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Constitutional Law - First Amendment - Book Removals - School Boards

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CONSTITUTIONAL LAW — FIRST AMENDMENT — BOOK REMOVALS — SCHOOL BOARDS — The United States Supreme Court has held that removals of books from high school libraries may not be motivated by the political, moral, or social tastes of school board members, or a desire of the board to suppress access to ideas with which they disagree.

Board of Education, Island Trees Union Free School District v. Pico, 102 S. Ct. 2799 (1982).

In September, 1975, Island Trees board of education members Ahrens, Martin, and Hughes,[1] petitioners, attended a conference sponsored by Parents of New York United (PONYU),[2] an organization of parents concerned about education legislation in the State of New York.[3] At the conference, they obtained a list of books considered unsuitable for school students.[4] It was determined that nine of these books were available in the high school library,[5] and one in the junior high school library.[6]

In a February, 1976, meeting with the school superintendent and the principals of the schools, the board asked that the listed books be removed from the library shelves and delivered to the board offices so that the members could read them.[7] This action received media attention, prompting a board press release characterizing the books as "anti-American, anti-Christian, anti-Semetic [sic],

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1. Petitioners were the Board of Education of the Island Trees Union Free School District, Board members Christina Fasulo, Patrick Hughes, Richard Melchers, Richard Michaels and Louis Nessim, and Board President and Vice-President Richard Ahrens and Frank Martin. Board of Educ., Island Trees Union Free School Dist. v. Pico, 102 S. Ct. 2799, 2802 (1982).

2. There was some confusion as to the name of this group; the court of appeals called them People of New York United. Pico v. Board of Educ., Island Trees Union Free School Dist., 638 F.2d 404, 406 (2d Cir. 1980), *aff'd*, 102 S. Ct. 2799 (1982).

3. 102 S. Ct. at 2802.

4. *Id.*

5. These nine books were: *Slaughter House Five*, by Kurt Vonnegut, Jr.; *The Naked Ape*, by Desmond Morris; *Down These Mean Streets*, by Piri Thomas; *Best Short Stories by Negro Writers*, edited by Langston Hughes; *Go Ask Alice*, Anonymous; *Laughing Boy*, by Oliver LaFarge; *Black Boy*, by Richard Wright; *A Hero Ain't Nothin' But a Sandwich*, by Alice Childress; *Soul On Ice*, by Eldridge Cleaver. 102 S. Ct. at 2803 n.3.

6. *Id.* The book available in the junior high school library was *A Reader for Writers*, edited by Jerome Archer. In addition, *The Fixer*, by Bernard Malamud, was included in the curriculum of a twelfth grade literature course. *Id.*

7. *Id.*

and just plain filthy,"[8] and claiming that the board had an obligation to protect the students from such a moral danger.[9]

Shortly thereafter, the board appointed a book review committee of four parents and four school staff members to consider the "educational suitability," "good taste," "relevance," and "appropriateness to age and grade level" of the books and recommend whether they should be retained.[10] The committee made a report to the board recommending retention of five of the listed books,[11] and removal of two others.[12] They could not agree on two of the books,[13] took no position on one,[14] and recommended that one be made available only with parental approval.[15] The board's decision, however, was to return only one book to the high school library without restriction,[16] to make another available with parental approval,[17] and to remove the remaining books.[18]

Respondents then brought this action under 42 U.S.C. § 1983[19] in the United States District Court for the Eastern District of New York, alleging that the books had been removed not because they were lacking in educational value, but because particular passages in them offended board members' personal political, social, and moral standards.[20] This, they claimed, denied them their rights under the first amendment.[21] Respondents sought a declaration that the board's action was unconstitutional with preliminary and

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8. The full text of this press release is set forth in Pico v. Board of Educ., Island Trees Union Free School Dist., 474 F. Supp. 387, 390 (1979), *rev'd*, 638 F.2d 404 (2d Cir. 1980), *aff'd*, 102 S. Ct. 2799 (1982).

9. 102 S. Ct. at 2803.

10. *Id.*

11. *Id. The Fixer, Laughing Boy, Black Boy, Go Ask Alice,* and *Best Short Stories by Negro Writers* were recommended for retention. *Id.* n.5.

12. *The Naked Ape* and *Down These Mean Streets. Id.* n.6.

13. *Soul on Ice* and *A Hero Ain't Nothin' But a Sandwich. Id.* n.7.

14. *A Reader for Writers. Id.* n.8.

15. 102 S. Ct. at 2803. *Slaughter House Five. Id.* n.9.

16. *Laughing Boy. Id.* n.10.

17. *Black Boy. Id.* n.11.

18. *Id.* at 2803-04.

19. 42 U.S.C. § 1983 provides in pertinent part:

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

42 U.S.C. § 1983 (1976 & Supp. IV 1980).

20. 102 S. Ct. at 2804.

21. *Id.*

permanent injunctive relief ordering the board to return the books and not to interfere with their use in the curriculum.[22]

The district court granted summary judgment to the board, based on the court's conclusion that the board's actions were motivated by its conservative educational policy and its belief that the books were educationally unsuitable.[23] The court rejected the respondents' first amendment claim, relying on an earlier holding that courts should not intrude in the daily operations of school systems in the absence of clear interference with constitutional rights.[24]

The district court's judgment was reversed by a three-judge panel of the United States Court of Appeals for the Second Circuit, each judge filing a separate opinion.[25] Judge Sifton, sitting by designation, delivered the judgment of the court. He stated that evidence indicating that the book removal decisions were based on board members' personal standards of morality and politics, together with the fact that no clear substantive or procedural guidelines had governed the removal process, created an inference that the members were not acting in the students' best interests, but out of a desire to impose their own views.[26] The court concluded that plaintiffs had made out a prima facie case of a first amendment violation, and should have been given an opportunity to proceed with their claims; it therefore remanded to the district court for trial.[27] There was a strong dissent by Circuit Judge Mansfield,[28] in which he asserted that *Presidents Council District 25 v. Community School Board No. 25*[29] should not have been overruled, and that the board's action was part of its usual regulatory function and in no way a violation of the students' first amendment rights.[30] Petition by the board for certiorari was granted.[31] The judgment of the court of appeals was affirmed, in a five/four decision generating seven separate opinions.[32]

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22. *Id.*

23. 474 F. Supp. at 392.

24. *Id.* at 395-97, (quoting Presidents Council v. Community School Bd., 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972)).

25. 638 F.2d 404 (1980).

26. *Id.* at 416.

27. *Id.* at 418.

28. *Id.* at 418-31.

29. 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972). *See infra* notes 241-49 and accompanying text.

30. 638 F.2d at 431.

31. 102 S. Ct. 384 (1982).

32. 102 S. Ct. at 2802. Justice Brennan wrote for the Court, joined by Justice Marshall

Justice Brennan announced the judgment of the Court.[33] He emphasized the limited nature of both the procedural and the substantive aspects of the case.[34] Justice Brennan acknowledged precedent for constitutionally restricting state control over the curriculum and the classroom,[35] but distinguished the instant case, which involved neither textbooks nor compulsory courses.[36] The board had sought to regulate only library books, not required reading materials,[37] and the action before the Court was limited to the issue of book removal, not book acquisition.[38] In addition, Justice Brennan emphasized the fact that the procedural status of the case was such that the Court could reverse the court of appeals' judgment and reinstate summary judgment in favor of petitioners only if it determined that "there (was) no genuine issue as to any material fact," and petitioners were "entitled to judgment as a matter of law."[39]

Justice Brennan stated the issue in the form of two questions: first, did the first amendment in any way restrict the board's discretion in removing library books? If so, did the affidavits and other evidentiary materials before the district court, when construed in respondents' favor, raise a genuine issue of fact as to whether those limitations were exceeded?[40] He stated that affirmative answers to both questions would dictate affirmance of the judgment of the court of appeals, while a negative answer to either

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and Justice Stevens. Justice Blackmun concurred in part and concurred in the judgment. Justice White concurred in the judgment. Chief Justice Burger, joined by Justice Powell, Justice Rehnquist and Justice O'Connor, dissented. Justice Powell dissented separately, as did Justice Rehnquist, who was joined by Chief Justice Burger and Justice Powell. Justice O'Connor also filed a dissenting opinion.

33. Justice Brennan was joined by Justice Marshall and Justice Stevens, and by Justice Blackmun in all but pt. II-A-(1). *Id.* at 2802.

34. *Id.* at 2805.

35. *Id. See* Epperson v. Arkansas, 393 U.S. 97 (1968) (declaring unconstitutional a state law prohibiting the teaching of the Darwinian theory of evolution in state-supported schools); Meyer v. Nebraska, 262 U.S. 390 (1923) (state statute forbidding teachers from providing foreign language instruction to students below a certain grade level struck down on fourteenth amendment due process grounds).

36. 102 S. Ct. at 2805.

37. *Id.*

38. *Id.*

39. FED. R. CIV. P. 56(c). Justice Brennan stated that doubts as to the existence of a genuine issue of material fact must be resolved against the moving party in a case such as this, and inferences from underlying factors viewed in the light most favorable to the party opposing the motion. 102 S. Ct. at 2806. *See* Adickes v. Kress & Co., 398 U.S. 144 (1970); United States v. Diebold, Inc., 369 U.S. 654 (1962).

