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Case Comment

Education or Indoctrination—Removal of Books from Public School Libraries: *Board of Education, Island Trees Union Free School District No. 26 v. Pico*

INTRODUCTION

Acting on a list of books considered objectionable by a politically conservative statewide parents organization,[1] the Board of Education of the Island Trees Union Free School District No. 26 [2] ordered all "listed" works removed from its librar-

1. Three members of the Board had obtained the list at a conference sponsored by "Parents of New York United" (PONYU). *See* Pico v. Board of Educ., Island Trees Union Free School Dist., 474 F. Supp. 387, 389 (E.D.N.Y. 1979). The books PONYU considered objectionable were: K. VONNEGUT JR., SLAUGHTERHOUSE-FIVE (1969); D. MORRIS, THE NAKED APE (1967); P. THOMAS, DOWN THESE MEAN STREETS (1967); BEST SHORT STORIES BY NEGRO WRITERS (L. Hughes ed. 1967); ANONYMOUS, GO ASK ALICE (1971); O. LAFARGE, LAUGHING BOY (1929); R. WRIGHT, BLACK BOY (1945); A. CHILDRESS, A HERO AIN'T NOTHIN' BUT A SANDWICH (1973); E. CLEAVER, SOUL ON ICE (1968); A READER FOR WRITERS (J. Archer ed. 1971); and B. MALAMUD, THE FIXER (1966). *See* 474 F. Supp. at 389 nn. 2-4. These books are commonly selected for high school libraries nationwide and are on many recommended reading lists. In fact, *The Fixer* won the Pulitzer Prize for Letters in 1967. *See* Comment, *Censoring The School Library: Do Students Have the Right to Read?,* 10 CONN. L. REV. 747 n.4 (1978).

In addition to the authors and titles of the objectionable books, the PONYU list contained quotations from the books as well as editorial comments. *See* Pico v. Board of Educ., Island Trees Union Free School Dist. No. 26, 638 F.2d 404, 407-08 (2d Cir. 1980). For example, Eldridge Cleaver, author of *Soul on Ice*, was described as the "[l]eader of Black panther [sic] and not allowed to live in America." *See id.* at 407. The list further stated that the book was "FULL OF ANTI-AMERICAN MATERIAL AND HATE FOR WHITE WOMEN," and specifically cited what it considered to be objectionable passages, including: "There are white men who will pay you to fuck their wives. They approach you and say, 'How would you like to fuck a white woman?' " E. CLEAVER, *supra* note 1, at 158-59. Another example of a passage that led to a work being found objectionable by PONYU is from Oliver LaFarge's *Laughing Boy*: " 'I'll tell you, she is all bad; for two bits she will do the worst thing.' " O. LAFARGE, *supra* note 1, at 38. For a full listing of editorial comments and identification of "objectionable" passages by PONYU, see *Pico,* 638 F.2d at 419-22 n.1 (Mansfield, J., dissenting); Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 102 S. Ct. 2799, 2823-27 (1982) (Powell, J., dissenting).

2. The Island Trees Union Free School District is located in a suburban

ies. The superintendent of schools eventually persuaded the Board to follow the established book removal procedure,[3] which entailed appointing a committee of school staff and parents to make appropriate recommendations. The Board, however, ultimately rejected most of the committee's recommendations, banning all but two of the works from school libraries.[4] In response, a group of students brought suit to compel the Board to return the books to the library, arguing that the Board action violated their first amendment rights.[5] After

community on Long Island, New York. The district's population is almost entirely white and largely Italian and Irish. *See* Comment, *supra* note 1, at 747 n.3.

3. Initially, the Board, following the adjournment of a regularly scheduled meeting, "unofficial[ly] directed" the superintendent of schools and the junior and senior high school principals to immediately remove the listed books, pending a later Board decision. *Pico,* 474 F. Supp. at 390. Three days after this directive, the superintendent sent a memorandum to the Board stating that since the school district already had a policy on book removals, the Board would be best advised to adhere to the normal procedure. That procedure required the superintendent, after receiving an objection to a book, to appoint a committee to study the work and make recommendations on retaining it. *Pico,* 638 F.2d at 409.

The Board's president responded with a memorandum of his own to the superintendent, which again directed that "*all* copies of the library books in question" be removed immediately. *Id.* (emphasis in original). Shortly after this exchange of memoranda, the New York press learned of the book removal. *See, e.g.,* N.Y. Times, Mar. 27, 1976, at 24, col. 2; N.Y. Times, Mar. 19, 1976, at 29, col. 1. At a press conference, the Board explained their action by stating that the works in question included material offensive to "Christians, Jews, Blacks, and Americans in general," and that the books contained "obscenities, blasphemies, brutality, and perversion beyond description." *Pico,* 474 F. Supp. at 390. The Board's press release concluded that Board members, as elected officials in charge of education, had a duty and a moral obligation to remove the books. *Id.* at 390-91. The Board, however, finally appointed a separate committee to read and make recommendations about the books. *Id.*

4. The committee recommended the retention of five of the books: *The Fixer*, *Laughing Boy*, *Black Boy*, *Go Ask Alice*, and *Best Short Stories of Negro Writers*. The works it suggested for removal were: *The Naked Ape* and *Down These Mean Streets*. The committee was unable to reach a consensus on two works, *Soul On Ice* and *A Hero Ain't Nothin' But a Sandwich*, and did not have an opportunity to consider *A Reader for Writers*. Finally, the committee recommended that students have access to *Slaughterhouse-five* only with parental approval. *Id.* at 391.

The Board agreed with the committee that *Laughing Boy* should be retained. The Board also voted to allow students access to *Black Boy*, but only with parental approval. The nine remaining books were completely banned by the Board. *See supra* note 1.

5. Pico v. Board of Educ., Island Trees Union Free School Dist., 474 F. Supp. 387 (E.D.N.Y. 1979). Led by student council president Steven Pico, the students initially brought their action in state court, but the defendant Board had the suit removed to the United States District Court for the Eastern District of New York pursuant to 28 U.S.C. § 1441 (1976). *See Pico,* 638 F.2d at 406 n.1. Originally, the plaintiffs asserted five causes of action: (1) violation of the N.Y. CONST. art. 1, § 8, guarantee of liberty of speech, (2) violation of U.S.

the district court granted summary judgment in favor of the Board,[6] and a split Second Circuit Court of Appeals reversed and remanded the case for trial,[7] the Supreme Court granted certiorari.[8] A divided Court affirmed the Second Circuit,[9] the plurality *holding* that the Board could not remove the texts from the library shelves if their action was motivated by a dislike for the ideas contained in the books and was an attempt to deny students access to those ideas.[10] To prevail on remand, therefore, the students would have to show that the Board had acted with such a constitutionally impermissible motive.[11]

CONST. amend. I, (3) and (4), violations of the two preceding provisions as applied to school librarians, and (5) violation of 42 U.S.C. § 1983 (1976). *See Pico,* 474 F. Supp. at 393-94. The district court held that the plaintiffs had no standing to assert claims (3) and (4) against the librarians and that, of the remaining causes of action, only the § 1983 action alleging a violation of first amendment rights was necessary to allow the plaintiffs to vindicate their rights. *Id.* at 394.

6. Judge Pratt based his decision in favor of the Board on the Second Circuit's previous holding in Presidents Council, District 25 v. Community School Board No. 25, 457 F.2d 289 (2d Cir.), *cert. denied,* 409 U.S. 998 (1972), which gave school boards unfettered discretion on book removals. *Pico,* 474 F. Supp. at 394-97. *See infra* notes 82-85 and accompanying text.

7. Pico v. Board of Educ., Island Trees Union Free School Dist. No. 26, 638 F.2d 404, 419 (2d Cir. 1980). The Second Circuit remanded to the district court the determination of whether the Board's action was prompted by a dislike of the ideas contained in the books. All three judges on the panel wrote separate opinions, and their divergent viewpoints are underscored by their opinions in a companion case, Bicknell v. Vergenness Union High School Bd. of Directors, 638 F.2d 438 (2d Cir. 1980) (removal by school board of Patrick Mann's *Dog Day Afternoon* from the library shelf and placement of Richard Price's *The Wanderer* on a restricted shelf held valid). Judge Newman, writing for the court in *Bicknell*, stated that students had no constitutional right of access to material fairly characterized as indecent and vulgar. He distinguished the cases on the basis that in *Bicknell* there was no suggestion that the Board had removed books because of the ideas contained in the works or because of political motivation, while in *Pico* these were very real concerns. *Id.* at 441. Judge Sifton, of the Eastern District of New York, sitting by designation, favored ordering both school boards to return the removed books to the library. *Id.* at 442-43 (Sifton, J., dissenting); *Pico,* 638 F.2d at 418 n.13. Judge Mansfield, on the other hand, concluded that neither board had violated the constitution. *Bicknell,* 638 F.2d at 442 (Mansfield, J., concurring); *Pico,* 638 F.2d at 419, 425-29 (Mansfield, J., dissenting). Thus, while a majority of the judges thought the two cases indistinguishable, Judge Newman's distinctions prevailed.

8. Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 454 U.S. 891 (1981). *See infra* note 110.

9. The Justices wrote seven separate opinions. *See infra* note 101.

10. Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 102 S. Ct. 2799, 2810 (1982).

11. On August 12, 1982, the Board voted to return all nine of the removed books to the library shelves. Its decision not to continue litigation was prompted by the advice of the Board's counsel, and also a petition signed by 1200 parents. *See* Nocera, *The Book-Banning Brawl,* THE NEW REPUBLIC, Sept. 13, 1982, at 20, 24.

Board of Education, Island Trees Union Free School District No. 26 v. Pico, 102 S. Ct. 2799 (1982).

Book removals from school libraries dramatize the inherent tension between two goals of public education. On the one hand, public schools have traditionally played a role as transmitters of societal values.[12] In acknowledging that society may legitimately use schools as a mechanism for "inculcating fundamental values necessary to the maintenance of a democratic political system"[13] and that schools are "the primary vehicle for transmitting 'the values on which our society rests,' "[14] the Supreme Court and other courts have consistently recognized that the states and their local school boards have primary and comprehensive control over public education.[15] Accordingly, the judiciary has been reluctant to meddle in school affairs,[16] frequently recognizing that school boards need broad discretionary powers.[17]

Counterpoised to the socialization function of the school is the concept of freedom of inquiry. The first amendment's objective of preserving a free marketplace of ideas from which enlightened discussion will ultimately lead to truth[18] is especially

12. "[A] principal function of all elementary and secondary education is indoctrinative—whether it be to teach the ABC's or multiplication tables or to transmit the basic values of the community." James v. Board of Educ., 461 F.2d 566, 573 (2d Cir.), *cert. denied,* 409 U.S. 1042 (1972) (school could not discharge teacher for wearing black armband protesting the Vietnam War if such expression did not disrupt classroom activities and did not influence the students). Judge Mansfield, a dissenter in the circuit court decision in *Pico*, was a member of the unanimous three judge panel that rendered the *James* decision. *See also* Note, *Removal of Public School Library Books: The First Amendment Versus the Local School Board,* 34 VAND. L. REV. 1407, 1409 (1981).

13. Ambach v. Norwick, 441 U.S. 68, 77 (1979) (upholding statute prohibiting aliens from teaching in the public schools unless they intended to become U.S. citizens).

14. Plyer v. Doe, 457 U.S. 202, 221 (1982) (state could not exclude illegal aliens from the public schools) (quoting Ambach v. Norwick, 441 U.S. at 76).

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

16. Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

17. Zykan v. Warsaw Community School Corp., 631 F.2d 1300, 1305-06 (7th Cir. 1980). Even courts that reverse school board actions note that they do not seek to limit a school board's traditionally wide discretion in prescribing curricula, setting classroom standards, and evaluating teachers. *See, e.g.,* James v. Board of Educ., 461 F.2d at 575; Russo v. Central School Dist. No. 1, 469 F.2d 623, 633 (2d Cir. 1972), *cert. denied,* 411 U.S. 952 (1973) (school board could not dismiss teacher who refused to salute the flag). Of course, schools could still serve as inculcators of societal values even if the discretionary authority rested at some other level of government, such as the state. Local control, however, helps ensure that schools transmit local values to students. *See infra* notes 63-66 and accompanying text.

18. "It is the right of the public to receive suitable access to social, polit-

important in a school setting because students are entitled to, and a quality education requires, exposure to a broad range of ideas. Even though open inquiry hampers the inculcating function, the Court has long recognized that a local school's power to socialize is limited: the state cannot use public education to "foster a homogeneous people"[19] by standardizing children, because a child is not a mere creature of the state.[20] Consequently, the state's interest in universal education must be balanced against those fundamental rights and interests upon which state action might impinge.[21] When faced with direct and sharp implications of basic constitutional values, the judiciary has forgone its normal reluctance to intervene in daily school operations,[22] especially upon proof of interference with a student's first amendment rights.[23] Declaring that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[24] the Court has found "scrupulous" protection of students' constitutional rights necessary to avoid "strangl[ing] the free mind at its source and teach[ing] youth to discount important principles of our government as mere platitudes."[25]

I. THE TENSION BETWEEN FREE INQUIRY AND ACCULTURATION

A. The First Amendment and Freedom of Inquiry

Central to delineating the first amendment's contours in a school setting is that provision's major goal of safeguarding the free exchange of information necessary for a self-governing

ical, esthetic, moral, and other ideas and experiences . . . ." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

19. Meyer v. Nebraska, 262 U.S. 390, 402 (1923) (law forbidding teaching in a foreign language and teaching a foreign language to students held unconstitutional).

20. Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (striking down Oregon statute prohibiting parents from sending their children to private schools).

21. Wisconsin v. Yoder, 406 U.S. 205, 214-15 (1972) (statute compelling Amish parents to continue to send their children to school after the eighth grade declared unconstitutional because it infringed upon the fundamental right of free exercise of religion and the parents' interest in raising their children as they saw fit).

22. Epperson v. Arkansas, 393 U.S. 97, 104 (1968). *See infra* notes 60-61 and accompanying text.

23. Official interference with teachers' first amendment rights can also evoke judicial involvement in school operations. *See supra* note 17.

24. *Tinker,* 393 U.S. at 506. *See infra* notes 35-37 and accompanying text.

25. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943). *See infra* notes 33-34 and accompanying text.

people.[26] James Madison, who headed the committee that drafted the first amendment, stated: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[27] The underlying assumption of the amendment is that only by allowing all viewpoints to be expressed will truth be attained because truth will ultimately prevail in the competition of ideas.[28] Thus, the state is not permitted to suppress ideas it believes are incorrect; rather, it may only put forth its own ideas as rebuttal.[29]

The first amendment seeks to insure the free flow of information by prohibiting government restriction of expression "because of its message, its ideas, its subject matter, or its content."[30] In certain circumstances the state can prescribe reasonable "time, place, or manner" restrictions on communication, but only when the regulations apply irrespective of what is being said.[31] Consequently, the state can regulate to some degree when and where the exchange of information occurs, but cannot regulate which ideas are being discussed. To allow content regulation of expressive activity—censorship—would contradict the "profound national commitment to the principle that debate on public issues should be

26. "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I. "[F]reedom of expression is essential to provide for participation in decision-making by all members of society. This is particularly significant for political decisions. . . . [T]he governed must . . . have full freedom of expression both in forming individual judgments and in forming the common judgment." T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 7 (1970). Even apart from the role it plays in the political process, the first amendment is important because it promotes individual fulfillment and self-realization. Police Dept. v. Mosley, 408 U.S. 92, 96 (1972). *See also* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 578-79 (1978).

27. 9 WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910), *quoted in Pico,* 102 S. Ct. at 2808.

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

29. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

30. *Mosley,* 408 U.S. at 95 (ordinance prohibiting picketing in the vicinity of school invalid because, in allowing exception for labor union picketing, the state had not been content-neutral).

31. Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85, 93-94 (1977) (ordinance banning "for sale" and "sold" signs in an effort to stem the exodus of white homeowners from a racially integrated town invalidated as content regulation of speech). *But cf.* Young v. American Mini-Theaters, 427 U.S. 50 (1976) (upholding zoning restrictions on "adult" theaters).

uninhibited, robust, and wide-open."[32]

Courts have employed the first amendment's proscriptions in two basic ways to limit a local school official's actions. In *West Virginia State Board of Education v. Barnette*,[33] the Supreme Court held that school officials could not compel a student to salute and pledge allegiance to the flag because the state could not force individuals to express any particular viewpoint. The Court pronounced that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[34] Not until *Tinker v. Des Moines Independent Community School District*,[35] however, did the Court expressly extend first amendment protection to expressive conduct actually initiated by elementary and secondary school students.[36] In *Tinker*, local school officials had suspended several students for wearing black armbands to protest the Vietnam War. Overturning the suspension, the Court declared that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students."[37]

Through *Barnette* and *Tinker*, the Court has established that a school official's discretion is limited by a student's constitutional right to expression. A local school board's removal of a work from its library, however, infringes upon freedom of expression less directly. The board is not forcing students to profess to ideas in which they do not believe, as in *Barnette*, nor is the board preventing students from voicing an opinion, as in *Tinker*. These officials are nonetheless denying students access to the ideas contained in the removed works. To vindicate

32. *Mosley,* 408 U.S. at 96 (quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964)). *See also* TRIBE, *supra* note 26, at 580-82.

33. 319 U.S. 624 (1943). *See supra* text accompanying note 25.

34. *Id.* at 642.

35. 393 U.S. 503 (1969).

36. T. EMERSON, *supra* note 26, at 609. *Tinker* has been proclaimed the "pathfinder" case in the recognition of students' rights of expression. *See* Comment, *Removal of Books from School Libraries by School Board Violates Students' First Amendment Rights*.—Minarcini v. Strongsville City School District, 541 F.2d 577 (6th Cir. 1976), 45 U. CIN. L. REV. 701, 703 (1976) (citing Denno, *Mary Beth Tinker Takes the Constitution to School,* 38 FORDHAM L. REV. 35, 53 (1969)).

37. *Tinker,* 393 U.S. at 506. The special circumstances of the school environment do require, though, some limitations on students' first amendment rights that would not be acceptable outside of an educational context. Specifically, students cannot be allowed to materially and substantially disrupt the work and discipline of the school, or infringe upon the right of other students. *Id.* at 509, 514.

their right to prevent book removals, student plaintiffs have had to look beyond *Barnette* and *Tinker*, finding support in two related concepts that encourage freedom of inquiry.

1. *The Right to Receive Information*

A fairly recent constitutional development promoting the free exchange of information is the right to receive information.[38] The Supreme Court first suggested the existence of this constitutional protection in *Martin v. City of Struthers*,[39] where the Court voided an ordinance prohibiting the door-to-door distribution of religious literature. Not only did the ordinance violate the distributor's right to disseminate messages through both literature and speech, the Court declared, it also interfered with a willing recipient's right to obtain the literature.[40] Yet, the Court seemed reluctant to rest its decision on the rights of recipients, referring only in dicta to the right to receive information.[41] Nearly twenty years later, in *Lamont v. Postmaster General*,[42] the Court relied on a recipient's first amendment rights in striking down a law that required an addressee to return a reply card to the Post Office before mail could be received from foreign Communists. The Court reasoned that by requiring the card's return the state had impermissibly placed an affirmative obligation on addressees' enjoyment of their first amendment rights. The Court did not, however, specify the exact nature of the first amendment rights involved.[43]

38. *See, e.g.*, Note, *The Constitutional Right to Know*, 4 HAST. CONST. L.Q. 109 (1977); Note, *The Right to Know in First Amendment Analysis*, 57 TEX. L. REV. 505 (1979); Emerson, *Legal Foundations of The Right to Know*, 1976 WASH. U.L.Q. 1, 6 (1976). The evolution of this right has predominantly taken place outside of the academic setting. For application of the right to receive information in the classroom, however, see *infra* notes 92-99 and accompanying text.

39. 319 U.S. 141 (1943).

40. *Id.* at 149. The drafters of the first amendment "chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. This freedom embraces the right to distribute literature . . . and necessarily protects the right to receive it." *Id.* at 143. In Marsh v. Alabama, 326 U.S. 501 (1946), in the context of holding that company policy in a company town could not prevent the distribution of religious literature, the Court again mentioned, in dicta, the right to receive information as an alternative ground for decision. *Id.* at 508-09.

41. Note, *The Right to Know in First Amendment Analysis*, *supra* note 38, at 508.

42. 381 U.S. 301 (1965).

43. Foreign nationals do not have a constitutional right to use the United States postal system. *Cf. id.* at 308 (Brennan, J., concurring). Justice Brennan, in his concurrence, was more explicit in his reliance on the right to receive information: "The right to receive publications is . . . a fundamental right." *Id.*

A majority of the Court finally expressly embraced the concept of a constitutional right to receive information in *Stanley v. Georgia*,[44] calling that right "well established" and "fundamental to our free society."[45] There the Court voided a statute making possession of pornography in a private residence a crime, finding that individuals had a right to obtain publications regardless of the publication's content.[46] Moreover, in that same year a unanimous Court proclaimed that individuals have a right to suitable access to a variety of ideas and experiences. In *Red Lion Broadcasting Co. v. FCC*,[47] the Court used the right to receive information as a basis for upholding the FCC's "fairness doctrine," which requires broadcasters to provide time for rebuttal to opinions expressed on controversial issues.

Perhaps the most important right-to-receive-information case, though, is *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[48] In *Virginia State Board*, the Court struck down a state law prohibiting licensed pharmacists from advertising the price of prescription drugs. The law had been challenged by consumers, potential recipients of the information. The Court stated that "where a speaker exists . . . the protection afforded [by the first amendment] is to the communication, to its source and to its recipients both."[49] *Virginia State Board* is significant because it extends the right to receive information so as to allow the intended recipient of specific information its protection even when the sender is unspecified.[50]

Brennan reasoned that the distribution of ideas would be of no avail unless the addressee was free to receive and contemplate them. *Id.* Another postal controversy appeared nine years later in Procunier v. Martinez, 416 U.S. 396 (1974), in which the Supreme Court struck down prison regulations that restricted the flow of personal mail to and from inmates. The Court stated that both the senders and recipients of communication enjoy first amendment protection against "unjustified governmental interference with the intended communication." *Id.* at 408-09.

44. 394 U.S. 557 (1969).

45. *Id.* at 564.

46. *Id.* The Court emphasized that although "[s]tates retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home." *Id.* at 568.

47. 395 U.S. 367, 390 (1969).

48. 425 U.S. 748 (1976).

49. *Id.* at 756.

50. *Id.* at 756-57. *See also* Note, *The Right to Know in First Amendment Analysis, supra* note 38, at 510.

2. *Academic Freedom*

Academic freedom, another concept which promotes the free exchange of information, has been defined as "that aspect of intellectual liberty concerned with the peculiar institutional needs of the academic community."[51] According to the American Association of University Professors (A.A.U.P.), the concept of academic freedom incorporates much of the function of the first amendment in the academic community: "Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition."[52]

In contrast to its treatment of the right to receive information, the Court has never tried to establish academic freedom as an independent constitutional right. Instead, the Court has "confined itself to eloquent but isolated statements on the significance of academic freedom," generally considering academic freedom as one factor relevant to a decision.[53] A recurring fact pattern in which the Court discusses academic freedom involves governmental inquiry into university professors' political views.[54] For example, in *Keyishian v. Board of Regents*,[55] the Court invalidated a statute requiring college instructors to sign oaths attesting that they were not Communists. The Court denounced orthodoxies in the classroom, emphasizing the importance of academic freedom: "The Na-

51. *Developments in the Law—Academic Freedom,* 81 HARV. L. REV. 1045, 1048 (1968). The concept had its origin in the medieval university—a community of scholars engaged in the pursuit of knowledge. EMERSON, *supra* note 26, at 593.

52. AMERICAN ASS'N OF UNIVERSITY PROFESSORS & ASS'N OF AMERICAN COLLEGES, STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE (1940), *reprinted in* EMERSON, *supra* note 26, at 594. The statement is also printed annually in the A.A.U.P. Bulletin. *See, e.g.,* 64 A.A.U.P. BULL. 108 (1978).

53. EMERSON, *supra* note 26, at 610, 616. *See infra* notes 54-62 and accompanying text.

54. *See, e.g.,* Wieman v. Updegraff, 344 U.S. 183, 190-96 (1952) (Frankfurter, J., concurring) (striking down a required loyalty oath for university professors); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (reversing a professor's contempt conviction for failing to answer questions concerning possible subversive activities); *Id.* at 262-63 (Frankfurter, J., concurring); Shelton v. Tucker, 364 U.S. 479, 485-87 (1960) (striking down a statute which required all teachers—secondary and post-secondary—to list their organizational memberships).

55. 385 U.S. 589 (1967). *Keyishian* drew upon the precedents of *Wieman*, *Sweezy*, and *Shelton*. *See supra* note 54. The Court then utilized *Keyishian* in both Epperson v. Arkansas, 393 U.S. 97 (1968) and Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969). *See infra* notes 60-62 and accompanying text.

tion's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovered truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' "[56]

The Court has also discussed the concept of academic freedom in the secondary school setting. In *Meyer v. Nebraska*,[57] the Court struck down as a due process violation a statute prohibiting foreign language instruction in public schools.[58] The Court concluded that one of the statute's defects was that it "interfere[d] . . . with the opportunities of pupils to acquire knowledge."[59] Interference with educational inquiry was also one defect of an Arkansas statute that prohibited the teaching of evolution in public schools. In *Epperson v. Arkansas*,[60] the Court relied on the establishment clause to overturn the statute, the majority not wanting to "re-enter the difficult terrain" of academic freedom which the Court had "traversed" in *Meyer*.[61] The Court also addressed the issue of academic freedom in *Tinker*, declaring that "state-operated schools may not be enclaves of totalitarianism," and "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."[62]

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56. *Keyishian*, 385 U.S. at 603 (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

57. 262 U.S. 390 (1923).

