Land & Water Law Review

Volume 18 | Issue 2 Article 17

1983

Constitutional Law - Book Removals from Public School Libraries - First Amendment Rights of Secondary School Students and School Board Authority - Establishing a Constitutional Standard for Review - Board of Education v. Pico

Sherrill Veal Singleton

CONSTITUTIONAL LAW—Book Removals from Public School Libraries—First Amendment Rights of Secondary School Students and School Board Authority— Establishing a Constitutional Standard for Review. ***Board of Education v. Pico,*** **_____ U.S. _____, 102 S.Ct. 2799 (1982).**

In September 1975, three members of the Board of Education, Island Trees Union Free School District No. 26, attended a conference in Watkins Glen, New York, sponsored by Parents of New York United (PONYU).[1] While at the conference, these board members acquired a list of books which were regarded as " 'objectionable' " and " 'improper fare for school students.' "[2] The list was supplemented with excerpts from the listed books and with editorial comments.[3]

In November, the board members checked the card catalogue on the district's senior high school library. They found nine texts[4] that had been included in the PONYU listing of objectionable fare. Later searches revealed another of the listed books in the junior high school library[5] and one in use in the twelfth grade literature class.[6]

In February 1976, these board members met informally with the principal after the regular board meeting to discuss the matter.[7] Consequently, the board issued an unofficial directive[8] requiring the removal of all copies of the books,[9] so that the board members could read them.[10]

The board's actions became publicly known shortly after its order removing the books for review. The board issued a press release to justify its actions which "characterized the removed books as 'anti-American, anti-Christian, anti-Semitic, and just plain filthy'."[11]

1. PONY was described as "a politically conservative organization of parents concerned about education legislation in the State of New York." Board of Educ. v. Pico, _____ U.S. _____, 102 S.Ct. 2799, 2802 (1982).
2. *Id.*
3. Pico v. Board of Educ., 638 F.2d 404, 407 (2d Cir. 1980), *reh'g denied,* (1981).
4. *Slaughter House Five,* by Kurt Vonnegut, Jr.; *The Naked Ape,* by Desmond Morris; *Down These Mean Streets,* by Piri Thomas; *Best Short Stories of Negro Writers,* edited by Langston Hughes; *Go Ask Alice,* of anonymous authorship; *Laughing Boy,* by Oliver LaFarge; *Black Boy,* by Richard Wright; *A Hero Ain't Nothin' But A Sandwich,* by Alice Childress; and *Soul on Ice,* by Eldridge Cleaver. Board of Educ. v. Pico, 102 S.Ct. at 2803 n.3 (1982).
5. *A Reader for Writers,* edited by Jerome Archer. Board of Educ. v. Pico, 102 S.Ct. at 2803 n.3 (1982).
6. *The Fixer,* by Bernard Malamud. Board of Educ. v. Pico, 102 S.Ct. at 2803 n.3 (1982).
7. Pico v. Board of Educ., 638 F.2d at 408 (2d Cir. 1980).
8. Board of Educ. v. Pico, 102 S.Ct. at 2803 (1982).
9. *Id.* at 2803 n.4.
10. *Id.* at 2803.
11. *Id.*

The board subsequently formed an eight-member committee, consisting of parents and Island Trees staff members, for the purpose of reviewing the removed books. The committee was directed to apply criteria such as " 'educational suitability,' 'good taste,' 'relevance,' and 'appropriateness to age and grade level' "[12] in making its decisions on whether to retain the books in the school library. In July the committee recommended that five books be retained,[13] that two be removed,[14] and that one be made available with parental approval.[15] The committee was unable to agree on two books,[16] and made no recommendation on another.[17]

The board did not follow the committee's recommendations. Instead, it removed nine books,[18] returned one without restrictions,[19] and made another available only with parental approval.[20] No public or official justification was given for its final decision.

Challenging the school board's exercise of its discretionary authority, the student plaintiffs filed suit in the United States District Court for the Eastern District of New York. The district court granted summary judgment in favor of the school board.[21] The court stated that it should not intervene in the resolution of conflicts which arise in the school's day-to-day operations and which do not sharply and directly implicate basic constitutional values.[22] The court further reasoned that a board *must* make content-based decisions when choosing appropriate books for the school,[23] because public schools primarily serve an indoctrinative function, where basic social skills and community values are transmitted to students.[24] The board, the court stated, must be given wide discretion to deter-

12. *Id.*
13. *Id.* at 2803 n.5 (*The Fixer, Laughing Boy, Black Boy, Go As Alice,* and *Best Short Stories by Negro Writers*).
14. *Id.* at n.6 (*The Naked Ape* and *Down These Mean Streets*).
15. *Id.* at n.9 (*Slaughter House Five*).
16. *Id.* at n.7 (*Soul on Ice* and *A Hero Ain't Nothin' But A Sandwich*).
17. *Id.* at n.8 (*A Reader for Writers*).
18. *See supra* note 4.
19. Board of Educ. v. Pico, 102 S.Ct. at 2803 n.10 (1982) (*Laughing Boy*).
20. *Id.* at n.11 (*Black Boy*).
21. 474 F. Supp. 387 (E.D.N.Y. 1979), *rev'd,* 638 F.2d 404 (2d Cir. 1980).
22. *Id.,* 474 F. Supp. at 397.
23. *Id.* at 396.
24. *Id.*

mine how, and which, community values are to be emphasized.[25]

The Second Circuit reversed the judgment of the district court on appeal, and remanded the case for trial.[26] Judge Sifton, delivering the judgment of the court, emphasized the procedural irregularities[27] surrounding the book removals and the unusual intervention by the board in removing the books.[28] The United States Supreme Court granted certiorari and affirmed the judgment of the Second Circuit.

