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Board of Education v. Pico: School Library Book Removal and the First Amendment Symposium - Selected Topics on Constitutional Law - Comment.

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Board of Education v. Pico: School Library Book Removal and the First Amendment

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I. Introduction

In 1969, the Supreme Court determined that rights of freedom of speech and expression are not "shed . . . at the schoolhouse gate."[1] First amendment challenges to school board decisions brought in the ensuing years by students, parents, and teachers produced a variety of frequently conflicting opinions.[2] This comment will discuss the extent of the author-

1. *See* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969) (school's prohibition on wearing black arm bands impinged on student's freedom of expression).

2. *Compare* Guzick v. Drebus, 431 F.2d 594, 599 (6th Cir. 1970) (ban on all non-school related emblems upheld due to possibility of disruption), *cert. denied*, 401 U.S. 948 (1971) *and* Wise v. Sauers, 345 F. Supp. 90, 93 (E.D. Pa. 1972), *aff'd mem.*, 481 F.2d 1400 (3d Cir. 1973) (ban on armbands urging violation of attendance laws upheld due to tense situation) *with* Butts v. Dallas Indep. School Dist., 436 F.2d 728, 732 (5th Cir. 1971) (restriction on armbands unconstitutional because board failed to determine whether armbands would cause disruption) *and* Aguirre v. Tahoka Indep. School Dist., 311 F. Supp. 664, 667 (N.D. Tex. 1970) (ban on armbands in absence of evidence of disruption violated *Tinker*). Another

ity vested in school boards and the rights of children in a school environment; the focal point will be student challenges to library book removal, an area recently addressed by the Supreme Court in *Board of Education v. Pico*.[3] An analysis of the principle propounded in *Pico* will be followed by guidelines for conforming a school board's book removal procedure to those guidelines.

II. SCHOOLS, STUDENTS, AND THE FIRST AMENDMENT

A. *Historical Autonomy of School Boards*

A school board is an arm of the state government in that each state legislature delegates to the various communities the authority to perform the state function of educating youth.[4] Historically, school boards have enjoyed near autonomy.[5] Before the 1960's, freedom of religion was the only first amendment concern to receive significant judicial consideration within the public school environment.[6] The judiciary's reluctance to in-

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area of litigation concerned student hairstyles. *Compare* Ferrell v. Dallas Indep. School Dist., 261 F. Supp. 545, 552-53 (N.D. Tex. 1966) (student's choice of hair length subordinate to state's interest in maintaining effective schools), *aff'd*, 392 F.2d 697 (5th Cir.), *cert. denied*, 393 U.S. 856 (1968) *with* Westley v. Rossi, 305 F. Supp. 706, 713-14 (D. Minn. 1969) (student could not be prevented from attending high school because of hair length). Moreover, teachers have used the first amendment as a basis for a "right to teach." *Compare* Keefe v. Geanakos, 418 F.2d 359, 360-62 (1st Cir. 1969) (upheld teacher's right to use as reading assignment magazine article on radicalism and revolt containing repeated use of "vulgar term for incestuous son") *and* Parducci v. Rutland, 316 F. Supp. 352, 358 (M.D. Ala. 1970) (upheld teacher's right to assign *Welcome to the Monkey House* by Kurt Vonnegut) *with* Mailloux v. Kiley, 323 F. Supp. 1387, 1392 (D. Mass.) (writing "fuck" on blackboard to illustrate concept of taboo words unacceptable teaching method), *aff'd*, 448 F.2d 1242 (1st Cir. 1971).

3. ___ U.S. ___, 102 S. Ct. 2799, 73 L. Ed. 2d 435 (1982).

4. *See, e.g.*, FLA. STAT. ANN. § 230.23 (West 1977 & Supp. 1983) (enumerating school board's powers and duties); MD. EDUC. CODE ANN. § 4.101(a) (1978) (educational matters under control of county board of education); N.Y. EDUC. LAW § 1604 (McKinney 1969 & Supp. 1982-1983) (listing 38 powers and duties of school district trustees). Public education is a state function because of the Constitution's silence on the issue of education. *See* U.S. CONST. amend. X (reserves all powers not specified in Constitution to states). Public education is "perhaps the most important function of the state and local governments . . . required in the performance of our most basic public responsibilities." Brown v. Board of Educ., 347 U.S. 483, 493 (1954); *see* Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (public education delegated to state and local authorities).

5. *See* Niccolai, *The Right to Read and School Library Censorship*, 10 J.L. & EDUC. 23, 23 (1981); Comment, *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 (1978). *See generally* 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).

6. *See, e.g.*, Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 231 (1948) (estab-

tervene in educational affairs is based on two theories: *in loco parentis*[7] and indoctrination.[8]

The *in loco parentis* doctrine is a product of English common law.[9] Under this doctrine, parents delegated to the teacher their authority over the child.[10] The American judiciary adopted *in loco parentis* when formal schooling was voluntary, but persisted in using the doctrine long after education ceased to be a parental option.[11] In recent years, however, parental challenges to school discipline have weakened *in loco parentis* as support for the school's authority.[12]

The second, and currently more viable, theory is that the school has an indoctrinating function; therefore, the school must be given broad discretion in instilling societal values in youths.[13] A logical extension of this

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lishment clause violated by "release time" program which utilized public school facilities for religious instruction); Everson v. Board of Educ., 330 U.S. 1, 8-18 (1947) (state may provide bus transportation to sectarian schools); West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 627 (1943) (compulsory recitation of pledge of allegiance successfully challenged on religious grounds).

7. *See* BLACK'S LAW DICTIONARY (4th ed. 1959) (defining *in loco parentis* as "in the place of a parent . . . charged with a parents' rights, duties and responsibilities").

8. *See* Ambach v. Norwick, 441 U.S. 68, 76-77 (1979) (school is vehicle for inculcating basic values essential to maintain democracy).

9. *See* Comment, *School Library Censorship: First Amendment Guarantees and the Student's Right to Know*, 57 U. DET. J. URB. L. 523, 526 (1980).

10. *See* 1 W. BLACKSTONE, COMMENTARIES *453. Blackstone stated:

> [The father] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, *viz.* that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

Id. at *453.

11. *See* Comment, *School Library Censorship: First Amendment Guarantees and the Student's Right to Know*, 57 U. DET. J. URB. L. 523, 526 (1980).

12. *See id.* at 526. Lower courts have rejected *in loco parentis* as justification for corporal punishment. *See* Baker v. Owen, 395 F. Supp. 294, 299 (M.D.N.C. 1975) (parents' successful suit based on corporal punishment administered over their objection); O'Rourke v. Walker, 128 A. 25, 26 (Conn. 1925) (teacher sued by parent for whipping son). Sending a child to public school is not indicative of the parents' intent to relinquish to that school the authority to administer corporal punishment. *See* Johnson v. Horace Mann Mut. Ins. Co., 241 So. 2d 588, 591 (La. Ct. App. 1970). *In loco parentis* has likewise been found inapplicable in cases involving school regulations on physical appearance. *See* Breen v. Kahl, 419 F.2d 1034, 1036-37 (7th Cir. 1969) (*in loco parentis* rejected as support for expulsion of students who violated hair length regulations; disciplinary power is shared with parents); Westley v. Rossi, 305 F. Supp. 706, 713 (D. Minn. 1969) (successful challenge of school policy on hair length). *In loco parentis* has no applicability absent a showing of disruption of school discipline. *See* Breen v. Kahl, 419 F.2d 1034, 1038 (7th Cir. 1969).

