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*Book Removal in Secondary Schools: A Violation of the First Amendment?*

*Board of Education v. Pico*

457 U.S. 853 (1982)

**I**N THE AMERICAN DEMOCRATIC SYSTEM, it is not uncommon for small, publicly-elected bodies to control the workings of societal institutions. These bodies may be federal, state or local in realm and function, and are usually given wide discretion.<sup>1</sup> But who is it that controls the actions of these bodies? This question is paramount to the myriad of recent cases involving the removal of books from secondary school libraries.<sup>2</sup> The body involved is the local school board — an elected unit charged with the duty of managing school affairs.<sup>3</sup> In that process of management, however, local school boards are apparently not sovereign.<sup>4</sup> In *Board of Education v. Pico*,<sup>5</sup> a suit brought originally in 1979 by junior high and high school students in New York, it was held by the Supreme Court of the United States that students are entitled to first amendment<sup>6</sup> protection of their “right of access to information” which is not to be infringed upon by the denial of access to ideas with which the board disagrees.<sup>7</sup> In *Pico*, this access occurs in the form of books acquired for the school library which are subsequently removed under the discretion of the school board.

<sup>1</sup>See, e.g., *President’s Council, Dist. 25 v. Community Bd. No. 25*, 457 F.2d 289 (2d Cir. 1972); *James v. Board of Educ.*, 461 F.2d 566 (2d Cir. 1972), *cert. den.*, 409 U.S. 1042 (1972), *reh. den.*, 410 U.S. 947 (1973).

<sup>2</sup>See generally, *Pratt v. Independent School Dist. No. 831, Forest Lake*, 670 F.2d 771 (8th Cir. 1982); *Bicknell v. Vergennes Union High School Bd. of Directors*, 638 F.2d 438 (2d Cir. 1980); *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300 (7th Cir. 1980); *Cary v. Board of Educ.*, 598 F.2d 535 (10th Cir. 1979); *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577 (6th Cir. 1976); *President’s Council, Dist. 25 v. Community Bd. No. 25*, 457 F.2d 289 (2d Cir. 1972); *Sheck v. Bailey School Comm.*, 530 F. Supp. 679 (D. Me. 1982); *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269 (D.N.H. 1979); *Right to Read Defense Comm. v. School Comm. of Chelsea*, 454 F. Supp. 703 (D. Mass. 1978).

<sup>3</sup>The responsibility for public education in the United States rests with the individual states which in turn usually delegate administrative responsibility to locally elected bodies commonly known as school boards. Note, *Schoolbooks, School Boards, and the Constitution*, 80 COLUM. L. REV. 1092, 1095 (1980).

<sup>4</sup>See, e.g., *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969).

<sup>5</sup>*Board of Educ. v. Pico*, 457 U.S. 853 (1982).

<sup>6</sup>The first amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” It applies to the states by virtue of the fourteenth amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936).

<sup>7</sup>457 U.S. at 866.

This case, like others before it,<sup>8</sup> concerns a conflict between the discretion vested by the state in the school board and the limitations established by the United States Constitution.<sup>9</sup> It is an example of the classic struggle between the recognition of individual rights and the powers of an administering body.<sup>10</sup> *Board of Education v. Pico* is only the latest in a line of cases which attempt to establish and define the first amendment rights of students.<sup>11</sup> It was hoped that the Supreme Court's decision in *Pico* would put an end to the controversies involving the removal of library books from school shelves. The Court's treatment and resolution of the issue, however, was not conclusive, and its influence on similar controversies is unclear. In the end, seven separate opinions were filed.<sup>12</sup> The justices were unable to establish whether the right of access to information exists, nor could they agree upon a clear standard of review to guide federal courts in similar disputes. Due to this lack of cohesion, the substantive issues were left unsettled, and the way is clear for further debate.