Justice Brennan, announcing the judgment of the Court, found that although the school board had broad discretion to manage school affairs, it could only exercise its discretion in a manner that comported with the first amendment.[29] According to the Justices, the absolute discretion that might be rightfully exercised in matters of curriculum does not extend into the school library, where the regime of voluntary inquiry holds sway.[30] In the realm of the school library, a board may not remove a book if the decisive factor in the removal decision is an intent to deny access to particular ideas with which the board disagrees.[31] The case was remanded for trial to determine if the board had exceeded constitutional limitations in the exercise of its discretion by removing the books from the school library.

THE COURT'S ANALYSIS: *Board of Education v. Pico*

The opinions in *Pico* employ analyses ranging from near total deference to school board discretion and judgments when

25. *Id.* at 396-98.
26. 638 F.2d 404 (2d Cir. 1980), *rev'g*, 474 F. Supp. 387 (E.D.N.Y. 1979), *aff'd*, _____ U.S. _____, 102 S.Ct. 2799 (1982).
27. *Id.*, 638 F.2d at 417-18.
28. *Id.* at 416.
29. 102 S.Ct. at 2806-07 (1982). Justice Brennan announced the Court's judgment, joined by Justices Marshall and Stevens in his opinion. Justice Blackmun joined in part, and filed a separated concurring opinion. Justice White also concurred in the judgment. Chief Justice Burger filed a dissenting opinion, joined by Justices Powell, Rehnquist, and O'Connor. Separate dissenting opinions were filed by Justice Powell, Justice Rehnquist (joined by Chief Justice Burger and Justice Powell) and Justice O'Connor.

    Justice White's opinion concurring in the judgment does little to clarify the constitutional issues involved in *Pico*. As he perceived the case procedurally, no necessity existed to reach the constitutional issues. Because of the dearth of a trial record and a conclusion by the Second Circuit that an unresolved factual question remained (the reason for the book removal), summary judgment was precluded. Justice White would have preferred to vacate the original judgment and remand for trial. *Id.* at 2816 (White, J., concurring).
30. 102 S.Ct. at 2809 (1982).
31. *Id.* at 2810.

formulating educational policy[32] to a more traditional first amendment approach[33] which considers the unique nature of the public school as a state-regulated institution and the restrictions imposed upon the exercise of school boards' discretionary powers by the first amendment itself.[34] The plurality,[35] concurring,[36] and dissenting[37] opinions all agree that school board authorities are constrained to some extent by the first amendment's protections of free speech when removing books from school libraries. The divergence in the Justices' positions becomes more apparent on the questions of the limits imposed by the Constitution upon school board discretion and the nature of the student's first amendment rights. The opinions of the plurality and dissents are significantly different and approach the issues from opposing perspectives. The plurality addressed the issue from the student's perspective, whereas the dissents and concurrence approached it from the perspective of school officials.

Justice Brennan's plurality opinion stated that books must not be removed simply because the board "dislike[s] the ideas contained in those books and seek[s] by their removal to 'prescribe what shall be orthodox on politics, nationalism. religion, or other matters of opinion.' "[38] The plurality recognized a student's right of access to ideas,[39] within the special context of the school library. The library was significant as a marketplace of ideas within the secondary school. In the library the voluntary inquiry of the student was less subject to school board control, in the view of the plurality.

32. *See, e.g.*, 102 S.Ct. at 2822-23 (Powell, J., dissenting).
33. *See, e.g.*, 102 S.Ct. at 2812-17 (Blackmun, J., concurring). Governmental regulation aimed at controlling the dissemination of the views advanced in a particular communication is presumed to collide with the first amendment. Government ordinarily cannot restrict expression because of the particular idea or message, the subject matter or its contents. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2 (1978).
Central to first amendment principles is the notion of government neutrality in the "marketplace of ideas." FCC v. Pacifica Found., 438 U.S. 726, *reh. denied*, 439 U.S. 883 (1978). Control of conduct which may be construed to be a content-based regulation of speech will also generally require a stricter standard of review. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 101 (1972).
34. 102 S.Ct. at 2812-17 (1982) (Blackmun, J., concurring).
35. *Id.* at 2807.
36. *Id.* at 2813 (Blackmun, J., concurring).
37. *Id.* at 2828-29 (Rehnquist, J., dissenting).
38. *Id.* at 2810.
39. *Id.* at 2808-09. For further discussion of the right to receive ideas and its constitutional development with special emphasis on school book removals, see Recent Developments, *Removal of Public School Library Books: The First Amendment Versus the Local School Board*, 34 VAND. L. REV. 1407, 1412-15 (1981); Comment, *Not on Our Shelves: A First Amendment Analysis of Library Censorship in the Public Schools*, 61 NEB. L. REV. 98, 113-23 (1982) [hereinafter cited as *Library Censorship*].