58. Some jurists have criticized *Meyer* as an example of the Court substituting its own judgment for that of the legislature in the era of substantive due process. *See, e.g.*, Cary v. Board of Educ., 598 F.2d 535, 540 (10th Cir. 1979) (teachers unsuccessfully challenged school board decision not to approve ten books for use in English classes). Yet, Professor Emerson thinks that the Court would probably still reach the same result in *Meyer* today, though resting on different grounds—likely either a modified form of substantive due process or first amendment protection. EMERSON, *supra* note 26, at 600.

59. Meyer v. Nebraska, 262 U.S. at 401. The statute's other faults were that it interfered with language teachers' opportunities to make a living and with parents' power to control their children's education. *Id.*

60. 393 U.S. 97 (1968).

61. *Id.* at 105-06. Justice Stewart in his concurrence discussed academic freedom more explicitly. He reasoned that a state could legitimately determine which academic subjects would or would not be included in the curriculum but could not criminally sanction a teacher for merely mentioning the existence of an entire system of respected thought. *Id.* at 115-16.

Professor Emerson suggests that the Court should have rested its decision on the right to receive information instead of the establishment clause. Emerson, *supra* note 38, at 8.

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

B. Acculturation and the Local School Board

1. *Board Discretion*

Although the *Tinker* goal of avoiding a "closed-circuit" treatment of students does limit local school board discretion, local boards have traditionally enjoyed nearly complete control in determining how the educational process will socialize students. Communities are able to transmit societal values to students via public education because popularly elected local boards usually administer the schools.[63] Since the local school board is so close to the people it represents,[64] constituents can readily express their reactions to board decisions, particularly at the next election. The Court has, in fact, repeatedly recognized that the respective states and their local boards have primary responsibility for education.[65] This responsibility includes more than simply providing students with basic skills; it also entails transmitting democratic and community values.[66]

Accordingly, the Court has stated that the judiciary should not involve itself with ordinary conflicts in the school,[67] nor should judges, acting merely on personal beliefs, overturn school officials' decisions.[68] "The system of public education that has evolved in this Nation," the Court has declared, "relies necessarily upon the discretion and judgment of school administrators and school board members."[69] Additionally, school officials have more latitude in regulating speech than do other state officials because students constitute a captive audience and, unlike adults, they are not free to leave presentations

63. The local school board has traditionally enjoyed almost exclusive control over public education in the United States. Niccolai, *The Right to Read and School Library Censorship,* 10 J.L. & Educ. 23 (1981).

64. *Pico,* 102 S. Ct. at 2822 (Powell, J., dissenting).

65. Most states have in turn delegated the primary responsibility for public education to the local school board. *See, e.g., Tinker,* 393 U.S. at 507; *Epperson,* 393 U.S. at 104; Zykan v. Warsaw Community School Corp., 631 F.2d 1300, 1305 (7th Cir. 1980). For a discussion of *Zykan*, see *infra* notes 86-91 and accompanying text.

66. *See supra* notes 15-17 and accompanying text.

67. *Epperson,* 393 U.S. at 104.

68. Wood v. Strickland, 420 U.S. 308, 326 (1975) (upholding expulsion of students for violating school prohibition against possession of alcoholic beverages at school or school activities).

69. *Id.* The Court continued, "[Section] 1983 was not intended to be a vehicle for federal-court corrections of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees." *Id.*

which offend them.[70] Some courts have gone so far as to assert that "the First Amendment leaves undisturbed the power of local officials to prescribe the curriculum and teaching techniques of the schools in their care."[71]

2. *Minors and Obscenity*

Society also attempts to socialize its members by regulating their exposure to obscenity, an area the Court declared to be outside of first amendment protections in *Miller v. California*,[72] and such regulation can legitimately be stronger when dealing with children. In *Ginsberg v. New York*,[73] the Court up-

70. Thomas v. Board of Educ., Granville Cent. School Dist., 607 F.2d 1043, 1049 (2d Cir. 1979), *cert. denied,* 444 U.S. 1081 (1980).

71. East Hartford Educ. Ass'n v. Board of Educ., 562 F.2d 838, 851 (2d Cir.) (Meskill, J., dissenting), *rev'd on rehearing en banc,* 562 F.2d 856 (2d Cir. 1977). Judge Meskill wrote for the majority in the later decision. *See also Developments in the Law-Academic Freedom, supra* note 51, at 1052-54.

In *James v. Board of Education*, the court noted that "courts consistently have affirmed that curriculum controls belong to the political process and local school authorities." 461 F.2d 566, 573 (2d Cir.), *cert. denied,* 409 U.S. 1042 (1972). For an example of a court reversal of a school board curriculum decision, see Pratt v. Indep. School Dist. No. 831, Forest Lake, Minn., 670 F.2d 771 (8th Cir. 1982) (school board's ideologically-based removal from the curriculum of a film concerning Shirley Jackson's short story *The Lottery* violated students' first amendment rights).

72. 413 U.S. 15, 23-24 (1973). Thus, if the materials which a school board sought to remove were constitutionally "obscene," the students clearly could not challenge the removal. To be "obscene," a work "taken as a whole" must lack "serious literary, artistic, political, or scientific value" and must appeal to the "prurient interest in sex." *Id.* at 24. The majority in *Miller* conceded that banning "obscenity" may restrict ideas as well, but they reasoned that anything which would constitute obscenity would not be an "essential part of any exposition of ideas, and [would be] of such slight social value as a step to truth that any benefit that [might] be derived from them [would] clearly be outweighed by the social interest in order and morality." *Id.* at 20-21 (quoting Roth v. United States, 354 U.S. 476, 484-85 (1957)). Justices Douglas and Black protested that even the standards announced in *Miller* and *Roth* impermissibly restricted thought. *See, e.g., Miller,* 413 U.S. at 40 (Douglas, J., dissenting); *Roth,* 354 U.S. at 508-14 (Douglas, J., dissenting).

While many school boards have objected to books on library shelves because of vulgar language, no board has claimed that the objectionable books constituted obscenity under *Miller*. *See, e.g., Pico,* 102 S. Ct. at 2802 n.2; Presidents Council, Dist. 25 v. Community School Bd. No. 25, 409 U.S. 998, 999 (1972) (Douglas, J., dissenting to denial of cert.); Bicknell v. Vergennes Union High School Bd. of Directors, 638 F.2d 438, 441 n.3 (2d Cir. 1980); Zykan v. Warsaw Community School Corp., 631 F.2d 1300, 1302 n.4. (7th Cir. 1980); Minarcini v. Strongsville City School Dist., 541 F.2d 577, 580 (6th Cir. 1976). Interestingly, the chairperson of the school board in Right to Read Defense Comm. v. School Comm., 454 F. Supp. 703 (D. Mass. 1978), asserted early in the controversy that the objectionable work was "obscene" under *Miller*, but at trial, the Board did not make such a claim. *Id.* at 705 n.1. The Board's counsel probably informed the Board that such an assertion would be futile.

73. 390 U.S. 629, 638 (1968).

held a statute prohibiting the sale to minors of materials that would not have been obscene for adults, noting that in seeking to protect children the state could constitutionally promulgate different obscenity standards for minors than for adults.[74] Seven years later, despite declaring unconstitutional an ordinance that prohibited drive-in theaters from showing movies displaying nudity, the Court again noted that "[i]t is well settled that a state or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults."[75] Finally, in *FCC v. Pacifica Foundation*,[76] the Court approved FCC sanctions imposed on radio stations that played a monologue containing "indecent" but not obscene language. The much-maligned[77] plurality opinion expressed particular concern about young children being exposed to the broadcast.[78]

Relying upon *Ginsberg* and *Pacifica Foundation*, Judge Newman[79] of the Second Circuit concluded in his concurring opinion in *Thomas v. Board of Education*[80] that school officials can regulate distribution on public secondary school campuses of materials containing indecent language. He declared that schools had a responsibility to promote standards of decency and civility among students, and that the first amendment did not prevent schools from taking reasonable steps toward attaining this goal. Moreover, he reasoned that many students, who comprised a captive audience, as well as their parents, legitimately expected the school to reasonably regulate vulgarity. Judge Newman reasoned that if the FCC could keep indecent language off the radio, then a school could stop indecent lan-

74. *Ginsberg* adopted the "variable obscenity" approach suggested in Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 MINN. L. REV. 5, 68-70 (1960). Dean Lockhart and Professor McClure argued that obscenity should be defined in terms of the tastes and sophistication of the work's intended audience. *Id. See also* J. NOWAK, R. ROTUNDA, J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 836-37, 843-44 (1978).

75. Erzonoznik v. City of Jacksonville, 422 U.S. 205, 212 (1975). The Court voided the ordinance as an impermissibly overbroad effort to protect minors. The Court said that any restrictions placed on dispersing protected information to minors must be narrowly drawn. *Id.* at 213.

76. 438 U.S. 726 (1978). The piece at issue was George Carlin's monologue entitled *Filthy Words*.

77. *See, e.g.,* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 67-68 (Supp. 1979); Comment, *Not on Our Shelves; A First Amendment Analysis of Library Censorship in the Public Schools,* 61 NEB. L. REV. 98, 112-13 (1982).

78. FCC v. Pacifica Found., 438 U.S. at 749.

79. For Judge Newman's role in *Pico* at the circuit court level, *see supra* note 7.

80. 607 F.2d 1043, 1053, 1058 (2d Cir. 1979) (Newman, J., concurring), *cert. denied,* 444 U.S. 1081 (1980).

guage from circulating on school grounds.[81]

II. THE BOOK REMOVAL DILEMMA

A. Previous Lower Court Decisions

The first case to deal specifically with the tension between free inquiry and acculturation in the context of a challenge to a school library book removal strongly supported the acculturation goal. *Presidents Council, District 25 v. Community School Board No. 25*[82] recognized school board discretion to the virtual exclusion of first amendment considerations. The Second Circuit reasoned that since the school board could freely select library books, it could naturally freely remove them.[83] Citing *Epperson*'s admonition to the judiciary to avoid intervention in daily school operations, the court concluded that no constitutional issue was present.[84] The Supreme Court denied certiorari in *Presidents Council*, but Justice Douglas vigorously dissented, asserting that in the absence of disciplinary risks, students should have the right to total ideological exposure.[85]

Although not recognizing a student's right to total ideological exposure, the Seventh Circuit established some theoretical limits on a school board's inculcating power in *Zykan v. War-*

81. *Id.* at 1057.

82. 457 F.2d 289 (2d Cir.), *cert. denied,* 409 U.S. 998 (1972). The local school board removed *Down These Mean Streets* by Piri Thomas from the junior high school library. The book, an autobiography of a boy growing up in Spanish Harlem, contains descriptions of sex, violence, and drugs. *See generally* O'Neil, *Libraries, Liberties and the First Amendment,* 42 U. Cin. L. Rev. 209 (1973); Levine, *School Libraries: Shelving East Harlem,* 1973 Civ. Lib. Rev. 1.

83. *Presidents Council,* 457 F.2d at 293.

84. *See supra* text accompanying note 22. Moreover, the court implied that a school library book removal could never constitute a constitutional transgression: "To suggest that the shelving or unshelving of books presents a constitutional issue, *particularly where there is no showing of a curtailment of freedom of speech or thought*, is a proposition we cannot accept." *Presidents Council,* 457 F.2d at 293 (emphasis added). Other courts have pointed to the emphasized phrase as a means for limiting the *Presidents Council* holding, although their efforts are less than convincing. *See, e.g.,* Minarcini v. Strongsville City School Dist., 541 F.2d 577, 581 (6th Cir. 1976); Salvail v. Nashau Bd. of Educ., 469 F. Supp. 1269, 1273-74 (D.N.H. 1979). A fair reading of *Presidents Council* indicates that the court would allow school boards to remove library books even if students could demonstrate that freedom of speech was harmed. *See* Note, *First Amendment Limitations on the Power of School Boards to Select and Remove High School Text and Library Books,* 52 St. John's L. Rev. 457, 467 (1978).

85. Presidents Council, Dist. 25 v. Community School Bd. No. 25, 409 U.S. 998, 999-1000 (1972) (Douglas J., dissenting to denial of cert.). Justice Douglas asked, "What else can the School Board now decide it does not like? How else will its sensibilities be offended?" *Id.*

saw Community School Corporation.[86] That court resolved the conflict between these two goals by declaring that school boards could not completely deny student access to a certain viewpoint by unshelving all the books espousing that position. In *Zykan*, students challenged a library book removal,[87] claiming that it was motivated by school officials' personal beliefs. The court, however, concluded that local school boards could properly make decisions based on their own social, political, and moral views[88] because they were elected officials with broad discretion and because high school students have not yet developed "the intellectual skills necessary for taking full advantage of the marketplace of ideas."[89] This lack of maturity, coupled with society's need to imbue community values, was held to be sufficient to limit a student's right to academic freedom.[90] Nevertheless, the court warned that a book removal would violate the first amendment if it was part of a "systematic effort to exclude a particular type of thought," or was the result of some identifiable "ideological preference."[91]

While *Zykan* placed a very high burden on student plaintiffs, *Minarcini v. Strongsville City School District*,[92] a case decided in the years between *Presidents Council* and *Zykan*, concluded that school boards should be saddled with the bur-

86. 631 F.2d 1300 (7th Cir. 1980). *See generally* Note, *School Board Removal of Books From Libraries and Curricula*—Pico v. Board of Education *and* Zykan v. Warsaw Community School Corp., 30 U. KAN. L. REV. 146 (1981).

