

## Remedy Without A Right: *Board of Education v. Pico*

### I. INTRODUCTION

Cases involving student challenges to school board decisions to remove books from school libraries have been confusing.<sup>1</sup> Opinions, exhibiting a general murkiness, have not defined what constitutional issues are involved and have failed to provide guidelines and standards for local school boards.<sup>2</sup> The courts seem to be torn between a personal dislike of content-based removal of books<sup>3</sup> and a reluctance to intervene in policies set by local elected officials.<sup>4</sup>

When the United States Supreme Court granted certiorari in *Board of Education v. Pico*<sup>5</sup> last year, followers of school library cases hoped that a decision might provide guidelines, definitions, and clarity. The Court announced its decision, however, with seven separate opinions<sup>6</sup> that generally reiterated the concerns that appeared in the earlier library cases but did not truly answer the questions:

— Which constitutional rights, if any, are at stake when school boards remove books from school libraries?

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<sup>1</sup>See *Pico v. Board of Educ.*, 102 S. Ct. 2799 (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); *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577 (6th Cir. 1976); *Presidents Council v. Community School Bd. Number 25*, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972); *Sheck v. Baileyville 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.*, 454 F. Supp. 703 (D. Mass. 1978).

<sup>2</sup>See generally cases cited *supra* note 1.

<sup>3</sup>See *Pico v. Board of Educ.*, 638 F.2d 404, 416, 434, 438 (2d Cir. 1980) (Newman, J., concurring), *aff'd*, 102 S. Ct. 2799 (1982); *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 582 (6th Cir. 1976); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 710, 714 (D. Mass. 1978).

<sup>4</sup>See *Pico v. Board of Educ.*, 638 F.2d 404, 419, 425 (2d Cir. 1980) (Mansfield, J., dissenting), *aff'd*, 102 S. Ct. 2799 (1982); *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1304-05 (7th Cir. 1980); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 710 (D. Mass. 1978).

<sup>5</sup>474 F. Supp. 387 (E.D.N.Y. 1979), *rev'd and remanded*, 638 F.2d 404 (2d Cir. 1980), *aff'd*, 102 S. Ct. 2799 (1982).

<sup>6</sup>*Board of Educ. v. Pico*, 102 S. Ct. 2799 (1982) (plurality opinion). Even Justice Brennan, the author of the plurality opinion, was critical of the result in *Pico*. In a rare moment of public self-criticism, Justice Brennan said that the Supreme Court probably made a mistake in taking the case and that it was a "paradigm example" of the Court addressing a constitutional issue it could have avoided. He suggested that the case might have been better decided or avoided altogether had the case gone to trial pursuant to the Second Circuit's decision, before being taken up by the Supreme Court. Speech by Justice Brennan to judges of the United States Court of Appeals for the Third Circuit (Sept. 9, 1982) (reported by the Associated Press, available on NEXIS).

—Do students have a right to receive certain information in the schools? If so, under what circumstances?

—What are the roles of the public school and the school library? Are they marketplaces of ideas or inculcators of societal values?

—Is there a difference between removing books from a library and failing to acquire certain books?

Although the *Pico* decision reaffirmed that school boards have broad powers<sup>7</sup> tempered by narrow limitations,<sup>8</sup> it imposed few, if any, practical limits on school board actions and provided little direction for school boards or lower courts.<sup>9</sup>

Although the Supreme Court neither recognized a broad right of access to information for high school students<sup>10</sup> nor truly defined which right is involved in library cases, the opinions in *Pico* suggest the issue is tied to the free speech clause of the first amendment. A majority of the Court agreed that an improperly motivated school board can violate some right by removing books from school libraries, but no five members of the Court were able to agree on what right was violated.<sup>11</sup> In that respect the Court broke with the traditional method of analyzing constitutional issues, which is first to establish what right is at stake and then to determine if that right has been violated.

This Note will examine the *Pico* decision, the origins of the undefined right, and the reasons why the Supreme Court did not endorse the right proposed by the plurality, a limited right of access to information for high school students. This Note will also explore

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<sup>7</sup>102 S. Ct. at 2806 (citing *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 507 (1969); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Pierce v. Society of Sisters*, 268 U.S. 510, 543 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923)).

<sup>8</sup>102 S. Ct. at 2809-10 (citing *Mount Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977); *Epperson v. Arkansas*, 393 U.S. 97, 104-05 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

<sup>9</sup>The decision had a practical effect within the Island Trees Union Free School District where the case originated. Less than two months after the Supreme Court issued its opinion affirming the appellate court decision to remand the case for trial, the board of education voted to return to the school libraries the books they had removed. *TIME*, Aug. 23, 1982, at 47.

<sup>10</sup>See *infra* notes 93-158 and accompanying text.

<sup>11</sup>102 S. Ct. at 2810-12 (plurality opinion); *id.* at 2812-16 (Blackmun, J., concurring); *id.* at 2816-17 (White, J., concurring). *Pico* was the first time the Court openly endorsed a motivational standard in a case strictly tied to free speech. Other free speech cases have discussed motivation but have not openly turned on that issue. Adopting a motivation standard opens the courtroom door to a host of other difficult problems, including which motivations are permissible and which are not, how to handle cases of mixed motivation, and how to determine the actual motivation in a given case. This Note will not, however, explore the motivation issue.

why the Court in *Pico* provided a remedy to high school students without a corresponding right.

A. *Facts of Board of Education v. Pico*

School board members of the Island Trees Union Free School District received lists of books that groups in other communities considered anti-American, seditious, and filthy. The school board subsequently ordered nine books on the list removed from the high school libraries, one from the junior high school library,<sup>12</sup> and one from the senior high school curriculum.<sup>13</sup>

The school superintendent objected to the removal saying that official school board policy for handling controversial library materials was not being followed and that removing the books could create a community furor.<sup>14</sup> The school board insisted, however, that all copies of all the books be removed from the libraries. The predicted furor arose, and the school board named a committee of school employees and parents to review the books.

The committee voted to return six books to the high school library and to remove two; it took no action on one book and disagreed about two others. The school board ignored the committee, returning two books to the library and permanently removing the other nine from the shelves. After the lawsuit was filed, the school board pointed to profanities, sexual allusions and offensive language as reasons for removing the books.<sup>15</sup>

B. *Disposition of the Pico Case*

Five students and their parents challenged the school board's removal of the books. They claimed the removal of the books violated their right of free speech and sought declaratory and injunctive relief

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<sup>12</sup>102 S. Ct. 2799, 2803 n.3. The books removed from the high school libraries were *Slaughter House Five* by Kurt Vonnegut, Jr.; *The Naked Ape* by Desmond Morris; *Down These Mean Streets* by Piri Thomas; *Best Short Stories by Negro Writers* edited by Langston Hughes; *Go Ask Alice* of anonymous authorship; *Laughing Boy* by Oliver LaFarge; *A Hero Ain't Nothin' But A Sandwich* by Alice Childress; *Soul on Ice* by Eldridge Cleaver; and *Black Boy* by Richard Wright.

