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JON NEWMAN'S THEORY OF DISPARAGEMENT AND THE FIRST AMENDMENT IN THE ADMINISTRATIVE STATE

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I clerked for Judge Newman during his first year on the Court of Appeals. I would like to say that I witnessed the process by which he developed into a superb appellate judge, but I cannot, because he was a superb appellate judge from the moment he was appointed. One indication of this is the most famous case he decided during that first year, *Pico v. Board of Education, Island Trees Union Free School District No. 26*.¹ It was a First Amendment matter, always an attention-getter, with the ACLU as plaintiff's attorney and, better still for purposes of notoriety, an issue whose complexity exceeded its seriousness – the removal of nine books from a high school library on political grounds. There were three separate opinions from the Court of Appeals panel, and the case went on to the Supreme Court, where it generated no less than seven separate opinions, none of which commanded a majority. This veritable blizzard of high-level judicial declarations, combined with the failure to resolve the issue, was an ideal stimulus to scholarly analysis. As a result, *Pico* was featured in a flurry of law review articles,² reprinted in a number of constitutional law casebooks³ and discussed in the leading constitutional law treatises.⁴ For closely related reasons, it

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1. *Pico v. Board of Educ.*, 638 F.2d 404 (2d Cir. 1980), *reh'g denied*, 646 F.2d 714 (2d Cir. 1980), *aff'd*, 457 U.S. 853 (1982).

2. *See infra* notes 26, 33.

3. *E.g.*, DEAN BRAVERMAN, WILLIAM BANKS & RODNEY SMOLLA, CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS IN OUR FEDERAL SYSTEM 1058 (4th ed. 2000); JESSE CHOPER, RICHARD FALLON, YALE KAMISAR & STEVEN SHIFFRIN, CONSTITUTIONAL LAW: CASES – COMMENTS – QUESTIONS 909 (9th ed. 2001); WILLIAM COHEN & JONATHAN VARAT, CONSTITUTIONAL LAW: CASES AND MATERIALS 1415 (11th ed. 2001); NORMAN REDLICH, BERNARD SCHWARTZ & JOHN ATTANASIO, CONSTITUTIONAL LAW 1358 (3d ed. 1996); GEOFFREY STONE, LOUIS SEIDMAN, CASS SUNSTEIN & MARK TUSHNET, CONSTITUTIONAL LAW 1290 (4th ed. 2001); KATHLEEN SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 1251 (14th ed. 2001); WILLIAM VAN ALSTYNE, THE AMERICAN FIRST AMENDMENT IN THE TWENTY-FIRST CENTURY: CASES AND MATERIALS 347 (3d ed. 2001).

4. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 942 (1997); DANIEL FARBER, THE FIRST AMENDMENT 44 (1998); JOHN NOWAK & RONALD ROTUNDA, CONSTITUTIONAL LAW § 1649 (6th ed. 2000); RODNEY SMOLLA, SMOLLA AND NIM-

was cited for a variety of propositions in over one hundred subsequent federal cases.

Although the judges and scholars who have dealt with the case have come to various conclusions, one theme that seems to unite them is that the issue posed by *Pico* is quite difficult, involving the conflict between acculturation and indoctrination, between preparation for democracy and the suppression of autonomy. What I suggest in this essay is that Judge Newman's concurring opinion in the case provides a relatively simple solution to the quandary.⁵ The position that he first articulated was partially relied upon by Justice Blackmun's separate opinion in the Supreme Court case and reflected in some of the scholarly literature that followed, but it has not been fully assimilated into the discussion, and its analytic force has not been fully appreciated. Moreover, while Judge Newman's solution is straight-forward, its larger implications for the theory of the First Amendment are profound and unexplored. They involve an area that will inevitably become increasingly important as time goes on, namely, the interaction between our concept of free speech and the modern administrative state. Part I of this essay presents the *Pico* case and considers various alternative rationales that have been offered for its conclusion. Part II discusses Judge Newman's theory in greater detail, and Part III focuses on its implications for the meaning of free speech in an administrative state.

I. THE *PICO* DECISION AND ITS CRITICS

The issue in *Pico* is readily stated, but the facts are simply too good to omit.⁶ In September 1975, three members of the Island Trees Board of Education attended a conference sponsored by a conservative organization entitled People of New York United, or PONY-U.⁷ One of the deliverables provided at this conference was a list of objectionable books, together with excerpts of vulgar passages from these books and editorial comments about each one, such as "seditious and disloyal," "anti-Christian," and "promotes women's lib." A little less than two

MER ON FREEDOM OF SPEECH § 10.04 [2][a][i] (1994); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1320 (2d ed. 1988).

5. See *Pico*, 638 F.2d at 432 (Newman, J., concurring).

6. See *id.* at 407-12.

7. Judge Newman, responding to the somewhat antic quality of the entire incident, observed in the first draft of his opinion that PONY-U was not a institution for the higher education of small horses. On consideration, he deleted this useful reminder, over the objection of one of his clerks. See *id.* at 436 n.6 (explaining acronym).

months later, the three school board members asked the school custodian to let them into the school library one evening, where they determined that nine of the books that appeared on the PONY-U list were on the shelves. After a series of meetings, the school board decided to remove the nine books from the high school and the junior high school libraries, and from the curriculum, on the grounds that they were “anti-American, anti-Christian, anti-Semetic (*sic*) and just plain filthy.” The books were: *A Reader for Writers*, by Jerome Archer, *Soul on Ice*, by Eldridge Cleaver, *A Hero Ain't Nothing But a Sandwich*, by Alice Childress, *The Best Short Stories by Negro Writers*, edited by Langston Hughes, *The Fixer*, by Bernard Malamud, *The Naked Ape*, by Desmond Morris, *Down These Mean Streets*, by Piri Thomas, *Slaughterhouse Five*, by Kurt Vonnegut, and *Go Ask Alice* (Anonymous).

The District Court gave summary judgment to the defendant school board. On appeal, Judge Sifton, writing for the court, began with the idea that mere removal of books from a school library does not constitute a prima facie First Amendment violation because of the wide discretion accorded to school officials.⁸ But “an unusual and irregular intervention in the school libraries’ operations by persons not routinely concerned with such matters,”⁹ he argued, does constitute a prima facie case. Thus, the school officials must bear the burden of establishing an affirmative defense, and this defense must stand up against the claim that the removal of books on grounds that they are “filthy,” whatever its justification, is vague and overbroad. On this basis, Judge Sifton remanded the case for trial without actually specifying the doctrinal rule that the trial court should apply. Judge Mansfield dissented, relying primarily on the scope of discretion afforded to school officials and the minimal impact of removing library books on students’ recognized First Amendment rights. He also emphasized the vulgar and offensive nature of the books involved by reprinting in the margin those passages that the school board had relied upon, thereby ensuring that Volume 638 of the Federal Reporter would not appear on the shelves of the school libraries in the Island Trees District if his opinion prevailed.

Judge Newman, concurring in the result, disputed Judge Mansfield’s conclusion that the school board’s action fell within its scope of discretion, and went beyond Judge Sifton’s opinion by articulating the

8. *Id.* at 412-14.

9. *Id.* at 414.

First Amendment principle that the school board had violated. “[T]he First Amendment,” he wrote, “does not permit the freedom of the teacher to become an instrument for suppression of the thoughts of students.”¹⁰ After citing the leading case on student First Amendment rights, *Tinker v. Des Moines*,¹¹ he continued: “Those in a school community have a right to be free not only from prohibition and unwarranted regulation of expression. They have a right to be free from official conduct that tends to suppress ideas. . . .”¹² Not every disapproving comment, of course, can be considered the suppression of ideas, but removing books from a school library may well be “the sort of clearly-defined, school-wide action that carries with it the potential for impermissible suppression of ideas.”¹³ This is particularly the case when the removal is politically motivated.¹⁴ Since a colorable claim was raised that the removals were politically motivated, but the defendants asserted that their motivation stemmed from the sexual content and vulgarity of the books. Judge Newman concluded that a trial was needed to resolve the matter, and he concurred with Judge Sifton on this basis.

