Case Comment

Board of Education v. Pico: The Supreme Court's Answer to School Library Censorship

I. INTRODUCTION

Censorship of school library materials has been increasing in recent years.[1] Nearly one-fifth of the schools responding to a national survey[2] reported challenges to library materials between September 1978 and June 1980.[3] About one-third of these censorship attempts were blocked, but in one-half of the cases the material was altered or removed prior to formal review. In forty percent of these instances no reevaluation of the censorship decision ever took place.[4] Incidents like these limit the availability of information in school libraries.[5] Furthermore, the legitimacy of book banning is proving increasingly divisive in communities around the country.[6]

As censorship attempts have become more frequent, so have federal court challenges to the removal of library materials.[7] Generally in these actions, the defendant is the local school board, which argues its right to unfettered discretion in such matters. Plaintiffs are most often students, sometimes joined by parents, teachers, or librarians, who argue that when a book is banned they are denied their constitutional rights under the first amendment.[8] The law in this area is unsettled, and the opinions

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1. The American Library Association's Office of Intellectual Freedom considers it the "'most massive, vicious, and sophisticated' censorship since McCarthyism of the 1950's." Arons, *Book Burning in the Heartland*, SAT. REV., July 21, 1979, at 29. *See also* CENSORSHIP AND EDUCATION (E. Obler ed. 1981); Wellborn, *As the Drive to Ban Books Spreads in the U.S.*, U.S. NEWS & WORLD REP., Mar. 8, 1982, at 66.

2. The survey, entitled "Books and Material Selection for School Libraries and Classrooms: Procedures, Challenges and Responses," was jointly sponsored by the American Library Association and the Association of American Publishers. Twenty-five percent of a random sample of 7500 school principals, librarians, and superintendents responded. Kamhi, *Censorship vs. Selection—Choosing Books for Schools*, AM. EDUC. 11, 11 (Mar. 1982).

3. *Id.* at 11, 16.

4. *Id.* at 13.

5. "Survey responses leave little doubt that local challenges resulted in a net reduction in the materials, information, and ideas available to students. . . . [C]hallenges were often resolved by across-the-board actions limiting access for all students. And rarely was other material selected to replace withdrawn or restricted items." *Id.*

6. Wellborn, *supra* note 1, at 66.

7. Book banning from the school library was at issue in the following cases: Bicknell v. Vergennes Union High School Bd. of Directors, 638 F.2d 438 (2d Cir. 1980); Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980); 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).

8. *See, e.g.*, Right to Read Defense Comm. v. School Comm., 454 F. Supp. 703 (D. Mass. 1978).

of the lower courts conflict.[9] Recently, however, the United States Supreme Court heard an appeal in one such case, *Board of Education v. Pico*.[10]

The *Pico* case arose after the Island Trees School Board removed nine books[11] from the junior and senior high school libraries because the books were "vulgar and in bad taste."[12] The issue was whether the School Board's traditional discretion in local matters allowed it to remove the books without impermissibly abridging the first amendment rights of students.[13] The Court's deeply divided decision does not offer clear guidelines for resolving future controversies. However, since *Pico* is the Supreme Court's only pronouncement on this issue, the decision warrants analysis to reveal what, if any, guidance it offers.

After briefly discussing the constitutional background,[14] the lower court decisions,[15] and the seven Supreme Court opinions,[16] this Case Comment will examine the *Pico* decision to determine what precisely was decided.[17] The problem of the precedential weight to be given to Supreme Court plurality opinions will be examined[18] in order to evaluate the decision and assess its implications for the future.[19]

II. CONSTITUTIONAL BACKGROUND

To fully understand *Pico* it is necessary to review its constitutional background. None of the issues is fully developed in the *Pico* opinions, but all relate to the general resolution of the book banning controversy.

The traditional function of public education is to prepare the nation's children for enlightened, responsible citizenship.[20] To fulfill this responsibility public schools

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9. The complaints were dismissed in Bicknell v. Vergennes Union High School Bd. of Directors, 638 F.2d 438 (2d Cir. 1980); Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980); and Presidents Council, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972). However, in Minarcini v. Strongsville City School Dist., 541 F.2d 577 (6th Cir. 1976), and Sheck v. Baileyville School Comm., 530 F. Supp. 679 (D. Me. 1982), the courts found that defendants had violated plaintiffs' rights to receive ideas. The court in Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269 (D.N.H. 1979), held that the School Board had failed to show an interest sufficient to justify its infringement of plaintiffs' rights. *Id.* at 1275. In Right to Read Defense Comm. v. School Comm., 454 F. Supp. 703 (D. Mass. 1978), the court found that students had a right to have access to ideas and to read controversial materials. *Id.* at 714.

10. 457 U.S. 853 (1982).

11. The books were *Go Ask Alice; Best Short Stories by Negro Writers* (Langston Hughes, ed.); Alice Childress' *A Hero Ain't Nothing but a Sandwich*; Eldridge Cleaver's *Soul on Ice*; Bernard Malamud's *The Fixer*; Desmond Morris' *The Naked Ape; A Reader for Writers* (Jerome Archer, ed.); Piri Thomas' *Down These Mean Streets*; and Kurt Vonnegut's *Slaughter House Five*. Pico v. Board of Educ., 474 F. Supp. 387, 389 nn.2-4 (E.D.N.Y. 1979).

12. *Id.* at 396.

13. *Id.* at 389.

14. *See infra* text accompanying notes 20–33.

15. *See infra* text accompanying notes 34–66.

16. Justice Brennan wrote the plurality opinion in which Justices Marshall and Stevens concurred. *See infra* text accompanying notes 69–85. Justice Blackmun wrote a separate opinion in which he concurred in much, but not all, of the plurality opinion. *See infra* text accompaning notes 86–91. Justice White concurred only in the judgment. *See infra* text accompanying notes 92–93. Chief Justice Burger wrote a dissenting opinion, joined by Justices Powell, Rehnquist, and O'Connor. *See infra* text accompanying notes 94–104. Justices Powell and O'Connor each wrote separate dissenting opinions. *See infra* text accompanying notes 105–08 & 114–15. Justice Rehnquist also wrote a separate dissent, joined by Chief Justice Burger and Justice Powell. *See infra* text accompaning notes 109–13.

17. *See infra* text accompanying notes 129–56.

18. *See infra* text accompanying notes 116–28.

19. *See infra* text accompanying notes 157–212.

20. Education "is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship." Brown v. Board of Educ., 347 U.S. 483, 493 (1954). *See also* Ambach v. Norwick, 441 U.S. 68, 76 (1979); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

must inculcate "fundamental values."[21] Local control of education is important to assure preservation and transmission of the community's moral and cultural heritage;[22] therefore courts generally have accorded school authorities broad discretion.[23] Judicial restraint is tempered, however, by the need to protect fundamental constitutional rights. The traditional threshold test for judicial review has been whether the actions of school authorities "directly and sharply implicate basic constitutional values."[24]

Since the plaintiffs in book banning cases like *Pico* are typically junior and senior high school students, the extent to which children have rights under established constitutional doctrine is an additional consideration in evaluating the appropriateness of judicial review of school board actions.[25] *Tinker v. Des Moines Independent Community School District*[26] suggests that the Supreme Court is willing, at least in some contexts, to extend first amendment protections to the activities of minors. In *Tinker* the Court found that students have a constitutional right to express political ideas in school so long as no disruption results.[27]

> School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect. . . . In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.[28]

Despite this strong statement of student rights, *Tinker* was not determinative in *Pico* because the library book removals impinged upon the right of access to information rather than the right of speech or expression.