The book removed from the junior high school library was *A Reader for Writers* edited by Jerome Archer.

<sup>13</sup>*The Fixer* by Bernard Malamud was being used in a twelfth grade literature course.

<sup>14</sup>102 S. Ct. at 2803 n.4.

<sup>15</sup>*Id.* at 2804-05. The books which the board permanently removed were *The Fixer*, *Go Ask Alice*, *Best Short Stories by Negro Writers*, *Slaughter House Five*, *The Naked Ape*, *Down These Mean Streets*, *A Reader for Writers*, *Soul on Ice*, and *A Hero Ain't Nothin' But A Sandwich*.

against the board and against individual school board members.<sup>16</sup> The district court issued a summary judgment for the school board<sup>17</sup> because it found that a principal function of public education was to transmit basic values of the community and that a content-based decision to remove books was in keeping with that function.<sup>18</sup> The court added that a student may have standing to sue in such a case under a "right to receive information" theory.<sup>19</sup>

The decision was appealed to the United States Court of Appeals for the Second Circuit where the three-judge panel, in a split decision, remanded the case for trial.<sup>20</sup> In ordering the case remanded Judge Sifton pointed to "irregular and ambiguous handling" of the removal decision which could suppress freedom of expression<sup>21</sup> and to school board action based on personal, moral, and political reasons as factors which required the school board to defend its actions.<sup>22</sup> The concurring judge urged a remand to determine the motivation of the school board in removing the books and to determine if such a removal would suppress ideas.<sup>23</sup> The third judge dissented on the basis that schools can regulate indecent language and that the school board was doing so when it removed the books.<sup>24</sup>

The Supreme Court upheld the appellate court decision to remand the case for trial.<sup>25</sup> The Court issued seven opinions, however, which reflected some of the concerns and conflicting interests in such library cases. In deciding to remand the case, Justice Brennan, joined by Justices Marshall and Stevens, said removal of library books may be constitutional depending on the motivation of the school board which removed them, but that school boards do not have an absolute discretion to remove books.<sup>26</sup> He also said students have a right of access to information under narrow circumstances — when books are *removed* from school *libraries*.<sup>27</sup> Justice Blackmun concurred in part, but not in the section of the opinion endorsing the right of access to information for students.<sup>28</sup> Justice White claimed a decision based on con-

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<sup>16</sup>474 F. Supp. 387, 394 (E.D.N.Y. 1979). The district court reduced all five causes of action under the federal and state constitutions and 42 U.S.C. § 1983 to a single claim of free speech and academic freedom.

<sup>17</sup>474 F. Supp. at 398.

<sup>18</sup>*Id.* at 396.

<sup>19</sup>*Id.* at 397.

<sup>20</sup>638 F.2d 404 (2d Cir. 1980).

<sup>21</sup>*Id.* at 415.

<sup>22</sup>*Id.* at 417.

<sup>23</sup>*Id.* at 438 (Newman, J., concurring).

<sup>24</sup>*Id.* at 425 (Mansfield, J., dissenting). The judge also quoted examples of objectionable language contained in the books. *Id.* at 419-22 n.1.

<sup>25</sup>102 S. Ct. 2799 (1982) (plurality opinion).

<sup>26</sup>*Id.* at 2810.

<sup>27</sup>*Id.* at 2805-09.

<sup>28</sup>*Id.* at 2812-16.

stitutional issues was unnecessary but concurred in the judgment to remand to determine the school board's motivation.<sup>29</sup>

Chief Justice Burger and Justices Powell, Rehnquist and O'Connor dissented from the decision to remand the case. Chief Justice Burger dissented saying that students have no right of access to particular books in the school library and that the school board has a right and a duty to make content-based decisions about books in order to transfer fundamental values to the students.<sup>30</sup> Justice Powell repeated some of Justice Burger's criticisms and attached an appendix of less-than-refined passages from the books.<sup>31</sup> Justice Rehnquist, joined by Justices Burger and Powell, said the right to receive information in a school setting is unsupported by past decisions and is contrary to the nature of inculcative education.<sup>32</sup> Justice O'Connor said that if a school board can select books for a library, it can remove them.<sup>33</sup>

## II. THE SETTING: EARLIER CASES

*Board of Education v. Pico*<sup>34</sup> was not the first time the federal courts have wrestled with the powers of local school authorities or even with the role of school libraries. At least seven other school library cases have been decided by the federal courts, six of which were decided before the Supreme Court granted certiorari to hear the *Pico* case.<sup>35</sup> The school library decisions have recognized that state and local officials have primary authority over the administration of public schools.<sup>36</sup> Many of these decisions also have recognized that, in order to exercise such authority, local school boards have broad discretionary powers.<sup>37</sup>

<sup>29</sup>*Id.* at 2816-17.

<sup>30</sup>*Id.* at 2818-19.

<sup>31</sup>*Id.* at 2822-23. *See id.* at 2823 app.

<sup>32</sup>*Id.* at 2830-31.

<sup>33</sup>*Id.* at 2835.

<sup>34</sup>474 F. Supp. 387 (E.D.N.Y. 1979), *rev'd and remanded*, 638 F.2d 404 (2d Cir. 1980), *aff'd*, 102 S. Ct. 2799 (1982).

<sup>35</sup>*Scheck v. Baileyville School Comm.*, 530 F. Supp. 679 (D. Me. 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); *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577 (6th Cir. 1976); *Presidents Council v. Community School Bd. Number 25*, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972); *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269 (D.N.H. 1979); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703 (D. Mass. 1978).

<sup>36</sup>*See, e.g., Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1305 (7th Cir. 1980); *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 579-80 (6th Cir. 1976); *Sheck v. Baileyville School Comm.*, 530 F. Supp. 679, 688 (D. Me. 1982).

<sup>37</sup>*See, e.g., Pico v. Board of Educ.*, 638 F.2d 404, 427 (2d Cir. 1980) (Mansfield, J., dissenting), *aff'd*, 102 S. Ct. 2799 (1982); *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1305 (7th Cir. 1980).

In acknowledging such authority and discretionary powers, courts often refer to language contained in Supreme Court cases such as *Epperson v. Arkansas*,<sup>38</sup> *West Virginia State Board of Education v. Barnette*,<sup>39</sup> and *Ambach v. Norwick*.<sup>40</sup> In some of these same cases, however, the Supreme Court has recognized that school authority can be limited when a constitutional value is at stake.<sup>41</sup> Accordingly, local authorities have been overruled when they prohibited the teaching of evolution,<sup>42</sup> when they required children to salute the flag,<sup>43</sup> and when they disciplined students or teachers for wearing black armbands in protest of the Vietnam War.<sup>44</sup> When a basic constitutional guarantee, that of free speech, for example, is implicated, however, the school authorities can impose limits on that freedom under certain conditions.<sup>45</sup> Defining those conditions and balancing the interests have caused considerable debate.<sup>46</sup>

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<sup>38</sup>393 U.S. 97 (1968). "By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operations of school systems . . ." *Id.* at 104.