13. *See, e.g.*, Ambach v. Norwick, 441 U.S. 68, 76-77 (1979) (school is vehicle for inculcating basic values essential to maintain democracy); Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (school should awaken student to cultural values); James v. Board of Educ., 461 F.2d 566, 573 (2d Cir. 1972) (principal function of public education is transmission of basic

"school as indoctrinator" theory is that the board, elected by the community, can best determine the values which the community deems important and select materials which convey these values.[14] This broad discretion clearly conflicts with the first amendment concern of academic freedom;[15] however, academic freedom has been used to bar restrictions almost exclusively at the university level.[16] Subscribers to the indoctrination theory believe that the need for social inculcation overshadows, or at least tempers, academic freedom in the public schools because of the young student's impressionability.[17] Opponents of the theory argue that the restriction of ideas is incongruous with training the young for participation in a democracy.[18]

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community values); *see also* Nahmod, *First Amendment Protection for Learning and Teaching: The Scope of Judicial Review*, 18 WAYNE L. REV. 1479, 1480 (1972). The study of American history and the Constitution is required in every state. *See, e.g.*, ARIZ. REV. STAT. ANN. § 15-1021 (West 1974) (requiring instruction of state and federal constitutions, American institutions, and state history); MINN. STAT. ANN. §§ 126.06- .08 (West 1979) (requiring lessons in Declaration of Independence, Constitution; and "patriotic exercises"); N.J. STAT. ANN. § 18A: 35-1 to -2 (West 1968) (course in American history stressing democratic ideals).

14. *See* Epperson v. Arkansas, 393 U.S. 97, 104-05 (1968); Parker v. Board of Educ., 237 F. Supp. 222, 229 (D. Md.), *aff'd*, 348 F.2d 464 (4th Cir. 1965), *cert. denied*, 382 U.S. 1030 (1966); *see also* Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293, 1350-55 (1976) (elected board rather than teachers should determine curriculum).

15. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978) (academic freedom special concern of first amendment). *See generally* Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293, 1299-1302 (1976) (discussion of academic freedom and its German origins).

16. *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589, 601-03 (1967) (invalidating requirement of teachers' loyalty oath); Sweezy v. New Hampshire, 354 U.S. 234, 261 (1957) (reversing contempt conviction of professor who refused to answer inquiries regarding content of university lecture); Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (invalidating loyalty oath requirement for faculty members). Moreover, claims of academic freedom are almost always asserted by teachers and not students. *See* Comment, *Testing the Limits of Academic Freedom*, 130 U. PA. L. REV. 712, 712 (1982).

17. *See* Nahmod, *First Amendment Protection for Learning and Teaching: The Scope of Judicial Review*, 18 WAYNE L. REV. 1479, 1480 (1972).

18. *See, e.g.*, Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 507 (1969) (quoting West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)) ("That they are educating the young for citizenship is reason for scrupulous protection of constitutional freedoms of the individual"); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) ("future depends upon leaders trained through wide exposure to . . . exchange of ideas"; classroom is "marketplace of ideas"); Albaum v. Carey, 283 F. Supp. 3, 11 (E.D.N.Y. 1968) (considerations favoring academic freedom relevant to elementary and secondary schools). An increasing number of educators have condemned the indoctrination theory. *See* Note, *Academic Freedom in the Public Schools: The Right to Teach*, 48 N.Y.U. L. REV. 1176, 1180 (1973).

B. *Children's Rights in a School Environment*

It is generally agreed that children possess fewer rights than adults under the Constitution.[19] Moreover, the school, as a restricted environment, places additional constraints on the constitutional rights of minors.[20] In recent years, however, the Supreme Court has extended to minor students the rights of equal protection[21] and civil due process.[22] In 1969, the Court acknowledged that children have first amendment rights of self expression in a school environment in *Tinker v. Des Moines Independent Community School District*.[23] The affirmative statement on students' rights in *Tinker* qualified the indoctrination theory and marked a significant change from the judiciary's traditional reluctance to interfere in school matters.[24] Subsequent first amendment challenges to school board decisions on curriculum have met with little success.[25] Challenges to library book removal, however, have fared considerably better.

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19. *See* Comment, *Not on Our Shelves: A First Amendment Analysis of Library Censorship in the Public Schools*, 61 NEB. L. REV. 98, 111 (1982). The traditional view is that children's rights are won individually by showing appropriateness in a given situation; the alternate view is that children have rights coextensive with adults which may only be withdrawn by justification specifically applicable to children. *See* Comment, *Censorship in the Public School Library—State, Parent and Child in the Constitutional Arena*, 27 WAYNE L. REV. 167, 171 (1980).

20. *See* Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321, 345 (1979).

21. *See* Brown v. Board of Educ., 347 U.S. 483, 495 (1954).

22. *See* Goss v. Lopez, 419 U.S. 565, 572-76 (1975) (suspension from public school required procedural due process).

23. 393 U.S. 503, 504-06 (1969) (prohibition on black armbands restricted students' freedom of expression).

24. *See id.* at 506. "First Amendment rights, applied in light of special characteristics of the school environment, are available to . . . students." *Id.* at 506. Students' first amendment rights, however, are not coextensive with those of adults. *See, e.g.*, Williams v. Spencer, 622 F.2d 1200, 1205-06 (4th Cir. 1980) (high school within constitutional authority in banning underground newspaper); Baughman v. Freienmuth, 478 F.2d 1345, 1348 (4th Cir. 1973) (time, place, and manner restriction on distributing nonschool-sponsored literature valid); Hernandez v. Hanson, 430 F. Supp. 1154, 1159 (D. Neb. 1977) (school could require prior approval for distribution of nonschool literature); *see also* Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321, 339 (1979) (child's right of free speech differs from adult right).

25. *See, e.g.*, Cornwell v. State Bd. of Educ., 428 F.2d 471, 472 (4th Cir.) (unsuccessful parental challenge of school sex education program), *cert. denied*, 400 U.S. 942 (1970); Davis v. Page, 385 F. Supp. 395, 404-05 (D.N.H. 1974) (elementary school health course did not invoke first amendment); Citizens for Parental Rights v. San Mateo County Bd. of Educ., 124 Cal. Rptr. 68, 82 (Ct. App. 1975) (unsuccessful challenge of sex education program; difference of opinion on curriculum does not give rise to constitutional right), *appeal dismissed*, 425 U.S. 908 (1976).