The standard suggested by the plurality is based upon motivation. If a board "*intended* by their removal decision to deny [students] access to ideas with which [the board] disagreed, and if [that] intent was the decisive factor[40] in [that] decision, then [the board members] . . . exercised their discretion in violation of the Constitution."[41] Upon his review of the record in the case, Justice Brennan concluded that a genuine issue of material fact remained: whether the board "exceeded constitutional limitations in exercising their discretion to remove the books."[42] Therefore, the plurality remanded the case for trial on the merits.

Justice Blackmun's concurrence utilized a more traditional first amendment analysis. He felt that the Court was required to make a "delicate accommodation between the limited constitutional restriction . . . imposed by the First Amendment, and the necessarily broad state authority to regulate education. In starker terms, [the Court] must reconcile the school's 'inculcative' function with the First Amendment's bar on 'prescriptions of orthodoxy'."[43] In his view, school boards may choose to remove a book without interference when a politically neutral criterion is at the basis of the decision,[44] and when no "*purposeful* suppression of ideas"[45] is present.

Because he felt the standard of the plurality could adequately guide the future proceedings when the case was remanded, Justice Blackmun concurred in the plurality's judgment. He viewed the first amendment rights involved as a stu-

40. 102 S.Ct. at 2810 n.22. The Court stated: "By 'decisive factor' we mean a 'substantial factor' in the absence of which the opposite decision would have been reached." *Id.* See Mount Healthy Bd. of Educ. v. Doyle, 429 U.S. 274, 281-87 (1977) for a discussion of the "substantial factor" rule as a general proposition. For a discussion of the *Mount Healthy* rule as it relates to the book removal issue, see Pico v. Board of Educ., 638 F.2d at 437-38 (Newman, J., concurring).

41. 102 S.Ct. at 2810 (emphasis in original) (footnote omitted).

42. *Id.*

43. *Id.* at 2814 (Blackmun, J., concurring). See *A Definitional Approach to Secondary School Students Right to Know*, 42 OHIO ST. L.J. 1025, 1026-30 (1981) for a discussion of the weaknesses of the traditional balancing analysis where first amendment interests are involved. The Comment author argues ad hoc balancing is most useful when the government interests are constitutionally neutral and a need for an especially sensitive consideration of each case outweighs the need for a precedential rule. Further, the author argues that a definitional balancing approach in library book removal cases would be more appropriate because it could define the scope of the first amendment freedoms. This would set a standard for review when the government regulation of expression is content-based and a need for a certain precedential rule is more apparent.

44. 102 S.Ct. at 2815 (Blackmun, J., concurring).

45. *Id.* (emphasis in original).

dent's right to be free from the official suppression of ideas, not the right of access to those ideas.[46] Because of this distinction, Justice Blackmun found his analysis could be applicable in the school as a whole and did not limit the issue to suppression of ideas by a board within the context of the school library.[47]

The dissenting opinions were fairly uniform in their reasoning. The dissents were very deferential toward locally-elected school board officials and their educational policy decisions. They agreed with the plurality and concurrence that the traditional function of public schools has been to inculcate the fundamental values necessary to the maintenance of a democratic system.[48] However, the dissenters argued that the plurality was essentially substituting its own view of what those values ought to be for those of the school administrators representing the community.[49] The dissents felt that no right of access to ideas was constitutionally assured to secondary school students in public schools, particularly when it was conceded that the books were readily available elsewhere.[50]

In his dissenting opinion, Justice Rehnquist distinguished state action as educator and state action as sovereign as triggering different levels of scrutiny.[51] Though the standards are stricter when sovereign action is involved, the Justice said the state in its role as educator does not function unfettered by the Constitution. He stated that state action as educator must not cast "a pall of orthodoxy over the classroom."[52] Because the school board's action had not prohibited students and teachers from discussing the books and their ideas, and because no practical restriction existed as to the books' availability, Justice Rehnquist could find no infringement of students' first amendment rights.

The dissents' arguments were directed toward the plurality's characterization of the right to receive ideas within the secondary school, and reflect a fundamental philosophical dif-

46. *Id.* at 2814 n.2.
47. *Id.* at 2814.
48. *Id.* at 2819 (Burger, C.J., dissenting), at 2822 (Powell, J., dissenting), at 2832 (Rehnquist, J., dissenting).
49. *Id.* at 2822 (Powell, J., dissenting).
50. *Id.* at 2821 (Burger, C.J., dissenting), at 2832-33 (Rehnquist, J., dissenting).
51. *Id.* at 2829 (Rehnquist, J., dissenting).
52. *Id.* at 2834 (Rehnquist, J., dissenting).

ference regarding the scope of the "inculcative function" of the secondary school. Because it was not clear from the record in *Pico* that the books had not been removed because of their vulgarity or educational unsuitability, rather than for politically-motivated reasons, the dissents preferred to defer to the judgments of the local board. Chief Justice Burger argued that book removals should be permitted when a board desires to refrain from giving materials of questionable value an "implicit endorsement,"[53] or when the books are vulgar, profane, or inappropriate for school use. He expressed a concern that federal judges and teenage students are not equipped to determine the morality and values of the classroom.[54] The standard enunciated by the plurality, whether a "school board's 'discretion [has been] exercised in a narrowly partisan or political manner',"[55] was viewed by Justice Powell as a standardless standard, giving no guidance to boards that must determine the educational value of materials. Justice O'Connor's dissent argued that school board judgments should be deferred to, as long as board decisions do not "interfere with the right of students to read the material and to discuss it."[56]