<sup>39</sup>319 U.S. 624 (1943). "Boards of Education . . . have, of course, important, delicate, and highly discretionary functions . . ." *Id.* at 637.

<sup>40</sup>441 U.S. 68 (1979). "[W]e look to the role of public education and to the degree of responsibility and discretion teachers possess in fulfilling that role . . . [They] may be regarded as performing a task 'that go[es] to the heart of representative government.'" (citations omitted). *Id.* at 75-76 (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)).

<sup>41</sup>*See, e.g., West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). In *West Virginia State Bd. of Educ.*, Justice Jackson, after admitting that local authorities have "highly discretionary functions," added that the functions must be performed within the limits of the Bill of Rights. "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Id.* at 637.

<sup>42</sup>*Epperson v. Arkansas*, 393 U.S. 97 (1968).

<sup>43</sup>*West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

<sup>44</sup>*Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969). *See also James v. Board of Educ.*, 461 F.2d 566 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972).

<sup>45</sup>*See Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. at 509 (limits could be imposed if exercising conduct would create disruption).

<sup>46</sup>*Compare Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940) (upholding flag salute requirement to encourage patriotism in schools) *with West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (striking down flag salute requirement as infringing on first amendment rights of students).

The debate often centers on whether schools should impress values on students or whether schools should provide a marketplace of ideas. Those court opinions that have supported locally elected school authorities have relied upon the school's role as an inculcator of community values. *See Pico*, 102 S. Ct. 2799, 2819-20 (1982) (Burger, C.J., dissenting); *id.* at 2823 (Powell, J., dissenting); *id.* at 2832 (Rehnquist, J., dissenting); *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1303 (7th Cir. 1980). *See also, Goss v. Lopez*, 419 U.S. 565, 593 (1973) (Powell, J., dissenting) (schools as inculcators

For the past decade, much of that debate has centered around school libraries. School boards have won the debate in only three cases,<sup>47</sup> and only one of those decisions<sup>48</sup> did not base the holding, at least in part, on the acceptability of the school board's motive.<sup>49</sup> The other decisions weighed the students' right to receive the information contained in the books against the traditional authority lodged in the school boards and came out on the side of the students.<sup>50</sup>

In *Presidents Council v. Community School Board*,<sup>51</sup> a group of parents, students, teachers and a librarian challenged a school board decision to remove a novel from junior high libraries. In an unreported decision, the trial court dismissed the plaintiffs' claim that their first amendment rights were violated. On appeal, the United States Court of Appeals for the Second Circuit affirmed the dismissal saying that a school board has the authority to select books and that there is no difference between selection of books and removal of books.<sup>52</sup> The court rejected an argument that books once shelved gain tenure. The court said removal created no impediment to freedom of expression and that a school board has authority to remove books if they are obsolete, irrelevant, or improperly selected.<sup>53</sup> Although the Supreme Court refused to grant certiorari,<sup>54</sup> Justice Douglas dissented and raised as material issues academic freedom, the right to know, learn and hear, and a determination whether schools are a marketplace of ideas or an inculcator of values.<sup>55</sup>

Four years later, an Ohio school board refused to purchase two textbooks and ordered two other books removed from the high school library. In *Minarcini v. Strongsville City School District*,<sup>56</sup> five students and their parents challenged the school board action claiming that the removal violated their first and fourteenth amendment rights. The trial court dismissed the case finding that no such rights had been

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of understanding rules and obedience); *East Hartford Educ. Ass'n v. Board of Educ.*, 562 F.2d 838, 843 (2d Cir. 1977) (referring to "basic community values" as rationale for requiring teachers to wear ties).

<sup>47</sup>*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); *Presidents Council v. Community School Bd. Number 25*, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972).

<sup>48</sup>*Presidents Council v. Community School Bd. Number 25*, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972).

<sup>49</sup>See *supra* note 11 and *infra* notes 87-89 and accompanying text.

<sup>50</sup>See *infra* notes 55-71 & 83-86 and accompanying text.

<sup>51</sup>457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972).

<sup>52</sup>457 F.2d at 293.

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

<sup>54</sup>409 U.S. 998 (1972).

<sup>55</sup>*Id.* at 998-1000.

<sup>56</sup>541 F.2d 577 (6th Cir. 1976), *rev'g* 384 F. Supp. 698 (N.D. Ohio 1974).

violated.<sup>57</sup> The United States Court of Appeals for the Sixth Circuit agreed that failure to purchase the textbooks was not a constitutional violation,<sup>58</sup> but it reversed on the library issue.<sup>59</sup> The reversal was based on the "right of students to receive information"<sup>60</sup> and on a finding that the books were removed because of content the board members found distasteful.<sup>61</sup> The opinion also referred to the school library as a marketplace of ideas dedicated to broad dissemination of ideas<sup>62</sup> that should not be narrowed with the excuse that the removed books were available at other times, in other places or under different circumstances.<sup>63</sup>

School library issues returned to the courtroom in 1978 in *Right to Read Defense Committee v. School Committee*<sup>64</sup> when students, teachers, and a librarian challenged a Massachusetts school board removal of an anthology from a high school library. The court held that removing the book because the school board objected to the language and theme of one poem violated the first amendment rights of the students. The court said that, by purchasing the book, the school board created a constitutionally protected right that, once created, could not be limited without demonstrating a substantial and legitimate government interest.<sup>65</sup> The court said that offensive language did not create such an interest<sup>66</sup> and termed the prospect of successive school boards sanitizing libraries of views divergent from their own "alarming."<sup>67</sup>

A year later, in *Salvail v. Nashua Board of Education*,<sup>68</sup> students, teachers, and parents sued the school board and the school superintendent after the school board ordered copies of a feminist magazine removed from the high school library. The school board claimed that the magazine was unsuitable for teen-agers.<sup>69</sup> The court held that such

<sup>57</sup>384 F. Supp. 698 (N.D. Ohio 1974).

<sup>58</sup>541 F.2d at 580.

<sup>59</sup>*Id.* at 583.

<sup>60</sup>*Id.*

<sup>61</sup>*Id.* at 582.

<sup>62</sup>*Id.* at 582-83 (citing *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969); *Brown v. Louisiana*, 383 U.S. 131 (1966); *Abrams v. United States*, 250 U.S. 616 (1919)).

<sup>63</sup>541 F.2d at 582 (citing *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975); *Spence v. Washington*, 418 U.S. 405, 411 n.4 (1974); *Schneider v. State*, 308 U.S. 147, 163 (1939)).

<sup>64</sup>454 F. Supp. 703 (D. Mass. 1978).

<sup>65</sup>*Id.* at 712 (citing *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Griffin v. Illinois*, 351 U.S. 12 (1956)).

