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The First Amendment in the Classroom: Library Book Removals and the Right of Access to Information

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THE FIRST AMENDMENT IN THE CLASSROOM: LIBRARY BOOK REMOVALS AND THE RIGHT OF ACCESS TO INFORMATION

> A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.
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> — 9 Writings of James Madison 103, *quoted in Board of Education v. Pico,* 102 S. Ct. 2799 (1982)

In the past decade, the books and curricula of our nation's public high school students have become the focal point of several federal court decisions,[1] as well as the topic of many legal commentaries.[2] Historically, courts have accorded local school authorities broad powers to determine what books local school children could and could not read.[3] Increasingly, however, courts are recognizing that many book removal decisions by school boards may infringe upon the first amendment rights of high school students.[4] In cases brought during the last decade, teachers, students and parents have challenged the decisions of local school boards to remove literature from school libraries. In general, these cases involved the same operative facts. School boards, exercis-

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[1] *See generally* Pratt v. Independent School District No. 831, Forest Lake, 670 F.2d 771 (8th Cir. 1982); Pico v. Board of Education Island Trees Union Free School District No. 26, 638 F.2d 404, *rehearing and rehearing en banc denied* (2d Cir. 1980), *aff'd,* 102 S. Ct. 2799 (1982); Bicknell v. Vergennes Union High School Board of Directors, 638 F.2d 438 (2d Cir. 1980); Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980); Cary v. Board of Education Arapahoe School District, 598 F.2d 535 (10th Cir. 1979); Minarcini v. Strongsville City School District, 541 F.2d 577 (6th Cir. 1976); President's Council, District 25 v. Community School Board No. 25, 457 F.2d 289 (2d Cir. 1972); Sheck v. Baileyville School Committee, 530 F. Supp. 679 (D. Me. 1982); Salvail v. Nashua Board of Education, 469 F. Supp. 1269 (D. N.H. 1979); Right to Read Defense Committee v. School Committee of Chelsea, 454 F. Supp. 703 (D. Mass. 1978).

[2] Recent Commentaries appear in the following law review articles: Orleans, *What Johnny Can't Read: "First Amendment Rights" in the Classroom,* 10 J. L. & EDUC. 1 (1981); Niccolai, *The Right to Read and School Library Censorship,* 10 J. L. & EDUC. 23 (1981), Note, *What Johnny Can't Read: School Boards and the First Amendment,* 42 U. PITT. L. REV. 653 (1981); Note, *Schoolbooks, School Boards, and the Constitution,* 80 COLUM. L. REV. 1092 (1980); Comment, *Censorship in the Public School Library — State, Parent and Child in the Constitutional Arena,* 27 WAYNE L. REV. 167 (1980).

All of these commentaries, however, were published before 1982, and do not contain a discussion of the recent United States Supreme Court holding in Bd. of Educ. v. Pico, 102 S. Ct. 2799 (1982). For a discussion of Pico and its significance, *see infra* notes 339-435 and accompanying text.

[3] For a discussion of the traditional power exercised by school boards in this area and the general reluctance of the courts to intervene in local school affairs, *see infra* notes 25-34 and accompanying text.

[4] *E.g.,* Minarcini v. Strongsville City School Dist., 451 F.2d 577, 583 (6th Cir. 1976). It has been argued that the increased concern of the courts in the actions of school boards is the result of at least three important factors. First, the greater importance given to the role of public

ing their traditional authority, have been sued for removing politically[5] or morally[6] controversial books from public high school libraries.[7] The challengers in such cases have charged that school boards, in removing certain books from school libraries or curricula, have overstepped their authority and have violated the students' first amendment rights.[8] The defendant school boards, in turn, generally claim a high degree of discretion concerning the selection and proscription of books and academic courses due to the nature of school systems and the subsequent need for local authorities to make educational policy. The central legal issue in the recent challenges to local school board removals of literature from school libraries and curricula, therefore, is whether secondary students are protected by the first amendment against such removals.

Despite the recent decision of the United States Supreme Court in *Board of Education v. Pico,*[9] no consistent standard for determining whether a local school board's action intrudes upon rights guaranteed by the first amendment has emerged. The results of cases have varied among districts and circuits.[10] The thesis of this note considers the reason for these varying and often conflicting results. It suggests the reason is, in short, that some courts have recognized a first amendment right of access to information as the constitutional right involved in book removals, while others have rejected the concept of a right of access and have analyzed the issue according to the more traditional first amendment freedom of expression doctrine.[11] This note proposes that courts focusing on a first amendment right of access present the best standard for reviewing whether school boards have violated the first amendment rights of high school students in removing certain literature from school libraries and curricula.

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education; secondly, the fact that more people are turning to the courts for resolution of such conflicts; and third, the apparent inability of legislatures to deal effectively with such controversial issues. For a more complete discussion of these and other factors, *see* Shannon, *The New Tactics Used by Plaintiffs in Imposing Their Views on, or Enforcing Their Rights Against, Public School Boards — A Commentary,* 2 J. L. & EDUC. 77, 77-80 (1973).

[5] *E.g.,* Minarcini v. Strongsville City School Dist., 541 F.2d 577, 579, 582 (6th Cir. 1976).

[6] *E.g.,* Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269, 1272 (D. N.H. 1979).

[7] In Salvail v. Nashua Board of Education, 469 F. Supp. 1269 (D. N.H. 1979), the Nashua Board of Education removed issues of "Ms. Magazine" from the library of the senior high school. *Id.* at 1272. In Right to Read Defense Committee v. School Comm. of Chelsea, 454 F. Supp. 703 (D. Mass. 1978), the school committee removed an anthology of writings by adolescents entitled "Male and Female Under 18" on the grounds that certain selections contained objectionable language. *Id.* at 704-05. For the facts and opinion of the federal district court in *Right to Read, see infra* notes 168-76 and accompanying text.

[8] *E.g.,* Minarcini v. Strongsville City School District, 451 F.2d 577, 579 (6th Cir. 1976); President's Council v. Community School Board, 457 F.2d 289, 290-91 (2d Cir. 1972).

[9] 102 S. Ct. 2799 (1982). For a discussion of the decision of the Supreme Court in Bd. of Educ. v. Pico, *see infra* notes 339-435 and accompanying text.

[10] For an analysis of the difficulties of using traditional first amendment balancing procedures in the book removal area, from both a practical and conceptual standpoint, see Orleans, *What Johnny Can't Read: "First Amendment Rights" in the Classroom,* 10 J. L. & EDUC. 1, 7-8 (1981) [hereinafter cited as *Orleans*].

[11] Cases not recognizing the first amendment right of access to information in the con-

This conclusion is based on four lines of analysis. First, recent Supreme Court cases, including the plurality opinion in *Board of Education v. Pico,*[12] have established that the right of access to information is a corollary of the traditional first amendment right of free speech or expression.[13] Second, this right of access, to at least some degree, has been held to extend to minors.[14] Third, Supreme Court decisions discussing the concept of "academic freedom" have ruled that first amendment rights generally extend to secondary students while in school.[15] Finally, by recognizing that the removal of a book more closely implicates the right of access to information than freedom of expression, such an approach not only remains consistent with constitutional precedent in this area, but also represents the most realistic view concerning what rights may actually be restricted when a book is removed from a library shelf.[16]

This note begins by tracing the historical development of the first amendment rights of high school students generally. The starting point of this historical survey is a time when courts were unwilling to review school board decisions because such policymaking was considered to be in the exclusive province of local authorities.[17] Next, the historical survey focuses on how the concepts of "academic freedom"[18] and the classroom as a marketplace of ideas[19] developed, and how these principles effectively limited the scope of local school board discretion. This historical section concludes with a discussion of the recent Supreme Court decisions recognizing the first amendment right of access to information generally as a corollary right to that of free speech, and the applicability of a right of access to minors in a secondary school setting.[20] In

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text of school library book removals include Pico v. Bd. of Educ., 638 F.2d 404, *rehearing and rehearing en banc denied* (2d Cir. 1980), *aff'd,* 102 S. Ct. 2799 (1982); President's Council v. Community School Bd., 457 F.2d 289 (2d Cir. 1972).

For cases recognizing secondary school students' first amendment rights of access to information, *see, e.g.,* Pratt v. Independent School District, 670 F.2d 771 (8th Cir. 1982); Minarcini v. Strongsville City School Dist., 541 F.2d 577 (6th Cir. 1976); Sheck v. Baileyville School Committee, 530 F. Supp. 679 (D. Me. 1982).

[12] 102 S. Ct. at 2808-09.

[13] For a discussion of the recent Supreme Court cases recognizing a first amendment right of access to information in contexts other than book removal cases, *see infra* notes 67-119 and accompanying text.

[14] *See infra* notes 101-19 and accompanying text.

[15] *See infra* notes 49-66 and accompanying text.

[16] This is based upon the proposition that the removal of a book will not usually restrict a student's freedom of expression, but rather, his ability to gain access to that book and the ideas contained therein. Some courts, however, have found in favor of the student/plaintiffs despite adhering to the first amendment doctrine of freedom of expression while denying recognition of the right of access to information. *See, e.g.,* Pico v. Bd. of Educ., 638 F.2d 404, *rehearing and rehearing en banc denied* (2d Cir. 1980), *aff'd,* 102 S. Ct. 2799 (1982). For a discussion of the reasoning of the Second Circuit in *Pico, see infra* notes 220-47 and accompanying text.

[17] *See infra* notes 25-34 and accompanying text.

[18] For a complete discussion of the concept of "academic freedom" and an analysis of the cases espousing the academic freedom principle, *see infra* notes 49-66 and accompanying text.

[19] For a complete discussion of the concept of the classroom as a "marketplace of ideas," *see infra* notes 57-63 and accompanying text.

[20] *See infra* notes 67-119 and accompanying text.

Section II, the book removal cases are discussed in depth. The development of the major legal issues in these cases over the period of a decade is analyzed in the context of the courts' attempts to construct a standard of review. Included in this analysis is a discussion of the two latest lower federal court decisions in this area, both decided in January of 1982.[21] This section concludes with a discussion of the recent Supreme Court decision in *Board of Education v. Pico,*[22] when the Court affirmed the judgment of the United States Court of Appeals for the Second Circuit.[23] This note will discuss the significance of the *Pico* decision, and will examine the critical questions left unanswered due to the use of multiple standards of review by the individual Justices.[24]

Because of the failure of the Supreme Court to hand down a clear standard of review by which federal courts may evaluate future book removal cases, the last section of this note recommends a model standard of review which is based upon recognition of the students' limited first amendment right of access to information. In presenting this recommended standard of review, this note draws upon the analysis and reasoning of the Supreme Court in *Pico,* as well as the principles espoused by several of the lower federal courts to hear book removal cases in the 1970's and early 1980's.

I. The Roots of the First Amendment in Education

This section traces the historical development of the role of the first amendment in American education, beginning at a time when courts categorically rejected challenges to local school board authority and decision-making discretion. It is shown how the courts gradually began to recognize that the Constitution may impose at least some restrictions on the scope of school board authority, and how this early recognition of constitutional limitations led to the development of concepts such as "academic freedom" and the "marketplace of ideas." This section concludes with a discussion of recent United States Supreme Court decisions recognizing a first amendment right of access to information in various factual contexts other than schoolbook removals.

A. *Early School Board Discretion*

Local school boards traditionally have exercised broad discretion in determining educational policy for their school systems.[25] In the 19th century,

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[21] *See, e.g.,* Pratt v. Independent School Dist., 670 F.2d 771 (8th Cir. 1982); Sheck v. Baileyville School Comm., 530 F. Supp. 679 (D. Me. 1982).

[22] 102 S. Ct. 2799 (1982).

[23] *Id.* at 2812.

[24] *See infra* notes 415-35 and accompanying text.

[25] *See, e.g.,* Bishop v. Rowley, 165 Mass. 460, 43 N.E. 191 (1896); Watson v. Cambridge, 157 Mass. 561, 32 N.E. 864 (1893). *See* Note, *First Amendment Limitations on the Power of School Boards to Select and Remove High School Text and Library Books,* 52 St. John's L. Rev. 457, 458-60 (1978) [hereinafter cited as Note, *First Amendment Limitations*]. This article provides references to many secondary sources concerning the traditional power of school boards and the reluctance of courts to interfere in local education policy matters. *Id.* at 458-59.

education was considered a legislative power of the states, which the states either could exercise themselves or delegate to local authorities.[26] Courts viewed the responsibility for education systems as being so entrenched in the legislative powers of the states that they were reluctant to review the decisions of local school authorities.[27] Until at least the 1920's, courts adhered to this view toward public education, and avoided limiting the discretion of local school boards.[28] As a result, state legislatures could regulate their own school systems and were limited only by the confines of their own state constitutions.[29]

The exclusive authority accorded to state and local officials over our nation's school systems could be traced to three traditional educational theories. The first of these theories stemmed from the lack of a constitutional right to an education. Since attendance at school was perceived by the courts as a privilege only, it was deemed appropriate that school boards could extensively condition a student's presence in school.[30] This "privilege" theory suggested that since there was no constitutional guarantee to an education, a school board was justified in exercising broad discretion in its educational policymaking.

The second theory which supported the exercise of broad discretion by school boards was derived from the common law doctrine of *in loco parentis*.[31] The doctrine *in loco parentis* suggested that school authorities were standing in place of the child's parents while the child was at school.[32] Due to the implied responsibility placed upon school officials by this doctrine, it was believed that school boards should be granted broad discretion in carrying out their duties. The third theory supporting this broad grant of authority to local school of-

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See also Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Non-Constitutional Analysis,* 117 U. PA. L. REV. 373 (1969) [hereinafter cited as Goldstein]. This article provides a comprehensive analysis of the exercise of this power, as well as the sources of school board authority. *Id.* at 384-87.

[26] *See, e.g.,* State *ex rel.* Clark v. Haworth, 122 Ind. 462, 468-69, 23 N.E. 946, 947 (1890), *discussed in* MORRIS, THE CONSTITUTION AND AMERICAN EDUCATION 115-16 (1974) [hereinafter cited as MORRIS].

[27] *See, e.g., State ex rel. Clark,* 122 Ind. at 469, 23 N.E. at 948. The Indiana Supreme Court in *State ex rel. Clark* stated: "It cannot be possible that the courts can interfere with this legislative power, and adjudge that the legislature shall not adopt this method or that method; for, if the question is at all legislative, it is so in its whole length and breadth." *Id. See* Note, *First Amendment Limitations, supra* note 43, at 460.

[28] *See infra* notes 35-40 and accompanying text.

[29] MORRIS, *supra* note 26, at 115.

[30] *See, e.g.,* Hamilton v. Regents of the Univ. of California, 293 U.S. 245 (1934) (certain students excluded from a land grant college for refusal to participate in military training on religious grounds). *Hamilton* has been interpreted to support the sweeping proposition that the state may require individuals to compromise their religious convictions as a condition to their attendance of a state university. Note, *First Amendment Limitations, supra* note 25, at 458 n.10. *But see* Tinker v. Des Moines Community School Bd., 393 U.S. 503, 506 n.3 (1969) (limiting the effect of *Hamilton* by stating that the decision "cannot be taken as establishing that the State may impose and enforce any conditions it chooses upon attendance at public institutions of learning however violative they may be of fundamental constitutional guarantees.").

[31] *See* Note, *First Amendment Limitations, supra* note 25, at 459.

[32] *See id.* at 459 n.11, *citing* E. REUTTER, THE COURTS AND STUDENT CONDUCT 3 (1975). *See also* Goldstein, *supra* note 25, at 377-84.

ficials was the "socialization theory."[33] This theory suggested that the classroom is essential to socialization of the young, and that certain educational choices made by school authorities are acceptable because they reflect local community standards which the students should learn.[34] The combination of these three theories lodged a high degree of discretion in local school authorities and the courts were reluctant to interfere. Gradually, however, the authority of school officials eroded as courts became more willing to exercise jurisdiction over educational matters.

B. *Early Limitations on School Board Power*

The broad discretion historically enjoyed by school boards in the promulgation of their policies was narrowed by two Supreme Court decisions in the 1920's. In *Meyer v. Nebraska,*[35] the Supreme Court indicated in a landmark decision that certain decisions of local and state school authorities may violate the Constitution.[36] In *Meyer,* the Court overturned a Nebraska law prohibiting the teaching of foreign languages to young children.[37] In *Pierce v. Society of Sisters,*[38] the Court sustained a challenge by parochial and other private schools to an Oregon law which required children to attend public schools.[39] Both *Meyer* and *Pierce* were decided upon fourteenth amendment considerations, the

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[33] *See* Note, *First Amendment Limitations, supra* note 25, at 459 n.13, and articles cited therein.

[34] *Id.*

[35] 262 U.S. 390 (1923).

[36] *Id.* at 403.

[37] *Id.* at 397, 403. The purpose of the law was to discourage the teaching of foreign languages to immigrant children, thus eliminating any danger to society which may result from such activity. *Id.* at 398.

Justice McReynolds, writing for the majority in *Meyer,* found that the law violated the fourteenth amendment by materially interfering with "the calling of modern language teachers, with opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own." *Id.* at 401. Thus, even though the rationale for the decision is based more on fourteenth amendment considerations of "personal liberty" than on first amendment considerations of free speech, the roots of future concepts of academic freedom can be seen in the language of the *Meyer* opinion.

Commentators have suggested that *Meyer* represents an extension of the *Lochner* era's traditional protection of economic rights under the guise of "fundamental values" to a protection of non-economic personal liberties. *See, e.g.,* GUNTHER, CONSTITUTIONAL LAW — CASES AND MATERIALS 571 (10th Edition, 1980) [hereinafter cited as GUNTHER].

[38] 268 U.S. 510 (1925).

[39] *Id.* at 511, 536. Justice McReynolds once again wrote the majority opinion in *Pierce* and reiterated views contained in *Meyer* concerning the intrusion of law into the rights of the parents and guardians of the children affected by interfering with their liberty to bring up and educate their children in the manner they desired. *Id.* at 518-19. The Court stated that there was no "general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who would nurture and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535.

See also Farrington v. Tokushige, 273 U.S. 284, 293, 298-99 (1927) (the Court struck down a statute excessively controlling teachers, curriculum, and textbooks in foreign language schools).

Court holding that the actions of the school authorities in those cases invaded the "personal liberty" of the parents in choosing how to bring up their own children.[40] The cases, therefore, did not raise questions concerning the first amendment rights of the students and teachers involved. Taken together, however, these cases indicated that actions by states with respect to their school systems did not enjoy the finality once thought to exist, and that the United States Supreme Court was willing to recognize certain constitutional limitations on the exercise of state educational decision-making.

Twenty years after *Meyer,* in 1943, the Court analyzed the relationship between a school board's authority and the first amendment in *West Virginia State Board of Education v. Barnette.*[41] In that case, the Court invalidated the school board's resolution which had required all teachers and students to participate in saluting the flag, and provided that a refusal or failure to do so would be treated as "insubordination," resulting in expulsion.[42] The Court, in finding that the flag salute constituted an utterance, and therefore a form of communication,[43] concluded:

> . . . the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.[44]

In reaching this conclusion, the Court suggested that the first amendment is critical to protecting individualism and cultural diversity in society.[45] In addition, the Court in *Barnette* determined that an argument based on both the fourteenth amendment principles articulated in *Meyer* and *Pierce* and the free speech clause of the first amendment was stronger than an argument based on the fourteenth amendment alone.[46] Thus, in *Barnette,* the United States Supreme Court recognized that the first amendment may act as a significant impediment to unbridled local school board discretion.

