Note examines the impact of the Supreme Court's holding in

(2d Cir. 1980); Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980); Cary v. Board of Educ., 598 F.2d 535 (10th Cir. 1979); Minarcini v. Strongsville City School Dist., 541 F.2d 577 (6th Cir. 1976); Presidents Council, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972); Sheck v.Baileyville School Comm., 530 F. Supp. 679 (D. Me. 1982); Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269 (D.N.H. 1979); Right to Read Defense Comm. v. School Comm., 454 F. Supp. 703 (D. Mass. 1978).

9. *See* Comment, *Schoolbooks, School Boards, and the Constitution*, 80 COLUM. L. REV. 1092, 1113 (1980). *See also* Note, *State Indoctrination and the Protection of Non-State Voices in the Schools: Justifying a Prohibition of School Library Censorship*, 35 STAN. L. REV. 497, 501 (1983) (students' first amendment interests and the schools' indoctrinative interests need not be analyzed as distinct).

10. *See supra* note 8. Unfortunately, the United States Supreme Court's decision in Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853 (1982), has done little to alleviate this confusion. *See infra* note 13 and accompanying text.

11. Pico v. Board of Educ., Island Trees Union Free School Dist. No. 26, 638 F.2d 404, 414-15 (2d Cir. 1980).

12. 457 U.S. 853 (1982) (plurality opinion).

13. Justice Brennan authored the opinion in which Justices Marshall and Stevens joined. Justice Blackmun, writing separately, concurred in part while expressing a different interpretation of the first amendment. Justice White concurred in the judgment but expressed no opinion on the constitutional rights at issue in the case. Chief Justice Burger and Justices Rehnquist, Powell, and O'Connor each wrote a separate dissenting opinion.

14. 457 U.S. at 875.

15. *Id.* at 866-68. Justice White, while concurring in the judgment, was concerned with the adjudication of a constitutional question when no trial record was developed in the district court. *Id.* at 883-84 (White, J., concurring). While it is unusual that the Court chose to grant certiorari in *Pico*, it is by no means unique. The Court has on numerous occasions reviewed questions of law in cases where the district court had granted summary judgment.

Pico by analyzing the heightened standard of review employed by the Court, and its recognition of a student's first amendment right to receive ideas. It describes the test set forth for determining a constitutional violation based on improper motivation and suggests that it may serve as a successful blueprint for censorship. This Note also discusses the effect *Pico* may be expected to have on future book removal cases. It concludes that not only is the constitutional entitlement addressed in *Pico* narrowly defined by the plurality, but the fragmented nature of the decision necessitates future clarification of the right at issue.

II. STATEMENT OF THE CASE

A. The Facts

In September, 1975, three members of the Island Trees Union Free School District Board (the Board) attended a conference sponsored by Parents of New York United (PONYU), a politically conservative organization.[16] During the conference, the board members acquired a list of books which PONYU members considered objectionable, improper, and ill-suited for use in public schools.[17] The school board's president and vice-president subsequently directed a search of the district's libraries and card catalogs. They discovered that the district libraries owned ten books which were on the PONYU list.[18]

It was not until February 1976, however, at a closed board meeting attended only by the board members, the principals of the junior and senior high schools and the district superintendent, that the Board ordered the removal of these books.[19] Shortly thereafter, the books were

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See, e.g., Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Mills v. Alabama, 384 U.S. 214 (1966).

16. *Pico*, 457 U.S. at 856.

17. *Id.* at 857. In a press release issued by the Board these books were characterized as " 'anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy . . . .' " *Id.* (quoting Pico v. Board of Educ., Island Trees Union Free School Dist., 474 F. Supp. 387, 390 (E.D.N.Y. 1979)).

18. *Pico*, 457 U.S. at 856. These books were: *Slaughterhouse Five*, by Kurt Vonnegut, Jr.; *The Naked Ape*, by Desmond Morris; *Down These Mean Streets*, by Piri Thomas; *Best Short Stories by Negro Writers*, edited by Langston Hughes; *Go Ask Alice*, by an anonymous author; *Laughing Boy*, by Oliver LaFarge; *Black Boy*, by Richard Wright; *A Hero Ain't Nothin' But a Sandwich*, by Alice Childress; *Soul on Ice*, by Eldridge Cleaver; *A Reader for Writers*, edited by Jerome Archer. *Id.* at 856-57 n.3.

19. *Id.* at 856-57. On March 19, 1976, the Board issued a press release which stated that "[w]hile . . . these books have a place on the shelves of the public library, [they] DO NOT belong in school libraries." Pico v. Board of Educ., Island Trees Union Free School Dist., 474 F. Supp. 387, 390 (E.D.N.Y. 1979). The Board concluded that it had a duty to remove the books to "protect [students] from . . . moral danger." *Id.*

removed from the libraries pending future Board action.[20] This prompted the issuance of a memorandum from the superintendent of the school district to the Board expressing disagreement with the Board's actions.[21] He urged that the Board follow existing policy which was "designed expressly to handle such problems" and recommended the appointment of a book review committee to help resolve the issue.[22]

Later that month, acting on the superintendent's memorandum and motivated by public pressure,[23] the Board directed that a committee of eight review the removed books and make recommendations concerning their usefulness, relevance, and general educational suitability.[24] On July 1, 1976, the committee recommended that four books be reshelved,[25] two be removed,[26] and reached no agreement on the remaining books.[27] Without explanation, the Board substantially rejected the committee's report.[28]

In response, several Island Trees high school students brought suit

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20. *Pico*, 457 U.S. at 857.

21. Pico v. Board of Educ., Island Trees Union Free School Dist. No. 26, 638 F.2d 404, 409 (2d Cir. 1980).

22. *Id.* The book removal policy required that notification be given to the superintendent and a committee be appointed to study the objectionable books and make recommendations. *Id.* Past court actions indicate the importance of an established policy concerning selection and removal of reading materials. In cases where a procedure was established and followed, the courts have refused to question the decisions reached, unless there was a clear showing of arbitrary and capricious conduct on the part of those conducting the proceedings. *E.g.*, Bicknell v. Vergennes Union High School Bd. of Directors, 638 F.2d 438, 441 (2d Cir. 1980) (book removal upheld despite Board's refusal to adopt book committee's recommendation when evidence indicated compliance with established book removal policy). *But see* Minarcini v. Strongsville City School Dist., 541 F.2d 577, 580-81 (6th Cir. 1976) (application of established book removal procedure may still run afoul of first amendment). Even Justice Brennan admitted that *Pico* "would be a very different case if the record demonstrated that petitioners had employed established, regular, and facially unbiased procedures for the review of controversial materials." 457 U.S. at 874.

23. Pico v. Board of Educ., Island Trees Union Free School Dist. No. 26, 638 F.2d 404, 409 (2d Cir. 1980). As the superintendent predicted, soon after numerous articles appeared in the New York press regarding the censorship activity, the Island Trees community demanded an explanation for the Board's action. *Id.*

24. Pico v. Board of Educ., Island Trees Union Free School Dist., 474 F. Supp. 387, 391 (E.D.N.Y. 1979).

25. *Id.* These books were *Laughing Boy*, *Black Boy*, *Go Ask Alice*, and *Best Short Stories by Negro Writers*.

26. *Id.* These books were *The Naked Ape* and *Down These Mean Streets*.

27. *Id.* These titles included *Soul on Ice*, *A Hero Ain't Nothin' but a Sandwich*, *Slaughterhouse Five*, and *A Reader for Writers*.

28. *Pico*, 457 U.S. at 858. The Board decided that *Laughing Boy* should be reshelved, that *Black Boy* should be available subject to parental approval, but that the remaining books should be permanently banned. *Id.* at 858 nn.10-11.

in state court, asserting that the Board's actions deprived them of their first amendment rights.[29] The students argued that the books were removed because they offended the board members' social, political, and moral tastes.[30] The Board removed the action to federal district court where its motion for summary judgment was granted.[31] The court found that the Board's decision was motivated by its belief that the books were educationally unsuitable. The Board's actions did not, therefore, constitute a constitutional violation.[32] An appeal was subsequently taken to the Court of Appeals for the Second Circuit.