<sup>66</sup>454 F. Supp. at 713-14 (quoting *Cohen v. California*, 403 U.S. 15, 26 (1971); *Keefe v. Geanakos*, 418 F.2d 359, 361 (1st Cir. 1969)).

<sup>67</sup>454 F. Supp. at 714.

<sup>68</sup>469 F. Supp. 1269 (D.N.H. 1979).

<sup>69</sup>*Id.* at 1271-72.

a removal violated the constitutional rights of the students by denying them access to the material the magazine contained.<sup>70</sup> The court added that shielding students from vulgarity was not such a substantial and legitimate government interest to warrant infringement of first amendment rights and rejected the contention that alternate sources for the material excused the removal.<sup>71</sup>

In 1980, three library cases reached the United States courts of appeals: *Pico v. Board of Education*,<sup>72</sup> *Zykan v. Warsaw Community School Corp.*<sup>73</sup> and *Bicknell v. Vergennes Union High School Board of Directors*.<sup>74</sup>

In *Zykan*, the school board in Warsaw, Indiana, voted to discontinue using certain textbooks, refused to order other textbooks, and ordered a book removed from the school library. One student and a former student claimed the actions violated their first amendment right to know. The trial court dismissed saying the complaint failed to allege a violation of a first amendment right to receive constitutionally protected communication. The judge added that a school board may prohibit use of textbooks or remove library books to shape students into good citizens and that officials may base such determinations on personal moral beliefs.<sup>75</sup> The United States Court of Appeals for the Seventh Circuit vacated the judgment and remanded with leave for the plaintiffs to amend their complaint.<sup>76</sup> The circuit court recognized a qualified freedom to hear subject to guidance from the school board.<sup>77</sup> It rejected the argument that a book cannot be removed based on content after it has been shelved<sup>78</sup> and said a school board may remove material as long as the removal does not impair a student's ability to investigate.<sup>79</sup>

In *Bicknell v. Vergennes Union High School Board of Directors*,<sup>80</sup> a companion case to *Pico*, the Second Circuit affirmed a district court decision allowing a school board to remove a book from a high school library. The school board removed one book from the library and placed another on a restricted shelf. The trial court dismissed a claim by students, parents, and library employees that student first amend-

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<sup>70</sup>*Id.* at 1274.

<sup>71</sup>*Id.* at 1275.

<sup>72</sup>638 F.2d 404 (2d Cir. 1980), *aff'd*, 102 S. Ct. 2799 (1982).

<sup>73</sup>631 F.2d 1300 (7th Cir. 1980).

<sup>74</sup>638 F.2d 438 (2d Cir. 1980).

<sup>75</sup>631 F.2d at 1303.

<sup>76</sup>*Id.* at 1308-09.

<sup>77</sup>*Id.* at 1304-05.

<sup>78</sup>*See* *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 582 (6th Cir. 1976); *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269, 1272-73 (D.N.H. 1979); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 712 (D. Mass. 1978).

<sup>79</sup>631 F.2d at 1308.

<sup>80</sup>638 F.2d 438 (2d Cir. 1980).

ment rights were violated.<sup>81</sup> In a divided opinion, the Second Circuit pointed out that no one suggested that the circumstances surrounding the removal would inhibit freedom of expression.<sup>82</sup>

While *Pico* was awaiting Supreme Court consideration, *Sheck v. Baileyville School Committee*<sup>83</sup> was decided. After a school board in Maine removed a book from the high school library, a district court said that information and ideas in books placed in school libraries by proper authorities were protected by the first amendment.<sup>84</sup> It added that access to such books can be limited only by "precise ascertainable standards"<sup>85</sup> and that objectionable language was not a legitimate reason to restrict student access to the book without some showing that exposure to the language might harm students.<sup>86</sup>

Most of the school boards faced with challenges in school library cases have defended their actions on the basis of their broad authority and on the fact that they were motivated by objectionable language contained in the materials removed.<sup>87</sup> Courts that found in favor of the challengers in such cases have either rejected the motivational claims<sup>88</sup> or said that objectionable language was not a substantial enough state interest to allow the books to be removed.<sup>89</sup> Opinions in other types of school cases, however, have focused not on the motivation but on the results of school board actions.<sup>90</sup> Some fourteenth amendment cases, however, have used a motivation or purpose test in finding a variety of other types of state actions unconstitutional.<sup>91</sup>

The *Pico* decision is unusual in that the motivation of the school board was the central issue in determining whether a constitutional violation had occurred in a first amendment free speech case.<sup>92</sup>

<sup>81</sup>475 F. Supp. 615 (D. Vt. 1979).

<sup>82</sup>638 F.2d at 441.

<sup>83</sup>530 F. Supp. 679 (D. Me. 1982).

<sup>84</sup>*Id.* at 689.

<sup>85</sup>*Id.* at 690 (citing *Keyishian v. Board of Regents*, 385 U.S. 589, 603-04 (1967)).

<sup>86</sup>530 F. Supp. at 691.

<sup>87</sup>*E.g.*, *Pico v. Board of Educ.*, 638 F.2d 404, 411 (2d Cir. 1980); *Sheck v. Baileyville School Comm.*, 530 F. Supp. 679, 687 (D. Me. 1982).

<sup>88</sup>*E.g.*, *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269, 1274 (D.N.H. 1979).

<sup>89</sup>*E.g.*, *id.* at 1275; *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 715 (D. Mass. 1978).

<sup>90</sup>*See Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969); *Shelton v. Tucker*, 364 U.S. 479 (1960); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *James v. Board of Educ.*, 461 F.2d 566 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972).

<sup>91</sup>Motivation has been a frequent and important consideration in cases concerning school desegregation, *Keyes v. School Dist.*, 413 U.S. 189 (1973); hiring policies, *Washington v. Davis*, 426 U.S. 229 (1976); and voting rights, *Mobile v. Bolden*, 446 U.S. 55 (1980).

<sup>92</sup>102 S. Ct. 2799, 2810 (1982), *aff'g* 638 F.2d 404 (2d Cir. 1980). The only other

Although such a finding is not unusual in school library cases, it is unusual in a Supreme Court decision involving the first amendment.

### III. RIGHT OF ACCESS

Although *Board of Education v. Pico*<sup>93</sup> suggested that a school board could violate the first amendment by removing books from a school library with improper motivation, there was no agreement as to whose right or exactly which right under the first amendment was being violated.<sup>94</sup> The earlier library cases exhibited similar confusion. One lower court suggested the right is tied to academic freedom,<sup>95</sup> and some of the library opinions have cited academic freedom cases.<sup>96</sup> Most courts, however, tied the right to the free speech clause of the first amendment as a type of silent speech and have referred to it as a right to receive information,<sup>97</sup> a right of access to information,<sup>98</sup> or a right to read.<sup>99</sup>

In *Pico*, the students who were denied access to the books removed from the library claimed a right of access to information under the first amendment and were deemed proper plaintiffs by the trial court.<sup>100</sup> The Supreme Court plurality agreed that students do

Supreme Court decision involving free speech in schools that relied on motivation was *Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), but that case also concerned due process in the firing of a teacher and thus was not strictly a free speech case.