40. 102 S. Ct. at 2806.

would require reversal.[41] He examined these questions in turn.

In the first section[42] of his opinion, Justice Brennan addressed the question of whether the first amendment imposed any limitations on the board's discretion to remove books from the school libraries.[43] He began by outlining the history of the Court's adherence to the principle that, under most circumstances, control of public education rests with the discretion of local authorities,[44] and the Court's recognition that public schools have a key role in the preparation of students as citizens, through the inculcation of moral, social and political values.[45] While these factors combine to give local school boards substantial authority to promote community values, Justice Brennan reiterated the Court's belief that the exercise of such authority must comport with an understanding of students' first amendment rights.[46]

Justice Brennan found the origin of this belief in *West Virginia State Board of Education v. Barnette*,[47] in which the Court reasoned that it is *because* the school is educating students for citizenship that it must perform its guiding role within the mandates of the Constitution, for students cannot learn to value principles the school feels free to ignore.[48] He also referred to *Epperson v. Arkansas*,[49] in which the Court emphasized the importance of free

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41. *Id.*

42. Part II-A-(1). 102 S. Ct. at 2806. Justice Blackmun did not join the plurality in this section.

43. *Id.*

44. *Id. See* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (suspension of students for wearing black armbands in class in a protest against the Vietnam War was an infringement of their right to free speech); Epperson v. Arkansas, 393 U.S. 97 (1968); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (invalidation, under fourteenth amendment, of state statute requiring all children between ages eight and sixteen to attend public schools); Meyer v. Nebraska, 262 U.S. 390 (1923), *see supra* note 35.

45. 102 S. Ct. at 2806. *See* Ambach v. Norwick, 441 U.S. 68, 76-77 (1979) In *Ambach*, the Court held that it was not violative of equal protection to deny resident aliens certification as public school teachers, as the governmental function of the school involves the teacher's promotion of civic virtues and is so bound up with the operations of the state as to permit exclusion of persons who have not become part of the process of self-government.

46. 102 S. Ct. at 2806-07.

47. 319 U.S. 624 (1943) (requirement that students salute the flag and recite the pledge of allegiance held beyond the constitutional limitations on the power of local authorities and an improper restriction of first amendment rights).

48. 102 S. Ct. at 2807. In *Barnette*, the Court stated: "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." 319 U.S. at 637.

49. 393 U.S. 97 (1968).

speech and inquiry in the school setting,[50] and *Tinker v. Des Moines Independent Community School District*,[51] which stressed that school officials must exercise their authority within first amendment limits.[52] In the context of these cases, stated Justice Brennan, students' first amendment rights were held safe from abridgment — whether the justification for the attempted limitation was "national unity" or "fear of disturbance."[53]

The role of the courts in protecting students' first amendment freedoms was defined in *Epperson v. Arkansas*:[54] courts may intervene in school system operations only where "basic constitutional values" have been "directly and sharply implicated."[55] Justice Brennan believed that intervention was appropriate in this case because of the potential effect of the book removals on the right to receive protected information.[56] Justice Brennan stated that, in the past, the Court had protected not only individual self-expression but also the public's access to knowledge and information.[57] He stated that this "right to receive ideas" is an inherent corollary of constitutionally guaranteed rights of free speech and press, stemming from the sender's first amendment right to transmit, and serving as a necessary predicate to the recipient's exercise of his own rights.[58] The right to receive prepares citizens generally, and students in particular, for meaningful participation in the political process.[59]

Justice Brennan pointed out that the right of students to receive information, as recognized in *Tinker v. Des Moines Independent*

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50. *Id.* at 104. The duty of federal courts is to "apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry." *Id.*

51. 393 U.S. 503 (1969).

52. *Id.* at 507. The Court in *Tinker* concluded that students do not "shed their rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506.

53. 102 S. Ct. at 2807. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. at 640-41; Tinker v. Des Moines Indep. Community School Dist., 393 U.S. at 508-09.

54. 393 U.S. 97 (1968).

55. *Id.* at 104.

56. 102 S. Ct. at 2807-08.

57. *Id.* at 2808. *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (holding unconstitutional a Massachusetts criminal statute forbidding certain expenditures by banks and business corporations for the purpose of influencing the vote on referendum proposals; commercial speech found constitutionally protected as furthering society's interest in free exchange of commercial information); Stanley v. Georgia, 394 U.S. 557 (1969) (finding unconstitutional a Georgia statute making mere private possession of obscene material a crime).

58. 102 S. Ct. at 2808.

59. *Id.*

Community School District,[60] is limited by the realities of the school environment,[61] but emphasized the special role of the school library.[62] He viewed the library as a place used by the student for self-enrichment and free inquiry into all subjects, and thus as a particularly appropriate forum for the recognition of students' first amendment rights.[63] Justice Brennan also noted the totally voluntary character of library use.[64] While the need to inculcate values might well justify the board's absolute control over the compulsory curriculum, such control would be inappropriate in the library's atmosphere of unrestricted inquiry.[65]

Having concluded that there were first amendment limitations on the school board's decision in the area of library book removals, Justice Brennan next examined the extent of these limitations.[66] He reviewed precedent to support his contention that, while significant discretion exists, it is not to be exercised in a partisan or political manner.[67] Justice Brennan proposed situations in which a Democratic school board might remove all books by or in favor of Republicans, or a white school board, in a racially motivated action, might remove all books by blacks, and inferred from these examples that the constitutional issue to be examined pertained to the suppression of ideas.[68] He suggested that the relevant inquiry was whether the school board intended to deny students access to ideas with which the board disagreed, and how decisive a factor this intent was in the removal decision.[69] Other motivations, such as a concern with the vulgarity or the educational suitability of the

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60. 393 U.S. 503, 511 (1969) ("students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate").

61. 102 S. Ct. at 2808-09. Those realities, as seen by the Court in *Tinker*, involve the fact that student exercise of first amendment rights may come into conflict with the rulemaking power of school officials, which has been recognized by the Court. 393 U.S. at 506-07.

62. 102 S. Ct. at 2809.

63. *Id.*

64. *Id.*

65. *Id.*

66. *See* pt. II-A-(2) of Justice Brennan's opinion. *Id.*

67. 102 S. Ct. at 2809. Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (local school board limited in discretion to refuse to rehire non-tenured teacher where action based on teacher's exercise of first amendment rights in making school principal's memorandum public); Epperson v. Arkansas, 393 U.S. 97 (1968); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) ("[T]he First Amendment . . . does not tolerate laws which cast a pall of orthodoxy over the classroom"); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

68. 102 S. Ct. at 2810.

69. *Id.*

removed books would be "perfectly permissible."[70]

In concluding his examination of the limitations imposed upon a board's discretion in removing books, Justice Brennan emphasized the fact that the Court's concern was with suppression of ideas; therefore, nothing in the opinion was to affect the discretion of school boards in the area of book acquisition.[71] The limitation placed on removal decisions, however, was that they could not be based simply on dislike of the ideas presented in the books, or on an attempt to prescribe an orthodox way of thought.[72]

Justice Brennan then addressed the second question posed by the case: whether the Court might properly reverse the judgment of the court of appeals and reinstate the district court's summary judgment in favor of the board.[73] The question to be considered was whether the evidentiary materials presented to the district court, when construed in respondent Pico's favor, raised a genuine issue of material fact as to whether petitioners' decision to remove the books exceeded constitutional limitations on their discretion.[74]

Justice Brennan analyzed the issue first from a substantive perspective. He noted Pico's claim that the removal decision was based upon the personal values of the board members, and members' conclusion that the books were "anti-American,"[75] and drew attention to the fact that the board, in its own explanation for the removals, conceded these issues, asserting that the books were "anti-American" and "offensive to . . . Americans in general."[76] He emphasized the fact that while the book committee's decisions were made on ostensibly permissible grounds,[77] these recommenda-

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70. *Id.* Justice Brennan here cited the transcript of oral argument, where respondents had conceded this point. *Id.*

71. *Id.*

72. *Id. See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

73. *See* pt. II-B. 102 S. Ct. at 2810.

74. *Id. See* FED. R. CIV. P. 56 (1980), which provides in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Id.

75. 102 S. Ct. at 2811.

76. *Id. See* 474 F. Supp. at 390. *See also* 102 S. Ct. at 2811 n.25 for Petitioner Martin's statement on the anti-Americanism of *A Hero Ain't Nothin' But a Sandwich*, which identifies George Washington as a slave owner: "I believe it is anti-American to present one of the nation's heroes . . . in such a negative and obviously one-sided life." *Id.* (citing Deposition of Petitioner Martin at 22).