Emphasizing the rights of recipients of speech, the Supreme Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[29] restricted the

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21. Ambach v. Norwick, 441 U.S. 68, 77 (1979). "Today [education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." Brown v. Board of Educ., 347 U.S. 483, 493 (1954). *See also* Note, 55 TEX. L. REV. 511, 513 (1977).

22. Project, *Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373, 1380 (1976) [hereinafter cited as Project, *Education and the Law*]; Note, 55 TEX. L. REV. 511, 513 (1977).

23. "By and large, public education in our Nation is committed to the control of state and local authorities. Courts 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." Epperson v. Arkansas, 393 U.S. 97, 104 (1968). *See also* Niccolai, *The Right to Read and School Library Censorship*, 10 J.L. & EDUC. 23, 23 (1981); Project, *Education and the Law*, supra note 22, at 1375; Comment, *What Johnny Can't Read: School Boards and the First Amendment*, 42 U. PITT. L. REV. 653 (1981) [hereinafter cited as Comment, *What Johnny Can't Read*].

24. Epperson v. Arkansas, 393 U.S. 97, 104 (1968). *See also* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), where the Court stated that "[t]he Fourteenth Amendment . . . protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have . . . important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights." *Id.* at 637.

25. Because of their immaturity, the constitutional rights of children have sometimes been found more limited than those of adults. *See, e.g.*, Ginzberg v. New York, 390 U.S. 629 (1968) (constitutional to forbid selling materials to minors on obscenity grounds even though material not obscene for an adult); Prince v. Massachusetts, 321 U.S. 158 (1944) (constitutional to prohibit children from selling merchandise in public places). *See also* Tushnet, *Free Expression and the Young Adult: A Constitutional Framework*, 1976 U. ILL. L.F. 746, 747.

26. 393 U.S. 503 (1969) (unconstitutional for school authorities to forbid students to wear armbands protesting the Vietnam War at school).

27. *Id.* at 511, 513.

28. *Id.* at 511.

29. 425 U.S. 748 (1976). "Freedom of speech presupposes a willing speaker. But where a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both." *Id.* at 756 (footnote omitted).

authority of a governmental body to regulate speech by impeding the flow of commercial information to the public. Although it appeared to recognize a constitutional right to receive information, the *Virginia Pharmacy Board* decision involved the commercial setting and did not consider the school environment. Thus, the degree to which the decision stands for a doctrine that would recognize constitutional protection of students' right of access in the context of public education is unclear.

Because the concept of academic freedom includes the right to express and receive ideas,[30] it would seem highly germane to the dispute in *Pico*. Indeed, the Supreme Court has declared strong constitutional support for academic freedom:

> Our Nation is deeply committed to safeguarding academic freedom . . . . That freedom is . . . a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." . . . The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."[31]

Notwithstanding the Court's discussion of academic freedom in terms of the constitutional protection of speech, the concept is not grounded in any unified legal theory. Furthermore, academic freedom has traditionally applied only to universities[32] although some court decisions have extended it to secondary education.[33]

In *Pico* the Supreme Court attempted to reconcile these diverse interests, but because different Justices placed different values on the competing interests, the attempt did not succeed.

III. THE *PICO* DECISIONS

A. *Facts*

Three members of the Island Trees School Board attended a conference sponsored by the Parents of New York United, a group of conservative parents. At the conference these members received a list of "objectionable" books.[34] Two months later, two members searched the high school library catalog and discovered nine of the "objectionable" books in the school library collection.[35] They found one more of

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30. For a discussion of academic freedom, see *Developments in the Law: Academic Freedom*, 81 HARV. L. REV. 1045 (1968).

31. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960); and United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

32. Niccolai, *supra* note 23, at 26; Project, *Education and the Law, supra* note 22, at 1440.

33. *See* Epperson v. Arkansas, 393 U.S. 97, 105 (1968) (quoting with approval Keyishian v. Board of Regents, 385 U.S. 589 (1967)); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion"); James v. Board of Educ., 461 F.2d 566, 573 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972); Project, *Education and the Law, supra* note 22, at 1440.

34. Pico v. Board of Educ., 474 F. Supp. 387, 389 (E.D.N.Y. 1979). The heading on the list read: "DO NOT LET THIS MATERIAL FALL INTO THE HANDS OF OUR YOUNGSTERS." *Censoring the School Library: Do Students Have the Right to Read?*, 10 CONN. L. REV. 747, 748 n.5 (1978). The list included the titles of the books and, for most of them, a series of out-of-context quotations. In a few cases, only a critical remark accompanied the title. Pico v. Board of Educ., 638 F.2d 404, 407-08 (2d Cir. 1980).

35. Pico v. Board of Educ., 474 F. Supp. 387, 389 (E.D.N.Y. 1979). The books were *Go Ask Alice; Best Short Stories by Negro Writers* (Langston Hughes ed.); Alice Childress' *A Hero Ain't Nothing but a Sandwich*; Eldridge

the books in the junior high school library[36] and eventually discovered that another book from the list had been approved by the School Board for inclusion in a twelfth-grade literature course.[37] The Board, in an executive session and over the objections of the school superintendent,[38] declined to follow its established procedure and had all copies of these books immediately removed from the libraries to the Board's office.[39] After the removal, the Board appointed a committee of parents and staff members to review the books and determine their "educational suitability." This committee ultimately recommended the return, subject to parental approval, of one of the books to both the library and curriculum, the return of four others to the library without restriction, the return of another for circulation with parental approval, and the removal of two of the books from the library. The committee could not agree on a recommendation for two of the books, and no opinion was given on another because not all of the committee members had read it.[40] The School Board, without explanation, ignored its committee's recommendations and returned one of the books to the library, returned another subject to parental approval, and removed the remaining nine books from both the library and the curriculum. The Board directed that these books were not to be included on required, optional, or suggested reading lists but could still be discussed in class.[41] The Board justified the removals by asserting that the books were "'anti-American, anti-Christian, anti-Semetic [*sic*], and just plain filthy.'"[42] They did not maintain that the books were obscene.[43]

At the time the suit was filed, plaintiffs were four high school students and one junior high school student in the Island Trees Union Free School District. Plaintiffs alleged that the defendant School Board had violated their first amendment rights by removing books from the school libraries solely on the basis of the Board members' personal beliefs that the books were "irrelevant, vulgar, immoral, and in bad taste."[44]

B. *The District Court Decision*

The District Court for the Eastern District of New York found that an earlier Second Circuit case, *Presidents Council, Dist. 25 v. Community School Board No. 25*,[45] controlled the resolution of *Pico*.[46] The *Presidents Council* court held that when

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Cleaver's *Soul on Ice*; Oliver LaFarge's *Laughing Boy*; Desmond Morris' *The Naked Ape*; Piri Thomas' *Down These Mean Streets*; Kurt Vonnegut's *Slaughter House Five*; and Richard Wright's *Black Boy*.

36. *Id.* That book was *A Reader for Writers* (Jerome Archer, ed.).

37. *Id.* That book was Bernard Malamud's *The Fixer*.

38. Pico v. Board of Educ., 638 F.2d 404, 408–09 & n.6 (2d Cir. 1980). The school superintendent objected to the Board's ad hoc removal of the books, urging that the established procedure for dealing with such issues should be followed. *Id.* at 409.

39. *Id.* at 409.

40. Pico v. Board of Educ., 474 F. Supp. 387, 391 & nn.6-11 (E.D.N.Y. 1979).

41. *Id.* at 391 & nn.12-14.