B. The Second Circuit's Reasoning

In *Pico v. Board of Education, Island Trees Union Free School District No. 26*,[33] the Second Circuit agreed that the Board had the authority to remove books from district libraries[34] and acknowledged that mere allegations that controversial books were removed from the library to prohibit expression of ideas would not constitute a first

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29. *Id.* at 858-59. The students sought injunctive and declaratory relief alleging violation of their federal and state constitutional rights. The action was brought pursuant to 42 U.S.C. § 1983. Section 1983 states, in pertinent part:

> Every person who, under color of any statute . . . of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1976). *See also* Monell v. Department of Social Servs., 436 U.S. 658 (1978) (local governing bodies can be sued directly under § 1983).

30. Pico v. Island Trees Union Free School Dist., 474 F. Supp. 387, 389 (E.D.N.Y. 1979).

31. *Id.* at 398.

32. *Id.* at 394-97. The district court rejected the plaintiff's reliance on Minarcini v. Strongsville City School Dist., 541 F.2d 577 (6th Cir. 1976), Right to Read Defense Comm. v. School Comm.. 454 F. Supp. 703 (D. Mass. 1978), and Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269 (D.N.H. 1979) and instead found Presidents Council, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972), controlling.

In *Presidents Council*, the Second Circuit upheld a school board's resolution to restrict student access to a library book. 457 F.2d at 291. In reaching this decision the circuit court relied on *Epperson v. Arkansas*, wherein the Supreme Court held that " '[c]ourts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.' " *Id.* (quoting 393 U.S. 97, 104 (1968)). Although the district court in *Pico* noted that the school district's decision reflected a misguided educational philosophy, it similarly held that because "[t]he challenged action . . . did not sharply and directly implicate basic first amendment values" the policies established by the school board should not be overruled. 474 F. Supp. 387, 398 (E.D.N.Y. 1979).

33. 638 F.2d 404 (2d Cir. 1980).

34. *Id.* at 414.

amendment violation.[35] The court recognized, however, that "an unusual and irregular intervention in the school libraries' operations by persons not routinely concerned with such matters" establishes a prima facie constitutional violation warranting judicial intervention.[36] The court explained that once a plaintiff establishes a prima facie violation,[37] the burden of persuasion shifts to defendant school officials[38] to demonstrate a reasonable basis for interference with students' first amendment rights.[39] Furthermore, even when officials are able to meet this burden, the court noted that plaintiffs are to be afforded the opportunity to rebut on the grounds that the school officials' justifications "were simply pretexts for the suppression of free speech."[40] The court further explained that the true motives underlying removal of books by

35. *Id.* In Bicknell v. Vergennes Union High School Bd. of Directors, 638 F.2d 438 (2d Cir. 1980), a companion case heard by the same panel on the same day as *Pico*, the court found no first amendment violation in the removal of "vulgar" and "indecent" books, reaffirming the rule that such materials are not constitutionally protected. *Id.* at 441.

36. 638 F.2d at 414-15. Unlike Judge Sifton, who authored the opinion, the remaining panel members did not find sufficient evidence upon which they could properly determine whether the plaintiffs had established a prima facie violation, and the case was therefore remanded for trial.

37. The Second Circuit recognized, but distinguished certain limited circumstances when a Board's "irregular and apparently arbitrary intervention" in school affairs would be tolerated. *Id.* at 415. These situations included school board regulation of (1) speech which " 'materially disrupts classwork or involves substantial disorder or invasion of the rights of others,' " *id.* (quoting Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 513 (1969)); (2) language which may affect the "psychological well being of the young," 638 F.2d at 415 (citing Trachtman v. Anker, 563 F.2d 512, 517 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978)); and (3) indecent language which would serve to undermine the Board's responsibility " 'to promote standards of civility and decency among school children.' " 638 F.2d at 415 (quoting Thomas v. Board of Educ., 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring), *cert. denied*, 444 U.S. 1081 (1980)).

38. The Second Circuit further explained that the school board's burden is not met by bare allegations that these circumstances existed. 638 F.2d at 415. School authorities must demonstrate that the manner in which the regulation was carried out complies with the test set out in James v. Board of Educ., 461 F.2d 566, 571 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972), and United States v. O'Brien, 391 U.S. 367, 377 (1968). *See infra* note 39. *See also* Comment, *A Definitional Approach to Secondary School Students Right to Know*, 42 OHIO ST. L.J. 1025, 1026-27 (1981).

39. 638 F.2d at 415. The court noted that the educators' burden is not a light one and set forth a two-prong test: (1) is the Board's policy justified on the grounds that the interests of discipline or sound education were materially and substantially jeopardized, *id.* (citing James v. Board of Educ., 461 F.2d 566, 571 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972)), and (2) does the policy constitute the least discriminatory alternative so as to advance the social interests that justify it without restricting protected speech to an extent greater than is essential to the furtherance of the interests. *Id.* at 415 (citing United States v. O'Brien, 391 U.S. 367, 377 (1968)).

40. 638 F.2d at 417.

school officials should be scrutinized lest the stated justification be used to mask an impermissible purpose:

> Where . . . evidence that the decisions made were based on defendants' moral or political beliefs appears together with evidence of procedural and substantive irregularities sufficient to suggest an unwillingness on the part of school officials to subject their political and personal judgments to the same sort of scrutiny as that accorded other decisions relating to the education of their charges, an inference emerges that political views and personal taste are being asserted not in the interests of the children's well-being, but rather for the purpose of establishing those views as the correct and orthodox ones for all purposes in the particular community.[41]

The court then enumerated the irregularities present in *Pico* that supported an inference that the Board's decision was based on unconstitutional motives rather than the welfare and education of district students.[42] In its attempt to determine the Board's motives, the Second Circuit adopted the approach set out in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*.[43] There, the United States Supreme Court reviewed the claim that a rezoning decision was motivated by discriminatory intent. The Court examined the historical background of the village board's decision, the specific sequence of events leading up to the challenged decision, and departures from the normal procedural sequence.[44] In *Pico*, the Second Circuit focused on the latter factor. The court found substantive departures from usual book removal procedures and policy which it considered highly probative of discriminatory motive, particularly because the factors usually considered by the Board would have strongly favored a decision con-

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41. *Id.*

42. These irregularities included:

> [1] defendants' substantive confusion, not to say incoherence, as to the reasons the books were being removed from the libraries; [2] the informal and dilatory manner in which the matter was pursued, including the lapse of three months from the time the presence of the offending books was discovered in the libraries until the principals of the schools were asked to take some action to prevent children from reading them . . . ; [3] the *ex post facto* appointment of a committee to review the removal of the books, the determinations of which were then, without explanation, not followed by the Board; [4] the strong opposition of professional personnel, including the District Superintendent, to the procedures used by the Board . . . ; and finally, [5] the "substantive" irregularities . . . of removing works by such generally recognized authors as Swift, the late Richard Wright, and Bernard Malamud.

Id. at 417-18 (citations omitted).

43. 429 U.S. 252 (1977).

44. *Id.* at 267-68.

trary to that reached.[45]

Troubled by the effect of these irregularities[46] and by the fact that the district court's grant of summary judgment deprived plaintiffs of their opportunity to argue the authenticity of the defendants' motives,[47] the Second Circuit remanded for trial on the merits.[48]

III. THE UNITED STATES SUPREME COURT'S REASONING

A. The Plurality Opinion

In upholding the Second Circuit's decision, a plurality of the United States Supreme Court recognized for the first time that the first amendment's guarantee of freedom of speech[49] limits the discretion of public school officials to remove library books considered offensive.[50] At the outset, Justice Brennan acknowledged that "courts should not 'intervene in the resolution of conflicts which arise in the daily operations of school systems' unless 'basic constitutional values' are 'directly and sharply implicate[d].' "[51] He found, however, that the actions of school officials in this instance justified such intervention. Although Justice Brennan agreed that school officials are authorized to " 'establish and apply their curriculum in such a way as to transmit community values,' "[52] he reaffirmed that this authority "must be exercised in a manner that comports with the . . . First Amendment."[53]

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45. 638 F.2d at 417.

