Urban Law Annual ; Journal of Urban and Contemporary Law

Volume 25

January 1983

Board of Education v. Pico {Board of Education, Island Trees Union Free Sch. Dist. No. 26 v. Pico, 102 S. Ct. 2799}: The First Amendment and Censorship of Books in Schools

Tracy A. Waggoner

BOARD OF EDUCATION v. PICO: THE FIRST AMENDMENT AND CENSORSHIP OF BOOKS IN SCHOOLS

Courts recognize that vigilance of constitutional freedoms[1] is nowhere more important than in public schools.[2] Among the constitu-

1. This Comment covers only the first amendment right of freedom to know or receive information. *See infra* note 11. Other constitutional freedoms are given protection in the school environment. *See, e.g.*, Stone v. Graham, 449 U.S. 39 (1980) (establishment clause violated for children who are induced to read and meditate on Ten Commandments in school); Ingraham v. Wright, 430 U.S. 651 (1977) (teacher and principal may be subject to suit under the fifth amendment if corporal punishment is unjustified); Dow v. Renfrow, 631 F.2d 91 (7th Cir. 1980) (probable cause not necessary for student searches but a search is unconstitutional under the sixth amendment if school authorities exceed bounds of reason), *cert. denied*, 451 U.S. 1022 (1981); Florey v. Sioux Falls School Dist. 49-5, 619 F.2d 1311 (8th Cir.) (religious ceremonies cannot be performed in public schools under the guise of study), *cert. denied*, 449 U.S. 987 (1980).

2 Shelton v. Tucker, 364 U.S. 479, 487 (1960) ("vigilant protection of constitutional freedoms is nowhere more vital than in the community or American schools."). *See, e.g.*, Tinker v. Des Moines School Dist., 393 U.S. 503, 512 (1969) (upheld students' freedom of expression regarding symbolic protest); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (Constitution does not permit laws to cast "pall of orthodoxy over classroom"); Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269, 1276 (D.N.H. 1979) (upheld students' right to receive information).

The schools discussed throughout this Comment are secondary schools. Most courts agree that factors such as the increased age and intellectual development of college students militate toward more first amendment protection than appropriate for high school students. This increased protection results in less judicial tolerance for actions by universities infringing on those rights. *See, e.g.*, Ginsberg v. New York, 390 U.S. 629 (1968) (analogous situation where ability to prevent sale of obscene material is dependent on whether the protected person is an adult or a minor); Gay Lib v. University of Missouri, 558 F.2d 848 (8th Cir.) (regulation preventing homosexually oriented political group from using university facilities violated university students' first and fourteenth amendment rights), *cert. denied*, 434 U.S. 1080 (1977); Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 808 (2d Cir. 1971) (blanket prohibition by university officials against distribution of literature on campus is unconstitutional). *See also* Wright, *The Constitution on Campus*, 22 VAND. L. REV. 1027, 1052-59 (1969) (comparing cases involving rights of high school students with those concerned with university students); Comment, *Not on Our Shelves: A First Amendment Analysis of Library Censorship in the Public Schools*, 61 NEB. L. REV. 98, 99 n.7 (1982) (expansive

tional rights guaranteed to students are those encompassed by the first amendment.[3] The first amendment protections for secondary students,[4] however, are counterbalanced by the broad discretion generally granted local school boards[5] to regulate student activities.[6] A

---

rights of university students compared with those of secondary students) [hereinafter cited as Comment, *Library Censorship*]; Comment, Right to Read Defense Committee at Chelsea v. School Committee of the City of Chelsea: *The First Amendment Comes Off the Shelf*, 14 NEW ENG. L. REV. 288, 300-01 (1978) (compares teaching licenses given in high schools and universities) [hereinafter cited as Comment, *Off the Shelf*].

3. Students are entitled to some first amendment rights. They are protected by § 1983 in both procedural and substantive matters. *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975) (student entitled to hearing before 10 day suspension); Dorstert v. Berthold Pub. School Dist., 391 F. Supp. 876 (D.N.D. 1975) (school authorities unconstitutionally interfered with student hair styles). *See generally* 1 C. ANTIEAU, FEDERAL CIVIL RIGHTS ACTS §§ 181-82 (2d ed. 1980 & Supp. 1981) (general discussion on student rights under § 1983); Golden, *Procedural Due Process for Students at Public Colleges and Universities*, 11 J.L. & EDUC. 337-59 (1982) (surveys procedural protections afforded students in public institutions).

4. The precise parameters of constitutionally protected academic freedoms in secondary schools are less clear than those of university students. Zykan v. Warsaw Community School Corp., 631 F.2d 1300, 1304 (7th Cir. 1980). *See supra* note 2. Courts recognize that students' rights are not developed equally with those of adults. Healy v. James, 408 U.S. 169, 203 (1972). *See also* Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 487-96 (1981) (discusses the inconsistency of court decisions regarding minor's rights in school); Wright, *supra* note 2, at 1032-33 (notes the increased maturity of university students and fact that they have constitutionally protected rights).

School authorities can impose restrictions on children that would violate an adult's rights. Baughman v. Freienmuth, 478 F.2d 1345, 1348 (4th Cir. 1973) ("In the secondary school setting first amendment rights are not coextensive with those of adults' . . ."). *See, e.g.*, Ginsberg v. New York, 390 U.S. 629, 638 n.6 (1968) (sales of obscene material may be prohibited for those under 18 years old); Fitzgerald v. Mountain Laurel Racing, Inc., 607 F.2d 588, 589 (2d Cir. 1979) (strip searches in schools may be made with less than probable cause). *See also* Schiff, *The Emergence of Student Rights to Privacy Under the Fourth Amendment*, 34 BAYLOR L. REV. 209 (1982) (compares rules pertaining to student search and seizures with those applied to adults); Comment, *Corporal Punishment in Public Schools: A Violation of Substantive Due Process?*, 33 HASTINGS L.J. 1245, 1250-54 (1982) (instances where permissible regulations for children would violate adult rights).

5. Though school board powers are derived from state statutes, judicial interpretation has contributed as much to local autonomy as explicit statutory authority bestowed on local school boards by state legislatures. E. REUTTER, SCHOOLS AND THE LAW 24 (5th ed. 1981). Since school boards' powers are derived from the state, they have no inherent power of their own. H. HUDGINS & R. VACCA, LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS § 3.2 (1979).

Duties of school boards vary according to legislative decree. *Compare* OHIO REV. CODE § 3329.07 (Page 1975) (Ohio statute discussed in Minarcini v. Strongsville City School Dist., 541 F.2d 577 (6th Cir. 1976)) *with* N.Y. EDUC. LAW § 2590-e(3) (McKinney 1979) (New York statute applied in President's Council, Dist. 25 v. Community

conflict between these competing interests arises when school boards censor library shelves,[7] thereby denying students any direct access to particular books.[8] In *Board of Education v. Pico*,[9] the Supreme Court

School Bd. No. 25, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 988 (1972). Many other state statutes grant power to school boards. *See* Diamond, *supra* note 4, at 506 n.130.

6. Courts uniformly recognize wide discretion in school board actions. *See, e.g.*, Pratt v. Independent School Dist. No. 831, 670 F.2d 771, 775 (8th Cir. 1982) (broad discretion allowed to further policymaking role); Zykan v. Warsaw Community School Corp., 631 F.2d 1300, 1305 (7th Cir. 1980) (broad discretion means constitutional claims are limited); Cary v. Board of Educ., 598 F.2d 535, 539 (10th Cir. 1979) (board within discretion to remove ten texts from curriculum). *See generally* Niccolai, *The Right to Read and School Library Censorship*, 10 J.L. & EDUC. 23, 23-25 (1981) (notes the expansion of court intervention from establishment grounds to include other first amendment rights); Comment, *Library Censorship, supra* note 2, at 100-03 (discusses how indoctrinative function of schools permits wide discretion to local authorities); Note, *Limit of School Board's Discretion in Curricular Choice—Public School Library as Marketplace of Ideas*, 27 CASE W. RES. L. REV. 1034 (1977) (follows development of court intervention in areas previously in complete discretion of school board). *Cf.* Pliscou v. Holtville Unified School Dist., 411 F. Supp. 842 (S.D. Cal. 1976) (broad discretion of school board does not extend to activities performed outside school time or nondisruptive of school activities).