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[40] *See supra* note 37.

[41] 319 U.S. 624 (1943).

[42] *Id.* at 628-29, 642.

[43] *Id.* at 632.

[44] *Id.* at 642.

[45] *Id.* at 641-42.

[46] *Id.* at 639. The Court suggested that a fourteenth amendment due process claim may be overcome with a showing of a "rational basis" by the state. When a violation of the first amendment is invoked as well, however, the vagueness of the fourteenth amendment due process clause disappears with the specific prohibitions of the first amendment constituting its standard. Freedoms of speech, press and religion, according to the Court, may not be infringed on such slender grounds. The Court in *Barnette* concluded:

> They [first amendment guarantees] are susceptible of restriction only to prevent grave and immediate danger to the interests which the State may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State, it is the more specific limiting principles of the First Amendment that finally govern this case.

Id.

Although *Barnette* seemed to open the door for increased intervention by courts into areas traditionally considered within the exclusive realm of local authorities, cases decided after *Barnette* and prior to the 1960's indicated that courts still were willing to defer to the broad policymaking powers of local officials.[47] In general, court reversals of school board decisions were limited to cases involving the establishment clause of the first amendment. In these cases, courts were unwilling to allow school boards to compromise the religious beliefs of students or to discriminate among students based upon their attendance at parochial rather than public schools.[48] Until the 1960's, however, *Barnette* remained the only Supreme Court decision invalidating a local school board

[47] *See* Note, *First Amendment Limitations*, *supra* note 25, at 461 n.22, *citing* Board of Directors v. Green, 259 Iowa 1260, 147 N.W.2d 854 (1967) (married student excluded from extracurricular activities); *In re* Kornblum, 70 N.Y. Dep't R. 19 (1949) (refusal of school board to purchase a periodical for use in a library); State *ex rel.* Idle v. Chamberlain, 12 Ohio Misc. 44, 175 N.E.2d 539 (1961) (exclusion of pregnant student). *But see* Rosenberg v. Board of Education, 196 Misc. 542, 92 N.Y.S.2d 344 (Sup. Ct. Kings County 1949). This case, like the other cases cited above, is an example of a court affirming the action of a school board. However, the rationale used by the court here reflects a much greater concern for the concept of freedom of speech and thought in the classroom. In *Rosenberg*, the court rejected the bid of parents to have the school board remove books on the grounds that they were objectionable to the Jewish race. *Id.* at 544, 92 N.Y.S.2d at 346. The court held that the discretion of local school officials in determining the direction of the school system should not be interfered with in the absence of actual malevolent intent. *Id.* Thus, even though the court in *Rosenberg* supports the proposition that school boards should have a high degree of discretion in book and curriculum choice, the reasoning behind this holding seems to be based more on a concept of academic freedom than on the power of local authorities.

[48] *See generally* Note, *First Amendment Limitations*, *supra* note 25, at 461 n.23, *citing* Lemon v. Kurtzman, 403 U.S. 602 (1971) (books and other educational materials may be provided by state to parochial schools); Board of Education v. Allen, 393 U.S. 236 (1968) (state may loan textbooks to parochial school students); School Dist. of Abington v. Schemmp, 374 U.S. 203 (1963) (bible reading may not be required in schools); Engle v. Vitale, 370 U.S. 421 (1962) (school authorities may not write official school prayers); Zorach v. Clauson, 343 U.S. 306 (1952) ("release time" program which allows public school students to leave for religious instruction held constitutional); McCollum v. Bd. of Educ., 333 U.S. 203 (1948) (program using schools for religious instruction unconstitutional as violative of the establishment clause); Everson v. Bd. of Educ., 330 U.S. 1 (1947) (state may provide bus transportation to sectarian schools).

See also Epperson v. Arkansas, 393 U.S. 97 (1968). Here the Court struck down a "monkey law" in the state of Arkansas which prohibited the teaching of Darwinian theories on the grounds that the law favored one religious view, namely, the Judeo-Christian concept of the creation contained in the Book of Genesis. *Id.* at 107-09. The Court, in its opinion, put this case in its historical context:

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. Our courts, however, have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief. By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not *directly and sharply implicate basic constitutional values*. On the other hand, "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."

Id. at 104, *quoting in part* Shelton v. Tucker, 364 U.S. 479, 487 (1960) [emphasis added]. The

regulation on the grounds that it violated the free speech clause of the first amendment.

C. *"Academic Freedom" in the 1960's*

The concept of "academic freedom" emerged in the Supreme Court's decision in *Keyishian v. Board of Regents of the University of New York.*[49] The *Keyishian* opinion, in considering the question of academic freedom,[50] established a foundation for future decisions involving first amendment rights in the schools. Its significance lies in the fact that the *Keyishian* Court recognized that the protections of the Constitution extended to those in the classroom environment.[51]

In *Keyishian,* the Court struck down a New York regulation which sought to prevent the appointment or retention of subversives in state employment.[52] Specifically, New York state officials attempted to block the retention by the state university of certain state university employees who were considered, by the state, to be subversive.[53] The *Keyishian* Court held that even though the purpose of the state in this case was legitimate, the means chosen for attaining that state purpose were overbroad. The Court declared that states may not "... broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[54] In discussing the place of the first amendment in the classroom, the Court stated:

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standard of "direct and sharp implication" was also used in several cases involving book removals by school boards. For a discussion of this standard in the book removal context, *see infra* notes 136-39 and accompanying text.

[49] 385 U.S. 589 (1967).

[50] *Id.* at 603. *See generally* Niccolai, *The Right to Read and School Library Censorship,* 10 J. L. & EDUC. 23, 26 (1981) [hereinafter cited as Niccolai].

Court acceptance of the concept of academic freedom has been slow and gradual in its development. For a discussion of the meaning and the limited role of academic freedom in universities before *Keyishian, see* Note, *Developments in the Law — Academic Freedom,* 81 HARV. L. REV. 1045 (1968) [hereinafter cited as Note, *Developments in the Law — Academic Freedom*]. It has been noted that the development of academic freedom with respect to teachers may have been slowed by a general reluctance of the courts to intervene in local school affairs and a fear that academic freedom would lead to improper influence on the part of teachers upon their students. *See* Nahmod, *First Amendment Protection for Learning and Teaching: The Scope of Judicial Review,* 18 WAYNE L. REV. 1479, 1494-95 (1972) [hereinafter cited as Nahmod].

[51] *Keyishian,* 385 U.S. at 603.

[52] *Id.* at 591, 609.

[53] *Id.* at 591. The regulation required faculty members at a state university to sign a certificate stating whether the faculty member was a Communist, if he had been a Communist at any time, and whether this information had been communicated to the university president. *Id.* at 592. The regulation also provided for removal of employees of the state (namely, teachers, school superintendents, or other employees) on the grounds of acts or utterances of a treasonous or seditious nature. *Id.* at 597.

[54] *Id.* at 602, *citing* Shelton v. Tucker, 364 U.S. 479, 488 (1960). It would appear at this juncture that the Court is employing a standard of review demanding a "legitimate and substantial" government purpose with a least restrictive means test. *Keyishian,* 385 U.S. at 602. This standard of review will reappear in some of the book removal cases of the late 1970's. *See infra* notes 175, 182 and accompanying text.

> Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools."[55]

Therefore, the *Keyishian* decision reflects the desire of the Supreme Court to ensure the constitutional protection of those in the classroom environment.

While the *Keyishian* decision expressly protected only the academic freedom of state university professors, the Supreme Court in 1969 in *Tinker v. Des Moines Community School District*[56] considered the extent to which academic freedom principles may be applied to high school students. Although the language of *Tinker* did not mention specifically "academic freedom," it did refer to the public schools as a "marketplace of ideas."[57] In addition, the decision itself demonstrated that the Supreme Court was willing to recognize and protect the first amendment free speech rights of secondary school students. In *Tinker,* the Court ruled that a local school board policy prohibiting the wearing of armbands by students in protest of the Viet Nam war violated the students' first amendment rights.[58] The Court held that, under the circumstances of the case, the wearing of an armband was closely akin to "pure speech" and was therefore entitled to comprehensive protection under the first amendment.[59] The *Tinker* Court further ruled that a state may not confine students to the expression of only those sentiments receiving official approval.[60] The Court noted that the classroom should be considered a marketplace of ideas,[61] and concluded that education should provide a forum for the exchange of ideas.[62] This exchange of ideas, in the Court's view, is crucial to the government's interest of training future national leaders.[63] Therefore, the Court in *Tinker* concluded that the first amendment protection of free speech extended into the classroom and to secondary school students.

In *Tinker*, the Court employed a two step standard of review. First, it determined that the school board had interfered with the students' right of expression, thereby establishing a prima facie constitutional violation. At this stage, the burden shifted to the state to justify its actions. Under *Tinker,* the

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[55] *Keyishian,* 385 U.S. at 603, *citing in part* Shelton v. Tucker, 364 U.S. 479, 487 (1960).

[56] 393 U.S. 503 (1969).

[57] *Id.* at 512.

[58] *Id.* at 514.

[59] *Id.* at 505-06. The court cited two cases in support of this proposition, Cox v. Louisiana, 379 U.S. 536 (1965), and Adderly v. Florida, 385 U.S. 39 (1966).

[60] *Tinker,* 393 U.S. at 511.

[61] *Id.* at 512.

[62] *Id.*

[63] *Id.* The Court here suggests that the training of future leaders depends upon "wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues [rather] than through any kind of authoritative selection.' " *Id.*

state must show that the proscribed expression or manner of expression would "materially and substantially" interfere with the proper discipline of the school.[64] If the state cannot carry this burden, its actions would then be struck down as violative of the first amendment rights of the students.

Thus, the Supreme Court in the 1960's broadened the first amendment protection accorded to high school students. The Court in *Tinker* demonstrated a shift in the traditional view of the judicial system toward the sovereignty of school boards and their actions. The Court declared that it was unwilling to favor local school board discretion to the detriment of the constitutional rights of secondary school students, stating that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[65] *Tinker* and *Keyishian*, however, expressly extended the protection of the first amendment to *speakers* only. First amendment rights were not expressly recognized for those desiring to *hear* protected speech, or to students desiring *access* to certain books or wanting specific courses included or retained in their high school curricula. Thus, these decisions recognized no first amendment right of access for high school students.

Before book removal decisions by school boards could be challenged successfully under the first amendment, it was necessary that a right of access to information be recognized as a component of the first amendment. Since the removal of a book clearly restricts a student's access to that book, and only in extreme cases could be said to limit a student's right to speak or express himself, it is apparent that without the development of such a right of access it would be very difficult for a challenge to a book removal decision to be sustained. This proposition is evidenced by the fact that in those cases where plaintiffs have successfully challenged book removal policies, the courts have recognized the right of access to information.[66]

D. *The First Amendment "Right of Access to Information"*

This section will examine the development of the concept of a first amendment right of access, and discuss the extent to which this right has been recognized with respect to minors. This examination, however, will focus on the development of this right only in connection with cases outside the book removal context. The right of access in book removal cases, including the position of the Supreme Court in *Board of Education v. Pico*,[67] is discussed in those later sections of the note which analyze the individual book removal cases in depth.[68] In this section it will be shown that until two recent Supreme Court

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[64] *Id.* at 513.

[65] *Id.* at 506.

[66] *See, e.g.*, Pratt v. Independent School Dist., 670 F.2d 771 (8th Cir. 1982); Minarcini v. Strongsville City School Dist., 541 F.2d 577 (6th Cir. 1976); Sheck v. Baileyville School Committee, 530 F. Supp. 679 (D. Me. 1982).

[67] 102 S. Ct. 2799 (1982). For a discussion of the reasoning of the Supreme Court in Bd. of Educ. v. Pico, *see infra* notes 339-436 and accompanying text.

[68] *See infra* notes 127-435 and accompanying text.

decisions, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,*[69] and *Richmond Newspapers, Inc. v. Virginia,*[70] it was unclear whether there existed a first amendment right of access. Thus, the first book removal cases, decided in the early 1970's, addressed the book removal issue prior to the more recent Supreme Court decisions which provided some basis for recognizing a right of access under the first amendment. In *Virginia State Board of Pharmacy,* the Court held that in the context of commercial advertising, the first amendment protects both the speakers and the recipients of speech.[71] In *Richmond Newspapers, Inc.*, the Court held that the public and the press had a first amendment right of access to attend criminal trials.[72] The exact nature and extent of this newly recognized right, however, remained unclear even after the Court's holding in *Richmond Newspapers, Inc.*

One of the earliest discussions by the United States Supreme Court of the first amendment right of access to information occurred in 1943 in *Martin v. City of Strothers.*[73] In *Martin,* the Court struck down an ordinance which prohibited certain methods of distributing literature door to door.[74] In holding that particular methods of distribution were protected by the first amendment, the Court stated that the first amendment should be given broad scope and should not be limited simply because certain forms of speech may disturb some people.[75] In addition, the Court, in dicta, stated that the first amendment protected not only the right to distribute literature, but also the right to receive it.[76] Thus, in a cursory manner, the Supreme Court discussed the concept of a first amendment right of access to information as early as 1943, and more importantly, provided some suggestion that it was of constitutional dimension. Since *Martin,* the Supreme Court has raised the concept of a right to receive information in varying contexts, including the right of an individual to possess obscene film,[77] the right of access to suitable broadcast material,[78] and the right to hear

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[69] 425 U.S. 748 (1976).

[70] 448 U.S. 555 (1980).

[71] *Virginia State Board of Pharmacy,* 425 U.S. at 757.

[72] *Richmond,* 448 U.S. at 576-77.

[73] 319 U.S. 141 (1943).

[74] *Id.* at 142, 149.

[75] *Id.* at 143.

[76] *Id.*

> "The right of freedom of speech and the press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. This freedom embraces the right to distribute literature, . . . and necessarily protects the right to receive it."

Id.

[77] Stanley v. Georgia, 394 U.S. 557, 564-65, 568 (1969). In *Stanley* the Court stated: "It is well established that the Constitution protects the right to receive information and ideas." *Id.* at 564.

[78] Red Lion Broadcasting v. F.C.C., 395 U.S. 367, 390 (1969). The Court in *Red Lion* held: "It is the right of the public to receive suitable access to social, political, esthetic, moral and

a Marxist scholar speak.[79] In these cases, however, the right of access never was central to disposition of case. Consequently, the nature and extent of this right was never fully developed.

Perhaps the Court's earliest clear statement of this first amendment right appeared in the 1976 decision, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council.*[80] This case is considered by many to be a landmark decision in the right of access area.[81] In *Virginia State Board of Pharmacy*, the Court struck down a Virginia statute prohibiting price advertising by pharmacists. The statute had been enacted, in part, on the grounds that such price advertisement by pharmacists constituted unprofessional conduct.[82] The Court voiced its concern for the right of the consumers who brought the action to hear the advertising, stating that "[i]f there is a right to advertise, there is a reciprocal right to receive the advertising . . . ."[83] The Court then broadened this statement and ruled that where a willing speaker exists, freedom of speech protects both the speaker and the recipients.[84] Thus, in 1976, the Supreme Court appeared to recognize a first amendment right of access to information in at least one factual context.

In a more recent case, the Court has indicated that the right of access to information may have a broader application than that recognized in *Virginia State Board of Pharmacy*. In the 1980 case of *Richmond Newspapers, Inc. v. Virginia,*[85] the United States Supreme Court held that the trial of a criminal case must be open to the public and to the press.[86] The plurality opinion of Chief Justice Burger reasoned that the right to attend criminal trials is implicit in the guarantees of the first amendment, and that without such a right many aspects of the freedoms of speech and the press would be eviscerated.[87] It has been noted, however, that the Justices in *Richmond Newspapers, Inc.* did not all agree on the foundation of this right of access to criminal trials within the first amendment.[88] The concurring opinions of Justices Stevens, Brennan and

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other ideas and experiences which is crucial here. That right may not be constitutionally abridged either by Congress or by the F.C.C." *Id.*

[79] Kleindienst v. Mandell, 408 U.S. 753, 756, 762 (1972). In *Kleindienst,* the Court stated: "In a variety of contexts the Court has referred to a First Amendment right to 'receive information and ideas . . .' " *Id.* at 762.

[80] 425 U.S. 748 (1976).

[81] Niccolai, *supra* note 50, at 25.

[82] *Virginia State Board of Pharmacy,* 425 U.S. at 749-50, 773.

[83] *Id.* at 757.

[84] *Id.* at 757. "Freedom of speech supposes a willing speaker. But where the speaker exists, . . . the protection afforded is to the communication, to its source and its recipients both." *Id.*

[85] 448 U.S. 555 (1980).

[86] *Id.* at 580.

[87] *Id.* For a complete discussion of a right of access for the public and the press to attend criminal trials as recognized in *Richmond,* see Note, *The First Amendment Right of Access to a Sex Crime Trial,* 22 B.C.L. REV. 361, 372-75 (1981) [hereinafter cited as Note, *The First Amendment Right of Access*].

[88] *Id.* at 372.

Blackmun were all based upon the relatively unprecedented first amendment right of access to information.[89] Mr. Justice Stevens, specifically, called *Richmond Newspapers, Inc.* a watershed case, since never before had the Court squarely held that the acquisition of newsworthy material was protected by the Constitution.[90] Stevens suggested that this was the first time the Court had held an arbitrary interference with access to important information to constitute an abridgement of the freedoms of speech and the press.[91]

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[89] *Richmond Newspapers, Inc.*, 448 U.S. at 582-83 (Stevens, J., concurring); *Id.* at 586-87 (Brennan, J., concurring); *Id.* at 604 (Blackmun, J., concurring).

[90] *Id.* at 582 (Stevens, J., concurring).

[91] *Id.* at 583 (Stevens, J., concurring).

The Supreme Court, in a 1982 decision, dispelled some of the doubt surrounding the interpretation of *Richmond Newspapers, Inc.* and the foundation for the right to attend criminal trials. In Globe Newspaper Co. v. Superior Court, 102 S. Ct. 2613 (1982), a newspaper unsuccessfully tried to gain access to a rape trial in the Superior Court for Norfolk County, Massachusetts. The criminal defendant in the case had been charged with the forcible and unnatural rape of three female minors. *Id.* at 2616. The trial judge ordered the courtroom closed, and the Globe's motion to revoke the closure order was denied. *Id.* Nine months after the trial had been completed, the Globe's appeal to the Massachusetts Supreme Judicial Court was held to be moot. *Id.* at 2617. In dicta, however, the court ruled that a Massachusetts statute required the trial be closed during the testimony of minor victims in order to encourage such victims to come forward with criminal charges and to protect minors from "undue psychological harm at trial." *Id.* The Supreme Judicial Court concluded that closure with regard to other portions of such a trial was within the discretion of the trial judge. *Id.* Upon remand from the United States Supreme Court, the Supreme Judicial Court ruled that despite the holding of the United States Supreme Court in *Richmond Newspapers, Inc.*, the state had a genuine interest in protecting the minor victims in this case, and therefore dismissed the Globe's appeal. *Id.* at 2617-18. The case was subsequently appealed to the United States Supreme Court.