46. *Id.* at 416. The court described the Board's behavior as "erratic, arbitrary and free-wheeling." *Id.* The court noted that once a board proceeds in this fashion it is "a matter of guesswork for teachers, librarians and students in the District whether other efforts at self-expression on their part will be curtailed with equally little notice." *Id.* at 416-17.

47. *Id.* at 418.

48. *Id.* at 419.

49. The first amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I.

50. 457 U.S. at 869. The Court began its analysis by noting the limited nature of the issues involved in the case. The facts as presented, did not require the Court to address the well established rules governing school curriculum. *Id.* at 861 (citing Epperson v. Arkansas, 393 U.S. 97 (1968) (prohibition against teaching evolution in state school unconstitutional); Meyer v. Nebraska, 262 U.S. 390 (1923) (prohibition against teaching modern foreign language unconstitutional)). At issue was the constitutionality of the Board's decision to physically *remove* library books, which are by their very nature optional rather than required reading material. 457 U.S. at 862. The procedural posture of the case further limited the questions presented. When reviewing a reversed order for summary judgment, a court must draw any factual inferences "in the light most favorable to the party opposing the motion." United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

51. 457 U.S. at 866 (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).

52. *Id.* at 864 (quoting Brief for Petitioners at 10).

53. 457 U.S. at 864. Justice Brennan reaffirmed that " 'First Amendment rights, applied in light of the special characteristics of the school environment, are available to . . . stu-

Justice Brennan reiterated the Court's previous recognition of the right to receive information characterizing it as an inherent corollary of the first amendment right to free speech.[54] Relying on *Lamont v. Postmaster General*[55] and its progeny,[56] Justice Brennan first addressed the *sender's* right to transmit ideas. He explained that the "right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them,"[57] reasoning that it is meaningless to protect the transmission of information if its receipt is proscribed.[58] Secondly, Justice Brennan reasoned that 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."[59] Relying on these two theories, the plurality extended the previously recognized right to receive information to school children.

Justice Brennan distinguished between the school board's claim of absolute discretion in matters of curriculum and its power within the unique boundaries of the school library.[60] He found the Board's reliance upon its duty to inculcate community values misplaced when it attempted to extend its claim of absolute discretion beyond the compulsory environment of the classroom and into the school library where students are free to select reading materials.[61] According to Justice Brennan, the special characteristics of the school library make that environment especially appropriate for the recognition of the right to receive information and ideas.[62] However, because only library book removal was involved in *Pico*, he repeatedly cautioned that the decision would not affect the acquisition of books for libraries, classrooms, or compulsory reading lists.[63]

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dents.'" *Id.* at 866 (quoting Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969)).

54. 457 U.S. at 866. The Court had recognized this right in Griswold v. Connecticut, 381 U.S. 479, 482 (1965) where it ruled that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge."

55. 381 U.S. 301 (1965).

56. *See infra* text accompanying notes 136-48.

57. 457 U.S. at 867 (emphasis in original). The Court cited numerous cases in support of this proposition, illustrating the development of the right to receive information. *See infra* note 138.

58. *Id.*

59. *Id.* (emphasis in original).

60. *Id.* at 868-69.

61. *Id.* at 869. Board members had argued "that they must be allowed *unfettered* discretion to 'transmit community values' through the Island Trees schools." *Id.* (emphasis in original).

62. *Id.* at 868-69.

63. *Id.* at 861-62, 871-72.

Justice Brennan explained that an inquiry into the motivations behind the Board's action was necessary to determine whether the Board's removal of library books denied students their first amendment rights.[64] Unconstitutional motivation would be demonstrated if the decisive factor for book removal was the Board's intent to deny access to the ideas contained therein.[65] Conversely, the first amendment rights of the students would not be violated if it were shown that the Board had decided to remove the books because they were either "pervasively vulgar" or "educationally unsuitable."[66]

After examining the students' allegations,[67] Board members' affidavits,[68] and other evidentiary material presented to the district court,[69] the plurality labeled the Board's motivations suspect. The plurality thus concluded that because there was a material issue of fact as to whether the Board had exceeded its discretion in removing the books from the libraries, summary judgment was improper.[70]

B. The Concurring Opinions

Justice Blackmun, concurring in the judgment, wrote separately to express his differing characterization of the first amendment right at issue in *Pico*. He declined to recognize the right to receive ideas identified by the plurality, finding the right at stake to be "narrower and more basic."[71]

"[I]f schools may be used to inculcate ideas, surely libraries may play a role in that process. . . . [Conversely,] the State may not act to

64. *Id.* at 870-71.

65. *Id.* at 871. Both parties conceded that if a book "removal decision was based solely upon the 'educational suitability' of the books in question," then unconstitutional motivation would not be demonstrated. *Id.* (quoting Transcript of Oral Argument at 53).

66. *Id.*

67. The students alleged that in making its removal decision the Board wrongfully ignored the advice of literary experts, the superintendent of schools, and district librarians and teachers. They further argued that the Board based its book removal decision, at least in part, on its belief that the books were "anti-American." *Id.* at 872, 874.

68. *Id.* at 873 n.25. These affidavits supported the students' allegations. For example, the deposition of one board member stated in part: "I believe it is anti-American to present one of the nation's heroes, the first President, . . . in such a negative and obviously one-sided life." *Id.* (quoting Deposition of Petitioner Martin at 22).

69. Other factors on which the Court relied included the Board's unexplained rejection of the book committee's recommendations; the fact that the Board's obscenity rationale for removal was unsupported in the removal of at least one of the books in question; and the refusal to follow established procedures for review of controversial materials. *Id.* at 873-75.

70. *Id.* at 875.

71. *Id.* at 878 (Blackmun, J., concurring). Consequently, Justice Blackmun did not join in Part IIA(1) of the plurality opinion in which the right to receive information was identified as the source of the plaintiff's constitutional protection. *Id.* at 882.

deny access to an idea simply because state officials disapprove of that idea for partisan or political reasons."[72] Moreover, although Justice Blackmun recognized that a school board has the authority to limit students' rights when they interfere with the daily operation of the school or the safety of others, he did not understand how a library book could be viewed as such an intrusion.[73]

Justice Blackmun further observed that while the right as defined by the plurality may well impose an affirmative duty upon the state to provide students with information or ideas, his definition required no such obligation.[74] He also expressed doubt that there was a "theoretical distinction between removal of a book and failure to acquire a book," but found the distinction useful in that book removal was more likely to evidence improper motivation.[75] Thus, Justice Blackmun agreed with the plurality that the Board should be required to demonstrate a proper motivation for its removal decision[76] and accepted the standard set forth to guide the proceedings on remand.[77]

Justice White also concurred in the judgment,[78] but expressed agreement with the plurality only to the extent that it affirmed the Second Circuit's determination that summary judgment was an inappropriate resolution of the issue.[79] He declined to evaluate and decide any constitutional issues raised by the case.[80] In addition, he adopted none of the plurality's first amendment analysis and opted merely to remand the case to the district court for reconsideration and amplification of the record.[81]

C. The Dissenting Opinions

Chief Justice Burger, joined by Justices Powell, Rehnquist, and

72. *Id.* at 878-79 (footnotes omitted).
73. *Id.* at 878 n.1.
74. *Id.* at 878.
75. *Id.* at 878-79 n.1.
76. *Id.* at 880.
77. *Id.* at 882.
78. *Id.* at 883 (White, J., concurring).
79. *Id.* "I am not inclined to disagree with the Court of Appeals on such a fact-bound issue and hence concur in the judgment of affirmance." *Id.*
80. "The Court seems compelled to go further and issue a dissertation on the extent to which the First Amendment limits the discretion of the school board to remove books from the school library. I see no necessity for doing so at this point." *Id.* Chief Justice Burger evidenced a similar view: " 'the most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible.' " *Id.* at 886 n.2 (Burger, C.J., dissenting) (quoting United States v. Lovett, 328 U.S. 303, 320 (1946) (Frankfurter, J., concurring)).
81. 457 U.S. at 883-84 (White, J., concurring).