7 Since the election in November of 1980, public criticism of library materials has increased 500%. Mann, *Books and TV—New Targets of the Religious Right*, U.S. NEWS & WORLD REP., June 8, 1981, at 45. *Accord* Note, *Public School Library Book Removals: Community Values v. First Amendment Freedoms*, 57 NOTRE DAME LAW. 166 (1981). Many individuals are involved in the dispute over book removal from school libraries. These include novelists, school principals, librarians, teachers, parents and students. *See* Marcus, *Censorship in the Schools*, NAT'L L.J., May 25, 1981, at 1, col. 1 (K. Vonnegut expresses concern over SLAUGHTERHOUSE FIVE being banned by a New York school board); Mouat, *Public Libraries New Target of Right Wing's Book Censorship Campaign*, Christian Sci. Monitor, Dec. 22, 1980, at 5 (librarian urges community input during selection process rather than removal on demand by some facets of community). *See also* Bicknell v. Vergennes Union High School Bd. of Directors, 638 F.2d 438 (2d Cir. 1980) (students are deprived when books are removed), Cary v. Board of Educ., 598 F.2d 535 (10th Cir. 1979) (teachers object to school board removing choice of texts from curriculum); Pico v. Board of Educ., Island Trees Union Free School Dist., 474 F. Supp. 387 (E.D.N.Y. 1979) (school board members removing books were parents), *rev'd*, 638 F.2d 404 (2d Cir. 1981), *aff'd*, 102 S. Ct. 2799 (1982).

8. Courts disagree on whether availability of removed books from alternative sources affects the alleged violation of rights caused by book removal. *See, e.g.*, Minarcini v. Strongsville City School Dist., 541 F.2d 577, 582 (6th Cir. 1976) (depriving students is not justified by alternative sources of access); Bicknell v. Vergennes Union High School Bd. of Directors, 475 F. Supp. 615, 621 (D. Vt. 1979) (board's removal precluded ability to obtain materials), *aff'd*, 638 F.2d 438 (2d Cir. 1980); Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269, 1275 (D.N.H. 1979) (availability of other times and places for free expression does not justify restraint). *But see* Zykan v. Warsaw Community School Dist., 631 F.2d 1300, 1306 (7th Cir. 1980) (no allegation

balanced the school board's motives precipitating removal[10] of certain library books against the students' right to receive information.[11]

---

that removal deprived students of all contact with materials); President's Council, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 289, 292 (2d Cir.) (parents have access to material and can give material to children thus intrusion on children's rights under the First Amendment are miniscule), *cert. denied*, 409 U.S. 988 (1972).

9. 102 S. Ct. 2799 (1982).

10. The reasonableness of the motive is a question of law for the court to decide. It may relate to either the subject matter or the method of implementation of a particular action. E. REUTTER, *supra* note 5, at 25. Both these factors are crucial in library book removal cases. Pratt v. Independent School Dist. No. 831, 670 F.2d 771, 776-78 (8th Cir. 1982) (favorable teacher reviews of the film were evidence of religious concerns of community and school board). *Accord* Bicknell v. Vergennes Union High School Bd., 638 F.2d 438, 441 (2d Cir. 1980) (no cause of action because removed material considered vulgar or indecent); Zykan v. Warsaw Community School Dist., 631 F.2d 1300, 1306 (7th Cir. 1980) (removal upheld because complaint did not allege imposition of particular religious conviction or suppression of a specific inquiry); Minarcini v. Strongsville City School Dist., 541 F.2d 577, 582 (6th Cir. 1976) ("intense community controversy" and favorable faculty book reviews indicate that the books were banned due to board member's distaste for particular subject matter therein); Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269, 1273-74 (D.N.H. 1979) (interim board guidelines pertinent to removal questions were not employed); Right to Read Defense Comm. of Chelsea v. School Comm., 454 F. Supp. 703, 711-12 (D. Mass. 1978) (vulgar language ground rejected as pretext for removing subject matter offensive to board members). *See also* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 267 (1977) ("Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role."); Tinker v. Des Moines School Dist., 393 U.S. 503, 510-11 (1969) (arbitrarily singling out armbands protesting Viet Nam War while other politically symbolic conduct continued was an abuse of discretion).

11. The right to receive information, relied on by student in library book removal cases, is based on a line of United States Supreme Court decisions. None of these cases involved students, which Chief Justice Burger points out in *Pico*, 102 S. Ct. at 2818-19 (Burger, J., dissenting). *Accord* Brief for Petitioner, Board of Educ., Island Trees Union Free School Dist. v. Pico, 102 S. Ct. 2299.

In 1943, the Supreme Court stated, "The right of freedom of speech and press . . . embraces the right to distribute literature, . . . and necessarily protects the right to receive it." Martin v. Struthers, 318 U.S. 141, 143 (1943). *Martin* invalidated a statute prohibiting door-to-door distribution of literature on the grounds that the deliverer had the right to disseminate literature. *Id.* at 145-47.

The Supreme Court strengthened the reciprocal right to receive information in Lamont v. Postmaster General, 381 U.S. 301 (1965). "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." *Id.* at 308 (Brennan, J., concurring). The *Lamont* Court held a statute requiring individuals to make a written request to receive foreign mail unconstitutional because it limited first amendment rights to receive information that is unfettered by government restriction.

In 1965, the right to receive information expanded to prevent states from "con-

The Court held that politically motivated suppression of ideas violated the students' first amendment rights.[12]

In *Pico*, students claiming infringement of first amendment rights[13]

---

tract[ing] the spectrum of available knowledge." Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (permitting dissemination of contraceptive information). This restriction on states was further expanded in Stanley v. Georgia, 394 U.S. 557 (1969), to forbid states from restricting receipt of pornographic material in one's home "regardless of [its] social worth." *Id.*

The right to receive information applies in university settings. Kleindienst v. Mandel, 408 U.S. 753 (1972). The government refused to issue a visa to a Belgian Marxist writer who planned to lecture at American universities. The Court explicitly recognized the rights of teachers and students to receive the information, but stated that the writer had no right to a visa. *Id.* at 762-63. Balancing the right to receive information against congressional power to regulate immigration, the Court did not find that the rights of the listeners predominated. *Id.* at 766-67.

The seminal case developing the right to receive information is Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). Its significance to library book removal cases lies in the third party status of plaintiffs. In *Virginia State Bd.*, plaintiffs were not directly restrained by the statute prohibiting pharmacists from advertising. Rather, they were consumers who wished to receive the advertised information. *Id.* at 756. Similarly, in book removal cases, novelists do not bring suit to prevent removal. The plaintiffs are students who wish to receive the books. Comment, *Library Censorship*, *supra* note 2, at 115-16. *Accord* Comment, *First Amendment Limitations on the Power of School Boards to Select and Remove High School Text and Library Books*, 52 ST. JOHNS L. REV. 457, 470-71 (1978) (since communication by books is a protected right, any reason for removal must meet constitutional standards) [hereinafter cited as Comment, *First Amendment Limitations*]. The *Virginia State Bd.* majority balanced the consumer's right to receive information against the state's interest in protecting both consumers and pharmacists. The Court refused to accept the dissent's position that since the same information was available elsewhere, the right to receive information was not impaired. 425 U.S. at 757, n.15. *See* Comment, *First Amendment Limitations, supra*, at 469-70.