42. *Id.* at 390 (quoting from a press release issued by the Board). The press release continued:

> This Board of Education wants to make it clear that we in no way are BOOK BANNERS or BOOK BURNERS. . . . [W]e all agree that these books simply DO NOT belong in school libraries. . . .
>
> It is our duty, our moral obligation, to protect the children in our schools from this moral danger as surely as from physical and medical dangers.

Id. (emphasis in original).

43. *Id.* at 392.

44. *Id.*

45. 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972). *See infra* text accompanying notes 157–63.

46. Pico v. Board of Educ., 474 F. Supp. 387, 394 (E.D.N.Y. 1979).

the School Board removed a book from the school library and then returned it subject to limited circulation, the Board did not infringe any constitutional right.[47] According to the *Presidents Council* court, a school board has the ultimate authority to select books for the school library and can also remove any books that board members feel were improperly selected.[48] The court considered that elected school board members, rather than courts, are the proper agents to decide book removal issues. Judicial intervention into such disputes should be limited to instances in which basic constitutional values are "'directly and sharply implicate[d].'"[49] The court held that the issues in *Presidents Council* did not raise such constitutional questions and granted defendants' motion for summary judgment. The *Pico* district court adopted the *Presidents Council* reasoning and likewise granted the Island Trees School Board's motion for summary judgment.[50]

C. *The Court of Appeals Decision*

On appeal, the Second Circuit Court of Appeals, in a split decision, held that there was a material issue of fact whether the School Board's motivations for the book removals were constitutional.[51] The case was remanded to determine these motivations.[52]

While the court acknowledged the tradition of local control of public education and courts' general reluctance to intervene in local school board decisions,[53] it also recognized the indoctrinational function of education,[54] students' constitutional rights,[55] and the first amendment limitations on actions by boards of education.[56] The court found that all these interests had to be taken into account. While a book removal may have constitutional implications, mere allegations that books have been removed from the school library do not make out a prima facie first amendment violation.[57]

The court distinguished *Presidents Council*, noting that in *Pico* plaintiffs had raised questions of constitutional magnitude about the School Board's motivation by showing that the book removals were "an unusual and irregular intervention in the school libraries' operations by persons not routinely concerned with such matters."[58] For Judge Sifton, who wrote the majority opinion, the School Board's actions raised the distinct possibility of a first amendment violation because an established procedure was not followed. His test was whether the defendants could justify the limitations on students' constitutional rights by showing that a valid educational interest was materially threatened.[59] Judge Sifton would have decided the case on the

47. 457 F.2d 289, 291 (2d Cir. 1972).
48. *Id.* at 293.
49. *Id.* at 291 (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).
50. 474 F. Supp. 387, 398 (E.D.N.Y. 1979).
51. Pico v. Board of Educ., 638 F.2d 404 (2d Cir. 1980). Each of the three judges wrote a separate opinion. A petition for rehearing or rehearing en banc was denied by a 5–5 vote. 646 F.2d 714 (2d Cir. 1980).
52. 638 F.2d 404, 407 (2d Cir. 1980).
53. *Id.* at 412 (citing Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).
54. *Id.* at 412 (citing James v. Board of Educ., 461 F.2d 566, 573 (2d Cir. 1972)).
55. *Id.* (citing Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969)).
56. *Id.* at 412-13 (citing West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).
57. *Id.* at 414–15.
58. *Id.*
59. *Id.* at 415 (citing James v. Board of Educ., 461 F.2d 566, 571 (2d Cir. 1972)).

merits for the plaintiffs because he felt it could be inferred that the Board's "political views and personal taste [were] 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."[60]

Judge Newman wrote a separate opinion in which he concurred in Judge Sifton's opinion but argued that a trial was needed to determine whether the facts supported plaintiffs' allegations.[61] If the School Board had attempted to suppress the ideas contained in the removed books, he would have held that the students' rights had been violated.[62] Defendants argued, however, that "the books were removed because of vulgar language and explicit sexual descriptions."[63] For Judge Newman, school authorities have considerable discretion in such instances. He argued that to prevail plaintiffs would have to show that the justifications of the School Board were not the true motives for the removals. An impermissible motivation would render the Board's censorship unconstitutional even if it were not the only motivation.[64]

Judge Mansfield, in dissent, argued that the majority was overruling *Presidents Council* and that its decision represented an unnecessary interference with the School Board's discretion.[65] To him the issues did not rise to a constitutional level because the Board's justifications for the removals, that the books were in bad taste, indecent, and educationally unsuitable, were constitutionally permissible.[66]

D. *The Supreme Court Decision*

The United States Supreme Court affirmed the appellate court's decision, five Justices agreeing that because there was a material issue of fact summary judgment was inappropriate.[67] The case was remanded for trial to determine the motivation of the School Board in removing the library books.[68]

1. *Justice Brennan's Plurality Opinion*

Justice Brennan, in the plurality opinion joined by Justices Marshall and Stevens and joined in part by Justice Blackmun, concluded that the first amendment does impose limits upon a school board's discretion and that the removal of books from a school library might impinge upon students' constitutional rights.[69] Justice Brennan carefully narrowed the issue to the removal of library books that had been selected for the library with the approval of the school board, or at least without their objection, and that were intended for noncompulsory reading outside of the classroom.[70]

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60. *Id.* at 417.
61. *Id.* at 437–38 (Newman, J., concurring).
62. *Id.* at 436.
63. *Id.*
64. *Id.* at 437.
65. *Id.* at 419 (Mansfield, J., dissenting).
66. *Id.* at 429, 432.
67. 457 U.S. 853, 853–55 (1982).
68. There will not be a trial on the merits because the Island Trees School Board returned the books to the library shelves after the Supreme Court decision. The Board instructed the librarian to send a note to the parents of any student who checked out the books. N.Y. Times, Aug. 13, 1982, at 81, cols. 4–5.
69. 457 U.S. 853, 874–75 (1982) (opinion of Brennan, J.).
70. *Id.* at 861–62.

The opinion acknowledged that because school boards traditionally have been accorded broad discretion in the management of local school affairs, courts should be reluctant to intervene.[71] The plurality recognized that schools have an important duty to inculcate community values and to promote traditional ideals, but emphasized that school boards must operate within the constraints of the first amendment.[72] For the plurality, students do not "'shed their rights to freedom of speech or expression at the schoolhouse gate.'"[73] Although courts should intervene only when "'basic constitutional values'" are "'directly and sharply implicate[d],'"[74] the plurality held that the first amendment rights of students could be "directly and sharply implicated" by book removals from the school library.[75]

For the plurality, a right to receive information and ideas is a necessary corollary to the rights of free speech and press.[76] Students, as well as adults, should benefit from this right because students are entitled to constitutional protection and can "'not be regarded as closed-circuit recipients of only that which the State chooses to communicate.'"[77] The plurality found that the school library, which is a part of school where no one is forced to read a specific book, is an especially appropriate place for students to exercise their right to receive information and ideas.[78]

Although a school board has substantial discretion to determine the school library's collection, it cannot exercise this discretion "in a narrowly partisan or political manner."[79] The test of permissible exercise of discretion is whether a school board *intends* to deny its students access to ideas that the board finds disagreeable. If this is the "decisive factor"[80] in a book removal decision, the school board violates its students' constitutional rights because such motives tend to prescribe an unconstitutional official orthodoxy.[81] Under the plurality's test, constitutionally acceptable motivations can be shown if the books are removed because they are deemed "pervasively vulgar" or educationally unsuitable.[82] These motives do not threaten to suppress ideas and therefore are constitutionally permissible.