87. The book removed was *Go Ask Alice*. The plaintiffs also unsuccessfully challenged school decisions to eliminate certain books from use in the curriculum and to not rehire a particular English teacher. After the school officials removed the books in question, they gave them to a senior citizens group for a public burning. *Zykan*, 631 F.2d at 1302 n.2.

88. *Id.* at 1305.

89. *Id.* at 1304.

90. *Id.*

91. *Id.* at 1306. The court thus allowed the students to amend their complaint to comply with the court's definition of the cause of action. *Id.* at 1308-09.

92. 541 F.2d 577 (6th Cir. 1976). The school board in *Minarcini* had ordered Joseph Heller's *Catch 22* and Kurt Vonnegut's *Cat's Cradle* removed from the school library. The students also objected to the board's refusal, contrary to a faculty recommendation, to approve *Catch 22* and Vonnegut's *God Bless You, Mr. Rosewater* as a classroom or library text. The court found no constitutional violation in the Board's withholding of this approval. *Id.* at 579. *See generally* Comment, *Board of Education's Removal of Selected Book From Public High School Library Violates Students' First Amendment Right to Receive Information,* Minarcini v. Strongsville City School District, *541 F.2d 577 (6th Cir. 1976),* 55 TEX. L. REV. 511 (1977); Comment, *supra* note 36; Comment, *School Library Censorship: First Amendment Guarantees and the Student's Right to Know,* 57 U. DET. J. URB. L. 523 (1980); Comment, *Student's Right to Receive Information Precludes Board's Removal of Allegedly Offensive Books from High School Library,* 30 VAND. L. REV. 85 (1977).

den of persuasion in the struggle between acculturation and open inquiry. In contrast to other courts of appeals, the Sixth Circuit spoke forcefully for freedom of inquiry, using the right to receive information to justify student access to library books.[93] The Sixth Circuit declared that a school board could remove library books only for reasons neutral in terms of the first amendment, namely reasons not based on a book's content. Because the Board had offered no neutral explanation for the book removal, the court was forced to accept the plaintiff's contention that the removal was based upon board members' personal distaste for the book's content. Such a purge, the court concluded, violated a student's right to receive information.[94]

A number of district courts have followed *Minarcini*,[95] with *Right to Read Defense Committee v. School Committee*[96] providing important elaboration. In *Right to Read*, the district court ordered the school committee to return the challenged text to the high school library.[97] The court noted, however, that not all book removals would violate the first amendment; removals based on a "substantial and legitimate governmental interest"—something comparable to *Tinker*'s requirement of a disci-

93. The Supreme Court had previously dealt with the right to receive information in an academic setting, but the case did not involve secondary education and the Court's statements were dicta. In Kleindienst v. Mandel, 408 U.S. 753 (1972), the Court confronted the issue of whether academicians could force the United States Attorney General to issue a temporary visa to a foreign journalist to enable him to participate in a speaking tour of college campuses. The Court held that because Congress had plenary power over immigration it need not consider first amendment concerns, and the Attorney General exercising delegated authority could deny the visa on the basis of a facially legitimate reason. *Id.* at 769-70. The Court did state, however, that it had "recognized that this right [to receive information and ideas] is 'nowhere more vital' than in our schools and universities." *Id.* at 763 (citing, *inter alia*, Keyishian v. Board of Regents, 385 U.S. 589 (1967) and Epperson v. Arkansas, 393 U.S. 97 (1968)). Thus, *Mandel* can be read as implying that the academicians' right to receive information would have prevailed but for Congress's exceptional power over immigration. *Id.* at 767.

94. *Minarcini*, 541 F.2d at 581-83.

95. *See, e.g.*, Sheck v. Baileyville School Comm., 530 F. Supp. 679 (D. Me. 1982) (granting a preliminary injunction compelling the school board to return to the library Ronald Glasser's *365 Days*, a nonfictional collection of war accounts by American combat troops); Salvail v. Nashau Bd. of Education, 469 F. Supp. 1269 (D.N.H. 1979) (school board could not remove *Ms.* magazine from the library).

96. 454 F. Supp. 703 (D. Mass. 1978).

97. The work in question was an anthology of adolescent writings, *Male and Female Under 18*. The school committee objected to sexually candid language in the poem, *The City to a Young Girl*.

plinary threat—would pass constitutional muster.[98] No such interest was present in the committee's action, according to the court, despite the officials' professed attempt to protect students from vulgar language in one of the poems in the book. The offense taken by some parents at the poem's vocabulary did not establish that it would actually harm children, especially in the face of expert testimony to the contrary.[99]

B. THE SUPREME COURT'S DECISION

Faced with a variety of alternatives for resolving the tension presented by book removals,[100] the Supreme Court was left badly divided by *Board of Education Island Trees Union Free School District No. 26 v. Pico*.[101] The plurality opinion, authored by Justice Brennan, recognized a school board's broad discretion in administering public education[102] and its need to use the curriculum to transmit societal values.[103] Even so, the plurality rejected the Board's claim that its discretion in performing the inculcating function should be completely unfettered, reasoning that school boards, like other governmental

98. *Right to Read Defense Comm.*, 454 F. Supp. at 713. *See supra* note 37 and accompanying text.

99. *Right to Read Defense Comm.*, 454 F. Supp. at 713.

100. *See, e.g.*, Harpaz, *A Paradigm of First Amendment Dilemmas: Resolving Public School Library Censorship Disputes*, 4 W. NEW ENG. L. REV. 1 (1981); Niccolai, *supra* note 63; Note, *supra* note 12. For example, the Second Circuit appeared to take a new interstitial position contrary to its earlier holding in *Presidents Council* when it handed down its *Pico* and *Bicknell* decisions on the same day. Judge Sifton, writing for the circuit court in *Pico*, distinguished the case from *Presidents Council*, because *Pico* involved "unusual and irregular intervention in the school libraries operations by persons not routinely concerned with such matters." *Pico*, 638 F.2d at 414; *see supra* note 7. For works discussing *Pico* before the Supreme Court rendered its decision, see, for example, Comment, *supra* note 1; Note, *supra* note 86; Comment, *supra* note 77; and Note, *What Are the Limits to a School Board's Authority to Remove Books From School Library Shelves?* Pico v. Board of Education, Island Trees Union Free School District No. 26, 1982 WIS. L. REV. 417.

101. The plurality opinion was written by Justice Brennan. Justices Marshall and Stevens concurred in the entire opinion, while Justice Blackmun concurred in all but one section and Justice White concurred in the result only. *See infra* note 110. The plurality limited its holding to the issue of book removal from a school library; it explicitly refrained from ruling on the issues involved in decisions regarding the curriculum and library book selection. Chief Justice Burger wrote a dissenting opinion in which Justices Rehnquist, Powell, and O'Connor concurred. Additionally, Justice Rehnquist wrote a separate opinion in which every dissenter but Justice O'Connor concurred. Finally, Justices Powell and O'Connor wrote separate dissents in which no other jurist concurred.

102. *Pico*, 102 S. Ct. at 2806.

103. *Id.*

entities, must respect the first amendment.[104] Consequently, the judiciary must scrutinize educational officials' decisions that sharply and directly implicate constitutional rights.[105]

A sharp and direct implication of first amendment rights is present when a school board removes a book from the school library, the plurality concluded, because an unshelving could violate a student's right to receive information.[106] The prevailing Justices based their conclusion on a student's need for exposure to a multiplicity of ideas in order to prepare for adulthood in our pluralistic society and on the rationale that students should not be merely docile recipients of whatever the state chooses to communicate.[107] Although conceding that any student's first amendment rights must be construed in the special context of the educational setting, the plurality found school libraries an especially appropriate location for the recognition of students' first amendment rights.[108]

Accordingly, the plurality concluded that school boards cannot use book removals to establish an orthodoxy.[109] The motivation behind the book removal determines whether the board is establishing an impermissible orthodoxy. A removal based on educational suitability would thus be valid. The plurality, in fact, believed that the student-respondents had implicitly conceded that the Board could remove the books if their true concern was vulgarity. On the other hand, if the Board in-

104. *Id.* at 2807.

105. *Id.*

106. *Id.* at 2808.

107. *Id.*

108. *Id.* at 2809. The Court stated that the library is the principal location for students to pursue their freedom "to inquire, to study and to evaluate." *Id.* (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)). Moreover, "a library is a place [for a student] to test or expand upon ideas presented to him, in or out of the classroom." *Id.* (quoting Right to Read Defense Comm. v. School Comm., 454 F. Supp. 703, 715 (D. Mass. 1978)). The plurality conceded that the school board's claim for freedom from judicial scrutiny would be stronger in the area of curriculum decisions, as opposed to decisions concerning the noncompulsory environment of the library. Additionally, the plurality opinion cited the substantial role school boards play in determining a school library's content. *Id.*

109. *Id.* at 2812. The plurality concluded that ample evidence supported the possibility that the Board had intended to deny students access to ideas and that the district court had thus erred in granting the Board's motion for summary judgment. Evidence indicating that the Board's removal of the books was politically motivated included: statements by Board members objecting to anti-American themes in the books, the absence of any vulgarity in at least one book (*A Reader for Writers*), the extraordinary removal procedures that were employed in lieu of standard policy, and the inclusion of all of the books removed on the PONYU "objectionable" list. *See supra* notes 1, 3.

tended to deny students access to ideas with which Board members disagreed, then the Board would be transgressing students' rights.[110]

The dissenting Justices,[111] although conceding that the students enjoyed first amendment protections at school, concluded that because the Board was not restricting student expression the book removal did not infringe upon those rights.[112] While acknowledging that the right to receive information prohibited the government from creating unreasonable obstacles to the flow of information,[113] that right, according to the dissenters, did not place an affirmative obligation upon the state to aid speakers in reaching potential recipients. By choosing not to retain certain books, the Board was simply making a permissible decision not to disperse certain information.[114] Moreover, in pursuing the legitimate function of transmitting societal values, school boards must be permitted to make content-based

110. *Pico,* 102 S. Ct. at 2810. Justice Blackmun, in his concurrence, explicitly tried to reconcile the socialization function of schools with the Constitution's proscription against orthodoxies. He concluded that school officials could attempt to instill certain values "by persuasion and example," or by choice of emphasis, but that they could not attempt to shield students from ideas which they found politically distasteful. *Id.* at 2816 (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943)). Thus, Justice Blackmun stated, a school board could not remove library books for the purpose of restricting access to political ideas and social perspectives if the board was motivated simply by official disapproval of the ideas or perspectives. *Id.* at 2815.

Justice Blackmun agreed with the plurality that school boards could make books unavailable if they contained vulgar language. He did not, however, recognize the library as having any special constitutional significance; it too could be utilized in the socialization process. *Id.* at 2814-15. He did note that library book removals would normally present student plaintiffs with their best opportunity to establish that a school board was attempting to suppress exposure to ideas. *Id.* at 2814 n.1.

Justice White, who constituted the fifth vote for affirmation, concurred in the result only. He reasoned that a factual record should have been developed at the trial court before the Supreme Court embarked on any constitutional pronouncements. *Id.* at 2816. Some commentators, in fact, have thought it surprising that the Court granted certiorari in *Pico* in light of the absence of a trial record. *See* Comment, *supra* note 77, at 126 n.211.

111. While joining in Chief Justice Burger's dissenting opinion, Justices Rehnquist, Powell, and O'Connor each also wrote separate dissents.

112. *Pico,* 102 S. Ct. at 2818 (Burger, C.J., dissenting). *See also supra* notes 35-37 and accompanying text (first amendment protection extends to students' expressive conduct).

113. *Pico,* 102 S. Ct. at 2818 (citing Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976)). Additionally, Justice Rehnquist argued that the right to receive information applied only when state action constituted a complete denial of access to the ideas sought. This was not the case in *Pico*, he pointed out, because students could still obtain the books in stores or at the public library. *Id.* at 2831-32 (Rehnquist, J., dissenting).

114. *Id.* at 2818-19 (Burger, C.J., dissenting).

decisions regarding the appropriateness of retaining materials in the school library or curriculum.[115]

The *Pico* dissenters also delineated logical flaws in the plurality decision. Noting the plurality's prohibition against creating orthodoxies in the classroom, Chief Justice Burger argued that textbooks, which were required reading, had more potential for establishing an orthodoxy than library books, which were optional. The plurality had, however, restricted its ruling to the latter.[116] Justice Rehnquist pointed out that if students did have a right to receive information, then any book removal, regardless of the motivation behind it, would deny students access to ideas and information.[117] In addition, the dissenters questioned the plurality's distinction between book removal and selection, because both events had equal potential for suppressing student exposure to ideas.[118] The dissenters' final criticism was that the plurality opinion offered little guidance to parties involved in subsequent book removal disputes.[119]

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115. *Id.* Justice Rehnquist pointed out that none of the right-to-receive-information cases had dealt with elementary or secondary educational settings. He also asserted that the library had no special status under a student's right to receive information, because, unlike a university library, an elementary or secondary school library was not intended for freewheeling inquiry. *Id.* at 2832 (Rehnquist, J., dissenting).