77. That is, educational suitability, good taste, relevance and appropriateness to age and grade level. 102 S. Ct. at 2811.

tions were ignored by the board.[78] Finally, he noted that *A Reader for Writers* was removed although neither vulgar nor indecent.[79] While these factors were not in themselves decisive, Justice Brennan stated that when combined with the fact that the removal decision ignored expert views, contravened the procedures advocated by the school superintendent,[80] and appeared to have been based not on an independent review of library contents but on the PONYU list, these irregularities added to suspicions about petitioners' motivations.[81]

For these reasons, the plurality opinion concluded, the Court could not rule that petitioners were entitled to judgment as a matter of law, but believed instead that an issue of material fact existed as to the constitutional validity of the motivation behind the book removal decision, which required resolution by the finder of fact.[82] Thus, the decision of the court of appeals was affirmed.[83]

Justice Blackmun concurred in part and concurred in the judgment.[84] While he agreed with the standard established by the plurality to guide the proceedings on remand, he viewed differently the first amendment right involved.[85] He found the case to be extremely complex in its presentation of two opposing constitutional principles: the important role of the public schools in the inculcation of fundamental values,[86] and the fact that in fulfilling this role the school must operate within first amendment confines.[87]

Justice Blackmun reviewed cases which placed limits on the discretion of school boards where their actions would result in the imposition of a particular system of thought,[88] although noting

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78. *Id.*

79. *Id. See* 638 F.2d 404, 428 n.6 (Mansfield, J., dissenting).

80. 102 S. Ct. at 2812. *See* 638 F.2d at 408. The court of appeals set forth a memorandum from Superintendent Richard Morrow in which Morrow stated that a policy had been established by the Board for use when objections were raised to a book. This policy called for the superintendent to appoint a committee to study the book and make recommendations on it. *Id.*

81. 102 S. Ct. at 2812.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* Justice Blackmun appeared to focus his attention on conflicting policies influencing the school board rather than on the relation of these policies to the individual rights of the students.

86. 102 S. Ct. at 2812-13 (Blackmun, J., concurring in part and concurring in the judgment). *See, e.g.*, Ambach v. Norwick, 441 U.S. 68 (1979).

87. 102 S. Ct. at 2813 (Blackmun, J., concurring in part and concurring in the judgment).

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

that none of these cases involved choice of curriculum or curricular materials.[89] He placed particular emphasis on *West Virginia State Board of Education v. Barnette*[90] for the proposition that school authorities are not to impose uniformity of thought.[91] Drawing from these cases and others dealing more generally with content-based regulation of speech,[92] Justice Blackmun articulated a general principle: the state (or school board) may not suppress exposure to ideas — for the sole *purpose* of suppressing exposure to those ideas — absent sufficiently compelling reasons.[93]

Justice Blackmun viewed this case as involving a narrower principle than the "right to receive information" identified by the plurality.[94] He would not have inferred that the State has an obligation to provide ideas, as a right to receive might imply,[95] nor did he feel that the school library should be exempt from the inculcative function of the school.[96] He suggested instead that certain forms of state discrimination among ideas are improper: those based on partisan or political concerns.[97] Justice Blackmun felt that while the unique inculcative function of the school limited the extent to which official decisions should be restrained, that same function made it imperative that some first amendment limitations be recognized so that orthodoxy would not be imposed.[98]

For these reasons, Justice Blackmun believed the proper holding would be that school officials may not remove books for the *purpose* of restricting access to the ideas or perspectives contained

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("students may not be regarded as closed-circuit recipients of only that which the state chooses to communicate"); Keyishian v. Bd. of Regents, 385 U.S. 589 (1967) (invalidity of New York attempt to remove "subversives" from university academic positions; the first amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom"); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (schools may not "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion").

89. 102 S. Ct. at 2813 (Blackmun, J., concurring in part and concurring in the judgment).

90. 319 U.S. 624 (1943).

91. 102 S. Ct. at 2813 (Blackmun, J., concurring in part and concurring in the judgment).

92. *Id. See* Police Dep't v. Mosley, 408 U.S. 92 (1972).

93. 102 S. Ct. at 2813 (Blackmun, J., concurring in part and concurring in the judgment) (emphasis in original).

94. 102 S. Ct. 2813-14. *See id.* at 2827-35 (Rehnquist, J., dissenting) for an extensive discussion of the concept of "right to receive."

95. 102 S. Ct. at 2814 (Blackmun, J., concurring in part and concurring in the judgment). *See also id.* at 2819 (Burger, C.J., dissenting).

96. 102 S. Ct. at 2814 & n.1 (Blackmun, J., concurring in part and concurring in the judgment).

97. *Id.* at 2814 (Blackmun, J., concurring in part and concurring in the judgment).

98. *Id.*

therein when the removal is based on disapproval of the ideas involved.[99] Such suppression, stated the Justice, clearly would be contrary to the first amendment.[100] Justice Blackmun would not interfere with the right of school officials to choose among books for politically neutral reasons: relevancy, better writing, space or financial limitations, offensive language,[101] inappropriateness for age group, presence of ideas dangerous to the public welfare,[102] or belief that one subject is more deserving of emphasis than another.[103] Disapproval of a novel or unpopular viewpoint would not be sufficient.

Justice Blackmun addressed several of the issues raised in Justice Rehnquist's dissent.[104] He did not agree that the concept of "suppression of ideas" was without merit when *purposeful* suppression was tied to first amendment rights.[105] Justice Blackmun gave the example of the removal of a foreign policy treatise from an elementary school library because it was too advanced for the students as an action not taken of the *purpose* of suppressing ideas.[106] He would not consider so clear-cut the removal of the treatise based on a decision that it was anti-American.[107] Also, Justice Blackmun was not comfortable with Justice Rehnquist's distinction between the state as sovereign and the state as educator,[108] since the first amendment applies to all state activities,[109] and restrains the state from content-based restrictions and suppression of access to certain ideas in all contexts.[110]

The tension which Justice Blackmun saw at the heart of the issue was between indoctrination of values as a purpose of public

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99. *Id.*

100. *Id.*

101. *Id.* at 2815 (Blackmun, J., concurring in part and concurring in the judgment). *See* FCC v. Pacifica Found., 438 U.S. 726, 757 (1978) (Powell, J., concurring).

102. 102 S. Ct. at 2815 (Blackmun, J., concurring in part and concurring in the judgment). *See* Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925).

103. 102 S. Ct. at 2815 (Blackmun, J., concurring in part and concurring in the judgment). These reasons appear, on their face, to conform to the reasons given by the Board for the removals. *See* 638 F.2d at 423 (Mansfield, J. dissenting) (citing the Board's testimony as to the reasons for the removals).

104. 102 S. Ct. at 2815 (Blackmun, J., concurring in part and concurring in the judgment). *See id.* at 2834-35 (Rehnquist, J., dissenting).

105. 102 S. Ct. at 2815 (Blackmun, J., concurring in part and concurring in the judgment).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id. See* Police Dep't v. Mosley, 408 U.S. 92 (1972).

education, and the limits to be placed on school board discretion.[111] While acknowledging that school officials may develop a curriculum aimed at instilling certain values,[112] he maintained that they could not intentionally shield students from ideas not generally accepted in the community. Justice Blackmun also agreed with the Chief Justice that applying the principles developed by the plurality might be difficult in particular cases.[113] He concluded, however, that while the sparseness of the record in the instant case made it difficult to analyze the impact of the plurality's decision, and might support those who felt that the case should not have been taken, it was necessary that the Court decide the case before it.[114] He joined, therefore, in all but part II-A-(1) of the plurality opinion.[115]

Justice White concurred in the judgment,[116] based on the conclusion of the court of appeals that a material issue of fact remained as to the reasons underlying the book removals, precluding a grant of summary judgment.[117] He expressed the hope that a trial would result, and produce a full record and findings on critical points.[118]

Justice White deemed it improper for the plurality to have reached the constitutional issue of first amendment limits on discretionary book removals, since there was an absence of fact on the record on which to proceed.[119] He would have preferred to remand for the district court to issue an opinion. Only if the district court's judgment were followed by an appeal, dissatisfaction with the judgment of the court of appeals and a grant of certiorari would Justice White address the constitutional question.[120] In support of his stance, Justice White offered two cases: *Kennedy v. Silas*

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111. 102 S. Ct. at 2815 (Blackmun, J., concurring in part and concurring in the judgment).

112. *Id.* at 2815-16 (Blackmun, J., concurring in part and concurring in the judgment). *See* Minersville School Dist. v. Gobitis, 310 U.S. 586, 604 (1940) (Stone, J., dissenting) (school may require study of government and history to "inspire patriotism and love of country").

113. 102 S. Ct. at 2816 (Blackmun, J., concurring in part and concurring in the judgment).

114. *Id.*

115. *Id.* Part II-A-(1) focused primarily on the articulation of the "right to receive" in the context of the case. *See supra* notes 58-65 and accompanying text.

116. 102 S. Ct. at 2816 (White, J., concurring in the judgment).

117. *Id. See* FED. R. CIV. P. 56.

118. 102 S. Ct. at 2816 (White, J., concurring in the judgment).