In a 6-3 decision over the dissents of the Chief Justice and Justices Rehnquist and Stevens, the Supreme Court reversed the ruling of the Massachusetts Supreme Judicial Court, and held that the statutory mandatory-closure rule in effect during the trial violated the first amendment. *Id.* at 2618. Justice Brennan, writing for the majority, stated:

> The Court's recent decision in *Richmond Newspapers* firmly established for the first time that the press and general public have a constitutional right of access to criminal trials. Although there was no opinion of the Court in that case, seven Justices recognized that this right of access is embodied in the First Amendment, and applied to the States through the Fourteenth Amendment.

Id. Justice Brennan went on to suggest that this right is founded upon two major principles fundamental to both the first amendment and the criminal justice system in general. First, the Court recognized that a major purpose of the first amendment was to "protect the free discussion of governmental affairs." *Id.* at 2619, *quoting* Mills v. Alabama, 384 U.S. 214, 218 (1966). According to the Court such protection ensures that individual citizens may "effectively participate in and contribute to our republican system of government." *Id.* Second, Justice Brennan suggests that access to criminal trials serves to foster the appearance of fairness, heighten public respect for the judicial process, and act as a check upon the system. *Id.* at 2620. Therefore, after *Globe Newspaper Co.*, the right of access to criminal trials appears to be grounded in general principles surrounding first amendment guarantees of access to government information as well as a desire to strengthen the integrity of the judicial process.

The Court observed, however, that this right was not absolute. According to the Court, a state may successfully close a trial for the purpose of denying access to sensitive information when two constitutional tests are met. First, the state must demonstrate that the closure is necessitated by a "compelling governmental interest." *Id.* Second, the state must also prove that the closure order was "narrowly tailored to serve that interest." *Id.* The Court concluded that, in this case, the statute in question was overbroad in its scope and therefore unconstitutional. The

Discussing this right of access in light of the value and importance generally accorded "uninhibited, robust and wide-open" debate on public issues,[92] Justice Brennan suggested that such public debate, as well as other civic behavior, must be informed.[93] Brennan concluded, therefore, that "[t]he structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for the communication itself, but for the indispensable conditions of meaningful communication."[94] It is this crucial need for informed, meaningful communication which led Justice Brennan to the observation that first amendment guarantees are customarily interposed to protect not only the right to speak, but further to protect the entire communication between the speaker and the listener.[95]

In contrast, it is noted that the plurality opinion of Chief Justice Burger stressed the more traditional first amendment right of freedom of assembly.[96] Although not expressly mentioning a right of access to information, the plurality opinion likewise did not eliminate such a right as a possible basis for its

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Court stated that "[s]ection 16A, in contrast, requires closure even if the victim does not seek the exclusion of the press and the general public, and would not suffer injury by their presence." *Id.* at 2621. With respect to the state's asserted interest in encouraging the victims of sex crimes to come forward with criminal complaints, the Court held that even if the statute effectively advanced the state's interest, the asserted interest is itself too speculative and intrusive, and would most likely be insufficient to withstand constitutional attack on those grounds. *Id.* at 2622.

The reinterpretation of *Richmond Newspapers, Inc.* by the Court in *Globe Newspaper Co.* is important in the context of book removal cases for three reasons. First, the constitutional validity of a right of access to criminal trials, doubtful after the opinions of a divided Court in *Richmond Newspapers, Inc.*, has been upheld by a clear majority of the Court in *Globe Newspaper Co.* Second, this right has been construed to protect the public's access to important government information, something never before expressly recognized by the Court. The principles underlying this protected access can be analogized to the need for protecting a student's access to educationally relevant and important information. For a discussion of the important role played by this principle in a standard of review for book removal cases, *see infra* notes 437-440 and accompanying text. Finally, the Court has set forth a standard of review by which to evaluate challenges involving this "access-related" first amendment right. The state must prove that it had a compelling government interest and that the means employed were closely tailored to achieve those permissible ends. For a discussion of the appropriateness of utilizing such a standard of review in book removal cases, *see infra* notes 441-52 and accompanying text.

[92] *Id.* at 587 (Brennan, J., concurring).

[93] *Id.* Justice Brennan, in a footnote, reiterated the view that:

> The . . . First Amendment is one of the vital bulwarks of our national commitment to intelligent self-government. It embodies our Nation's commitment to popular self-determination and our abiding faith that the surest course for developing sound national policy lies in a free exchange of views on public issues. And public debate must not only be unfettered; it must also be informed. For that reason this Court has repeatedly stated that First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression. (Footnotes and citations omitted).

Id. at 587 n.3, *citing* Saxbe v. Washington Post Co., 417 U.S. 843, 862-63 (1974) (Powell, J., dissenting).

[94] *Richmond Newspapers, Inc.*, 448 U.S. at 587-88 (Brennan, J., concurring).

[95] *Id.* at 586-87 (Brennan, J., concurring).

[96] *Id.* at 577-78, *discussed in* Note, *The First Amendment Right of Access, supra* note 87, at 372.

ultimate finding. Further, the concurring opinion of Justice Stewart, although appearing to ground its reasoning in the traditional free speech and press analysis, stated in a footnote that "[t]he right to speak implies a freedom to listen," and that "[t]he right to publish implies a freedom to gather information."[97] Therefore, the reciprocal right of access to protected speech appears implicit in Stewart's finding that the public and the press should be accorded access to criminal trials.

Thus, these two recent Supreme Court decisions strongly support the contention that the right of access to information rises to the level of receiving protection under the first amendment to the Constitution. In *Virginia State Board of Pharmacy,* in the context of commercial advertising, the Court expressly stated that the first amendment protects both the speaker and the recipients of speech.[98] In *Richmond Newspapers, Inc.,* three Justices found the public right of access to a criminal trial to be based at least in part on a first amendment right of access to information,[99] while a fourth recognized the first amendment right to speak implies a freedom to listen.[100] Although the Supreme Court has not defined the exact nature and extent of a right of access to information, the language of these cases strongly suggests that where the speech of a willing speaker is protected by the first amendment, those same constitutional protections should be accorded a willing listener's desire to hear or gain access to that protected information.

The right of access to information with respect to minors, however, has received less attention and less protection than the right of access accorded adults. For example, in 1968, the Supreme Court in *Ginsberg v. New York*[101] upheld a statute which prohibited selling to minors certain "girlie" magazines which would not have been obscene if shown to adults.[102] The rationale of the Court in upholding the restricted access rights of minors was twofold. First, the Court reasoned that the statute aided parents in preventing their children from gaining unlimited access to such adult material.[103] Second, the Court stated that the law reflects the concern of the legislature regarding the potential harm to young children from such access.[104] With these factors in mind, the Court in *Ginsberg* established a "variable obscenity" standard which treats minors differently than adults in evaluating the constitutionality of a state's prohibition on selling obscene material.[105] This approach deems a statute which defines

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[97] *Richmond Newspapers, Inc.,* 448 U.S. at 599 n.2 (Stewart, J., concurring), *quoting* Kleindienst v. Mandel, 408 U.S. 753 (1972); Bransburg v. Hayes, 408 U.S. 665, 681 (1972).

[98] Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 767 (1976).

[99] *See supra* notes 89-95 and accompanying text.

[100] *Richmond Newspapers, Inc.,* 448 U.S. at 599 n.2 (Stewart, J., concurring).

[101] 390 U.S. 629 (1968).

[102] *Id.* at 631-33.

[103] *Id.* at 639-40.

[104] *Id.* at 640-41.

[105] *Id.* at 631-33. For a discussion of the "variable obscenity" standard of *Ginsberg* which treats minors differently from adults, *see* Note, *Regulation of Programming Content to Protect Children*

obscenity in terms of an appeal to the prurient interest of *minors* to be constitutional.[106] Therefore, under *Ginsberg,* a state may legitimately restrict the access of minors to material which is constitutionally protected with regard to adult consumption.

The rationale of *Ginsberg* was extended to the broadcast medium in *F.C.C. v. Pacifica Foundation.*[107] In *Pacifica,* the Court upheld the authority of the F.C.C. to regulate the transmission of patently offensive material over the airwaves.[108] The Court reasoned that the accessibility of minors to the broadcast medium coupled with the *Ginsberg* concerns for a minor's well-being justify regulation of controversial yet constitutionally protected adult broadcast material.[109] Thus, *Ginsberg* and *Pacifica* demonstrate that the right of access to information for minors may be limited by the state's interest in protecting minors from uncontrolled exposure to sexually explicit or offensive materials which were intended for adult consumption.[110]

The Supreme Court has suggested, however, that minors do have some first amendment rights of access to communicative materials. In *Erznoznik v. City of Jacksonville,*[111] the Court struck down as overbroad a local ordinance which prohibited the showing of films containing nudity by drive-in theatres when the screens of such theatres were visible from a public street or place.[112] One argument posed by the city in defense of the ordinance was that it was a legitimate exercise of the city's police power in protecting minors from this type of harmful visual influence.[113] The Court cited *Ginsberg* in recognizing that a state or municipality legitimately may adopt more stringent controls on communicative materials available to youths than on material available to adults.[114] The Court also stated, however, that minors are entitled to a significant measure of first amendment protection, and that the government may bar public dissemination of protected materials to them only in relatively narrow and well-defined circumstances.[115] Specifically, the materials in question must be considered "obscene" under the *Ginsberg* test, and therefore be considered protected with regard to adults and unprotected with regard to minors. The Court concluded by suggesting that a definition of obscenity must be drawn

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After Pacifica, 32 VAND. L. REV. 1377 (1979), *cited in* Note, *Schoolbooks, School Boards, and the Constitution,* 80 COLUM. L. REV. 1092, 1103 n.78 (1980) [hereinafter cited as Note, *Schoolbooks*].

[106] *Ginsberg,* 390 U.S. at 631-33.

[107] 438 U.S. 726 (1978).

[108] *Id.* at 743.

[109] *Id.* at 749-50. In fact, the majority in *Pacifica* allowed regulation of such materials which would not even be termed obscene according to the *Ginsberg* test of variable obscenity with regard to minors. *Id.* at 767 (Brennan, J., dissenting).

[110] *See* Note, *Schoolbooks, supra* note 105, at 1104.

[111] 422 U.S. 205 (1975).

[112] *Id.* at 206-07, 213.

[113] *Id.* at 212.

[114] *Id.*

[115] *Id.* at 212-13. The term "protected" in this context obviously refers to material protected with regard to adults, which is subsequently found to be unprotected and subject to state regulation with regard to minors.

narrowly when government is attempting to regulate the dissemination of materials to minors, and that government regulation, through broad ordinances such as the one in this case, generally should not be used to protect the young from certain ideas and images.[116]

The Supreme Court in *Erznoznik*, therefore, made an important statement concerning the regulation of obscenity with regard to minors. The Court determined that unless speech is legally obscene as to youths, or subject to some other legitimate reason for proscription, such speech may not be suppressed merely to protect minors from images or ideas that a legislative body may believe to be unsuitable for them.[117] Thus, unless it can be shown that speech is obscene as to minors under the *Ginsberg* standard, it is protected by the first amendment and may not be suppressed by the state. The Court summed up this principle in rather sweeping language when it stated: "In most circumstances, the values protected by the First Amendment are no less applicable when the government seeks to control the flow of information to minors."[118] Further, the Court ruled that in those circumstances in which the government may permissibly deny minors access to certain material, the regulations effecting such a denial must be drawn narrowly.[119]

Although the exact nature and extent of the first amendment right of access to information has not been fully developed, recent Supreme Court decisions indicate that this relatively new corollary to the traditional free speech clause will continue to grow in importance. Against this background of the developing first amendment right of access to information, the book removal cases have been decided. The first book removal cases were brought while the concept of a constitutional right of access to information was still in its infancy. Thus, the courts in these cases were forced to analyze the book removal problem in terms of the more traditional first amendment values of freedom of speech and academic freedom with regard to expression only.[120] In subsequent cases, however, when the right of access had attained greater support in Supreme Court jurisprudence, circuit courts sought to determine whether local

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[116] *Id.* at 213-14.

[117] *Id.*

[118] *Id.*

[119] *Id.* The Court in *Erznoznik* struck down the ordinance as over-broad, stating:

> In this case, assuming the ordinance is aimed at prohibiting youths from viewing the films, the restriction is broader than permissible. The ordinance is not directed against sexually explicit nudity, nor is it otherwise limited. Rather, it sweepingly forbids display of all films containing any uncovered buttocks or breasts, irrespective of the context or pervasiveness. Thus, it would bar a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous. The ordinance also might prohibit newsreel scenes of the opening of an art exhibit as well as shots of bathers on a beach. Clearly all nudity cannot be deemed obscene even as to minors.

Id. at 213.

[120] *See, e.g.*, President's Council v. Community School Bd., 457 F.2d 289 (2d Cir. 1972). For a discussion of the Second Circuit's holding in *President's Council*, *see infra* notes 127-43 and accompanying text.

book removal decisions had violated the students' right of access to the removed material.[121] In such cases the courts were willing to find that book removals infringed upon the students' right of access rather than measure these removal decisions against the backdrop of the traditional first amendment doctrine of freedom of expression.[122] Although the right of access standard has been adopted by two recent lower federal courts,[123] other courts have expressly rejected the application of such a new first amendment concept.[124] When the United States Supreme Court considered the question of book removals in *Board of Education v. Pico*,[125] the Justices were split on the issue of the application of a right of access in these cases.[126] The next section of this note examines the decisions of the federal courts regarding book removals, concluding with a discussion of the clouded mandate of the Supreme Court.

II. THE BOOK REMOVAL CONTROVERSY

A. *The Early Cases*

In its 1972 decision, *President's Council v. Community School Board*,[127] the United States Court of Appeals for the Second Circuit apparently became the first federal court to examine the first amendment rights of high school students in the context of a book removal decision by a local school board. The case involved the removal of "Down These Mean Streets," an autobiography about growing up in Spanish Harlem, from all the junior high school libraries in Queens, New York.[128] The school board had removed the book after complaints from parents that the vulgar language and explicit sexual interludes contained in the book would have a detrimental moral and psychological effect on the school children.[129] The plaintiffs in the suit, who included parents, teachers, and students,[130] charged that the removal of the book by the school

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[121] *See infra* notes 156-59 and accompanying text.

[122] *See supra* note 66.

[123] *See, e.g.*, Pratt v. Independent School Dist., 670 F.2d 771 (8th Cir. 1982); Sheck v. Baileyville School Committee, 530 F. Supp. 679 (D. Me. 1982).

[124] *See supra* note 120. *See, e.g.*, Pico v. Bd. of Educ., 638 F.2d 404, *rehearing and rehearing en banc denied* (2d Cir. 1980), *aff'd*, 102 S. Ct. 2799 (1982).

[125] 102 S. Ct. 2799 (1982).

[126] *See infra* notes 415-18 and accompanying text.

[127] 457 F.2d 289 (2d Cir. 1972), *cert. denied*, 409 U.S. 998 (1972).

[128] *Id.* at 290-91. The educational value of the book, besides any literary value, was stated by the court to be that it acquainted the predominantly white, middle-class students in the school with the realities of life for young people in Spanish Harlem. *Id.* at 291. The resolution of the school board removing the book completely was later revised to make the book available to parents only, on a direct loan basis. *Id.* at 290. This fact, however, was not mentioned by the court in the body of the opinion, and did not appear to affect the analysis and final resolution of the constitutional issues raised.

[129] *Id.* at 291.

[130] *Id.* at 290. The plaintiffs included present and past presidents of various parent-teacher associations in the district, students, teachers, parents and guardians, a school librarian and a principal of a school in the district. *Id.*

board had violated their first amendment rights.[131] The court rejected the plaintiffs' claim, holding that the school board had acted permissibly within the scope of its authority in removing the book.[132]

At the time the case was heard, the right of access concept had not been fully developed,[133] and it seemed clear that the variable obscenity doctrine of *Ginsberg v. New York,*[134] by itself, did not unquestionably support the recognition of a minor's right of access to information.[135] The standard of review adopted by the court in *President's Council* was that for a court to interfere in the daily operation of the school systems, the dispute must "*directly and sharply* implicate basic constitutional values."[136] The court stated that the school board's actions in *President's Council* did not curtail the freedom to express ideas or to discuss any subject.[137] The court noted further that the students were free to discuss the books openly in school even after their removal.[138] The court ruled that the students' first amendment right of free *expression* was not violated, and that absent such a showing of a direct constitutional violation, local authorities may remove schoolbooks for reasons of obsolescence or where the books were improperly selected originally for whatever reason.[139]

The Second Circuit was careful to distinguish *Tinker v. Des Moines Community School District,* where the Supreme Court had upheld, as a form of protected expression, the constitutional right of secondary school students to wear armbands to school.[140] The court reasoned that in *Tinker* a form of free speech was being prohibited.[141] In *President's Council,* the court noted, the students still were free to discuss the books if they so desired.[142] By making this distinction,

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[131] *Id.* at 289. The suit was brought pursuant to 42 U.S.C. § 1983 (1970) and 28 U.S.C. § 1343(3) (1970). *Id.*

[132] *Id.* at 294.

[133] The case generally considered the first to recognize at least a limited right of access to information, *Virginia State Board of Pharmacy,* was not decided until 1976. For a general discussion of the decision of the Supreme Court in *Virginia State Board of Pharmacy, see supra* notes 80-84 and accompanying text. For a general discussion of the development of the right of access to information in the Supreme Court, *see supra* notes 69-119 and accompanying text.

[134] 390 U.S. 629 (1968). For a discussion of the variable obscenity standard of *Ginsberg, see supra* notes 101-06 and accompanying text.

[135] The *Ginsberg* standard acted to prohibit certain material from being shown or distributed to minors, and, as such, did not expressly recognize a right of access to any specific information. *See supra* notes 102-04 and accompanying text.

[136] *President's Council,* 457 F.2d at 291. In applying the test of a "direct and sharp" implication of constitutional values, the court in *President's Council* is adopting the standard of Epperson v. Arkansas, 393 U.S. 97, 104 (1968) for the establishment of a prima facie constitutional violation. For a discussion of this standard, and its application in *Epperson, see supra* note 48.

[137] *President's Council,* 457 F.2d at 293.

[138] *Id.*

[139] *Id.* The phrase, "for whatever reason," seems at this point to give school boards a carte blanche right to remove books without cause. This language is interpreted narrowly by later decisions. *See, e.g.,* Minarcini v. Strongsville City School Dist., 541 F.2d 577, 581 (6th Cir. 1976).

[140] 393 U.S. 503, 514 (1968).

[141] *President's Council,* 457 F.2d at 293.