The dispute in *Pico* began when the Island Trees Union Free School District Board of Education ordered nine books<sup>13</sup> removed from the shelves of elementary and secondary school libraries. The members of the school board had been spurred into action when they saw the titles of these books on a list of "objectionable" books at a conference sponsored by Parents of New York United (PONYU), an educational organization considered politically conservative.<sup>14</sup> The school board appointed a committee of parents and teachers to advise them of the suitability of these books for secondary school students, and the committee suggested that only two of them be removed.<sup>15</sup> The school board, however, overturned or ignored the committee's recommendations for undisclosed reasons. All nine books were removed for being what the board described as "anti-American, anti-Christian, anti-Semitic, and just plain filthy."<sup>16</sup> This

<sup>8</sup>See *supra* note 2.

<sup>9</sup>Langvardt, *Not on Our Shelves: A First Amendment Analysis of Library Censorship in the Public Schools*, 61 NEB. L. REV. 98, 135 (1982).

<sup>10</sup>Comment, *Removal of Public School Library Books: The First Amendment Versus the Local School Board*, 34 VAND. L. REV. 1407, 1409 (1981).

<sup>11</sup>This litigation may be divided into areas of hair length cases, student suspension cases, control over student newspaper cases, and library censorship cases. Courts have been divided in their treatment of the constitutionality of such restrictions. See, J. HOGAN, *THE SCHOOLS, THE COURTS AND THE PUBLIC INTEREST*, 98-108 (1974); Gross v. Lopez, 419 U.S. 565 (1975); A. LEVINE, *THE RIGHTS OF STUDENTS: THE BASIC A.C.L.U. GUIDE TO A STUDENT'S RIGHTS* 25, at 31-32, 34-41 (1973); *supra* note 2.

<sup>12</sup>Justice Brennan wrote the plurality opinion, joined by Justices Marshall and Stevens. Justice Blackmun concurred in part and concurred in the judgment. Justice White wrote an opinion concurring in the judgment only. Justice Burger wrote a dissenting opinion joined by Justices Powell, Rehnquist and O'Connor. Justices Rehnquist, Powell and O'Connor also wrote separate dissenting opinions.

<sup>13</sup>The books were: *SLAUGHTER HOUSE FIVE*, by Kurt Vonnegut, Jr.; *THE NAKED APE*, by Desmond Morris; *DOWN THESE MEAN STREETS*, by Piri Thomas; *BEST SHORT STORIES OF NEGRO WRITERS*, edited by Langston Hughes; *GO ASK ALICE*, of anonymous authorship; *LAUGHING BOY*, by Richard Wright; *A HERO AIN'T NOTHIN' BUT A SANDWICH*, by Alice Childress; and *SOUL ON ICE*, by Eldridge Cleaver.

<sup>14</sup>457 U.S. at 856.

<sup>15</sup>*THE NAKED APE*, by Desmond Morris and *DOWN THESE MEAN STREETS*, by Piri Thomas, were found unsuitable. *Pico v. Bd. of Educ.*, 474 F. Supp. 387, 391 n.8 (E.D.N.Y. 1979).

<sup>16</sup>*Id.* at 390.

decision was reached by the board even though the parent-teacher committee had suggested that the books be retained with only minimal supervision of the students.<sup>17</sup>

Five students<sup>18</sup> expressed their opposition by bringing suit in the Eastern District Court of New York under 42 U.S.C. § 1983. This section establishes the illegality of and liability for acts done by the state which deprive citizens of their constitutional rights. The local school board acts as an agency of the state for this purpose. The students claimed their freedom under the first amendment had been infringed upon by the board's decision, and they sought an injunctive order forcing the board to return the books to the library and a declaration that the removal was unconstitutional.<sup>19</sup> The district court granted summary judgment in favor of the defendant school board stating that the material was vulgar, and that the board's actions did not amount to a "sharp and direct infringement of any first amendment right."<sup>20</sup> The court indicated that although the removal was content based, the decision was based on the board's "conservative educational philosophy" and not on religious principles.<sup>21</sup> This decision was reversed by the Second Circuit Court of Appeals, which decided that the school board had failed its burden of showing a reasonable basis for interfering with the students' rights.<sup>22</sup> This burden was placed upon the board because the circumstances surrounding the removal of the books were so irregular. The appellate division held that the board had failed to meet its burden and that the students should have "been offered an opportunity to persuade a finder of fact that the ostensible justifications for the school board's actions . . . were simply pretexts for the suppression of free speech."<sup>23</sup> The Supreme Court granted the school board's petition for certiorari.<sup>24</sup>