III. Student Challenges to Library Book Removal

A. *Basis for a First Amendment Challenge*

The primary challenge to the removal of school library books is founded on a first amendment interest in receiving information,[26] a corollary of freedom of speech.[27] The right to receive information has been held applicable to personal correspondence,[28] political[29] and religious material,[30] pornography,[31] and commercial information.[32] When a right to receive information is asserted, the courts weigh the first amendment interest of the individual in receiving the information against the government's interest in restricting it.[33] The Supreme Court, through dicta in *Red Lion Broadcasting v. FCC*,[34] spoke of the public's right to have access to information, ideas, and experiences.[35] This broader concept, not as yet explicitly recognized by the Supreme Court as an established constitutional right, has been called a "right to know."[36]

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26. *See, e.g.*, Bicknell v. Vergennes Union High School Bd. of Directors, 638 F.2d 438, 441 (2d Cir. 1980) (removal of books for vulgarity not violative of first amendment); Minarcini v. Strongsville City School Dist., 541 F.2d 577, 581-82 (6th Cir. 1976) (removal of library books violated student's right to receive information); Presidents Council, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 289, 293 (2d Cir. 1972) (holding on constitutional issue in unshelving of books).

27. *See* Note, *The Right to Know in First Amendment Analysis*, 57 Tex. L. Rev. 505, 505 (1979).

28. *See* Procunier v. Martinez, 416 U.S. 396, 408-09 (1974) (censorship of prisoners' mail held unconstitutional).

29. *See* Lamont v. Postmaster General, 381 U.S. 301, 307 (1965) (law requiring postal service to detain unsealed foreign mail of communist nature declared unconstitutional).

30. *See* Marsh v. Alabama, 326 U.S. 501, 509 (1946) (distribution of religious literature in company town protected); Martin v. City of Struthers, 319 U.S. 141, 142-43 (1943) (ordinance prohibiting summoning resident to door for handbills unconstitutional).

31. *See* Stanley v. Georgia, 394 U.S. 557, 564 (1969) (mere private possession of obscene material cannot be crime).

32. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976) (ban on drug price advertising violated consumers' first amendment rights).

33. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968).

34. 395 U.S. 367 (1969).

35. *See id.* at 390.

36. *See* Presidents Council, Dist. 25 v. Community School Bd. No. 25, 409 U.S. 998, 999 (1972) (Douglas, J., dissenting) (denying certiorari). This first amendment right has also been called the "freedom to read." E. Newman, The Freedom Reader 118 (1963); O'Neil, *Libraries, Liberties and the First Amendment*, 42 U. Cin. L. Rev. 209, 216 (1973); Comment, *Not On Our Shelves: A First Amendment Analysis of Library Censorship in the Public Schools*, 61 Neb. L. Rev. 98, 113 (1982).

B. *History of Cases Challenging Library Book Removal*

The first case to raise the possibility of a right to know in a public school setting was *Presidents Council District 25 v. Community School Board No. 25*[37] in 1972. Upholding the school board's removal of *Down These Mean Streets* from the junior high library, the Second Circuit deferred to the school board's discretion.[38] The court ignored the possibility of a student right to receive information and saw no constitutional issue in the removal of books from a school library.[39] Four years later, the Sixth Circuit reached a contrary result on a similar question in *Minarcini v. Strongsville City School District.*[40] Acknowledging a right to know, the *Minarcini* court spoke of the library as a privilege created by the state for the students and not subject to withdrawal by succeeding boards desiring to " 'winnow' the library for books the contents of which occasioned their displeasure . . . ."[41] In 1978 and 1979, two federal district courts in the First Circuit, citing *Minarcini,* found the removal of reading material from the school library an infringement on students' first amendment rights.[42] The Seventh Circuit faced the same issue in 1980 and ruled in the school board's favor in *Zykan v. Warsaw Community School Corp.*[43] That same year the Second Circuit heard two cases on library book removal. In *Bicknell v. Vergennes Union High School,*[44] the board's removal of two books because of "vulgar and indecent" language was allowed to stand.[45] The second case was *Pico v. Board of Education.*[46]

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37. 457 F.2d 289 (2d Cir.), *cert. denied,* 409 U.S. 998 (1972).

38. *See id.* at 291. The book was initially removed from the library but later returned with the stipulation that it be available to parents. *See id.* at 291.

39. *See id.* at 291. "To suggest that shelving or unshelving of books presents a constitutional issue, particularly where there is no showing of a curtailment of freedom of thought, is a proposition we cannot accept." *Id.* at 293.

40. 541 F.2d 577, 582 (6th Cir. 1976). The school district had removed Joseph Heller's *Catch 22* and Kurt Vonnegut's *Cat's Cradle* from the library; they also refused to approve *Catch 22* or Vonnegut's *God Bless You Mr. Rosewater* as texts. *See id.* at 579. The court saw no problem with the board's selection of textbooks, but the removal of library books presented a different issue. *See id.* at 579-81.

41. *Id.* at 581.

42. *See* Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269, 1272, 1275 (D.N.H. 1979) (ad hoc proceeding removing *Ms.* magazine from library because of advertisements it contained); Right to Read Defense Comm. v. School Comm. of Chelsea, 454 F. Supp. 703, 715 (D. Mass, 1978) (removal of *Male and Female Under 18,* a poetry anthology, because of street language in one selection).

43. 631 F.2d 1300, 1302 (7th Cir. 1980) (board had removed *Go Ask Alice* from high school library).

44. 638 F.2d 438 (2d Cir. 1980).

45. *See id.* at 441. Books removed were *Dog Day Afternoon* by Patrick Mann and *The Wanderers* by Richard Price. There was no suggestion that the books were removed because of the ideas they contained. *See id.* at 440-41.

46. *See* Pico v. Board of Educ., 638 F.2d 404 (2d Cir. 1980), *aff'd,* ___ U.S. ___, 102 S.

IV. BOARD OF EDUCATION v. PICO

In *Pico* three board members of the Island Trees Union Free School District obtained a list of "objectionable" books while attending a conference sponsored by a statewide, politically conservative parents' organization.[47] Ten books which appeared on the list were found in the high school and junior high school libraries,[48] and the board ordered their removal from the shelves.[49] Ignoring established procedure within the district,[50] the board selected a committee to review the volumes in question.[51] The committee suggested that five be retained[52] and only two be removed;[53] the board, however, rejected this recommendation and re-

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Ct. 2799, 73 L. Ed. 2d 435 (1982).

47. *See* Pico v. Board of Educ., ___ U.S. ___, ___, 102 S. Ct. 2799, 2802, 73 L. Ed. 2d 435, 440 (1982). Parents of New York United (PONYU) was "concerned about education legislation." *See id.* at ___, 102 S. Ct. at 2802, 73 L. Ed. 2d at 440.

48. *See id.* at ___, 102 S. Ct. at 2802-03, 73 L. Ed. 2d at 440. Nine of the books were in the high school library: *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*, anonymous author; *Laughing Boy* by Oliver La Farge; *Black Boy* by Richard Wright; *A Hero Ain't Nothin' But a Sandwich* by Alice Childress; and *Soul on Ice* by Eldridge Cleaver. *A Reader for Writers*, edited by Jerome Archer, was found in the junior high library. *The Fixer* by Bernard Malamud, also listed, was being used in a twelfth grade literature course. *See id.* at ___, 102 S. Ct. at 2803 nn.3-4, 73 L. Ed. 2d at 440 nn.3-4.