School libraries are depositories of information. "Sellers" (books) and "buyers" (students) form a communicative bond. Comment, *First Amendment Limitations, supra*, at 471. Such communication is protected under the first amendment and thus restrictions placed thereon must meet constitutional standards. School authorities must show a substantial government interest is being served to justify the restriction. Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269, 1275 (D.N.H. 1979); *see also* Comment, *First Amendment Limitations, supra*, at 471 & nn.81-83 (examples of substantial government interests).

For a more in-depth discussion of the development of the right to receive information, see Niccolai, *supra* note 4, at 23-26; Comment, *Library Censorship, supra* note 2, at 113-16; Comment, *Off the Shelf, supra* note 2, at 304-08; Comment, *First Amendment Limitations, supra*, at 467-74; Comment, *Student's Right to Receive Information Precludes Board's Removal of Allegedly Offensive Books from High School Library*, 30 VAND. L. REV. 85, 85-98 (1977).

12. 102 S. Ct. at 2810 (Brennan, J.).

13. Specifically the students claimed a violation of the right to freedom of expression. *See* 102 S. Ct. at 2804; Pico v. Board of Educ., Island Trees Union Tree School

challenged the school board's removal of certain books[14] from junior and senior high school libraries.[15] The students sought declaratory and injunctive relief under 42 U.S.C. § 1983.[16] The district court[17] dismissed the action, stating that book removal fell within the school board's discretionary power.[18] The Court of Appeals for the Second Circuit[19] remanded *Pico* for trial, instructing the district court to determine the school board's motivation for removing the books.[20] On

---

Dist., 474 F. Supp. 387, 394 (E.D.N.Y. 1979), *rev'd*, 638 F.2d 404 (2d Cir. 1980), *aff'd*, 102 S. Ct. 2799 (1982).

14. The banned books at issue are: A READER FOR WRITERS (J. Archer ed. 1971); BEST SHORT STORIES BY NEGRO WRITERS (L. Hughes, Ed. 1967); A. CHIDRESS, A HERO AIN'T NOTHING BUT A SANDWICH (1973); E. CLEAVER, SOUL ON ICE (1968); GO ASK ALICE (anonymous 1972); O. LAFARGE, LAUGHING BOY (1929); D. MORRIS, THE NAKED APE (1967); P. THOMAS, DOWN THESE MEAN STREETS (1967); K. VONNEGUT, SLAUGHTERHOUSE FIVE (1969); R. WRIGHT, BLACK BOY (1945).

15. A READER FOR WRITERS (J. Archer ed. 1971) was the only book found in, and removed from the junior high. *Pico*, 474 F. Supp. at 389. After removal, and subsequent board consideration, LAUGHING BOY was returned to the high school library shelves. *Id.* at 391. BLACK BOY was returned subject to a restriction requiring parental approval prior to check-out. *Id.*

16. 102 S. Ct. 2799, 2801 (1982) (Brennan, J.). 42 U.S.C. § 1983 (1976) provides:

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

Id. School boards are considered "persons" under § 1983 and are thus subject to suit. Kingsville Indep. School Dist. v. Cooper, 611 F.2d 1109 (5th Cir. 1980); O'Hern v. School Dist., 578 F.2d 220 (8th Cir. 1978). *Accord* Monell v. Department of Social Servs., 436 U.S. 658 (1978); 1 C. ANTIEAU, *supra* note 3, § 95 (relevance of *Monell* in redefining "person" under § 1983).

17. Pico v. Board of Educ., Island Trees Union Free School Dist., 474 F. Supp. 387 (E.D.N.Y. 1979), *rev'd*, 638 F.2d 404 (2d Cir. 1980), *aff'd*, 102 S. Ct. 2799 (1982).

18. 474 F. Supp. at 398. "The challenged action [falls] within the broad range of discretion constitutionally afforded to educational officials who are elected by the community." *Id.* For a general discussion on the powers of school boards, see *supra* notes 5-6 and accompanying text. *See also infra* note 28 and accompanying text.

The Second Circuit had previously addressed public school library book removals in President's Council, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 988 (1972). In that case, the court found no infringement of a basic constitutional right. *See infra* notes 38-47 and accompanying text. The district judge in *Pico* determined that *President's Council* was binding and thus he could not prevent the school board from removing books that they found inconsistent with community standards. 474 F. Supp. at 397.

19. Pico v. Board of Educ., Island Trees Union Free School Dist., 638 F.2d 404, 407 (2d Cir. 1980), *aff'd*, 102 S. Ct. 2799 (1982).

20. 638 F.2d at 417-19 and 438 (Newman, J., concurring). The remand over-

a writ of certiorari, the Supreme Court affirmed,[21] reiterating the importance of ascertaining the intent[22] underlying the board's action.[23] If the board intended to suppress ideas, they abused their discretion and infringed upon the first amendment rights of their students.[24]

First amendment freedoms[25] hold a preferred position among constitutional rights.[26] When confronted with a first amendment issue,

---

turned a summary judgment dismissal in favor of defendant school board. 474 F. Supp. at 398. Both Judge Sifton, writing for the court, and Judge Newman, concurring, found material questions of fact concerning the motivation prompting removal. 638 F.2d at 438. The court recognized that there are legitimate reasons for book removal including the application of community standards to issues of personal taste and political belief. *Id.* at 418 n.13. The court distinguished the application of the aforementioned values in developing school policy and requiring conformity with "subjective and intangible standards of personal morality or political philosophy." *Id.* The two judges in the majority disagreed on the necessity for a new trial. Judge Sifton believed that the book removal had unusual characteristics, because the persons instigating the investigation did not usually become involved in such matters, and the procedure followed suggested political motivation. *Id.* at 414. Judge Sifton said he would issue summary judgment to the plaintiffs. *Id.* at 419. Judge Newman, concurring in result, expressed the need to remand to determine exactly why the books had been removed. *Id.* at 438. School officials are not allowed to suppress ideas or "chill" expression through book removal but are allowed to remove a book if it is considered vulgar or obscene. *Id.* at 433. *See also* Comment, *First Amendment Limitations, supra* note 11, at 471 (listing factors acceptable as motivation for removal).

21. 102 S. Ct. at 2812. Specifically the Court affirmed the court of appeals decision to remand to the trial court, so it could determine the motive for the book removals. *Id.*

22. *Id.* at 2810. The plurality opinion discussed the intent of the school board. Justice Blackmun's concurring opinion dealt with the school board's purpose. *Id.* at 2815. Both focused on the school board's motivation.

23. *Id.* at 2812.

24. *Id.* The Court noted that the constitutionality of the removal of the books rests on the permissibility of the school board's motives. The removal would be upheld if, on remand, the district court finds the school board objected to the vulgarity of the books. The action cannot be upheld if the school board was motivated by a desire to limit student access to materials that are incompatible with the school board's beliefs. 102 S. Ct. at 2812.

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

For general discussion of first amendment rights, see Cox, *Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1 (1980); Goldberg, *The First Amendment and its Protections*, 8 HASTINGS CONST. L.Q. 5 (1980) (emphasizes importance of giving first amendment "breathing room"); Van Alstyne, *The First Amendment and the Free Press: A Comment on Some New Trends and Some Old Theories*, 9 HOFSTRA L. REV. 1 (1980) (difference in speech-related and press-related freedoms).

