Freedom to Read Foundation News

50 EAST HURON STREET, CHICAGO, ILLINOIS 60611 PHONE (312) 944-6780

William D. North, President Judith F. Krug, Executive Director

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The Supreme Court's Decision in *Pico*

On June 25, the United States Supreme Court rendered its decision in Board of Education, Island Trees Union Free School District No. 26, et al. *v.* Pico, et al., *declaring that the First Amendment's guarantee of freedom of speech limits the discretion of public school officials to remove books they consider offensive from school libraries. Arguing for the plurality, Justice William Brennan said, "Local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion."*

The Court, however, failed to offer any guidelines to school boards on the limits to their power to remove books. Instead, in a 5-4 decision, the Justices agreed only that the dispute must go back to a federal trial court to see if the school board members had "constitutionally valid concerns" that justified removal.

The well-known case (see FTRF News, *vol. 9, nos. 3-4; vol. 8, nos. 3-4) concerns the removal in 1976 of nine titles, including works by such noted authors as Kurt Vonnegut, Bernard Malamud, and Richard Wright from the Island Trees Union High School library. The books were removed by order of the school board after they appeared on a list of objectionable titles circulated by a conservative parents' group. Steven Pico and four other students sued the school board in 1977 on the ground that the removal of the books had violated the students' First Amendment rights.*

In August, the school board, no doubt fearing the further exposure a trial would bring, agreed to return the books to the library shelves. This landmark case in the application of the First Amendment to school libraries thus ended in victory.

The Freedom to Read Foundation funded a friend-of-the-court brief filed in the names of the American Library Association, the New York Library Association, and the Foundation. Excerpts from the brief appeared in the FTRF News, *vol. 10, no. 4. Elsewhere in this issue Foundation President William D. North comments on the*

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Highlights of Philadelphia Annual Conference Meeting

In a report to the Council of the American Library Association at the ALA's 1982 Annual Conference, FTRF President William D. North reported on the business transacted by the Foundation Trustees at their July 8 meeting in Philadelphia.

The year past has been a period of unparalleled peril and promise for those concerned for the future of intellectual freedom and the right to read.

Never since the McCarthy era have there been so many or such vigorous attempts to monopolize the marketplace of ideas represented by schools, libraries, and media forums. Never before have the attacks on the freedom of inquiry assumed such diverse and subtle forms. Never before has the censorship mentality and ideology so frequently and effectively disguised itself in the garb of right, truth, justice, balance, and moderation.

The censorship mentality seems always to be both the product and symptom of fear and uncertainty. Censors fear the new, the different, the unknown, the unusual, the rare. In these terms, the pressure to engage in censorship is understandable, for economic, social, domestic, and international uncertainties confront us on every side.

Yet we know that censorship provides no answers or solutions to our problems—it merely suppresses our capacity and ability to find them.

Recognizing that censorship cannot be ignored because it breeds more censorship; recognizing that the conversion of education into indoctrination is the antithesis of all that our First Amendment heritage promises for us and for those who will follow us, the Freedom to Read Foundation undertook at its 1982 annual meeting a broadened program of affirmative action to identify and oppose efforts to monopolize the minds of Americans. The program involves the following immediate measures, with much more to follow:

1. A grant of $5,000.00 to the Media Coalition, to support its defense of the right to publish and sell materials protected by the First Amendment, and to continue to monitor legislative initiatives to censor or suppress access to ideas and information.

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Highlights *(from p. 1)*

2. A grant of nearly $2,000.00 to librarian Jeanne Layton to enable her to continue her defense of the right of the professional librarian to defend the integrity of the library collection and to do so without fear of reprisal.
3. A grant of $1,500.00 to the New York Civil Liberties Union to support the legal costs incurred in taking the *Pico* case to the Supreme Court of the United States, and in winning the case despite immense odds.
4. A commitment to file an *amicus curiae* brief in a Colorado case involving the constitutionality of a library exemption in a variable obscenity, harmful to minors statute.
5. A program to clarify the terms for making application for support to the Foundation, to assure no issue of First Amendment significance goes unnoticed and no victim of censorship goes undefended and unvindicated.