In the Supreme Court, Justice Brennan, joined by Justices Marshall and Stevens, affirmed the Court of Appeals decision on a rationale that differed from Judge Newman’s. First Amendment protection, Justice Brennan said, includes a right to receive information, and school students are not excluded from this protection.¹⁵ A school must exercise control over its curriculum, of course, but a school library is a different matter. Its use is entirely voluntary on the students’ parts, and it affords them “an opportunity at self-education and individual enrichment that is wholly optional.”¹⁶ Thus, if the school board removed the books from the school library because they intended to deny students access to the ideas in those books, then it had violated the First Amendment. Justice Brennan emphasized the narrowness of his opinion, noting that “nothing in our decision today affects in any way the discretion of a local school board to choose

10. *Id.* at 433.

11. *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969) (holding that students had a First Amendment right to wear black armbands to protest the Vietnam War, regardless of school regulations to the contrary).

12. *Pico*, 638 F.2d at 433.

13. *Id.* at 434.

14. *Id.* at 434-35.

15. *See Pico* 457 U.S. at 866-69 (1982).

16. *Id.* at 869.

books to *add* to the libraries of their respective schools.”¹⁷ Justice Blackmun concurred, but adopted a rationale similar to that of Judge Newman’s. Justice Blackmun denied 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.’”¹⁸ Instead, he concluded that “the State may not act to deny access to an idea simply because state officials disapprove of that idea for partisan or political reasons.”¹⁹ Justice White also concurred in affirming the Court of Appeals, thus constituting a majority, on the ground that there were contested issues of fact that should be tried.²⁰

There were four separate dissents. Chief Justice Burger’s dissent, in which Justices Powell, Rehnquist and O’Connor joined, argued that the plurality opinion interfered with the discretion of school boards and failed to explain why its right to receive rationale would be limited to the removal of books from the school library, as opposed to the acquisition of books or the design of the curriculum.²¹ Justice Powell wrote separately to emphasize that “[s]chool boards are uniquely local and democratic institutions,”²² and to append Judge Mansfield’s reprint of the offensive passages. The most substantive dissent was Justice Rehnquist’s, joined by Chief Justice Burger and Justice Powell. In addition to arguing that the plurality opinion attributed political motivations to the school board that were not justified by the record, he argued that the right to receive was not applicable to the educational setting. Schools must make substantive choices, he said, stressing that “elementary schools and secondary schools are inculcative in nature. The libraries of such schools serve as supplements to this inculcative role.”²³ The government, in its role as educator, he argued, is subject to fewer First Amendment restrictions than it is in other capacities.²⁴

What emerges from this welter of opinions is the Supreme Court’s declaration that removal of books from a school library raises First

17. *Id.* at 871 (emphasis in original).

18. *Id.* at 878.

19. *Id.* at 878-79.

20. On remand, the case was settled because the Island Trees School Board agreed to return the books to the library. See DAVID MOSHMAN, CHILDREN, EDUCATION AND THE FIRST AMENDMENT: A PSYCHOLEGAL ANALYSIS 122 (1989).

21. *Id.* at 885-93.

22. *Id.* at 894.

23. *Id.* at 915.

24. *Id.* at 920. Justice O’Connor also wrote a brief dissent which reiterated a few of Justice Rehnquist’s arguments. *Id.* at 921.

Amendment concerns because such action potentially violates the students' right to receive information. Subsequent federal cases regularly cite *Pico* for this principle.²⁵ However, the dissenters and various commentators have noted that this is not a particularly convincing rationale.²⁶ To begin with, it can be easily challenged with law-school style hypotheticals. For example, suppose a school board, having replaced astronomy with environmental studies in the high school curriculum, then decided to remove the astronomy books from the school library. Or suppose the school board found that an idiosyncratic junior high school librarian had ordered multiple volumes of Hegel's works, and decided to remove them because "they were not appropriate for the students," or "the students were not ready for them." Even the proffered rationale of the Island Tress School Board – that the removed books were inappropriately vulgar – would have passed constitutional muster had it been believed, or so the plurality implied.²⁷ Clearly, the government could not prohibit citizens from reading astronomy, or Hegel, or even vulgarity, and courts would unproblematically invoke the right to receive against any effort to do so. But it seems hard to believe that any court would find that the removal of these books from the school library, at least for the indicated reasons, violated the First Amendment. The basic problem, of course is that there is a great difference between allowing people to obtain a particular book and requiring the state to supply it. There is a further difference between requiring the state to supply a particular book in a context where it is supplying books in general, such as a public library, and requiring it to supply a particular book in a specialized setting. Surely, to indulge in one further hypothetical, it would not violate the First Amendment to remove copies of Hegel, or even *Slaughterhouse Five*, that had somehow

25. See *Satellite Broad. & Communications Assoc. v. FCC*, 275 F.3d 337, 353 (4th Cir. 2001); *Monteiro v. Tempe Union High School Dist.*, 158 F.3d 1022, 1027 (9th Cir. 1988); *Gregg v. Barrett*, 771 F.2d 539, 547 (D.C. Cir. 1985); *Schuloff v. Fields*, 950 F. Supp. 66, 68 (E.D.N.Y. 1997); *Providence Journal Co. v. City of Newport*, 665 F. Supp. 107, 111 (D.R.I. 1987); *Brown v. Bd. of Regents*, 640 F. Supp. 674, 678 (D. Ne. 1986); *Democratic Party of the United States v. Nat'l Conservative Political Action Comm.*, 578 F. Supp. 797, 820 (E.D.Pa. 1983); *Am. Future Sys. v. Penn State Univ.*, 568 F. Supp. 666, 670 (M.D. Pa. 1983); see also *Brophy v. Town of Costine*, 534 A.2d 663, 664 (Me. 1987).

26. See, e.g., Moshman, *supra* note 20, at 130-31; Mark Yudof, *Library Book Selection and the Public Schools: The Quest for the Archimedean Point*, 59 IND. L.J. 527, 545-48 (1983) [hereinafter Yudof, *Library Book Selection*].

27. 457 U.S. at 871.

found their way into the art history library of a government-run museum.

Because the plurality opinion by the Court fails to withstand analysis, a number of commentators have offered alternative rationales. Mark Yudof suggests that the aspect of the *Pico* case that triggers First Amendment scrutiny is that the Island Trees School Board circumvented the ordinary procedures for selecting or removing books from the school libraries.²⁸ “If higher authorities have no policy on book assignment or selection and thereby delegate such authority on a de facto basis to teachers and librarians, they cannot later intervene in an ad hoc manner to limit the dissemination of books or their acquisition.”²⁹ This is an interesting argument in that it addresses the administrative structure of the school system, an obvious reality to anyone involved in public education, but something that often disappears from view when a court speaks of “the school board” or “local government” the way the Burger, Powell and Rehnquist dissents do. Moreover, it is a flexible approach, since the intervention by superior authorities could be regarded either as an improper breach of procedure or as a event that triggers scrutiny on the basis of some further constitutional provision like the First Amendment.

One difficulty with Yudof's rationale, however, is that it is essentially procedural and imposes no substantive First Amendment limitations. It would allow the school board to remove books on any basis, including ideological unacceptability, if it had not delegated authority to subordinate officials, or if it had established rules specifying the areas of unacceptability, or even, perhaps, if it had established rules specifying its ability to intervene. In this respect, it parallels the rather questionable line of due process cases holding that state officials can avoid creating any liberty or property rights, and thereby avoid the requirement of the due process clause, by simply not establishing criteria to cabin their discretion.³⁰ An even more serious problem is that it establishes, some sort of constitutional protection for the unencum-

28. MARK YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* 243-44 (1983) [hereinafter Yudof, *WHEN GOVERNMENT SPEAKS*]; Yudof, *Library Book Selection*, *supra* note 26, at 553-59.