O'Connor, dissented, arguing that the plurality opinion "demeans [the Court's] function of constitutional adjudication."[82] The opinion, in his view, improperly subjected the decisions of school authorities "concerning what books are to be in the school library . . . to federal-court review."[83] He stated that were this notion of judicial intervention recognized as law, "this Court would come perilously close to becoming a 'super censor' of school board library decisions."[84]

The Chief Justice rejected the plurality's recognition of a student's right of access to particular library books. Citing *Rowan v. Post Office Department*,[85] he asserted that a sender's rights are not absolute. He pointed out that the Court has never indicated that the government has an obligation to aid a speaker or author in reaching an audience.[86] Chief Justice Burger further reasoned that because the books which the Board removed were available in public libraries and neighborhood book stores, the Board's book removal decision did not constitute a deprivation of constitutional dimensions.[87] Although the Chief Justice argued that judicial intervention was improper under the instant facts, he suggested the availability of other remedies, including the removal of Board members from office.[88]

Chief Justice Burger also criticized the plurality's distinction between book removal and acquisition, arguing that an accident of timing should not be the basis of a constitutional entitlement. He further noted that if, as the plurality stated, book removal could constitute im-

82. *Id.* at 893 (Burger, C.J., dissenting).

83. *Id.* at 885.

84. *Id.*

85. 397 U.S. 728 (1970). Chief Justice Burger's reliance on *Rowan* seems misplaced. There the Court upheld the constitutionality of a federal statute which provided a procedure through which a homeowner could prevent delivery of " 'matter which the addressee believe[d] to be erotically arousing or sexually provocative.' " *Id.* at 730 (quoting 39 U.S.C. § 4009(a) (Supp. IV 1964)). Although *Rowan* does restrict the sender's right to distribute material, its factual setting and emphasis on the autonomy of the individual distinguishes it from *Pico*.

Conversely, the constitutionality of 39 U.S.C. § 4009(g), which permits parent addressees to block the receipt of "offensive" material by their minor children but which was not addressed by the *Rowan* Court, was questioned by Justices Brennan and Douglas. 397 U.S. at 741 (Brennan, J., concurring). Thus, *Rowan* offers no precedential support for the proposition that a school board acting in place of the parent may restrict student access to materials deemed offensive.

86. 457 U.S. at 888 (Burger, C.J., dissenting). The Chief Justice asserted that "the 'right to receive information and ideas' . . . does not carry with it the concomitant right to have those ideas affirmatively provided at a particular place by the government." *Id.* (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969)).

87. *Id.* at 892 (Burger, C.J., dissenting).

88. *Id.* at 891.

proper suppression of ideas, "[s]imilarly, a decision to eliminate certain material from the curriculum . . . would carry an equal—probably greater—prospect of 'official suppression.' "[89]

Justice Powell expressed "genuine dismay" with the plurality's opinion,[90] which he described as a "debilitating encroachment upon the institutions of a free people."[91] He predicted that the use of the courts to resolve educational policy decisions would "corrode the school board's authority and effectiveness."[92] Justice Powell contended that "the decision as to the educational worth of a book is a highly subjective one. Judges rarely are as competent as school authorities to make this decision; nor are judges responsive to the parents and people of the school district."[93] He characterized a decision to remove school library books as an educational decision which should thus be made by the duly constituted board.[94]

Justice Rehnquist, joined by Chief Justice Burger and Justice Powell, found error in every aspect of the plurality opinion. Unlike Justice White,[95] Justice Rehnquist deemed it proper to consider the constitutional issues; he reasoned that once certiorari is granted a case must be decided on the merits.[96] He contended, however, that under the district court's summary judgment procedure the respondents' statement of facts should have established the limits of the Court's constitutional analysis.[97] Therefore he took exception to the plurality's reliance on other evidentiary material in an effort to create a more favorable version of the facts.[98] After reviewing the facts as framed by the respondents' motion in opposition to summary judgment, Justice Rehnquist concluded that the Board did not "run afoul of the First and Four-

89. *Id.* at 892-93.

90. *Id.* at 894 (Powell, J., dissenting). That Justice Powell once held the position of school board president in Richmond, Virginia may explain the tone of his dissent. Greenhouse, *High Court Limits Banning of Books*, N.Y. Times, June 26, 1982, at 10, col. 3.

91. 457 U.S. at 897 (Powell, J., dissenting).

92. *Id.* at 894.

93. *Id.* (footnote omitted).

94. *Id.* at 897.

95. *See supra* text accompanying notes 78-81.

96. 457 U.S. at 904-05 n.1 (Rehnquist, J., dissenting).

97. *Id.* at 905.

98. *Id.* at 905-06. Justice Rehnquist relied on rule 9(g) of the local rules of the United States District Court for the Eastern District of New York, which requires parties to submit a statement of material facts in support of or in opposition to a summary judgment motion. All uncontroverted facts would be deemed admitted. E.D.N.Y. Rule 9(g). Justice Rehnquist argued that because respondents had "essentially conceded" that some of the materials were obscene or offensive, the Court was precluded from finding otherwise. *Id.* at 906 & n.4. *See also supra* text accompanying notes 67-69.

teenth Amendments."[99] He sought to resolve the constitutional question by distinguishing the roles of state government as *educator* and as *sovereign*.[100] When the government acts as educator, he reasoned, it "is engaged in inculcating social values and knowledge in relatively impressionable young people."[101] Therefore, "actions by the government as *educator* do not raise the same First Amendment concerns as actions by the government as *sovereign*."[102]

Justice Rehnquist further argued that there was no supporting precedent for the right to receive information and ideas within the educational environment. He criticized the plurality's reliance on past decisions which recognized this right within other limited settings.[103] Although Justice Rehnquist acknowledged that the right to receive ideas is the reciprocal to the right of free speech,[104] he contended that "the denial of access to ideas inhibits one's own acquisition of knowledge only when that denial is relatively complete."[105] This was not the case here, he explained, where "the removed books are readily available to students and nonstudents alike at the corner bookstore or the public library."[106]

Justice Rehnquist also characterized the plurality opinion as analytically unsound and internally inconsistent.[107] He noted that by confining the right to receive ideas to a library setting, the plurality "provid[ed] no protection against a school board's decision not to acquire a particular book, even though that decision denies access to ideas as fully as does removal of the book from the library."[108] Furthermore, because the plurality narrowly framed the issue in terms of the authority of school officials to *remove* a book, the failure to *acquire* a library book, while causing the same infringement, would remain constitutionally unguarded.[109] Finally, he questioned the validity of

99. 457 U.S. at 908.
100. *Id.* at 909.
101. *Id.*
102. *Id.* at 910 (emphasis added).
103. *Id.* at 911. Justice Rehnquist acknowledged that "the Court has recognized a limited version of that right in other settings," but noted that "not one of these cases concerned or even purported to discuss elementary or secondary educational institutions." *Id.* at 911. Justice Rehnquist took particular issue with the plurality's recognition of a school child's right to receive ideas, observing that *Tinker* concerned only the rights of students to "freedom of speech and expression, not the right of access to particular ideas." *Id.*
104. *Id.* at 912.
105. *Id.* at 913.
106. *Id.*
107. *Id.* at 915.
108. *Id.* at 910.
109. *Id.* at 916.

the plurality's motive requirement which holds that it is only when school officials *intend* to deny student access to ideas that their actions may be found unconstitutional.[110] Rather, he reasoned that a book removal decision can deny a student access to certain ideas regardless of the motive underlying the decision.[111]

IV. JUDICIAL CHALLENGES TO SCHOOL OFFICIALS' ACTIONS: SCOPE OF REVIEW

A. Historical Background

Board of Education, Island Trees Union Free School District No. 26 v. Pico[112] represents a pronounced change in the Supreme Court's attitude toward the traditional standard of deference afforded educators. The reluctance of courts to intervene in the daily operations of school systems has stemmed, in part, from the broad discretion vested in local boards to formulate educational policy.[113] Judicial review of educational decisions was historically rare,[114] and exceptions were mostly confined to attacks on the curriculum based upon alleged violations of the first amendment's freedom of religion and establishment clauses.[115]

The fact that education was traditionally viewed as a parental obligation supported the view that educational decisions were more properly made by local governing bodies.[116] The indoctrinative function of

110. *Id.* at 917.