In addition to these actions which have been announced, the Foundation is committed to litigation strategies and initiatives to take the offensive, to challenge the challengers of the right to read. Needless to say, these measures may not be described here without forewarning and thereby, forearming our enemies—but you and every other member of ALA will know as soon as possible and will take satisfaction in what is to come.

Having said all this, I would close this report with the observation, so fundamental as to be a truism, that your legal rights consist only of those rights you can afford to assert or defend. The Constitution, the civil rights laws, the guarantees of the Bill of Rights are meaningless if we have no power, no resources, no means to assert them in court or in the legislatures.

This is why we ask you to join the Foundation and why we ask you to enlist others to join.

If librarians, libraries, and those who believe that the freedom of the mind is an unalienable right want a strong arm to defend them, they must provide the muscle and sinew through their membership and contributions.

The peril or promise of this period is a function of our preparedness—and ultimately of your concern.

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U.S. Supreme Court rules in Ferber

On July 2, the United States Supreme Court rendered its decision in *People* v. *Ferber*, upholding the constitutionality of a law prohibiting the distribution of non-obscene material showing children engaged in certain sexual activities. The case arose in 1977 when the state of New York passed two laws on the sale and production of sexually explicit films, photographs, or live performances using children. One law (§ 263.10) prohibits the promotion of obscene sexual conduct by children. The other (§ 263.15) proscribes the distribution of materials depicting children engaged in sexual activity, regardless of whether the depiction is obscene. In the same year, Paul Ira Ferber, the proprietor of a Manhattan "adult" bookstore, was arrested for violating both laws. Ferber was subsequently found not guilty of the obscenity violation but guilty of Section 263.15 of the New York Penal Law. An appeals court overturned the conviction on the grounds that the statute was overbroad in criminalizing the sale or dissemination of constitutionally protected materials. The state of New York, in *People* v. *Ferber*, appealed that decision to the U.S. Supreme Court (see FTRF News, vol. 11, no. 1).

The Supreme Court, by a 9-0 ruling, stated that the need to safeguard the "physical and psychological well being of a minor" is "compelling," and the need specifically to prevent "the sexual exploitation and abuse of children constitutes a government objective of surpassing importance." Writing for the Court, Justice White said that "child pornography" was a "category of material outside the protection of the First Amendment" and could be regulated regardless of whether it was obscene.

The Court recognized, however, in upholding the New York child pornography law, that "like obscenity statutes, such laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy." Thus, while the Court now allows the states greater leeway in regulating sexually explicit depictions of children, it nonetheless recognizes that certain limitations must be adhered to, even in the area of "child pornography."

The constitutional result of the decision is to place child pornography in that category of "speech" not deserving of First Amendment protection, along with obscenity, defamation and language that incites to violence. The practical result is to uphold the constitutionality of laws in nineteen other states that prohibit child pornography regardless of whether the material is obscene. It still remains to be seen, however, whether the Supreme Court will actually permit the prosecution of sexual depictions of children having serious literary, artistic, scientific or similar value. As Justice O'Connor expressly stated, the constitution "might . . . permit [the states] to ban knowing distribution of works depicting minors

engaged in explicit sexual conduct, regardless of the social value of the depictions."

Justice White's opinion was joined in full by Chief Justice Warren E. Burger and Associate Justices Lewis F. Powell, William H. Rehnquist, and Sandra Day O'Connor, who also contributed a separate opinion. Associate Justice Harry A. Blackman filed a one-sentence "concurring in the result."

Associate Justices John Paul Stevens and William H. Brennan Jr., who was joined by Associate Justice Thurgood Marshall, also filed opinions concurring in the result.

The Meaning of the *Pico* Case

By William D. North, President, Freedom to Read Foundation. The following comments are excerpted and edited from a longer article in "The Pico *Case and Challenges to Books in Schools" to appear in the November 1982 issue of the* Newsletter on Intellectual Freedom.