29. Yudof, *Library Book Selection*, *supra* note 26, at 555.

30. *See, e.g.*, *Leis v. Flynt*, 439 U.S. 438 (1979) (lawyer has no property interest in right to appear in court); *cf. Barry v. Barchi*, 443 U.S. 55 (1979) (licensee has property interest in license because statute established rules for its removal); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978) (subscriber has property interest in continued utility service because terms for its revocation were established). These cases have been

bered exercise of authority by subordinate officials; it established, in Professor Yudof's phrase, an "irrevocable delegation."³¹ This may be a proper description of the relationship between a jurisdiction-granting legislature and a court, a relationship which of course pre-dates the administrative state. In an administrative state, however, ordinary assignments of authority to subordinate officials should not be characterized in this manner. Very few administrative delegations are irrevocable; intervention to countermand a subordinate's decision, when that decision is regarded as unwise, is a standard mode of supervision. To forbid or even disfavor such interventions would hobble the ordinary process of administration and further insulate subordinate officials who are already insulated by the brute scale and complexity of their specific tasks. It would create perverse incentives to promulgate unnecessary rules or declarations that purportedly denied subordinates the authority they actually possessed. Of course, the image of the political superior who intervenes in an administrative decision in response to political pressure is an unappealing one, but the countervailing situation occurs when a superior intervenes to countermand a decision that is short-sighted, ill-considered, biased, or corrupt. It would be difficult to say which situation is more common – and the characterization would inevitably depend upon one's point of view – but the preference for the latter characterization is built into our entire structure of government. Interventions become unacceptable when they violate some substantive standard that is independent of the intervention process itself. The truly troublesome aspect of the school board's action in *Pico* is not that it intervened, but that its intervention seems to offend some aspect of the First Amendment.

Another alternative rationale is to acknowledge that schools inevitably inculcate values but that the acceptable range of values was exceeded in this case. In fact, *Pico* is regularly cited by courts for the proposition that schools necessarily promote values.³² Many scholars not only accept this situation, but argue that it is desirable – the schools, in their view, should promote the values that serve as the basis

partially rejected with respect to the liberty interest, *see, e.g.*, *Vitek v. Jones*, 445 U.S. 480 (1980) (certain liberty interests are inherent in the due process clause).

31. YUDOF, WHEN GOVERNMENT SPEAKS, *supra* note 28, at 240-45; Yudof, *Library Book Selection*, *supra* note 26, at 553.

32. *See, e.g.*, *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *Henery v. City of St. Charles*, 200 F.3d 1128, 1130 (8th Cir. 1999); *Amatel v. Reno*, 156 F.3d 192, 197 (D.C. Cir. 1998); *Bystrom v. Fridley High Sch.*, 822 F.2d 747, 751 (8th Cir. 1987); *Board. of Ed. v. Wilder*, 960 P.2d 695, 702 (Colo. 1998).

for a democratic polity.³³ It is difficult to dispute this view, if only because it is virtually inconceivable that publicly operated schools in a functioning society would teach values that are antithetical to the ones that underlie that society's political system. But none of this resolves the problem raised by *Pico*. To put the matter in the simplest terms, a school would not be a school if it did not have a curriculum, and there is no question that a curriculum must be based on, and attempt to communicate, a large number of values. But a school does not need to remove books from its library, at least on any substantive grounds. Conversely, a school could do a great deal of values inculcation without removing library books. This is not an effort to side-step the problem of values in the educational process, which is important and complex, but to avoid side-stepping the actual issue that is raised by the case. The removal of books from the library on substantive grounds is not an intrinsic part of the educational process; it is an unusual occurrence – one that will typically involve the kinds of departures from ordinary procedures that Yudof notes – and it opens a window on an essentially different aspect of our First Amendment theory. There is, to be sure, a point of contact with the issue of values inculcation in the curriculum, but that is best explored after the basic issue raised by *Pico* has been addressed.

II. JUDGE NEWMAN'S THEORY OF DISPARAGEMENT

According to Judge Newman's concurring opinion in *Pico*, the real First Amendment problem with the school board's actions is that the board, assuming the respondents' claims were proven at trial, was

33. AMY GUTMANN, *DEMOCRATIC EDUCATION* 44-65 (1987); George Bereday, *Values, Education and the Law*, 48 *MISS. L.J.* 585 (1977); Susan Betinsky, *A Contemporary Proposal for Reconciling the Free Speech Clause With Curriculum Values Inculcation in the Public Schools*, 70 *NOTRE DAME L. REV.* 769 (1995); David Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 *TEX. L. REV.* 477 (1981); Robert Gordon, *Freedom of Expression and Values Inculcation in the Public School Curriculum*, 13 *J.L. EDUC.* 523 (1984); Bruce Hafen, *Schools as Intellectual and Moral Associations*, 1993 *B.Y.U. L. REV.* 605; Stanley Ingber, *Socialization, Indoctrination, or the "Pall of Orthodoxy": Value Training in the Public Schools*, 1987 *U. ILL. L. REV.* 15; Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public Schools*, 95 *YALE L.J.* 1647 (1986); Joel Moscovitz, *The Making of the Moral Child: Legal Implications of Values Education*, 6 *PEPP. L. REV.* 105 (1978); Michael Rebell, *Overview: Education and the Law: Schools, Values, and the Courts*, 7 *YALE L. & POL'Y REV.* 275 (1989); Suzanna Sherry, *Responsible Republicanism, Educating for Citizenship*, 62 *U. CHI. L. REV.* 131 (1995); R. George Wright, *Free Speech Values, Public Schools and the Role of Judicial Deference*, 22 *NEW ENG. L. REV.* 59 (1987).

trying to suppress ideas. Removal of the books from the school library did not significantly interfere with the students' ability to read those books, all of which were readily available at public libraries and bookstores, many in inexpensive paperback editions. But the action, "a deliberate decision, taken by leading school officials,"³⁴ was not designed to prevent students from gaining access to the books. Rather, it was designed to disparage the ideas that the books expressed, that is, to suggest that they were not simply wrong but unacceptable.³⁵ In contemporary terms, the removal was an act of expressive speech by the government.³⁶ Matthew Adler points out that this concept seems unlikely to provide the kind of general insight into our legal system that its proponents claim,³⁷ but it is applicable to certain situations, and *Pico* is one of them. As Judge Newman wrote: "[t]he symbolic effect of a school's action in removing a book solely because of its ideas will often be more significant than the resulting limitation upon access to it."³⁸

The fact that this act occurred in a school context, where students are properly under the immediate and continuous supervision of government authorities, makes the symbolism more difficult to separate from valid governmental functions. "It is not a First Amendment violation every time a teacher tells a student not to speak, nor does a school administrator violate the First Amendment every time he includes one subject in the educational curriculum and excludes an-

34. *Pico*, 638 F.2d at 419.

35. The Supreme Court's plurality opinion did contain some language that reflected this rationale. See 457 U.S. at 870-71. "Our Constitution does not permit the official suppression of *ideas*. Thus whether petitioners' removal of the books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind the petitioners' actions." *Id.* at 871 (emphasis in original). But this statement was set within the context of a right to receive and the special status of school libraries. Justice Blackmun's concurrence states the rationale more directly. See *id.* at 875.