In order to determine a board's motivation, the plurality recommended close scrutiny of the procedures used and found that the record in *Pico* showed that the board had followed irregular procedures, which at least suggested a lack of concern for students' rights.[83] On this basis the plurality found that the district court had improperly granted summary judgment: a genuine issue of material fact existed concerning the motivation of the School Board. The case was remanded to determine

71. *Id.* at 863–64.
72. *Id.* at 864.
73. *Id.* at 865 (quoting Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969)).
74. *Id.* at 866 (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).
75. *Id.*
76. *Id.* at 866–67.
77. *Id.* at 868 (quoting Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 511 (1969)).
78. *Id.* at 868–69.
79. *Id.* at 870.
80. "Decisive factor" was defined by Justice Brennan as a "substantial factor" without which the opposite decision would have been made. *Id.* at 871 n.22.
81. *Id.* at 871 (West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), prohibited the establishment of an official orthodoxy in a school).
82. *Id.*
83. *Id.* at 875.

whether the Board's decision rested on its desire to suppress the ideas within the censored books or to establish a political orthodoxy based on the Board members' personal values.[84] If either motivation were decisive, the book removals would be unconstitutional.[85]

2. *Justice Blackmun's Concurrence*

Justice Blackmun concurred in most of the plurality opinion and in the judgment[86] but did not accept Justice Brennan's assertion of a right to receive information and ideas in the school library.[87] He felt that such a right implies an affirmative duty for the schools to provide students with specific information. With this he disagreed. He also considered school libraries a part of the total school environment and as appropriate a place to inculcate community values as anywhere else in the school.[88]

For Justice Blackmun, "[t]he State may not suppress exposure to ideas—for the sole *purpose* of suppressing exposure to those ideas—absent sufficient compelling reasons."[89] He would have balanced the inculcative duty of the school board against the first amendment prohibition of state-sponsored orthodoxy in the classroom. The inculcative nature of schools limits students' first amendment rights, but schools still must allow diversity in thought. Justice Blackmun argued that a school board must justify a book removal decision by showing a purpose other than the suppression of an idea disagreeable to its members. Any content-based removal resting only on school board members' disapproval of the books would be unconstitutional because it would tend to establish an official orthodoxy.[90] He would allow the removal of books because they contain offensive language, express ideas adverse to the public welfare, or are "inappropriate for the age group."[91] He felt that those motivations do not threaten to impose an official orthodoxy and are constitutional.

3. *Justice White's Decision Concurring Only in the Judgment*

Justice White concurred in the judgment but refused to address the constitutional questions. He felt those issues should not be addressed until the trial court resolved the factual issue of the School Board's motivation for the removal of the library books.[92] As Justice Rehnquist pointed out, Justice White's opinion is really a "single vote to dismiss the writ of certiorari as improvidently granted."[93]

4. *Chief Justice Burger's Dissent*

Chief Justice Burger dissented and was joined by Justices Powell, Rehnquist, and O'Connor.[94] The dissent contended that because the Island Trees School Board

84. *Id.*
85. *Id.* at 871–72.
86. *Id.* at 875–76.
87. *Id.* at 878–79 (Blackmun, J., concurring).
88. *Id.*
89. *Id.* at 877 (emphasis in original).
90. *Id.* at 879–80.
91. *Id.* at 880.
92. *Id.* at 883 (White, J., concurring).
93. *Id.* at 904 n.1 (Rehnquist, J., dissenting).
94. *Id.* at 885 (Burger, C.J., dissenting).

had the authority to remove books from the school library, there was no genuine issue of material fact to be determined on remand.[95] The dissenters noted that the plurality decision stripped locally elected school boards of their broad discretion to administer public schools by subjecting the authority of school boards to federal court review.[96]

The dissent argued that in allowing the removal of books deemed "educationally unsuitable" or "pervasively vulgar," the plurality offered neither guidance for application of those standards nor any rationale for their adoption as a basis for removing books. Ultimately, the courts would have to rule on the validity of the motivation for each book removal case, which would violate local control of public education.[97]

The dissent's basic argument was that elected school boards are better suited to decide library book disputes than are federal courts. Under the plurality's "right to receive information," courts would substitute their views for those of the local authorities, and the Supreme Court would become a "super censor."[98] The dissenters emphasized a school board's duty to inculcate community values and asserted that the board members' personal values and preferences are constitutional grounds for deciding what is appropriate educational material.[99]

The dissent accepted the *Tinker* holding that students have constitutional rights[100] but argued that in this instance those rights had not been threatened. The Chief Justice determined that no restraints had been placed on the students since they were permitted to read the removed books elsewhere and could discuss the ideas anywhere, even in the classroom.[101]

Since both parties agreed that the books were removed because the Board found them "irrelevant, vulgar, immoral, and in bad taste, making them educationally unsuitable for the district's junior and senior high school students,"[102] the dissent found no genuine issue of material fact in the case. In stating that school boards must make content-based decisions in order to fulfill their duty to inculcate community values and that such decisions are properly based on the board members' value judgments,[103] the dissenters apparently would have granted school boards unreviewable local discretion. Accordingly, the appropriate place to challenge board decisions is at the polls.[104]

5. *Justice Powell's Dissent*

Justice Powell, in a separate dissent,[105] expressed his concern that the plurality would undermine the respect and authority of local school boards. Arguing that

95. *Id.* at 890–91, 891 n.5.
96. *Id.* at 891–92.
97. *Id.* at 890–91.
98. *Id.* at 885.
99. *Id.* 890–91, 891 n.5.
100. *Id.* at 886.
101. *Id.* The books were available at bookstores and at the public library. *Id.*
102. *Id.* at 885 n.1.
103. *Id.* at 889.
104. *Id.* at 891. In the *Pico* case the School Board had made the book removals a major election issue, and the two incumbents who ran were reelected. 638 F.2d 404, 411 (2d Cir. 1980).
105. 457 U.S. 853, 893 (1982) (Powell, J., dissenting).

public school boards are specifically directed to inculcate basic community values in the future citizens of the country, he found that the Island Trees School Board was only fulfilling this obligation.[106] He concluded his opinion on a curious note: "In different contexts and in different times, the destruction of written materials has been the symbol of despotism and intolerance. But the removal of nine vulgar or racist books from a high school library by a concerned local school board does not raise this specter."[107] One wonders what would "raise this specter" for Justice Powell.[108]

6. *Justice Rehnquist's Dissent*

Justice Rehnquist, in a separate dissent joined by Chief Justice Burger and Justice Powell,[109] asserted that school board members must act on their own personal values in making educational decisions and inculcating youth with basic social values.[110] He argued that because education involves a selective exposure to information, it is for local school authorities to determine what material is relevant.[111] A school library is simply a part of the school's teaching environment and not subject to separate rules.[112] Justice Rehnquist concluded that the students' rights to speak or express themselves had not been infringed since the banned books were readily available elsewhere.[113]

7. *Justice O'Connor's Dissent*

In a brief opinion Justice O'Connor argued that "it is not the function of the courts to make the decisions that have been properly relegated to the elected members of school boards."[114] For her, a school board has the discretion to determine the "educational suitability" of a book and can remove books from the school library so long as it does not deny students the right to read and discuss such books.[115]

IV. ANALYSIS

A. *Authority*

An initial problem raised by the *Pico* decision concerns the weight it is to be given as a precedent. Because a majority of justices did not concur in any one opinion, the authority of *Pico* is limited.[116] The Fifth Circuit Court of Appeals has