The plurality opinion in *Pico* was written by Justice Brennan, who framed the issue as "whether the First Amendment imposes limitations upon the exercise by a local school board of its discretion to remove library books from high school and junior high school libraries."<sup>25</sup> If such limitation is found to exist the court must then decide, in a light most favorable to respondent students, if there was a question of fact as to whether the board exceeded those limitations.<sup>26</sup> The plurality recognized that "school boards have broad discre-

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<sup>17</sup>The committee recommended that SLAUGHTERHOUSE FIVE be made available to the students only with parental approval. 474 F. Supp. at 391, n.10.

<sup>18</sup>The students were: Steven Pico, Jaqueline Gold, Glenn Yarris, Russell Rieger, and Paul Sochinski.

<sup>19</sup>457 U.S. at 859.

<sup>20</sup>*Id.* at 860.

<sup>21</sup>474 F. Supp. at 392.

<sup>22</sup>457 U.S. at 860 (citing 638 F.2d 404 (2d Cir. 1980)).

<sup>23</sup>*Id.* (citing 638 F. Supp. at 414).

<sup>24</sup>457 U.S. at 861.

<sup>25</sup>*Id.* at 855-56.

<sup>26</sup>*Id.* at 872.

tion in the management of school affairs.”<sup>27</sup> Justice Brennan also stated that public schools are vital “in the preparation of individuals for participation as citizens,” and for “inculcating fundamental values necessary to the maintenance of a democratic political system.”<sup>28</sup> School boards are permitted to transmit social, moral, and political community values, but the manner of that transmission must comport with constitutional limitations. The Court quoted from *Ambach v. Norwick*,<sup>29</sup> but it did not accept the broader concept involved in that case that education necessarily involves politics.<sup>30</sup> The plurality in *Pico* was adamant that political motivations are not to influence educational decisions. Justice Brennan stated that the school board had “significant discretion to determine the content of their school libraries . . . [b]ut that discretion may not be exercised in a narrowly partisan or political manner.”<sup>31</sup>

Relying largely on the rationales of a few landmark decisions, the Court went on to explain why vigorous protection of constitutional rights is especially important to the student. *West Virginia v. Barnette*<sup>32</sup> dealt with a school board’s requirement that students salute the American flag while pledging allegiance, and the Court held this requirement an infringement upon first amendment freedoms.<sup>33</sup> In *Epperson v. Arkansas*<sup>34</sup> a statute forbidding the teaching of evolution in the public classroom was held unconstitutional.<sup>35</sup> The *Pico* Court was especially dependent upon *Tinker v. Des Moines Independent Community School District*.<sup>36</sup> In that case, public school students peacefully wearing black arm bands as a vehicle for protest had been protected from school board interference.<sup>37</sup> *Tinker* is often cited for its principle that student expression is protected unless it “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.”<sup>38</sup> Students possess rights which cannot be curtailed merely because the administration deems it desirable. These cases form the platform for the plurality’s position that first amendment freedoms fundamentally apply to secondary school students.

Justice Brennan stated that students’ constitutional rights must be protected if we are not to “strangle the free mind at its source,”<sup>39</sup> and to “safeguard

<sup>27</sup>*Id.* at 853.

<sup>28</sup>*Id.* at 864 (*quoting* *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)).

<sup>29</sup>441 U.S. 69 (1979).

<sup>30</sup>457 U.S. at 864.

<sup>31</sup>*Id.* at 870.

<sup>32</sup>319 U.S. 624 (1943).

<sup>33</sup>*Id.* at 642.

<sup>34</sup>393 U.S. 97 (1968).

<sup>35</sup>*Id.* at 109.

<sup>36</sup>393 U.S. 503 (1969).

<sup>37</sup>*Id.* at 509.

<sup>38</sup>*Id.* at 513. Other language in *Tinker* suggests that in order to justify book removal in library censorship cases, the board of education must demonstrate some state interest which is at least as substantial as the particular “material and substantial” interests referred to in the so-called “Tinker test.”