36. For discussions of this concept, see Dan Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996); Dan Kahan, *Social Influence, Social Meaning and Deterrence*, 83 VA. L. REV. 349 (1997); Larry Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Richard Pildes & Richard Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483 (1993); Richard Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725 (1998); Cass Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

37. Matthew Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000).

38. *Pico*, 638 F.2d at 419.

other.”³⁹ That is the reason why Judge Newman wanted to remand the case for trial. But the plaintiff’s allegations, if proven, would have demonstrated that the school board, in a high-profile decision, singled out certain books from the library on the basis of their content and ordered them removed. “It is one thing to teach, to urge the correctness of a point of view. But it is quite another to take any action that condemns an idea, that places it beyond the pale of free discussion and scrutiny.”⁴⁰ This effort to disparage particular ideas is the symbolic meaning of the school board’s action that renders it a violation of the First Amendment. “Perhaps no single event has more evocative power to signal the suppression of free speech than the burning of a book.”⁴¹ “Removing a book from a school library is a less offensive act, but it can also pose a substantial threat of suppression.”⁴²

Judge Newman’s disparagement rationale avoids the tortured effort of the Supreme Court plurality to explain why school libraries are unique and distinct from the school classroom.⁴³ Several lower courts struggled with this distinction,⁴⁴ and one provided a memorable, if not particularly practicable formulation of the concept: “*Pico* indicates that some of the First Amendment freedoms retained at the schoolhouse gate may be shed at the classroom door.”⁴⁵ According to the disparagement rationale, however, there is nothing special about school libraries; they simply constitute one context where disparagement of ideas by state officials might occur. Similarly – and here the Supreme

39. *Id.* at 432.

40. *Id.* at 432-33 (footnote omitted).

41. *Id.* at 432.

42. *Id.* at 434. One of the few cases that followed the disparagement rationale, *V.I. Wexner v. Anderson Union High School Board of Trustees*, 258 Cal. Rptr. 26 (Cal. Ct. App. 1989), has been de-published under California law. During its evanescent existence, it said: “The problem is all the more serious because the type of action, book banning, is the archetypical symbol of repression of free speech and because it occurs, in a manner of speaking, ‘in front of the children.’” *Id.* at 32.

43. *Bd. of Ed.*, 457 U.S. at 868. The plurality described the school library as “a place dedicated to quiet, to knowledge, and to beauty.” *Id.* (quoting *Brown v. Louisiana*, 383 U.S. 131, 142 (1966)). It is difficult to believe that anyone who could write these words, or subscribe to them, was ever a student in a school with a school library. If the plurality’s opinion rests on the accuracy of this characterization, it is vulnerable indeed.

44. *Burch v. Barker*, 861 F.2d 1149 (9th Cir. 1988); *Romano v. Harrington*, 725 F. Supp. 687 (E.D.N.Y. 1989).

45. *Romano*, 725 F. Supp. at 690.

Court plurality became more tortured still⁴⁶ – there is nothing special, within the context of a school library, about the removal of books as opposed to their acquisition. The crucial question is the message that the government officials' actions are communicating, a message that will be determined by the tremendous resources of meaning construction that are available to people in any functioning society.⁴⁷

The removal of books from a school library, as Judge Newman wrote, may be “a casual, insignificant decision, as when the school librarian replaces an obsolete book, or discards a rarely-used one to make shelf space available for other volumes.”⁴⁸ Even if the librarian harbored secret, ideological reasons, for removing books, there would be no First Amendment violation if he never revealed those reasons, and the pattern of removal that they produced never became apparent. His ideological reasons would simply disappear within the acknowledged range of his authority to make decisions and would be numbered among the many improper but fugitive thoughts that flit through the minds of all government officials as they go about their tasks. It is only when the removal is a deliberate and publicized decision, couched in ideological terms, that it acquires the symbolic power to disparage and suppress ideas, and becomes equivalent to a low-temperature book burning.

The acquisition of books is likely to be an even less significant and less notorious decision, since there are only a few reasons to remove a book but innumerable reasons for not buying one. Nonetheless, failure to acquire can be used to send the same impermissible message. If the school board, for example, announces that it is instructing all librarians in the district to avoid acquiring any book that champions women's liberation, it is using acquisitions policy to disparage an idea. The mode of expression is different, but the message is essentially the

46. 457 U.S. at 871 (“Nothing in our decision today affects in any way the discretion of a local school board to choose books to *add* to the libraries of schools.”) (emphasis in original). This language is impossible to reconcile with the rationale for the decision.

47. See, e.g., PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* (Richard Nice, trans., 1977); IRVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959); EDMUND HUSSERL, *LOGICAL INVESTIGATIONS* (J.N. Findlay, trans., 1973); KARL POLANYI AND HARRY PROSCH, *MEANING* (1975); MARSHALL SAHLINS, *CULTURE AND PRACTICAL REASON* (1976); ALFRED SCHUTZ, *THE PHENOMENOLOGY OF THE SOCIAL WORLD* (George Walsh & Frederick Lehnert, trans., 1967); MAX WEBER, *ECONOMY AND SOCIETY* 3-62 (Guenther Roth & Claus Wittich, eds., 1978).

48. *Pico*, 638 F.2d at 419.

same as an announcement that already-acquired books are being removed, and it represents the same violation of the First Amendment. Similarly, the content of the classroom curriculum, far from being an area of greater school board discretion, as the plurality opinion suggested,⁴⁹ presents even greater opportunities for the disparagement of ideas, and requires greater First Amendment scrutiny. If the school board declared that nothing may appear in the curriculum that favors the redistribution of wealth or the revocation of environmental regulation, it would have committed the same constitutional sin of attempting to suppress idea through the technique of disparagement.

Disparagement is thus a concept that cuts across all areas of governmental operations. While it is certainly true, as Robert Post observes, that different modes of governmental action create different demands, particularly in the First Amendment area,⁵⁰ it is also true that there are certain underlying types of action that vary in their particulars but are united by their socially constructed meaning. There are many ways for the government to disparage ideas, each usable and potentially effective in certain particular settings; the crucial question is whether the action under consideration could be understood as such by the citizens who are the targets of the government's symbolic communication. This consideration provides a principle that courts can apply with some degree of coherence in distinguishing between permissible and impermissible modes of government speech. The Supreme Court has acknowledged that the general requirement of content neutrality is inapplicable to the kinds of government-managed institutions that characterize the administrative state.⁵¹ To run a school, a theater, or a museum requires content-based decisions about what will be included or excluded, and how the included material will be presented. But these decisions, while embodying choices about the things that the government considers valuable, and even providing symbolic messages about social value in general, need not disparage the ideas that have been excluded. When the government crosses this second line, when it indicates that certain ideas are not only undesirable but unacceptable, it violates the First Amendment.

49. See *Bd. of Ed.*, 457 U.S. at 861-62.

50. ROBERT POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* (1995).

51. See, e.g., *Rosenberger v. Univ. of Va.*, 515 U.S. 819 (1995); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); see also Bruce C. Hafen, *Hazelwood School District and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685 (1988).

To trace this principle through leading First Amendment decisions would require a more extensive essay, but its operation can be illustrated by considering some of the federal cases that have claimed to follow *Pico*. In *Bowman v. Bethel-Tate Board of Education*,⁵² the District Court, citing *Pico*, held that the school board violated the First Amendment when it prohibited third grade students from presenting a play called “Sorcerer and Friends” because the play “glorifie[d] cowardice, denigrate[d] patriotism, and disparage[d] the aged.”⁵³ The play did not involve the features that the Supreme Court plurality identified in its reverential description of school libraries,⁵⁴ but, as a voluntary, after-school activity, it did not fall within the curricular area where school board control is regarded as so important.⁵⁵ Nonetheless, the *Bowman* court’s decision is correct; the school board’s prohibition of the play based on its ideas represents the same sort of disparagement as the removal of the books in *Pico*.