119. *Id.*

120. *Id.*

Mason Co.[121] and *Dombrowski v. Eastland*,[122] in which the Court remanded for production of a fuller record on which to base its decision.[123] He felt that this approach was particularly imperative in a case involving unexplored first amendment areas.[124]

Chief Justice Burger dissented, in an opinion joined by Justices Powell, Rehnquist, and O'Connor.[125] He indicated that he believed that the plurality wrongly focused on the fact that the decision to examine the books was sparked by the observations of a "politically conservative organization" rather than accepting the district court's observation that the parties were in basic agreement as to the reasons for the removal.[126] He believed the plurality, by holding that a school board's determination of library contents was a proper subject for judicial review, would cast the Court in the role of a "super censor" of school libraries.[127] The Chief Justice felt that the basic issues in the case were whether school boards are to be administered by elected officials or by teenage students and federal judges, and whether decisions concerning library contents can be based on concepts of morality, good taste and educational relevance.[128] The plurality's structuring of this case as a first amendment problem was, the Chief Justice felt, a technique for imposing its own views on proper book selection.[129] Further, he pointed out that the case presented a possible concern over mootness.[130]

Chief Justice Burger agreed that students have a right to speech and expression in educational contexts.[131] Without a showing that student rights had been restricted in some way, however, he was unable to accept the plurality's suggestion that students have an enforceable right — a first amendment "entitlement" — to receive

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121. 334 U.S. 249, 257 (1948) ("We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings").

122. 387 U.S. 82, 84 (1967) ("In the absence of the factual refinement which can occur only as a result of trial, we need not and, indeed, could not express judgment as to the legal consequences").

123. 102 S. Ct. at 2816-17 (White, J., concurring in the judgment).

124. *Id.* at 2817 (White, J., concurring in the judgment).

125. *Id.* (Burger, C.J., dissenting).

126. *Id.* n.1 (Burger, C.J., dissenting). *See* 474 F. Supp. at 392.

127. 102 S. Ct. at 2817 (Burger, C.J., dissenting).

128. *Id.*

129. *Id.*

130. *Id.* n.2 (Burger, C.J., dissenting).

131. *Id.* at 2818 (Burger, C.J., dissenting). *See* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (so long as the educational process is not disrupted, school cannot prohibit student expression of certain ideas); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (student cannot be compelled to salute the flag).

information and ideas contained in school library books.[132] He criticized the plurality's use of school-related precedent[133] as a basis for this right; one which he believed the Court had never previously recognized.[134]

Chief Justice Burger attacked the plurality's "right to receive" argument on two fronts.[135] He began by examining the right of the sender, acknowledging that the government may not impose obstacles between one who sends information and one who receives,[136] or unreasonably restrain the expression of certain ideas.[137] But Chief Justice Burger made a distinction between not hindering speech and affirmatively aiding it. He noted that the Court had never held that a sender's right to convey information was absolute,[138] or that the government was required to help a sender reach his audience.[139]

Next, the Chief Justice turned to the recipient. He asserted that neither the "right to receive information and ideas"[140] nor the necessity for an informed citizenry[141] established a right to have particular books retained in school libraries.[142] The Chief Justice suggested that recognition of such a right would, by logical extension, require the government to provide all citizens with access to infor-

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132. 102 S. Ct. at 2818 (Burger, C.J., dissenting).

133. Epperson v. Arkansas, 393 U.S. 97 (1968); Meyer v. Nebraska, 262 U.S. 390 (1923).

134. 102 S. Ct. at 2818 (Burger, C.J., dissenting).

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

136. *Id.* at 2818 (Burger, C.J., dissenting). *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (striking down statute declaring it unprofessional conduct for a licensed pharmacist to advertise prescription drug prices). *See also* Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972), where the Court stated that freedom of speech necessarily implies protection of the right to receive.

137. 102 S. Ct. at 2818 (Burger, C.J., dissenting). *See* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969).

138. 102 S. Ct. at 2819 (Burger, C.J., dissenting). *See* Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970) (upholding homeowner's right not to receive erotic materials). A similar argument was made by court of appeals Judge Mansfield in his dissent in *Pico*, 638 F.2d at 429, to assert that the importance of Presidents Council v. Community School Bd., 457 F.2d 289 (1972), had not been lessened by Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). He stated:

> Here no speaker exists claiming a constitutional right to address the students with respect to the text of the removed books . . . since under *Virginia State Board* the right of students to receive information is no greater than that of the speaker to furnish it, the decision has no application to the facts of this case.

638 F.2d at 429.

139. 102 S. Ct. at 2819 (Burger, C.J., dissenting).

140. *Id. See* Stanley v. Georgia, 394 U.S. 557, 564 (1969).

141. 102 S. Ct. at 2819 (Burger, C.J., dissenting). *See id.* at 2808.

142. 102 S. Ct. at 2819 (Burger, C.J., dissenting).

mation.[143] Additionally, he believed that the plurality had misused *Tinker v. Des Moines Independent Community School District*,[144] a case restricting the limitations which could be placed on students' rights to free expression, to support an affirmative duty to supply information.[145] It was necessary, stated the Chief Justice, to distinguish actions by the government which would "contract the spectrum of available knowledge"[146] from actions in which the government chooses not to be the channel for certain information.[147] He rejected the notion that having the government provide continuing access to particular books was a right established by the first amendment or prior decisions by the Court.[148]

In the next part of his opinion, Chief Justice Burger took note of the fact that essentially all school activity involves transmitting information.[149] The Chief Justice pointed out the Court's recognition of the public school's inculcative function.[150] He would assure the fulfillment of that function by leaving content-based selection of academic materials to elected school boards.[151] According to the Chief Justice, to vest this selection power in the Court, rather than in a body which reflects the standard of the local community, would be contrary to the idea of democratic government.[152] The Chief Justice summarized the standard established by the plurality as one which sought to prevent the partisan exercise of school board discretion, but which permitted decisions based on a book's "pervasive vulgarity" or its educational unsuitability.[153] The Chief Justice did not see how "educational suitability" could operate as a standard without content-based decisions being made; nor did he see why vulgarity had to be "pervasive" before it could be found inappropriate.[154] In addition, while the plurality would not permit political factors to motivate removals, the Chief Justice asserted that all decisions in the realm of public education are in some sense political.[155] He concluded that what the plurality had identi-

143. *Id.*
144. 393 U.S. 503 (1969).
145. 102 S. Ct. at 2819 (Burger, C.J., dissenting).
146. *Id. See* Griswold v. Connecticut, 381 U.S. 479 (1965).
147. 102 S. Ct. at 2819 (Burger, C.J., dissenting).
148. *Id.*
149. *Id.*
150. *Id. See* Ambach v. Norwick, 441 U.S. 68 (1979).
151. 102 S. Ct. at 2819 (Burger, C.J., dissenting).
152. *Id.* at 2820 (Burger, C.J., dissenting).
153. *Id.*
154. *Id.*
155. *Id. See* Ambach v. Norwick, 441 U.S. 68, 74 (1979) (public education "go[es] to

fied as valid reasons for book removal involved, nonetheless, basically partisan judgments.[156] If such judgments must be made, the Chief Justice would rather they be made not by the courts, but by elected school officials, who are chosen by and responsive to the communities they serve.[157] He believed that the school board's accountability to its constituents would prevent abuse of its discretion, and pointed out that even if the community failed to mandate the presence of a book in its schools, it could obtain the book from private, non-school sources.[158]

In part II,[159] Chief Justice Burger criticized the distinction made by the plurality between text books and optional library materials. He found it illogical that optional materials would be subject to greater scrutiny before removal than would texts, despite the fact that decisions about selection or removal of texts would be more likely to impose a "pall of orthodoxy" over the classroom.[160] Chief Justice Burger was dissatisfied with the distinction between acquisition and removal of books under a "suppression of ideas" standard as well.[161] He pointed out the anomaly of the "book tenure" concept, which had been discussed by the district court in *Pico*.[162] The Chief Justice did not see how the decision not to acquire a book is less a suppression of ideas than the decision to remove it — yet the plurality had placed no restriction on the first decision while "locking in" a school board to books already acquired unless their removals were properly justified.[163]

In summary, the Chief Justice stated that he could see no constitutional basis for these various distinctions, and could not agree that the Constitution mandated that judges, not school boards,

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the heart of representative government").

156. 102 S. Ct. at 2820 (Burger, C.J., dissenting).

157. *Id.* at 2820-21 (Burger, C.J., dissenting). *See also id.* at 2820 n.5, in which Chief Justice Burger stated that this case was an example of "super censorship" in its insistence on a remand so that the plurality's standard could be applied.

158. 102 S. Ct. at 2821 (Burger, C.J., dissenting).

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* Justice Burger pointed to the district court's decision. 474 F. Supp. at 395-96. The district court had reaffirmed the standard of Presidents Council v. Community School Bd., 457 F.2d 289 (2d Cir. 1972), rejecting book tenure. The district court argued that Minarcini v. Strongsville City School Dist., 541 F.2d 577 (6th Cir. 1976), Right to Read Defense Comm. of Chelsea v. School Comm. of Chelsea, 454 F. Supp. 703 (D. Mass. 1978), and Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269 (D.N.H. 1979), while purporting to distinguish *Presidents Council*, simply adopted the book tenure concept rejected by the Second Circuit. 474 F. Supp. at 395.