PRECEDENT: PUBLIC SCHOOLS, STUDENTS, AND THE FIRST AMENDMENT

The Supreme Court has held that a state can permissibly regulate "precisely delineated areas,"[57] when the state has determined that "a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of the First Amendment guarantees,"[58] and when it has a special interest in promoting the welfare of children.[59] In the area of public education, states have been allowed considerable discretion in determining how children's interests can best be served. However, it is generally agreed that students do not "shed their constitutional rights

53. *Id.* at 2820 (Burger, C.J., dissenting).
54. *Id.* at 2821 (Burger, C.J., dissenting).
55. *Id.* at 2822 (Powell, J., dissenting).
56. *Id.* at 2835 (O'Connor, J., dissenting).
57. Ginsberg v. New York, 390 U.S. 629, 649 (1968) (Stewart, J., concurring).
58. *Id.* at 649-50.
59. *Id.* at 640-43. In *Ginsberg*, the Court upheld a variable obscenity standard promulgated to regulate children's exposure to offensive materials which was stricter than the standard used to regulate adult exposure to obscenity. *See also* FCC v. Pacifica Found., 438 U.S. 726, 749-50, *reh. denied*, 439 U.S. 883 (1978) (FCC regulation prohibiting daytime broadcast of George Carlin's monologue "Filthy Words" was upheld by the Court).

to freedom of speech or expression at the school house gate."[60] The Court has held that schools cannot permissibly interfere with first amendment liberties without a showing that the restriction is necessary to promote and protect the state's interests.[61] Absolute prohibitions of particular speech-related activity will not survive constitutional scrutiny if the activity does not substantially disrupt or materially interfere with school activities.[62] A state may not compel particular beliefs,[63] nor may it justify a prescriptive orthodoxy in the classroom.[64] A state must refrain from ideological coercion and must "not be partisan or enemy of any class, creed, party, or faction."[65]

Because of the importance of first amendment freedoms in our society, the Court has defined some of the constitutional limits restraining the exercise of school board discretion. In *West Virginia v. Barnette,*[66] the Court struck down a school regulation making the flag salute mandatory. The legislative intent of the statute under which the regulation was promulgated was for schools to teach, foster and perpetuate the ideals, principles, and spirit of Americanism.[67] The Court stated that an "ideological discipline"[68] could not be imposed upon the students. Free public education must remain faithful to the ideals of secular instruction and political neutrality.[69] The Court found that the compelled flag salute, as a means of fostering national unity, offended the Constitution.[70] The freedom to be intellectually and spiritually diverse is protected by the first amendment.[71] These freedoms were intended to be placed beyond the reach of majorities and withdrawn from the "vicissitudes of political controversy."[72]

60. Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 508 (1969).
61. Pierce v. Society of Sisters, 268 U.S. 510 (1925) (struck down Oregon law compelling all students to attend public school); Meyer v. Nebraska, 262 U.S. 390 (1923) (struck down state law requiring all instruction to be in the English language).
62. Tinker v. Des Moines Indep. School Dist., 393 U.S. at 513 (1969).
63. West Virginia v. Barnette, 319 U.S. 624 (1943).
64. Keyishian v. Board of Regents, 385 U.S. 589 (1967).
65. West Virginia v. Barnette, 319 U.S. at 637 (1943).
66. 319 U.S. 624 (1943).
67. *Id.* at 625.
68. *Id.* at 637.
69. *Id.*
70. *Id.* at 640-41.
71. *Id.* at 641.
72. *Id.* at 638.

In *Epperson v. Arkansas,*[73] the Court stated that although judicial intervention in the public school system should be carefully considered, such intervention is appropriate when necessary to "safeguard the fundamental values of freedom of speech and inquiry and of belief."[74] The state's authority to structure its school system did not allow it to purposefully exclude particular ideas in order to prescribe what is acceptable within the classroom. The state must remain neutral in areas of opinion or belief.

Nevertheless, the Court has also recognized that, at least at the secondary level of education, the primary function of state-operated schools is indoctrinative:[75]

> [The public school system is a] . . . "civic institution for the preservation of a democratic system of government," and . . . the primary vehicle for transmitting "the values on which our society rests." . . . "[It] is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." . . . [E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. . . . [E]ducation has a fundamental role in maintaining the fabric of our society. . . .
>
> [Education plays a] pivotal role . . . in sustaining our political and cultural heritage. . . . "[E]ducation [also] prepares individuals to be self-reliant and self-sufficient participants in society." . . . [Education contributes to the] social, economic, intellectual, and psychological well-being of the individual. . . .
>
> . . . .
>
> . . . [It contributes to the well-being of the Nation by preparing individuals to] live within the structure of our civic institutions, and [to] . . . contribute in even the smallest way to the progress of our Nation.[76]

School boards thus have broad discretion in the management of schools, and within the constitutional limits set out above,

73. 393 U.S. 97 (1968).
74. *Id.* at 104.
75. *E.g.,* Ambach v. Norwick, 441 U.S. 68, 76-77 (1979). *Cf.* West Virginia v. Barnette, 319 U.S. at 637 (1943).
76. Plyler v. Doe, ____ U.S. ____, 102 S.Ct. 2382, 2397-98 (1982) (citations omitted).

the state is free to create an academic environment where teaching and learning will proceed free from disruption.[77]

In contrast to many of the decisions above, the Court stated in *Keyishian v. Board of Regents* that the classroom itself is the "marketplace of ideas."[78] The nation's future depends upon "leaders trained through 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.' "[79] *Keyishian,* however, was addressing more specifically the issues of academic freedom within the university environment.