The prohibition in *Pratt v. Independent School District No. 831*⁵⁶ did involve the curriculum. The school board in the case decided to remove a film version of Shirley Jackson’s short story, “The Lottery,” from the high school literature curriculum based on objections by parents that the film posed “a threat to the students’ religious beliefs and family values.”⁵⁷ The Court of Appeals was unencumbered by the Supreme Court’s opinion in *Pico*, which had not yet appeared, and followed Judge Newman’s analysis. Although *Pratt* involved the curriculum, and the Court of Appeals acknowledged the authority of the school board in this area, it presented the same issue of disparagement. By removing the film from the curriculum, the school board was declaring that “the ideas contained in the film are unacceptable and should not be discussed or considered”⁵⁸ but instead should be suppressed – even though discussion was exactly what the film and its attendant curricular materials were designed to foster. Thus, the fact that the film was included in the curriculum made no difference. While the school board could certainly have removed course materials

52. 610 F. Supp. 577 (S.D. Ohio 1985).

53. *Id.* at 579.

54. *Id.* at 580-1.

55. *Id.*

56. 670 F.2d 771 (8th Cir. 1982).

57. *Id.* at 776-77. In the story, the inhabitants of a small town annually stone one person, selected by lottery, to death, in obedience to tradition. The story can certainly be read as a condemnation of religious dogmatism.

58. *Id.* at 779.

from the curriculum for a variety of reasons, or for no reason at all, it could not do so when the removal was being used as a symbolic action indicating that certain ideas should be suppressed.⁵⁹

In contrast, *PMG International Division v. Cohen*⁶⁰ upheld a prohibition against the sale of sexually explicit material at military post exchanges. The District Court distinguished *Pico* on the ground that it occurred in a school context rather than a military base, and that it dealt with the removal, rather than the acquisition of material. Neither of these distinguishing factors is relevant however because the preferable rationale for the District Court's conclusion is that the exclusion of sexually explicit material was not understood as disparaging any particular ideas.⁶¹ Therefore, the government was not engaging in prohibited viewpoint discrimination.⁶²

The dispute in *Bell v. U-32 Board of Education*,⁶³ like *Bowman*, involved the prohibition of a student play, in this case a portrayal of life on the street entitled "Runaways."⁶⁴ The play was to be presented to the entire school community by junior high and high school students and the presentation, for which the performers received academic credit, was considered "part of the curriculum."⁶⁵ The school board prohibited the presentation on the ground that the play "involved inappropriate activity for the students who would be involved in performing and producing the play and would be inappropriate viewing as a school-sponsored event for the school community and the community at large."⁶⁶ But, as the District Court noted, the text of the play continued to be available in the school library, and to be "used as a text in a humanities course."⁶⁷ The court did not provide much of a rationale for its decision, other than a vague invocation of societal values and school board discretion, for which it cited *Pico*, but it could have done so by relying on the disparagement principle. Although the U-32 school board had prohibited production of a play, it had done so based on the propriety of presenting it, not on the basis of its ideas.

59. *Id.* at 776.

60. 57 F. Supp. 2d 916 (N.D. Cal. 1999).

61. *Id.* at 919. The Court also held that a military post exchange is not a public forum. That aspect of the case is beyond the scope of this essay.

62. *Id.* at 919.

63. *Bell v. U-32 Bd. of Educ.*, 630 F. Supp. 939 (D. Vt. 1986).

64. *Id.*

65. *Id.* at 941.

66. *Id.* at 942.

67. *Id.*

The continued availability of the play's text in the library, and its continued use in the curriculum, effectively counteracted any implication that the school board's real intention was to disparage the ideas in the play. In other words, the symbolic meaning of the school board's action, when understood within the social context of the various participants, was not the constitutionally forbidden one of disparaging ideas.

Although the disparagement principle is broad in application, it is narrow in focus. Disparagement is a mode of governmental speech, which is itself a problematic type of governmental action. There is a substantial body of scholarly literature addressing the First Amendment problems that are created when the government is the speaker, rather than the regulator of privately-generated speech.⁶⁸ Some of this speech shares with disparagement the feature of expressing negative opinions of ideas. Despite this similarity, disparagement is a useful conceptual category because it raises unique difficulties that these other modes of government speech do not present, and is distinguishable on that basis. In particular, disparagement is distinguishable from viewpoint discrimination and political criticism.

To begin with viewpoint discrimination, the Supreme Court, while acknowledging the need for content discrimination in the operation of an institution, has regularly declared that viewpoint discrimination is unconstitutional.⁶⁹ This latter principle apparently applies when the government authorizes, subsidizes or taxes private speakers, rather than generating speech on its own. It further forbids the government from making choices among speakers on the basis of their point of view.

However, as Robert Post points out, neither the distinction between government-initiated and government-sponsored speech, nor the distinction between content and viewpoint discrimination, is coherent.⁷⁰ In managing an institution, the government cannot be neu-

68. See Abner Greene, *Government of the Good*, 53 VAND. L. REV. 1 (2000); Robert Post, *Subsidized Speech*, 106 YALE L.J. 151 (1996). Frederick Schauer, *Is Government Speech a Problem*, 35 STAN. L. REV. 373 (1983); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980); Mark Tushnet, *Talking to Each Other: Reflections on Yudof's When Government Speaks*, 1984 WIS. L. REV. 129 (1984); Yudof, *Library Book Selection*, *supra* note 26; YUDOF, WHEN GOVERNMENT SPEAKS, *supra* note 28.

69. See *Rosenberger v. Univ. of Virginia*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987); *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983).

70. Post, *supra* note 68.

tral. It must both initiate its own speech and make judgments about the speech of the people who comprise the institution, and it must do so on the basis of both content and viewpoint.⁷¹ What it need not do is proclaim that the reason for its choices is that the rejected or disfavored ideas are unacceptable or that they are beyond the limits of acceptable discourse. This additional message offends the First Amendment because it is intended to suppress ideas rather than to implement a program or operate an institution.

Those who did not receive government grants, have their artwork displayed in public museums, or their plays produced in public theaters might feel that their ideas had been rejected and might even attempt to modify them in an effort to do better the next time around. Such reactions might be an inevitable concomitant of a government funding program, particularly if the funding agency possesses some prestige. There are, however, other venues that support the promulgation of ideas and, for some of these, a person's failure to obtain public support might be a reason to provide alternative support on a private basis. However, if the funding agency not only rejects but disparages, if it indicates that the applicant's ideas are simply unacceptable, then there is a strong likelihood that many of these private sources will be foreclosed. Even if the government monopolizes speech by operating all the universities or all the theaters – a situation that obviously creates problems of its own – there is still a difference between rejection and disparagement. Rejection may deny the applicant a chance to present his views to the general public, but it still leaves him safe in the possession and expression of those views. Disparagement does not.

Additionally, disparagement can be distinguished from the sort of criticism that inevitably occurs in political debate. As Mark Yudof and others have observed,⁷² public officials in our system of government are required to state their decisions and explain their reasons. Consider, for example, a state governor who decided to take a position on a controversy about whether the state parks should be made available for an expanded range of recreational and commercial uses or whether the parks' ecology should be preserved from human interference. She could try to avoid governmental speech by privately instructing the state parks commissioner to grant licenses for new

71. Post, *supra* note 68, at 166-67; Shiffrin, *supra* note 68, at 572-74.

72. Yudof, WHEN GOVERNMENT SPEAKS, *supra* note 28, at 20-50; David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 739 (1992); Greene, *supra* note 68, at 8-12.

recreational and commercial uses or, alternatively, by instructing him to stop granting licenses and cancel as many of the existing ones as possible. If new legislation were required to achieve these policies, she could privately contact influential legislators and urge them to enact the necessary statute. Such efforts to avoid governmental speech, however, are hardly conducive to the kind of political system we desire, a system that is open to public debate about the issues and responsive to citizen demands. It is not sufficient that the governor is an elected official. That status does not give her *carte blanche* in our system to take whatever actions she chooses without further public input. The processes of public debate and lobbying both political and administrative decision makers are as central to our system of governance as the choice of public officials by election.⁷³ For this system to function, public officials must speak; they must declare their positions and present the arguments that favor those positions.