26. Kovacs v. Cooper, 336 U.S. 77, 88 (1949). *See generally* McKay, *The Prefer-*

the Supreme Court determines whether the restraint unduly infringes upon protected rights.[27] The Court invalidates restraints that impermissibly restrict first amendment rights.[28]

Although favored, even first amendment rights are not absolute.[29]

---

ence for Freedom, 34 N.Y.U. L. REV. 1182 (1959) (policy and purpose behind the preferred position of first amendment rights). Limitations on preferred first amendment freedoms can be justified only by compelling state interests in regulating a particular subject. Williams v. Rhodes, 393 U.S. 23, 31 (1968) ("decisions of this Court have consistently held that only a compelling state interest . . . can justify limiting first amendment freedom"). *See, e.g.*, Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707, 718 (1981) (infringement on religious freedom only justified by the least restrictive means furthering a compelling state interest); Rosen v. Port of Portland, 641 F.2d 1243, 1247 (9th Cir. 1981) (ordinances infringing on first amendment rights subjected to exacting scrutiny); Robinson v. Price, 615 F.2d 1097, 1099 (5th Cir. 1980) (there must be both a compelling state interest to justify a regulation and no less restrictive alternative means); Bertot v. School Dist. No. 1, 613 F.2d 245 (10th Cir. 1979) (court fiercely protects first amendment rights).

27. Elrod v. Burns, 427 U.S. 347, 360 (1975). Perhaps the most common restriction on speech derives from the clear and present danger doctrine articulated by Justice Holmes in Schenck v. United States, 249 U.S. 47 (1919). To restrict speech, the words must be used "in such circumstances and [in] such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Id.* at 52. The test was refined in Brandenburg v. Ohio, 395 U.S. 444 (1969). Under the *Brandenburg* refinement, speech may be restricted if "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action." *Id.* at 447. For a general discussion on the development of the clear and present danger doctrine see L. TRIBE, AMERICAN CONSTITUTIONAL LAW 608-63 (1978).

Clear and present danger is not the only permissible restriction on speech. *E.g.*, United States Labor Party v. Oremus, 619 F.2d 683, 687 (7th Cir. 1980) (reasonable time, place and manner restrictions are acceptable); Bernard v. Gulf Oil, 619 F.2d 459, 471 (5th Cir.) (prior restraint may be acceptable if sufficient procedural safeguards are provided), *cert. denied*, 449 U.S. 1033 (1980).

28. Healy v. James, 408 U.S. 169, 184 (1972) ("college has a legitimate interest in preventing disruption on campus"); *see supra* note 4. The broad discretion of school boards covers more than curriculum and library choices. *See supra* notes 5-6. It extends to controlling the conduct of students. Mitchell v. Board of Trustees, 625 F.2d 600 (5th Cir. 1980) (school authorities have the right to make rules prohibiting bringing weapons to school); Reisman v. School Comm., 439 F.2d 148 (1st Cir. 1971) (school authorities have a duty to punish student conduct which materially disrupts the classwork of others); Dillon v. Pulaski County Special School Dist., 468 F. Supp. 54 (D. Ark. 1978) (vital state interest in orderly educational system allows wide latitude in formulating reasonable regulations contributing to the decorum of the school), *aff'd*, 594 F.2d 699 (8th Cir. 1979). *See generally* Comment, *What Johnny Can't Read: School Boards and the First Amendment*, 42 U. PITT. L. REV. 653 (1981) (overview of the right to receive information, book removal cases and school board discretion and limits).

29. Elrod v. Burns, 427 U.S. 347, 360 (1976). The test articulated in *Elrod* for

At times, judicially recognizable countervailing forces supersede these rights.[30] A commonly recognized countervailing force is a school board's discretion to control its students.[31]

The seminal first amendment case illustrating the tension between school boards and students is *Tinker v. Des Moines School District*.[32] In *Tinker*, students wore armbands in symbolic protest against the Viet Nam War.[33] Subsequently, they were suspended.[34] The

---

restrictions on the first amendment states that infringements are presumptively prohibited but appropriate restraints may be permitted. *Id.* at 360. *See, e.g.*, International Soc'y for Krishna Consciousness v. Rochford, 585 F.2d 263, 271 (7th Cir. 1978) (first amendment freedoms may be restricted to further important government interests such as public safety and welfare in airports); Erskine v. West Palm Beach, 473 F. Supp. 48, 51 (S.D. Fla. 1979) (first amendment protections give way to the protection of public safety and welfare); Childs v. Duckworth, 509 F. Supp. 1254, 1261 (N.D. Ind. 1975) (prison authorities have several interests which justify infringement on first amendment rights). *But see* Abbott v. Thetford, 529 F.2d 695, 700 (5th Cir. 1976) (mere fear or apprehension of disturbance insufficient to justify denial of freedom of expression), *cert. denied*, 430 U.S. 954 (1977).

30. Smith v. United States, 431 U.S. 291, 299 (1976). Determining whether material is obscene exemplifies the court's role in strictly scrutinizing restrictions against an individual's right to expression. "Since it is only 'obscenity' that is excluded from constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law." Roth v. United States, 354 U.S. 476, 497-98 (1957). In obscenity cases, "as in all others involving rights derived from the first amendment guarantees of free expression, [the] court cannot avoid making an independent constitutional judgment *on the facts of the case*. . . ." Jacobellis v. Ohio, 378 U.S. 184, 190 (1964) (emphasis added) (footnote omitted). These principles apply to school book removal cases as courts look at the motivations, and procedures preceding library book removal. *See infra* notes 75-77. *See also supra* note 20 and accompanying text.

Obscenity is not the only first amendment area in which courts carefully scrutinize the specific facts involved. *E.g.*, Thomas v. Board of Educ., Granville Cent. School Dist., 607 F.2d 1043, 1050 (2d Cir. 1979) (courts examine school board actions carefully when they affect extracurricular activities); Ealy v. Littlejohn, 569 F.2d 219, 229-30 (5th Cir. 1978) (careful watch over grand jury proceedings to prevent violation of first amendment freedom of association); Mabey v. Reagan, 537 F.2d 1036, 1050 (9th Cir. 1976) (actual rather than the potential disruption of freedom is considered).

31. *See, e.g.*, First Nat'l Bank v. Bellotti, 435 U.S. 765, 784-86 (1978) (state statute abridging the freedom of speech of corporations invalidated); Miller v. California, 413 U.S. 15, 24 (1973) (to be valid obscenity laws must be strictly defined and narrowly construed); Gooding v. Wilson, 405 U.S. 518, 522 (1972) (fighting words statutes invalid unless narrowly drawn).

32. 393 U.S. 503 (1969). The tension arises from the conflict between the power of the school board and the scope of student rights under the first amendment, see *supra* notes 2-6.

33. 393 U.S. at 504.

34. *Id.* Aware of the students' plan to wear armbands, the principals adopted a

Supreme Court confirmed the school board's comprehensive authority to mandate and control student conduct.[35] The Court noted, however, that the power does not extend to suppressing expressions of opinion that do not disrupt classes or school work.[36] To justify suppression of unpopular ideas, school authorities must show more than the desire to avoid the potential disruption evoked by such ideas.[37]

The necessity for school boards to justify their actions has again

---

policy to suspend any student who refused to remove the band when asked. The plaintiffs in *Tinker* refused to remove their armbands and were suspended. *Id.*

35. *Id.* at 507. "[T]he court has repeatedly emphasized the need for affirming the comprehensive authority . . . of school officials . . . to prescribe and control conduct in the schools." *Id. See also* Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (courts will not intervene in school affairs unless constitutional values are implicated). *See supra* note 28.