<sup>93</sup>102 S. Ct. 2799 (1982).

<sup>94</sup>For a detailed discussion of which first amendment right is at stake in school library cases, see *Recent Developments, Removal of Public School Library Books: The First Amendment Versus the Local School Board*, 34 VAND. L. REV. 1407, 1428-33 (1981).

<sup>95</sup>*Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1304 (7th Cir. 1980).

<sup>96</sup>*Keyishian v. Board of Regents*, 385 U.S. 589 (1967), cited in *Board of Educ. v. Pico*, 102 S. Ct. at 2809; *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 710 (D. Mass. 1978). *Shelton v. Tucker*, 364 U.S. 479 (1960), quoted in *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269, 1275 (D.N.H. 1979); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 710 (D. Mass. 1978). *Meyer v. Nebraska*, 262 U.S. 390 (1923), cited in *Board of Educ. v. Pico*, 102 S. Ct. at 2805; *Sheck v. Baileyville School Comm.*, 530 F. Supp. 679, 686 (D. Me. 1982); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 710 (D. Mass. 1978).

<sup>97</sup>*Board of Educ. v. Pico*, 102 S. Ct. at 2814, 2818; *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1304 (7th Cir. 1980); *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 583 (6th Cir. 1976); *Sheck v. Baileyville School Comm.*, 530 F. Supp. 679, 686 (D. Me. 1982). See also *Pratt v. Independent School Dist.*, 670 F.2d 771, 779 (8th Cir. 1982) (film removed from curriculum).

<sup>98</sup>*Board of Educ. v. Pico*, 102 S. Ct. at 2818 (Burger, J., dissenting); *Bicknell v. Vergennes Union High School Bd. of Directors*, 638 F.2d 438, 442 (2d Cir. 1980) (Sifton, J., dissenting); *Sheck v. Baileyville School Comm.*, 530 F. Supp. 679, 684 (D. Me. 1982).

<sup>99</sup>*Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 714 (D. Mass. 1978).

<sup>100</sup>474 F. Supp. 387, 394 (E.D.N.Y. 1979).

have such a right under very narrow circumstances,<sup>101</sup> but the other six members of the Supreme Court disagreed. Just as the plurality had difficulty expressing the exact nature of the right it sought to protect, the opinions gave only a cursory review of the origins of that right.<sup>102</sup>

#### A. *Origin of the Right of Access*

Any recognition of a student right of access to information depends on the confluence of two distinct lines of cases. The first is recognition of a right of access to information,<sup>103</sup> the second is an extension of academic freedom and information rights of teachers and students.<sup>104</sup> Both lines of cases have emerged in relatively recent years, and both have involved rights that the courts recognized as being of limited scope.

The first line, which recognized the rights of recipients of information, has been tied to the free speech clause of the first amendment, a clause which has traditionally protected persons wishing to disseminate information. Although as early as 1943 the Supreme Court mentioned the rights of recipients of information,<sup>105</sup> these rights received little attention from the courts until the late 1960's. In the late 1960's, the Supreme Court's recognition that persons who received information had a right to receive that information slowly emerged in cases concerning postal regulations,<sup>106</sup> pornography,<sup>107</sup> broadcasting<sup>108</sup> and contraceptives.<sup>109</sup> In the 1970's, this right of access was further delineated in *Procunier v. Martinez*<sup>110</sup> and *Virginia State Board of*

<sup>101</sup>102 S. Ct. at 2809-10.

<sup>102</sup>*Id.* at 2808.

<sup>103</sup>See *infra* notes 105-17 and accompanying text.

<sup>104</sup>See *infra* notes 119-20.

<sup>105</sup>*Martin v. Struthers*, 319 U.S. 141 (1943). "[F]reedom of speech . . . embraces the right to distribute literature . . . and necessarily protects the right to receive it." *Id.* at 143.

<sup>106</sup>*Lamont v. Postmaster General*, 381 U.S. 301 (1965). "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." *Id.* at 308 (Brennan, J., concurring).

<sup>107</sup>*Stanley v. Georgia*, 394 U.S. 557 (1969). "[T]he Constitution protects the right to receive information and ideas." *Id.* at 564.

<sup>108</sup>*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization . . . by the Government . . . . It is the right of the public to receive . . . access to . . . ideas and experiences which is crucial here." *Id.* at 390.

<sup>109</sup>*Griswold v. Connecticut*, 381 U.S. 479 (1965). "[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Id.* at 482.

<sup>110</sup>416 U.S. 396 (1974). The Court stated:

*Pharmacy v. Virginia Citizens Consumer Council, Inc.*<sup>111</sup> The right of access to information has never been clearly defined, but the Supreme Court has stated that the right could be limited if balanced against a substantial government interest.<sup>112</sup>

Some lower court decisions have indicated the right to receive information may depend on the right of someone else to disseminate information,<sup>113</sup> and one Supreme Court opinion described the right to disseminate and the right to receive as "two sides of the same coin."<sup>114</sup> Other opinions have suggested that the suppression of one party's access to information can create an atmosphere whereby another party's dissemination of information may be hindered<sup>115</sup> and that suppressing access to information ultimately suppresses dissemination of information by limiting the source of ideas that one party would use in forming opinions.<sup>116</sup> These cases involved adults, however, and there is some feeling that the rights of minors in this area may not be coextensive with those of their elders.<sup>117</sup>

Some library cases sought to extend the right of access to information to students.<sup>118</sup> For the most part, the courts based this extension on language in cases involving student and teacher rights to disseminate information<sup>119</sup> and cases involving academic freedom.<sup>120</sup> In

Communication by letter is not accomplished by the act of writing words on paper. Rather, it is effected only when the letter is read by the addressee. Both parties to the correspondence have an interest in securing that result, and censorship . . . necessarily impinges on the interest. [T]he . . . interest is grounded in the First Amendment's guarantee of freedom of speech.

*Id.* at 408.

<sup>111</sup>425 U.S. 748 (1976). "Freedom of speech presupposes a willing speaker. But where a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both." *Id.* at 756.

<sup>112</sup>*Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972).

<sup>113</sup>*E.g.*, *Pico v. Board of Educ.*, 638 F.2d at 429 (Mansfield, J., dissenting).

<sup>114</sup>*Kleindienst v. Mandel*, 408 U.S. 753, 775 (1972) (Marshall, J., dissenting).

<sup>115</sup>*Pico v. Board of Educ.*, 638 F.2d at 434 (Newman, J., concurring).

<sup>116</sup>*See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978).

<sup>117</sup>*See Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503,, 515 (1969) (Stewart, J., concurring); *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1304-05 (7th Cir. 1980).