163. 102 S. Ct. at 2821 n.8 (Burger, C.J., dissenting).

parents and teachers, should regulate the standards of morality and vulgarity in the classroom.[164]

Justice Powell dissented, based on his interpretation of the role of the school board in the system of government,[165] and his disapproval of the implication he found in the plurality opinion that any student might, in the future, be able to invoke the power of the court to overrule an elected school board's educational decision.[166] He discussed the intensely local nature of the school board, and stated that resolving educational policy disputes through litigation rather than through the decisions of bodies responsive to the people they serve could only lead to a lessening of school board effectiveness.[167]

Justice Powell voiced criticisms similar to those made by Chief Justice Burger and Justice Rehnquist, stating that he could find no constitutional support for the "right to receive ideas" in school,[168] nor did he find guidance from the plurality as to acceptable standards by which the courts are to oversee, and school boards to make, discretionary decisions in the area of curriculum.[169] The plurality's formulation — that decisions cannot be made in a "narrowly partisan or political manner" — was seen by Justice Powell as a "standardless standard" comparable to the "chancellor's foot."[170] He was also reluctant to allow students the right to challenge book removals, because he could not ascertain a reasonable limitation upon the areas in which students would be permitted to challenge educational decisions on the basis of a "right to receive ideas."[171]

Justice Powell asserted that the plurality's reasoning was contradictory.[172] While the plurality accepted the Court's traditional view that the public school is an important means of transmitting democratic values and societal standards to prepare children for participation in the political system,[173] and had, during the same term,

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

165. 102 S. Ct. at 2822 (Powell, J., dissenting).

166. *Id.*

167. *Id.*

168. *Id. See supra* notes 135-38 and accompanying text.

169. 102 S. Ct. at 2822 (Powell, J., dissenting).

170. *Id.*

171. *Id.* at 2822-23 (Powell, J., dissenting). Justice Powell suggested that the plurality could not meaningfully distinguish a book removal challenge from a challenge of the decision not to purchase a book, of decisions as to which courses could be added to or removed from the curriculum, or of what a classroom teacher might elect to teach or not to teach.

172. 102 S. Ct. at 2823 (Powell, J., dissenting).

173. *Id. See supra* notes 44-48 and accompanying text.

extended the right to such preparation to the children of illegal aliens,[174] it penalized a school board for exercising its discretion in selecting the values and standards to be conveyed.[175] Justice Powell felt that the plurality denied the school board the right to refrain from promoting indecency, advocacy of violence or racism, or degradations of the individual — values which never have been accepted in the American system.[176] He stated that the removal of the nine books at issue here did not suggest a book burning mentality; instead, he believed that the plurality's decision was an interference with democratic institutions.[177]

Justice Rehnquist dissented, joined by the Chief Justice and Justice Powell.[178] He began by addressing the procedural posture of the case, which he believed had received too little attention in the plurality opinion.[179] Justice Rehnquist stated that, in light of Rule 9(g) of the local rules of the district court, Pico, having had summary judgment entered against him, was entitled to have had the facts set forth in his Rule 9(g) statement accepted for review purposes.[180] Thus, Justice Rehnquist believed Justice Brennan should not have gone outside of Pico's Rule 9(g) statement of facts to review the case.[181]

Justice Rehnquist stated that, considering only respondent

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174. 102 S. Ct. at 2823 (Powell, J., dissenting). Justice Powell was referring to Plyler v. Doe, 102 S. Ct. 2382 (1982), which upheld the rights of children of illegal aliens to attend the public schools.

175. 102 S. Ct. at 2823 (Powell, J., dissenting).

176. *Id.*

177. *Id.* Justice Powell attached as an appendix Judge Mansfield's summary of excerpts from the books involved in this case. *Id.* at 2823-27. These excerpts were quotations from each of the books, with particular emphasis on vulgar language and sexual situations. *See also* 638 F.2d at 419-22 n.1 (Mansfield, J., dissenting).

178. 102 S. Ct. at 2827 (Rehnquist, J., dissenting).

179. *Id. See also id.* n.1 where Justice Rehnquist detailed his reasons for disagreeing with Justice White's conclusion that the constitutional issues need not have been reached.

180. 102 S. Ct. at 2827-28 & n.2 (Rehnquist, J., dissenting). Local Rule 9(g) provides:

> Upon any motion for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement of the material facts as to which it is contended that there exists a general issue to be tried.
>
> The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.
>
> All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.

E.D.N.Y.R. 9(g).

181. 102 S. Ct. at 2828 (Rehnquist, J., dissenting).

Pico's description of the facts, he could find no basis for Justice Brennan's concern over "suppression of ideas."[182] He emphasized respondents' admission that the books involved profanity, explicit sex, bad grammar, and anti-American or religiously, racially or ethnically offensive statements, and respondents' agreement that while the books were excluded from use in the school there was no effort to prevent discussion of them, or of their themes.[183] For this reason, Justice Rehnquist believed that Justice Brennan was unwarranted in assessing this case, on its facts, in terms of "suppression of ideas." The extreme suppression of ideas suggested by Justice Brennan[184] would be dealt with by Justice Rehnquist when — if ever — it arose.[185]

Justice Rehnquist next discussed the fact that the government acts in different roles, with restrictions on it as a sovereign[186] which may not have the same first amendment implications as are present when it acts in other capacities.[187] When the state acts as educator, stated Justice Rehnquist, it makes decisions concerning curriculum, books, and faculty so that it can carry out its inculcative responsibilities. These decisions, when made by the school board, will be based on members' personal values or the values of the community, or the board can choose to have the choices made by experts.[188] Justice Rehnquist voiced agreement with the Seventh Circuit Court of Appeals' holding in *Zykan v. Warsaw Community School Corp.*[189] that local boards could properly use their personal moral views in making educational decisions.[190] When a board uses

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182. *Id.*

183. *Id. See also* Presidents Council v. Community School Bd., 457 F.2d 289, 292 (2d Cir. 1972), where a distinction was made between removing a book from the library and totally restricting access to it.

184. 102 S. Ct. at 2829 (Rehnquist, J., dissenting). *See supra* text accompanying note 68 for Justice Brennan's examples of a Democratic school board suppressing Republican works, or a white board denying access to books by or about blacks.

185. 102 S. Ct. at 2829 (Rehnquist, J., dissenting).

186. *Id.* For example, on the record before the court, Justice Rehnquist suggested that a town council could not have prohibited the sale of these books by private booksellers within the municipality. *Id.*

187. *Id.* For example, the state as employer could regulate the speech of its employees in a way it could not regulate the speech of the general public, Pickering v. Board of Educ., 391 U.S. 563 (1968), and could act to prohibit expressive conduct on its property as could a private owner. Adderley v. Florida, 385 U.S. 39 (1967).

188. 102 S. Ct. at 2829 & n.5 (Rehnquist, J., dissenting).

189. 631 F.2d 1300 (7th Cir. 1980) (the indoctrinational responsibility of the schools vested the state with an interest outweighing students' rights to academic freedom; remanding to permit showing of whether impermissible orthodoxy had been imposed).

190. *Id.* at 1308.

its discretion in the making of such decisions, it does not exclude particular books or subjects from the community at large, asserted Justice Rehnquist; the materials are available elsewhere, and the exclusions thus do not raise the same first amendment concerns in the school context as they would if they were sovereign actions.[191]

Justice Rehnquist next considered the "right to receive" issue. He found illogical the plurality's limitations on this right: that it exists only in the library and only as to ideas in previously acquired books; that it does not extend to permitting restraints on decisions not to acquire; that it limits permissible reasons for removal. Any decision not to acquire or to remove a book, no matter what the reason, is a denial of access; to Justice Rehnquist, logic would require extension of the plurality's concern to all of these sorts of decisions.[192] His primary objection was not to the limitations, however, but to the existence of the right at all — an existence he found unsupported by precedent and inconsistent with the role of elementary and secondary education.[193] Justice Rehnquist pointed out that previous decisions concerning student rights dealt with the right of self-expression, such as a symbolic armband display,[194] or a refusal to participate in the flag salute.[195] He acknowledged that the Court had recognized a right to receive in some settings, but, while the plurality read *Tinker v. Des Moines Independent Community School District*[196] to extend the right to the school context, Justice Rehnquist believed this interpretation was incorrect.[197] He also found no sender's right in the school context upon which to base the students' reciprocal right to receive.[198] Additionally, stated Justice Rehnquist, a denial of access is a limit on the recipient's exercise of his own first amendment rights only when that denial is nearly complete, as it was in the right to receive cases reviewed by Justice Brennan[199] — a situation clearly

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191. 102 S. Ct. at 2830 (Rehnquist, J., dissenting).

192. *Id.*

193. *Id.* Justice Rehnquist's analysis of these issues was similar to that undertaken by the Chief Justice. *See supra* notes 136-48 and accompanying text.

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

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

196. 393 U.S. 503 (1969).

197. 102 S. Ct. at 2831 (Rehnquist, J., dissenting). *See id.* at 2808.