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106. *Id.* at 896.
107. *Id.* at 897.
108. *See supra* text accompanying notes 1–6.
109. 457 U.S. 853, 904 (Rehnquist, J., dissenting).
110. *Id.* at 909.
111. *Id.*
112. *Id.* at 910.
113. *Id.* at 915.
114. *Id.* at 921 (O'Connor, J., dissenting).
115. *Id.*
116. H. BLACK, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS 135–37 (1912); Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756 (1980) [hereinafter cited as Note, *Precedential Value*]; Comment, *Supreme Court No-Clear-Majority Decisions: A Study in* Stare Decisis, 24 U. CHI. L. REV. 99 (1956) [hereinafter cited as Comment, *No-Clear-Majority Decisions*]. *See* Baker v. State, 15 Md. App. 73, 289 A.2d 348 (1972), *cert. denied*, 411 U.S. 951 (1973) (court refused to be bound by U.S. v. Jorn, 400 U.S. 470 (1971), in which four justices joined the opinion, two joined in the judgment only, and three dissented); People *ex rel.* Marlowe v. Martin, 192 Misc.

already concluded that *Pico* has no precedential value for interpretation of the first amendment because only four of the Justices in the majority addressed the free speech issues, while Justice White concurred only in the decision to remand and refused to address the constitutional issues.[117] *Marks v. United States*,[118] in which the Supreme Court instructed that when no one rationale is joined by five Justices the position taken by the Justice concurring in the judgment on the narrowest grounds should be viewed as the holding of the case,[119] supports the Fifth Circuit's assessment of *Pico*. This leaves a 4-4 or a (3 + 1)-4[120] split of opinion on the constitutional questions and limits the stare decisis[121] effect to those issues on which a majority of Justices did agree.[122]

Because of the need for guidelines, the precedential effect of plurality Supreme Court decisions, although usually more than nil, is frequently difficult to determine.[123] The interpretation of plurality opinions tends to vary depending on the actual divisions among the Justices.[124] The fact that Justices concur in different opinions does not preclude agreement of a majority on a single point of law.[125] If four Justices in dissent agree with one Justice from the majority on a single issue, there is a majority, with resultant stare decisis effect.

Since in a plurality decision a majority of the Justices have agreed on a result that binds the parties, sometimes that result can have precedential effect on future cases with similar facts.[126] In such cases it is the result, not the rationale, that is authoritative. This is generally true when the issue is dismissal of the case rather than a determination on the merits.[127] *Pico* is such a case since five Justices agreed that summary judgment is inappropriate when a school board has removed books from the school library. However, the reasoning of the various opinions in *Pico* has limited authority since no opinion reflects the views of a majority of the Court.[128] Nonetheless, it is still valuable to consider these opinions because, without achieving the weightiness of stare decisis, the individual opinions do offer insight into the concerns

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192, 83 N.Y.S.2d 201 (Wyoming County Ct. 1948) (court refused to be bound by Gayes v. New York, 332 U.S. 145 (1947), in which there was a 4–1–4 split similar to that in *Pico*). *See generally* Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127 (1981).

117. Muir v. Alabama Educ. Television Comm'n, 688 F.2d 1033, 1045 n.30 (5th Cir. 1982).

118. 430 U.S. 188 (1977).

119. *Id.* at 193.

120. Justice Blackmun concurred in much of the plurality opinion but not all of it. The particular split depends on the issue. *See supra* text accompanying notes 87–91.

121. See generally H. BLACK, *supra* note 116, at 182–99, for a discussion of the stare decisis principle.

122. Comment, *No-Clear-Majority Decisions*, *supra* note 116.

> "There must be a concurrence of a majority of the judges upon the principles, rules of law, announced in the case, before they can be considered settled by a decision. If the court is equally divided or less than a majority concur in a rule, no one will claim that it has the force of the authority of the court."

Id. at 100 n. 10 (quoting WAMBAUGH, THE STUDY OF CASES 50 (2d ed. 1894)). *See also* Note, *Precedential Value*, *supra* note 116, at 779.

123. *See* Note, *Precedential Value*, *supra* note 116. See generally Comment, *No-Clear-Majority Decisions*, *supra* note 116, which discusses how less than majority opinions have been used as authority.

124. Note, *Precedential Value*, *supra* note 116, at 767.

125. *Id.* at 768.

126. H. BLACK, *supra* note 116, at 135–37; Note, *Precedential Value*, *supra* note 116, at 769–74 & n. 65.

127. Note, *Precedential Value*, *supra* note 116, at 770.

128. *See supra* note 116.

of the different Justices and may offer guidance to their positions in a similar case in the future.

B. *The* Pico *Decision: What Was Decided?*

Justice White's position is the most narrow and places the most severe limitations on analysis of *Pico* and any attempt to establish guidelines.[129] By affirming the appeals court and refusing to address the constitutional issues, he stated his belief that certiorari had been improvidently granted.[130] His opinion does not offer any insight into his views on the merits, but he did concur in the decision to remand and agreed with the appellate court that the School Board's motivation was a crucial, unresolved factual issue. That Justice White agreed with the others in the majority that a library book removal can so abridge students' first amendment rights that it warrants court intervention can be inferred from his failure to join in the dissent's position that defendants' motion for summary judgment should have been granted.

A majority of the *Pico* Court agreed, then, that it is possible for a plaintiff to show a constitutional violation when a school board removes books from a school library. This is true because a school board's discretion is subject to court review if it appears that the motivation for the removals might have been unconstitutional. Since a majority of the Supreme Court agreed on these two issues, *Pico* should be considered to have settled them, with the appropriate stare decisis effect. Henceforth, each case will have to be individually litigated once plaintiffs can establish that the motivation may not have been constitutionally acceptable. Plaintiffs will still have to prove their case in a full trial on the merits, but the initial burden of establishing a prima facie case has been lightened, and the cause made legitimate.

How the courts will rule on the merits is uncertain, however, and whether school boards will be restrained for motives that are merely suspect or only for flagrant abuses of discretion remains open. The lower courts will have to determine on their own where to draw the lines, at least until the Supreme Court speaks with a more unified voice. The lower courts may well look to the *Pico* opinions for suggested guidelines even though its authority is not mandatory. The opinions of the plurality and Justice Blackmun set out the issues and tests these Justices feel would be controlling. While Justice Blackmun's opinion is narrower than the plurality's,[131] he concurred in most of the plurality opinion and accepted the plurality's guidelines for remand.[132]

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129. *See supra* text accompanying notes 118–19.

130. Board of Educ. v. Pico, 457 U.S. 853, 904 n.1 (1982) (Rehnquist, J., dissenting). Ordinarily Justices abide by the self-imposed "rule of four" whereby a vote of a minority of four Justices binds the Court to take the case and rule on its merits. Rogers v. Missouri Pac. R.R., 352 U.S. 500, 509 n.23 (1957). *See generally* Leiman, *The Rule of Four*, 57 COLUM. L. REV. 975 (1957).

131. If Justice Blackmun would decide a case for plaintiffs using the criteria he set out in *Pico*, the plurality, using their criteria, would probably also rule in plaintiffs' favor. The reverse is not necessarily true. Therefore, Justice Blackmun's opinion is narrower than that of the plurality. Note, *Precedential Value, supra* note 116, at 764. As pointed out in the text accompanying notes 118–19 *supra*, the narrower opinion places a limitation on the broader opinion's precedential authority.

132. 457 U.S. 853, 875–76 (1982) (Blackmun, J., concurring).