[142] *Id.*

the Second Circuit in 1972 made it clear that it was unwilling to extend to high school students a first amendment right of access to school library books.[143]

The decision of the Second Circuit in *President's Council* was appealed to the Supreme Court. The Court denied certiorari, with Justices Stewart and Douglas dissenting.[144] In his dissenting opinion, Justice Douglas stated that the actions of school boards are not immune from constitutional scrutiny,[145] endorsing the concept of academic freedom.[146] Justice Douglas further recognized the right to hear, to learn, and to know[147] and stated that "this right to know is nowhere more vital than in our schools and universities."[148] The opinion noted that the book in question was not alleged to be obscene under either traditional standards[149] or the stricter standards for minors set forth in *Ginsberg v. New York*.[150] Justice Douglas concluded his dissent by stating that the first amendment requires any regulation of free speech to be "narrowly drawn" so as to limit such speech in the least restrictive manner possible.[151] This final requirement imposed upon any regulation of expression suggests that any local policy which is overbroad in its scope, that is, suppresses more speech than is necessary for the attainment of the permissible goals of the state, may be struck down as unconstitutional for that reason.[152]

The Douglas dissent to the Court's denial of certiorari in *President's Council* is significant because it recognizes the potential importance of the right of access to information in book removal cases and suggests local policies concern-

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[143] *Id.* The court in *President's Council* did not recognize a right of access to information, and concentrated only on the active aspect of the first amendment. Since speech or thought itself was not prohibited, the court held that freedom of speech was not violated. *Id.* Since there was no showing of such a violation, the removal of a book without such a curtailment of speech did not present a constitutional issue. *Id.*

[144] 409 U.S. 998 (1972).

[145] *Id.* at 998. In making this statement, Douglas cited several Supreme Court decisions, including Meyer v. Nebraska, 262 U.S. 390 (1923), *see supra* notes 35-37; Epperson v. Arkansas, 393 U.S. 97 (1968), *see supra* note 65; Tinker v. Des Moines Independent School Dist., 393 U.S. 503 (1968), *see supra* notes 56-65.

[146] *President's Council,* 409 U.S. at 998 (Douglas, J., dissenting). "Academic freedom has been upheld against attack on various fronts." *Id.*

[147] *Id.* at 999. "The First Amendment involves not only the right to speak and publish, but also the right to hear, to learn and to know." *Id.*

[148] *Id.* In support of this proposition, the opinion cites several cases including Kleindienst v. Mandel, 408 U.S. 763 (1972), *see supra* note 79; Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967), *see supra* notes 49-55.

[149] *Id.* at 999. The Supreme Court in Roth v. United States defined obscenity as "whether to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests." 354 U.S. 476, 489 (1957). *See also Niccolai, supra* note 50, at 29.

[150] *President's Council,* 409 U.S. at 999 (Douglas, J., dissenting). This stricter standard refers to the variable obscenity standard of Ginsberg v. New York, 390 U.S. 629 (1968); *see supra* notes 101-06.

[151] *President's Council,* 409 U.S. at 1000 (Douglas, J., dissenting).

[152] For an example of the Supreme Court striking down an ordinance as overbroad under the first amendment, *see* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); *see supra* notes 111-19 and accompanying text.

ing book removals may be struck down as unconstitutionally broad. Justice Douglas posited the existence of a first amendment right "to hear, to learn, and to know," which is independent of the first amendment right of expression.[153] Further, by asserting the importance of this right in schools and universities, Justice Douglas implied that such a right to know may be violated when school boards remove books from school libraries.[154] Finally, by stating that any regulation of first amendment rights must be implemented through a policy narrowly drawn to meet permissible goals justifying such restrictions of constitutional freedoms, Justice Douglas implied that the means employed by a school board in effectuating a book removal may themselves be subject to judicial scrutiny.[155] If the book removal policies are found to be overbroad in scope, they may be struck down as unconstitutional.

The concepts of academic freedom and a first amendment right to know, articulated by Justice Douglas in *President's Council,* were recognized in 1976 by the Court of Appeals for the Sixth Circuit in *Minarcini v. Strongsville City School District.*[156] In *Minarcini,* the court sustained the challenge of five high school students to removal of books from a school library by the local school board.[157] The *Minarcini* court ruled that the high school students had a first amendment "right to know," basing this observation on the Supreme Court's holding in *Virginia State Board of Pharmacy* earlier that year that a right of access to information did exist under the first amendment.[158] Despite the fact that the Supreme Court had mentioned a right of access in earlier decisions, the *Minarcini* court suggested that its applicability in book removal cases may have been in doubt but for the Supreme Court's latest statement in *Virginia State Board of Pharmacy.*[159] With the recognition of this right of access, unlike the plaintiffs in *President's Council,* the plaintiffs in *Minarcini* could establish a prima facie constitutional violation upon the removal of a book from the school library, since

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[153] *President's Council,* 409 U.S. at 999 (Douglas, J., dissenting).

[154] *Id.*

[155] *Id.* at 1000 (Douglas, J., dissenting).

[156] 541 F.2d 577 (6th Cir. 1976).

[157] *Id.* at 579. The students sued through their parents as next of friends. *Id.*

[158] *Id.* at 583.

[159] *Id.* The court noted the importance of the Supreme Court's opinion in *Virginia State Board of Pharmacy* by stating:

> We recognize of course, that we deal here with a somewhat more difficult concept than a direct restraint on speech. Here we are concerned with the right of students to receive information which they and their teachers desire them to have. First Amendment protection of the right to know has frequently been recognized in the past.... Nonetheless, we might have felt that its application here was more doubtful absent a very recent Supreme Court case [Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).].

Minarcini, 541 F.2d at 583. For a complete discussion of the holding of the Supreme Court in *Virginia State Board of Pharmacy, see supra* notes 80-84 and accompanying text.

The court then quoted extensively from the opinion of *Virginia State Board of Pharmacy,* and concluded that the decision firmly served "to establish both the First Amendment right to know which is involved in our instant case and the standing of the student plaintiffs to raise the issue." *Minarcini,* 541 F.2d at 583.

the very act of removal sharply and directly implicates a constitutional right — the right to know and to gain access to information.

After a prima facie violation was established, the *Minarcini* court balanced the state interests in granting broad discretion to local school boards against the students' interests of academic freedom[160] and first amendment protection. The court noted further the constitutional interest in avoiding a "pall of orthodoxy" from being cast upon the classroom.[161] The court concluded that reasons such as the obsolescence, poor physical condition of a book, or a lack of shelf space in the library may constitute legitimate justification for a book removal.[162] The court emphasized, however, that a school board may not condition the use of a school library merely upon the social or political tastes of the individual school board members.[163] Moreover, the *Minarcini* court stated that a library is a "storehouse of knowledge," and that when it is created by the state for the benefit of the public school students, such a privilege may not be restricted by the personal tastes of succeeding school boards.[164] Finally, the *Minarcini* court rejected the argument that the availability of the removed book outside the school library erases any constitutional infringement.[165]

In *Minarcini,* the Sixth Circuit significantly limited the authority of school boards to remove a book from a public high school library. By recognizing in secondary school students the right of access to books on the shelves of public high school libraries, the court made it possible for plaintiffs to establish a prima facie violation of first amendment rights upon the removal of a book from the library. Under *Minarcini,* after this prima facie violation has been demonstrated, the burden shifted to the school board to prove that it was pursuing a legitimate state interest in removing the book.[166] According to the *Minarcini* court, however, the political and social views of individual board members are not considered legitimate state interests justifying removal.[167]

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[160] *Id.* at 580. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Id., citing* Epperson v. Arkansas, 393 U.S. 97, 104-05 (1968).

[161] *Minarcini,* 541 F.2d at 580.

[162] *Id.* at 581.

[163] *Id.* at 582. Here, in a footnote, the court suggests that it would be consistent with the first amendment for every library to contain some books with which every citizen has some objection, as to either subject matter, expression or idea. *Id.* at 582 n.1.

[164] *Id.* at 581. The court held that the privileges created when the state builds a library for the benefit of its students are not "subject to being withdrawn by succeeding school boards whose members might desire to 'winnow' the library for books the content of which occasioned their displeasure or disapproval." *Id.* Further, the court ruled that the removal of books in general places a greater burden upon freedom of the classroom than the prohibition of the wearing of armbands which was struck down on first amendment grounds in Tinker v. Des Moines Independent School Dist., 393 U.S. 503 (1968). *Id.* at 582. For a complete discussion of the decision of the Supreme Court in *Tinker, see supra* notes 56-65 and accompanying text.

[165] *Id.* at 582. "Restraint on expression may not generally be justified by the fact that there may be other times, places or circumstances available for such expression." *Id.*

[166] *See supra* note 162 and accompanying text.

[167] *Minarcini,* 541 F.2d at 582. The only rationale the court found in this case for supporting the book's removal involved the school board's contention that the books in question

Within two years of *Minarcini,* two federal district courts, outside the Sixth Circuit, followed the *Minarcini* court's lead and sustained challenges to the removal of literature from high school libraries by local school authorities. In *Right to Read Defense Committee v. School Committee of Chelsea,*[168] the school board of Chelsea, Massachusetts had removed an anthology of writings by adolescents from the city's high school library.[169] Similar to the school board in *Minarcini,* the Chelsea school committee argued that the book it removed was filthy, obscene and disgusting.[170] The Federal District Court for Massachusetts held that the actions of the school board in removing the book violated the high school students' "right to read and be exposed to controversial thoughts and ideas."[171] Further, the court observed that the removal was an unconstitutional infringement upon notions of academic freedom, and that students may not be confined to the expression of only officially approved sentiments.[172]

Thus, the court followed the lead of the Sixth Circuit in *Minarcini* by recognizing a student's constitutional right of access to information. As in *Minarcini,* the district court in *Right to Read* conceded that every removal of a book by a school board may not be unconstitutional.[173] Echoing the reasoning of *Minarcini,* however, the court observed that once the state has acted by placing a book in a library for the benefit of the students, conditions may not be placed upon use of the library related solely to the social or political tastes of the school board members.[174] The court ruled that when first amendment values are implicated, the school board must demonstrate a substantial and legitimate interest in removing the book.[175] The court concluded that when a book is

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were "garbage" and "drivel," and that the moral values espoused by the books were questionable. *Id.* at 581-82.

[168] 454 F. Supp. 703 (D. Mass. 1978).

[169] *Id.* at 704-05. The book was entitled "Male and Female Under 18," and was removed primarily due to objections voiced concerning one poem contained in the book written by a fifteen year old girl entitled "The City to a Young Girl." *Id.*

[170] *Id.* at 711.

[171] *Id.* at 714-15. "What is at stake here is the right to read and be exposed to controversial thoughts and language — a valuable right subject to First Amendment protection." *Id.* at 714. By adding the words "controversial thoughts and language," the court in *Right to Read* is giving the concept of a right of access to information its broadest application yet in the book removal context. The court in *Minarcini* had recognized a right to know in the context of high school libraries, but did not define the scope and extent of this right. *See supra* notes 158-59 and accompanying text. The Massachusetts District Court in *Right to Read* is suggesting that this right of access may include a broader range of subject matter than may have been envisioned previously.

[172] *Id.* at 714-15.

[173] *Id.* at 713.

[174] *Id.* at 712-13, *citing* Minarcini v. Strongsville City School Dist., 541 F.2d 577, 582 (6th Cir. 1976).

[175] *Right to Read,* 454 F. Supp. at 713. The court noted that the substantial and legitimate interest required in Tinker v. Des Moines Independent School Dist., 393 U.S. 503, 509 (1968), was that the expression in question would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school . . ." *Id.* The court in *Right to Read* suggested that *Tinker* does not require the school board to demonstrate that the presence of the book in the school library constituted a threat to school discipline. *Id.* The court did rule, however, that "some interest comparable to school discipline must be at stake." *Id.*

removed because its theme and language are offensive to a school committee, those challenging such removal are entitled to seek court intervention.[176]

In 1979, the Federal District Court for the District of New Hampshire followed the trend established in *Minarcini* and *Right to Read* and, in *Salvail v. Nashua Board of Education,* overruled the book removal actions of a local school board.[177] In *Salvail,* the Nashua, New Hampshire Board of Education had removed all issues of "Ms. Magazine" from the high school library.[178] The *Salvail* court ruled that the periodical had been removed due to the political rather than any sexual content of the magazine's issues.[179] The court, in quoting language from the Supreme Court's opinion in *Virginia State Board of Pharmacy,* observed that first amendment protections extend to the recipient as well as to the speaker of protected communication.[180] In guarding the first amendment rights of the students involved, the court held that since the social and political tastes of board members may not condition the use of public high school libraries, the action of the school board in removing the magazines was constitutionally impermissible.[181] In reaching this conclusion, the court held that the school board had failed to demonstrate a substantial and legitimate government interest for its invasion of the first amendment rights of the students.[182] Accordingly, the court held that the removal violated the first amendment rights of the students, and declared the resolutions of the school board ordering the removal of the magazines to be null and void.[183]

Thus, *Minarcini, Right to Read,* and *Salvail* accorded public high school students some degree of first amendment protection of their interests in enjoying continued access to the books placed in their school libraries. The cases suggest that when a state establishes public school libraries, students are thereby vested with a constitutional right of access to the books on the shelves. When a school board removes a book because it is offensive to the social, political or moral tastes of school board members, a prima facie violation of this first amendment right of access to information may be established.[184] In order to justify its actions and rebut the prima facie case, the school board must demonstrate that it removed the book pursuant to a legitimate and substantial government interest.[185] Therefore, by the end of the decade of the 1970's, the

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[176] *Id.* at 712.

[177] 469 F. Supp. 1269, 1276 (D. N.H. 1979).

[178] *Id.* at 1272. The removal was initiated by one member of the Nashua School Board who objected to the periodical due to "advertisements for vibrators, contraceptives, materials dealing with lesbianism and witchcraft, and gay material." *Id.* The board member also objected to advertisements for what he considered to be a "pro-communist newspaper" ("The Guardian"). *Id.*

[179] *Id.* at 1274.

[180] *Id., quoting* Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756 (1976).

[181] *Salvail,* 469 F. Supp. at 1274.

[182] *Id.* at 1275.

[183] *Id.* at 1276.

[184] *See supra* notes 158-59, 163, 171, 174, 176, 180 and accompanying text.

[185] *See supra* notes 166-67, 175, 182 and accompanying text. Despite the fact that all three

Minarcini line of cases had established a clear trend in the federal courts concerning the standard of review to be used in book removal cases. These courts recognized the first amendment right of access to information to be the constitutional right involved in these cases, and by doing so made it easier for plaintiffs to bring court actions against the restrictive decisions of local school boards engaged in the removal of books from high school libraries. In 1980, however, two circuit court decisions interrupted this development of a right of access to information in book removal cases.

B. *The Standards of* Pico *and* Zykan

In 1980, the Seventh Circuit in *Zykan v. Warsaw Community School Corp.*,[186] and the Second Circuit in *Pico v. Board of Education*,[187] each addressed the book removal question. In each case, the student plaintiffs claimed their first amendment rights had been violated when the defendant school boards removed certain books from the high school libraries and curricula.[188] In *Zykan*, the court noted the existence of a "qualified right to hear,"[189] yet ruled that school boards generally may legitimately remove books based on the personal moral, social and political views of board members.[190] As a result, the court in *Zykan* ruled that the plaintiffs in the case had failed to demonstrate a prima facie constitutional violation.[191] In *Pico*, the Second Circuit ruled that the student plaintiffs in that case had established a prima facie case.[192] In reaching this decision, however, the *Pico* court did not recognize a first amendment right of access to information for secondary school students. Rather, the court ruled that procedural irregularities attendant to the school board's removal action, by chill-

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courts require a substantial and legitimate government interest to override a book removal, for the most part the cases provide little guidance in defining exactly what may constitute this permissible state interest. *Minarcini* stressed the physical condition of the book or the library as interest which may justify removal. Minarcini v. Strongsville City School Dist., 541 F.2d 577, 581 (6th Cir. 1976). *Salvail* held that removal due to the social or political views of the board itself does not constitute a legitimate interest. *Salvail*, 469 F. Supp. at 1274.

Salvail and *Right to Read* suggested that obscenity may be considered a legitimate state interest. *Salvail*, 469 F. Supp. at 1273; Right to Read Defense Committee v. School Committee of Chelsea, 454 F. Supp. 703, 713-14 (D. Mass. 1978). Neither of these cases, however, defines what constitutes "obscenity" for the purposes of book removals. The court in *Salvail* stated that the materials under examination in that case were not "obscene within any recognized legal definition." *Salvail*, 469 F. Supp. at 1273. By using this language, the New Hampshire district court in *Salvail* avoided setting forth a specific standard for obscenity to be used in these cases.

Likewise, the Massachusetts district court in *Right to Read* ruled that the language of the work in question was "tough" but not "obscene." *Right to Read*, 454 F. Supp. at 714. In so ruling, the court stressed the important role that rough language may play in giving the development of a sensitive theme credibility, and concluded that even though the language may shock, the words used do, nevertheless, communicate. *Id.* at 714.

[186] 631 F.2d 1300 (7th Cir. 1980).

[187] 638 F.2d 404 (2d Cir. 1980), *aff'd*, 102 S. Ct. 2799 (1982).

[188] *Zykan*, 631 F.2d at 1301.

[189] *Id.* at 1304.

[190] *Id.* at 1305.

[191] *Id.* at 1308.

[192] *Pico*, 638 F.2d at 418.

ing future protected speech in the school, interfered with the students' first amendment right of freedom of expression.[193] Consequently, these two cases represented a break with the trend established in the *Minarcini* line of cases which recognized the constitutional right implicated in book removal cases to be the first amendment right of access to information.[194]

In *Zykan,* the defendant school board removed certain books from the school library and from the curriculum of the high school.[195] The plaintiffs, a current and a former student of the school, claimed that the removal action violated their first and fourteenth amendment rights.[196] The plaintiffs charged that the action of the school board resulted in a diminution or loss of academic freedom in the school district, and that the removal action violated their "right to know."[197] They claimed further that the actions of the school board would continue to have a chilling effect upon the "free exchange of knowledge" in the school.[198] The issue isolated for review by the *Zykan* court was whether the plaintiffs had presented a constitutional claim, as the district court below had dismissed the claim on the grounds that no such constitutional violation had been demonstrated.[199]

In determining what burden the plaintiffs must carry to establish a prima facie constitutional violation under the first amendment, the court first examined what right was brought into question by the book removal.[200] The court noted that concepts such as the "marketplace of ideas" acted to justify the extension of first amendment protections to the classroom situation under the principle of academic freedom.[201] The court observed that academic freedom served to emphasize the importance "to the scholarly and academic communities of being free from ideological coercion."[202] The court suggested, however, that the contours of academic freedom had not been firmly established, in the context of secondary schools, as compared to colleges and universities.[203]

The *Zykan* court, in examining what these contours should be in the case of high school students, recognized that secondary school students do retain an interest in freedom of the classroom through a qualified "right to hear."[204] The court noted, however, that the relevance of academic freedom was limited in the secondary school environment by two factors.[205] The first factor cited by

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[193] *Id.* at 414-15.

[194] The *Minarcini* analysis of a student's right of access to information is discussed *supra* at notes 158-59.

[195] *Zykan,* 631 F.2d at 1302 n.2.

[196] *Id.* at 1301.

[197] *Id.* at 1303.

[198] *Id.*

[199] *Id.* at 1301, 1303.

[200] *Id.* at 1304.