36. *Tinker*, 393 U.S. at 508. Although school boards have broad discretion in determining school policy, the power is not unlimited. "The dangers of unrestrained discretion are readily apparent. Under the guise of beneficent concern for the welfare of school children, school authorities, albeit unwillingly, might permit prejudices of the community to prevail." James v. Board of Educ., 461 F.2d 566, 575 (2d Cir. 1972). *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97 (1968) (anti-evolution law struck down on establishment grounds); Board of Education v. Barnette, 319 U.S. 624, 637 (1942).

> The Fourteenth Amendment, as now applied to the states, protects the citizen against the State itself and all its creatures—Boards of Education not excepted. These have, of course, important, delicate and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights.

Id. See also Pratt v. Independent School Dist. No. 831, 670 F.2d 771, 776 (8th Cir. 1982) (school boards to not have absolute discretion to remove materials from schools); Zykan v. Warsaw Community School Dist., 631 F.2d 1300, 1305 (7th Cir. 1980) (school board power limited by constitutional considerations); Thomas v. Board of Educ., 607 F.2d 1043, 1049 (2d Cir.) (school authorities have some latitude in restricting otherwise protected speech on school grounds), *cert. denied*, 444 U.S. 1081 (1979). *See also* Comment, *Library Censorship*, *supra* note 2, at 102-03 (courts wary of potential constitutional problems arising from imposition of community prejudices to the exclusion of contrary views). *Cf.* Note, *Constitutional Law—Schools—School Board Removal of Books from Libraries and Curricula*, 30 KAN. L. REV. 146, 150 (1981) (courts defer to school boards on local matters).

Despite the deferential attitude of courts to board actions "[w]hen First Amendment values are implicated, the local officials removing the book must demonstrate some substantial and legitimate government interest." Right to Read Defense Comm. of Chelsea v. School Comm., 454 F. Supp. 703, 713 (D. Mass. 1978). *Accord* Comment, *Library Censorship, supra* note 2, at 102 (the judiciary cannot defer to school boards and must remain "profoundly skeptical" of state assertions that an action significantly affecting first amendment rights can withstand constitutional attack) (citing Thomas v. Board of Educ.).

37. *Tinker*, 393 U.S. at 509.

become evident in cases concerning library book removals.[38] In 1972, a New York school board faced an unprecedented claim[39] arising from the removal of a book from a junior high school library.[40] In *President's Council, District 25 v. Community School Board No. 25*,[41] the Second Circuit Court of Appeals found no infringement on basic constitutional values[42] and dismissed the action.[43] Relying on judicial restraint,[44] the court refused to substitute its own judgment

38. *See infra* notes 39-60 & 75-77.

39. Prior to 1972, there were few cases pertaining to the rights and responsibilities of libraries. One earlier case dealt with desegregating public library facilities on equal protection grounds. Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (5th Cir.), *cert. denied*, 326 U.S. 721 (1945). The lack of precedent regarding book removal on first amendment grounds may, in large part, explain the summary disposition of plaintiff's claim in President's Council, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 988 (1972). See the discussion of *President's Council* in the text accompanying notes 41-48. *See generally* O'Neil, *Libraries, Liberties and the First Amendment*, 42 CIN. L. REV. 209, 211-12 (1973).

40. President's Council, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 988 (1972). The board removed P. THOMAS, DOWN THESE MEAN SHEETS (1967).

41. 457 F.2d at 289 (2d Cir.), *cert. denied*, 409 U.S. 988 (1972).

42 *Id.* at 292. "The intrusion of the Board here upon any first amendment constitutional right . . . is not only not 'sharp' or 'direct,' it is miniscule." *Id.*

43. *Id.* at 291.

44. For an overview of judicial restraint, see Lamb, *Judicial Restraint Reappraisal*, 31 CATH. U.L. REV. 181 (1982).

> Courts uniformly agree that restraint is required when they review board decisions. [N]o matter what choice of books may be made . . . some other person or group may well dissent. The ensuing shouts of book burning, witch hunting and violation of academic freedom hardly elevate this intramural strife to first amendment constitutional proportions. If it did, there would be a constant intrusion of the judiciary into the internal affairs of the school.

President's Council, 457 F.2d at 292.

Many courts have a tendency to defer to school board decisions. "[N]othing in the constitution permits the courts to interfere with local educational discretion until local authorities begin to substitute rigid and exclusive indoctrination for the mere exercise of their prerogative to make pedagogic choices regarding matters of legitimate dispute." Zykan v. Warsaw Community School Corp., 631 F.2d 1300, 1306 (7th Cir. 1980). *Accord* E. REUTTER, *supra* note 6, at 25 (courts generally will not substitute their judgment for local school board discretion if the local authority has the power to perform a particular act).

The Supreme Court has said: "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." Epperson v. Arkansas, 393 U.S. 97, 104 (1968). *Accord* Pratt v. Independent School Dist. No. 831, 670 F.2d 711, 775 (8th Cir. 1982) (intervention justified only when the evidence does not present a legitimate rational for school board action); James v. Board of Educ., 461 F.2d

for that of the duly elected local officials.[45] The court rejected the students' argument that minors have an unqualified first amendment right of access to non-obscene books.[46] By its decision, the court refused to recognize the theory that books gain tenured status when placed upon the shelf.[47] Instead, the court granted the school board equivalent discretion to remove books that it had in selecting them.[48]

The Sixth Circuit, rejecting the *President's Council* approach, established an alternative solution for book removal cases in *Minarcini v. Strongsville City School District*.[49] There, senior high school stu-

566, 573 (2d Cir. 1972) ("curriculum controls belong to the political process and local school authorities"); Special Project, *Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373, 1425-26 (1976) (courts recognize expertise of legislators and school boards to administer school policies). *See generally Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1051-55 (1968) (discussion of judicial restraint based on lack of expertise).

45. 457 F.2d at 291. "Since the Legislature of the State of New York has by law determined that the responsibility for the selection of materials in public school libraries . . . is to be vested in the community school board . . . we do not consider it appropriate for this court to review either the wisdom or efficiency of the determinations of the Board." *Id.*

46. 457 F.2d at 292. Plaintiffs relied on Ginsberg v. New York, 390 U.S. 629 (1968) for this argument. *Ginsberg* upheld a statute preventing sales of obscene materials to minors under 17 years of age. *Id.* at 638. In rejecting plaintiff's argument, the court emphasized the educational function of schools, stating that nothing compels schools to become depositories for any book that is not obscene. 457 F.2d at 292-93.

47. *Id.* at 293. The plaintiffs argued that once a book is shelved, it is "tenured" and should not arbitrarily be removed. *Id.* The court in *President's Council* found that neither shelving, or unshelving books constituted a constitutional issue, "particularly where there is no showing of a curtailment of freedom of speech or expression." *Id.* There must be an authority who can remove books that are obsolete, irrelevant or improperly selected. *Id. President's Council* revealed that the school board was that authority. *Id.* Later cases discussing book tenure agree that books may be exorcised from shelves for the legitimate reasons mentioned in *President's Council*, but note that motivations behind removal are relevant in distinguishing legitimate from illegitimate removals. *See infra* notes 53 & 75 and accompanying text. *See also* Comment, *Off the Shelf, supra* note 2, at 310-11 (discussing how shelving a book grants it some protection from removal for arbitrary or political reasons).

48. 457 F.2d at 293. "[B]ooks which become obsolete or irrelevant or where [sic] improperly selected initially, for whatever reason, can be removed by the same authority which was empowered to make the selection in the first place." *Id.* For a general discussion on removal and selection of particular books, see Comment, *supra* note 28, at 659-64.