111. *Id.*

112. 457 U.S. 853.

113. The large majority of state legislatures has delegated extensive educational decision-making authority to local school boards. *See e.g.*, ARIZ. REV. STAT. ANN. §§ 15-341 — 15-343 (Supp. 1983); CAL. EDUC. CODE §§ 1000-1082 (West 1978 & Supp. 1984); FLA. STAT. §§ 230.03, 230.23 (West 1977 & Supp. 1982); ILL. REV. STAT. ch. 122 §§ 10-22.1 — 10-22.34 (Smith-Hurd 1961 & Supp. 1983-84); MASS. GEN. LAWS ANN. ch. 71, §§ 37-37K (West 1982 & Supp. 1984); MICH. COMP. LAWS ANN. §§ 340.561-.641 (West 1976); N.Y. EDUC. LAW § 1709 (McKinney 1972).

114. *See* Bishop v. Inhabitants of Rowley, 165 Mass. 460, 462, 43 N.E. 191, 191 (1896) (good faith acts by school officials cannot be judicially revised); Watson v. Cambridge, 157 Mass. 561, 563, 32 N.E. 864, 864-65 (1893) (school board decisions which involve internal educational affairs will not be adjudicated).

115. *See generally* Epperson v. Arkansas, 393 U.S. 97 (1968) ("the State may not adopt programs or practices in its public schools or colleges which 'aid or oppose' any religion"); Engel v. Vitale, 370 U.S. 421 (1962) (state law requiring forcible recitation of official prayer in public schools inconsistent with establishment clause); Nahmod, *First Amendment Protection for Learning and Teaching: The Scope of Judicial Review*, 18 WAYNE L. REV. 1479 (1972).

116. One doctrine, termed *in loco parentis* ("in place of the parent") and often cited in support of judicial deference to school board decisions, provides for the school official to step into the parents' shoes while the child is in school. The rationale behind the doctrine is historically based. Parents, by voluntarily sending their children to school, were thought to

public schools further justified the local school board's decision-making authority.[117] Parents believed that the principal role of public schools was to establish and apply the curriculum in such a way as to transmit community values.[118] The library, in particular, was viewed as an appropriate forum in which local authorities could reinforce community ideologies, attitudes, or standards.[119] Additionally, courts were reluctant to intervene in school controversies because the school board's expertise in educational matters was viewed as superior to that of the judiciary.[120]

B. Modern Developments

Although the Constitution indirectly reserves power over education to the states, the same document restrains censorship, particularly through application of the first and fourteenth amendments. Moreover, this constitutional restriction applies to the schools: "[I]t is beyond dispute that . . . school boards must operate within the confines of the First Amendment."[121] As one commentator noted, "[a]ssuring good education is not a function of the courts. Assuring that public school education operates within constitutional bounds is a function of

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have delegated disciplinary authority over their children to the school official. Following the institution of compulsory education, however, the doctrine was severely weakened. Presently, court decisions, state statutes, and school district policies have eliminated or severely limited its application. *See* Comment, *Not on* Our *Shelves: A First Amendment Analysis of Library Censorship in the Public Schools*, 61 NEB. L. REV. 98, 100 (1982); Comment, *What Will We Tell the Children? A Discussion of Current Judicial Opinion on the Scope of Ideas Acceptable for Presentation in Primary and Secondary Education*, 56 TUL. L. REV. 960, 962-64 (1982); Comment, *School Library Censorship: First Amendment Guarantees and the Student's Right to Know*, 57 U. DET. J. URB. L. 523, 524-26 (1980); Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. PA. L. REV. 373, 377-84 (1969).

117. James v. Board of Educ., 461 F.2d 566, 573 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972); Zykan v. Warsaw Community School Corp., 631 F.2d 1300, 1305 (7th Cir. 1980).

118. *See* Project, *supra* note 3, at 1375-80.

119. *See*, *e.g.*, Project, *supra* note 3, at 1486-89; O'Neil, *Libraries, Librarians and First Amendment Freedoms*, 4 HUM. RTS. 295 (1975).

120. Nevertheless, although local boards are characteristically composed of civically responsible citizens, such persons often have no particular training in educational administration. Most state laws require only limited qualifications for membership on the board of education such as age, local residence, citizenship, and literacy. Stallings, *supra* note 3, at 286. Thus, it could be argued that deference has often been afforded members of school boards who may be no more competent than the judiciary to make educational policy. Certainly, when first amendment rights are implicated, a judge would be expected to be the more sensitive, and thus the more appropriate arbiter of constitutional standards. *See* Project, *supra* note 3, at 1486; *Developments in the Law: Academic Freedom*, 81 HARV. L. REV. 1048, 1050 (1968).

121. *Pico*, 457 U.S. at 876 (Blackmun, J., concurring).

the courts."[122]

Recognition of the first amendment rights of students has resulted in a departure from the prior policy of judicial deference afforded school officials.[123] The Supreme Court's landmark decision, *Tinker v. Des Moines Independent Community School District*,[124] signaled an awareness of the need for a heightened standard of review when local educational decisions implicate first amendment values. The *Tinker* Court addressed the right of high school students to wear black arm bands in protest of the Vietnam War.[125] The Court held that students retain some constitutional rights which the state may not suppress without inviting judicial intervention[126] and stated that unless such expression substantially interferes with school activities, it cannot be prohibited by school authorities.[127] The majority thus recognized that judicial intervention is imperative even where first amendment intrusion is relatively minor.[128]

Nonetheless, the authority of a school board to interpret its own rules or guidelines is usually unquestioned.[129] When a complaint pertains solely to matters within the administrative expertise of the educational officials involved, it is not even considered judicially cognizable.[130] Consequently, the Supreme Court has repeatedly held it improper for the federal judiciary to overrule the decisions of school administrators solely on the basis that such actions are unwise or incompassionate.[131] The federal circuit courts have also cautioned against overturning board decisions unless a specific constitutional

122. Reutter, *Censorship in Public Schools*, in CURRENT LEGAL ISSUES IN EDUCATION 1, 9 (M. McGhehey ed. 1977).

123. *See generally* Minarcini v. Strongsville City School Dist., 541 F.2d 577 (6th Cir. 1976); Right to Read Defense Comm. v. School Comm., 454 F. Supp. 703 (D. Mass. 1978). One explanation offered for the increasing adjudication of school controversies, *see supra* note 8, is the change in educational theory and practice. Current studies indicate that instead of focusing on order and indoctrination, schools are advocating a more progressive approach which stresses greater student inquiry and exposure to a variety of ideas. *See* Nahmod, *supra* note 115, at 1480-81.

124. 393 U.S. 503 (1969).

125. *Id.* at 504.

126. *Id.* at 511.

127. *Id.* at 514.

128. *See id.* at 513-14.

129. *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925); Meyer v. Nebraska, 262 U.S. 390, 402 (1923); Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269, 1273 (D.N.H. 1979).