[201] *Id.*

[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] *Id.*

the court as limiting the student's right to and need for such freedom was the level of intellectual development of the secondary school student.[206] The lower level of intellectual development of secondary school students, according to the court, limits the student from taking full advantage of the "marketplace of ideas," and results in a need for greater guidance in making important educational decisions on the part of those experienced in such matters.[207] The second factor cited by the court was that a school's responsibility not only entails the academic development of its students, but also includes a broader role in nurturing socialization and a sense of civic responsibility.[208] As a result of these factors, the court concluded that a state has a vital and compelling interest in "the choice of and adherence to a suitable curriculum for the benefit of our young citizens."[209]

In addition, the court suggested that as a result of this need for intellectual and moral guidance from a body capable of transmitting the mores of the community, the states have granted broad discretionary powers over such matters to local school boards.[210] Accordingly, the court held that generally it is permissible and appropriate for local school boards to base their policy decisions upon the personal, social, political and moral views of board members.[211]

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[206] *Id.*

[207] *Id.* The *Zykan* court, however, does not give specific examples of where this guidance is needed, nor does it indicate how and why the students' ability to take advantage of the marketplace of ideas is limited. The court does not explain whether it believes secondary school students incapable of differentiating between right and wrong, whether they cannot make choices concerning sexually explicit materials, or whether the students are simply too inexperienced at discerning what areas of academic inquiry are appropriate or helpful to their own intellectual development.

This analysis does seem to support the proposition that a core curriculum must be fashioned for students in order to guarantee they receive certain minimum instruction in these vital areas. It does not, however, support the contention that students, in their intellectual development, should not be exposed to a wide variety of reading materials available to them on a voluntary basis.

[208] *Id.* In this regard, the court stated: "The importance of secondary schools in the development of intellectual faculties is only one part of a broad formative role encompassing the encouragement and nurturing of those fundamental social, political, and moral values that will permit a student to take his place in the community." *Id.* The court does not indicate, however, when a school board's attempts at nurturing certain values in high school students crosses the fine constitutional line it has drawn and becomes impermissible indoctrination. In short, the *Zykan* court proposes an "indoctrination" standard without indicating what types of conduct on the part of school boards constitute indoctrination.

Moreover, the court fails to explain how the *exclusion* of reading material from a school library serves to broaden a student's intellect and civic duty. This concept seems better placed in an argument favoring the *inclusion* of certain types of material in a school library. If schools teach certain social, political and moral views, while including material exploring different views in the school library, school boards would attain both the goals of instilling civic and moral values in the students as well as preserving the library as a marketplace of ideas.

[209] *Id.*

[210] *Id.* at 1305. The court cites Indiana state law which gives broad powers to local school boards in the governance of secondary school matters concerning "curriculum, textbooks and other educational matters." *Id. See,* IND. CODE 20-5-2-1; 20-5-2-2; and 20-10.1-4-4 (1980).

[211] *Id.* The court stated, however, that limitations on this broad grant of authority include the inability of a school board to fire teachers for every random comment made in the

Therefore, the court ruled that in order for plaintiffs to present a prima facie constitutional violation in book removal cases, it must be demonstrated that the school board has substituted *rigid and exclusive indoctrination* for the mere exercise of its right and duty to make general policy decisions concerning the operation of the schools.[212] In this respect, the court noted that the plaintiffs had failed to allege they had been deprived of all contact with the material in question.[213] The court concluded by stating that the plaintiffs had not shown that the library had been purged of all material offensive to "a single, exclusive perception of the world," or that the school authorities had prohibited the students from buying or reading a particular book, or bringing it to school and discussing it there.[214] Therefore, in this case, the court ruled that the plaintiffs had not demonstrated a prima facie first amendment violation, and that, as a result, no constitutional claim had been presented.[215]

Therefore, even though the *Zykan* court did recognize the interest of secondary students in a first amendment right of access to information, the court ruled that certain factors limited the relevance of such a right in the context of schoolbook removals.[216] Due to the youthful age of the students and their need for educational guidance, the court concluded that local school authorities should be given broad discretion in making local educational policy.[217] Consequently, the court held that school boards may base such removal decisions upon their own political, social and moral values and beliefs,[218] and in order for plaintiffs to establish a prima facie violation, they must demonstrate that the school board engaged in rigid and exclusive indoctrination in effecting a book removal decision.[219] Considering the difficulty a plaintiff may be expected to experience in meeting this prima facie test, it is apparent that the *Zykan* standard would result in at least one serious consequence. It would appear that virtually any case tried under the *Zykan* standard would be dismissed without the burden of proof ever being shifted to the defendant school board to justify its actions. Under these circumstances, therefore, the true motives behind a school board's book removal actions may never be uncovered.

In another book removal case decided a month after *Zykan,* the Court of Appeals for the Second Circuit reached different results in finding that a prima facie constitutional violation had been presented. In *Pico v. Board of Education,*[220]

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classroom, religious indoctrination, a flat prohibition of the mention of certain relevant topics in the classroom, and forbidding students from taking interest in certain topics not directly covered by the curriculum. *Id.* at 1305-06.

[212] *Id.* at 1306.

[213] *Id.*

[214] *Id.* at 1308.

[215] *Id.*

[216] *Id.* at 1304. *See supra* notes 204-09 and accompanying text.

[217] *Zykan,* 631 F.2d at 1305. *See supra* note 210 and accompanying text.

[218] *Zykan,* 631 F.2d at 1305.

[219] *Id.* at 1306.

[220] 638 F.2d 404, *rehearing and rehearing en banc denied* (2d Cir. 1980), *aff'd,* 102 S. Ct. 2799 (1982).

the student plaintiffs sued the board of education of the Island Trees Union Free School District on Long Island for violating their first amendment rights when they removed ten works from the high school library.[221] The school board stated that the books were removed because they contained obscenities, brutality, perversion, and material offensive to Christians, Jews, Blacks, and Americans in general.[222] The removal of the books by the school board, however, apparently was without serious regard for the established local policy and procedure for such removals.[223] The Court of Appeals held that due to the procedural irregularities surrounding the removal of the books, the granting of the defendant's motion for a summary judgment by the district court was erroneous.[224] The court ordered the case remanded for further findings of fact.[225]

The court of appeals found that the plaintiffs had established a prima facie violation of their first amendment rights of free expression due to the school board's book removal action.[226] This finding was based, however, upon the procedural aspects of the school board's actions and not on the substantive reasons offered by the defendants for the books' removal.[227] In the plurality opinion, Judge Sifton stated that in this case there had been an unusual and irregular intervention in the school library's operation by persons not routinely concerned with such matters.[228] Further, Judge Sifton noted that the school board had not clearly explained the scope and intention behind their action.[229] As a result of the "irregular and ambiguous" nature of their actions, the court concluded that misunderstandings as to the scope of the board's actions would be created in the minds of pupils, teachers and librarians.[230] Such misunderstandings, according to the court, would lead to the chilling and suppression of freedom of expression, as those in the schools would not know exactly what type of speech may be subject to proscription by the school board.[231]

The court in *Pico* ruled that once a prima facie violation of the students' first amendment rights of free expression has been established, the burden shifts to the school board to demonstrate that it acted because "interests of discipline or sound education are materially and substantially jeopar-

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[221] *Id.* at 406. The court noted that the books involved were: "*The Fixer,* by Bernard Malamud; *Slaughterhouse Five,* by Kurt Vonnegut; *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,* by an anonymous author; *A Hero Ain't Nothing But a Sandwich,* by Alice Childress; *Black Boy,* by Richard Wright; *Laughing Boy,* by Oliver LaFarge; *Soul on Ice,* by Eldridge Cleaver; and an anthology entitled, *A Reader for Writers,* edited by Jerome Archer." *Id.* at 407 n.2.

[222] *Id.* at 410.

[223] *Id.* at 409.

[224] *Id.* at 418-19.

[225] *Id.*

[226] *Id.* at 414-15.

[227] *Id.*

[228] *Id.* at 414.

[229] *Id.*

[230] *Id.* at 414-15, 416.

[231] *Id.* at 415, 416.

dized. . . ."[232] The court declared further that these school board defenses must be based on reasonable inferences flowing from concrete facts and not abstractions.[233] If such a government interest can be shown, the actions of the school board, despite their restrictive effect upon student expression, would be justified.[234] The court concluded its discussion of the school board's defenses by imposing a procedural burden upon the state as well. The court declared that a book removal policy must be narrowly drawn to advance only those social interests which justify it, and may not restrict speech to an extent "greater than is essential to the furtherance of those [permissible] interests."[235]

While the plurality opinion in *Pico* was careful to delineate the burden of the state in book removal cases, bearing in mind that the burden shifts to the state only upon the showing of a prima facie constitutional violation by the plaintiffs is important.[236] In *Pico,* the court did not recognize the students' first amendment right of access and declared, instead, that the plaintiffs must demonstrate that their right of free expression had been impermissibly restricted.[237] In *Pico,* the court found the students' right of expression to be violated since the procedural irregularities surrounding the school board's actions resulted in the chilling of protected speech.[238] The plurality opinion of Judge Sifton, however, suggested in *dicta* that a constitutional violation may exist where a book is removed for the purpose of banning unpopular views.[239] Judge Sifton stated that even where no procedural violations attend the removal of books by a school board, such actions may be challenged successfully if the plaintiffs can establish that the government interests offered by the school board to justify its actions were mere pretexts for the suppression of free speech.[240] The court did state that the thoughtful application of personal standards of taste, morality, and political belief by school boards to school policy not only is legitimate but should be encouraged.[241] The court stated, however, that the political views and personal taste of the board members must be asserted in the interest of the children's well-being, and not "for the purpose of establishing those views as the correct and orthodox ones for all purposes in the particular community."[242] Therefore, even if the school board is able to establish that they did not act in an irregular and ambiguous manner in removing books from the school library, the plaintiffs are afforded the opportunity to demonstrate that the government interests offered by the school board are mere pretexts for the banning of unpopular views.

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[232] *Id.* at 415.
[233] *Id.*
[234] *Id.*
[235] *Id., citing* Eisner v. Stamford Board of Education, 440 F.2d 803, 806 (2d Cir. 1971).
[236] *Pico,* 638 F.2d at 415.
[237] *Id.* at 414.
[238] *Id.* at 415.
[239] *Id.* at 417.
[240] *Id.*
[241] *Id.*
[242] *Id.*

In setting forth its standard of review, the court in *Pico* ruled that the constitutional right requiring scrutiny in book removal cases is the freedom of expression and not a first amendment right of access to information.[243] To establish a prima facie first amendment violation in these cases, which would justify the intervention of the federal courts into the daily administration of school affairs, the plaintiff must demonstrate that the action of the school board *directly and sharply* implicated basic constitutional values.[244] The *Pico* court noted, however, that most book removal decisions are a part of the every day administration of a school's curriculum and library, and, as a result, would not impinge either directly or indirectly upon the free expression of ideas.[245] The decision of the Second Circuit in *Pico,* nevertheless, indicated one example of when a book removal may implicate first amendment rights of expression to an extent sufficient to trigger judicial scrutiny. In *Pico,* when the book removal decision of a school board was made in an irregular and ambiguous manner, the danger of first amendment chilling is increased to the point where freedom of expression may be repressed.[246] Under these circumstances, the burden of proof is shifted to the school board to justify its actions, and the plaintiffs are subsequently given the chance to prove that the state interests offered by the school board are mere pretexts for the suppression of certain views.[247]

The decisions of the Seventh and Second Circuits in *Zykan* and *Pico* represent a significant retreat from the positions of the previous cases recognizing the first amendment right of access to information for secondary school students. The courts in *Minarcini, Right to Read* and *Salvail,* in analyzing book removal cases with reference to the first amendment right of access, held that school boards may not remove books based upon the social, political and moral views of individual school board members.[248] In these right of access cases, the burden of proof shifted to the school board to demonstrate they acted pursuant to a legitimate and substantial government interest in infringing upon the students' right of access to the removed material.[249] The Seventh Circuit in *Zykan* observed that students do have an interest in a right to hear, but held that such a right is limited in secondary school students by reason of their youthful age and need for educational guidance by local school authorities.[250] As a

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[243] *See supra* notes 236-37 and accompanying text.

[244] *Id.* at 414. "Powers to prescribe what may or may not be said and what may or may not be read — powers which are denied to most public officials, . . . are accorded to school officials because they are the necessary prerequisites to the formation of a school curriculum and the necessary prerequisites to the stocking of a school library. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Id., citing* Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

[245] *Pico,* 638 F.2d at 414.

[246] *Id.* at 414-15

[247] *Id.* at 418.

[248] *See supra* notes 158-64, 171-76, 179-81 and accompanying text.

[249] *See supra* notes 166-67, 175, 182 and accompanying text.

[250] *See supra* notes 204-09 and accompanying text.

result, the *Zykan* court ruled that school boards may base their removal decisions upon personal social, political and moral beliefs, and suggested that absent a showing of rigid and exclusive indoctrination by plaintiffs, the actions of a school board in removing books from school libraries should be upheld as a constitutional exercise of their broad discretionary powers in this area.[251] The Second Circuit in *Pico* failed to recognize even a limited right of access to information, analyzing the book removal in that case with reference to the first amendment right of free expression.[252] Under the standard adopted in *Pico,* absent a showing that the book removal action of the school board sharply and directly implicated the right of freedom of expression, no prima facie constitutional violation will be found.[253] After suggesting that such book removals do not usually impinge upon the freedom of expression, the *Pico* court held that an exception to that general rule may exist where, due to the irregular and ambiguous nature of a school board's book removal action, freedom of expression may be impermissibly chilled.[254] Under the *Pico* standard, therefore, a challenge to the book removal policies of a local school board would be successful in only a narrow set of circumstances.

The two latest lower federal court cases to consider the issue of book removals, decided in early 1982, returned to the reasoning of the *Minarcini* line of cases with respect to the recognition of secondary students' first amendment right of access to information. These cases emphasized that it is the right of access which is implicated when a book is removed from a library shelf, and that this right of access deserves the same scrutiny traditionally attendant to violations of the more traditional right of free speech and expression.[255] These cases are important not only because they represent the latest statement of the federal courts on the issue of book removals, but also in that they examine realistically the constitutional values implicated by the removal of books from school libraries and set forth the most cogent and consistent standards of review to date on this question.

C. *The "Right of Access" Revisited*

The two latest cases concerning the first amendment rights of high school students were decided in early 1982. These cases recognize explicitly a student's first amendment right of access to information, and present cogent and understandable standards for reviewing book removal decisions. In *Pratt v. Independent School District,*[256] the United States Court of Appeals for the Eighth Circuit held that the first amendment right of access to information of certain

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[251] *See supra* notes 210-12 and accompanying text.

[252] *See supra* note 243 and accompanying text.

[253] *See supra* notes 244-45 and accompanying text.

[254] *See supra* notes 226-31 and accompanying text.

[255] *See, e.g.,* Pratt v. Independent School Dist., 670 F.2d 771 (8th Cir. 1982); Sheck v. Baileyville School Committee, 530 F. Supp. 679 (D. Me. 1982).

[256] 670 F.2d 771 (8th Cir. 1982).

high school students was violated when the defendant school board removed a controversial film from the school district's curriculum.[257] The *Pratt* court determined that the plaintiffs had met their prima facie burden by demonstrating that the board banned the films due to the ideas expressed in them.[258] The burden was then ruled to shift to the school board to establish that a substantial and reasonable government interest existed in order to justify the state's interference with the students' right to receive information.[259] In *Sheck v. Baileyville School Committee,*[260] the United States District Court for the District of Maine granted plaintiffs'[261] motion for injunctive relief and ordered the local school board to return a book which it had removed from the school library to the shelves.[262] The court in *Sheck* recognized the students' first amendment right of access, suggesting that the banning of a library book should at least presumptively implicate this right of secondary students to receive the information and ideas written in the book.[263]

In *Pratt,* the local school board ordered that a film entitled "The Lottery," which had been used in an American Literature class, be removed from the school's curriculum.[264] In making this decision, the school board had ignored the recommendations made by a committee, appointed to review the films, which suggested that the film not be used in the junior high school, but that it be retained in the curriculum of the high school.[265] The plaintiffs, students at

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[257] *Id.* at 779.

[258] *Id.* at 777.

[259] *Id.*

[260] 530 F. Supp. 679 (D. Me. 1982).

[261] The plaintiffs in *Sheck* included students and parents of students. *Id.* at 681.

[262] *Id.* at 681, 693.

[263] *Id.* at 687.

[264] *Pratt,* 670 F.2d at 773-74.

[265] *Id.* at 774. The School District had a stated policy setting forth the procedures for selection and review of instructional materials. The court explained this policy in a footnote:

> This procedure provides for three levels of review of a citizen's complaint. First, the objection to the material must be made to the person having control over the questioned material. If the challenge is not resolved with the media specialist or teacher, the citizen has a right to have his objections evaluated by a Committee for Challenged Materials which is set up to review the complaint. The seven-person Challenge Committee — composed of two citizens, two teachers, one media person, one administrator and one student — has the duty to evaluate the material based on the criteria set forth in the policy, and make a recommendation regarding its future use. Finally, if the Challenge Committee's recommendation is unsatisfactory, the challenger has a right to appeal to the school board.

Id. at 774 n.2.

According to this stated procedure, the Challenge Committee held a public meeting at which the films were viewed and open discussion was held. *Id.* at 774. Teachers present at the meeting also expressed their reasons for using the film in class. *Id.* At the conclusion of the meeting, the Committee voted to recommend that the film be removed from the junior high school curriculum, but retained at the high school level. *Id.* At a public meeting three weeks later, the school board voted to reject a motion to "accept and confirm" the Committee's recommendations, and further voted to completely eliminate the film and its trailer film from the school district's curriculum. *Id.* Both votes were by a 4-3 margin, and "[t]he board gave no reasons for its decision." *Id.*

the school, thereafter brought suit in the district court, and alleged a violation of their first amendment right to receive information.[266] The district court found that the school board had offered no evidence of a legitimate reason for excluding the film, and ordered the film reinstated in the school district's curriculum.[267] The case was appealed to the Court of Appeals for the Eighth Circuit where the decision of the district court was affirmed.[268]

The Eighth Circuit held that the actions of the school board had violated the students' first amendment right of access to information, stating: "What is at stake is the right to receive information and be exposed to controversial ideas — a fundamental First Amendment right."[269] The court recognized that school boards generally are granted broad discretionary powers with which to discharge their duties,[270] and that this discretion includes the authority to determine the curriculum, teaching methods and educational materials used in the school system.[271] The court stated, however, that this discretion is limited by the first amendment right of students to be free from official conduct which casts a "pall of orthodoxy" on classroom instruction.[272] The court suggested that a cognizable first amendment claim arises if a book is excluded "to suppress an ideological or religious viewpoint with which the local authorities disagree."[273] Viewing the book removal cases as indistinguishable from the case involving the removal of a film,[274] the court stated that applicable to both sets of facts was the principle that the banning of educational materials due to their ideological and religious content is constitutionally impermissible.[275] Based on this reasoning, the court determined that the plaintiffs had established a prima facie violation because the objections of the board to the film contained "religious overtones" and because the films had been removed due to their "ideological content."[276]

Under the standard of review adopted by the court in *Pratt,* once plaintiffs had established a prima facie violation of the first amendment right of access to information, the burden shifted to the school board to prove that a substantial and reasonable government interest supported its actions.[277] The court did not delineate what government interests it would consider specifically to be substantial, but it rejected the interests posited by the school committee in the instant case.[278] The board had argued that the films removed were too violent for

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[266] *Id.* at 773.

[267] *Id.*

[268] *Id.* at 780.

[269] *Id.* at 779.

[270] *Id.* at 775.