198. *Id.* at 2831 (Rehnquist, J., dissenting).

199. *Id.* at 2831 n.7 (Rehnquist, J., dissenting). These "right to receive" cases were First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) (Massachusetts law prohibiting corporate expenditures to express viewpoints on ballot issues); Stanley v. Georgia, 394 U.S. 557 (1969) (Georgia law criminalizing all private possession of obscene materials); Griswold v. Connecticut 381 U.S. 479 (1965) (law criminalizing all use of contraceptive devices or actions encour-

distinguishable from the instant case, where the books were readily available elsewhere.[200]

Justice Rehnquist stated that the inculcative nature of the public school demands that students be exposed to ideas in a selective and orderly way.[201] At the elementary and secondary levels in particular, educators must make determinations as to which ideas are relevant to the students' acquisition of knowledge and which are not.[202] A demand that all materials be made available in an eclectic fashion would, in Justice Rehnquist's view, be fundamentally contradictory to the basic nature of an inculcative education.

Justice Rehnquist criticized Justice Brennan's use of language from a case on *public* libraries,[203] and from another on universities and colleges,[204] as a basis for his assertion that school libraries are a unique environment. Justice Rehnquist pointed out that school libraries serve as supplements to the inculcative role of the public school; they are geared toward the teaching of selected skills and thus provide no forum for the exercise of a right to receive information.[205] He then returned to a point he had made earlier: that the book removals did not violate the right to receive information because the books at issue were available from non-school sources — including the public library, where they were put on display for public inspection following their removal from the schools.[206]

Justice Rehnquist called attention to Justice Brennan's distinction between the removal of a previously acquired book and the decision not to acquire a book at all.[207] He found that distinction unsound, stating that both decisions are effective in denying access to the book's contents.[208] In addition, he asserted that the denial of access to an idea is not necessarily the same as its suppression.[209] The Justice read the plurality's opinion as justifying its distinction

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aging such use); Lamont v. Postmaster General, 381 U.S. 301 (1965) (requiring persons receiving communist propaganda in the mails affirmatively to assert their desire to receive it); Martin v. City of Struthers, 319 U.S. 141 (1943) (law prohibiting all door-to-door distribution of religious literature).

200. 102 S. Ct. at 2832 (Rehnquist, J., dissenting).

201. *Id.*

202. *Id.*

203. *Id. See* Brown v. Louisiana, 383 U.S. 131 (1966).

204. 102 S. Ct. at 2832 (Rehnquist, J., dissenting). *See* Keyishian v. Board of Regents, 385 U.S. 589 (1967).

205. 102 S. Ct. at 2832 (Rehnquist, J., dissenting).

206. *Id.* at 2832-33 (Rehnquist, J., dissenting).

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

208. *Id. See also supra* note 162 for a discussion of the "book tenure" concept.

209. 102 S. Ct. at 2833 (Rehnquist, J., dissenting).

between acquisition and removal on the grounds that the latter was more visible and required greater conscious effort, but he believed that this was irrelevant if the Court's real concern was with "suppression of ideas."[210] He also felt that the "bad motive" test proposed by the plurality was specious. In the face of concern with a right to receive, the reason for denial of access should be irrelevant, as the result is the same.[211] Additionally, the Justice asserted that not all restrictions on information received result in the imposition of an orthodox system of thought.[212]

On the same basis, Justice Rehnquist could not understand the standards used in the plurality's examination of the motives behind removal decisions. He stated that he had believed that content-based restrictions on the marketplace of ideas were prohibited,[213] yet removals for vulgarity or educational unsuitability, permissible by the plurality's view, would require content analysis.[214]

Justice Rehnquist criticized the plurality's use of the phrase "suppression of ideas" as a catch-all rather than an analytical tool.[215] He believed that previous decisions under the first amendment had provided sufficient guidance for the Court without requiring the use of a formula which gave rise to different meanings in disparate situations.[216] He advocated the standard used in *Tinker v. Des Moines Independent Community School District*[217] that the prohibition of the expression of a particular idea is not constitutionally permissible, absent a showing that the prohibition is necessary to maintain order and preserve the learning environment.[218] He stated that it would be inappropriate to say that the Island Trees School Board had suppressed the ideas of vulgarity

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210. *Id.*

211. *Id.*

212. *Id.* at 2833-34 (Rehnquist, J., dissenting).

213. *Id.* at 2834 (Rehnquist, J., dissenting). *See* Widmar v. Vincent, 102 S. Ct. 269 (1981) (state university's exclusion from its facilities of religiously-oriented student group violated fundamental principle that state regulation of speech should be content-neutral).

214. 102 S. Ct. at 2834 (Rehnquist, J., dissenting).

215. *Id.*

216. *Id. See* Kovacs v. Cooper, 336 U.S. 77, 96 (1949) (Frankfurter, J., concurring) (court should not undertake "a complicated process of constitutional adjudication by a deceptive formula"). Justice Rehnquist gave three examples of "suppression of ideas": a school policy that no student, teacher, or library book would be permitted to criticize United States foreign policy; a policy that current events would not be discussed in Latin class; a teacher's illness requiring that the class forego the study of the most recent 20 years of United States history.

217. 393 U.S. 503 (1969).

218. *Id.* at 510-11.

and profanity, for all they had in fact done was remove vulgar books, not preclude discussion of them.[219] Such a removal, stated Justice Rehnquist, was, on respondents' version of the facts,[220] a first amendment-protected decision based on educational suitability.[221]

Justice Rehnquist stated that his emphasis on the limitations placed by the plurality on the right to receive ideas was not meant to suggest that the limitations should be eliminated, but sought only to suggest that the right is misplaced in the elementary and secondary school setting.[222] He stated that, similarly, his criticism of the "suppression of ideas" formula was meant to show not that such suppression is constitutionally permissible,[223] but to suggest the imprecision of the concept as an aid to decision-making.[224]

Justice Rehnquist once again emphasized that he would recognize less stringent regulations on the government as educator, particularly in the elementary and secondary school setting, than those which apply to it in its sovereign role.[225] When a school board chooses not to offer a book or a course, stated the Justice, it does not condemn that book or course, but only determines that it will not be part of the knowledge inculcated by the school.[226]

Under the *Epperson v. Arkansas* standard,[227] Justice Rehnquist believed the action taken by the school board in this case was acceptable, and indistinguishable from the variety of decisions made by such boards every day on the basis of "personal values, morals and tastes."[228] He concluded that, in this case, respondents' rights of free speech and expression were not infringed, and by respondents' own admission, no ideas had been suppressed.[229]

Justice O'Connor dissented.[230] She felt that the plurality overlooked the school board's role as educator, which requires many

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219. 102 S. Ct. at 2834 (Rehnquist, J., dissenting).

220. *Id.* at 2834-35 (Rehnquist, J., dissenting). *See supra* notes 180-81 and accompanying text.

221. 102 S. Ct. at 2835 (Rehnquist, J., dissenting).

222. *Id.* Justice Rehnquist emphasized again the difference between the public school and institutions of higher learning. *Id.*

223. *Id.*

224. *Id.*

225. *Id. See* Tilton v. Richardson, 403 U.S. 672, 685-86 (1971) (Burger, C.J., concurring).

226. 102 S. Ct. at 2835 (Rehnquist, J., dissenting).

227. 393 U.S. 97, 104 (1968). *See supra* notes 54-55 and accompanying text.

228. 102 S. Ct. at 2835 (Rehnquist, J., dissenting).

229. *Id.*

230. *Id.* (O'Connor, J., dissenting).

decisions of the same character as book removal.[231] While Justice O'Connor stated that she did not personally agree with the board's choices in this particular case, she believed that it was the school board's right to determine educational suitability, and accordingly joined the Chief Justice in his dissent.[232]

Underlying the cases in the area of book removal are two basic principles: the right of local school boards to control the educational process, and the first amendment guarantees of freedom of speech and expression as they have come to be defined in the school setting. In addition, the concepts of a "right to receive information" and of "book tenure" have played an important role in decisions in this area.

Local school boards typically operate under broad grants of power,[233] and the courts have been somewhat reluctant to interfere in their day-to-day decisions. The importance of the school's inculcative function is repeatedly emphasized; a corollary to that emphasis is that community-controlled boards are the arm of government best suited to determine what values will be conveyed and to control the flow of information to students. Three major cases not dealing with book removals are discussed frequently in the book removal cases for their delineations of those situations in which the courts will restrict the amount and type of control which school boards may exert over matters involving students' first amendment rights.[234]

In the early case of *West Virginia State Board of Education v. Barnette,*[235] the Court held that a school could not compel a stu-

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231. *Id.* For example, setting curriculum, selecting teachers, determining what library books to purchase initially.

232. *Id.*

233. *See, e.g.*, N.Y. EDUC. LAW § 1709 (McKinney 1970) which provides in pertinent part:

> § 1709. *Powers and Duties of Boards of Education* The said board of education of every union free school district shall have the power and it shall be its duty:
>
> . . . .
>
> 3. To have in all respects the superintendence, management and control of the educational affairs of the district, and, therefore, shall have all the powers reasonably granted expressly or by implication by this chapter or other statutes.