<sup>118</sup>*Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 583 (6th Cir. 1976); *Sheck v. Baileyville School Comm.*, 530 F. Supp. 679, 685 (D. Me. 1982); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 714 (D. Mass. 1978).

<sup>119</sup>In a case involving students who were punished for wearing armbands to protest the Vietnam war, the Supreme Court said, "[Students do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969), *quoted in Board of Educ. v. Pico*, 102 S. Ct. at 2807; *Pratt v. Independent School Dist.*, 670 F.2d 771, 776 (8th Cir. 1982); *Pico v. Board of Educ.*, 638 F.2d at 432 (Newman, J., concurring).

<sup>120</sup>In a case involving teachers who were ordered to sign loyalty oaths, the Supreme Court said, "[T]he First Amendment . . . does not tolerate laws which cast a pall of

school library cases, courts have consistently limited this right of access to circumstances where information had once been offered and now was being removed.<sup>121</sup> They have also limited the right by applying it primarily to libraries, allowing school boards almost complete authority over curriculum.<sup>122</sup> Those who have espoused these limitations may have done so out of respect for school board autonomy and for statutes giving local school authorities control over curricula.<sup>123</sup> Such limitations, however, have handed ammunition to those who oppose extending this right to students.

### B. Criticizing the "Right"

Because a limited right tends to favor practicality over doctrinal purity and courts already are uncomfortable backing youthful challenges to adult authority,<sup>124</sup> no student right of access to information—even in a limited sense—was authorized in *Pico*. The plurality endorsed such a right, but Justices Blackmun and White did not join that part of the decision, and the dissenters attacked it vigorously. The dissenters damned the right the students sought as too limited to qualify as a right, while recognizing that a full-blown right of access would be too intrusive to school operations to find many supporters.

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orthodoxy over the classroom." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), quoted in *Board of Educ. v. Pico*, 102 S. Ct. at 2809; *Pratt v. Independent School Dist.*, 670 F.2d 771, 776 (8th Cir. 1982); *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1306 (7th Cir. 1980); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 710 (D. Mass. 1978).

In a case involving teachers who were required to file a list of organizations to which they belonged, the Court said, "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960), quoted in *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 710 (D. Mass. 1978).

<sup>121</sup>*Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 582 (6th Cir. 1976); *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269, 1272 (D.N.H. 1979); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 711 (D. Mass. 1978). See *infra* notes 128-36 and accompanying text. See also *Pratt v. Independent School Dist.*, 670 F.2d 771, 776 (8th Cir. 1982) (film removed from curriculum).

<sup>122</sup>See *Zykan v. Warsaw Community School Corp.*, 631 F.2d at 1304-07; *Minarcini v. Strongsville City School Dist.*, 541 F.2d at 579-80; *Presidents Council v. Community School Bd. Number 25*, 457 F.2d at 290; *Pico v. Board of Educ.*, 474 F. Supp. at 397 (dismissal of curriculum claim not appealed). See also *Cary v. Board of Educ.*, 598 F.2d 535 (10th Cir. 1979) (school board decision not to use certain textbooks upheld).

<sup>123</sup>See, e.g., IND. CODE. §§ 20-5-2-1 to -2 (1976), *id.* § 20-10.1-4-4 (1976), cited in *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1305 (7th Cir. 1980); N.Y. EDUC. LAW §§ 701, 1709 (McKinney 1969), quoted in *Pico v. Board of Educ.*, 638 F.2d at 422 n.2 (Mansfield, J., dissenting); OHIO REV. CODE ANN. § 3329.07 (Page 1975) quoted in *Minarcini v. Strongsville City School Dist.*, 541 F.2d at 579.

<sup>124</sup>See, e.g., *Pico v. Board of Educ.*, 102 S. Ct. at 2821 (Burger, C.J., dissenting); *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1304, 1307 (7th Cir. 1980).

Although the dissenters in *Pico* made much of the supposed inconsistencies of granting a limited right of access to information to high school students, they ignored the fact that many other first amendment rights are less than absolute.<sup>125</sup> The right of association is limited by regulations on subversive activities and by conspiracy laws.<sup>126</sup> The right of free press does not immunize publications from libel, invasion of privacy, obscenity and copyright concerns.<sup>127</sup> The right of free speech can be restricted by regulations involving time, place and manner. In reality few, if any, substantive rights are absolute and unfettered. The fact that other rights exist despite occasional limitations placed upon them did not, however, prevent the *Pico* dissenters from attacking the proposal of a limited right of access to information for high school students. Their criticisms lay in three major areas.

1. *Removal v. Failure to Acquire.*—In *Pico*, Chief Justice Burger, who did not recognize a student right of access to information, asked why the right should apply only when a school board removes books and not when a school board fails to acquire books. He referred to the distinction as a “coincidence of timing.”<sup>128</sup> Justice Blackmun, who concurred in the judgment, also questioned whether there is a theoretical distinction between removal of and failure to acquire books. Although he refused to endorse a student right of access, he agreed with one of the court of appeals’ opinions in *Pico* that there is a practical and evidentiary distinction.<sup>129</sup>

Discussions about the distinction between removal of and failure to acquire have appeared both in library case opinions and law review articles.<sup>130</sup> The argument that a right of access to information must encompass the right to demand that materials be purchased as well as the right to require that materials not be removed obfuscates the issue already before the court: whether students have a right to require that information, once offered, not be removed arbitrarily. As Judge Newman of the Second Circuit explained in the lower court

<sup>125</sup>See J. NOWAK, R. ROTUNDA, & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 720-22 (1978).

<sup>126</sup>See L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-23 (1978).

<sup>127</sup>See, e.g., *Roth v. United States*, 354 U.S. 476, 481-84 (1954); L. TRIBE, *supra* note 126 at § 12-12.

<sup>128</sup>102 S. Ct. at 2821 (Burger, C.J., dissenting).

<sup>129</sup>*Id.* at 2814 n.1 (Blackmun, J., concurring in part) (citing 638 F.2d at 436 (Newman, J., concurring)).

<sup>130</sup>See 102 S. Ct. at 2821 (Burger, C.J., dissenting); *id.* at 2833 (Rehnquist, J., dissenting). See generally, Note, *Schoolbooks, School Boards, and the Constitution*, 80 COLUM. L. REV. 1092, 1116 (1980); Comment, *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).

opinion in *Pico*, there are many reasons for not acquiring books, and generally the failure to acquire a book does not attract enough public notice to create an atmosphere likely to suppress ideas.<sup>131</sup> He wrote: "There are many reasons why a book is not acquired, the most obvious being limited resources, but there are few legitimate reasons why a book, once acquired, should be removed from a library not filled to capacity."<sup>132</sup>

If in the future a school board failed to acquire a book and surrounded its decision with public pronouncements, as Justice Rehnquist hypothesized in *Pico*,<sup>133</sup> a court could decide whether to extend the first amendment right to such a case. Until then the practical, evidentiary advantage in generally limiting the right of access to removal cases outweighs the theoretical inconsistency in recognizing such a limited right.