[271] *Id.*

[272] *Id.* at 776. For a discussion of the origin of the concept of a "pall of orthodoxy," *see supra* note 55 and accompanying text.

[273] *Id.* at 776.

[274] *Id.* at 776 n.6.

[275] *Id.*

[276] *Id.* at 776.

[277] *Id.* at 777.

[278] *Id.* at 778.

a high school curriculum, and that this violence outweighed and overshadowed the otherwise valuable and important themes contained in the films.[279] The circuit court affirmed the findings of the district court that the evidence to support the school board's position was not sufficient to justify the removal action.[280] The circuit court further agreed with the district court's finding that the true motive behind the removal was that the board and certain members of the community objected to the ideas contained in the films.[281] The circuit court concluded that the board had eliminated the films "not because they contained scenes of violence or because they distort the short story, but rather ... because the majority of the board ... considered the films' ideological and religious themes to be offensive."[282] The court therefore held that since the school board had failed to show a legitimate and substantial state interest in removing the films, its action constituted an unjustified interference with the students' first amendment rights of access to information.[283]

The court suggested further that the actions of the school board in *Pratt* did not satisfy the procedural requirements regarding acts which tend to restrict freedom of expression and access. The court held that the first amendment requires "that a school board act so that the reasons for its decision are apparent to those affected."[284] In *Pratt,* the court observed that the school board had failed clearly to inform the students and teachers in the school district exactly what it was proscribing in removing the films from the curriculum.[285] In such circumstances the court observed that the symbolic effect of the removal may be more significant than the resulting limitation of access to the story.[286] Instead of clearly stating specifically why the films were being removed, i.e., the extent of unnecessary violence or the use of obscenity, the court suggested that the school board in *Pratt* gave students and teachers the message that the *ideas* contained in the films were unacceptable and should not be considered or discussed.[287] The court concluded that the consequences of such procedural deficiencies are that speech is chilled and freedom of expression is restricted.[288] This reasoning of the *Pratt* court concerning procedural irregularities is reminiscent of the reasoning used by the Second Circuit in *Pico* with one major

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[279] *Id.* at 777-78.
[280] *Id.* at 778.
[281] *Id.*
[282] *Id.*
[283] *Id.* at 779.
[284] *Id.* at 778.
[285] *Id.* at 778-79.
[286] *Id.* at 779.
[287] *Id.* The court stated this proposition in the following manner:

> The symbolic effect of removing the films from the curriculum is more significant than the resulting limitation of access to the story. The board has used its official power to perform an act clearly indicating that these ideas contained in the films are unacceptable and should not be discussed or considered. The message is not lost on students and teachers, and its chilling effect is obvious.

Id., citing Pico v. Bd. of Educ., 638 F.2d 404, 436 (2d Cir. 1980) (opinion of Newman, J.).
[288] *Pratt,* 670 F.2d at 779.

difference. In *Pico,* procedural irregularities and the attendant chilling effect upon protected expression.was a requisite to the plaintiffs' showing of a prima facie first amendment violation in book removal cases.[289] In *Pratt,* procedural regularity was considered by the Eighth Circuit to be a burden which the school board must carry in order to constitutionally restrict the students' first amendment right of access to information.[290]

A week after *Pratt* was decided, the United States District Court for the District of Maine, following the reasoning of *Minarcini* and *Pratt,* established a similar standard of review and burden for the plaintiffs in book removal cases. In *Sheck v. Baileyville School Committee,*[291] the court recognized the existence of students' first amendment rights of access to information in the "educational environment of the secondary school library."[292] The court emphasized further that the book removal actions of a school board are restrained by requirements of procedural regularity imposed upon all agencies of the state by the fourteenth amendment.[293] The court concluded that the legitimacy of a school board's actions in removing a book from a secondary school library may ultimately depend upon "whether it could *rationally* conclude that exposure to [the removed book] might be harmful to students."[294] The issue before the court in *Sheck* was whether injunctive relief should be granted to restore a book entitled *365 Days* to the shelves of the school library after it had been removed by the local school board.[295]

In *Sheck,* the school board had voted to remove the book in question from the library and to ban its possession anywhere on school property including school buses.[296] The plaintiffs, students and parents of students, brought this action seeking declaratory and injunctive relief, claiming that the actions of the school board in removing the book had violated their first and fourteenth amendments' rights.[297] In determining whether to issue an injunction ordering the school board to return the removed book to the library shelves, the court considered whether the plaintiffs had exhibited a likelihood of success on the merits of their constitutional claim.[298]

The court posited that in order to establish a prima facie case, the plaintiffs were required to demonstrate that their basic first amendment rights had been directly and sharply implicated by the ban.[299] The court looked to

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[289] *See supra* notes 228-31 and accompanying text.

[290] *Pratt,* 670 F.2d at 778-79.

[291] 530 F. Supp. 679 (D. Me. 1982).

[292] *Id.* at 687.

[293] *Id.* at 690.

[294] *Id.* at 691.

[295] *Id.* at 680-81. The book removed was *365 Days* by Ronald F. Glasser. The book is described as a compilation of nonfictional Vietnam War accounts by American soldiers involved in combat in that war. *Id.*

[296] *Id.* at 683.

[297] *Id.*

[298] *Id.* at 684.

[299] *Id., citing* Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

previous book removal cases for guidance in determining whether the first amendment rights of the students in *Sheck* had been directly and sharply implicated by the school board's actions. Looking first to the standards of *Zykan*[300] and *Pico*,[301] the court noted that under either of those standards the banning of *365 Days* by the school board in *Sheck* could be viewed as not directly and sharply implicating basic constitutional rights.[302] The court observed, however, that the *Minarcini* line of cases[303] suggested an alternative standard. Under those standards, the *Sheck* court noted that a violation of first amendment rights may be present in this case.[304] Thus, because the book removal cases examined by the court in *Sheck* did not present a uniform analytical framework by which to evaluate book removal cases, the *Sheck* court examined the major issues in detail in order to determine the most appropriate standard.

The court noted that in book removal cases it is not the right of expression which is involved, but the right to receive information and ideas.[305] The court observed that the constitutional contours of this right to receive information and ideas were rudimentary,[306] but suggested that where the right had been recognized, the courts had emphasized the inherent societal importance of "fostering the free dissemination of knowledge and ideas in a democratic society."[307] The right of access, according to the court, does not depend upon the existence of an attempted direct communication between speaker and recipient, nor does it hinge on whether there are alternative means of obtaining the information.[308] The court suggested that the importance of public education in constitutional jurisprudence mandates that the protections of the first amendment not be limited to speakers only or to adults only.[309] Therefore, the court concluded that the banning of a library book, "the least obtrusive conventional communication resource available," should at least presumptively implicate the reciprocal first amendment right of high school students to receive the information and ideas contained in the books.[310]

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[300] For a discussion of the standard of review used in *Zykan*, see *supra* notes 212-15 and accompanying text.

[301] For a discussion of the standard of review proposed by the Second Circuit in *Pico*, see *supra* notes 226-47 and accompanying text.

[302] *Sheck*, 530 F. Supp. at 685. The court suggested that in *Zykan* the first amendment is not implicated unless removal is part of a general purge of materials conflicting with views of orthodoxy imposed by the school board, or that the book is otherwise completely unavailable to the students. *Id.* The court noted that in *Pico* no violation occurs unless circumstances are so unusual and irregular as to create misunderstanding as to the scope and purpose of the ban resulting in a chilling of other forms of expression. *Id.*

[303] For a discussion of the standard of review in *Minarcini*, see *supra* notes 156-67 and accompanying text. For a discussion of the other two cases in the *Minarcini* line, *Salvail* and *Right to Read*, see *supra* notes 168-83 and accompanying text.

[304] *Sheck*, 530 F. Supp. at 685.

[305] *Id.*

[306] *Id.* at 686.

[307] *Id.*

[308] *Id.*

[309] *Id.* at 686-87.

[310] *Id.* at 687.

The language of the *Sheck* opinion suggests that the very act of removal should constitute a prima facie violation. The court stated that it would be dangerous to presume that the action of the state in banning an educationally valuable book does not directly and sharply implicate rights merely "because the ban was not intended to suppress ideas."[311] The court suggested that even where the removal action is based strictly on vocabular considerations, such as obscenity,[312] as long as the words in the books convey ideas the federal courts must "remain on first amendment alert."[313] Therefore, due to the emphasis placed on students' right of access in *Sheck,* it appears that the prima facie threshold is crossed in *Sheck* when a book with proven educational value is removed from a library. This would appear to be true even if the plaintiff had not asserted that the ban was due to the intent of the school board to suppress certain ideas.[314]

After determining that the information and ideas in books properly placed in a school library are protected by the first amendment right of access to information, the court addressed what procedural requirements may govern a school board's decision to remove material from a library.[315] The court held that a school board's actions must be consistent with the requirements of procedural regularity mandated by the fourteenth amendment.[316] This requirement prohibits arbitrary interference with the free flow of information and ideas, and demands that public officials not exercise overbroad discretion in censoring speech.[317] "Precise, ascertainable standards" must be used in the government's regulation of free speech in order to prevent the chilling of legitimate speech-related conduct.[318] The court held that these procedural requirements extend to the actions of school boards in book removal cases.[319]

According to the court in *Sheck,* the procedural requirements of the fourteenth amendment may demand that the school board show that it rationally could be concluded that exposure to the removed book might be harmful to the students.[320] The court suggested further that a showing of harm resulting to some students would not support a finding that the book is harmful to all students in the school.[321] Thus, the court suggested that the means employed by a school board to proscribe protected speech must be closely tailored to the goal of eradicating the harm caused by the retention of the book or certain passages therein.[322] The court found that the school board in *Sheck* acted pur-

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[311] *Id.*
[312] *Id.* at 687-88.
[313] *Id.*
[314] *See supra* note 313 and accompanying text.
[315] *Sheck,* 530 F. Supp. at 689-93.
[316] *Id.* at 690.
[317] *Id.*
[318] *Id.*
[319] *Id.* at 691.
[320] *Id.*
[321] *Id.*
[322] *Id.* at 692-93. This discussion of a closely tailored means test is reflective of the pro-

suant to no procedural ground rules.[323] Therefore, the court determined that the actions of the school board were seriously deficient due to their procedural irregularity, arbitrariness, vagueness, and overbreadth.[324]

Thus, *Sheck* and *Pratt,* the two latest lower federal court cases considering the removal of educational materials from school libraries and curricula, represent a departure from the point of view espoused by the circuit courts in *Zykan* and *Pico,*[325] while returning to the philosophy of the *Minarcini* line of cases.[326] The *Minarcini* line of cases recognized the students' right of access to information as the first amendment right implicated by the book removal decisions of local school authorities.[327] The Second Circuit in *Pico,* on the other hand, failed to recognize the right of access and decided the case with reference to the first amendment doctrine of freedom of expression.[328] By doing so, the Second Circuit noted that in most book removal cases freedom of expression would not be sharply or directly implicated.[329] In finding for the plaintiffs under such a standard, the facts presented in *Pico* constituted an atypical case — an exception as opposed to the rule. The Second Circuit held, in short, that the procedural irregularities attendant to the school boards' actions in *Pico* could result in an impermissible chilling of protected expression.[330] In *Pratt* and *Sheck,* the plaintiffs were presented with a less restrictive initial burden. Since the right implicated was the right of access to information, the plaintiffs had to demonstrate only that a book with proven educational value was removed from the library.[331] Once this is established, a double burden is shifted to the defendant school board. The school board must prove not only that it had a legitimate and substantial government interest in removing the book,[332] but also that the manner in which these interests were pursued was closely tailored to meet these permissible educational goals.[333]

The split among these courts is significant in several respects. First, the courts differ in what first amendment right they consider implicated by book removal decisions. While the Second Circuit in *Pico* analyzed book removals with reference to the first amendment right of free expression, the Eighth Circuit in *Pratt* and the Maine District Court in *Sheck* recognized and applied the first amendment right of access to information. Second, while the courts in *Zykan* and *Pico* supported a greater degree of discretion for local school

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cedural burdens placed on the school board by the Second Circuit in *Pico; see supra* note 235 and accompanying text.

[323] *Sheck,* 530 F. Supp. at 692.

[324] *Id.* at 692 n.19.

[325] *See supra* notes 186-254 and accompanying text.

[326] *See supra* notes 156-185 and accompanying text.

[327] *See supra* notes 158-59, 171, 180 and accompanying text.

[328] *See supra* notes 227-31, 237-38 and accompanying text.

[329] *See supra* note 245 and accompanying text.

[330] *See supra* note 246 and accompanying text.

[331] *See supra* notes 269, 310 and accompanying text.

[332] *See supra* note 277 and accompanying text.

[333] *See supra* notes 315-24 and accompanying text.

authorities,[334] the courts in *Pratt* and *Sheck* imposed greater restrictions upon the exercise of this traditional discretion.[335] Finally, these differences in philosophy resulted in two significantly different standards of review. Where the Second Circuit's standard in *Pico* made it very difficult for student/plaintiffs to establish a prima facie case,[336] the standards adopted in *Pratt* and *Sheck* lightened this burden significantly, and shifted the burden of demonstrating a legitimate and substantial interest to the school board at a much earlier point in time.[337] In short, while the standards of *Pico* and *Zykan* favored defendant school boards in book removal cases, the standards of *Pratt* and *Sheck* favored the student/plaintiffs. In 1981, the school board in *Pico* petitioned the United States Supreme Court for certiorari, and in October this petition was granted.[338] This was significant since the Supreme Court would now have an opportunity to resolve the split among the lower federal courts, and *Pico* would become the first book removal case argued before the highest court in the land. A detailed discussion of the Supreme Court's findings in *Pico* follows in the next section of this note.

D. *The View of the United States Supreme Court*

When the Supreme Court considered the question of secondary school library book removals in *Board of Education v. Pico,*[339] the Justices were unable to settle many of the substantive issues raised by the federal district and circuit courts. This indecisiveness was due in part to the fact that the Court from the outset significantly narrowed its scope of inquiry in *Pico*.[340] Moreover, when specific substantive issues were raised, such as the existence of a first amendment right of access to information, the Justices were unable to arrive at a majority opinion, as is evidenced by the seven separate opinions filed in the case.[341] This section examines the Supreme Court's decision in detail, review-

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[334] *See supra* notes 310-11 and accompanying text.

[335] *See supra* notes 269-87, 315-24 and accompanying text.

[336] Under *Pico* the plaintiff must demonstrate that the school board's action infringed upon its first amendment right of free expression. This was accomplished by showing that the irregular and ambiguous nature of the school board's procedures resulted in impermissible first amendment chilling. *See supra* notes 226-31 and accompanying text.

[337] By recognizing the first amendment right of access to information, a plaintiff was no longer required to demonstrate, through the indirect and difficult route set forth in *Pico,* that its free speech was chilled. Since the right of access became the operative constitutional right implicated by the removal of a book, the plaintiff could reach the prima facie plateau by demonstrating that the book had been removed, thereby denying access to it. *See supra* note 310 and accompanying text.

[338] 102 S. Ct. 385 (1982).

[339] 102 S. Ct. 2799 (1982).

[340] See text and notes at notes 346-54 *infra*.

[341] Justice Brennan wrote the plurality opinion, and was joined by Justice Marshall and Justice Stevens. Justice Blackmun concurred in part and concurred with the judgment. Justice White wrote an opinion concurring in the judgment only. Justice Burger wrote a dissenting opinion which was joined by Justices Powell, Rehnquist and O'Conner. Justices Rehnquist, Powell and O'Conner also wrote separate dissenting opinions.

ing the factual and procedural history of the case as well as analyzing the opinions of the Justices including the plurality opinion of Justice Brennan. The section concludes with a discussion of the important issues left unresolved after *Pico* and the resultant lack of a clear standard of review by which federal courts may resolve such disputes in the future.

The Supreme Court began its inquiry by noting the procedural history of *Pico*. The Court observed that the District Court had granted summary judgment in favor of the defendant school board, reasoning that the board had acted upon its belief that the removed books were vulgar and, although the school board's decision may have reflected a misguided educational philosophy, their actions did not constitute a "sharp and direct infringement of any first amendment right."[342] The Court of Appeals for the Second Circuit reversed, holding that due to the irregular and unusual manner in which the board affected the book removal, the board was obliged to demonstrate a reasonable basis for interfering with the students' first amendment rights.[343] The Second Circuit concluded that since the board had not presented sufficient justification for their action, the students should have "been offered an opportunity to persuade a finder of fact that the ostensible justifications for [the school board's] actions . . . were simply pretexts for the suppression of free speech."[344] The Supreme Court granted the school board's petition for certiorari.[345]

Justice Brennan, writing the plurality opinion, noted at the outset that three factors served to limit the proper scope of the Supreme Court's inquiry in *Pico*. First, since the books removed in *Pico* were *library* books, the Court was not required to consider the issues raised in *Meyer v. Nebraska*[346] and *Epperson v. Arkansas*,[347] where the authority of the state to regulate school curriculum and classroom activities was questioned.[348] Second, since *Pico* involved only book removals, the Court concluded that it need not consider the question of a school board's power to regulate the acquisition of library books.[349] Third, since *Pico* currently involved an appeal from the District Court's decision to grant summary judgment, the Court reasoned that the substantive question before it was constrained by the procedural posture of the case.[350] Consequently, the Court framed the issue before it in the form of two distinct questions.

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[342] *Pico*, 102 S. Ct. at 2804, *quoting* Pico v. Bd. of Educ., 474 F. Supp. 387, 397 (E.D.N.Y. 1979).

[343] *Pico*, 102 S. Ct. at 2804, *citing* Pico v. Bd. of Educ., 638 F.2d 404 (2d Cir. 1980).

[344] *Pico*, 102 S. Ct. at 2804-05, *quoting* Pico v. Bd. of Educ., 638 F.2d at 417.

[345] 102 S. Ct. 385 (1981).

[346] 262 U.S. 390 (1923), *see supra* notes 35-37 and accompanying text.

[347] 393 U.S. 97 (1968), discussed *supra* note 48.

[348] *Pico*, 102 S. Ct. at 2805.

[349] *Id.*

[350] *Id.* at 2806. Since the appeal was from the summary judgment granted by the District Court, the Court noted that: "We can reverse the judgment of the Court of Appeals, and grant petitioners' request for reinstatement of the summary judgment in their favor, only if we determine that 'there is no genuine issue as to any material fact,' and that petitioners are 'entitled to a judgment as a matter of law.' Fed. Rule Civ. Proc. [sic] 56(c) [sic]." *Id.*

First, the Court sought to decide whether the first amendment imposed *any* limitations upon the discretion of the school board to remove books from the school library.[351] Second, construing the affidavits and other evidence presented to the District Court most favorably to the student/plaintiffs, it addressed whether there was a genuine factual dispute about the school board's violation of those limitations.[352] If either of the two questions were answered by the Supreme Court negatively, the Court reasoned that the summary judgment issued by the District Court should be reinstated.[353] If both questions were answered in the affirmative, the Court observed that the judgment of the Second Circuit should be affirmed and the case should be remanded for a trial on the facts.[354]

Initially, Justice Brennan observed that school boards had traditionally and legitimately exercised broad discretion in the management of local school affairs.[355] This discretion included the important role of the school board in transmitting community values by virtue of their choice of educational policy.[356] Despite this high degree of discretion, however, the Court recognized that local school boards must discharge their " 'important, delicate and highly discretionary functions' within the limits and constraints of the First Amendment."[357] Among the first amendment rights enjoyed by students, according to Justice Brennan, is the right to receive ideas.[358] Brennan observed that this right had been recognized in a number of contexts by the Supreme Court, and reasoned that this right was even more appropriate and important in the context of the school library.[359]

In recognizing that secondary school students enjoyed a first amendment right of access to information, Justice Brennan was careful to point out that not all book removal decisions would violate this right.[360] The Court suggested that if the school board had removed the books because they were "pervasively vulgar," or because they were educationally unsuitable, they would have been acting within the proper scope of their discretion.[361] These motives, according

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[351] *Id.*

[352] *Id.*

[353] *Id.*

[354] *Id.*

[355] *Id.*

[356] *Id.* The Court stated: "We are therefore in full agreement with petitioners that local school boards must be permitted 'to establish and apply their curriculum in such a way as to transmit community values,' and that 'there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.' " *Id.*

[357] *Id.* at 2806-07.