130. Muka v. Cornell, 48 A.D.2d 944, 946, 368 N.Y.S.2d 874, 877 (N.Y. App. Div. 1975).

131. *See, e.g.*, Wood v. Strickland, 420 U.S. 308, 326 (1975) (inappropriate to set aside administrative decision to remove books even though decision viewed as lacking basis in wisdom and compassion).

right is violated.[132]

When constitutional issues are involved, however, the "customary deference to an agency's interpretation of its own regulations is inappropriate,"[133] and courts will strictly scrutinize the decision of school administrators. Thus, by recognizing a student's first amendment right to receive information, the *Pico* Court heightened the standard of review applied to school board book removal action. Specifically, when first amendment values are implicated, local officials must demonstrate that such action was compelled by some substantial and legitimate government interest.[134]

V. SOURCE OF CONSTITUTIONAL ENTITLEMENT: THE RIGHT TO RECEIVE IDEAS

In *Board of Education, Island Trees Union Free School District No. 26 v. Pico*,[135] student litigants argued that the first amendment barred the removal of books from district libraries. A careful reading of the fragmented ruling in *Pico* indicates that the first amendment may be invoked to bar the censorship of library materials under limited circumstances.

A. Recognition of the Right

Although it was well established in *Tinker v. Des Moines Independent Community School District*[136] that students do not "shed their constitutional rights to freedom of speech . . . at the schoolhouse gate,"[137] prior to *Pico*, the constitutional contours of the student's right to receive information and ideas remained rudimentary.[138] No Supreme

132. *See, e.g.*, East Hartford Educ. Ass'n v. Board of Educ., 562 F.2d 838, 857 (2d Cir. 1977) (en banc); Presidents Council, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 289, 291 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972).

133. Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269, 1273 (D.N.H. 1979).

134. Cary v. Board of Educ., 598 F.2d 535, 543 (10th Cir. 1979). "Censorship or suppression of expression of opinion . . . should be tolerated only where there is a legitimate interest of the state which can be said to require priority." *Id. See generally* Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269, 1275 (D.N.H. 1979); Right to Read Defense Comm. v. School Comm., 454 F. Supp. 703, 713 (D. Mass. 1978).

135. 457 U.S. 853 (1982).

136. 393 U.S. 503 (1969).

137. *Id.* at 506.

138. Prior to the instant case, at least five federal courts had considered first amendment challenges to the removal of books from school libraries. Three courts found such action to be unconstitutional, therefore recognizing a student's right to receive ideas. *See* Minarcini v. Strongsville City School Dist., 541 F.2d 577 (6th Cir. 1976); Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269 (D.N.H. 1979); Right to Read Defense Comm. v. School Comm., 454 F. Supp. 703 (D. Mass. 1978). Conversely, the Second Circuit held that such removal did not

Court decision had recognized the right of public school students to receive educational information. The Court had, however, acknowledged the existence of the right to receive ideas in other contexts.

The first clear reference to this right appeared in *Lamont v. Postmaster General*.[139] The *Lamont* Court held unconstitutional a statute that required the postal service to detain delivery of material advocating communism on the ground that it infringed the first amendment rights of addressees.[140] The Court's focus, therefore, was on the addressees' right to receive such publications. Although the majority opinion did not fully explore the nature of the underlying constitutional interest, Justice Brennan's concurrence set forth the constitutional parameters of the right to receive ideas:

> 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. . . . I think the right to receive publications is such a fundamental right.[141]

Four years after *Lamont*, the Court held in *Stanley v. Georgia*[142] that the Constitution protects the right to receive information and ideas regardless of their social worth.[143] Subsequently, in *Kleindienst v. Mandel*,[144] the issue raised was whether the first amendment grants a domestic audience the right to invite foreign speakers to the United States. While basing its decision on other grounds, the *Mandel* Court acknowledged that freedom of speech necessarily protects the citizens' right to receive information and ideas.[145]

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violate the first amendment. *See* Presidents Council, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 289, 291 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972). *See supra* note 32. In a recent Seventh Circuit case, that court found no constitutional violation resulting from library book removal, but nevertheless recognized that secondary students do retain a "freedom to hear" interest. *See* Zykan v. Warsaw Community School Corp., 631 F.2d 1300, 1304 (7th Cir. 1980).

139. 381 U.S. 301 (1965).

140. *Id.* at 305.

141. *Id.* at 308 (Brennan, J., concurring).

142. 394 U.S. 557 (1969).

143. *Id.* at 564.

144. 408 U.S. 753 (1972).

145. *Id.* at 762-65. While a majority of the *Mandel* Court acknowledged a U.S. citizen's first amendment right to hear an alien speak and the dissenters strengthened the constitutional basis for a right to receive information, *Mandel* does not directly support recognition of the right addressed in *Pico* because of the distinction between written and oral communication. One commentator has suggested that because written words can be preserved, inter-

Not until 1975 did a majority of the Court recognize the existence of the right to receive information. In *Procunier v. Martinez*,[146] the Court held that an individual has the right to receive uncensored mail from a prisoner.[147] Justice Marshall noted in his concurrence that were the Court to sustain a policy which serves to withhold information from the public it would be "at odds with the most basic tenets of the guarantee of freedom of speech."[148] Nonetheless, the recipient's right to assert a cause of action based on a violation of this right was doubtful prior to *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc.*[149]

In *Virginia State Board of Pharmacy*, potential consumers challenged on first amendment grounds a statute that imposed fines on pharmacists who advertised prescription drug prices.[150] One of the issues the Court addressed was whether the potential recipients of drug price information had standing to assert a constitutional violation. Significantly, the Court relied on *Lamont* and its progeny in holding that the first amendment affords protection not only to the communication or its source, but to recipients as well.[151]

B. Expansion of the Right

Virginia State Board of Pharmacy provided student litigants with a useful analogy. Arguably, the information contained within a library text should likewise be afforded first amendment protection which could be properly asserted by the potential student recipients of the book's contents. At least two federal courts adopted this reasoning, and extended first amendment protection to secondary students affected by library book censorship.

The Sixth Circuit, in *Minarcini v. Strongsville City School District*,[152] considered whether the school board's removal of two library books impinged on the students' right to receive information. Relying

ference with their receipt is less onerous than denial of a speaker's access to an audience. Arguably then, "there may be a more compelling constitutional case for the claim of an audience to hear a speaker than for a reader to receive printed material." O'Neil, *Libraries, Liberties and the First Amendment*, 42 U. CIN. L. REV. 209, 228 (1973).

146. 416 U.S. 396 (1974).

147. *Id.* at 408. "Whatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech." *Id.*

148. *Id.* at 427 (Marshall, J., concurring).

149. 425 U.S. 748 (1976).

150. *Id.* at 749-50.

151. *Id.* at 756.

152. 541 F.2d 577, 583 (6th Cir. 1976).

principally on *Virginia State Board of Pharmacy*, the court held that the first amendment right to receive information was applicable within the school setting and that students had standing to assert this right.[153] More recently, in *Salvail v. Nashua Board of Education*,[154] a New Hampshire district court rejected Second Circuit precedent,[155] reasoning that the Court's analysis in *Virginia State Board of Pharmacy* was controlling.[156]

It was well established in *Tinker*, however, that a student's first amendment rights are limited to some extent by the special nature of a school environment.[157] Therefore, although *Virginia State Board of Pharmacy* may have supplied student litigants with standing to challenge school library book removal decisions, it left unresolved the extent to which the judiciary should intervene in public school affairs.

C. Pico*'s Application of the Right*

While the basis for a constitutional right to receive information seems logically compelling, it is not squarely embedded in constitutional law. In his attempt to acknowledge this "student right to receive," Justice Brennan combined the principles set out in *Tinker* with those cases which recognized the right to receive in other contexts.[158] Admittedly, although *Tinker* concerned freedom of speech and expression the Court did not directly address the students' constitutional right to receive ideas in that case.[159] Rather, the *Tinker* Court considered whether high school students have the right to exercise symbolic speech within school grounds. *Tinker* addressed the active right to deliver speech while *Pico* involved the passive right to receive it.[160] *Tinker*, therefore, when read narrowly, does not support the extension to students of the first amendment right to receive ideas.[161]

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153. *Id.* at 583.