Justice Rehnquist also put forth additional arguments his fellow dissenters did not make in their opinions. First, he concluded that even under the plurality's "suppression of ideas" standard, the Board's removal was valid, because it was based on concern for profanity and vulgarity and students could still discuss the themes of the removed books themselves. *Id.* at 2828-29. Justice Rehnquist also argued that in administering the library, the state was acting not in its role as sovereign, but rather in its role as educator. Pointing to Pickering v. Board of Education, 391 U.S. 563, 568 (1968), a case involving the state as an employer, and Adderley v. Florida, 385 U.S. 39, 46 (1967), a case involving the state as property owner, Justice Rehnquist asserted that when the state assumes a role other than sovereign, the first amendment does not apply to its actions with the same force. In its role as educator, the state was undertaking to socialize students, a process which inherently entails selecting certain ideas for presentation over others. While such discrimination would not be proper for the state as sovereign, it was permissible for the state as educator. *Pico,* 102 S. Ct. at 2829-30 (Rehnquist, J., dissenting).

116. *Id.* at 2821 (Burger, C.J., dissenting).

117. *Id.* at 2833 (Rehnquist, J., dissenting).

118. *Id.* at 2821 (Burger, C.J., dissenting), 2822-23 (Powell, J., dissenting), 2833 (Rehnquist, J., dissenting).

119. *Id.* at 2820 (Burger, C.J., dissenting). The dissenters characterized "educational suitability" as a "standardless phrase," and asserted that a prohibition against "'political' factors" motivating book removals also provided no guidance for future cases because "virtually all educational decisions necessarily involve 'political' determinations." *Id.*

III. RESOLVING THE TENSION BETWEEN FREE INQUIRY AND ACCULTURATION

The book removal controversy faced by the Court in *Pico* demonstrates that two major constitutionally recognized functions of public education can work at cross-purposes. The Court has established that public schools may properly inculcate students with societal values.[120] Clearly, the most efficient and effective indoctrination of societal values would prevent students from inquiring into areas of their own choosing. Yet, the Court has also recognized that students need freedom to inquire and to be exposed to a variety of ideas.[121] A theoretically pure marketplace of ideas, however, would preclude the use of schools as vehicles of socialization. Thus, both objectives cannot be fully realized.[122] While the dissenting Justices in *Pico* virtually ignored the goal of open inquiry, the plurality undertook the difficult task of trying to reconcile the tension between the inculcating function of public education and the concept of a free marketplace of ideas. The plurality's balance, however, does not afford open inquiry the protection it requires.

A. BOOK REMOVAL

1. *Freedom of Inquiry*

Open inquiry is a necessary component of education in a self-governing society, in the secondary as well as the collegiate setting.[123] Participation in the free marketplace of ideas cannot

120. *See supra* notes 12-14 and accompanying text.

121. *See supra* notes 53-56 and accompanying text.

122. *See* Comment, *Removing Books from School Libraries,* 96 HARV. L. REV. 151, 160 (1982).

123. Professor Emerson states:

> Ultimately any system of freedom of expression depends upon the existence of an educated, independent, mature citizenry. Consequently realization of the objectives of the First Amendment requires educational institutions that produce graduates who are trained in handling ideas, judging facts and argument, thinking independently, and generally participating effectively in the marketplace of ideas. Hence the First Amendment could be said to require the kind of educational institutions that are capable of producing such results.

EMERSON, *supra* note 26, at 613. *See also supra* notes 26-32, 56-62, and accompanying text. Speaking on the role of teachers from the primary grades to the universities, the Court stated that their task is "to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion." Weiman v. Updegraff, 344 U.S. 183, 195-97 (1952). *See also* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 512 (1969); Epperson v. Arkansas, 393 U.S. 97, 104-05 (1968).

be postponed, as Justice Rehnquist implies,[124] until a student matriculates. Not everyone partakes of post-secondary education, but those who do not are still fullfledged members of society who need and deserve the skills necessary to participate in self-government. Even a college education does not guarantee independent thought: students who attend a university may never be able to think independently if they received a thorough indoctrination at the secondary school level.

Some courts,[125] unlike the *Pico* dissenters, at least recognize that open inquiry is a laudable goal in secondary schools but argue that it must nevertheless be limited. They reason that secondary students lack the intellectual ability to effectively evaluate ideas, a skill necessary for meaningful participation in the free marketplace of ideas.[126] Accordingly, school boards and educational professionals, who are better able to evaluate ideas, need to offer students direction and guidance, which includes determining what books will be available in the library.[127] This position, however, underestimates students' abilities. As one federal judge stated: "Today's high school students are surprisingly sophisticated, intelligent, and discerning. They are far from easy prey for even the most forcefully expressed, cogent, and persuasive words."[128] Moreover, no book would even appear on a library shelf unless a school official (perhaps a prior board or more likely a librarian) had previously determined that the books had some educational value.[129]

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124. *Pico,* 102 S. Ct. at 2832 (Rehnquist, J., dissenting). No dissenter even acknowledged that freedom of inquiry and the free marketplace of ideas are laudable goals in a secondary school setting. Not once did a dissenter deal with or even mention the famous passage in *Tinker* stating that junior and senior high school students needed exposure to a wide variety of ideas. *See Tinker,* 393 U.S. at 511.

125. *See, e.g.,* Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980). *See also supra* text accompanying notes 86-91.

126. Justice Stewart noted: "[A] child . . . [does not possess the] full capacity for individual choice which is the presupposition of First Amendment guarantees." *Tinker,* 393 U.S. at 515; (Stewart, J., concurring). *See supra* notes 89-90 and accompanying text. *See also* Note, *supra* note 86, at 154.

127. *Zykan,* 631 F.2d at 1304.

128. Wilson v. Chancellor, 418 F. Supp. 1358, 1368 (D. Or. 1976) (voiding a school board order preventing the appearance of outside political speakers). Additionally, the American Library Association (A.L.A.) declares in its *Library Bill of Rights* that patrons of all ages should have unfettered access to all library material. American Library Association, Library Bill of Rights art. 5 (1948, amended 1980). The *Library Bill of Rights*, however, is an embodiment of A.L.A. positions and does not have binding legal effect.

129. It is very unlikely that a librarian would ever select a work which was even arguably "obscene." Comment, *supra* note 1, at 765 n.105. *See generally*

The plurality in *Pico* thus took a positive step in promoting freedom of inquiry by recognizing that the right to receive information through reading applies to secondary school students. As one commentator stated, "[J]udicial recognition of a right to read [school library books is] consistent with the purposes and premises of the first amendment,"[130] it being meaningless to protect only expression of ideas without protecting the receipt of those ideas as well.[131] The *Pico* dissenters correctly noted that the Court had never before applied this right to students in public schools. Yet, in *Tinker*, the Court had declared that students are entitled to full enjoyment of their first amendment rights as long as their exercise of such rights does not threaten school discipline, disrupt school activities, or infringe upon the rights of others.[132] Accordingly, students must be permitted to enjoy the "well established"[133] right to receive information unless their use of that right transgresses the *Tinker* limitations. A student's exercise of his or her right to read in the library does not, of itself, threaten school discipline or disrupt school activities. Nor does a reader infringe upon the rights of others by subjecting a captive audience to material they find offensive: only those who seek out a work will be exposed to it.[134]

Coupled with the *Pico* plurality's recognition of the right to receive information in a school setting is its recognition of the special status of the school library.[135] Perhaps Justice Rehnquist is correct in stating that little precedent exists for granting school libraries special constitutional status,[136] but "[a] library is a mighty resource in the free marketplace of ideas. It is specially dedicated to broad dissemination of ideas."[137] A library is therefore the focal point for freedom of inquiry within

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supra note 72 and *infra* note 208 (discussion of obscenity standards and school library collections).

130. O'Neil, *supra* note 82, at 222.

131. *Id.*

132. *Tinker,* 393 U.S. at 514. *See also supra* notes 35-37 and accompanying text (a student's right to receive information must be applied in light of the special educational environment).

133. *See supra* note 45 and accompanying text.

134. *See* Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269, 1275 (D.N.H. 1979). *See also supra* notes 80-81 and accompanying text; Comment, *supra* note 77, at 134.

135. A majority of the Court did not recognize this status. Justice Blackmun agreed with the dissenters that schools may also use the library to inculcate. *Pico,* 102 S. Ct. at 2814 (Blackmun, J., concurring).

136. *Id.* at 2832 (Rehnquist, J., dissenting). *See supra* note 115.

137. Minarcini v. Strongsville City School Dist., 541 F.2d 577, 582-83 (6th Cir. 1976) (citing Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissent-

a school.[138] As the plurality opinion pointed out, in the library "a student can literally explore the unknown and discover areas of interest and thought not covered by the prescribed curriculum. . . . Th[e] student learns that a library is a place to test or expand upon ideas presented to him, in or out of the classroom."[139] Thus, by providing a haven for open inquiry amidst an array of socializing forces, the library offers a reasonable solution[140] to the problem of striking a balance between the school's inculcating function and the free marketplace of ideas.

Nevertheless, the *Pico* dissenters argued that a student's right to receive information still should not limit school officials' discretion in removing library books. Chief Justice Burger did correctly state that a student's right to receive information does not place an affirmative obligation on the school to provide particular books in the library.[141] The Court has held, however, that once the state voluntarily chooses to provide a benefit it cannot subsequently deny or place conditions on the use of that benefit in a manner which impinges upon a patron's first amendment rights unless the state can demonstrate that some compelling state interest necessitates the restrictions.[142] Thus, once a school board voluntarily provides the benefit of a library, it cannot subsequently place restrictions on the library's use that violate a patron's constitutional rights.[143]

An unshelving implicates the right to receive information because the state is hindering access to information previously available. Such a hindrance is impermissible unless it can be justified in terms of some compelling state interest.[144] More-

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

138. *Pico,* 102 S. Ct. at 2809. *See also* O'Neil, *supra* note 82, at 246; *supra* note 108.

139. *Pico,* 102 S. Ct. at 2809 (quoting Right to Read Defense Comm. v. School Comm., 454 F. Supp. 703, 715 (1978)). *See also* O'Neil, *supra* note 82, at 246; *supra* note 108.

140. *See* Comment, *supra* note 1, at 770.

141. *Pico,* 102 S. Ct. at 2819 (Burger, C.J., dissenting).

142. *See* Sherbert v. Verner, 374 U.S. 398, 403-06 (1963) and cases cited therein.

143. *Minarcini,* 541 F.2d at 582. *Cf.* Douglas v. California, 372 U.S. 358 (1962) (while the state does not have to provide for appeals as a matter of right, having chosen to do so, it must also provide indigents with counsel for their appeals).

144. For example, in Lamont v. Postmaster General, 381 U.S. 301 (1965), requiring an addressee to fill out a return card before obtaining mail was held an impermissible hindrance on the addressee's right to receive information. Of

over, that the same books are available outside of the school does not save an otherwise unconstitutional removal. In *Virginia State Board*, the Court declared that the state could not restrict the right to receive information simply because the recipients could obtain the same message from another source.[145] The Court further held that recipients' rights do not depend on the rights of senders; a student's right to receive information exists irrespective of whether authors and publishers have a right to have their works placed in the school library.[146]

The *Pico* plurality's reliance upon the right to receive information was, therefore, an appropriate choice in light of its own precedent.[147] Unfortunately, the opinion qualified a student's right to read books found in the school library by holding that only those book removals motivated by school board dislike for the ideas contained in those works would violate the student's

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course, the government never had an obligation to provide a postal service, but once having done so it could not then transgress upon an addressee's rights. *See* TRIBE, *supra* note 77, at 675 n.5. For a discussion of the state's interest in book removal, see *infra* notes 151-81 and accompanying text.

145. The Court in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumers Council, Inc., 425 U.S. 748 (1976), unequivocally declared that alternative methods for obtaining information are irrelevant in determining whether an individual's right to receive information has been violated. *Id.* at 757 n.15. *See* Harpez, *supra* note 100, at 47. Consequently, Justice Rehnquist is wrong when he states that right-to-receive cases only involved relatively complete denials of access. *Pico,* 102 S. Ct. at 2831-32 (Rehnquist, J., dissenting). Even so, in some circumstances a board's removal of a library book may for all practical purposes be a complete denial of access. Students may be unable to purchase the books or to travel to public libraries during their often limited hours of business. One of the plaintiffs in Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269 (D.N.H. 1979), encountered this difficulty. *See id.* at 1275 n.5.

Justice Rehnquist also argued that a school's special status made the right to receive information totally inappropriate in the public educational setting. Merely declaring that in secondary schools the state is assuming the role of educator instead of sovereign, however, does not provide an adequate basis for a board's denying students their right to receive information. The Court has explicitly stated that junior and senior high school students enjoy first amendment rights. *See, e.g.,* Tinker v. Des Moines Indep. Community School Dist., 493 U.S. 503, 506 (1969).