49. *See id.* at ___, 102 S. Ct. at 2803, 73 L. Ed. 2d at 441. When this directive became public, a press release was issued labeling the books as "anti-American, anti-Christian, anti-Semitic, and just plain filthy." *Id.* at ___, 102 S. Ct. at 2803, 73 L. Ed. 2d at 440 (quoting Pico v. Board of Educ., 474 F. Supp. 387, 390 (E.D.N.Y. 1979)).

50. *See id.* at ___, 102 S. Ct. at 2803 n.4, 73 L. Ed. 2d at 440 n.4 (board policy provided for superintendent to appoint committee).

51. *See id.* at ___, 102 S. Ct. at 2803, 73 L. Ed. 2d at 441. The four parents and four school staff members were instructed to consider the books' "educational suitability," "good taste," "relevance," and "appropriateness to age and grade level." *See id.* at ___, 102 S. Ct. at 2803, 73 L. Ed. 2d at 441.

52. *See id.* at ___, 102 S. Ct. at 2803, 73 L. Ed. 2d at 441. The committee recommended keeping *The Fixer, Laughing Boy, Black Boy, Go Ask Alice*, and *Best Short Stories of Negro Writers. See id.* at ___, 102 S. Ct. at 2803 n.5, 73 L. Ed. 2d at 441 n.5 (citing Pico v. Board of Educ., 474 F. Supp. 387, 391 nn.6-7 (E.D.N.Y. 1979)).

53. *See id.* at ___, 102 S. Ct. at 2803, 73 L. Ed. 2d at 441. They recommended removal of *The Naked Ape* and *Down These Mean Streets. See id.* at ___, 102 S. Ct. at 2803 n.6, 73 L. Ed. 2d at 441 n.6 (citing Pico v. Board of Educ., 474 F. Supp. 387, 391 n.8 (E.D.N.Y. 1979)). The committee could not agree on *Soul on Ice* and *A Hero Ain't Nothin' But A Sandwich*, took no position on *A Reader for Writers*, and recommended that *Slaughter House Five* be available subject to parental approval. *See id.* at ___, 102 S. Ct. at 2803 nn.7-9, 73 L. Ed. 2d at 441 nn.7-9 (citing Pico v. Board of Educ., 474 F. Supp. 387, 391 nn.9-10 (E.D.N.Y. 1979)).

turned only two books to the library.[54] A group of five students[55] reacted to this decision by filing suit in a New York federal district court.[56] The student petitioners alleged that the books were removed solely because they offended the board's "social, political and moral tastes," thus denying the students their first amendment rights.[57] The district court granted summary judgment in favor of the board.[58] On appeal, the Second Circuit reversed and remanded the action for trial.[59] The Supreme Court granted certiorari to consider the board's request for reinstatement of the summary judgment.[60] Affirming the Second Circuit decision, the Court held that a school board cannot remove library books solely because they dislike the ideas contained therein.[61]

The plurality, in its opinion by Justice Brennan, concluded that school library book removal could be challenged on first amendment grounds.[62] The distinction between texts and library books was justified in two ways. First, a textbook decision affects a "captive audience," while library books are optional reading.[63] Second, the school library is the primary

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54. *See id.* at ___, 102 S. Ct. at 2803 nn.10-11, 73 L. Ed. 2d at 441 nn.10-11. (*Laughing Boy* and *Black Boy* were returned; *Black Boy* required parental permission).

55. *See* Pico v. Board of Educ., 638 F.2d 404, 404 (2d Cir. 1980). Suit was brought by the parents as next friends of the minor students. *See id.* at 404. Students are among the plaintiffs in all of the library cases. *See, e.g.*, Bicknell v. Vergennes Union High School Bd. of Directors, 638 F.2d 438, 441 (2d Cir. 1980) (petitioners were students, parents, and librarian); Minarcini v. Strongsville City School Dist., 541 F.2d 577, 579 (6th Cir. 1976) (suit brought by five students through their parents); Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269, 1269 (D.N.H. 1979) (student, teacher, graduate, and two concerned citizens, all individually, and as representatives of their class, filed suit). The problem of separating the first amendment interests of a minor in the school environment from the interests of his parents or guardians has been acknowledged. *See* Wisconsin v. Yoder, 406 U.S. 205, 241-46 (1972) (Douglas, J., dissenting in part). In some book removal cases, parents have sued in their own behalf. *See* Presidents Council, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 289, 290 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972); Bicknell v. Vergennes Union High School Bd. of Directors, 638 F.2d 438, 441 (2d Cir. 1980); Right to Read Defense Comm. v. School Comm. of Chelsea, 454 F. Supp. 703, 705 n.2 (D. Mass. 1978). Only in *Right to Read*, was the parents' claim dismissed for lack of standing. *See* Right to Read Defense Comm. v. School Comm. of Chelsea, 454 F. Supp. 703, 705 n.2 (D. Mass. 1978).

56. *See* Pico v. Board of Educ., 474 F. Supp. 387 (E.D.N.Y. 1979).

57. *See* Board of Educ. v. Pico, ___ U.S. ___, ___, 102 S. Ct. 2799, 2804, 73 L. Ed. 2d 435, 441 (1982).

58. *See* Pico v. Board of Educ., 474 F. Supp. 387, 398 (E.D.N.Y. 1979).

59. *See* Pico v. Board of Educ., 638 F.2d 404, 419 (2d Cir. 1980).

60. *See* Board of Educ. v. Pico, ___ U.S. ___, ___, 102 S. Ct. 2799, 2805, 73 L. Ed. 2d 435, 443 (1982).

61. *See id.* at ___, 102 S. Ct. at 2810, 73 L. Ed. 2d at 450. Two months after this Supreme Court decision, the Island Trees School Board returned the books to the library, thus avoiding a trial. *See* TIME 47 (Aug. 23, 1982).

62. *See id.* at ___, 102 S. Ct. at 2810, 73 L. Ed. 2d at 450.

63. *See id.* at ___, 102 S. Ct. at 2805, 73 L. Ed. 2d at 443. The "captive audience"

focus of inquiry and study and, therefore, is a particularly appropriate environment for recognition of students' first amendment rights.[64] In limiting the holding to book removal, the plurality focused on the motivations behind the board's decision. If intent to deny access to ideas was the "decisive factor,"[65] then the board's exercise of discretion violated the Constitution.[66] The plurality was also particularly troubled by the ad hoc procedure in which the books were removed.[67] In his concurring opinion, Justice Blackmun disagreed that the right to receive information is peculiarly associated with the school library[68] and viewed the problem as an improper discrimination between ideas by the state.[69] Justice White concurred with the holding but refused to address the constitutional issue presented.[70]

Although each dissenting justice authored separate opinions, all four justices echoed the traditional view that the judiciary should not intervene in school affairs and, therefore, refused to recognize a student's right

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concept was first addressed by the Court in 1952. *See* Public Utils. Comm'n v. Pollack, 343 U.S. 451, 466 (1952) (rejecting contention that subjecting public bus passengers to recorded advertisements deprived them of liberty without due process). This distinction between texts and library books suggests that the Supreme Court would agree with state court opinions holding that curriculum decisions do not generally provide a basis for first amendment challenges. *See, e.g.*, Todd v. Rochester Community Schools, 200 N.W.2d 90, 93-94 (Mich. Ct. App. 1972) (upholding use of *Slaughter House Five*); Rosenberg v. Board of Educ., 92 N.Y.S.2d 344, 346 (Sup. Ct. 1949) (unsuccessfully challenging use of *Oliver Twist* and *Merchant of Venice* as anti-semitic); Carroll v. Lucas, 313 N.E.2d 864, 866 (Ohio Ct. of C.P. 1974) (concerning *Trips: Rock Life in the Sixties* by Ellen Sander).