Other courts have distinguished between removal of and failure to acquire books by claiming that a school board once having acted by placing the book in the school library, though not compelled to acquire the book, has created a constitutionally-protected interest that cannot be withdrawn arbitrarily or with improper motivation.<sup>134</sup> Critics of this view have likened it to giving a book tenure.<sup>135</sup> But as the court of appeals' opinion in *Pico* points out, the right at issue is not that of the book, but that of the students and other members of the school community.<sup>136</sup>

2. *Library v. Curriculum.*—Critics of extending the right of access to students also have questioned whether such a right can attach to school libraries and not the curriculum.<sup>137</sup> They have based their criticism in part on their view that school libraries are an instructional arm of the school and not an alternative institution for learning.<sup>138</sup> Critics also have suggested that because libraries are optional, they are more like dessert and that rights should attach only to the substantive, compulsory entities that are the meat and potatoes of society.<sup>139</sup> Proponents of a right of access might respond that the

<sup>131</sup>638 F.2d 404, 434-36 (2d Cir. 1980).

<sup>132</sup>*Id.* at 436.

<sup>133</sup>102 S. Ct. at 2833.

<sup>134</sup>*Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 582 (6th Cir. 1976); *Sheck v. Baileyville School Comm.*, 530 F. Supp. 679, 689 n.13 (D. Me. 1982); *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269, 1272-73 (D.N.H. 1979); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 712 (D. Mass. 1978).

<sup>135</sup>*See Presidents Council v. Community School Bd. Number 25*, 457 F.2d 289, 293 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972).

<sup>136</sup>638 F.2d at 435.

<sup>137</sup>*See, e.g., Board of Educ. v. Pico*, 102 S. Ct. at 2821 (Burger, C.J., dissenting); *id.* at 2832 (Rehnquist, J., dissenting).

<sup>138</sup>*Id.* at 2832 (Rehnquist, J., dissenting).

<sup>139</sup>*Id.* at 2821 (Burger, C.J., dissenting).

difference between library and curriculum lies in the lack of state interest involved in optional reading material as compared to the amount of state interest involved in required reading for the students. Once again, the criticism has a theoretical appeal but avoids the library issue actually before the court.

The seeming inconsistency of attaching the right to library books and not to textbooks may be explained by pointing out that the right of access is tied not only to information already disseminated but information yet to be disseminated.<sup>140</sup> While school authorities routinely revise curricula and routinely remove old textbooks to make way for new ones, such is not the case with libraries. Because textbook removal is routine, it lacks the symbolic influence that removal of a library book has.<sup>141</sup> Because textbooks are removed routinely, there is little chance that removing one will suggest that the ideas contained within a certain book are officially disfavored. The rarer occurrence, the removal of a library book, is more likely to raise the inference that certain ideas are unacceptable and that a wise student will not voice such ideas unless he too wishes to incur official disfavor.

Additionally, because curricula are routinely revised, school boards usually have established procedures<sup>142</sup> to make such decisions, and abuses are less likely to occur than in periodic raids on school libraries.<sup>143</sup> Curriculum decisions, therefore, have been left to the school boards, and there the boards are free to inculcate values through emphasis of ideas.<sup>144</sup> When abuses concerning curricula have occurred, however, courts have intervened.<sup>145</sup>

Perhaps the distinction between classroom and library is again one of expediency. While courts recognize that schools are marketplaces of ideas,<sup>146</sup> they also realize that specific information must be disseminated in classrooms in a relatively short period of time. Such is not the case in a library.<sup>147</sup> Also, students in a classroom are much

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<sup>140</sup>See *supra* notes 113-17 and accompanying text.

<sup>141</sup>See *Pico v. Board of Educ.*, 638 F.2d at 434 (Newman, J., concurring).

<sup>142</sup>See *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1303 (7th Cir. 1980); *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 579-80 (6th Cir. 1976).

<sup>143</sup>For a discussion of periodic raids on school libraries that have *not* been challenged in court, see *Mind Benders*, Indianapolis Star, Aug. 24, 1982, at 8, col. 1.

<sup>144</sup>See *Board of Educ. v. Pico*, 102 S. Ct. at 2816 (Blackmun, J., concurring). *But see id.* at 2820-21 (Burger, C.J., dissenting).

<sup>145</sup>See *Pratt v. Independent School Dist.*, 670 F.2d 771 (8th Cir. 1982); *Loewen v. Turnipseed*, 488 F. Supp. 1138 (N.D. Miss. 1980).

<sup>146</sup>*E.g.*, *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1304 (7th Cir. 1980); *Sheck v. Baileyville School Comm.*, 530 F. Supp. 679, 687 (D. Me. 1982).

<sup>147</sup>See *Sheck v. Baileyville School Comm.*, 530 F. Supp. 679, 687 (D. Me. 1982); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 715 (D. Mass. 1978), *cited in Board of Educ. v. Pico*, 102 S. Ct. at 2809.

more of a captive audience whose sensibilities might be better shielded from unnecessary controversy or possible offensiveness<sup>148</sup> than those who seek out ideas in the voluntary atmosphere of the library. Because schools appear to serve both as marketplaces of ideas and disseminators of specific information, the courts may recognize that the least obtrusive place for the hubbub of the marketplace is a voluntary rather than a compulsory atmosphere.<sup>149</sup>

3. *Alternate Sources.*—The third criticism against extending the right of access to information to students is that removal does not deny the students' access to the books but merely restricts access in the schools.<sup>150</sup> Allowing the consideration of other sources and of other places to affect book removal cases presupposes two conditions: first, that removals are not based on the contents of the books, and second, that public schools are not public or semi-public forums.<sup>151</sup> If either condition existed, the availability of alternative sources of information might excuse the removal of library books by school officials. Schools, however, have been recognized as semi-public forums closely tied to expression though not created for actual public interchange of ideas.<sup>152</sup> The alternative source criticism also fails in this context as books are a peaceful form of expression scarcely incompatible with the purpose of public education.

If book removal is regarded as being based on contents, which it would seem to be, the alternative source criticism fails even earlier.<sup>153</sup> Any harm that the contents of the books could bring about could be averted by further exchange of ideas, because the schools could counter harmful ideas by emphasizing ideas that are not harmful. Whenever more speech can eliminate injury that less speech is trying to avoid, suppression is deemed unnecessary.<sup>154</sup> Allowing the existence of alternate sources to support the removal of library books to prevent harm from "bad" language or ideas would be ironic because "alternative sources" in first amendment cases usually refers to the requirement that the state action be the least drastic means available.

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<sup>148</sup>*Cf.* *Close v. Lederle*, 424 F.2d 988 (1st Cir.), *cert. denied*, 400 U.S. 903 (1970) (school officials could withdraw permission to display art to shield captive audience from offensiveness).