<sup>39</sup>457 U.S. at 853 (*quoting* *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

the fundamental values of freedom of speech and inquiry.”<sup>40</sup> Thus, at the outset the Court addressed the conflict between the role of the administration and the freedom of the individual. The Court has further stated that students do not “shed their rights to freedom of speech or expression at the schoolhouse gate”<sup>41</sup> and that “the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library.”<sup>42</sup>

The specific first amendment right involved was described by the plurality as “the right to receive ideas.”<sup>43</sup> The Court found the origin of this idea in cases involving the distribution of printed material.<sup>44</sup> It flows from the right of free speech and press which involves the sender as well as a willing recipient. The plurality was convinced that such a right exists and has been recognized by the Court in the past. In *Stanley v. Georgia*,<sup>45</sup> an obscenity case, Justice Brennan had stated that the right to receive publications is a fundamental right.<sup>46</sup> In *Pico* he attempted to apply this right to high school students. For further support the *Pico* plurality looked to *Griswold v. Connecticut*<sup>47</sup> in which the Court observed that “[t]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right to freedom of speech and press includes, not only the right to utter or to print, but . . . the right to receive, the right to read . . . and the right to inquire . . . .”<sup>48</sup> The *Griswold* case, however, dealt with the distribution of birth control information and like the other distribution cases, seems removed from the rights of students and the privileges of the school administration.

Nevertheless, the Court in *Pico* held that this right to receive information has special significance to secondary school students since freedom of access “prepared students for active and effective participation in the pluralistic, [and] often contentious society in which they will soon be adult members.”<sup>49</sup> The Court even recognized that the “special characteristics of the school environment”<sup>50</sup> must be considered in the application of this right. It used this to support its view by stating that students, more than anyone else, must be allowed wide access to ideas and literature of all types.<sup>51</sup>

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<sup>40</sup>*Id.* (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

<sup>41</sup>*Id.* (quoting *Tinker*, 393 U.S. at 506).

<sup>42</sup>*Id.* at 866.

<sup>43</sup>*Id.* at 867.

<sup>44</sup>*See, e.g.,* *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

<sup>45</sup>394 U.S. 557 (1969).

<sup>46</sup>*Id.* at 564.

<sup>47</sup>381 U.S. 479 (1965).

<sup>48</sup>*Id.* at 482.

<sup>49</sup>457 U.S. at 868.

<sup>50</sup>*Id.* (quoting *Tinker*, 393 U.S. at 506).

<sup>51</sup>*Id.*

On another level, the Court was concerned because this case dealt with school board intervention in an area of education — the school library — which is an optional aspect of learning.<sup>52</sup> Justice Brennan stated that “the libraries afford [students] an opportunity at self-education and individual enrichment that is wholly optional.”<sup>53</sup> The Court held that while school boards have absolute discretion in matters of *curriculum*, based upon “their duty to inculcate community values,”<sup>54</sup> board attempts to invade the students free choice of *leisure* reading, overstep acceptable bounds. The Court’s emphasis upon the library as “wholly optional” and as a “place to test or expand upon ideas presented to . . . [the student] in or out of the classroom”<sup>55</sup> is indicative of its view that the student should be free to read whatever he likes in his free time and not be restricted by an administrative review or community standards. Indeed, the Court has stated that “[v]oluntary inquiry . . . holds sway” in this area.<sup>56</sup> This theme of required versus optional reading, has been a recurring one in book removal cases, and the Court has found that difference vital to its decisions.

Regarding *Epperson* and *Barnette* as its most solid basis concerning school board function, the plurality recognized that “petitioners rightly possess significant discretion to determine the content of their school libraries. That discretion, however, may not be exercised in a narrowly partisan or political manner,”<sup>57</sup> as “our constitution does not permit the official suppression of *ideas*.”<sup>58</sup> Finally, the Court concluded that there was a genuine issue of fact remaining as to the school board’s motive in the removal. If the board had removed the books because they were educationally unsuitable or vulgar, it would be beyond reproach. This determination was held to rest within the boards’ realm of regulation.<sup>59</sup> If, however, a board of education were to remove books “simply because they dislike[d] the ideas contained in those books,”<sup>60</sup> and by their removal hoped to instill their own personal values, morals and philosophies upon the students, they would be found guilty of having infringed upon the students’ right of free access to ideas.<sup>61</sup> Consequently, the petitioners in *Pico* were not entitled to summary judgment as a matter of law because there remained “the possibility that petitioners’ decision to remove the books rested decisively upon disagreement with constitutionally protected ideas in those

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<sup>52</sup>*Id.*

<sup>53</sup>*Id.* at 869.