64. *See* Board of Educ. v. Pico, ___ U.S. ___, ___, 102 S. Ct. 2799, 2809, 73 L. Ed. 2d 435, 448 (1982).

65. *See id.* at ___, 102 S. Ct. at 2810, 73 L. Ed. 2d at 449. By "decisive factor," the Court meant a factor the absence of which would result in an opposite decision. *See id.* at ___, 102 S. Ct. at 2810 n.22, 73 L. Ed. 2d at 449 n.22 (citing Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)).

66. *See id.* at ___, 102 S. Ct. at 2810, 73 L. Ed. 2d at 449.

67. *See id.* at ___, 102 S. Ct. at 2812, 73 L. Ed. 2d at 452. Had petitioners used "established, regular, and facially unbiased procedures" in removing the books, the outcome would have been very different. *See id.* at ___, 102 S. Ct. at 2811, 73 L. Ed. 2d at 451.

68. *See id.* at ___, 102 S. Ct. at 2814, 73 L. Ed. 2d at 454 (Blackmun, J., concurring). Although he acknowledged a practical distinction, he doubted that there was a theoretical distinction between removing a book and failing to acquire it. *See id.* at ___, 102 S. Ct. at 2814 n.1, 73 L. Ed. 2d at 454 n.1 (quoting Pico v. Board of Educ., 638 F.2d 404, 436 (2d Cir. 1980) (Newman, J., concurring in the result)).

69. *See id.* at ___, 102 S. Ct. at 2814, 73 L. Ed. 2d at 454 (Blackmun, J., concurring). Blackmun distinguishes this from the plurality's analysis which, he says, focuses on the state's "failure to provide information." *See id.* at ___, 102 S. Ct. at 2814 n.2, 73 L. Ed. 2d at 454 n.2 (Blackmun, J., concurring).

70. *See id.* at ___, 102 S. Ct. at 2816-17, 73 L. Ed. 2d at 457-58 (White, J., concurring in judgment).

to receive information in the school environment.[71] Chief Justice Burger noted that the school board is an elected body and that parents dissatisfied with board decisions should elect board members who represent their point of view.[72] Moreover, he felt that the students were not denied access to the books removed from the library because there were alternate sources within the community for obtaining those same books.[73] The Chief Justice also suggested that the limitations which the plurality placed on its own holding were illogical because censorship of compulsory reading material was more likely to impose a "pall of orthodoxy."[74] Justice Powell noted the plurality's failure to elaborate on school board book removal standards which would protect a student's first amendment interest in the school library.[75] He quoted from nine[76] of the ten offending books, terming them "vulgar or racist."[77] Addressing the indoctrinating function of the public schools, Justice Rehnquist argued that education necessarily consists of a selective presentation of ideas.[78] Like the Chief Justice, Rehnquist also observed that the board's decision did not affect the students' right to obtain the books from another source.[79] Finally, he suggested that the distinction between removing books and not acquiring

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71. *See id.* at ___, 102 S. Ct. at 2821, 73 L. Ed. 2d at 464 (Burger, C.J., dissenting); *id.* at ___, 102 S. Ct. at 2822, 73 L. Ed. 2d at 464 (Powell, J., dissenting); *id.* at ___, 102 S. Ct. at 2830, 73 L. Ed. 2d at 474 (Rehnquist, J., dissenting); *id.* at ___, 102 S. Ct. at 2835, 73 L. Ed. 2d at 481 (O'Connor, J., dissenting).

72. *See id.* at ___, 102 S. Ct. at 2820-21, 73 L. Ed. 2d at 462-63 (school board is truly "of the people and by the people"). The Chief Justice cited Epperson v. Arkansas, 393 U.S. 97, 104 (1968) in support of this proposition. *See id.* at ___, 102 S. Ct. at 2820 n.6, 73 L. Ed. 2d at 462 n.6 (Burger, C.J., dissenting).

73. *See id.* at ___, 102 S. Ct. at 2821, 73 L. Ed. 2d at 463 (Burger, C.J., dissenting) (books removed from library available at bookstores and public library). No authority was given for this contention. *See id.* at ___, 102 S. Ct. at 2821, 73 L. Ed. 2d at 463 (Burger, C.J., dissenting).

74. *See id.* at ___, 102 S. Ct. at 2821, 73 L. Ed. 2d at 463 (Burger, C.J., dissenting) (textbooks more likely to impose "pall of orthodoxy" than optional reading because students have no choice).

75. *See id.* at ___, 102 S. Ct. at 2822, 73 L. Ed. 2d at 464-65 (Powell, J., dissenting). Powell opined that "the 'chancellor's foot' standard was never this fuzzy." *Id.* at ___, 102 S. Ct. at 2822, 73 L. Ed. 2d at 464-65 (Powell, J., dissenting).

76. *See id.* at ___, 102 S. Ct. at 2823-27, 73 L. Ed. 2d at 466-70 (*A Reader for Writers* was not excerpted because it contained no vulgarities).

77. *See id.* at ___, 102 S. Ct. at 2822-23, 73 L. Ed. 2d at 465 (Powell, J., dissenting).

78. *See id.* at ___, 102 S. Ct. at 2829, 73 L. Ed. 2d at 473 (Rehnquist, J., dissenting) (government as educator differs from government as sovereign). Justice Rehnquist offered no authority for this proposition. *See id.* at ___, 102 S. Ct. at 2829, 73 L. Ed. 2d at 473 (Rehnquist, J., dissenting).