[358] *Id.* at 2808.

[359] *Id.* Justice Brennan cited several cases in support of this proposition: Stanley v. Georgia, 394 U.S. 557, 564 (1969), *see supra* note 77 and accompanying text; Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972), *see supra* note 79 and accompanying text; Martin v. Struthers, 319 U.S. 141, 143 (1943), *see supra* notes 73-76 and accompanying text.

[360] *Pico*, 102 S. Ct. at 2810.

[361] *Id.* The language used by Justice Brennan in the plurality opinion suggests that the burden of proving legitimate motivation lies with the school board in these cases: " . . . an un-

to the Court, would not "carry the danger of an official suppression of ideas," and would therefore not violate the first amendment.[362] If, however, the school board had *intended* to deny students access to ideas with which the school board members disagreed, and if such intent was a decisive factor in the removal decision,[363] then it could be said that the school board had violated the Constitution in the exercise of its discretion.[364] This standard arises from the Court's belief that official action based upon such motivations would encourage the type of "officially prescribed orthodoxy unequivocally condemned in *Barnette*."[365]

The plurality opinion of Justice Brennan, therefore, decided two important substantive issues which concerned the lower federal courts in the prior decade. First, the opinion recognized that students enjoy a first amendment right of access to information, and that this right extends into the secondary school library context.[366] Second, the opinion enunciated a specific standard of review by which to determine whether the actions of a particular school board infringed upon this newly recognized right. If the decisive factor in the board's book removal decision was to deny students access to certain ideas with which the school board disagreed, the students' first amendment right of access to information would have been violated.[367] This violation is presumably the prima facie violation which plaintiffs in book removal cases must demonstrate in order to avoid an adverse summary judgment. Alternatively, if the school board can demonstrate that such a motive was not decisive, and that their decision was based on a belief that the books were pervasively vulgar or that the books were educationally unsuitable, there would be no first amendment violation.[368] In applying this standard of review to the facts presented in *Pico,* Justice Brennan concluded that the school board was not entitled to a judgment as a matter of law.[369] Consequently, the case was remanded for trial in order to

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constitutional motivation would not be demonstrated if it were shown that petitioners [school board] had decided to remove the books at issue because those books were pervasively vulgar. . . . And again . . . if it were demonstrated that the removal decision was based solely upon the 'educational suitability' of the books in question." *Id.*

[362] *Id.*

[363] The Court, in a footnote, defined "decisive" in the following manner: "By 'decisive factor' we mean a 'substantial factor' in the absence of which the opposite decision would have been reached." *Id.* at 2810 n.22.

[364] *Id.* at 2810.

[365] *Id.* West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), was the case in which the Supreme Court struck down a local ordinance requiring all students and teachers to salute the flag. For a discussion of this case and its holding, see *supra* notes 41-46 and accompanying text.

[366] *Pico,* 102 S. Ct. at 2808-09.

[367] *Id.* at 2810.

[368] *Id.*

[369] In making this decision, the Court examined the procedure used by the school board in effectuating its removal decision. The Court noted that: "Respondents alleged that in making their removal decision petitioners ignored the 'advice of literary experts,' the views of 'librarians and teachers within the Island Trees School system,' and the guidance of 'publications that rate books for junior and senior high school students.' " *Id.* at 2812. The Court further observed the:

determine the school board's motivation for removing the books.[370]

Justice Blackmun's concurring opinion likewise recognized the importance of the student's right of access to certain educational material.[371] Justice Blackmun, however, determined this right to be narrower than envisioned by the plurality.[372] He suggested that the state should not be under an obligation to provide students with information and ideas, a concept which may arise from a broadly stated right of access to information.[373] Justice Blackmun contended that the student's rights were violated when a school board discriminated between ideas, deciding to deny access to some for partisan or political reasons.[374] Therefore, Justice Blackmun modified slightly the standard of review advocated by the plurality, proposing that school officials may not "remove books for the *purpose* of restricting access to the political ideas or social perspectives" contained therein when the action is motivated by the school board's disapproval of the ideas involved.[375] Because Justice Blackmun believed that the plurality had adopted a standard similar to his own, he joined in all but one part of the plurality opinion.[376]

Justice White, concurring in the judgment only, noted that since the Court of Appeals had determined that there was a material issue of fact surrounding the underlying reasons behind the school board's action, the case

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"Respondents also claimed that petitioners' decision was based solely on the fact that the books were named on the PONY-U list received by petitioners [school board members] Ahrens, Martin and Hughes, and that petitioners 'did not undertake an independent review of other books in the [school] libraries.' " *Id.* The Court further observed that the Board ignored the advice of the school superintendent to follow the established policy to handle such matters in the district, and instead pursued the matter employing their own "extraordinary procedure. . . ." *Id.* Construing the above-mentioned allegations along with other affidavits and evidentiary material in a manner favorable to the student/respondents, the Court concluded that petitioners were not "entitled to a judgment as a matter of law." *Id.* A critical material issue of fact regarding the school board's motivations remained unresolved, and as a result a summary judgment was not in order. *Id.*

[370] *Id.*

[371] *Id.* at 2813-14 (Blackmun, J., concurring in part and concurring in the judgment).

[372] *Id.*

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

[374] *Id.* Justice Blackmun stated in this regard: " . . . our precedents command the conclusion 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." *Id.*

[375] *Id.*

[376] *Id.* at 2816 (Blackmun, J., concurring in part and concurring in the judgment). The distinction between the standard of the plurality and that of Justice Blackmun appears to be illusory. Both hold that a school board may not remove books for the purpose of denying access to ideas with which the individual board members may disagree. Both also appear to suggest that the plaintiff, in order to establish a prima facie case, must demonstrate that the school board acted upon this impermissible motive. Justice Blackmun does specifically list more permissible motives than does the plurality. He suggests that a school board may constitutionally remove books for reasons including relevancy to the curriculum, quality of writing style, space and financial limitations, offensive language, themes which are psychologically and intellectually inappropriate for the age group, and a number of other politically neutral considerations. *Id.* at 2815 (Blackmun, J., concurring in part and concurring in the judgment).

Justice Blackmun himself does perceive one major difference between the standard espoused by the plurality and his own: "In effect, my view presents the obverse of the plurality's

should be remanded for a factual determination of those issues and a summary judgment should not be granted.[377] He suggested that it was not necessary to reach the constitutional issues and therefore declined to join in the plurality's constitutional analysis.[378] Justice White's position is significant in that it prevented a majority from being formed on the resolution of the critical substantive issues of the first amendment right of access to information and the specific standard of review to be adopted. As it stands, only four Justices ruled in favor of recognizing the right of access, and only four submitted a standard of review.[379]

In a dissenting opinion,[380] Chief Justice Burger suggested initially that nowhere had the Supreme Court ever recognized a first amendment right of access with respect to secondary school students.[381] The Chief Justice expressed the opinion that such a right would impose upon the government an obligation to provide students with continuing access to particular books.[382] The Chief Justice suggested that prior cases discussing a "right to receive information" did not grant the "concomitant right to have those ideas affirmatively provided at a particular place by the government."[383] He suggested that since the school board is an elected body, they are, in essence, expressing the views of the community which placed them in office.[384] Further, the Chief Justice reasoned that since the students could obtain the removed books elsewhere — book stores, public libraries — there was no need to impose upon a school board an obligation to provide such materials.[385] Finally, the Chief Justice questioned the plurality's application of a right of access to the removal of books only, and suggested that such a right may be expanded into a right to have certain books *acquired* by school boards.[386] The Chief Justice concluded that book removal

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analysis: while the plurality focuses on the failure to provide information, I find crucial the State's decision to single out an idea for disapproval and then deny access to it." *Id.* at 2814 n.2 (Blackmun, J., concurring in part and concurring in the judgment). This observation by Justice Blackmun is particularly interesting since the plurality expressly stated: " . . . 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 their schools. Because we are concerned in this case with the suppression of ideas, our holding today affects only the discretion to *remove* books." *Id.* at 2810 (emphasis the Court's). It appears most likely that Justice Blackmun fears that in future cases where the Court may be asked to rule on the constitutionality of a school board deciding *not* to add certain books to the school library, the plurality would differ in its application of the first amendment right of access significantly from how he would see it applied. In the context of book removal cases, however, the standards of the plurality and Justice Blackmun are effectively the same.

[377] *Id.* at 2816 (White, J., concurring in the judgment).

[378] *Id.* at 2817 (White, J., concurring in the judgment).

[379] These four include the three Justices joining the plurality opinion as well as Justice Blackmun.

[380] This dissenting opinion of the Chief Justice was joined by Justices Rehnquist, Powell and O'Conner.

[381] *Id.* at 2819 (Burger, C.J., dissenting).

[382] *Id.*

[383] *Id.*

[384] *Id.* at 2820-21 (Burger, C.J., dissenting).

[385] *Id.* at 2821 (Burger, C.J., dissenting).

[386] *Id.*

decisions were well within the constitutional scope of authority of the school boards, and that such decisions should not be overturned by federal judges.[387]

Justice Powell, in a separate dissenting opinion, echoed the concerns of the Chief Justice with regard to recognition of a broad first amendment right of access to information in the context of public school libraries.[388] He further suggested that a duly appointed school board should remain free to make such decisions, and should not be constitutionally required to "promote ideas and values repugnant to a democratic society or to teach such values to children."[389] Justice Powell attached to his opinion an Appendix containing excerpts from the removed books which, presumably, he considered to be vulgar or repugnant.[390] It is apparent that Justice Powell was concerned with the content of these books, and it is likely that the nature of these phrases influenced his decision in voting to uphold the power of the school board to remove such material.

Justice Rehnquist began his dissenting opinion by suggesting that the plurality opinion had construed the facts of the case more favorably to the students than they had done themselves.[391] After reviewing the exerpts provided in the affidavits and evidence, he concluded that eight of the nine books removed contained "demonstrable amounts" of profanity and vulgarity, and the ninth contained nothing which could be termed partisan or political.[392] Consequently, Justice Rehnquist reasoned that the school board had acted in a permissible manner even under the standard set forth by the plurality.[393]

Justice Rehnquist next distinguished the dual roles of the government as sovereign and educator, emphasizing his belief that different levels of scrutiny may be appropriate depending upon which role the state was undertaking in a given factual setting.[394] In its role as educator, Justice Rehnquist concurred with the opinion of the Seventh Circuit in *Zykan v. Warsaw Community School Corp.*[395] that school boards should be allowed to make educational decisions "based upon their personal social, political and moral views."[396] Since the

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[387] *Id.*

[388] *Id.* at 2822 (Powell, J., dissenting). Justice Powell stated that " . . . this new found right finds no support in the First Amendment precedents of this Court." *Id.*

[389] *Id.* at 2823 (Powell, J., dissenting).

[390] *Id.* at 2823-27 (Powell, J., dissenting).

[391] *Id.* at 2827-28 (Rehnquist, J., dissenting). Justice Rehnquist notes here the local rule 9(g) of the district court which required the parties to set forth their own version of the facts in the case. *Id.* He suggested that the respondents were entitled to have these facts presented to the Supreme Court for review, but were not entitled to an interpretation of the facts more favorable than contained in their own rule 9(g) statement. *Id.* at 2828 (Rehnquist, J., dissenting). Justice Rehnquist contends that this more favorable interpretation was granted by the plurality in this case. *Id.*

[392] *Id.*

[393] *Id.*

[394] *Id.* at 2829 (Rehnquist, J., dissenting).

[395] 631 F.2d 1300 (7th Cir. 1980). For a discussion of the decision of the Seventh Circuit in *Zykan*, see *supra* notes 189-219 and accompanying text.

[396] *Pico,* 102 S. Ct. at 2829-30 (Rehnquist, J., dissenting).

school board in this case was merely effectuating educational policy and not proscribing certain materials to society as a whole, such actions in the role of educator "do not raise the same First Amendment concerns as actions by the government as sovereign."[397] Justice Rehnquist viewed the actions of the school board in *Pico* to be no more than part and parcel of the daily educational decisions school boards must face when confronted with limited resources of time, space and money.[398] Moreover, since the removed books could be obtained elsewhere by the students, Justice Rehnquist reasoned that "the benefits to be gained from exposure to those ideas have not been foreclosed by the State."[399]

Justice Rehnquist, like the Chief Justice and Justice Powell, expressed discomfort with the plurality's recognition of a first amendment right of access to information in the context of secondary school libraries.[400] He observed that other cases involving the first amendment and education were limited to the right of student expression, and did not support recognition of a right of access to information.[401] He further observed that those Supreme Court cases which did discuss the right of access to information did so in contexts other than public education, and concluded that nowhere had the Supreme Court ruled that high school students possess such a right.[402] Justice Rehnquist concluded his discussion of the right of access by rejecting the contention of the plurality that such a right flowed as a natural corollary of the first amendment doctrine of freedom of expression in this case.[403] He suggested that in those cases which recognized such a right to receive ideas, it was first established that there existed a willing speaker whose right to speak or communicate those ideas was constitutionally protected.[404] Justice Rehnquist reasoned that it would be ludicrous to "contend that all authors have a constitutional right to have their books placed in junior high school and high school libraries."[405] Without such a right, however, Justice Rehnquist concluded that Supreme Court precedent would not recognize the reciprocal right to receive information.[406]

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[397] *Id.* at 2830 (Rehnquist, J., dissenting). Justice Rehnquist illustrated his point by example: "Had petitioners been the members of a town council, I suppose all would agree that, absent a good deal more than is present in this record, they could not have prohibited the sale of these books by private booksellers within the municipality." *Id.* at 2829 (Rehnquist, J., dissenting). Considering the educational role played by a school board, however, Justice Rehnquist concludes that a school board must be given a far greater deal of discretion and that book removals in the context of school libraries would be, therefore, constitutional. *Id.* at 2830 (Rehnquist, J., dissenting).

[398] *Id.* at 2835 (Rehnquist, J., dissenting).

[399] *Id.* at 2831 (Rehnquist, J., dissenting).

[400] *Id.* at 2830 (Rehnquist, J., dissenting).

[401] *Id.* Justice Rehnquist mentioned two other Supreme Court cases dealing with the first amendment in the context of public education: Tinker v. Des Moines School District, 393 U.S. 503 (1969); West Virginia v. Barnette, 319 U.S. 624 (1943).

[402] *Pico*, 102 S. Ct. at 2830 (Rehnquist, J., dissenting).

[403] *Id.* at 2831-32 (Rehnquist, J., dissenting).

[404] *Id.* at 2831 (Rehnquist, J., dissenting).

[405] *Id.*

[406] *Id.*

Finally, Justice Rehnquist contended that the very role public education plays in society supports the proposition that school boards should be granted a high degree of discretion in discharging their responsibilities.[407] He suggested that schools teach students the basic skills necessary to function in society and further inculcate the fundamental values "necessary to the maintenance of a democratic political system."[408] Consistent with these educational goals, he stressed, is the requirement of an orderly exposure to information relevant for the individual development of the student.[409] Since secondary education must be targeted toward the teaching of basic skills and ideas, Justice Rehnquist claimed that a high school library cannot provide the same type of "free-wheeling inquiry" possible in a public or university library.[410] Concluding, Justice Rehnquist stated that since the removal of a library book should be considered a routine decision school boards are forced to make when confronted with the aforementioned goals, ". . . the First Amendment right to receive information simply has no application to the one public institution which, by its very nature, is a place for the selective conveyance of ideas."[411]

Justice O'Conner, in her brief dissent, observed that the act of removing books from school libraries is constitutionally within the powers of local school boards provided it does not interfere with the right of the students to "read the material and to discuss it."[412] Justice O'Conner further suggested that although she may not have personally agreed with all aspects of the decision of the school board in *Pico,* she did not believe the courts should make decisions properly relegated to elected school board members.[413] Given the brevity of her opinion, determining the nature and extent of her cryptic reference to a student's "right to read," is impossible.[414] Even if she does implicitly recognize some type of right of access to information, she was persuaded in this case that any such right was protected by the availability of the removed books outside the school library.

In analyzing the import of *Board of Education v. Pico* for the resolution of future book removal actions brought in the federal courts, it is important to bear in mind that no five Justices were able to agree on the substantive constitutional issues presented in the plurality opinion. With regard to the students' right to receive information, only four Justices can be said to have recognized this right.[415] Three Justices can be said to have expressly rejected

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[407] *Id.* at 2832 (Rehnquist, J., dissenting).
[408] *Id.*
[409] *Id.*
[410] *Id.*
[411] *Id.*
[412] *Id.* at 2835 (O'Conner, J., dissenting).
[413] *Id.*
[414] *Id.*
[415] These four include the three Justices signing the plurality opinion as well as Justice Blackmun. *See id.* at 2808-09; *Id.* at 2814 (Blackmun, J., concurring in part and concurring in the judgment).

the application of a right of access to book removal cases,[416] one has mentioned the existence of an undefined "right to read,"[417] and one has expressed no opinion on the constitutional issues presented in the case.[418] Concerning the standard of review appropriate in book removal cases, only three Justices expressly concurred in that posed by Justice Brennan's plurality opinion, while another Justice offered a slightly modified version.[419] Taking the plurality opinion as the present view of the Supreme Court, a plaintiff, in order to establish a prima facie constitutional violation, must demonstrate that the school board *intended* to suppress certain partisan or political ideas unfavorable to its individual members.[420] In turn, a school board may prove that it acted legitimately by removing books based on the belief that they were pervasively vulgar or that they were educationally unsuitable for retention in the library.[421]

In light of the split in the Court over these substantive constitutional issues, and due to the inability of the Court to form a majority on one particular standard of review, three major issues involved in book removal cases remain clouded after *Board of Education v. Pico*. First, it remains unclear what first amendment right, if any, is implicated when a school library book is removed from a library. One possibility is a broad right of access to information, recognized by the plurality opinion of Justice Brennan[422] and espoused by the courts in *Minarcini*,[423] *Pratt*[424] and *Sheck*.[425] Another possibility is the more limited right not to be denied access to information based on partisan political considerations, expressed in Justice Blackmun's concurring opinion in *Pico*.[426] Finally, it may be that the availability of the removed books precludes the application of a right of access altogether,[427] and these cases must be analyzed by reference to the more traditional first amendment doctrine of freedom of expression.[428]

Secondly, given the split among the Justices, the appropriate standard of review in future book removal cases remains unclear. The Supreme Court did not discuss what type of evidence is sufficient to demonstrate that a school

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[416] These three include Chief Justice Burger and Justices Powell and Rehnquist. *See id.* at 2818 (Burger, C.J., dissenting); *Id.* at 2822 (Powell, J., dissenting); *Id.* at 2830 (Rehnquist, J., dissenting).