49. 541 F.2d 577 (6th Cir. 1976). The district court, relying on *President's Council*, had given the school board parallel rights on selecting and "winnowing" library materials. Minarcini v. Strongville City School Dist., 384 F. Supp. 698, 706 (N.D.

dents brought suit against the Board of Education for removing two books from the school library.[50] The books were removed upon the recommendation of a minority report which labeled the books as "garbage."[51] The court noted that a school board need not provide a library or choose particular books. Once a library is established, however, library use cannot be restricted by the social and political tastes of school authorities.[52] By removing books to suppress a political or social philosophy contrary to that of the board members, the board infringed the students' constitutional right to receive information.[53]

Ohio 1974). The court of appeals established a new standard, focusing on the motive to removal. 541 F.2d at 582-83.

50. *Id.* at 579. The school board had removed J. HELLER, CATCH 22 (1973) and K. VONNEGUT, CAT'S CRADLE (1963).

51. The report, prepared by one of the board members, stated in pertinent part:

> 1. It is recommended that *God Bless You*[,] *Mr. Rosewater* not be purchased, either as a textbook, supplemental reading book or library book. The book is completely sick. One secretary read it for one-half hour and handed it back to the reviewer with the written comment, "GARBAGE."
>
> 2. Instead, it is recommended that the autobiography of Captain Eddie Rickenbacker be purchased for use in the English course. It is modern and it fills the need of providing material which will inspire and educate the students as well as teach them high moral values . . .
>
> . . . .
>
> 6. It is also recommended that *Cat's Cradle*, which was written by the same character (Vennegutter) who wrote, using the term loosely, *God Bless You*[,] *Mr. Rosewater*, and which has been used as a textbook, although never legally adopted by the Board, be withdrawn immediately and all copies disposed of in accordance with statutory procedure.
>
> 7. Finally, it is recommended that the McGuffey Readers be bought as supplemental readers for enrichment program purposes for the elementary schools, since they seem to offer so many advantages in vocabulary, context and sentence structure over the drivel being pushed today.

541 F 2d at 581-82. The *Minarcini* court found that absent a neutral first amendment explanation for removal, it was apparent that the personal tastes of board members instigated the removal. *Id.* at 581.

52. *Id.* at 582. *Accord* Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269, 1272 (D.N.H. 1979) (no requirement that the school must provide a library or choose particular books); Right to Read Defense Comm. of Chelsea v. School Comm., 454 F. Supp. 703, 711-13 (D. Mass. 1979) (having chosen a particular book, the board created a constitutionally protected interest in its access).

53. 541 F.2d at 583. *Accord* Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269, 1274-75 (D.N.H. 1979) (protests of inappropriate sexual content of advertisements in MS Magazine was a pretext for removing magazine that espoused unpopular political views); Right to Read Defense Comm. of Chelsea v. School Comm., 454 F. Supp. 703, 711-12 (D. Mass. 1979) ("[W]hen, as here, a book is removed because its theme and

Several years later, in *Zykan v. Warsaw Community School Corp.*,[54] a school board faced similar claims when it removed a book from the school library. The Seventh Circuit dismissed the action,[55] stating that the complaint failed to suggest that the board had acted with intent to eliminate a particular field of inquiry or to impose a rigid orthodoxy of ideas.[56] The court stated two factors that qualify secondary students' freedom to hear or receive information: first, the intellectual development level of high school students;[57] and second, the responsibility of schools to instill fundamental community values in their students.[58] Thus, in some instances, students' right to receive information may be limited.[59] In *Zykan*, the students were unable to establish a violation.[60]

Recently, the Eighth Circuit found that a school board had abused its discretion[61] when it removed a film from the curriculum.[62] The

---

language are offensive to a school committee, those aggrieved are entitled to court intervention.").

54. 631 F.2d 1300 (7th Cir. 1980). The board removed GO ASK ALICE (anonymous) (1972). *Id.* at 1302.

55. *Id.* at 1308-09. The court dismissed the case with leave to amend the complaint to state a constitutional cause of action. *Id.*

56. *Id.* at 1306.

57. *Id.* at 1304. "A high school student's lack of intellectual skills necessary for taking full advantage of the marketplace of ideas engenders a correspondingly greater need for direction and guidance from those better equipped by experience and reflection to make critical educational choices." *Id.*

The development level of students affects not only their right to receive information but all other first amendment rights as well. *See supra* notes 11 & 29. *See generally Developments in the Law, supra* note 44, at 1052-54 ("It seems unwise to assume as a matter of constitutional doctrine that school children possess sufficient sophistication or experience to distinguish 'truth' from 'falsity' ").

58. 631 F.2d at 1304. The court noted that the school must encourage and nurture "fundamental social, political and moral values that will permit a student to take his place in the community." *Id.*

59. *Id.* at 1305. "[I]t is in general permissible and appropriate for local boards to make educational decisions based upon their personal social, political and moral views." *Id.* (citing Gary v. Bd. of Educ., 598 F.2d 535, 544 (10th Cir. 1979)).

60. The relative difficulty in establishing a violation of first amendment rights is due to the lower standard of protection afforded secondary status. *See supra* notes 2 & 3.

61. Pratt v. Independent School Dist. No. 831, 670 F.2d 771, 779 (8th Cir. 1982). For a discussion on the extent of school board discretion and limits thereon, see *supra* notes 5, 6, 10, 28 & 36.

62. 670 F.2d at 774. "The Lottery," a film derived from S. JACKSON, THE LOTTERY (1975), was removed from the literature class curriculum. *Id.* at 773.

While *Pratt* pertains to curriculum materials rather than library books, it is rele-

Court of Appeals, in *Pratt v. Independent School District 831*,[63] extended the principles found in *Minarcini*[64] to curriculum materials.[65] *Pratt* held that students have a right to ideas, which school authorities cannot suppress.[66] Focusing on the similarity of facts in all book removal cases, *Pratt* established a plausible reconciliation among the prior book removal cases.[67] *President's Council*[68] was distinguished because the books there contained extensive sex and violence. Removal of such material falls within the discretion of school officials.[69] In Pratt, library officials removed the books as part of an ideological ban,[70] which warrants constitutional protections.[71]

In its first attempt to address the book removal issue, a plurality[72]

---

vant Although the *Pratt* court analyzed and distinguished the library cases, it followed the approach used in the book cases to review the discretion given to school boards. There is a similarity between using school principals to make curriculum decisions and school boards to make library decisions. *See infra* note 65.

63. 670 F.2d 771 (8th Cir. 1982).

64. *See supra* notes 49-53. These principles are also found in Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269, 1275 (D. Mass. 1979) and Right to Read Defense Comm. of Chelsea v. School Comm., 454 F. Supp. 703, 712-13 (D. Mass. 1978). Both cases relied heavily on *Minarcini*.

65. 670 F.2d at 776 n.6. Generally, school boards have greater discretion to remove books from the curriculum because students are captive audiences. James v. Board of Educ., 461 F.2d 566, 573 (2d Cir. 1972). Even that discretion, however, is qualified by a concern for protecting constitutional rights. *Id.*

66. 670 F.2d at 776 (citing Pico v. Board of Educ., Island Trees Union Free School Dist., 638 F.2d 404, 433 (2d Cir. 1980) (Newman, J., concurring), *aff'd*, 102 S. Ct. 2799 (1982)).

67. 670 F.2d at 776 n.6.

68 *See supra* notes 41-48.

69. *Pratt*, 670 F.2d at 776 n.6. "Because the officials in *President's Council* removed the book due to the extensive violence and sex it contained, we do not believe that it is . . . inconsistent with our decision here." *Id. Accord* Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 102 S. Ct. 2799, 2810 (1982) (books can be removed if they are not suitable for education); Zykan v. Warsaw Community School Dist., 631 F.2d 1300, 1304 (7th Cir. 1980) (community has a legitimate, vital and compelling interest in the choice of a suitable curriculum for the benefit of young citizens). *See also* Niccolai, *supra* note 5, at 28-29 (permissible reasons to remove books).