The guidelines for the remand proceedings[133] directed close scrutiny of the School Board's procedures in removing the books. The record showed that the Board had not followed its own established procedures; had singled out only those books on the "objectionable books" list provided by an outside organization; had ignored the advice of its superintendent of schools; had ignored the advice of teachers, librarians, and literary experts; and had not explained the rejection of the book review committee's recommendations.[134] By establishing these procedural irregularities, plaintiffs had successfully shown a possible constitutional violation. The burden of proof then shifted to the School Board to show that its motivations for the removals were constitutional.[135]

For the plurality and Justice Blackmun, the Board could successfully justify its removal decision if that decision was not intended to suppress ideas or impose an official orthodoxy.[136] Constitutionally valid motivations for the plurality would include removal because a book was "pervasively vulgar" or educationally unsuitable.[137] For Justice Blackmun a permissible justification would be that a book contained "offensive language," was "inappropriate for the age group," or advanced ideas adverse to the public welfare.[138]

The plurality found that students have a constitutionally protected right to receive ideas and information and that the special nature of the school library makes it the place within a school where students can assert this right. Justice Blackmun, however, did not support the students' right to receive ideas and doubted the existence of a valid distinction between the library and the rest of the school. Because on these points he was aligned with the dissent, Justice Blackmun and the four dissenters constitute a majority whose views should be regarded as precedential authority for the nonexistence of this right.[139]

In rejecting the asserted right of students to receive information in the library, the dissent and Justice Blackmun agreed that schools have no duty to provide students with specific information.[140] This proposition may be acceptable to the plurality so long as specific ideas are not being excluded deliberately. The plurality's distinction between book selection and book removal[141] can be seen as a tacit admission that schools cannot, and are not obligated to, provide all information in the school setting. The difference of opinion appears only when a book is removed. For the plurality, once a book has been selected and not objected to by a school board or its agents, students have a constitutional right of access to that book in the school library unless

133. *See supra* note 68.

134. 457 U.S. 853, 874–75 (1982) (opinion of Brennan, J.).

135. *Id.* at 870. Under the standard set out in Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977), to challenge the defendant's decision on constitutional grounds the plaintiff must first show that the decision was substantially affected by the exercise of a constitutionally protected right. Once that has been done, the burden shifts to the defendant, who must show by a preponderance of the evidence that the decision was not based on the protected conduct. *Id.* at 287. *See also* Muir v. Alabama Educ. Television Comm'n, 688 F.2d 1033, 1044 (5th Cir. 1982).

136. 457 U.S. 853, 871 (1982) (opinion of Brennan, J.).

137. *Id.*

138. *Id.* at 880 (Blackmun, J., concurring).

139. *See supra* text accompanying note 125.

140. 457 U.S. 853, 878 (1982) (Blackmun, J., concurring); *id.* at 887 (Burger, C.J., dissenting).

141. *Id.* at 862, 871–72 (opinion of Brennan, J.). The dissent disagreed with this distinction, *id.* at 892 (Burger, C.J., dissenting), and Justice Blackmun expressed doubt about the distinction. *Id.* at 878 n.1 (Blackmun, J., concurring).

the school board can show a constitutionally permissible justification for its removal.[142] Justice Blackmun did not find a constitutional right of access to library books, but he nevertheless agreed with the plurality that books can be removed only if the school board can show the absence of any intent to suppress ideas or to impose an official orthodoxy on the schools.[143] Neither the plurality nor Justice Blackmun found that the school owes its students access to every book the students might wish to read.[144] However, a board does owe its students a duty not to censor what has been properly made available simply because of the personal preferences and values of the school board members.[145]

In general, Justice Blackmun felt that students' first amendment rights in school, including the library, are more circumscribed than did the plurality. Both point to the special environment of the school and its necessary limitations on student rights,[146] but Justice Blackmun would balance what he found to be a school board's authority to administer the schools and inculcate community ideals against "the limited constitutional restriction . . . . imposed by the First Amendment."[147] He would hold "that school officials may not remove books for the *purpose* of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by the officials' disapproval of the ideas involved."[148]

In summary, the plurality and Justice Blackmun agreed that an intent to suppress ideas or to impose an official orthodoxy over the school is impermissible.[149] Books may be removed from the school library for constitutionally neutral reasons but not simply because the content of the books is personally offensive to board members. In order to ascertain the board's motivation, courts should look at the particular facts of the case and the procedure that was followed.[150] Since only four Justices concurred in these directives, they have no stare decisis value. Lower courts looking for guidance, however, may be persuaded by this reasoning until more decisive guidelines are developed.

C. *The Dissenting Opinions*

The lack of agreement in the majority opinion, which leaves much of the book removal issue unresolved, points to the real possibility that in a subsequent decision the dissent might be in the majority.[151] Thus, it is appropriate to analyze briefly the dissenting opinions.

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142. *See supra* text accompanying notes 136–37 concerning justifications that the plurality would consider constitutionally acceptable.

143. *See supra* text accompanying notes 90–91.

144. 457 U.S. 853, 862 (1982) (opinion of Brennan, J.); *id.* at 878 (Blackmun, J., concurring).

145. *Id.* at 871–72 (opinion of Brennan, J.). Justice Blackmun joined in this part of the plurality opinion. *Id.* at 855.

146. *Id.* at 864–65 (opinion of Brennan, J.); *id.* at 879 (Blackmun, J., concurring).

147. *Id.* at 879 (Blackmun, J., concurring).

148. *Id.* at 879–80 (emphasis in original).

149. *See supra* text accompanying notes 79–81 & 89–91.

150. 457 U.S. 853, 872–74 (opinion of Brennan, J.). Justice Blackmun concurred in this part of the plurality opinion. *Id.* at 855.

151. Since five of the Justices who participated in *Pico* are over 70 years of age, the makeup of the Court could change in the foreseeable future. A small change in the Court's personnel could result in the opposite outcome in a future case.

All four of the dissenting Justices concurred in Chief Justice Burger's opinion. Their viewpoints were more unified than were those of the majority. For the dissent, the issues were whether school boards or federal judges should administer local schools, and whether "morality, good taste and relevance to education" are valid justifications for decisions to remove books from school libraries.[152] All of the dissenting Justices agreed that these decisions should be left to local school boards and that the judiciary has no place in resolving such issues.[153] Emphasizing the broad discretion that school boards need to administer schools and to inculcate fundamental community values,[154] they also agreed that the School Board's justification in *Pico* was constitutionally valid.[155] Preventing the abuse of this discretion should be left to the local voters at the polls.[156] In brief, the dissent essentially would allow elected school boards unreviewable discretion in book removal cases.

D. *Applications of* Pico

In order to determine how to apply *Pico*'s guidelines, such as they are, it is helpful to analyze briefly several of the previously decided lower court cases in light of the recent Supreme Court decision. This is a necessarily speculative venture since Justice White did not address the constitutional issues, and courts are not bound by the *Pico* opinions.