On June 25th the Supreme Court rendered its decision in the *Pico* case. But that decision, far from resolving the issues presented by challenges to book removal, did nothing more than establish that these issues are unlikely to be resolved by this Supreme Court, at least as presently constituted, under any rationale commanding even a majority of the Justices, let alone a consensus.

The *Pico* case, even though it did not produce a majority opinion, is, however, one of the most significant First Amendment decisions to be rendered by the Supreme Court since its Obscenity Decisions of June, 1973. Like the Obscenity Decisions, *Pico* reflects the continuing and fundamental schism existing between two factions of the Court concerning the scope and application of the First Amendment.

The issue presented by *Pico* was preeminently ripe for consideration by the Supreme Court. Starting in 1971 and continuing throughout the decade of the 1970s, courts were encountering with increasing frequency cases in which school boards were accused of, and even admitted to, removing books from their school libraries, not because of obsolescence, lack of shelf space, or lack of relevance, but rather because the books were deemed inconsistent or contrary to the "value inculcation" objectives of the curriculum. As in the *Pico* case, these cases consistently involved the removal of a library work previously identified as worthy of acquisition under accepted book selection criteria. Likewise, they involved books which were elective reading and not part of the required curriculum. Moreover, they were invariably removed without regard for established procedures for "culling" or "winnowing" works no longer deemed appropriate for retention.

While all of these cases, including *Pico,* arose in the context of First Amendment challenges to the removal of books from school libraries, they all turned on differences in judicial perceptions of the proper role of school officials in the educational process. As a consequence, the primary effect of the Supreme Court's consideration in *Pico* was to identify what must be characterized as a fundamental philosophical dispute between two substantially equal and determined factions of the Court over the nature and function of elementary and secondary education in America.

One faction, led by Chief Justice Burger, clearly perceives elementary and secondary education to be "indoctrinative" or "prescriptive" in purpose. The other faction, led by Justice Brennan, clearly perceives such education to involve an "analytic" objective which cannot constitutionally be subordinated to or frustrated by the indoctrinative function.

Under the indoctrinative or prescriptive concept of education, information and accepted truths are furnished to a theoretically passive, absorbent student. The function of teacher, school, and educational materials is to convey these truths rather than create new wisdom. On the other hand, the analytic educational concept contemplates the examination of data and values in a way that involves the teacher, school, and students in a search for truth.

The self-evident sources of Justice Brennan's concern with Chief Justice Burger's perception of schools as ". . . vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system' " is that, so used, students will become nothing more than ". . . closed circuit recipients of only that which the State chooses to communicate."

Justice Brennan's concern with laws, official conduct, and policies which "cast a pall of orthodoxy over the classroom" has been a consistent, recurrent, and intensifying theme in opinions he has written in First Amendment cases since he first expressed it in *Keyishian* v. *Board of Regents,* where he contended that: "The classroom is peculiarly the 'marketplace of ideas.' " Justice Brennan's insistence that schools function as "marketplaces" of ideas as well as a means of ". . . promoting respect for authority and traditional values be they social, moral or political" reveals his doubt about the ability of a political majority to resist imposing its orthodoxy at the expense of individual inquiry and intellectual freedom.

As Justice Brennan's First Amendment opinions consistently reflect his abiding concern for individual freedom of inquiry, Justice Burger's First Amendment opinions, in *Pico* and other cases, reflect his equally abiding concern for the promotion and protection of the "social interest in order and morality." Having concluded that schools may legitimately be used for inculcating "fundamental values," Chief Justice Burger has no hesitation in granting school authorities ". . . broad discretion to

fulfill that obligation," including the right to make ". . . content based decisions about the appropriateness of retaining materials in the school library and curriculum." Justice Burger's concern with the conduct of school authorities is not that they may impose orthodoxy in the classroom, but rather that they may impose an orthodoxy that does not accurately reflect community values. This risk, however, Chief Justice Burger dismisses summarily on the basis that "local control of education involves democracy in a microcosm."