Tinker v. Des Moines Independent School District,[80] extended the protections of the first amendment to the secondary classroom but required them to be considered "in light of the special characteristics of the school environment."[81] The Court stated, students are not "closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved."[82] Regulation in the school must be done for constitutionally permissible reasons. Relying on the principles set forth by the Court in *Keyishian,* the Court stated that a student's first amendment rights could only be restricted when school anthorities could demonstrate that the student's conduct materially disrupted or involved substantial disorder in the school environment or invaded the rights of others.[83]

77. West Virginia v. Barnette, 319 U.S. at 631, 637 (1943). See, for a sample of instances where lower federal courts have found it appropriate to restrain the exercise of school authorities' power: Eisner v. Stamford Bd. of Educ., 440 F.2d 803 (2d Cir. 1971) (School policy prohibiting distribution of student newspaper and requiring prior approval for distribution struck down); Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966) (School regulation forbidding students from wearing "freedom buttons" struck down as arbitrary and unnecessary infringement of first amendment rights when no disruption or disorder within the school was present).
78. 385 U.S. 589, 603 (1967).
79. *Id.* at 603 (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (1943)). A number of lower federal courts have incorporated the marketplace of ideas concept into their analyses, finding it useful in the resolution of book removal disputes. *See, e.g.,* Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980) (The marketplace concept, however, was seen to be less significant than the need for educational guidance within the school); Minarcini v. Strongsville City School Dist., 541 F.2d 577, 583 (6th Cir. 1976) (also recognized the right of the student to receive ideas within school library).
80. 393 U.S. 503 (1969). The prohibition in *Tinker* (black armbands worn by students to protest U.S. involvement in the Vietnam war) was motivated by school authorities' desire to avoid the potential controversy such expression could cause.
81. *Id.* at 506.
82. *Id.* at 511.
83. *Id.* at 513. *See also,* Michelman, *Forward: On Protecting the Poor Through the Fourteenth Amendment,* 83 HARV. L. REV. 7, 154-159 (1969). This article includes a discussion of *Tinker* and its impact. The author characterizes *Tinker* as adopting the view that the "process of education in a democracy must be democratic." Michelman, *supra,* at 159.

No case prior to *Pico* had ever declared that students have an affirmative right of access to ideas at the secondary school level. This right has developed in contexts other than the school environment. However, it has evolved as a corollary to the first amendment principles which value intellectual and spiritual diversity, and an informed citizenry over which one has been kept in ignorance. *Martin v. City of Struthers*[84] is one of the early cases protecting both the right of a "speaker" to distribute literature and the right of a willing recipient to receive it. The Court discussed the principles of the first amendment and the scope of its protections: "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."[85]

In *Kleindienst v. Mandel*,[86] the Court acknowledged the importance of the right to receive information within the university environment. The nature of the right to receive information has been more fully discussed in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[87] The Court stated there that commercial speech could not be restrained, because first amendment principles value a fully informed citizenry and do not allow the public to be kept in ignorance.[88] The Court stated, however, that restrictions as to time, place, and manner of speech,[89] when they serve a significant governmental interest and leave open alternate channels of communication, may still be upheld.[90]

84. 319 U.S. 141 (1943).
85. *Id.* at 143.
86. 408 U.S. 753 (1972). Because the government had refused to issue a temporary visa to an invited conference speaker, his intended audience argued that the government's action unlawfully hindered their right to hear him. The Court refused to require that the visa be granted, but acknowledged the importance of receiving information in the university.
87. 425 U.S. 748 (1976). The Virginia State Board of Pharmacy had prohibited pharmacists from advertising drug prices, arguing that it was necessary to maintain the professionalism of pharmacists.
88. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Concil, Inc.*, has been relied on in several of the lower federal court decisions in the book removal cases. *See, e.g.*, Minarcini v. Strongsville City School Dist., 541 F.2d 577 (6th Cir. 1967). That court relied on the decision in *Virginia State Bd. of Pharmacy* to extend the right to receive ideas into the secondary school. 541 F.2d at 583. Where school board members had given no justification for the book removals being challenged, other than personal taste, the board did not have an unfettered discretion to censor materials in the school library. *Id.* at 582. This court reasoned that by removing the books from the library, "a mighty resource in the marketplace of ideas," classroom discussion was burdened. *Id.*
89. *Cf.* Cox v. New Hampshire, 312 U.S. 569, 576-77 (1941). (Municipal ordinances enacted for the purpose of controlling the exercise of first amendment freedoms cannot substitute for the duty to maintain order in connection with the exercise of these rights. Ordinances not intended to suppress first amendment freedoms can consider time, place, and manner, if done without unfair discrimination.)
90. 425 U.S. at 770-71.

ANALYSIS

The Court has continued to accept the notion that the primary function of the public school is the indoctrination or inculcation of fundamental values.[91] This view recognizes that a school board may make choices and select materials suitable for use in achieving that purpose. Through its curriculum and educational programs the school board carries out its inculcative function.