Such speech by government officials necessarily involves criticism of the opposing point of view. How could the governor possibly explain why she favored increasing the recreational and commercial uses of the parks without criticizing the views of the ecologists; how could she possibly explain an effort to protect the parks' ecology without criticizing the effort to increase human use? In fact, people are often more clear about their reasons for disliking an opposing view than they are about their reasons for adopting the one they favor. People who do not know very much about ecology may nonetheless have strong feelings about having a bunch of beer-guzzling yahoos tooling around the state parks in snowmobiles. To craft any rule that attempted to eliminate or dampen spirited criticism of opposing positions would certainly hobble a public official's efforts to explain her position, and probably reduce them to incoherence. To use constitutional litigation to enforce a rule of this nature would convert the courts into a brooding editorial presence in the sky.

This necessary criticism can be readily distinguished from disparagement. Criticism simply states that a particular view is wrong or that it should not be followed. Disparagement declares that this view is unacceptable, that it is beyond the limits of acceptable debate and acceptable thought. Although they share certain features, these two types of governmental speech are polar opposites in the sense that criticism embodies public debate, while disparagement impedes it. Most Ameri-

73. See Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711 (2001).

can politicians have criticized communism at some point in their careers, but it was Joseph McCarthy who undertook to disparage it, to suppress the idea of communism by insisting that it was outside the boundaries of acceptable discourse.⁷⁴

This example of Senator McCarthy may seem extreme, particularly in light of the apparent fecklessness of the Island Trees School Board,⁷⁵ and there is certainly a countervailing phenomenon that official disapproval, if it lacks force or prestige, can lend the disparaged work a particular appeal. Motion picture producers often sprinkle a few of the words that shocked Judge Mansfield into the dialogue because they believe that only "R" rated films will attract a teenage audience, and all self-respecting rappers make sure that their CD's obtain a "Parental Advisory" label. But whatever its effects in particular cases, the act of disparagement is distinguishable from criticism, and creates identifiable dangers when performed by government. The distinction, and the dangers, are illustrated by two decisions that relied on *Pico*, *Bowman v. Bethel-Tate Board of Education*⁷⁶ and *Bell v. U-32 Board of Education*,⁷⁷ both of which involved the prohibition of a student-performed play. In *Bowman*, the school board prohibited performance of the play because it glorified cowardice and denigrated patriotism. This decision represented symbolic governmental speech that disparaged the ideas presented by the play, declaring them beyond the bounds of acceptable discourse. After such a prohibition, only an unusually audacious student would have stood up in class and argued that the play was full of good ideas, and only a preternaturally audacious student would have suggested that patriotism deserves to be denigrated. In contrast, the school board in *Bell* prohibited performance on the ground that the play was not appropriate for the entire school community, but kept it in the school library and the high school curriculum.

74. See CEDRIC BELFRAGE, *THE AMERICAN INQUISITION, 1945-1960* (1973); ROBERT GRIFFITH, *THE POLITICS OF FEAR: JOSEPH R. MCCARTHY AND THE SENATE* (1987); ELLEN SCHRECKER, *MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA* (1998).

75. *Pico v. Bd. of Educ.*, 638 F.2d at 410 (noting the school board members' fear that announcing the names of the objectionable books before removing them from the shelves would cause a run on these books by the students).

76. *Bowman v. Bethel-Tate Bd. of Educ.*, 610 F. Supp. 577 (S.D. Ohio 1985) (invalidating the school board's action as a violation of the First Amendment). See *supra* text accompanying notes 52-55.

77. *Bell v. U-32 Bd. of Educ.*, 630 F. Supp. 939 (D. Vt. 1986) (upholding the school board's action against a First Amendment challenge). See *supra* text accompanying notes 63-67.

This decision, although content-based, was an acceptable exercise of administrative authority because no disparagement was involved; the reason given did not suggest that the ideas in the play were unacceptable. After that decision, it would not have been difficult at all for a student to express approval of the play's ideas, or even disapproval of the school board decision; in fact, the play's retention in the curriculum can be seen as an invitation to do so.

III. DISPARAGEMENT AND THE CONUNDRUMS OF THE ADMINISTRATIVE STATE

Judge Newman's concept of disparagement thus provides a coherent principle for resolving *Pico*, and a significant number of other First Amendment cases. There are, however, some complex implications of the principle that merit further exploration. To return to the *Pico* case itself, once the act of removing school books for ideological reasons is identified as disparagement or the suppression of ideas, it is easy enough to conclude that Eldridge Cleaver's condemnations of racism, or Desmond Morris' theories of evolution, or even Kurt Vonnegut's insouciance, should not be disparaged. But what about a book endorsing totalitarianism, slavery, the Taliban's position on women, or the annihilation of the Jews? Surely such books could be removed from the library on the basis that their ideas were unacceptable. And surely these ideas are disparaged in a large majority of the classrooms in America. Still other ideas that are beyond the ordinary thought processes of modern individuals, such as human sacrifice or the ritual consumption of unwanted children, would be disparaged if they were ever to arise as real possibilities. Viewpoint discrimination and political criticism are indeed distinguishable from disparagement, and there are many ideas that can be validly rejected or criticized but not disparaged. There are other ideas, however, that we feel should be disparaged, that are indeed regarded as beyond the bounds of acceptable political discourse.

This suggests that the disparagement principle operates within a delimited area. It does not cover the entire range of possible ideas, but only those that are the subjects of present political controversy. The essential principle is that the government must not disparage ideas that are actively accepted and advanced by some non-negligible group within civil society. Those ideas must be treated with respect in the basic First Amendment interest of fostering, rather than suppressing, political debate. Government speakers are not required to subsidize

all such ideas, and indeed they are permitted to criticize them, but must not attempt to extirpate them. In other words, it is only civil society, not government, that may deem an idea unacceptable and exile it from the realm of the conceivable. Once civil society has done so, however, the government may follow. As citizens, we expect our schools and our political leaders to condemn racism, genocide and dictatorship. By doing so, they do not foreclose an active debate but rather reaffirm the principles that our society acknowledges as its foundations.

The limits on the disparagement principle, it must be remembered, do not represent the limits of the First Amendment in its entirety, but only its limits in the context of government speech and symbolic governmental action. When coercive governmental action is involved, those limits expand to the entire range of human thought. Thus, the First Amendment, as currently understood, prohibits the state from criminalizing any ideas or forbidding their dissemination. Indeed, citizens are indeed permitted to make statements favoring racism, genocide, human sacrifice and ritual murder. While, there are other limits on speech, such as the speech-action distinction, within the realm of ideas the government may not apply coercive force. The common phrase that is used to express this view is that we are committed to defending the rights of those whose thoughts we hate.⁷⁸ This principle does not extend to government subsidy or approval, however. If civil society unites in finding certain ideas hateful, a government that is responsive to that society is not required to support those ideas, or to avoid the inevitable criticisms of them that result from its assertion of basic social values.

Defining the limits of disparagement in this manner provides at least a partial solution to the complex problem of values inculcation in the public schools. The fact that schools inevitably embody values in their curricula and inculcate those values as an inextricable part of the educational process does not mean that they need to disparage any values that they do not choose to inculcate. A school board does indeed have the authority to construct a curriculum that does not include *Soul on Ice* or *Slaughterhouse Five*, but it is not permitted to disparage the ideas presented in those books by declaring that those ideas are beyond the limits of acceptable discourse. Such disparage-

78. See ARYEH NEIER, *DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM* (1979).

ment is not necessary to the process of curricular decision making. But there are other ideas, presented for example in *Mein Kampf*,⁷⁹ or John Calhoun's *Disquisition on Government*,⁸⁰ that must indeed be disparaged in order to create any plausible curriculum in our society that addresses political issues.