<sup>54</sup>*Id.*

<sup>55</sup>*Id.* (quoting *Right to Read*, 454 F. Supp. at 715).

<sup>56</sup>*Id.*

<sup>57</sup>*Id.* at 870.

<sup>58</sup>*Id.* at 871.

<sup>59</sup>See, *Bicknell v. Vergennes Union High School Board of Directors*, 638 F.2d 438 (2d Cir. 1980). “[S]o long as the material removed are permissibly considered to be vulgar or indecent, it is no cause for legal complaint that the Board members applied their own standards of taste about vulgarity.” *Id.* at 441.

<sup>60</sup>457 U.S. at 872.

<sup>61</sup>*Id.* at 871.

books.”<sup>62</sup> Thus, the standard espoused by the plurality is to decide whether a school board’s motive in the removal was to deny students access to particular ideas with which the board disagreed, or whether the books were pervasively vulgar or educationally unsuitable.<sup>63</sup> In applying this standard, the Court held that the Island Trees School Board was not entitled to a summary judgment, and remanded the case for retrial on the merits.<sup>64</sup>

Among the concurring Justices, Justice Blackmun also recognized the right of students to receive information and ideas.<sup>65</sup> He, however, did not believe that the board must initially provide the information, and he provided a list of more permissible motives for removal than had the plurality.<sup>66</sup> Justice White did not reach the constitutional issue as he believed the case should be immediately remanded for a determination of the issues in dispute.<sup>67</sup> Because Justice White took no position on the merits of *Pico*, no majority was formed as to the existence of a first amendment right of access to information or the standard of review.

The dissenting opinion of Chief Justice Burger was joined by Justices Rehnquist, Powell, and O’Connor. Their first disagreement with the majority concerned the existence of the right of access said to be enjoyed by secondary school students.<sup>68</sup> They contended that such a right had never been recognized by the Supreme Court.<sup>69</sup> Such a right would obligate school boards to actively provide students with access to the type of literature in question.<sup>70</sup> Since the material was available elsewhere — in public libraries and bookstores — the board need not be under such obligation.<sup>71</sup> Furthermore, Chief Justice Burger considered the removal of library books to be well within the scope of the school board’s duties, and that its discretion should not be fettered by the courts.<sup>72</sup> The dissenting Justices felt that “in order to fulfill its function, an elected school

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<sup>62</sup>*Id.* at 875.

<sup>63</sup>*Id.*

<sup>64</sup>*Id.*

<sup>65</sup>*Id.* at 876 (Blackmun, J., concurring in part and concurring in the judgment). He stated that “our precedents command the conclusion that the State may not act to deny access to an idea simply because state officials disapprove of that idea for partisan or political reasons.” *Id.* at 879.

<sup>66</sup>He suggests that a school board may constitutionally remove books for reasons including relevancy to the curriculum, quality of writing style, space and financial limitations, offensive language, themes which are psychologically and intellectually inappropriate for the age group, and a number of other politically neutral considerations. *Id.* at 880.

<sup>67</sup>*Id.* at 883 (White, J., concurring in the judgment).

<sup>68</sup>*Id.* at 888 (Burger, C.J., dissenting).

<sup>69</sup>*Id.* The Chief Justice suggested that prior cases discussing a “right to receive information and ideas” did not grant the “concomitant right to have those ideas affirmatively provided at a particular place by the government.” *Id.* He felt that since the school board is an elected body, it is, in essence, expressing the views of the community. *Id.* at 889.

<sup>70</sup>*Id.* at 892.

<sup>71</sup>*Id.*

<sup>72</sup>*Id.* at 893.

board must express its views on the subjects which are taught to its students,"<sup>73</sup> and that the courts should not be free to interfere.