70. Pratt v. Independent School Dist. No. 831, 670 F.2d 771, 776 (8th Cir. 1982).

71. In *Pratt*, the parents and school board objected to the film because of its religious and ideological message. They viewed the film as a threat to family values and religious beliefs. *Id.* at 776-77. The district court found removal on this basis a prima facie case of unconstitutional activity. *Id.* at 776.

72. Justices Blackmun, Marshall and Stevens joined in the opinion written by Jus-

of the Supreme Court in *Board of Education v. Pico*[73] recognized secondary students' right to receive information.[74] Justice Brennan, writing for the Court, stated that removal of library books, motivated by a desire to prescribe an orthodox view of political and social values,[75] violates students' first amendment rights.[76] Acknowledging school board authority over internal school matters,[77] Justice Brennan nevertheless found that a material question of fact existed regarding the permissibility of the removal.[78]

Relying on earlier Court decisions,[79] Brennan found school board discretion limited when employed to restrict learning to a particular philosophy.[80] On the other hand, the Court approved restrictions based on pervasive vulgarity or the educational suitability of material.[81] Accordingly, the plurality concluded that the removal may have infringed the right of Island Trees students to receive informa-

---

tice Brennan. 102 S. Ct. 2799, 2802 (1982). The Court handed down seven opinions, four of which were dissents.

Granting *certiorari* before a trial record was developed may, in large part, account for the numerous opinions. One first amendment scholar, Harvard Professor Alan Dershowitz, derides the inability of the Court to wait for a riper case to discuss book removal issues. "The court reaching out and taking the case at this posture," he believes, is "very dangerous." "It's another example of the absurd hypocrisy of 'judicial restraint.'" Lauter, *Can School Board Ban Library Books?*, NAT'L L.J., Oct. 26, 1981, at 5, col. 1.

73. 102 S. Ct. 2799 (1982).

74. *Id.* at 2808 (Brennan, J.). The Court engaged in a historical review of the right to receive information and concluded that a student's right to know was the next step in the development. *Id.* at 2808-09. *See supra* note 11.

75. 102 S. Ct. at 2810 (Brennan, J.). "Our Constitution does not permit the official suppression of *ideas*." *Id.* (emphasis in original).

76. *Id. See supra* notes 2-4.

77. *Id.* at 2806 (Brennan, J.). *See generally supra* notes 5-6 (overview on school board power). This authority includes the right to acquire books. 102 S. Ct. at 2810 (Brennan, J.). "[N]othing in our decision today affects in any way the discretion of a local school board to choose books to *add* to the libraries of their schools." *Id.* (emphasis in original).

78. *Id.* at 2811 (Brennan, J.). Because there was a material question of fact, the court held that the summary judgment in favor of the school board should not have been granted. *Id.*

79. *Id.* at 2808 (Brennan, J.). Brennan reviewed the cases that established the right to receive information. *Id. See supra* note 11.

80. *Id.* at 2809-10 (Brennan, J.). "If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this factor was the decisive factor in petitioners' discretion, then petitioners have exercised their discretion in violation of the Constitution." *Id.* at 2810 (emphasis in original).

81. *Id.* [A]n unconstitutional motive would *not* be demonstrated if it were shown

tion if, upon remand, the district court found the removal motivated by an intent to suppress a particular philosophy of ideas.[82]

Justice Blackmun concurred in the judgment,[83] but expressed dissatisfaction with the plurality's emphasis on the right to receive information.[84] He stated that discriminating against[85] and suppressing a particular idea,[86] arbitrarily singling it out solely on the basis of political or moral judgments, violates the first amendment.[87] Justice Blackmun noted that while board members may attempt to instill

---

that petitioners had decided to remove the books at issue because those books were persuasively vulgar." *Id.* (emphasis in original).

The plurality concedes that school boards may "transmit community values." 102 S. Ct. at 2806. Furthermore, they may use discretion to "determine the content of their school libraries." *Id.* at 2810. "But that discretion may not be exercised in a narrowly partisan or political manner." *Id.*

82. *Id.* at 2812 (Brennan, J.). The Court remanded to the district court to determine why the books were removed from the library. If the trial court determines that desire to suppress political ideas motivated the removal of the books, then the books will have to be returned. *Id.*

The plurality also reviewed evidence concerning implementation of the ban and found a strong suggestion of illegitimate motives. *Id.* at 2811-12. Several facts are particularly troublesome to the Court. The board ignored the advise of teachers and librarians, removing books based on a list obtained at a conservative political meeting. There was no "independent review" of other library books. *Id.* Further, the board ignored established channels to accommodate complaints and possible subsequent removals. *Id.* Ultimately, the plurality determined that the removal procedures were "highly irregular and ad hoc." *Id.*

83. 102 S. Ct. at 2812 (Blackmun, J., concurring). Justice Blackmun agreed with the plurality's standard of review to be used on remand, but had a different perspective on first amendment rights. *Id.*

84. *Id.* at 2813-14 (Blackmun, J., concurring). "I do not suggest that the state has any affirmative obligation to provide students with information or ideas, something that may well be associated with a 'right to receive.'" *Id.* at 2814.

85. *Id.*

86. The suppression theory was evident in Tinker v. Des Moines School Dist., 393 U S. 503 (1969), where the court found that singling out armbands over other political symbols because of disapproval by school officials denied the students' rights of expression. *Id.* at 509-11.

87. 102 S. Ct. at 2813-14 (Blackmun, J., concurring). Examples of permissible removal include relevance to curriculum, quality of writing, space considerations or financial limitations, as well as when a book is beyond the comprehension of students. *Id.* at 2815. These instances do not implicate first amendment rights because they are legitimate reasons within the discretionary power of school boards to remove material from school libraries. There is a sharp distinction between these reasons, however, and suppressing books for "anti-American" content, which is a political motivation. *Id.*

community values through persuasion,[88] they may not present a narrowly restricted perspective.[89] Justice White also concurred in the judgment, but declined to comment on the first amendment issue, claiming it was not properly before the Court.[90]

In the dissent,[91] four Justices rejected the right of students to have access to particular books.[92] Justice Rehnquist, in a separate dissent, dismissed the idea of students' right to receive information.[93] He argued that since authors lack the right to insist that libraries shelve their books, there can be no reciprocal right[94] for students to receive this information.[95] Justices Burger and Rehnquist argued that the right to receive information conflicts with the indoctrinative function of secondary schools.[96] All four dissenting Justices viewed the dis-

88. *Id.* at 2813 (Blackmun, J., concurring). *Accord* Ambach v. Norwick, 441 U.S. 68, 77 (1980) ("perceptions of the public schools as inculcating fundamental values [are] necessary to the maintenance of a democratic political system").

89. *Id.* at 2814 (Blackmun, J., concurring). "[W]e must reconcile the schools' 'inculcative' function with the First Amendment's bar on 'prescriptions of orthodoxy.' " *Id.*

90. Justice White provided the fifth vote necessary to create a majority. In a separate concurrence, Justice White agreed that a factual dispute exists regarding reasons underlying the board's actions. *Id.* at 2816. For this reason, he concurred in the judgment but refused to discuss the possible constitutional issues without a full trial record. *Id.*

91. Chief Justice Burger wrote the dissenting opinion that Justices Rehnquist, Powell and O'Connor joined. 102 S. Ct. 2817 (Burger, C.J., dissenting). These Justices also filed three separate dissenting opinions.

92. 102 S. Ct. at 2819 (Burger, C.J., dissenting). "We all agree . . . that knowledge is necessary for effective government. [That], however, does not establish a *right* to have particular books retained on the school library shelves . . . there is not a hint in the First Amendment . . . of a "right" to have the government provide continuing access to certain books." *Id.* (emphasis in original).