Thus there appear to be three levels of governmental judgment emerging from our conception of free speech. With respect to all ideas, whatever their character or their acceptability in civil society, the government must not employ coercive force; it must not forbid citizens from believing or expressing these ideas. It may, however, disparage those ideas that civil society has placed beyond the limits of acceptable discourse. Ideas that are within those limits, however, may not be disparaged; when the government speaks, it must be careful not to indicate that such ideas are unacceptable. Again, it is civil society, not government, that can declare ideas unacceptable. But while government speakers may not disparage these ideas, they are not required to be neutral with respect to them. In conducting political debate and providing funds to private citizens or operating institutions, they may exercise both content and viewpoint discrimination, selecting those ideas they want to subsidize or endorse, and those they want to ignore or criticize. Finally, there are certain contexts, such as judicial or administrative adjudications and funding for electoral speech, where strict neutrality is required and the government may not indicate any content or viewpoint preferences at all. These are specialized contexts, and the rules that govern them tend to emerge from the policies particular to those contexts, rather than from the First Amendment.⁸¹ Thus the requirement of neutrality in adjudication comes from considerations of due process rather than from freedom of speech. Similarly, the requirement that government be strictly neutral in funding speech related to elections emerges from our concept of elections.⁸²

Distinguishing between the disparagement of acceptable ideas, which is constitutionally prohibited, and the disparagement of unac-

79. ADOLF HITLER, *MEIN KAMPF* (Ralph Manheim, trans., 1999).

80. JOHN C. CALHOUN, *A DISQUISITION ON GOVERNMENT* (Richard K. Cralle, ed. 1943).

81. For a contrary view, see Shiffrin, *supra* note 68, at 622-40. Shiffrin argues for the necessity of an eclectic approach to government speech, but one reason why he finds a lack of unifying First Amendment principles may be that he tries to derive the rules regarding speech in the electoral process from the First Amendment.

82. See Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1 (1998); Rubin, *supra* note 73, at 758-64.

ceptable ideas, which is permitted, is a plausible way to resolve the characteristic dilemma of judicial review, namely, the conflict between protecting rights and validating the majoritarian political process. To allow acceptable ideas to be disparaged in public schools would sanction a serious intrusion on the protections afforded to free speech. But to forbid schools from teaching their students that racism or genocide are unacceptable would be politically untenable and morally repugnant. A coherent constitutional rule, however, should be justified by considerations that run deeper than either political expediency or vague intuition. In fact, the prohibition of disparagement, and the limitation of its range to acceptable ideas, is justified by some of the most basic elements of our political morality. In particular, the justification flows from a consideration of the purposes and dangers of the modern administrative state.

The particular danger of disparagement, as discussed above, involves the government's role as a speaker, rather than its role in general or the general impact of disparagement. Any government is capable, virtually by definition, of deploying coercive force,⁸³ but it is established by our First Amendment principles that our government may not deploy coercive force against ideas, however unacceptable. Similarly, the disparagement of one's ideas may be hurtful, but it is inherent in a system that allows free speech to every citizen that virtually every idea will be disparaged by someone, and that certain ideas will be disparaged by a great many people. While the conflicting demands of freedom and civility may be resolved in a variety of ways, it is clear that the freedom of each person to speak necessarily implies the freedom to disparage the ideas of others. The concern raised by allowing government to disparage unacceptable ideas, therefore, does not stem from the role of government per se, or from the abstract notion of disparagement, but from the government's particular role as speaker and its ability to suppress speech by disparagement to an extent that is equivalent or greater⁸⁴ to that which it could achieve by coercive force.

One of the most notable features that distinguishes the administrative state from its traditional predecessors is the prevalence of gov-

83. See MAX WEBER, *ECONOMY AND SOCIETY* 53-56, 212-17 (Guenther Roth & Clause Wittich, eds. 1978).

84. For an argument that the government can suppress ideas more effectively through ideology than through the use of force, see MAX HORKHEIMER AND THEODOR ADORNO, *DIALLECTIC OF ENLIGHTENMENT* 120-67 (John Cumming, trans., 1996).

ernment speech and the potential impact of that speech on the values associated with the First Amendment. A basic premise that underlies our First Amendment theory is the autonomy of civil society.⁸⁵ Freedom of speech is described as serving the deontological value of allowing people to develop their own ideas, and the instrumental value of permitting the criticism and consequent control of governmental actors. Both these values, however, assume that there exists a space between government and society and that government does not dominate the process of opinion and idea formation to an extent that independent thought becomes impossible.⁸⁶ In pre-modern Europe, domination of this sort was beyond the capacity of any government. Religion was the predominant source of social values and religious authorities were largely independent of the state. Before the Reformation, the Catholic Church served as an independent source of social and political authority, often confronting royal governments, and sometimes prevailing over them.⁸⁷ The Reformation diminished its role, but often in favor of individual conscience and autonomy.⁸⁸ Throughout this period, education outside of the home was provided almost exclusively by religious organizations.⁸⁹ In addition, much of the process of opinion formation occurred in localized or family interactions beyond the reach of any large-scale institution. While pre-modern civil society can be fairly described as dominated by tradition, this was actually a welter of different traditions, creating a diffuse civil culture that resisted centralized control. Quite apart from the independence of religious institutions and the decentralization of culture, pre-

85. On the concept of civil society, see JEAN COHEN & ANDREW ARATO, *CIVIL SOCIETY AND POLITICAL THEORY* (1992); NIKLAS LUHMANN, *THE DIFFERENTIATION OF SOCIETY* (1982).

86. See Jeremy Waldron, *Autonomy and Perfectionism in Raz's Morality of Freedom*, 62 S. CAL. L. REV. 1097 (1989).

87. See NORMAN CANTOR, *THE CIVILIZATION OF THE MIDDLE AGES* 417-33 (rev. ed. 1994); BRIAN TIERNEY, *THE CRISIS OF CHURCH AND STATE 1050-1300* (1964); I.S. ROBINSON, *Church and Papacy*, in *THE CAMBRIDGE HISTORY OF MEDIEVAL POLITICAL THOUGHT* 252 (J.H. Burns, ed., 1988); J.A. WATT, *Spiritual and Temporal Powers*, in *id.* at 367.

88. See JAROSLAV PELIKAN, *SPIRIT VERSUS STRUCTURE: LUTHER AND THE INSTITUTIONS OF THE CHURCH* (1968); QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT, VOL 2: THE AGE OF REFORMATION* (1978); MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (Talcott Parsons trans., 1958).

89. See JAMES BOWEN, *A HISTORY OF WESTERN EDUCATION* (1972-81); HARRY GOOD & JAMES TELLER, *A HISTORY OF WESTERN EDUCATION* (3d ed. 1969). With respect to the medieval period, see JOSEPH AND FRANCES GIES, *LIFE IN A MEDIEVAL CITY 154-65* (1969); NICHOLAS ORME, *ENGLISH SCHOOLS IN THE MIDDLE AGES* (1973).

modern states lacked the administrative capacities to exercise much impact on civil society; for many of them, raising the finances necessary to keep their basic operations intact was about as much as they could manage.