154. 469 F. Supp. 1269 (D.N.H. 1979).

155. Presidents Council, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972). The *Salvail* court noted that because *Presidents Council* was decided prior to the Court's decision in *Virginia State Bd. of Pharmacy*, its precedential value is severely limited. 469 F. Supp. at 1273-74.

156. 469 F. Supp. at 1273-74.

157. 393 U.S. at 506.

158. *See supra* text accompanying notes 139-48.

159. *Pico*, 457 U.S. at 910-11 (Rehnquist, J., dissenting); *id.* at 886-87 (Burger, C.J., dissenting).

160. *See supra* note 145.

161. For an exhaustive review of *Tinker* and its ramifications see Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477 (1981).

The plurality's reliance on the right to receive case law is also open to criticism. As Chief Justice Burger noted, the mere fact that a writer has something to say does not require that school officials carry that message to students.[162] Practically speaking, this right, as Justice Brennan defines it, does appear to impose an affirmative duty upon school officials to shelve any requested book unless they can show a compelling reason why they should not do so. Although the line of cases beginning with *Lamont* may provide the Court with useful analogies for a students' right to receive information, as the Chief Justice argued their precedential value may be limited in this context. One commentator explains that "[w]hat the *Lamont* Court recognized was not an absolute right of access, but rather a right not to have access conditioned upon a politically hazardous disclosure."[163] In other words, no *affirmative* right to receive personal mail is vested in the addressee. Rather, the *Lamont* Court held that Congress could not *condition* or impose unreasonable *restraints* on the receipt of suspect mail.

Justice Rehnquist also took issue with the plurality's reliance on the right to receive case law. He argued that none of these decisions directly controlled the instant case because they concerned a complete denial of access to the ideas sought.[164] The Chief Justice's suggestion that students may gain access to books banned from school libraries in book stores or public libraries is, however, unpersuasive.[165] The *Mandel* Court labeled as loathsome the notion that the existence of other alternatives extinguishes altogether any constitutional interest.[166]

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162. 457 U.S. at 887 (Burger, C.J., dissenting).

163. *See* O'Neil, *supra* note 145, at 219.

164. 457 U.S. at 912-13 (Rehnquist, J., dissenting). *See supra* text accompanying notes 136-48.

165. *See infra* note 168. Chief Justice Burger further suggested that when "parents disagree with the educational decisions of the school board, they can take steps to remove the board members from office." 457 U.S. at 891 (Burger, C.J. dissenting). The ineffectiveness of such a solution, however, is readily apparent. Protection of students' first amendment rights would be virtually nonexistent were courts to defer this controversy to the electoral process. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1942). For example, if a school board eliminated books that supported a view held by the minority of the community, in order to remove the school board members responsible for this action the minority group affected would bear the heavy, and possibly impossible, burden of convincing a majority of the voters to support their removal effort. Comment, *What Johnny Can't Read: School Boards and the First Amendment*, 42 UNIV. PITT. L. REV. 653, 665 (1981). In addition, the complexity of recall laws may frustrate the removal challenge. Often special requirement provisions are included in a recall statute which add to the difficulty of this electorate remedy. *See* 1981 YEARBOOK OF SCHOOL LAW 26.

166. 408 U.S. 753, 765 (1972). Although the *Mandel* Court did not need to balance first amendment rights against governmental regulatory interests, it recognized that alternative means of access to information may be relevant when such balancing is necessary. *Id.*

Moreover, Justice Rehnquist's argument that alternative access to information justifies its restriction[167] was rejected by the Court in *Virginia State Board of Pharmacy*. There the Court emphasized that it was "aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by [the] message by some other means."[168]

Criticism of the plurality's reliance on *Tinker* is also weakened by a close reading of that case. Although the factual setting of *Tinker* is distinguishable from that of *Pico*, *Tinker* does contain authority for the plurality's ruling that " 'the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.' "[169] *Tinker* recognized that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to . . . students."[170] The *Pico* Court's use of this expansive language, coupled with the right to receive case law, enabled it to extend first amendment protection to the interests of students in school library materials.

Nevertheless, a more efficient and constitutionally sound way to adopt the spirit of *Tinker* may be found in Justice Blackmun's approach. Instead of focusing on a duty to provide information, as did Justice Brennan, Justice Blackmun reasoned that the educator should be prevented from restraining certain ideas simply because school officials find them politically distasteful.[171] As did the *Lamont* Court, Justice Blackmun stressed that the government may not impose

167. 425 U.S. at 782-83 (Rehnquist, J., dissenting).

168. *Id.* at 757 n.15. *See also* Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981). In *Schad*, a case that successfully challenged on first amendment grounds the use of the state's zoning power to prohibit adult entertainment, Justice Stevens and Chief Justice Burger, who was joined by Justice Rehnquist, argued that as long as there was reasonable access to the form of entertainment outside the community, total exclusion was permissible. *Id.* at 80 (Stevens, J., concurring); *id.* at 87 (Burger, C.J., dissenting).

This "alternative access" solution leaves unanswered several troubling questions. How can a school board ensure that reasonable access to the banned books outside its jurisdiction will remain? What happens if the community in which the books are located decides to exclude them? What provision is to be made for students in rural areas with transportation problems who have no access to the public library or bookstore in the nearest town? Will a school library book removal action be invalidated under such circumstances?

169. 457 U.S. at 866 (quoting Griswold v. Connecticut, 381 U.S. 479, 482 (1965)). Justice Blackmun similarly noted in his concurrence that even though the state possesses a significant amount of power to inculcate certain values " 'state-operated schools may not be enclaves of totalitarianism. . . . In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.' " 457 U.S. at 877 (Blackmun, J., concurring) (quoting *Tinker*, 393 U.S. at 511).

170. 393 U.S. at 506.

171. 457 U.S. at 879, 882 (Blackmun, J., concurring).

unreasonable restraints or conditions upon the receipt of information, in this case within the school environment.[172] By characterizing the right in the negative, (what the government cannot do) Justice Blackmun's approach avoids imposition of an affirmative obligation on school officials to provide information.[173]

Moreover, under Justice Blackmun's characterization of the right to receive, the school official would have more latitude and discretion to choose one library book over another without fear of violating the Constitution.[174] Additionally, Justice Blackmun's opinion is internally consistent. First amendment protection, as he defines it, would be available regardless of the setting in which it is invoked. The right to be free from politically motivated censorship would not be somehow peculiar to the school library or limited to book removal.[175]

Still, neither Justices Brennan nor Blackmun provides adequate guidance as to what constitutes a violation of the student's right to receive. Instead, both Justices focused upon a school board's intent and motivation in order to test the constitutionality of a book removal decision.

D. The Test for Determining Constitutional Violations

The *Pico* Court explained that a determination of whether the first amendment rights of Island Trees students had been violated by the Board's book removal action depended on the motivation behind the Board's action.[176] Although Justice Brennan was criticized for framing this newly recognized constitutional right in terms "too diaphanous to assist careful decision,"[177] he was more explicit in distinguishing between a proper and improper motive for book removal.

The *Pico* Court delineated a two-prong test: "If [the Board] *in-*

172. *Id.* at 878-80.

173. *See supra* text accompanying note 74.

174. Justice Blackmun recognized that the authority of school officials to select the contents of school libraries should not be contravened. Examples of school board decisions cited by Justice Blackmun which would not implicate first amendment values included: (1) choosing one book over another because it is deemed more relevant to the curriculum or better written; (2) deciding not to shelve a book because it contains offensive language; (3) restricting a book because it is found to be "psychologically or intellectually inappropriate for the age group;" or (4) because it is found to contain ideas which are "manifestly inimical to the public welfare;" and (5) choosing one book over another because its subject is more deserving of emphasis according to the school official. 457 U.S. at 880.

175. *Id.* at 878.

176. *Id.* at 871.