79. *See id.* at ___, 102 S. Ct. at 2830, 73 L. Ed. 2d at 474 (Rehnquist, J., dissenting) (books not forbidden to citizenry in general).

them was artificial.[80] Justice O'Connor saw no problem with the removal of books from the library as long as there was no infringement on the right of the student to read and otherwise discuss the material.[81]

V. PICO'S IMPACT

A. *Evolution of a Student's Right to Know*

A right to know, that is, a right to have access to ideas, would be a logical expansion of the first amendment interest in receiving information. Early cases suggesting a right to receive were brought by the speakers.[82] In *Lamont v. Postmaster General*,[83] however, the recipient of the information himself successfully asserted this right.[84] In 1976, the Supreme Court recognized the right to receive information from an unspecified speaker in *Virginia State Board of Pharmacy v. Citizens Consumer Council, Inc.*[85] The Court did not require a nexus between parties at either end of the communication, but found that "where a speaker exists . . . protection afforded is to the communication, to its source and to its recipients both."[86] A problem with the right to receive is that the stronger statements by the Supreme Court regarding the existence of this right are inextricably bound up in the evaluation of other constitutional concerns. In *Virginia Board*, the right to receive was discussed in the context of the Court's primary determination that commercial speech should be afforded first amendment protection.[87] The right to receive information was similarly a secondary issue in *Stanley v. Georgia*,[88] where the Court emphasized the right to privacy in holding that mere possession of pornography could not be designated a crime.[89] The facts in *Pico* offered the Supreme Court an opportunity to establish a right to know independent of any other constitutional considerations. The plurality clearly wanted to

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80. *See id.* at ___, 102 S. Ct. at 2830, 73 L. Ed. 2d at 474 (Rehnquist, J., dissenting) (failure to acquire books denies access as fully as removal).

81. *See id.* at ___, 102 S. Ct. at 2835, 73 L. Ed. 2d at 481 (O'Connor, J., dissenting).

82. *See, e.g.*, Marsh v. Alabama, 326 U.S. 501, 509 (1946) (distribution of religious literature in company town); Thomas v. Collins, 323 U.S. 516, 518 (1945) (union organizers asserting right to address workers); Martin v. City of Struthers, 319 U.S. 141, 143 (1943) (ordinance prohibited summoning resident to door for purpose of receiving handbills).

83. 381 U.S. 301 (1965).

84. *See id.* at 307 (law requiring postal service to detain unsealed communist mail unconstitutional).

85. *See* 425 U.S. 748, 756 (1976).

86. *See id.* at 756.

87. *See id.* at 760-72.

88. 394 U.S. 557 (1969).

89. *See id.* at 564.

recognize such a right,[90] but neither of the concurring justices was willing to join with them on that point.[91] It should be noted that Justice White, who alluded to a right to know in *Red Lion Broadcasting Co. v. FCC*,[92] refused to address the constitutional issue in this case.[93]

Although the issue of a right to know is clouded in *Pico* by the students' minority and the school setting, arguably a right to know should have been recognized. Local school boards are endowed with considerable authority, but it is not absolute.[94] Students' constitutional rights must be construed in the special light of the school environment,[95] but judicial intervention in school operations is justified when fundamental rights are implicated.[96] Here, the school board's removal of books from the library infringed on the students' right to have access to the ideas those books contained.[97]

The dissent argues that the inculcative function of the school necessitates abridgment of the students' first amendment rights; however, this indoctrination theory is not universally accepted.[98] It is ironic that the dissent, in the interest of instilling societal values in students, would restrict a basic democratic right,[99] thus "teach[ing] youth to discount important principles of our government as mere platitudes."[100]

Justice Powell believed that the board's actions were permissible be-

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90. *See* Board of Educ. v. Pico, ___ U.S. ___, ___, 102 S. Ct. 2799, 2808, 73 L. Ed. 2d 435, 446-47 (1982).

91. *See id.* at ___, 102 S. Ct. at 2814, 73 L. Ed. 2d at 454 (Blackmun, J., concurring); *id.* at ___, 102 S. Ct. at 2816, 73 L. Ed. 2d at 457 (White, J., concurring).

92. 395 U.S. 367 (1969). Justice White wrote: "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged . . . ." *Id.* at 390.

93. *See* Board of Educ. v. Pico, ___ U.S. ___, ___, 102 S. Ct. 2799, 2816, 73 L. Ed. 2d 435, 457 (1982) (White, J., dissenting).

94. *See* Niccolai, *The Right to Read and School Library Censorship*, 10 J.L. & EDUC. 23, 23 (1981). The judiciary has long recognized that local boards have broad discretion in managing school affairs. *See* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 507 (1969); Pierce v. Society of Sisters, 268 U.S. 510, 515 (1925); Meyer v. Nebraska, 262 U.S. 390, 402 (1923).

95. *See* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969).

96. *See* Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

97. *See* Board of Educ. v. Pico, ___ U.S. ___, ___, 102 S. Ct. 2799, 2803, 73 L. Ed. 2d 435, 440 (1982) (books removed because "anti-American, anti-Christian, anti-Semitic, and just plain filthy") (quoting Pico v. Board of Educ., 474 F. Supp. 387, 390 (E.D.N.Y. 1979)).

98. *Compare* Wilson v. Chancellor, 418 F. Supp. 1358, 1367-68 (D. Or. 1976) (today's youth too sophisticated to be easy prey) *with* Mailloux v. Kiley, 323 F. Supp. 1387, 1392 (D. Mass. 1971) (students cannot interact with adults on equal level).

99. *See* Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967). Justice Brennan wrote: "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth . . . ." *Id.* at 603.

100. West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

cause all but one of the unshelved books contained some vulgarity or sexual explicitness.[101] Vulgarity is a constitutionally neutral criterion which the plurality would accept as a basis for library book removal.[102] The obscenity standard varies from adult to child,[103] and from community to community;[104] therefore, a popularly elected school board represents local standards and may properly determine that expletives and sex contained in a book make its presence in the school inappropriate. The same court of appeals which reversed the summary judgment in *Pico* held for the school board in *Bicknell* because the removal of the offending books had been based *solely* on their vulgarity.[105] While a school board's discretion to determine what constitutes vulgarity is founded on its status as a representative of community standards, the actions of the Island Trees board were based on a list of "objectionable" books which was prepared outside the community.[106] Although, arguably, there were vulgarities or sexual explicitness in most of the books at issue in *Pico*, the school board's original explanation of its actions clearly reflected their concern with the ideas the books contained.[107] Thus, the board's motivation is suspect, regardless of the occasional vulgarity which may be found in the excised volumes.

Another argument propounded by the dissent is that the democratically elected school board represents the values of the community.[108] While this is certainly true,[109] it does not justify the board's attempt to

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101. *See* Board of Educ. v. Pico, ___ U.S. ___, ___, 102 S. Ct. 2799, 2823, 73 L. Ed. 2d 435, 466 (1982) (Powell, J., dissenting).

102. *See id.* at ___, 102 S. Ct. at 2810, 73 L. Ed. 2d at 449.

103. *See* Ginsberg v. New York, 390 U.S. 629, 638 (1968) (upholding New York statutes which prohibited sale of "girlie" magazines to minors). A variable obscenity standard is justified by the state's interest in protecting children from objectionable materials. *See id.* at 636; *cf.* FCC v. Pacifica Found., 438 U.S. 726, 740 (1978) (upholding FCC ban on satiric monologue concerning "words you couldn't say on the public airwaves" in part because of accessibility to children). Obscenity is not protected by the first amendment. *See* Roth v. United States, 354 U.S. 476, 485 (1957).

104. *See* Miller v. California, 413 U.S. 15, 24 (1973) (test is whether "average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the purient interest").

105. *See* Bicknell v. Vergennes Union High School Bd. of Directors, 638 F.2d 438, 441 (2d Cir. 1980).