Id. 638 F.2d 404, 422 n.2 (1980) (Mansfield, J., dissenting), *aff'd*, 102 S. Ct. 2799 (1982). *See also generally* Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. PA. L. REV. 373 (1969). Generally, this right includes selection of texts and control of curriculum.

234. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969); Epperson v. Arkansas, 393 U.S. 97 (1968); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

235. 319 U.S. 624 (1943).

dent to salute the flag. The Court emphasized the discretionary nature of the school board's function,[236] but declared that it was essential that those who were training students to assume the role of citizens not restrict those students in the exercise of their constitutional rights.[237] Twenty-five years later, in *Epperson v. Arkansas*,[238] the Court, in invalidating a state statute prohibiting the teaching of the Darwinian theory, stated that court intervention in school operations was permissible only where conflicts arose in which basic constitutional values were directly implicated.[239] In another decision stressing both the Court's commitment to preserving local control over educational decisions and its mandate that such control not infringe on constitutionally protected areas, the Court in *Tinker v. Des Moines Independent Community School District*[240] held that students could not be prohibited from wearing black armbands to protest the war in Vietnam so long as they did not actually disrupt the school environment. Both *Epperson* and *Tinker*, while concerned with discretionary local authority, acknowledged a broad concept of free speech in the school setting.

Prior to *Pico*, the leading case in the area of book removal in the Second Circuit had been *Presidents Council v. Community School Board*.[241] In *Presidents Council*, the court of appeals found that the record failed to establish any violation of students' first amendment rights in the school board's restriction of *Down These Mean Streets* by Piri Thomas, an account of a Puerto Rican youth growing up in New York City's East Side Barrio, from open access on junior high school library shelves to direct loan access to students' parents only.[242] The court felt that the process of book selection was ongoing, and that while there would be conflicts from time to time, decisions would have to be made.[243] Because the community school board had been given the responsibility for library book selection,[244] and because administrative procedures were

236. *Id.* at 637.

237. *Id.*

238. 393 U.S. 97 (1968).

239. *Id.* at 104. *Epperson*, in dealing with what sorts of materials must be made available, presages the later emphasis on the "right to receive."

240. 393 U.S. 503 (1969).

241. 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972).

242. 457 F.2d at 290-91. This book is one of those involved in the controversy in *Pico*. 102 S. Ct. at 2803.

243. 457 F.2d at 291-92.

244. *Id.* at 290 (quoting N.Y. EDUC. LAW § 2590-e(3) (McKinney 1970)). The statute deals with "selection of text books and other instructional materials" and does not specifically mention library books. 457 F.2d at 290.

available for review of library matters,[245] the court did not find unusual circumstances justifying intervention under *Epperson*.[246] It particularly emphasized that no one had been penalized by the removal; that the book, its contents and the issues it raised could still be discussed; and that the book was available for parents to give to their children if they saw fit.[247] The *Presidents Council* court also clearly rejected any distinction between shelving and removal of books, stating that it found no constitutional basis for holding that a book could acquire "tenure" once in place on the library shelf.[248] A board empowered to select books could also remove them.[249]

The next major book removal case was *Minarcini v. Strongsville City School District*.[250] *Minarcini* involved the school board's refusal to follow faculty recommendation to approve certain books for use as texts or library books, its removal of books from the library, and its issuance of a resolution prohibiting the use of these books in class discussion or as supplemental reading[251] — restrictions somewhat more broad than those involved in *Presidents Council*. The court, while acknowledging the discretion of the school board and its statutory power to purchase text books,[252] went beyond *Presidents Council* to examine not just the *effect* of the book removals, but the motivations of the board members who had authorized them.[253] After extensively quoting school board meeting minutes,[254] the court concluded that in the absence of any explanation of the board's action which was neutral in first amend-

245. *Id.* (quoting N.Y. EDUC. LAW § 310(5)-(6) (McKinney 1970)).

246. 393 U.S. 97 (1968) (that is, a conflict "directly and sharply implicat[ing] basic constitutional values").

247. 457 F.2d at 292. *See also* 409 U.S. 998, 999 (1972) for Justice Douglas' dissent to the denial of certiorari in this case: "At school the children are allowed to discuss the contents of the book and the social problems it portrays. They can do everything but read it. This in my mind lessens somewhat the contention that the subject matter of the books is not proper." *Id.* (Douglas, J., dissenting).

248. 457 F.2d at 293. ("This concept of a book acquiring tenure by shelving is indeed novel and unsupportable under any theory of constitutional law we can discover").

249. *Id.*

250. 541 F.2d 577 (6th Cir. 1976).

251. *Id.* at 579.

252. *Id.*

253. *Id.* at 582-83.

254. *Id.* at 580-82. For example, see recommendation 7 of Dr. Cain's minority report: "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, content and sentence structure over the drivel being pushed today." *Id.* at 582.

ment terms, the removal must have been related solely to board members' social and political opinions,[255] and was thus inconsistent with students' first amendment rights.

Minarcini was also important for the introduction into the secondary school setting of the "right to receive" concept. The court quoted a long passage from *Virginia State Board v. Virginia Citizens Consumers Council*,[256] a case which had invalidated a state statute prohibiting as unprofessional the advertising by pharmacists of prescription drug prices. The quoted passage listed "right to receive" cases, and explained that the first amendment protects the communication itself, thus extending reciprocal rights to the speaker and the recipient.[257] The *Minarcini* court concluded that this right to know was correctly extended to students, although it did not describe the application of the right to the school context in general terms.[258]

Finally, the Seventh Circuit in *Zykan v. Warsaw Community School Corp.*[259] focused strongly on the first amendment rights of students, in an attempt to work out a way in which these rights could be reconciled to the secondary school setting.[260] Plaintiffs had alleged that the school board violated their first and fourteenth amendment rights by removing books from the curriculum and from the library, by eliminating certain courses, and by failing to rehire two teachers.[261] The court suggested two factors which narrow the scope of academic freedom in elementary and secondary schools: the students' lack of intellectual development requires that they be directed and guided in order that they may properly approach the "marketplace of ideas," and these schools provide societal indoctrination as well as intellectual stimulation.[262] These factors represent, in essence, court recognition of the schools' inculcative function. The court, in an echo of *Epperson v. Arkan-*

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255. *Id.*

256. 425 U.S. 748 (1976). This case was believed by one student commentator to be that from which the concept of the right to receive information is primarily derived. *See* 34 VAND. L. REV. 1407, 1414 (1981).

257. 541 F.2d at 583.

258. *Id.*

259. 631 F.2d 1300 (7th Cir. 1980).

260. *Id.* at 1304-05.

261. *Id.* at 1302-03.

262. *Id.* at 1304. Discussions of academic freedom in the university context are not uniformly seen by the courts as transferable to the elementary or secondary school setting. *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589 (1967). *See generally* 102 S. Ct. at 2830-31 (Rehnquist, J., dissenting).

sas,[263] stated that court interference was improper so long as educational choices were not being made from a desire to indoctrinate students with a particular system of belief.[264] The court explicitly asserted that it would generally be permissible for educational decisions to be based upon personal social, moral or political standards of board members.[265] The *Zykan* court reviewed the conflicting responses of the courts to the issue of "book tenure,"[266] and ultimately rejected the concept,[267] following *Presidents Council* and the district court's holding in *Pico*.[268] It noted, however, that the issues raised by the case were sufficiently unusual that plaintiffs should be given leave to amend to see if they could bring their claim up to the level of a constitutional issue.[269]

On the same day that *Pico* was decided in the court of appeals, the same panel of judges, divided along different lines,[270] decided *Bicknell v. Vergennes Union High School Board of Directors*.[271] That case involved the removal from the school library of *Dog Day Afternoon* by Patrick Mann and *The Wanderers* by Richard Price. The court concluded that plaintiffs' allegations were insufficient to warrant a trial on the issue of whether there had been a risk of suppression of ideas, and a resulting first amendment violation, in these removals.[272] It pointed out that there was no suggestion that the books had been removed because of the ideas they contained,[273] or that the board had acted out of political motivations.[274]

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263. 393 U.S. 97 (1968).

264. 631 F.2d at 1306.

265. *Id.* at 1305.

266. *Id.* at 1308.

267. *Id.*

268. 474 F. Supp. 387 (E.D.N.Y. 1979). The district court in *Pico* had relied on *Presidents Council*. District Judge Pratt cited with approval the *Presidents Council* court's use of the *Epperson* standard, its conclusion that because the books or their contents had not been banned altogether, there was no direct infringement of the first amendment right, and its rejection of the concept of book tenure. *Id.* at 394-95.

269. 631 F.2d at 1309.

270. In *Pico*, District Judge Sifton filed the opinion for the court with Circuit Judge Newman concurring and Circuit Judge Mansfield dissenting. 638 F.2d at 404-05. In *Bicknell*, Judge Newman filed the opinion for the court, Judge Mansfield concurred and Judge Sifton dissented. 638 F.2d 438, 439 (1980).

271. 638 F.2d at 438 (1980).