Commentators have suggested that this indoctrinative view of education at the secondary level is consistent with a prescriptive model of education.[92] In the prescriptive model, the educational process is quite circumscribed. School authorities enjoy a wide latitude in determining which skills and values will be preferred. Curriculum is highly structured and tailored to implement these particular academic choices. This is to be contrasted with the analytical model applicable at the university level.[93] In higher education, the educational process is structured to foster creative, independent thought in the quest for knowledge. (It must be stressed however, that the proposed hierarchy of education within this two-tiered model is paradigmatic, with a significant amount of overlap between the goals and purposes of each educational

91. The indoctrinative function of state educational systems is to prepare students for future life, teach basic skills and citizenship. Ambach v. Norwick, 441 U.S. 68 (1979). *See also* Wisconsin v. Yoder, 406 U.S. 205 (1972); Brown v. Board of Educ., 347 U.S. 483 (1954); West Virginia v. Barnette, 319 U.S. 624 (1943).

In *Brown*, a state regulation allowing the segregation of schools under the "separate but equal" doctrine was struck down by the Court. *Brown* is cited in numerous cases which discuss the importance of education and the inculcation of values. *Brown* acknowledged that schools play an instrumental role in "awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." 347 U.S. at 493.

92. In the prescriptive model of education, basic skills and preferred values are the main emphasis of the curriculum. *See Library Censorship, supra* note 39, at 101; Comment, *The Right to Know and School Board Censorship of High School Book Acquisitions,* 34 WASH. & LEE L. REV. 1115, 1121 (1977) [hereinafter cited as *School Board Censorship*] (argued that decisions regarding which values and ideas will be socially preferred may often be primarily political decisions).

93. The analytical model is characterized by free inquiry, problem-solving, and the critical examination of all values and ideas. Any foreclosure in this context can significantly burden the educational process within the higher institutions. *Library Censorship, supra* note 39, at 101-03; *School Board Censorship, supra* note 90, at 1121. *See also* Goldstein, *Reflections on Developing Trends in the Law of Student Rights,* 118 U. PA. L. REV. 612 (1970) (author compares the analytical and prescriptive models of education).

The indoctrinative theory of education has been the subject of considerable criticism in legal commentary. *See* Comment, *Censoring the School Library: Do Students Have the Right to Read?* 10 CONN. L. REV. 747, 766-71 (1978); Comment, *School Library Censorship: First Amendment Guarantees and the Student's Right to Know,* 57 J. URB. L. 523 (1980); Comment, *Censorship in the Public School Library—State, Parent and Child in the Constitutional Arena,* 27 WAYNE L. REV. 167 (1980).

structure.)[94] These commentators have suggested that the constitutional questions which arise at the university level when access to materials and ideas is severely curtailed are of a greater magnitude that those at the secondary level of education.

The Court's decisions are consistent with this two-tiered model of education as well. *Keyishian,* concerned with academic freedom within the university, characterized the classroom as the marketplace of ideas. *Tinker* applied the principles of *Keyishian,* but required that they be considered in light of the secondary school's special characteristics.[95] Justice Frankfurter, in *Sweezy v. New Hampshire,*[96] made this distinction more clear when he stated, "In a university knowledge is its own end, not merely a means to an end. . . ."[97] In the secondary school, knowledge *is* the means to an end. Knowledge is acquired during this time which will prepare students for future participation as citizens who will preserve the values upon which our society rests.[98] First amendment rights and concomitant protections increase with the student's own increased level of maturity.[99] As this developmental process occurs and as different models of education become applicable, where the school's function is no longer primarily indoctrinative, the level of interference by school authorities should be reduced as well.[100]

When the role of the secondary school is accepted as indoctrinative, with materials carefully selected to further the school's educational goals, the fact that access to particular books has been denied will be incidental. Thus, the analytical

94. Goldstein argues that the prescriptive/analytical model "represents only a theoretical paradigm that can never exist in pure form. . ." and that the lines between the two levels of education are becoming increasingly blurred. Goldstein, *supra* note 93, at 614.
95. 393 U.S. at 506.
96. 354 U.S. 234 (1957).
97. *Id.* at 262 (Frankfurter, J., concurring) (quoting The Open Universities in South Africa 10-12).
98. Ambach v. Norwick, 441 U.S. at 76-77 (1979).
99. *Cf.* Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976); Zykan v. Warsaw Community School Corp., 631 F.2d at 1304 (7th Cir. 1980).
100. This developmental view has been criticized as making the child's first amendment rights contingent upon attaining adulthood or a particular level of development that many adults in fact never achieve. Comment, *Censorship in the Public School Library—State, Parent and Child in the Constitutional Arena,* 27 WAYNE L. REV. 167, 188-90 (1980). *See also Library Censorship, supra* note 39, at 113 (the author suggests that secondary school students' first amendment rights should be co-extensive to those of adults, and not contingent upon gaining maturity).

focus will necessarily be placed on the intent, purpose and motivations behind board decisions concerning educational materials for the school. The plurality's analysis is thus inappropriate to the extent that it focuses on the right of access to ideas.