106. *See* Board of Educ. v. Pico, ___ U.S. ___, ___, 102 S. Ct. 2799, 2802, 73 L. Ed. 2d 435, 440.

107. *See id.* at ___, 102 S. Ct. at 2803, 73 L. Ed. 2d at 440 (the books were "*anti-American, anti-Christian, anti-Semitic,* and just plain filthy") (emphasis added) (quoting Pico v. Board of Educ., 474 F. Supp. 387, 390 (E.D.N.Y. 1979)). Moreover, one of the books, *A Reader for Writers,* was completely devoid of any vulgarity or sexual explicitness. *See id.* at ___, 102 S. Ct. at 2811, 73 L. Ed. 2d at 451.

108. *See id.* at ___, 102 S. Ct. at 2820-21, 73 L. Ed. 2d at 462-63.

109. *See* Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention,* 59 TEX. L. REV. 477, 509 (1981).

"cast a pall of orthodoxy"[110] over the school library by prescribing what is acceptable in religion, politics, nationalism, and other matters of opinion.[111] Finally, availability of the excised books in the library and bookstores of the community will not, as the dissent suggests, eliminate the constitutional problem. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[112] other sources of information did not remedy the burden created by the advertising prohibition.[113] Restraint on expression, of which the right to receive is a corollary, may generally not be justified by the fact that there may be other times, places, or circumstances available for such expression.[114]

B. *Limitations on the Right*

1. Removal v. Non-Acquisition

The idea of distinguishing between non-acquisition and removal of a book did not originate with the *Pico* decision.[115] It has been suggested that according higher status to a volume already on the shelves is nothing more than "tenure" for books.[116] Some authorities have attempted a theoretical distinction: the library as a public forum and the book as silent speech.[117] There is certainly a practical distinction. Removal of a book,

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110. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) ("First Amendment . . . does not tolerate laws which cast a pall of orthodoxy over the classroom").

111. *Compare* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("no official . . . can prescribe what shall be orthodox in politics, nationalism, religion") *with* Board of Educ. v. Pico, ___ U.S. ___, ___, 102 S. Ct. 2799, 2803, 73 L. Ed. 2d 435, 440 (board removed books because they were "anti-American, anti-Christian, anti-Semitic") (quoting Pico v. Board of Educ., 474 F. Supp. 387, 390 (E.D.N.Y. 1979)).

112. 425 U.S. 748 (1976).

113. *See id.* at 757 n.15.

114. *See* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 (1975); Spence v. Washington, 418 U.S. 405, 411 n.4 (1974); Schneider v. Town of Irvington, 308 U.S. 147, 163 (1939).

115. *See, e.g.*, Minarcini v. Strongsville City School Dist., 541 F.2d 577, 581 (6th Cir. 1976) (library is privilege not subject to withdrawal by "winnowing" of books); Right to Read Defense Comm. v. School Comm. of Chelsea, 454 F. Supp. 703, 711 (D. Mass 1978) (school board's authority to select books absolute, but limits exist on authority to remove same); Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269, 1273 (D.N.H. 1979) ("state, having so acted when not compelled, may consequentially create a constitutionally protected interest").

116. *See* Presidents Council, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 289, 293 (2d Cir. 1972) (rejecting contention that unshelving of books already in library presents constitutional issue).

117. *See* Minarcini v. Strongsville City School Dist., 541 F.2d 577, 582-83 (6th Cir. 1976); Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269, 1275 (D.N.H. 1979); *see also* Comment, *First Amendment Limitations on the Power of School Boards to Select and Remove*

more than failure to acquire it, suggests an impermissible motive.[118] A book may not be acquired for any number of reasons, the foremost being financial.[119] There are few legitimate explanations, however, for removing a book from a library which is not completely filled.[120] The plurality did not speak of this practical distinction, but did focus on the board's reason for removing the books as being determinative.[121] If motive is truly the key, a bad motive for refusing to acquire a book violates the student's right to receive information no less than a bad motive for unshelving a book.[122] Proof of motive in cases of non-acquisition may be difficult. It has been suggested that while decisions regarding non-acquisition of a book and book removal should be governed by the same constitutional standard, different presumptions may be in order.[123] An initial educational decision to acquire or not acquire a book, if made in accordance with regular procedures, should be presumed constitutional.[124] Thus, the party challenging that initial determination, be it school board or student,

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High School Text and Library Books, 52 ST. JOHN'S L. REV. 457, 471 (1978). A public forum is a place owned by the government and available for exercising first amendment rights. *See* Harpaz, *A Paradigm of First Amendment Dilemmas: Resolving Public School Library Censorship Disputes*, 4 W. NEW ENG. L. REV. 1, 9 (1981). It has been suggested that a public school is a secondary or semi-public forum, that is, a government-owned place which is compatible with speech use but created for some other purpose. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-21, at 690 (1978). *But see* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 512 (1969) (important part of education process is "personal intercommunication among the students"). *See generally* Comment, *The Public School as Public Forum*, 54 TEX. L. REV. 90 (1975) (discussion of schools as public forums).

118. *See* Board of Educ. v. Pico, ___ U.S. ___, ___, 102 S. Ct. 2799, 2814 n.1, 73 L. Ed. 2d 435, 454 n.1 (1982) (Blackmun, J., concurring) (citing Pico v. Board of Educ., 638 F.2d 404, 436 (2d Cir. 1980) (Newman, J., concurring)).

119. *See id.* at ___, 102 S. Ct. at 2814 n.1, 73 L. Ed. 2d at 454 n.1 (Blackmun, J., concurring).

120. *See id.* at ___, 102 S. Ct. at 2814 n.1, 73 L. Ed. 2d at 454 n.1 (Blackmun, J., concurring); *see also* Note, *Constitutional Law—First Amendment—Student's Right to Receive Information Precludes Board's Removal of Allegedly Offensive Books from High School Library*, 30 VAND. L. REV. 85, 98 (1977) (absence of budgetary concerns should weigh in favor of students' rights).

121. *See* Board of Educ. v. Pico, ___ U.S. ___, ___, 102 S. Ct. 2799, 2809-10, 73 L. Ed. 2d 435, 449 (1982). The court cited Mount Healthy City Board of Education v. Doyle, 429 U.S. 274, 283-84 (1977), which held that a teacher is entitled to reinstatement if the decision not to rehire was based on his exercise of first amendment freedoms.

122. *See* Note, *Constitutional Law—First Amendment Right to Receive Information*, 55 TEX. L. REV. 511, 520-21 (1977).

123. *See* Comment, *Schoolbooks, School Boards, and the Constitution*, 80 COLUM. L. REV. 1092, 1116 (1980).