The earliest case to be litigated, and one used as precedent for several subsequent decisions,[157] was *Presidents Council, Dist. 25 v. Community School Board No. 25*.[158] In *Presidents Council* a group of parents, teachers, librarians, and students challenged the School Board's limitations on access to a book in the district's junior high school libraries.[159] After parents objected to the book's obscenities and explicit sexual references, the Board, in an executive session, ordered its removal from the libraries. Six weeks later, at a public meeting, the Board returned the book to the libraries but for loan only to the parents of the children at the school.[160] The court determined that the State of New York had delegated to school boards the responsibility for the selection of books for school libraries and that the removal of a book is within a board's authority.[161] In finding that there had been no threat to constitutional rights sufficient to cause the court to intervene, the *Presidents Council* court pointed to several factual considerations: the librarian had not been penalized, teachers and students were free to discuss the ideas contained in the book, the book could be

152. 457 U.S. 853, 885 (Burger, C.J., dissenting).
153. *Id.* at 889.
154. *Id.*
155. *Id.* at 889–90.
156. *Id.* at 889.
157. *See, e.g.*, Bicknell v. Vergennes Union High School Bd. of Directors, 638 F.2d 438 (2d Cir. 1980); Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980); Pico v. Board of Educ., 474 F. Supp. 387 (E.D.N.Y. 1979).
158. 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972).
159. *Id.* at 290. The book was Piri Thomas' *Down These Mean Streets*.
160. *Id.* at 290–91.
161. *Id.* at 291–92.

assigned as outside reading, and parents could still borrow it for their children.[162] As a result, the Second Circuit affirmed the district court's dismissal of the complaint.[163]

After *Pico*, the *Presidents Council* court's dismissal ought to be inappropriate. *Pico* directed courts to consider the procedures used by a board of education in removing a book, and plaintiffs can now point to those procedures to show a possible constitutional violation. An initial executive session decision like that in *Presidents Council* might support a presumption that the board decided to ban the book without regard for students' constitutional rights. The ultimate decision to return the book to the libraries on the condition that only parents could borrow it suggests an intent to prescribe an official orthodoxy by singling out the book for disapproval. The burden of proof would shift to the board to show a constitutionally permissible reason for its actions. The court would have to determine the school board's motivation for the decision. If the motivation were found to be the book's use of obscenities and explicit sexual references, the court would then have to determine whether these were constitutionally permissible motives. Under *Pico* the determinative question would be whether these motives tended to suppress ideas or impose an official orthodoxy on the school.[164] Even though they are not bound to do so, lower courts might well want to adopt this approach.

In *Minarcini v. Strongsville City School District*[165] students brought a class action suit after the School Board removed two books from the school library.[166] Class discussion of the books was prohibited, and they were not to be assigned as supplementary reading.[167] The Sixth Circuit Court of Appeals, emphasizing the role of a library as a "mighty resource in the free marketplace of ideas,"[168] found that the removals violated students' first amendment rights by infringing their right of access to ideas.[169]

The *Pico* plurality would support this analysis, but five Supreme Court Justices denied the special nature of the school library and the existence of a student's right of access to ideas in the library.[170] As the *Minarcini* record stands, however, the finding of a constitutional violation would surely be upheld because the School Board failed to offer an explanation for the book removals.[171] Once plaintiffs show that the action may have been impermissible, the school board must prove a constitutionally neutral motivation to justify its action. If it does not defend the removal, the court must conclude that the board was motivated by unconstitutional considerations and that the censorship violated students' rights.[172] After *Pico*, the *Minarcini* Board would probably have attempted to justify its decision.

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162. *Id.* at 292.
163. *Id.* at 289.
164. *See supra* text accompanying notes 136–38.
165. 541 F.2d 577 (6th Cir. 1976).
166. *Id.* at 579. The books were Joseph Heller's *Catch 22* and Kurt Vonnegut's *Cat's Cradle*.
167. *Id.*
168. *Id.* at 582.
169. *Id.*
170. *See supra* text accompanying note 139.
171. 541 F.2d 577, 582 (6th Cir. 1976).
172. *See supra* note 135 and accompanying text.

Facts such as those in *Minarcini* might cause Justice O'Connor to join the majority and find a cause of action. She stated in her dissent that local school boards should be able to remove school library books so long as they do not prohibit students from reading and discussing the books.[173]

The School Board in *Right to Read Defense Committee v. School Committee*[174] removed an anthology from the high school library.[175] According to the court, the school library should be a place where students can explore information beyond the limitations of the curriculum. By removing the book, the School Board had limited students' access to ideas and violated their right to read.[176] The court found that the School Board had banned the book because the theme and language of one poem were offensive to Board members.[177] That was not considered a substantial or legitimate government interest and did not justify the infringement of students' constitutional rights.[178]

The *Pico* plurality would endorse the analysis in *Right to Read* because they, too, considered the library an appropriate place for students to exercise the right of access to ideas and information.[179] Justice Blackmun would disagree on this point. However, since the motivation for the removal was the Board members' personal values, and that motivation tends to suggest an intent to suppress ideas and impose an official orthodoxy on the school,[180] the overall *Pico* analysis would probably uphold the *Right to Read* decision.

As these examples illustrate, after *Pico* a court's analysis may be more limited than before. Although the guidelines are not binding, they may point to a reasonable line of inquiry. Exactly what the lower courts will do with *Pico* remains to be seen, but at a minimum they may not routinely grant summary judgment for the defendants. Once a plaintiff establishes a possible constitutional violation, a full trial on the merits is necessary, with the school board's motivation as the key issue. If the book removal can be justified in a constitutionally acceptable manner, it will be upheld. It remains for the lower courts to determine which motivations are constitutionally permissible and which are not.

V. EVALUATION

One clear legacy of *Pico* will be more litigation over school library book removals.[181] Since plaintiffs now have a cause of action, and since the Supreme Court majority failed to agree upon definitive standards for review, each case will have to be tried individually. Because the lower courts will have to decide on a case by case basis which removals are unconstitutional, they may well become the "super

173. 457 U.S. 853, 921 (1982) (O'Connor, J., dissenting).

174. 454 F. Supp. 703 (D. Mass. 1978).

175. *Id.* at 704–05. The book was *Male and Female Under 18.*

176. *Id.* at 714–15.

177. *Id.* at 711.

178. *Id.* at 713.

179. *See* 457 U.S. 853, 869 (1982) (opinion of Brennan, J.). Justice Brennan quotes with approval the *Right to Read* court's characterization of the school library.

180. *See supra* text accompanying notes 149–50.

181. There will be more litigation, that is, unless school boards refrain from removing library books.

censors" envisioned by Chief Justice Burger. This is hardly an optimal situation, but without precise guidelines the only alternative is to allow local school boards the unreviewable discretion advocated by the dissent. Such unreviewable discretion would mean that a school board's duty to inculcate community values, as interpreted by the board members, becomes an overriding interest. The equally important interests of providing for an educated citizenry and protecting individual constitutional rights[182] would be subordinated. As Justice Blackmun noted, a tension exists between the inculcative needs of public education and any limitation on school board discretion to make educational decisions. That tension, however, only demonstrates that the problem is difficult and not that one resolution is to be preferred over another.[183]

A school board's duty to prepare its students to be responsible citizens goes beyond inculcating local values.[184] As Justice Douglas aptly asked: "Are we sending children to school to be educated by the norms of the School Board or are we educating our youth to shed the prejudices of the past, to explore all forms of thought, and to find solutions to our world's problems?"[185] Students need to be taught to cope with diversity rather than be protected from it. Television and newspapers regularly present a broad view of reality. Many students will soon go beyond their local communities and be confronted with a variety of values and ideas, some of which might not be acceptable in the community in which they were educated. Limiting the information available to a high school student who will soon be considered an adult and asked to act the part of a responsible citizen[186] is not a realistic or responsible role for the public schools. Community values can be inculcated through the schools, but the schools should not and need not be limited to that function. The inculcative interest of the schools represents only one of their functions in the community.[187] Because the preparation of enlightened citizens is at least as important,[188] this interest should not be routinely subordinated.

The major reason the dissent would allow local school boards unfettered discretion is the fear that a flood of student challenges to school board authority would oblige federal courts to determine local educational policy.[189] *Pico*, however, does not undermine local school board authority but simply assures students that a school board, in making a book removal decision, must consider student rights. The plurality and Justice Blackmun recognized the need to restrain judicial review in these

182. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506, 511–12 (1969); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

183. 457 U.S. 853, 881–82 (1982) (Blackmun, J., concurring).

184. Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321, 337 (1979).

185. *Presidents Council, Dist. 25 v. Community School Bd. No. 25*, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998, 999–1000 (1972) (Douglas, J., dissenting).

186. Some high school students are already eighteen years old and eligible to vote. "It would be foolhardy to shield our children from political debate and issues until the eve of their first venture into the voting booth. Schools must play a central role in preparing their students to think and analyze and to recognize the demagogue." James v. Board of Educ., 461 F.2d 566, 574 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972).

187. Garvey, *supra* note 184, at 336–37.

188. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943). *See generally* Garvey, *supra* note 184.

189. 457 U.S. 853, 890–91 (1982) (Burger, J., dissenting).

cases[190] and they did not issue a blanket invitation for litigation. Students must first show that board activities have threatened their constitutional rights. Summary judgment would presumably still be available to a school board that removed a book for constitutionally neutral reasons after following a fair, preestablished procedure.[191] Justice Blackmun and the plurality would permit plaintiffs to prevail only where students can show that a school board was attempting to suppress certain ideas. Under Justice Blackmun's analysis the balance would tend to favor the school board. For him, the school board's discretion is a major consideration, and the risk of suppressing ideas is generally of a lesser magnitude.[192] Because Justice Blackmun's is the narrowest majority opinion to consider the constitutional questions, his interpretation of students' rights becomes a limitation.[193] All that the *Pico* majority has done is to allow a cause of action to students in questionable book removal cases. The students must still prove an unconstitutional motivation on the part of the board. The plurality anticipated several valid defenses,[194] and more may emerge in subsequent litigation.

The dissent criticized the majority for applying vague and subjective standards to determine the propriety of the school board's motivation.[195] That the standards are subjective and difficult to apply is, however, not a valid reason for rejecting judicial responsibility. Where questions of "'motive, intent, consciousness, or subjective feelings and reactions'" are involved, summary judgment is inappropriate.[196] By refusing to review the Board's motivation, the dissent was saying either that the students' rights were unimportant or nonexistent, or that it was simply too difficult to protect them. Under *Tinker v. Des Moines Independent Community School District*,[197] however, students do have constitutional rights.[198] Necessarily, those rights are to be protected by the courts.

The dissent would let school board members answer at the polls for their actions. By the time an election occurs, however, the offending school board decision may have already been implemented and the damage done.[199]

An additional and very serious flaw in the dissent's approach is the inability of elections to protect minority interests. The United States is a majoritarian society, but diversity and minority rights are specifically protected by the Constitution. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[200] To hold, as did the dissent, that the minority must submit without review to majority censorship in the school library setting simply because courts are not as well equipped as local

190. *Id.* at 871–72 (opinion of Brennan, J.); *id.* at 879 (Blackmun, J., concurring).
191. *Id.* at 872 (opinion of Brennan, J.).
192. *Id.* at 879 (Blackmun, J., concurring).
193. *See supra* text accompanying notes 118–19.
194. *See supra* text accompanying notes 137–38.
195. 457 U.S. 853, 890 (1982) (Burger, C.J., dissenting).
196. Cross v. United States, 336 F.2d 431, 433 (2d Cir. 1964) (quoting Empire Elecs. Co. v. United States, 311 F.2d 175, 180 (2d Cir. 1962)).
197. 393 U.S. 503 (1969).
198. *Id.* at 511.
199. Comment, *What Johnny Can't Read*, *supra* note 23, at 665.
200. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

school boards to administer schools is to abdicate judicial responsibility. The Court acts "in these matters not by authority of [its] competence but by force of [its] commissions. [It] cannot, because of modest estimates of [its] competence in such specialities as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed."[201] It is the duty of the courts to protect individual rights from abuse by the state.[202]

The school board, having been duly elected by the majority of the voters of a district, owes a duty to its constituents to represent them in educational matters. In *Pico* the Board made the book removals a major issue at a subsequent school board election.[203] When the incumbent members were reelected, they considered it a plebiscite approving the censorship. The Board obviously had the approval of the majority of the voters, but what of the minority of the community who disapproved of the book removals?[204] The Board gave the minority no further opportunity to object and did not allow any students library access to the disapproved books. Students who wish access to a broad range of ideas and information should not be constrained by those whose horizons are more limited. Even if the library is merely a part of the total school environment,[205] it can still afford access for those who desire a variety of materials without intruding upon the rights of those who might find some of the ideas offensive.[206] Students have constitutionally protected rights,[207] including the right to hold a minority view.[208]

Public schools must be particularly careful to attend to the needs of all of the children of the district. The minority cannot be expected to send their children elsewhere for an education that is more compatible with their beliefs because this is often not possible. Alternative education may be prohibitively expensive or unavailable locally. The minority viewpoint need not be part of the required curriculum,[209] which is necessarily very selective due to the constraints of classroom time, but it must not be overlooked in assessing the educational program as a whole.

For the *Pico* dissent, the availability of the censored books at the public library and local bookstores limited the impact of the school library removals. Since the Board's directive did not prohibit students from reading or discussing the books, the dissent did not believe that the removals from the school library suppressed the ideas in the books.[210] In other circumstances, however, the Court has held that the

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201. *Id.* at 640.

202. *Id.* at 637. "The Fourteenth Amendment . . . protects the citizens against the State itself and all of its creatures—Boards of Education not excepted. These have . . . important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights." *Id.*

203. 638 F.2d 404, 411 (2d Cir. 1980).

204. After the lawsuit was filed, the Board mailed a questionnaire to school district homes asking whether the recipient approved of the book removals. Of the 17% responding, 59% supported the removals and 41% opposed them. The total number of responses was 866. *Id.* at 412.

205. *See supra* text accompanying note 139.

206. Comment, *Not on* Our *Shelves: A First Amendment Analysis of Library Censorship in the Public Schools*, 61 NEB. L. REV. 98, 134 (1982).

207. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 511 (1969).

208. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

209. Board of Educ. v. Pico, 457 U.S. 853, 869 (1982) (opinion of Brennan, J.); James v. Board of Educ., 461 F.2d 566 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972).

210. 457 U.S. 853, 891–92 (1982) (Burger, C.J., dissenting).

availability of information somewhere is not adequate availability.[211] Students spend a large part of their time at school and may have neither time nor opportunity to seek information elsewhere.[212] Time outside of school is often spent at part-time jobs, sporting activities, or general socializing, and the informational input outside of school is frequently negligible. Lack of transportation to public libraries and bookstores, as well as the cost of purchasing materials, imposes further limitations on students' access to books outside of the school environment. The public school is responsible for students' intellectual growth and development, and it is there that the ideas and information should be available.

VI. CONCLUSION

The *Pico* decision is unsatisfying. Neither side has been fully vindicated, and the Supreme Court was obviously unable and unwilling to resolve the issues more clearly. Basically, the Court has found that while school board discretion must be limited by first amendment considerations, students' first amendment rights must be limited by the special circumstances of the school environment. The responsibility for book removal cases has been returned to the lower courts, and for now it will be up to them to define this still uncertain area of law. Plaintiffs who oppose the removal of books do have a valid cause of action, however, and the motivation for the removal has become the vital issue. It remains for plaintiffs to prove their cases. Whether school boards will be restrained only for a flagrant abuse of discretion or simply whenever their motivation is constitutionally suspect remains to be determined. Meanwhile, school boards should be on notice that they must consider their students' constitutional rights before censoring library books.

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211. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748. 757 n.15 (1976). *See also* Schneider v. State, 308 U.S. 147, 163 (1939).

212. Comment, *What Johnny Can't Read, supra* note 23, at 662.