Justice Powell, in a separate opinion, warned that the plurality's decision allows the students a great deal of control over what they would like to be taught. All the students have to do is bring suit and have a judge review a board decision.<sup>74</sup> This much freedom to the students could be more destructive than the alternative. He also called the plurality's standard of review a "standardless" one, as it offered little guidance in determining when a removal is conducted in a "narrowly partisan or political manner."<sup>75</sup> Justice Powell also included with his opinion an appendix containing disputed excerpts from the removed books.<sup>76</sup> His decision was obviously affected by the content of the disputed books.

Justice Rehnquist was also adamant that the Supreme Court "has never held that the First Amendment grants . . . students a right of access to certain information in school."<sup>77</sup> Besides, he stated, even a denial of access by removing the material from the libraries was not a complete denial, and it should not amount to a constitutional infringement.<sup>78</sup> As all of the dissenting Justices agreed, Justice Rehnquist believed that "education consists of the selective presentation and explanation of ideas" and not of "free-wheeling inquiry."<sup>79</sup> The school board members, in his opinion, should be free to make educational decisions based on their personal, social, political and moral views, since that is precisely their function.<sup>80</sup>

In her brief dissent, Justice O'Connor echoed the others by emphasizing that the school board was acting well within its authority to remove the books, and that there had been no infringement upon what she described, without elaboration, as the student's right to read.<sup>81</sup>

If the plurality opinion in *Pico* is taken as the current view of the Supreme Court in book removal cases, a plaintiff contending constitutional infringement must show that the removal was motivated by the intent to suppress ideas and information politically unfavorable to the board members. The board must then demonstrate that the material was vulgar or educationally unsuitable for retention. The plurality is, however, only that — a plurality. Therefore, the

<sup>73</sup>*Id.* at 889.

<sup>74</sup>*Id.* at 893 (Powell, J., dissenting).

<sup>75</sup>*Id.* at 895.

<sup>76</sup>*Id.* at 897-903.

<sup>77</sup>*Id.* at 911 (Rehnquist, J., dissenting).

<sup>78</sup>*Id.* at 908.

<sup>79</sup>*Id.* at 914. Justice Rehnquist commented that "the First Amendment right to receive information simply has no application to the one public institution which, by its very nature, is a place for the selective conveyance of ideas." *Id.* at 915.

<sup>80</sup>*Id.* at 909.

<sup>81</sup>*Id.* at 921 (O'Connor, J., dissenting).

major issues involved in this type of case are not satisfactorily resolved. First, is there a right of access to information under the first amendment that applies to secondary school students? On this point the Justices stood far apart in their positions. The plurality stated that such a general right exists and is applicable. Justice Blackmun, however, stated the right in narrower terms as the right not to be denied access due to partisan political considerations.<sup>82</sup> Justice Rehnquist suggested that no right of access was involved because the material was always available elsewhere.<sup>83</sup>

The other issue left unresolved is the applicable standard of review in book removal cases. How will it be decided what motivations supported the removals, and which of these motivations will be acceptable? Are vulgarity and unsuitability the only permissible motives?<sup>84</sup> None of the Justices suggested any means for judging the merits of future cases or any standard by which to evaluate the presented evidence. How much is required to prove that the board acted within its capacity as the manager of educational affairs?

The plurality in *Pico* concluded that secondary school students enjoy a constitutional right of access to information that is not to be infringed upon by school boards which remove library books because of the ideas contained in them.<sup>85</sup> The Justices cited cases such as *Epperson*, *Barnette*, *Meyer*, and *Tinker* in support of their position that school boards do not enjoy complete discretion in the administration of educational affairs. Each of these cases dealt with a different area of the educational process,<sup>86</sup> but all have come to be regarded as landmark decisions restricting the school board's exercise of its authority. The deciding factor in each of these cases was the existence of first amendment protection of a student's rights, and *Pico* elaborated on the existence of that right. The plurality in *Pico* described it as "the right to receive information," and they cited cases such as *Keyishian v. Board of Regents*<sup>87</sup> and *Right to Read Defense Committee v. School Committee*<sup>88</sup> to demonstrate the applicability of this right to secondary students. The plurality granted the school board absolute discretion in matters involving curriculum and required reading, but not in areas of optional participation such as the school library. The plurality's distinction between required and optional material was not supported by any explicit precedent, but rather relied upon the historical role of the local school board. It was held however, that the board may remove books even from the "sacred" library if it considered them to be vulgar or unsuitable.