93. 102 S. Ct. at 2831 (Rehnquist, J., dissenting). *See supra* note 11 (the right to know).

94. *See supra* note 11 (the right to receive information).

95. 102 S. Ct. at 2831 (Rehnquist, J., dissenting). Justice Rehnquist maintains that the right to receive information depends on the right to convey that information. *Id.* Because authors do not have the right to express their ideas in libraries there is no coresponding right to speak from which the right to know can derive. *Id.*

96. 102 S. Ct. at 2819 (Burger, C.J., dissenting) ("how are 'fundamental values' to be inculcated except by having school boards make content-based decisions about the appropriateness of retaining materials in the school library and curriculum"); *id.* at 2832 (Rehnquist, J., dissenting). "The idea that such students have a right of access, in the school, to information other than that thought by their educators to be necessary is contrary to the very nature of an inculcative education." *Id. See supra* notes 55-57 and accompanying text.

tinction between removal of books and the initial failure to acquire them to be without merit.[97]

The distinction between acquisition and removal, however, is not as illogical as the dissent maintains. It is more difficult to prove that illegitimate factors influenced a decision not to acquire a book than it is to prove that improper factors motivated the removal of a book.[98] By tailoring the decision to removal situations, however, the plurality does not preclude the possibility that students' rights may be violated through failure to acquire.[99] Nonetheless, since failure to acquire was not at issue before the Court, the plurality's narrow holding is justifiable.

Justice Blackmun's concurring opinion is significant, because it narrows the effect of the Court's opinion. Because he refused to base

97. 102 S. Ct. at 2821 (Burger, C.J., dissenting). "It does not follow that the decision to remove a book is less 'official suppression' than the decision not to acquire a book desired by someone?" (Footnote omitted). *Id.*; 102 S. Ct. at 2822 (Powell, J., dissenting); 102 S. Ct. at 2833 (Rehnquist, J., dissenting). "The failure of a library to acquire a book denies access to its contents just as effectively as does the removal of the book from the library's shelf." *Id.* 102 S. Ct. at 2835 (O'Connor, J., dissenting). "If the school board can . . . determine initially what books to purchase for the school library, it surely can decide which books to discontinue or remove from the school library . . ." *Id.*

98. Because the Supreme Court did not address acquisition, issues concerning the burden of proof did not arise. Lower courts, however, acknowledge that it is more difficult to show that illegitimate factors controlled the decision not to choose a particular book. Legitimate factors that could result in a decision not to acquire a book include: limited financial resources; lack of space; or a judgment that the material is too advanced for the students to comprehend. *See, e.g.*, Zykan v. Warsaw Community School Dist., 631 F.2d 1300, 1308 (7th Cir. 1980) (noting that budgets limit the number of books that can be acquired); Pico v. Board of Educ., Island Trees Union Free School Dist., 474 F. Supp. 387, 397 (E.D.N.Y., 1979), *rev'd*, 638 F.2d 404 (2nd Cir. 1980), *aff'd*, 102 S. Ct. 2799 (1982).

Several courts distinguished removal and acquisition cases. *See, e.g.*, Minarcini v. Strongsville City School Dist., 541 F.2d 577, 580-81 (6th Cir. 1976); Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269 (D.N.H. 1979); Right to Read defense Comm. of Chelsea v. School Comm., 454 F. Supp. 703 (D. Mass. 1978). At least one court maintained that the distinction was invalid. Pico v. Board of Educ., Island Trees Union Free School Dist., 474 F. Supp. 387, 395 (E.D.N.Y., 1979), *rev'd*, 638 F.2d 404 (2nd Cir. 1980), *aff'd*, 102 S. Ct. 2799 (1982). *See also* Comment, *Library Censorship, supra* note 2, at 136-36 (the actual difference between removal and acquisition is a matter of proof).

An additional distinction between removal and acquisition was noted in *President's Council*, 457 F.2d 289, 290 n.1 (2d Cir.), *cert. denied*, 409 U.S. 988 (1972) (the authority to acquire school books may be expressly granted by statute.)

99. 102 S. Ct. at 2805, 2810 (Brennan, J.).

his opinion on the right to receive information,[100] that theory elicited support from only three Justices.[101] Since the dissenting Justices also rejected extension of the right to receive information to secondary students,[102] Blackmun's opinion creates a majority against this point.[103] This is the only issue that has been clearly resolved. Justice White's reticence in discussing the merits[104] makes further conjecture on the breadth of the decision speculative at best.

Although *Pratt* clarified some of the relevant issues in book removal cases,[105] the *Pico* Court failed to mention the *Pratt* decision.[106] In *Pico*, the entire Court discussed the right to receive information and the discretion appropriate for school boards.[107] Yet, in failing to establish a clear majority[108] and neglecting to mention prior book removal cases,[109] the Court has perpetuated the existing uncertainty in this area.

---

100. *Id.* at 2813-14 (Blackmun, J., concurring).

101. The plurality opinion, written by Justice Brennan, was joined by Justices Marshall and Stevens. 102 S. Ct. at 2801.

102. 102 S. Ct. at 2819 (Burger, C.J., dissenting). *See supra* notes 92-95 and accompanying text.

103. Justice White's opinion on this issue is less significant because a contrary majority has been attained. In the future, cases argued before this Court should emphasize the suppression of ideas and discrimination against certain beliefs. This theory has been accepted by the plurality and Justice Blackmun.

104. 102 S. Ct. at 2817 (White, J., concurring). "We should not decide constitutional questions until it is necessary to do so, or at least until there is a better reason to address them than are evident here." *Id.*

105. *See supra* notes 61-71 and accompanying text.

106. The *Pratt* decision was issued in January of 1981, two months prior to oral arguments in *Pico*. Because the Court did not mention *Pratt* the viability of *Pratt*'s reconciliation of the cases is uncertain. *See supra* notes 67-71 and accompanying text.

107. Eight Justices agreed that school boards might be given broad discretion. 102 S. Ct. at 2806 (Brennan, J.); *id.* at 2814 (Blackmun, J., concurring); *id.* at 2822 (Powell, J., dissenting); *id.* at 2835 (Rehnquist, J., dissenting); *id.* (O'Connor, J., dissenting). Justice White expressed no opinion on the subject. *Id.* at 2816 (White, J., concurring). *See supra* notes 92-95 and accompanying text.

108. *See supra* notes 72 & 90.

109. Only two prior cases are mentioned. Justice Brennan cites Right to Read Defense Comm. of Chelsea v. School Comm., 454 F. Supp. 703 (D. Mass. 1978) for the proposition that libraries are places for students to expand on ideas and explore areas of interest. 102 S. Ct. at 2809 (Brennan, J.). Justice Rehnquist agreed with Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980), which held that school boards are experts in determining the community values appropriate for students to learn. 102 S. Ct. at 2829-30 (Rehnquist, J., dissenting).

The *Pico* decision[110] does not provide school boards with discernible guidelines to follow in book removal cases.[111] Since the extent of first amendment protections provided to secondary students is uncertain,[112] there are no clear limits on school board discretion.[113] Without a specific standard that boards can follow and courts can apply, inconsistent decisions will continue. School boards attempting to monitor the content of school libraries need a consistent, easily applied doctrine to guide their actions. *Pico* fails to evince such a doctrine.

Tracy A. Waggoner

110. 102 S. Ct. at 2810 (Brennan, J., plurality).
111. 102 S. Ct. at 2820 (Burger, C.J., dissenting).
112. *See supra* notes 2-4 and accompanying text.
113. *See supra* notes 5, 6 & 28 and accompanying text.