124. *See id.* at 1116. This is analogous to the presumption that public officers in their official capacity act legally and in a regular manner. *See* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 807 (2d ed. 1972).

should bear the burden of proving his allegations.[125]

2. Texts v. Library Books

Cases challenging curriculum decisions have met with little success.[126] As one court explained, "discretion as to the selection of textbooks must be lodged somewhere [and] . . . no federal constitutional prohibition prevents its being lodged in school board officials . . . ."[127] Perhaps the "shifting burden of proof" concept discussed in the previous section explains why curriculum and textbook decisions are generally upheld. Challenges regarding curriculum and texts are generally challenges of the initial determination, which is imbued with a presumption of propriety.[128] The parent or student who challenges the decision has the burden of proof which, in the absence of some blatantly unconstitutional motive on the part of the decision-making body,[129] would be virtually impossible to overcome. Again, however, if motive is the decisive factor,[130] there is no reason why an improper motive in selecting or removing textbooks should be immune from challenge under the student's right to know.

C. *Weaknesses of the Holding*

The holding in *Pico* is weak both numerically and substantively. It is a plurality opinion[131] with which the fifth justice concurs on grounds other than the constitutional issue presented.[132] Additionally, the four dissent-

125. *See* Comment, *Schoolbooks, School Boards, and the Constitution,* 80 COLUM. L. REV. 1092, 1117 (1980). In the case of book removal, the school board must prove that its decision was "based on a legitimate educational consideration." *See id.* at 1117.

126. *See, e.g.,* Cornwell v. State Bd. of Educ. 428 F.2d 471, 472 (4th Cir.) (unsuccessful parental challenge of school sex education program), *cert. denied,* 400 U.S. 942 (1970); Davis v. Page, 385 F. Supp. 395, 404-05 (D.N.H. 1974) (elementary school health course did not invoke first amendment); Citizens for Parental Rights v. San Mateo County Bd. of Educ., 124 Cal. Rptr. 68, 82 (Ct. App. 1975) (unsuccessful challenge of sex education program; difference of opinion on curriculum does not give rise to constitutional right), *appeal dismissed,* 425 U.S. 908 (1976). *But see* Loewen v. Turnipseed, 488 F. Supp. 1138, 1154 (N.D. Miss. 1980) (state textbook committee's rejection of history book which addressed racial problems denied authors, teachers, and students free speech).

127. Minarcini v. Strongsville City School Dist., 541 F.2d 577, 579 (6th Cir. 1976).

128. *See* Comment, *Schoolbooks, School Boards, and the Constitution,* 80 COLUM. L. REV. 1092, 1116 (1980).

129. *See id.* at 1117.

130. *See* Board of Educ. v. Pico, ___ U.S. ___, ___, 102 S. Ct. 2799, 2809, 73 L. Ed. 2d 435, 449 (1982).

131. *See id.* at ___, 102 S. Ct. at 2802, 73 L. Ed. 2d at 439 (Brennan, J., for the plurality, joined by Marshall, Stevens, & Blackmun, JJ.).

132. *See id.* at ___, 102 S. Ct. at 2816, 73 L. Ed. 2d at 475 (White, J., concurring). Justice White's reluctance to disagree with the court of appeals on the reason underlying

ing justices[133] clearly saw no constitutional issue raised by the school board's actions. There are two substantive problems. Although the court expressed concern about irregularities in the book removal procedure,[134] it failed to offer concrete guidelines for school boards.[135] Moreover, the Court places only minimal restrictions which can be easily circumvented on the authority of school boards to suppress ideas.[136]

VI. GUIDELINES

Justice Powell correctly noted the plurality's failure to provide concrete guidelines for avoiding infringement of a student's first amendment interests,[137] but the lack of guidelines is reflective of the minimal restrictions which the *Pico* holding actually imposes on the schools. To avoid impropriety in removing a book from the school library, a board need only have some sort of procedure for evaluating "objectionable" books with constitutionally neutral criteria and follow the procedure when a question or complaint is raised.[138] The Island Trees board violated this minimal restraint on its discretion at every turn. Its members initially objected to the books on ideological grounds.[139] The board then usurped the superintendent's authority to appoint a review committee.[140] Finally, it disregarded the recommendations of its own committee without explanation.[141]

The court noted certain criteria which would be acceptable in evaluating books. These included educational suitability, pervasive vulgarity, good taste, relevance, and appropriateness to age level.[142] A book removal couched in these broad, constitutionally neutral terms would not offend the holding in *Pico*.

While the plurality was not specific about what would constitute an

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the book removal suggests that he might side with the plurality. *Cf. id.* at ___, 102 S. Ct. at 2816, 73 L. Ed. 2d at 475 (White, J., concurring.).

133. *See* Board of Educ. v. Pico, ___ U.S. ___, 102 S. Ct. 2799, 73 L. Ed. 2d 435 (1982) (Burger, C.J., Powell, Rehnquist, & O'Connor, JJ., dissenting).

134. *See id.* at ___, 102 S. Ct. at 2812, 73 L. Ed. 2d at 452 ("the antithesis of those procedures that might tend to allay suspicions regarding petitioners' motivations").

135. *See id.* at ___, 102 S. Ct. at 2811, 73 L. Ed. 2d at 451. The court simply noted that "established, regular and facially unbiased procedure[s]" for review of controversial materials would have made *Pico* a very different case. *See id.* at ___, 102 S. Ct. at 2811-12, 73 L. Ed. 2d at 452.

136. *See id.* at ___, 102 S. Ct. at 2810, 73 L. Ed. 2d at 449-50.

137. *See id.* at ___, 102 S. Ct. at 2822, 73 L. Ed. 2d at 464-65 (Powell, J., dissenting).

138. *Cf. id.* at ___, 102 S. Ct. at 2811, 73 L. Ed. 2d at 451.

139. *See id.* at ___, 102 S. Ct. at 2803, 73 L. Ed. 2d at 441.

140. *See id.* at ___, 102 S. Ct. at 2803 n.4, 73 L. Ed. 2d at 440 n.4.

141. *See id.* at ___, 102 S. Ct. at 2803, 73 L. Ed. 2d at 441.

142. *See id.* at ___, 102 S. Ct. at 2811, 73 L. Ed. 2d at 451.

acceptable review procedure, a lower court has noted with approval the procedure established in one community.[143] To deal with questions or complaints about books within the school, that board provided for the appointment of a committee composed of representatives from the administration, faculty, and library.[144] The individual responsible for acquisition of the book is also part of the reviewing committee.[145] Again, the exact composition of the committee is not significant. The important thing is that a school board should have an established procedure which is followed whenever questions or complaints arise regarding books in the school.[146]

VII. Conclusion

Pico is the first book removal case to be heard by the Supreme Court. In holding that a school board may not remove library books solely for ideological reasons, the Court has placed minimal restrictions on school-board authority and afforded similarly minimal protection to the students' first amendment interest in having access to ideas. Perhaps the significance of *Pico* is that, given the opportunity, the Supreme Court did not recognize a right to know.

143. *See* Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269, 1276 (D.N.H. 1979) (board's ad hoc procedure in removing *Ms.* magazine from library nullified; failed to follow established procedure).

144. *See id.* at 1271.

145. *See id.* at 1271.

146. *Cf.* Board of Educ. v. Pico, ___ U.S. ___, ___, 102 S. Ct. 2799, 2811, 73 L. Ed. 2d 435, 451 (1982).