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<sup>82</sup>*Id.* at 879.

<sup>83</sup>*Id.* at 913. Justice Rehnquist reasoned that "the benefits to be gained from exposure to those ideas have not been foreclosed by the State." *Id.*

<sup>84</sup>See *supra* note 65.

<sup>85</sup>457 U.S. at 872.

<sup>86</sup>*Epperson* involved teaching evolution; *Barnette* addressed the requirement of a flag salute; *Meyer* dealt with the teaching of a foreign language; and *Tinker* involved students wearing black arm bands in protest.

<sup>87</sup>358 U.S. 589 (1966).

<sup>88</sup>454 F. Supp. 703 (D. Mass. 1978).

The Court vested the board with this decision. The problem is that if the board reviews a book and finds it objectionable for any reason whatsoever, all it must do is represent that the book was “educationally unsuitable.” This behavior would be beyond reproach by the law because the board has been granted this discretion and because it would be impracticable to prove the actual motivation.

On the other hand, the dissenting Justices were concerned that preventing a school board from removing books it found unsuitable would undermine its authority. They felt that the board’s duty to inculcate community values was supreme. They failed to recognize, however, the distinction that the plurality drew between required and optional material. They viewed the board either as having authority over both or else saw no distinction. The dissenters also disagreed that the right to receive information existed, and even if it did, they did not believe it would apply to the realm of education. Perhaps they would have done better to evaluate the students’ rights according to the freedom of expression doctrine. The students could be said to be protected by the right to read what they wish, and such a right could not be infringed upon by the board prescribing what was appropriate. Surely the dissenting justices must have recognized that students enjoy freedom to express themselves.

In general, the Supreme Court in *Pico* delivered a disappointingly vague opinion that offers little guidance for future cases. The Justices’ opinions eloquently expressed the issues involved,<sup>89</sup> and did decide that the motives of the school board in *Pico* were paramount and yet to be determined as a matter of fact. They did not, however, provide much guidance for the lower court. As it stands, each future case in the area of library censorship must be decided on an ad hoc basis and revolve around the nebulous motivations behind the removal.

The most gaping abyss in the Court’s treatment of the *Pico* case was the noncommittal position regarding the role of a school board and the extent to which it should be free from judicial review. The plurality as well as the dissenters agreed that secondary school students should be free to express themselves through activities, such as wearing black armbands to protest the Vietnam War,<sup>90</sup> that do not interfere with school procedures. Students should also be free to refrain from participating in school activities such as flag saluting.<sup>91</sup> But when can a school board exert its authority to guide students in a direction that will most effectively lead them through maturity and adulthood? Isn’t a school board elected to guide our country’s children and to instill in them the community values? Isn’t it the manager of education? Surely a school board must be given more trust than the plurality in *Pico* gave them. The judiciary should not be

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<sup>89</sup>Those issues are optional versus required material, acquisitions versus removal of books, removal procedures, constitutionality, and the role of the school board.

<sup>90</sup>*Tinker*, 393 U.S. 503.

<sup>91</sup>*Barnette*, 319 U.S. 624.

so quick to intervene where discretion has already been vested. The Court did suggest a distinction between optional and required material, but that standard is vague and subjective. A more objective standard of review is needed in this area to clarify a school board's duties and function. The Supreme Court was given this opportunity but it only demonstrated that the clash between a school administration's power and an individual's freedom is still a strong one. Library book removal cases such as *Pico* reveal this clash and have as their core one of our most sacred institutions — education. Only more discussion and exposure will narrow the gap between what the Supreme Court demonstrated to be a wide rift in American opinion and philosophy. *Board of Education v. Pico* will find its place beside *Meyer*, *Tinker*, *Epperson*, and *Barnette* in the area of school board scrutiny and will be a widely cited source for inevitable similar disputes.

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