The advent of the administrative state creates the possibility that government will dominate and control the conceptual process of civil society, eliminating the independence that is crucial for our conception of the First Amendment. With the secularization of culture, religious organizations have declined as independent sources of influence and no equivalent institutions have arisen in their place. Education is now provided largely by state-run schools.⁹⁰ With the growth of transportation and communications networks, local traditions have been replaced by a national culture dominated by large-scale institutions, most notably the national media. Modern governments generally possess an enormous administrative apparatus and the capacity to operate and expand that apparatus quite effectively. By taking advantage of the vast potential of the public schools for indoctrination, and taking control of the national media, it becomes possible for a modern state to dominate civil society, and suppress, if not eliminate, its ability to generate independent ideas.⁹¹ This was certainly the aspiration of twentieth century totalitarian regimes,⁹² and one that George Orwell captured in his description of “Newspeak.”⁹³

But the same conditions that generate the dangers of the administrative state are also responsible for its necessity. Whether we like it or not, society has become secular and tradition has been attenuated, if not eliminated, as a source of justification and social meaning. An elaborate administrative apparatus is absolutely necessary to meet the citizenry's demands for social justice and material well-being. Despite the dangers that it poses, the administrative state is not an affliction that has been visited upon us, but the product of consistent citizen demands over a two-hundred year long period. To focus solely on the field involved in *Pico*, education is now regarded as a necessity, if not a

90. See Bowen, *supra* note 89; LAWRENCE CREMIN, *THE TRANSFORMATION OF THE SCHOOL: PROGRESSIVISM IN AMERICAN EDUCATION, 1876-1957* (1961); BRUCE CURTIS, *BUILDING THE EDUCATIONAL STATE* (1988); Good & Teller, *supra* note 89.

91. See JURGEN HABERMAS, *LEGITIMATION CRISIS* (Thomas McCarthy, ed., 1975).

92. See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 305-479 (rev. ed. 1973).

93. GEORGE ORWELL, 1984 at 246 (1949); (“It was intended that when Newspeak had been adopted once and for all . . . a heretical thought — that is, a thought diverging from the principles of Ingsoc — should be literally unthinkable, at least so far as thought is dependent on words.”).

right;⁹⁴ and one of the citizenry's most persistent demands is that more and better education be provided. In modern society, however, education can only be provided by the state through a complex administrative apparatus. As noted above, education inevitably involves the inculcation of values. Thus, the modern state has obtained this role in response to circumstances and citizen demands. Some states may employ education as a means of political indoctrination, but the development of extensive public education systems cut across every type of modern administrative state, from totalitarian to democratic.

The boundary of the disparagement principle traces the lines of equilibrium between these opposing considerations. If we are to have an educational system, it must be based on values. Values that are diametrically opposed to those that form the basis of the system are necessarily disparaged. Commitment to tolerance requires the condemnation of racism, commitment to equality requires the condemnation of God-given social hierarchy, commitment to democracy requires the condemnation of totalitarianism, commitment to the value of knowledge requires condemnation of obscurantism. But the dangers posed by the administrative state's capacity to overwhelm the conceptual process of civil society suggests that this condemnation should go no further than is absolutely necessary. Values that are not foundational, that are not the basis of a virtually unanimous social consensus, can still be presented, but the opposing values should not be condemned. To do so impedes the debate about these values within civil society and employs the enormous influence of a state-run educational system to suppress ideas that are under active consideration, and which deserve the opportunity to prevail.

Within this rationale for the boundaries of the disparagement principle, however, there remains a tension between the educational system's ability to inculcate non-foundational values and the effort to preserve political debate within civil society. Over time, the inculcation of values, even without disparagement of the opposing values, can have the same effect as disparagement. To ignore an idea while presenting its opposite is an implicit condemnation, and while its immediate impact is likely to be weaker than disparagement, its cumulative impact, over time, may be equally great. Underlying this

94. It appears as a right in the Universal Declaration of Human Rights, Art. 26. For the text of this document, see *BASIC DOCUMENTS IN INTERNATIONAL LAW* (Ian Brownlie ed., 1967); *LOUIS HENKIN, ET AL., BASIC DOCUMENTS SUPPLEMENT TO INTERNATIONAL LAW: CASES AND MATERIALS* (2d ed. 1987).

phenomenon is a challenge to the basic First Amendment premise that civil society is separate from government and possesses conceptual autonomy. If the schools inculcate values, particularly non-foundational values, they may give the state the capacity to overwhelm the conceptual process that the disparagement principle is designed to protect.

These considerations suggest that the disparagement principle cannot rest on the idea that civil society can be protected from governmental influence. Government is inevitably a major force in the process of opinion formation; even if one distinguishes it from civil society, as a convenient heuristic, one must acknowledge that the two realms are intimately linked and that the effects of government on civil society are profound. Those who are in an optimistic mood, or live in a nation that has treated them with kindness, may describe this governmental influence as education. Those who are more mistrustful, or who have felt the jackboot of authority press down upon their necks, may describe it as propaganda or indoctrination. However, it is impossible to deny that the massive, comprehensive government of the administrative state impacts greatly on debates within civil society.

The solution to this is to recognize that the disparagement principle is based on political morality and not on instrumental social policy considerations. Government may inevitably influence civil society while also acting as if civil society possesses a basic conceptual autonomy. As citizens, we want government to avoid the effort to suppress non-foundational ideas, even though we know that it will nonetheless do so by virtue of its endorsement of their opposites. While this is a moral position, it is neither fanciful nor ineffective from an empirical perspective. A government that conforms to a political morality that precludes it from suppressing ideas will do so nonetheless, but it will do so slowly. What it will not do – what this political morality precludes – is a rapid, focused effort to extirpate the disfavored ideas. And it is this time scale difference that comprises most of the distinction between liberty and oppression. The gradual influences that transform people's views simply contribute to the inevitable process of intersubjective opinion formation. Since human beings are socially constructed, their opinions, although individually held, are never individually generated, but always derive from a complex social matrix. This process is experienced as ordinary life, not as oppression. In psychological terms, individuals internalize these gradual influences and perceive them simply as their own genuinely-held opinions. The imposition of values in brief periods of time, however, will be perceived by

people as an external force that conflicts with their genuinely-held views and their essential selves. They may resist, or they may comply, but they will feel that they have been oppressed and that they have lost their liberty.

One could argue that they have lost their liberty in either case because a governing entity has imposed its views upon them. But this is essentially a false consciousness argument. The difficulty with it is that there is no convincing definition of human liberty that does not involve people's ability to choose what they actually and presently desire. Moreover, people's experiences matter a great deal; whatever other moral positions one adopts, the difference between feeling oppressed by government and not experiencing this feeling should be regarded as significant. Finally, an interactive government, of the kind that exists in modern Western nations, will be strongly influenced by its citizenry over any substantial period of time. Elected officials must appeal to the populace, and appointed administrators, unless they occupy highly insulated positions, will be subject to a variety of pressures and pragmatic limitations. Thus, the values that such governments impose over extended periods will contain a large admixture of the citizenry's own desires and, for this reason as well, will seem more like guidance than oppression.

CONCLUSION

Judge Newman's concurring opinion in *Pico* states a more satisfactory rationale for the decision in the case than the Supreme Court's plurality opinion. By focusing on the issue of the disparagement or suppression of ideas, Judge Newman was able to develop a more workable principle for dealing with library book removal than the plurality's right to receive rationale. More importantly, he articulated a principle that is not restricted to school libraries, as the plurality opinion was, but cuts across all aspects of public education and government speech in general. Most important of all, the disparagement principle enables us to understand and partially resolve some of the complexities for First Amendment theory that are created by the administrative state. The administrative state is a fertile source of complexities because it is new, often newer than the political conceptions which we employ to deal with it. This is certainly the case with the concept of free speech which, in its classic formulation, presumes a separation between government and civil society that no longer exists. To preserve the advantages of the administrative state, but guard against its dangers, that

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concept needs to be re-thought. One of the great values of Judge Newman's disparagement principle is that it represents a step in that direction.