[417] Justice O'Conner made reference to an undefined "right to read." *Id.* at 2835 (O'Conner, J., dissenting).

[418] *See id.* at 2817 (White, J., concurring in the judgment).

[419] *Id.* at 2810; *Id.* at 2814 (Blackmun, J., concurring in part and concurring in the judgment).

[420] *Id.* at 2810.

[421] *Id.*

[422] *Id.* at 2808-09.

[423] Minarcini v. Strongsville City School Dist., 541 F.2d 577, 583 (6th Cir. 1976).

[424] Pratt v. Independent School Dist., 670 F.2d 771, 777 (8th Cir. 1982).

[425] Sheck v. Baileyville School Committee, 530 F. Supp. 679, 687 (D. Me. 1982).

[426] Bd. of Educ. v. Pico, 102 S. Ct. 2799, 2814 (1982) (Blackmun, J., concurring in part and concurring in the judgment).

[427] *Id.* at 2832 (Rehnquist, J., dissenting).

[428] *See generally* President's Council v. Community School Bd., 457 F.2d 289 (2d Cir. 1972).

board has intended to suppress unfavorable ideas. Moreover, when considering whether to remove certain works from a school library, it is unclear whether school boards are limited to considerations of vulgarity and educational quality[429] or if they may also permissibly remove books for reasons such as a lack of shelf space or poor physical condition of the book itself.[430]

Finally, the question of procedural regularity was not even discussed by the Supreme Court. Whether school board decisions, tainted by procedural irregularities, should be considered constitutionally deficient is uncertain.[431] While some courts have considered a showing of procedural regularity to be a part of the school board's burden in justifying their book removal decisions,[432] others have ruled that procedural irregularities may be exposed by plaintiffs in establishing a prima facie constitutional violation.[433] Must school boards hold public hearings before deciding to remove books from school libraries,[434] or may a school board make removal decisions based solely upon their personal social, political or moral views?[435]

In short, except for the plurality opinion, joined in substance by at most four of the nine Supreme Court Justices, lower courts are left with no authoritative guidelines according to which the complicated and controversial issues presented in typical book removal cases may be resolved.

III. RECOMMENDATION

Given the rather confused state of the law in this area following *Board of Education v. Pico,* this note now draws upon the principles discussed by the Supreme Court as well as by other federal courts in cases discussed in prior sections, and offers the following recommendation concerning the appropriate methodology for resolving future book removal disputes. This recommended standard for reviewing whether book removal decisions violate first amendment rights consists of three parts. First, it is necessary to set forth what the plaintiff must prove in order to establish a prima facie constitutional violation. Second, after the prima facie threshold has been crossed, it must be asked whether the state had a sufficient government interest in removing the book to justify interference with constitutional rights. Third, if the school board proves

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[429] *See, e.g.,* Bd. of Educ. v. Pico, 102 S. Ct. 2799, 2810 (1982).

[430] *See, e.g.,* Minarcini v. Strongsville City School Dist., 541 F.2d 577, 581 (6th Cir. 1976).

[431] The existence of procedural irregularities was considered determinative by at least one court in deciding a book removal challenge. *See* Pico v. Bd. of Educ., 638 F.2d 404, 414-15 (2d Cir. 1980).

[432] *See, e.g.,* Sheck v. Baileyville School Committee, 530 F. Supp. 679, 689-90 (D. Me. 1982).

[433] *See, e.g.,* Pico v. Bd. of Educ., 638 F.2d 404, 414-15 (2d Cir. 1980).

[434] Public meetings were held prior to the final book removal decision in at least one case. *See* Pratt v. Independent School Dist., 670 F.2d 771, 774 (8th Cir. 1982).

[435] This was held to be permissible in at least one book removal case. *See, e.g.,* Zykan v. Warsaw Community School Corp., 631 F.2d 1300, 1305 (7th Cir. 1980). This principle was quoted approvingly by Justice Rehnquist in his dissenting opinion in Board of Education v. Pico. *See, e.g.,* Bd. of Educ. v. Pico, 102 S. Ct. 2799, 2829-30 (1982) (Rehnquist, J., dissenting).

it had such an interest, it must be determined whether the means used to effect this regulation were closely tailored to meet the asserted government interest.

A. *Prima Facie Violation*

It is submitted that a prima facie violation of the first amendment right of access to information is established when a plaintiff demonstrates: (1) a book of educational value has been removed from the school library by the school board or any local official acting in his capacity as a representative of the school board or of the state; and (2) by removing the book, the school board intended to suppress access to ideas which were unfavorable to members of the school board.

This standard of review rests upon the recognition that public high school students enjoy a limited first amendment right of access to the information and ideas contained in school library books. Recognition of an absolute right of access in the public school library context would result in at least two undesirable consequences. First, it would render a school board susceptible to a federal lawsuit every time it decided to remove a book from a school library shelf, regardless of the motivation behind the removal decision. Second, recognition of an absolute right of access logically, if not likely, would result in the imposition of a constitutionally based duty to *acquire* books upon a school board.[436] Given the inevitable physical and financial constraints which confront school boards daily, this result would be no less than disastrous.

In contrast, the limitation placed on the application of the right of access to book removal cases submitted by this note is desirable for several reasons. Under the proposed standard of review, in order to establish a prima facie first amendment violation, a plaintiff must prove, through the presentation of evidence to a finder of fact, that the desire to deny access to ideas disagreeable to board members was *a* motivating factor behind the school board's book removal decision. This prima facie test avoids the problems mentioned above, and further insures that book removal decisions are made in the best interest of the students and not as part of a personal moral or political crusade by certain school board members.[437] While preserving the traditional, legitimate authori-

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[436] This potential consequence of a broadly recognized right of access to information was noted by two Justices in their dissenting opinions in *Pico*. *See, e.g.*, Bd. of Educ. v. Pico, 102 S. Ct. 2799, 2819 (1982) (Burger, C.J., dissenting); *Id.* at 2823 (Powell, J., dissenting).

[437] Judge Sifton, writing for the plurality in *Pico* at the circuit court level, stated in this regard:

> Where, however, as in this case, evidence that the decisions made were based on defendants' moral or political beliefs appears together with evidence of procedural and substantive irregularities sufficient to suggest an unwillingness on the part of school officials to subject their political and personal judgments to the same sort of scrutiny as that accorded other decisions relating to the education of their charges, an inference emerges that political views and personal taste are being asserted not in the interests of the children's well-being, but rather for the purpose of establishing those views as the correct and orthodox ones for all purposes in the particular community.

Pico v. Bd. of Educ., 638 F.2d 404, 417 (2d Cir. 1980).

ty of school boards to direct local educational policy,[438] this standard protects the rights of students to enjoy continued access to educationally relevant books which have been placed in their school libraries.[439] Finally, by allowing plaintiffs to cross the prima facie threshold by proving that an impermissible motive was but one of many possible factors leading to a book removal decision, school boards employing such facially tainted decision-making procedures will be prevented from successfully having these cases "nipped in the bud" by early dismissal orders prompted by unduly difficult prima facie burdens.[440]

B. *Substantial and Legitimate Government Interests*

Under the proposed standard of review, once the plaintiff has established a prima facie constitutional violation, the book removal actions of the school board are considered to be presumptively violative of the first amendment right

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[438] *See infra* notes 25-34 and accompanying text.

[439] In recognizing the students' first amendment rights of access to information, Justice Brennan, writing for the plurality in Board of Education v. Pico, stated: " . . . the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press and political freedom." Board of Education v. Pico, 102 S. Ct. 2799, 2808 (1982). Justice Brennan, discussing the relevance of the right of access to book removal cases specifically, stated: " . . . the special characteristics of the school *library* make that environment especially appropriate for the recognition of the First Amendment rights of students." *Id.* at 2809 (emphasis the Court's).

[440] This point is evidenced by observing the results reached by courts in various book removal cases, and by comparing their individual standards of review. In the 1972 case of President's Council v. Community School Board, the Second Circuit did not recognize the students' first amendment right of access, but rather decided the case by reference to the more traditional first amendment doctrine of freedom of expression. In dismissing the plaintiff's action, the court stated: "To suggest that the shelving or unshelving of books presents a constitutional issue, particularly where there is no showing of a curtailment of freedom of speech or thought, is a proposition we cannot accept." President's Council v. Community School Bd., 457 F.2d 289, 293 (2d Cir. 1972). The Seventh Circuit, in Zykan v. Warsaw Community School Corp., set forth a prima facie test which required plaintiffs to demonstrate that local school officials had begun to "substitute rigid and exclusive indoctrination for the mere exercise of their prerogative to make pedagogic choices regarding matters of legitimate dispute." Zykan v. Warsaw Community School Corp., 631 F.2d 1300, 1306 (7th Cir. 1980). In dismissing the plaintiff's action, the court observed that the students had not demonstrated a systematic effort to "exclude a particular type of thought" from the school library. *Id.* The court further noted that the plaintiffs could obtain the books from other sources, and as a result the board had not "deprived them of all contact with the material in question . . ." *Id.* In these cases where the courts have imposed a particularly difficult burden of proof on the plaintiffs initially, the cases have been dismissed without reaching a discussion of the actual reasons for the removal of the specific books which originally gave rise to the lawsuit.

In contrast, courts which have recognized a first amendment right of access to information have generally reached the second level of constitutional analysis which probes whether the school board had a legitimate and substantial government interest in deciding to remove certain books from the school libraries. *See, e.g.*, Bd. of Educ. v. Pico, 102 S. Ct. 2799, 2810-11 (1982); Pratt v. Independent School Dist., 670 F.2d 771, 777 (8th Cir. 1982); Minarcini v. Strongsville City School Dist., 541 F.2d 577, 581 (6th Cir. 1976). These courts have actually examined the reasons given by a school board for removing the books in question, and have been able to reach the true merits of the case. Moreover, the courts espousing less burdensome requirements at the prima facie stage have invariably found in favor of the student/plaintiffs.

of access to information.[441] At this point, the burden of proof shifts to the school board to demonstrate that it had a substantial and legitimate government interest in removing the book(s) in question.[442] In order to rebut the presumption established by the plaintiff's prima facie showing, the school board must prove that the stated legitimate and substantial government interest constituted the decisive factor in its decision to remove the book.[443] In opposition to this contention of the school board, the plaintiff should be given the opportunity to demonstrate that the reasons offered by the school board are mere "pretexts" to justify removal actually based on impermissible grounds.[444] In the final analysis, a court will be presented with one decisive question: Was the decisive factor in the school board's book removal decision the legitimate government interest suggested by the school board, or the impermissible motivation to deny access to protected ideas? If the decisive factor is found to be the legitimate government interest, the book removal decision should be upheld. If the removal decision was primarily motivated by the illegitimate desire on the part of school board members to deny students' access to certain protected ideas, the actions of the school board should be struck down as an unconstitutional denial of the students' first amendment rights of access to information.

In general, courts have discussed four types of government interests which may justify a school board's removal of a book, and this note now recommends the adoption of these interests into a standard of review. First, if the school board can prove that it was primarily motivated by the belief that the books were pervasively vulgar[445] or obscene,[446] the removal decision should be

[441] One court went as far as to suggest that the very removal of a library book, "the least obtrusive conventional communication resource available," should "at least presumptively implicate the reciprocal first amendment right of secondary students to receive the information and ideas there written." Sheck v. Baileyville School Committee, 530 F. Supp. 679, 687 (D. Me. 1982).

[442] One court recently set forth this shifting of burdens in the following manner: "Therefore, to avoid a finding that it acted unconstitutionally, the board must establish that a substantial and reasonable governmental interest exists for interfering with the student's right to receive information." Pratt v. Independent School Dist., 670 F.2d 771, 777 (8th Cir. 1982).

This shifting of the burden to the state is further reflective of the form taken by standards of review in equal protection cases. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197-98 (1976) (challenge to Oklahoma drinking age claiming unconstitutional gender-based classification). In setting forth the test, the Court in *Craig* stated that: "To withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.*

[443] The term "decisive factor" here is given the same meaning it was accorded by the Supreme Court in *Pico*. "By 'decisive factor' we mean a 'substantial factor' in the absence of which the opposite decision would have been reached." Bd. of Educ. v. Pico, 102 S. Ct. 2799, 2810 n.22 (1982).

[444] *See, e.g.*, Pico v. Bd. of Educ., 638 F.2d 404, 418 (2d Cir. 1980). The Second Circuit in *Pico* ruled that even if the defendant school board had successfully demonstrated a substantial and legitimate government interest in removing the books in question, the plaintiffs should then be given an "opportunity to persuade the finder of fact that the proffered justifications were mere pretext for an intentional violation of plaintiff's rights." *Id.*

[445] *Id.* at 2810. In this regard, the Court stated: ". . . an unconstitutional motivation would not be demonstrated if it were shown that petitioners had decided to remove the books at issue because those books were pervasively vulgar." *Id.*

[446] The Supreme Court has applied a "variable obscenity" standard to minors in the

upheld. Second, certain physical limitations involved with the operation of a school library may justify the removal of certain works. There are three specific circumstances in which removal should be allowed: (1) when a copy of the book becomes worn out; (2) when a book becomes educationally obsolete; and (3) when limitations on shelf space in the library require the removal of some books.[447] Third, the actions of school boards should be upheld if it can be demonstrated that allowing the book(s) to remain on the shelves would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[448] Finally, if the school board can prove that it was primarily motivated by the belief that the book in question was "psychologically or intellectually inappropriate for the age group,"[449] the removal decision should be upheld.

The government interests listed above not only exhaust those generally recognized by the courts to be "legitimate and substantial," but also provide local school authorities with sufficient room in which to effectuate sound educational policy. By allowing school boards to maintain discipline, manage the physical operation of a library, and protect minors from undue exposure to vulgar and obscene material, it would appear that the traditional authority of school boards to protect the interests and well-being of secondary school students is preserved. Moreover, the adoption of such a standard would provide local school authorities with a much needed set of guidelines within which they may make book removal decisions confident that their actions would withstand a constitutional challenge. The recommended standard, therefore, would provide this area of the law with both predictability and flexibility, recognizing the legitimate interests of school boards and secondary school students alike.

C. *Closely Tailored Means Test*

As the final step in this model standard of review, it is recommended that courts adopt a *closely tailored means* test under which to scrutinize local book removal decisions. Simply stated, this test asks "whether the policy is as narrowly drawn as may reasonably be expected so as to advance the societal interests that justify it, or, to the contrary, does it unduly restrict protected [access] to an extent greater than is essential to the furtherance of those interests?"[450] Under such a test, any otherwise legitimate book removal decision which is overbroad in its scope, i.e., restricting access to more material

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past. *See supra* notes 101-19 and accompanying text.

[447] *See, e.g.*, Bd. of Educ. v. Pico, 102 S. Ct. 2799, 2815 (1982) (Blackmun, J., concurring in part and concurring in the judgment); Minarcini v. Strongsville City School Dist., 541 F.2d 581 (6th Cir. 1976).

[448] This state interest has been held sufficient to justify a school board's restriction of student speech, and, by analogy, should certainly suffice to legitimize restrictions imposed on the more limited student right of access to information. *See, e.g.*, Tinker v. Des Moines Community School Dist., 393 U.S. 503, 509 (1969).

[449] Bd. of Educ. v. Pico, 102 S. Ct. 2799, 2815 (1982) (Blackmun, J., concurring in part and concurring in the judgment).

[450] Pico v. Bd. of Educ., 638 F.2d 404, 415 (2d Cir. 1980).

than is necessary to attain the permissible government interests submitted by the school board, would be struck down as violative of the first amendment right of access to information. The inclusion of such a means test in this standard of review is based upon the principle that "the First Amendment freedoms need breathing space to survive, [and therefore] government may regulate in the area only with narrow specificity."[451] This type of means test further acts to prevent the chilling of protected speech caused by irregular, ambiguous and overbroad book removal policies.[452]

CONCLUSION

In general, school boards, for various reasons, have removed objectionable books and periodicals from high school libraries across the country. In a few instances, plaintiffs have challenged the book removal decisions on first amendment grounds, contending that the removal of the books violated the rights of students in the school. In these cases, courts have wrestled with concepts of "academic freedom," "the marketplace of ideas," and the yet undefined "right to read." The early courts analyzed book removal cases by reference to the traditional first amendment doctrine of freedom of expression, and, not surprisingly, were unable to see how the removal of a book from a school library inhibited the student's right to speak. Increasingly, however, federal district and circuit courts began to incorporate the newly developing right of access into the book removal cases. By early 1982, a strong line of cases had developed recognizing the secondary school student's first amendment right of access to information, while other courts refused to recognize or apply the right. Consequently, the state of the law was confused and no uniform standard of review existed.

In the summer of 1982, the Supreme Court had the opportunity to dispel some of the confusion surrounding book removal litigation when it granted certiorari in *Board of Education v. Pico.* The Court, however, was unable to form a majority opinion and resolve this confusion. The Court split evenly on the issue of the first amendment right of access, and the seven separate opinions set forth no less than four standards of review, none of which could command the support of more than four Justices. The plurality opinion, signed by three Justices and agreed to in principle by another, did recognize a right of access to information, and held that school boards could not remove books in order to deny students access to ideas found to be personally disagreeable to individual school board members. Yet, the plurality opinion neither defined the parameters of the newly recognized right nor established a detailed framework of its proposed standard of review. After *Board of Education v. Pico,* therefore, federal courts are still left with no clear direction for the resolution of book removal disputes.

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[451] *Id.* at 416, *quoting* Keyishian v. Bd. of Regents, 385 U.S. 589, 603-04 (1967). For a discussion of *Keyishian*, see *supra* notes 49-55 and accompanying text.

[452] Pico v. Bd. of Educ., 638 F.2d 404, 415 (2d Cir. 1980).

Although the aftermath of *Board of Education v. Pico* is impossible to predict with certainty, it is clear that book removal decisions by local school boards will continue to be challenged in the federal courts. This note has presented a recommended standard of review by which federal courts may evaluate these constitutional claims in the future. Based upon the recognition of a limited first amendment right of access to information, this recommended standard of review initially requires the plaintiff to demonstrate that the school board was motivated, at least in part, by the desire to deny access to ideas found to be personally objectionable to individual school board members. After establishing a prima facie violation in this manner, the school board must now assume the burden of proving not only that a legitimate and substantial government interest existed concerning their book removal decision, but that this permissible interest was the decisive factor in their ultimate removal decision. In addition, the school board must demonstrate that the means employed in their removal decision constituted the "least restrictive means" of attaining the legitimate government interest cited. If the school board is successful in carrying this burden of proof, their book removal decision should be sustained. If they fail, their decision should be declared unconstitutional and the removed literature should be ordered placed back on the library shelf. The ultimate goal of this recommended standard is to ensure that local school boards, when deciding to remove books from school libraries, are doing so in the best interest of the students while not unconstitutionally restricting the students' first amendment rights of access to important and educationally relevant information.

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