The plurality's analysis is also inadequate because it does not require a clear assessment of the standards boards employ in making educational decisions nor of the limits confining those discretionary choices. The plurality's test does not adequately distinguish between inculcation and suppression within the school environment. Inculcation implies a selective process which requires that boards make affirmative choices regarding suitable educational materials.[101] This, school authorities are undoubtedly free to do.[102] A choice of emphasis and the desire to stress particular values is permissible, positive action.[103] Such action differs from deliberate attempts to "coerce uniformity"[104] or to suppress ideas that are politically repugnant to school officials:

> School officials may seek to instill certain values by "persuasion and example," or by choice of emphasis. That sort of positive educational action, however, is the converse of an intentional attempt to shield students from certain ideas that officials find politically distasteful. . . . "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials. . . ."[105]

School officials may not freely suppress ideas with which they do not wish to contend.[106]

101. Board of Educ. v. Pico, 102 S.Ct. at 2828 (1982) (Rehnquist, J., dissenting). *See also* Palmer v. Board of Educ., 603 F.2d 1271, 1274 (7th Cir. 1979); Pico v. Board of Educ., 474 F. Supp. 387 (1979).
102. Board of Educ. v. Pico, 102 S.Ct. at 2810 (1982). *See also* Mercer v. Michigan Bd. of Educ., 379 F. Supp. 580, 585-86 (E.D. Mich. 1974).
103. Board of Educ. v. Pico, 102 S.Ct. at 2815 (1982) (Blackmun, J., concurring). *See also* West Virginia v. Barnette, 319 U.S. at 640 (1943).
104. West Virginia v. Barnette, 319 U.S. at 640 (1943).
105. Board of Educ. v. Pico, 102 S.Ct. at 2816 (1982) (Blackmun, J., concurring) (citations omitted).
106. Pico v. Board of Educ., 638 F.2d at 433 (2d Cir. 1980); Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966); *Cf.* Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972) (discusses content-based regulations of speech).

In contrast to the plurality's analysis, Justice Blackmun's analysis probably hits the nail more squarely on the head by refusing to rely on the right to receive ideas in the secondary school context. He recognized that the interests of the school and student may conflict. However, schools are not charged with the responsibility of making students into ideological clones. Instead, the school's function is to prepare the students for future life as productive citizens and to teach the basic principles upon which a democratic society is based. Boards must make thoughtfully considered decisions if students are to learn the fundamental principles of our democratic society and understand them as more than "mere platitudes."[107] The first amendment protects the diversity of thought. This requires tolerance by a board for that which may be uncomfortable or inpolitical opposition. First amendment rights cannot be abridged for "mere undifferentiated fear or apprehension of disturbance, nor to avoid controversy."[108]

At the same time, school boards should have the freedom to function without interference in daily operations.[109] It must be clear that the determinations of local school authorities are simply pedagogic decisions.[110] In making the decisions regarding the values and skills to be taught, boards cannot be intending to create an exclusive, rigid indoctrinatory plan through the purposeful exclusion of any particular ideological system or preference.[111] Once a book has been removed for such impermissible reasons, courts should not hesitate to intervene. The first amendment rights of school students, at the least, the right to be free from the official suppression of ideas,[112] must be protected to maintain the philosophical grounding of our constitutional democracy.

The standard devised by the purality in *Pico* provides adequate guidelines for determining the extent to which school boards may interfere with first amendment rights, by looking

107. Board of Educ. v. Pico, 102 S.Ct. at 2814 (1982) (Blackmun, J., concurring) (quoting West Virginia v. Barnette, 319 U.S. at 637 (1943)).
108. Tinker v. Des Moines Indep. School Dist., 393 U.S. at 508-09 (1969).
109. Epperson v. Arkansas, 393 U.S. at 104 (1968).
110. *Cf.* West Virginia v. Barnette, 319 U.S. at 637 (1943). *See also* Zykan v. Warsaw Community School Corp., 631 F.2d at 1306 (7th Cir. 1980).
111. *See* West Virginia v. Barnette, 319 U.S. at 637 (1843); Zykan v. Warsaw Community School Corp., 631 F.2d at 1306 (7th Cir. 1980).
112. Pico v. Board of Educ., 638 F.2d at 433 (2d Cir. 1980).

to the motivation behind the removal decision.[113] Even though the effect on the student will be the same regardless of intent,[114] an intent-based test is appropriate because of the wide discretion courts have traditionally afforded school boards in making educational decisions and choices. It is important to determine that any given justification for interference with first amendment rights is not mere pretext, when "Under the guise of beneficent concern for the welfare of school children, school authorities . . . might permit the prejudices of the community to prevail."[115]

It is arguable that the "relatively high threshold"[116] student litigants wishing to challenge particular book removals must cross will chill the exercise (and protection) of first amendment rights. However, when one carefully examines the case law that has developed in this area, it is clear that certain elements of board action can give rise to an inference of unconstitutional restraint of first amendment rights. Thus, the factual background of each case will be crucial to create the inference which will be necessary to support the student plaintiff's case. Procedural irregularity,[117] selective elimination of topics,[118] a lack of independent review of books,[119] interference by individuals not ordinarily involved in the book selection process,[120] an absolute prohibition of discussion about the books and their contents,[121] an absence of supporting evidence showing that a book was improperly selected in the first place[122] are all factors that may lead a court to find the removal was improper.[123] The burden of persuasion is then