272. *Id.* at 441. The court of appeals affirmed the district court's dismissal of the complaint.

273. *Id.* Instead, both sides acknowledged that the books were removed for vulgarity and indecent language.

274. *Id.*

Bicknell, like *Pico,* involved allegations of irregularities in the removal process. In *Bicknell,* appellant student asserted a separate violation of due process in alleging that the board had disregarded its established removal procedures, as set forth in a statement of policy and procedures for library operation.[275] In *Pico,* the court of appeals itself considered the extremely irregular removal procedure as an element in making out a *prima facie* case of first amendment violation,[276] and a factor which distinguished the case from *Presidents Council.*[277] Judge Sifton, in his dissent in *Bicknell,* asserted that he could see no reason for distinguishing *Pico.* He would have remanded *Bicknell* as well, to allow plaintiffs to probe the reasons for the procedural irregularities, and their relationship to the substantive justifications given by the board for the removals.[278]

By these cases, the terms upon which the Supreme Court would examine *Pico* were established: the clash of traditional ideas of local school board authority and inculcative purpose with the first amendment rights of students; the interpretation of students' right to receive ideas; and the acceptance or rejection of the book tenure concept.[279]

While Justice Brennan acknowledged at the outset of his opinion the limitations on the Court's review of a denial of summary judgment,[280] he expressly stated that the Constitutional issues were more worthy of attention than a narrow review would permit.[281]

Justice Brennan's opinion was significant both for what it undertook and for what it neglected. He placed great emphasis on the "right to receive" doctrine, and supported this emphasis by a long list of cases related to the concept,[282] but did not explicitly relate

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275. *Id.*

276. 638 F.2d 404 at 414-15.

277. 457 F.2d 289 (2d Cir.), *cert. denied,* 409 U.S. 998 (1972). *See* 638 F.2d 404 at 413.

278. 638 F.2d 438 at 442-43 (Sifton, J., dissenting).

279. *See generally* Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269 (D.N.H. 1979) (Board's removal of *Ms.* magazine from library not based on legitimate state interest; court enjoined further removals and ordered replacement of censored issues and renewal of subscription); Right to Read Comm. of Chelsea v. School Comm. of Chelsea, 454 F. Supp. 703 (D. Mass. 1978) (removal from library of anthology on basis of board members' personal determination that its contents were offensive held an infringement of students' first amendment rights). These cases purported to distinguish *Presidents Council.*

280. 102 S. Ct. at 2805. *See supra* note 39 and accompanying text.

281. 102 S. Ct. at 2805. Justice Rehnquist disagreed. *See supra* notes 179-81 and accompanying text.

282. 102 S. Ct. at 2808. *See supra* notes 57-59 and accompanying text; *see also supra* note 199 and accompanying text for Justice Rehnquist's criticism of Justice Brennan's analysis.

these cases to the school setting.[283] Justice Brennan did not mention *Virginia State Board v. Virginia Citizens Consumers Council*,[284] a leading case in the development of the concept of the right to receive, and one discussed in two earlier book removal cases.[285] The court in *Minarcini v. Strongsville City School District*[286] had quoted *Virginia State Board* to support the extension of a first amendment right to know to students,[287] but without any in-depth discussion of how to adapt the general parameters of that right to the school environment. Four years later, the Seventh Circuit, in *Zykan v. Warsaw Community School Corp.*[288] also cited *Virginia State Board* for what it termed "the qualified 'freedom to hear' that has lately emerged as a constitutional concept",[289] but placed limits on the right to receive based on students' lack of intellectual capacity[290] and on the legitimate community interest in providing students with social, political and moral guidance.[291]

Justice Rehnquist did not refer to either *Minarcini* or *Zykan* in his extensive criticism of Justice Brennan's use of the right to receive doctrine. Yet he pointed out the plurality's failure to do what the *Minarcini* court also neglected,[292] that is, to forge a clear link between the doctrine as it had developed in cases not involving school contexts, and a conclusion that it should also apply to students. Justice Rehnquist also adopted a form of the *Zykan* limitations, and faulted the plurality for inadequately realizing the implications of these limitations.[293]

Justice Brennan did not deal in depth with two of the problems engendered by the right to receive approach: the difficulty in distinguishing between removal decisions regarding texts and those regarding library books,[294] and the same difficulty with respect to

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283. 102 S. Ct. at 2808. Justice Brennan used Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) as the stepping-stone between the right to receive cases and the rights of students.

284. 425 U.S. 748 (1976).

285. Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980); Minarcini v. Strongsville City School Dist., 541 F.2d 577 (6th Cir. 1976).

286. 541 F.2d 577 (6th Cir. 1976).

287. *Id.* at 583.

288. 631 F.2d 1300 (7th Cir. 1980).

289. *Id.* at 1304.

290. *Id.*

291. *Id.*

292. 102 S. Ct. at 2830-31.

293. *Id.* at 2832.

294. *See* Minarcini v. Strongsville City School Dist., 541 F.2d at 580-83 for a discussion of the role of the school library and its relation to the right to receive; but note that there is no attempt to make an analytical distinction between texts and library books.

removals versus acquisitions.[295] While Justice Brennan approached the first issue by emphasizing the special role of the school library as a forum for free inquiry while tacitly acknowledging the board's authority to control the classroom environment,[296] he did not adequately explore the concept of book tenure. Instead, he asserted that his concern over suppression of ideas properly limited his analysis to the implications of book removals only[297]—a position attacked by the Chief Justice[298] and by Justice Rehnquist.[299] Justice Brennan's neglect of book tenure is particularly noticeable in light of the fact that one of the factors which brought the case before the court was the conflict in the circuits relating to their acceptance or rejection of book tenure,[300] and another was *Pico's* conflict with the earlier Second Circuit decision in *Presidents Council v. Community School Board*[301] on this point.[302]

Justices Burger, Brennan, Blackmun, Rehnquist, and Powell all treated the local school board as a unique arm of the government, and agreed that in it are lodged broad discretionary powers, a duty to see that community values are inculcated, and an ability to respond to community needs. The Justices balanced these powers in various ways with first amendment rights of students. The dissenting opinions were noticeable in their concern that teenagers, rather than school officials, would be able to exercise power over book-related decisions.[303] However, it is the parents of these teenagers who bring court actions, and who normally would be expected to do so only after failure of valid administrative procedures. Had the plurality provided guidance for the establishment of such procedures, the courts would not be required to act as "super censor," but could review board actions for compliance with administrative

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295. *See* 102 S. Ct. at 2805-06, where Justice Brennan stated the posture of the plurality: "Rather, the only action challenged in this case is the *removal* from school libraries of books originally placed there by the school authorities, or without objection by them." *Id.* *See also supra* note 148 and accompanying text, and *supra* note 195 and accompanying text.

296. 102 S. Ct. at 2809.

297. *Id.* at 2810. His language was, "[b]ecause we are concerned in this case with the suppression of ideas, our holding today affects only the discretion to *remove* books." *Id.* (emphasis in original).

298. 102 S. Ct. at 2821. The Chief Justice asked, "Why does the coincidence of timing become the basis of a constitutional holding?" *Id.*

299. 102 S. Ct. at 2833. He stated, "If Justice Brennan truly has found a 'right to receive ideas,' . . . this distinction between acquisition and removal makes little sense." *Id.*

300. *See supra* note 218 and accompanying text.

301. 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972).

302. *See supra* note 218 and accompanying text.

303. 102 S. Ct. at 2821 (Burger, C. J., dissenting). *See also* 102 S. Ct. at 2822-23 (Powell, J., dissenting).

guidelines — guidelines recognizing parental input through parents' election of school officials whose standards reflected their own.

Justice Brennan outlined the relevant inquiry to be made by the district court on remand: whether the board's decision had been primarily motivated by an intention to deny students access to ideas with which the board disagreed. If this had been the case, the removal had been in violation of students' constitutional rights.[304] Based on this analysis, Justice Brennan concluded that there was a genuine issue of material fact remaining as to the basis on which petitioners had actually made their removal decision.[305] Yet if the Court's role was to have established a clear standard to guide the district court, there is validity to Chief Justice Burger's dissatisfaction with this standard.[306] Perhaps the result of this decision will not be so much to aid courts in the evaluation of the actions of school boards as to aid school boards in framing their reasons for book removals — whatever they might actually be — in constitutionally acceptable terms: pervasive vulgarity, educational unsuitability; and in avoiding the sorts of irregular procedures to which both the plurality opinion in this case and the court of appeals in *Pico* objected.

It will be impossible as well to see how the plurality's standard would have been worked through in this case. As an article by UPI Staff Writer Anne Saker reported:[307] "In mid-August (1982), the Island Trees School Board decided to avoid further legal action and put the books back on the shelves — but librarians are required to notify parents if their children check the books out."[308] Courts, school boards and scholars will therefore have to await other cases in the area to see if the Supreme Court's standard can be practically applied.

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304. 102 S. Ct. at 2810.
305. *Id.* at 2812.
306. *Id.* at 2822. (Powell, J., dissenting).
307. The Pittsburgh Press, September 26, 1982, at C-2, col. 1.
308. *Id.*