146. *Virginia State Bd. of Pharmacy,* 425 U.S. at 756-57. In addition, the addressees in Lamont v. Postmaster General, 381 U.S. 301 (1965), had a right to receive their mail even though the foreign senders of that mail had no guaranteed right to use the United States postal system. *Id.* at 308 (Brennan, J., concurring). *See also* TRIBE, *supra* note 77, at 674-78.

147. The concept of academic freedom perhaps could have been equally as effective a tool, but that doctrine is considerably less developed and more amorphous than the right to receive information. *See supra* notes 51-62 and accompanying text. Perhaps the plurality feared that if it employed the concept of academic freedom its decision would have implications beyond the specific issue of book removal. The plurality took special care in limiting its holding to the book removal issue. *See Pico,* 102 S. Ct. at 2805.

right.[148] The Court could have reached this same result by simply resting upon *Barnette*'s proscription of state-prescribed orthodoxies. As Justice Rehnquist stated, a book removal, motivated by whatever reason, necessarily denies students access to the ideas it contains.[149] Therefore, even when school officials are not motivated by a desire to prescribe an orthodoxy, a book removal should still constitute a violation of a student's right to receive information absent a compelling state interest. The state regulation in *Virginia State Board*, for example, had the legitimate purpose of maintaining high standards of professionalism. The Court nonetheless concluded that this was not a sufficient justification for infringing upon a consumer's right to receive information, especially since the state had alternative means of achieving their goal.[150] The reasons school officials offer for removing books also must be examined in this light.

2. *Acculturation*

In removing library books, school officials sometimes claim they are carrying out their community's will regarding appropriate values to transmit to students.[151] The *Pico* dissenters would accept that premise as sufficient justification for virtually all library book removals.[152] This position, however, ignores the very real possibility of local majorities being insensitive, if not hostile, to individual rights and the right to inquire into beliefs contrary to their own.[153] Thus, a board could well be ade-

148. *Pico,* 102 S. Ct. at 2812. *See supra* notes 109-10 and accompanying text.

149. *Pico,* 102 S. Ct. at 2833 (Rehnquist, J., dissenting). Of course, motivation-based tests are nothing new for the judiciary. *See* Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 283-84 (1977) (the Board could have fired an untenured teacher for no reason at all, but if the decision not to rehire him was in retaliation for his exercising first amendment rights the Board had run afoul of the Constitution); Commissioner v. Culbertson, 337 U.S. 733 (1949) (court required to determine whether taxpayers truly intended to form a partnership). "Triers of fact are constantly called upon to determine the intent with which a person acted." *Culbertson,* 337 U.S. at 743. Nevertheless, Justice Rehnquist is correct when he states that "[b]ad motives and good motives alike deny access to the books removed." *Pico,* 102 S. Ct. at 2833 (Rehnquist, J., dissenting).

150. *Virginia State Bd. of Pharmacy,* 425 U.S. at 766-70.

151. *See supra* note 3. *See generally supra* notes 15-17 and accompanying text.

152. *See Pico,* 102 S. Ct. at 2822 (Powell, J., dissenting), 2832 (Rehnquist, J., dissenting).

153. A sampling of some of the reknowned books which educators have banned, or have attempted to ban, is one indication of this insensitivity: *1984* by G. Orwell, *Brave New World* by A. Huxley, *The Catcher in the Rye* by J.D. Salinger, *Of Mice and Men* by J. Steinbeck, *The Merchant of Venice* by Shakespeare, *The Adventures of Tom Sawyer* and *The Adventures of Huckleberry*

quately representing the majority of its constituency when it transgresses upon a student's constitutional rights. As the *Pico* plurality pointed out, one of the major goals of the Bill of Rights is precisely to protect individuals from the tyranny of the majority: "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. . . ."[154]

Moreover, restrictions upon school officials' ability to remove library books will not seriously obstruct their efforts to socialize students because they have ample opportunity to do so through other means. School officials would continue to determine which courses would be taught and which textbooks would be used. Since both these determinations involve required activities, they are much more powerful tools for inculcating students than are the optional readings of the library.[155] Employing the curriculum to foster societal values, if not abused,[156] is constitutionally legitimate under *Barnette*'s pronouncement that school officials can instill values by "persuasion and example."[157] Library book removal, on the other hand, is not an instance of teaching by "persuasion and example."

Nor is it necessary for school officials to remove library books in order to prevent students from inferring school approval of the books and their contents. Chief Justice Burger correctly stated that schools should not be forced to endorse ideas of which they disapprove,[158] but the mere presence of a book in a school library does not imply state approval. Even some who offer the implication of state approval as a justification for book removal concede that library books project less of an aura of state endorsement than do required readings.[159] Moreover, if libraries actually approved of all their holdings, few American libraries would contain *Mein Kampf* or *The Com-*

Finn by Mark Twain, *The Sun Also Rises* by E. Hemingway, *Black Like Me* by J.H. Griffins, and *Citizen Tom Paine* by H. Fast. *See* Niccolai, *supra* note 63, at 34 n.53; Comment, *supra* note 77, at 106 n.55.

154. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943). Justice Blackmun cited this passage in his concurrence. *Pico,* 102 S. Ct. at 2816.

155. *Cf. Pico,* 102 S. Ct. at 2821 (Burger, C.J., dissenting). Students spend 75 percent of their class time, and 90 percent of their homework time, on assigned textbook materials. P. GOLDSTEIN, CHANGING THE AMERICAN SCHOOLBOOK: LAW, POLITICS AND TECHNOLOGY 1 (1978).

156. *See supra* note 71.

157. *Barnette,* 319 U.S. at 640. *See supra* note 110.

158. *See Pico,* 102 S. Ct. at 2820 (Burger, C.J., dissenting).

159. *See* Nocera, *supra* note 11, at 23.

munist Manifesto.[160] Finally, to remove any doubt, a school board could publicize, as some already do, that it does not endorse the ideas contained in its library books.[161]

Even if school officials were correct in their claim that impairment of their ability to remove library books would hinder the socialization process,[162] the result in book removal cases should be the same. The Court has repeatedly placed limits on the power of schools to indoctrinate students,[163] especially when this power runs afoul of preferred first amendment values.[164] In addition, while numerous institutions help to inculcate societal values (church and family are two examples), very few help to promote independent thinking. Consequently, if one of these two conflicting goals of public education must yield ground, it should be the inculcating function.

Of course, if the books which a school board sought to remove were constitutionally "obscene" under *Miller*, first amendment protections would not apply. No school board has yet asserted, however, that a removed work met the *Miller* test,[165] nor have any of the challenged books constituted "obscenity" under the broader *Ginsberg* standard for minors, because the books' appeal to prurient interests have not been sufficiently strong.[166]

In *Pico*, Chief Justice Burger contended that isolated vul-

160. Comment, *supra* note 1, at 764 n.100.

161. The American Library Association states: "Libraries do not advocate the ideas found in their collections." American Library Association, Statement on Labeling, *An Interpretation of the* Library Bill of Rights (1951, amended 1981). *See supra* note 128. The Minneapolis Public Schools System, for example, states in its selection guidelines that "[t]he inclusion of controversial material [in learning materials] does not imply endorsement of the ideas by Minneapolis school personnel." Minneapolis Public Schools, Selection of Learning Materials—General Guidelines 6411 B (rev. Feb. 23, 1976).

162. While the plurality continued to recognize the legitimacy of the acculturation function of schools, *Pico,* 102 S. Ct. at 2806, the public school as an inculcator of societal values is not without its critics. *See, e.g.,* G. DENNISON, THE LIVES OF CHILDREN (1969); J. FARBER, THE STUDENT AS NIGGER (1969); P. GOODMAN, GROWING UP ABSURD (1960); J. HENRY, CULTURE AGAINST MAN (1963); J. HERNDON, THE WAY IT SPOZED TO BE (1968); J. HOLT, HOW CHILDREN FAIL (1964); I. ILLICH, DESCHOOLING SOCIETY (1971); H. KOHL, 36 CHILDREN (1967); A. NEILL, SUMMERHILL (1960); N. PASTMAN & C. WEINGARTNER, TEACHING AS A SUBVERSIVE ACTIVITY (1969); RADICAL SCHOOL REFORM (B. Gross & R. Gross eds. 1970); C. SILBERMAN, CRISIS IN THE CLASSROOM (1970). *See* Comment, *supra* note 1, at 766 n.113.

163. *See supra* notes 18-25, 62, and accompanying text.

164. "Freedom of . . . speech . . . [is] in a preferred position." Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).

165. *See supra* note 72.

166. If a librarian did happen to select a truly obscene work, the school board could, of course, subsequently remove it. *See supra* note 72. *See also*

garity was a sufficient justification for a library book removal.[167] His reliance upon *FCC v. Pacifica Foundation*[168] is not persuasive, though, because that case expressed concern over invasion of the privacy of the home by unsolicited vulgarity, a concern which is not present in a library setting.[169] Concern for the privacy rights of fellow students likewise does not justify a book removal because, as stated previously, only those students who seek out a work will be exposed to it.[170] Moreover, the Chief Justice's position ignores an earlier Court's rejection of "the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."[171] Objections to indecent language may be pretexts for hostility to unpopular ideas,[172] and the first

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Presidents Council, Dist. 25 v. Community School Bd. No. 25, 409 U.S. 998, 1000 (1972) (Douglas, J., dissenting to denial of cert.).

Ginsberg v. New York, 390 U.S. 629 (1968), the leading case allowing stricter regulation of obscenity when dealing with children, involved the sale of a "girlie" magazine (one containing photographs of naked women). The books typically involved in removal cases do not have any such photographs. While it is true that the Court has declared that even a book containing no pictures can be constitutionally obscene, *see* Kaplan v. California, 413 U.S. 115, 119-20 (1973), only once since Roth v. United States, 354 U.S. 476 (1957), which set forth the modern obscenity standard that is basically retained in *Miller*, has the Court declared a book obscene. *See* Mishkin v. New York, 383 U.S. 502 (1966). In fact, most of the books in *Mishkin* were illustrated and their appeal to prurient interest intense. *See id.* at 505. In comparison, the challenged works in public school libraries are much too tame to qualify as "obscene" even under *Ginsberg*. Interview with Robert C. McClure, Professor of Law, University of Minnesota Law School, in Minneapolis, Minnesota (Aug. 29, 1983). *See supra* note 69. Another indication of *Ginsberg*'s inapplicability is that neither it nor Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), another obscenity case, were even cited by the dissenters in *Pico*.

167. Chief Justice Burger assailed the plurality for requiring a school board to be concerned with "pervasive vulgarity" in order to justify a book removal. *Pico,* 102 S. Ct. at 2820 (Burger, C.J., dissenting).

168. 438 U.S. 726 (1978).

169. *See* Right to Read Defense Comm. v. School Comm., 454 F. Supp. 703, 715 n.10 (D. Mass. 1978). *Pacifica Foundation* has been strongly criticized. *See supra* note 77.

Justice Brandeis's comments in a case upholding the regulation of outdoor advertising indicate that he too would have denounced *Pacifica Foundation* as failing to distinguish between intrusive and nonintrusive modes of communication: "The radio can be turned off, but not so the billboard." Packer Corp. v. Utah, 285 U.S. 105, 110 (1932).

170. *See supra* note 134 and accompanying text. *Cf.* Miller v. California, 413 U.S. 15, 44 (1973) (Douglas, J., dissenting) ("no one is being compelled to look at [offensive materials]").

171. Cohen v. California, 403 U.S. 15, 25-26 (1971) (reversing breach of peace conviction of courtroom spectator who wore a jacket stating: "Fuck the Draft").

172. The Island Trees Board learned this lesson, although too late. "Over the course of the fight, the Board . . . learned not to emphasize its political concerns and to play instead its obscenity card, which was much safer in court." Nocera, *supra* note 11, at 24.

amendment cannot tolerate such a convenient guise for banning expression.[173]

The plurality's allowance for book removals motivated by "pervasive vulgarity" perhaps may help insure that concern for vulgarity truly prompted the action, but such a removal would still violate the constitutional proscription against "cleans[ing] public debate to the point where it is grammatically palatable to the most squeamish among us."[174] Students need access to a wide variety of books, even those fairly characterized as "pervasively vulgar," to assure exposure to a vigorous presentation of various viewpoints.[175] Claims that students are still able to discuss the content of removed books[176] are unavailing because only through exposure to the most direct and forceful expression of a position will students be able to meaningfully participate in the free marketplace of ideas.[177]

Moreover, no harm to students resulting from exposure to vulgar language has been demonstrated; in fact, substantial evidence exists that such exposure has no lasting effects on either adolescents or adults.[178] One circuit court has stated that if

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173. Cohen v. California, 403 U.S. 15, 26 (1971).

174. *Id.* at 25. Moreover, "it is nevertheless often true that one man's vulgarity is another's lyric." *Id.* The Minneapolis Public Schools' materials selection policy states: "The use of offensive language or frankness in dealing with sex should not preclude titles [from selection] if they contribute to the accuracy of the character portrayal and assist in expanding the reader's attitudes." Minneapolis Public Schools, Selection of Learning Materials—General Guidelines 6411 B (rev. Feb. 23, 1976).