113. 102 S.Ct. at 2810.
114. *Id.* at at 2833-38 (Rehnquist, J., dissenting).
115. Thomas v. Board of Educ., 607 F.2d 1043, 1051 (2d Cir. 1979) (quoting James v. Board of Educ., 461 F.2d 566, 575 (2d Cir. 1972)).
116. Zykan v. Warsaw Community School Corp., 631 F.2d at 1306 (7th Cir. 1980).
117. Pico v. Board of Educ., 638 F.2d at 417 (2d Cir. 1980).
118. Cary v. Board of Educ., 598 F.2d 535 (10th Cir. 1979) (Board had banned 10 out of a total 1,265 books from the list of materials approved for use in language arts classes).
119. *Id.* (books in question had been reviewed by a text evaluation committee).
120. Pico v. Board of Educ., 638 F.2d at 414 (2d Cir. 1980). *See also* Williams v. Board of Educ., 388 F. Supp. 93 (S.D.W. Va. 1975) (parental challenge to materials selected for use in the school not sufficient; administrative remedies had not been pursued).
121. Board of Educ. v. Pico, 102 S.Ct. at 2834 (1982) (Rehnquist, J., dissenting). *But see* Cary v. Board of Educ., 598 F.2d at 544 (10th Cir. 1979) (upheld prohibition forbidding teachers to read aloud from or to discuss books during classtime at such length as to constitute a class assignment).
122. Right to Read Defense Comm. v. School Comm., 454 F. Supp. 703, 711 (D. Mass. 1978).
123. *See* Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) (discussion of evidentiary considerations which are relevant when attempting to establish an impermissible intent); Note, 27 CASE W. RES. 1034, 1049-52 (1977). The author of this Note also discusses the evidentiary problems present in book removal cases. The author argues that decisions will be valid when based upon legitimate educational considerations.

placed upon school authorities to establish that the intent behind the removal was not an all-out effort to suppress ideas of a particular sort.

Pico[124] and the host of book removal cases from the lower federal courts[125] suggest that procedural irregularity in book withdrawals is especially crucial in creating the inference that a board intended to suppress ideas. Over-zealous administrators, often with legitimate concerns for a book's propriety, cannot sidestep the procedures established within the school system for book evaluation. Neutral criteria, in combination with procedural regularity, generally will lead a court to conclude that the withdrawal and the board's motivation were constitutionally permissible. A sensitive and delicate regard for the interests which compete during this decision-making process can yield results relatively satisfactory to both local boards and students, and at the same time preserve a board's autonomy to make sensible and rational educational decisions.

If there were no opportunity for judicial review and board decisions to remove particular books remained unfettered, the results could be shocking. As one judge aptly commented, "The prospect of successive school committees 'sanitizing' the school library of views divergent from their own is alarming, whether they do it book by book or one page at a time."[126]

CONCLUSION

Pico stands for the proposition that the intentional suppression of ideas is not permissible within the secondary school. The case is important because it is the first in which the Court has addressed the constitutionality of local school board decisions removing books from school libraries. It is also the first case that has extended the "right to receive ideas" to secondary school students. The right to receive ideas will not,

124. Board of Educ. v. Pico, 102 S.Ct. at 2811-12 (1982); Pico v. Board of Educ., 638 F.2d at 416-17 (2d Cir. 1980) (books removed before any school officials had read them on the basis of the PONYU list).

125. *See, e.g.*, Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269, 1271 (D.N.H. 1979) (removal of MS magazine from library accomplished by circumventing established guidelines for selection and review of materials); Right to Read Defense Comm. v. School Comm., 454 F. Supp. at 706-07 (D. Mass. 1978) (book removed by committee chairman after parent's complaint before entire committee had met to review the book).

126. Right to Read Defense Comm. v. School Comm., 454 F. Supp. at 714 (D. Mass. 1979).

however, be the factor upon which the book removal cases turn. Instead, the crucial determination will be the motivation prompting particular book removal decisions. If the decisive factor in the decision is an intent to suppress particular ideas in a narrowly partisan or political manner, the decision will not be upheld.

The difficulties in *Pico* are numerous and one hesitates to speculate how far-reaching the decision's impact will be in the future. Because *Pico* is a plurality opinion, and because of the Justices' varied analyses, the decision does not clearly resolve the constitutional issues involved in the book removal cases. Additionally, Justice Brennan stressed the narrow and limited nature of the action being challenged: "removal from school libraries of books originally placed there by the school authorities, or without objection from them."[127] Whether the plurality's analysis is applicable, in other disputes, such as a board's refusal to acquire a particular book, is unclear.

The language of *Pico* does not clearly distinguish inculcation from suppression. This distinction should be made because the action of the state in structuring its educational system must be checked by constitutional considerations which prohibit the intentional suppression of ideas. To allow suppression in a deliberate attempt to eliminate student exposure to particularly disagreeable ideas is clearly contrary to first amendment principles. These principles cannot be disregarded even at the secondary level, if preparation of future well-informed citizens is the goal of secondary education. Schools should not "strangle the free mind at its source and teach youth to discount important principles of our government as 'mere platitudes.' "[128] Courts must intervene to prevent any unnecessary restraint by school officials when students' first amendment rights are threatened. If the integrity of the public school system is to be protected and its goals are to be met, it is wise to recall the words of Chief Justice Warren in *Sweezy v. New Hampshire:*

127. 102 S.Ct. at 2805-06 (emphasis in original).
128. *Id.* at 2814 (Blackmun, J., concurring) (quoting West Virginia v. Barnette, 319 U.S. 624,637 (1943)).

"Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[129]

SHERRILL VEAL SINGLETON

129. 354 U.S. at 250.