177. *Id.* at 919 (Rehnquist, J., dissenting); *accord id.* at 890 (Burger, C.J., dissenting); *id.* at 894-95 (Powell, J., dissenting).

tended by [its] removal decision to deny [students] access to ideas with which [the Board] disagreed, and if this *intent* was the decisive factor in [the Board's] decision, then [the Board] has exercised [its] discretion in violation of the Constitution."[178] It is not, as Justice Rehnquist implied in his dissent,[179] unusual or nonproductive for the Court to inquire about a school board's intent when its actions are challenged. The Supreme Court recently acknowledged that the motives underlying a school official's actions may determine the necessity of judicial intervention.[180] The difficulty, however, lies in establishing the existence of a school board's specific unconstitutional motive. Most board actions concerning a book removal decision typically occur behind closed doors and thus provide little evidence from which a court may determine actual motive.[181]

Although not infallible, the *Arlington* test applied by the Second Circuit in *Pico*[182] enabled that court to look beyond the criteria for book removal articulated by the Board and discover procedural and other irregularities which warranted an inference that the welfare and education of students were not the motivating factors behind the school board's book removal decision.[183]

E. Evidence Indicating Unconstitutional Motivation

Unlike the circuit court opinion, the Supreme Court opinion did not enumerate the steps a court should take to identify improper motive. Nonetheless, although it did not expressly refer to the *Arlington* test, the *Pico* plurality did apply the *Arlington* analysis within its discussion of the propriety of the trial court's grant of summary judgment.[184]

An examination of the evidentiary material presented to the dis-

178. *Id.* at 871 (emphasis added). The Second Circuit ruled that a school board's limitation on a student's constitutional rights would be justified if the restriction were made to protect the interest of discipline or sound education from material and substantial jeopardy. *Pico*, 638 F.2d at 415 (citing James v. Board of Educ., 461 F.2d 566, 571 (1972)).

179. 457 U.S. at 917 (Rehnquist, J., dissenting).

180. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285-87 (1977) (Rehnquist, J.). *But see* Rogers v. Lodge, 458 U.S. 636-37 (1982) (Stevens, J., dissenting) (Justice Stevens, while joining the *Pico* plurality, has expressed dissatisfaction with the application of intent tests in constitutional adjudication). *See also The Supreme Court, 1981 Term*, 96 HARV. L. REV. 62, 107 n.12 & 159 n.52 (1981).

181. *Pico* serves as a case in point. The Island Trees School Board announced its directive to remove the nine library books in a closed board meeting. 638 F.2d at 409.

182. *See supra* text accompanying notes 42-48.

183. 638 F.2d at 417-18.

184. 457 U.S. at 871-75.

trict court led the plurality to conclude that the Island Trees school officials' book removal decision was partially the result of an affront to their personal values, morals, and tastes (constitutionally permissible motives) and their belief that certain book passages were anti-American (a constitutionally questionable motive).[185] A review of the procedures employed by the Board, however, raised suspicions regarding these motives.[186] Among the factors on which the Court relied were the Board's unexplained rejection of the book committee's recommendations; absence of support for the Board's obscenity rationale in the case of at least one of the books (*A Reader for Writers*, edited by Jerome Archer); and the Board's refusal to follow established procedures for review of controversial materials.[187] The Court concluded that "[t]he evidence plainly [did] not foreclose the possibility that petitioners' decision to remove the books rested decisively upon disagreement with constitutionally protected ideas in those books, or upon a desire on petitioners' part to impose upon the students of the Island Trees High School and Junior High School a political orthodoxy to which petitioners and their constituents adhered."[188] After an in depth review of all the claims, affidavits, and other evidentiary materials, the Court held that the evidence created a genuine issue of material fact concerning the credibility of petitioners' justifications for their decisions.[189]

In criticizing the plurality's independent review of the record, Justice Rehnquist overlooked the possibility that a factual determination may be crucial to the outcome of a case.[190] Moreover, the particular circumstances and facts relevant to a specific case often deprive precedent of its reliability.[191] Indeed, it has been suggested that a federal court's review of basic and ultimate facts should be as comprehensive as necessary to protect an asserted first amendment right.[192]

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185. *Id.* at 872.

186. *See supra* note 42 and accompanying text.

187. 457 U.S. at 872-74. Justice Brennan noted that "[t]his would be a very different case if the record demonstrated that petitioners had employed established, regular, and facially unbiased procedures for the review of controversial materials." *Id.* at 874.

188. *Id.* at 875.

189. *Id.*

190. He argued that respondents were not entitled to any more favorable version of the facts than those they had submitted in their motion opposing summary judgment and that such facts indicated that removal was instituted for proper reasons. *Id.* at 905-08 (Rehnquist, J., dissenting). *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943); *Pico*, 638 F.2d at 413. *See supra* note 98.

191. *See* Nahmod, *supra* note 115, at 1486.

192. *Id.* at 1486-87.

VI. *Pico*'s Limited Impact

Although the Court's ruling in *Pico* has been hailed as an important constitutional victory by book publishers and civil liberty lawyers, the decision is likely to impact less sharply on a school board's discretionary powers than was originally anticipated. A number of observations lead to this conclusion.

First, as Justice Brennan explicitly emphasized, the nature of the decision is limited.[193] The holding only affects challenges to the *removal* of books from the school library. It affects neither the acquisition[194] nor the purchase or retention of curricular materials for use in the classroom.[195] Secondly, the Court noted that an unconstitutional motivation would not be demonstrated when library books were removed because they were pervasively vulgar or educationally unsuitable.[196] In effect, *Pico* permits school officials to suppress ideas and information when their decisions rest on proper motivations.

Furthermore, the plurality conceded that this would have been a very different case had the record demonstrated that the school board employed an established, regular, and facially unbiased policy for the review of controversial materials.[197] It may be that educators have only to employ routine neutral book removal procedures to avoid judicial intervention. Ironically, if such procedural devices are employed to mask improper motives, the *Pico* decision may serve as a blueprint for successful censorship.

Finally, because the right to receive section of Justice Brennan's opinion was joined only by Justices Marshall and Stevens, a majority of the Court has yet to recognize and clearly identify this right as constitutionally guaranteed. Notably, Justice White, while concurring in the judgment, expressed no opinion on the possibility that the school board's actions might have amounted to a constitutional violation.[198] Thus, although a plurality of the Court recognized that the first amendment affords some kind of protection against school library censorship, were the Court to review a future decision on the merits a majority might well hold otherwise.

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193. *See* 457 U.S. at 861-63.
194. *Id.* at 862.
195. *Id.*
196. *Id.* at 871.
197. *Id.* at 874.
198. *Id.* at 883-84 (White, J., concurring).

VII. CONCLUSION

In *Tinker*, the Court reaffirmed the principle that a state cannot "so conduct its schools as to 'foster a homogeneous people.' "[199] If meaning is to be given this principle, the courts have a responsibility to review the actions of educators to ensure that they do not violate the first amendment rights of students. Perhaps the *Pico* Court is to be faulted for granting certiorari in the absence of findings of fact and conclusions of law by the district court. The procedural posture of the case obviously constrained the Court in its attempt to delineate the first amendment limitations placed on school officials. In any case, the plurality's recognition of a constitutionally based right to information does not mean to suggest that simply because one student wishes to read a particular book, a court can compel school officials to place it in a school library. It is to say, however, that school authorities who unilaterally remove library books must now bear the burden of showing that their actions were properly motivated.

Ideally, however, the Court should have set out a standard to provide guidance to both educators and the judiciary in order to prevent future controversy and encourage educational decisions which comport with the Constitution. " 'The danger of [a] chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform . . . what is being proscribed.' "[200] Unfortunately, the plurality failed to define with sufficient clarity the constitutional contours of the right at issue in *Pico*. Thus, the fragmented nature of the decision leaves clarification of the precise contours of that right to another day.

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199. 393 U.S. at 511 (quoting Meyer v. Nebraska, 262 U.S. 390, 402 (1923)).

200. 638 F.2d at 416 (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603-04 (1967)).