<sup>149</sup>*See* *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 715 (D. Mass. 1978).

<sup>150</sup>*See* *Board of Educ. v. Pico*, 102 S. Ct. at 2821 (Burger, C.J., dissenting); *id.* at 2832-33 (Rehnquist, J., dissenting); *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1306 (7th Cir. 1980).

<sup>151</sup>*See* L. TRIBE, *supra* note 126 § 12-20, at 684; *id.* § 12-20, at 682-84. *See generally id.* § 12-2, at 580-84.

<sup>152</sup>*See* *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 513 (1969); L. TRIBE, *supra* note 126 § 12-21, at 690.

<sup>153</sup>*See* L. TRIBE, *supra* note 126 § 12-8, at 602.

<sup>154</sup>*Id.* at 602-03 (citing *Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977)).

Alternate sources do not lessen the symbolic significance of removal. As one of the court of appeals' opinions in *Pico* stated: "The impact of burning a book does not depend on whether every copy is on the fire."<sup>155</sup> Restraint on expression may not generally be justified by there being other times, places, or circumstances available for such expression.<sup>156</sup> Because the right of access is closely tied to the right of expression in a free society,<sup>157</sup> the same theory should apply.<sup>158</sup>

#### IV. WHAT RIGHT THEN?

*Board of Education v. Pico*<sup>159</sup> did establish that some first amendment interest tied to free speech could be violated, but it did not define what that interest is or to whom it belongs. The acceptance of students as proper plaintiffs<sup>160</sup> and the occasional rejection of others as plaintiffs in library cases<sup>161</sup> suggest that the right mainly rests with the students. *Pico* did not, however, authorize a full, affirmative right of access to information for students. Only three of the nine justices would be willing to do that.<sup>162</sup>

A majority of the Court did recognize that a school board can violate the first amendment by removing books from a library without proper motivation. In a sense, the Court has created a crime without a true victim. The violation would seem to be of a right of a free society not to have ideas suppressed by the government. Students who are the direct beneficiaries of the right as it exists in schools are the proper parties to report the violation but do not truly own that right. The students have enough interest in the right, and are injured enough when that right is violated, to bring the violation to the attention of the courts. In doing so, they represent the rest of society much as a prosecutor does when he files charges in a criminal case.

There is little or no precedent for a court recognizing a violation of a right without recognizing the right itself. There is slight prece-

<sup>155</sup>638 F.2d at 434 (Newman, J., concurring).

<sup>156</sup>*Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 582 (6th Cir. 1976) (citing *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975); *Spence v. Washington*, 418 U.S. 405, 411 n.4 (1974); *Schneider v. State*, 308 U.S. 147, 163 (1939)).

<sup>157</sup>"The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin." *Kleindienst v. Mandel*, 408 U.S. 753, 775 (1972) (Marshall, J., dissenting).

<sup>158</sup>For a discussion of why alternative sources will not solve the problems created if books are allowed to be removed from school libraries, see O'Neill, *Libraries, Liberties and the First Amendment*, 42 U. CIN. L. REV. 209, 240-41 (1973).

<sup>159</sup>102 S. Ct. 2799 (1982).

<sup>160</sup>*E.g.*, *Pico v. Board of Educ.*, 474 F. Supp. at 397; *Sheck v. Baileyville School Comm.*, 530 F. Supp. 679, 683 (D. Me. 1982).

<sup>161</sup>*E.g.*, *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 705 n.2 (D. Mass. 1978).

<sup>162</sup>102 S. Ct. at 2806-10.

dent, however, for the Court to allow a plaintiff to represent societal interests in Constitutional challenges.<sup>163</sup> *Pico* represents two main views. The plurality is consistent: students have a limited right of access to information;<sup>164</sup> society has a right not to have ideas suppressed;<sup>165</sup> and school boards do not have a right to remove books from school libraries with improper motivations.<sup>166</sup> The dissenters are also consistent: students have no such right of access in the school setting;<sup>167</sup> the societal interest at stake is the autonomy of elected school boards;<sup>168</sup> and school boards have authority to remove library books from school libraries.<sup>169</sup>

Any uncertainty or inconsistency in this matter rests with Justice Blackmun who recognized no affirmative right of access but some vague right not to have the state discriminate between ideas<sup>170</sup> and who agreed with the plurality that school boards may not remove books from school libraries with improper motivations. Justice White, by concurring, tacitly endorsed the limitations on the school board<sup>171</sup> while deferring discussion of the constitutional issues to the future. His view regarding what rights, if any, students have or society has was not stated. At any rate, Justices Blackmun and White are likely to cast the deciding votes determining what rights students, society, and school boards may or may not have regarding school libraries and book removal because the other justices have taken what seem to be firm positions.

## V. CONCLUSION

The *Pico* decision is significant not because it recognized a right, but because it recognized a limitation. Students received no affirmative right of access to information in this decision, but school boards were told that they do not have authority to restrict the flow of information except in certain circumstances. Exactly what those circumstances

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<sup>163</sup>The news media, for example, have traditionally based their claims on having a right of access to government meetings, records, and trials on the grounds that they act as a surrogate for the public. While never actually acknowledging that the news media play such a role, the Court has allowed newspapers standing to represent the public in suits. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980).

<sup>164</sup>*Board of Educ. v. Pico*, 102 S. Ct. at 2808-09.

<sup>165</sup>*See id.*

<sup>166</sup>*Id.* at 2810.

<sup>167</sup>*Id.* at 2818-19.

<sup>168</sup>*Id.* at 2819-21.

<sup>169</sup>*Id.*

<sup>170</sup>*Id.* at 2813-14.

<sup>171</sup>*Id.* at 2816-17. By remanding to determine motivation, Justice White agreed with the plurality that the motivation of the school board was crucial; had he agreed with the dissenters, the board's motivation would be irrelevant.

are has not been determined because improper motivation has not been adequately defined nor have questions about educational suitability, vulgarity and mixed motivation been answered. Moreover, the Supreme Court has confused the constitutional climate by being quick to apply a remedy without waiting to find or define a right.

If the confusion was created by a reluctance to endorse a limited right, the dissenters in *Pico* are questioning long-standing policies which recognize that first amendment rights can exist with limitations. If the dissenters are advancing criticisms of limited rights to mask a general reluctance to entertain student challenges to school board authority, their criticisms of a limited right are unprincipled.

The major source of the confusion, however, may lie with the concurring opinions of Justices Blackmun and White. Justice Blackmun's adherence to a societal right not to have the state discriminate between ideas unlocks a Pandora's box of questions about standing, which his opinion never addresses. Justice White, by attempting to sidestep the entire issue of whose right or what right is at stake, adds to the air of mystery that may continue to haunt school boards and courts in years to come. By showing a willingness to provide a remedy without a right, only one thing is certain: school board authority has been somehow limited, but no one can say exactly why.

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