175. "Books communicate ideas, more permanently and often more persuasively than any other form of expression." *Pico,* 638 F.2d at 432 (Newman, J., concurring). In addition, "[w]ords are often chosen as much for their emotive as their cognitive force," and the Constitution protects the former use as well as the latter. *Cohen,* 403 U.S. at 26.

176. *See, e.g., Pico,* 102 S. Ct. at 2828 (Rehnquist, J., dissenting).

177. Speaking of "all who study any subject in order to arrive at the truth," John Stuart Mill declared:

> Nor is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them, who defend them in earnest and do their very utmost for them. He must know them in their most plausible and persuasive form; he must feel the whole force of the difficulty which the true view of the subject has to encounter and dispose of, else he will never really possess himself of the portion of truth which meets and removes that difficulty.

J.S. MILL, ON LIBERTY 46-47 (The World's Classics ed. 1912) (1st ed. London, 1859).

178. A government study, chaired by William B. Lockhart, Dean of the University of Minnesota Law School, concluded that "[i]f a case is to be made against 'pornography' . . . it will have to be made on grounds other than demonstrated effects of a damaging personal or social nature." COMMISSION ON

students truly need protection from contact with four-letter words, then the court "would fear for their future."[179] Especially sensitive students can avoid library books which they might find offensive; and librarians are available to aid them in their selection process.[180]

Admittedly, the possibility exists that students would misuse information obtained from certain books, but the first amendment dictates accepting that risk when faced with the

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OBSCENITY AND PORNOGRAPHY, THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 139 (1970). The study dealt with the effects of exposure not only to sexually-oriented textual materials, but also to films, photographs, and sexual devices, *id.* at 3 n.4, materials commonly considered more erotically stimulating than books. In addition to independent research, the Commission examined popular and scientific literature and concluded that "[e]mpirical research . . . has found no reliable evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal sexual behavior among youth or adults." *Id.* at 139. The Commission found that delinquent and nondelinquent youths had similar exposure to sexually explicit materials and that sex offenders actually had less adolescent exposure to erotica than did other adults. *Id.* at 26-27. In addition, exposure to sexually-oriented materials did not appear to substantially change individual's sexual behavior, attitudes about sexuality, or views concerning sexual morality. *Id.* at 25-26. One cited study concluded that while home background and peer influence were statistically related to "moral character," no such relationship between exposure to sexually-oriented materials and moral character could be established. *Id.* at 202. *See also supra* note 99 and accompanying text. The *Report*, however, does have its critics. *See, e.g.,* Diamond, *Pornography and Repression: A Reconsideration of "Who" and "What"* in TAKE BACK THE NIGHT 187 (L. Lederer ed. 1980).

179. Keefe v. Geanakos, 418 F.2d 359, 361 (1st Cir. 1969) (granting a temporary injunction to stop teacher dismissal proceedings commenced in response to the teacher's classroom use of an article which contained the word "motherfucker"). The court continued, "We do not question the good faith of the [school officials] in believing that some parents have been offended. With the greatest respect to such parents, their sensibilities are not the full measure of what is proper education." *Id.* at 361-62.

180. In addition, some schools allow parents to inform officials that their child should not be allowed to read a certain work. The St. Paul Public Schools, for example, provide: "No child will be prevented from reading or viewing any school materials in which he has interest. However, reasonable efforts will be made to comply with requests from parents that certain materials be withheld from their children." St. Paul Public Schools, Instructional Materials Selection Procedures 3 (1975).

None of the student challenges to public school library book removals have involved a conflict between students and their parents. A school following a parental request not to let their child read a certain work might, however, violate that student's right to receive information. *Cf.* Wisconsin v. Yoder, 406 U.S. 205, 242 (1972) (Douglas, J., dissenting) (if children possess sufficient maturity, they should be able to attend high school, if they so desire, over the otherwise valid objections of their parents). Bellotti v. Baird, 443 U.S. 662 (1979), and Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976), are also analogous, both holding, *inter alia*, that states can not require parental consent before allowing a minor to obtain an abortion.

danger of suppressing ideas.[181] Of course, if school officials could demonstrate that a certain work posed a real threat of emotional or psychological harm to student readers,[182] then the removal would be constitutionally justified by a compelling state interest.[183]

3. *Striking the Proper Balance*

The overwhelming majority of reasons school boards offer to justify book removals are not sufficiently compelling to warrant interference with a student's right to receive information. Schools have ample opportunity to inculcate students without impinging on first amendment rights. Thus, while a school board can legitimately avoid emphasizing a work by not requiring its reading,[184] it should not be permitted to purge the book from its library. Consequently, the *Pico* plurality's position limiting a school's power to inculcate is superior to the dissenters' view that the acculturation function should have virtual free reign.

Even the plurality, however, failed to recognize that a school board should be allowed to remove a library book only in extraordinary circumstances. Presumably, a book has already passed the test of "educational suitability" once it has made its way into the school library.[185] Such a work deserves a status analogous to tenure, which would assure that officials could not subsequently limit students' access to a diversity of ideas by removing the work.[186] The risk that occasionally a truly "unsuitable" work would be on the library shelves is out-

181. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 508 (1969).

182. The Second Circuit has explicitly rejected this standard. Bicknell v. Vergennes Union High School Bd. of Directors, 638 F.2d 438, 441 n.4 (2d Cir. 1980). For an example of a sufficient showing of potential psychological and emotional harm, see Trachtman v. Anker, 563 F.2d 512, 517-19 (2d Cir. 1977), *cert. denied,* 435 U.S. 925 (1978). In *Trachtman*, the court upheld the school's ban on distribution of a survey inquiring about students' sexual habits. All students would have received a questionnaire, which is distinguishable from a student seeking out a work in the library.

183. *Cf.* Dennis v. United States, 341 U.S. 494, 509-10 (1951) ("Speech is not an absolute above and beyond control by the legislature, when its judgment, subject to review here, is that certain kinds of speech are so undesirable as to warrant . . . sanctions.").

184. *Pico,* 102 S. Ct. at 2815 (Blackmun, J., concurring).

185. *See supra* note 129 and accompanying text.

186. Two courts, however, have rejected the argument that books obtain a status similar to tenure. *See* Presidents Council, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 289, 293 (2d Cir.), *cert. denied,* 409 U.S. 998 (1972); Zykan v. Warsaw Community School Corp., 631 F.2d 1300, 1308 (7th Cir. 1980). For a

weighed by the risk to students' freedom of inquiry if school officials had substantial discretion in removing library books. Nor should objections to "pervasive vulgarity" provide justification for book removals; not only does that standard offer a convenient pretext for ideologically motivated school officials, it also allows for an impermissible "cleansing" of first amendment interaction.[187]

To adequately protect the free marketplace of ideas, a standard that is much more stringent and much less ambiguous[188] than the *Pico* holding is necessary. Accordingly, any unshelving of a public school library book should constitute a prima facie violation of a student's right to receive information. Under such a standard, the school board would have the burden of justifying any removal in terms of the narrow grounds *Tinker* set forth as warranting an abridgment of student rights. The board would have to show that a student reading the work would interfere with the rights of others or substantially dis-

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description of the purposes of tenure in a university setting, see EMERSON, *supra* note 26, at 595.

187. *See supra* notes 171-77 and accompanying text.

188. The dissenters are correct in assailing the plurality for offering little guidance to the parties involved. *See supra* note 119 and accompanying text. One commentator has stated that before the Supreme Court's *Pico* decision, the law on school board book removals was "so varied that [it was] murky," and that the *Pico* ruling itself "does little to clear up the confusion." Nocera, *supra* note 11, at 20. *See also* Note, *supra* note 100, at 469 (citing Address by Robert M. O'Neil, University of Illinois Conference on Schools and the Constitution, The First Amendment in the Library and the Classroom—Recent Developments (July 28, 1982)). Consequently, the issues raised by *Pico* are not likely to quietly vanish. Incidents of library book removals usually ebb and flow with the political tides of the nation, with the number of incidents generally increasing as the mood of the country becomes more conservative. *See id.* at 463. Not surprisingly, the number of book removals has risen recently. One indicator of this increase is the number of reported book banning incidents received by the Office of Intellectual Freedom of the American Library Association. Judith Krug, head of the Office of Intellectual Freedom, states that in the 1970s that figure rose from 100 to 300 per year, while by 1981 one thousand incidents were being reported annually. Nocera, *supra* note 11, at 22. Another barometer is a recent Minnesota Civil Liberties Union study indicating that 212 of the nearly 500 public schools and libraries that responded to the questionnaire reported challenges to books, films, and records. Minnesota Daily, Jan. 24, 1983, at 3. The plurality ruling in *Pico* will probably not deter school boards who are convinced that they should remove certain books from their libraries, although the ruling should cause a change in tactics. *See generally supra* notes 3, 172, and accompanying text (tactics and attitudes of school boards in previous cases). School boards seeking to ban books in the future likely will not voice political and ideological objections to the texts. Instead, boards will take care to complain only of a lack of "educational suitability" or of "pervasive vulgarity." *See Pico,* 102 S. Ct. at 2810. In addition, school boards will probably use established procedures for handling book challenges instead of creating ad hoc measures as did the Island Trees Board.

rupt school discipline or classwork.[189] As in *Tinker*, an "undifferentiated fear or apprehension of a disturbance [would] not [be] enough to overcome the right" to first amendment freedoms.[190] Rarely would a school board be able to meet this stringent standard, especially since reading library books is usually a voluntary and tranquil activity.[191] Alternatively, if a school board could demonstrate that a certain library book threatened to cause psychological or emotional harm to student readers, then the board could also justifiably remove the book. Only these specific justifications are sufficiently compelling to warrant unshelving a library book.

The standard set forth in this Comment does not depend upon the particular motivation of school officials. Even book removals that are not ideologically motivated would be invalid unless the school board could establish one of the narrow justifications for removal. For example, if a school board's sincere concern about discipline prompted it to unshelve a library book, it would still have to demonstrate that the work actually posed a material threat to discipline.[192] This formulation is much less vague than the *Pico* plurality opinion.[193] It would unambiguously put school officials on notice that they could rarely remove a book from their libraries, especially if the unshelving is justifiable only as a response to parental outrage.

B. Book Selection

1. *Distinctions Between Book Removal and Selection*

Usually, book selection is less controversial than book removal,[194] although book selection also has first amendment implications. Some courts, as illustrated by the *Presidents Council* and *Zykan* decisions, have viewed book selection and removal as indistinguishable, both procedures being encompassed under a school board's authority to maintain the library

189. *See supra* note 37 and accompanying text.

190. Tinker v. Des Moines Indep. Comm. School Dist., 393 U.S. 503, 508-09 (1969), *cited with approval in Pico,* 102 S. Ct. at 2807.

191. *See supra* notes 108, 132-34, and accompanying text.

192. *See supra* note 190 and accompanying text. Prohibiting book unshelvings regardless of motive eliminates the problem of school officials seeking to disguise ideologically based book removals by only voicing objections to vulgarity. *See supra* notes 172-77, 188, and accompanying text. Of course, any book removal that would be impermissible under the *Pico* plurality's holding would be impermissible under the more stringent standards suggested by this Comment.

193. *See supra* notes 109-10 and accompanying text.

194. *Cf.* Harpez, *supra* note 100, at 93-94.

collection it deems proper.[195] These courts have considered the library to be merely an auxiliary to the classroom.[196] Other courts, however, have drawn a distinction between book selection and removal. While acknowledging that a school board is not obligated to select particular works, those courts restrict a school board's ability to remove existing library books.[197] These courts accord the school library a special status beyond that of mere adjunct to the prescribed curriculum.

The *Pico* plurality opinion embraced this latter view. While recognizing the library's special status in the marketplace of ideas, the plurality carefully pointed out that its decision did not speak to the issue of book acquisitions. The dissenters in *Pico* correctly observed, however, that school officials can employ the book selection process as well as book removals to officially suppress certain ideas.[198] The answer to the dissent is to go beyond the plurality's holding and allow student plaintiffs a cause of action in both instances.

Student challenges to school library acquisitions, though, have a somewhat different theoretical basis than do book removal challenges. Clearly, both failure to select and removal prevent a student from reading that particular work in the school library. Banishing a book already in place, however, is more hostile to the first amendment because it dramatically communicates official disapproval of the condemned work in a way that failing to select a book normally does not. Hence, a greater "chilling" effect results from a book removal.[199] Moreover, the right to receive information, upon which the book removal challenge in *Pico* was based, is not precisely applicable to book selection. While that right prohibits the state from hindering an individual's access to information, it does not saddle

195. Presidents Council, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 289, 293 (2d Cir.), *cert. denied,* 409 U.S. 998 (1972); Zykan v. Warsaw Community School Corp., 631 F.2d 1300, 1308 (7th Cir. 1980). The *Zykan* court, though, did state that a school board could not stock the library so that it would reflect only one perspective. 631 F.2d at 1308. *See also Pico,* 638 F.2d at 431 (Mansfield, J., dissenting).

196. *Presidents Council,* 638 F.2d at 292; *Zykan,* 631 F.2d at 1308.

197. *See, e.g., Pico,* 638 F.2d at 435-36 (Newman, J., concurring); Minarcini v. Strongsville City School Dist., 541 F.2d 577, 582 (6th Cir. 1976); Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269, 1272 (D.N.H. 1979); Right to Read Defense Comm. v. School Comm., 454 F. Supp. 703, 712 (D. Mass. 1978).

198. *Pico,* 102 S. Ct. at 2821 (Burger, C.J., dissenting), 2822-23 (Powell, J., dissenting), 2833 (Rehnquist, J., dissenting). Nevertheless, a book removal standard, even by itself, would greatly contribute to the diversity of a library collection. *See infra* text accompanying notes 203-04.

199. *See supra* note 86 at 154-55. *See also Pico,* 638 F.2d at 434 (Newman, J., concurring).

the government with an affirmative obligation to provide particular information.[200] As Chief Justice Burger noted, if a school rejects a work at the selection stage, it simply fails to affirmatively *provide* access to the ideas contained within.[201] The Chief Justice failed to recognize, however, that by removing a library book, a school board is affirmatively *denying* access to ideas which had been readily available.[202]

2. *Establishing a Constitutional Standard for Book Selection*

As a matter of sound educational policy, schools should strive to acquire a library collection containing a "balanced presentation of ideas."[203] The book removal standard that this Comment advocates would greatly add to the diversity of library collections. School boards of different ideologies could select works previously ignored, knowing that subsequent boards could not unshelve their selections. The inability to re-

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200. *See supra* notes 141-44 and accompanying text.

201. *Pico,* 102 S. Ct. at 2819 (Burger, C.J., dissenting).

202. In fact, alternative sources of access may not be available to students. *See supra* note 145 and accompanying text; Harpez, *supra* note 100, at 48-49.

203. At least one commentator has suggested that a balanced presentation in library materials should be constitutionally mandated. *See* Niccolai, *supra* note 63, at 31.

The Library Bill of Rights states: "Libraries should provide materials and information presenting all points of view on current and historical issues. Materials should not be proscribed or removed because of partisan or doctrinal disapproval." Library Bill of Rights art. 2 (1948, amended 1980).

The Minneapolis Public Schools, for example, state:

> The student's right to learn must be recognized and protected by a selection policy which provides a wide diversity of materials.
>
> . . . .
>
> Materials which present various interpretations of controversial subjects should be readily accessible.
>
> . . . [C]are must be taken to represent the many sides of public opinion. Examples of propaganda and extremist viewpoints should be provided to enable students to assess conflicting views.

Minneapolis Public Schools, Selection of Learning Materials—General Guidelines 6411 B (rev. Feb. 23, 1976).

Also illustrative is the declaration of the St. Paul Public Schools:

> Access to large and varied collections of materials is essential to programs which provide students with independent study time.
>
> . . . Because the curriculum may not include items of personal relevance to students, access to a wide range of supplemental materials is essential.
>
> . . . .
>
> If a controversial issue is covered at all in the curriculum or in the library, materials representing all sides of that issue are to be included.

St. Paul Public Schools, Instructional Materials Selection Procedures 1-2 (1975). For two additional enlightened library selection policies, see Comment, *supra* note 1, at 751 n.24 and 756 n.50.

move a previous school board's selections would, over time, yield a diverse library collection.

The right to receive information, however, does not empower courts to order school officials to purchase specific works. Nevertheless, the first amendment does require certain minimum standards for the book selection process: school officials cannot stock their libraries with books of only one point of view or exclude any particular view because such efforts violate the first amendment's proscription of officially prescribed orthodoxies.[204]

The constitutional proscription of orthodoxy gives students the right to challenge book acquisitions, as the right to receive information test allows challenges to book removals. As stated above, the book removal standard does not require examination of school officials' motivations because it is based on the right to receive information.[205] Unlike the book removal standard, however, the book selection standard would consider the motivation of school officials. Motivation is a factor because the book selection standard is founded on the proscription of orthodoxies and, as the plurality in *Pico* noted, intent is necessary to establish an orthodoxy.[206]

Such an intent requirement inevitably places a formidable burden of proof on plaintiffs challenging book selection decisions; establishing that school officials acted with an impermissible motive will often be extremely difficult.[207] Schools

204. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 622, 642 (1943).

205. *See supra* notes 188-93 and accompanying text.

206. *See supra* notes 109-10 and accompanying text; *Pico,* 102 S. Ct. at 2810.

207. Procedural safeguards and selection standards would make plaintiffs' task easier. In addition to helping prevent abuse in selecting materials initially, these directives would provide a record that a court could subsequently examine. *See* Niccolai, *supra* note 63, at 36-37.

The American Association of School Librarians, for example, acknowledges that the local school board is "legally responsible for all matters relating to the operation of the school district," but urges that "[t]he responsibility for the selection of instructional materials . . . should be delegated to the certificated library/media personnel employed by the school district." Such personnel would then coordinate material selection with "teachers, students, supervisors, administrators, and community persons." *Policies and Procedures for Selection of Instructional Materials,* SCH. MEDIA Q., Winter 1977, at 109, 110.

The American Library Association (A.L.A.) spells out specific criteria to guide school systems in resource selection. The A.L.A. states that the following criteria should be used:

a. educational significance
b. contribution the subject matter makes to the curriculum and to the interests of the students
c. favorable reviews found in standard selection sources
d. favorable recommendations based on preview and examination of materials by professional personnel

obviously do not have the resources to purchase unlimited quantities of library books, and officials cannot help but reflect personal preferences and moral convictions in their decision to purchase one work over another. Many non-ideological and objective reasons may also underlie such a choice. School officials may base book selection on the need for books dealing with certain subjects, quality of writing style, or even cost. Consequently, an isolated incident of a school official passing over a particular book would probably be insufficient to establish a violation of the prohibition against prescribing orthodoxies. To prove the requisite motivation, plaintiffs would generally have to show a pattern of behavior such as school officials continually bypassing a particular viewpoint without any justification based on selection criteria unrelated to ideology.

Although removal of and failure to select a book both result in the work's absence from a school library, challenges to each are based upon different constitutional theories. Book removals can be challenged as violating the right to receive information; book selections must instead be challenged as violating the ban on prescribing orthodoxies. The practical result of this

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e. reputation and significance of the author, producer and publisher
f. validity, up-to-dateness, and appropriateness of material
g. contribution the material makes to breadth of representative viewpoints on controversial issues
h. high degree of potential user appeal. . . .
j. high artistic quality and/or literary style
k. quality and variety of format
l. value commensurate with cost and/or need
m. timeliness or permanence
n. integrity . . . .

The following criteria will be used as they apply:

1. Learning resources shall support and be consistent with the general educational goals of the state and district and the aims and objectives of individual school and specific courses.

. . . .

5. Learning resources shall be designed to help students gain an awareness of our pluralistic society.
6. Learning resources shall be designed to motivate students and staff to examine their own attitudes and behaviors and to comprehend their own duties, responsibilities, rights and privileges as participating citizens in our society.
7. Learning resources shall be selected for their strengths rather than rejected for their weaknesses.

The selection of learning resources on controversial issues will be directed towards maintaining a balanced collection representing various views.

Learning resources shall clarify historical and contemporary forces by presenting and analyzing intergroup tension and conflict objectively, placing emphasis on recognizing and understanding social and economic problems.

Office for Intellectual Freedom of the American Library Association, Workbook for Selection Policy Writing 5-7 (draft copy, Nov. 16, 1982).

difference between book removal and book selection challenges is that in the latter situation, students will have a much more difficult time establishing their case.[208] Nonetheless, students should have the opportunity to raise both challenges.[209]

IV. CONCLUSION

Local school boards should generally reflect the opinions of their constituents, but not when doing so infringes upon the constitutional rights of others, including students. The very purpose of the Bill of Rights is to protect certain privileges from majorities insensitive to individual liberty. Important individual rights are implicated both when a school board removes a book and when it consistently excludes works of a particular ideology from its library shelves.

When the Supreme Court first had an opportunity to confront this issue over ten years ago, Justice Douglas poignantly 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?"[210] As this Comment indicates, the answer to Justice Douglas's question must be the latter course.

Accordingly, students should have the opportunity to demonstrate that school officials are impermissibly prescribing an official orthodoxy through a library selection process that intentionally excludes works of a specific viewpoint. Any book removal, moreover, should constitute a prima facie violation of a student's right to receive information. In order to justify an unshelving, school officials should have to meet a stringent burden of showing that the removed work posed a real threat to

208. *See supra* note 110; Niccolai, *supra* note 63 at 30; Comment, *supra* note 77 at 135-36. One commentator, while in favor of students having an opportunity to challenge book selections, predicts that students would bring few such suits because of the difficult proof problems. *Id.* at 136.

209. This Comment also favors giving students the opportunity to prove that curriculum decisions were impermissibly motivated by an ideological desire to deny students access to certain ideas. *See, e.g.,* Pratt v. Independent School Dist. No. 831, Forest Lake, Minn., 670 F.2d 771 (8th Cir. 1982) (ideologically-based removal of a film from the curriculum violated students' first amendment rights). *Cf.* Cary v. Board of Educ., 598 F.2d 535 (10th Cir. 1979) (unsuccessful challenge to school board decision to remove ten works from the recommended reading lists of certain elective English classes. The parties stipulated that the Board decision was not part of a systematic effort to exclude any particular ideology).

210. Presidents Council, Dist. 25 v. Community School Bd. No. 25, 409 U.S. 998, 999-1000 (1972) (Douglas, J., dissenting to denial of cert.).

school discipline or the psychological well-being of students. School boards would clearly be on notice that parental pressure does not justify removal of a book from the school library. These standards would prevent a school board's exercise of discretion from impinging upon a student's first amendment rights.

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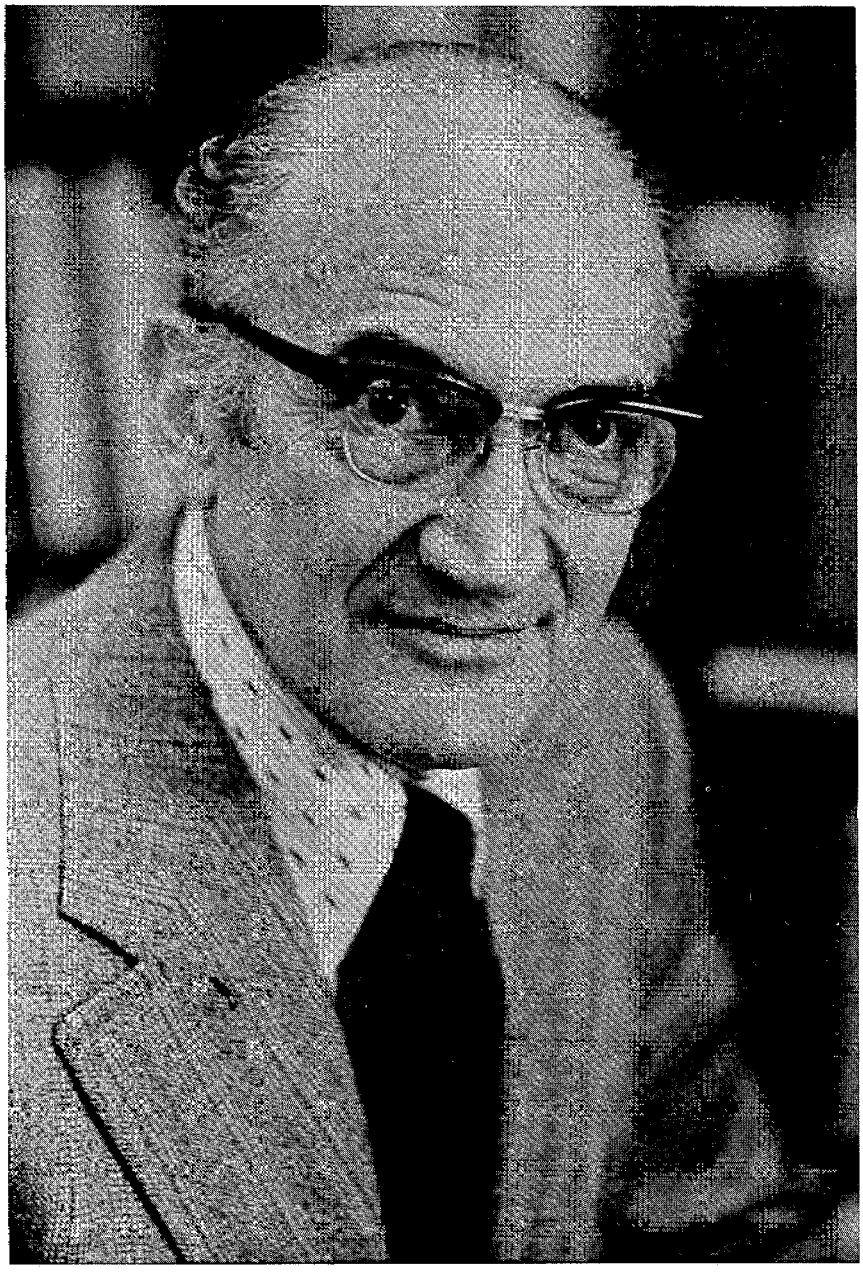

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