It is more than a little difficult to understand from whence Chief Justice Burger derived his "democracy in a microcosm" model of parent-teacher-student-school board relationships. Certainly he is aware that less than twenty percent of the voters are parents of elementary and secondary school children; certainly he is aware that the six-year average term of a school board member makes change in board composition and orientation a process requiring years; certainly he is aware that in most communities of this nation the school system, governed by the school board, is larger in terms of bureaucracy, budget and manpower than any other governmental activity.

But, it is even more difficult to understand how Chief Justice Burger could propose such total reliance on participative political solutions to controversies involving value inculcation in view of his unavoidable knowledge of the circumstances which almost invariably produce the removal of library materials. In *Pico,* for instance, the books were banned from the library, not on the basis of a complaint from a parent of an Island Trees school student, but on the basis of an "objectionable book list" prepared by an organization called Concerned Citizens and Taxpayers for Decent School Books of Baton Rouge Louisiana, distributed to three members of the Island Trees School Board at a meeting of a "conservative" organization in Watkins Glen, New York.

As inexplicable and unreal as is Chief Justice Burger's "democratic" solution to the failure of a school board to reflect correctly the community values to be inculcated by the secondary school, it is nothing compared to his solution for those whose values are not represented in the curricular orthodoxy: "They," says Chief Justice Burger, "have alternative sources to the same end. Books may be acquired from book stores, public libraries or other alternative sources unconnected with the unique environment of the local public schools."

That no less than four Justices of the Supreme Court could accept and endorse this view of the First Amendment's application to secondary education is a striking and, in my opinion, frightening indication of the philosophical change which has occurred on the Court since it held, in *West Virginia State Board of Education* v. *Barnette,* that "The Fourteenth Amendment, as now applied to the States, protects the citizens against the State itself and all of its creatures—Boards of Educations not excepted."

The concept that secondary school can, consistent with the First Amendment, be reduced to a purely indoctrinative function serving the will of any transient political majority which might gain control of the system is an anathema to the very purpose for which the Amendment was adopted. That purpose was not to protect the rights *of* the majority, but rather to protect the rights of the minority *from* the majority.

But aside from its gross inconsistency with the philosophical premise of the First Amendment, the concept that the secondary school can constitutionally be restricted to a value-inculcating mechanism is affirmatively counterproductive to the society and the people in at least three fundamental respects.

First, the concept absolutely guarantees that secondary schools will become political and ideological battlegrounds. It assures the "winner" of the competition for control of the school system, for the time he can remain in control, the right, not only to control curriculum content, but also to purge the school library of competing ideas. This is an opportunity no demagogue or ideologue can or will resist.

Second, the concept is in direct opposition to the objective of educational integration recognized by the Supreme Court as a constitutional mandate since *Brown* v. *Board of Education.* The success of such integration is a function of, and is measured by, not merely the numerical mix of races, religions, and nationalities in a school, but also in the capacity of the school to accommodate a variety of cultural, social, economic, and political perspectives and values. Educational parochialism is a fountainhead of bigotry and such parochialism is promoted, not deterred, by an indoctrinative mechanism which brooks no opposing viewpoints and values. Indeed, the very utility of the school as an "assimilative force" in our society is frustrated if the values which it inculcates are mere functions of the accident of geography, school district boundary, or school board composition at any point in time.

Finally, and perhaps most offensive to the "values on which our society rests," is the concept that the secondary public school, unlike the institution of higher learning, can be restricted to a narrow indoctrinative function. This constitutes nothing more nor less than constitutionally protected "educational elitism." The distinction which Justice Rehnquist makes in *Pico* between the application of the First Amendment to secondary schools and its application to institutions of higher education is implicitly based on the unsupported and unsupportable conclusion of the Seventh Circuit in *Zykan* that the student's need for academic freedom "is bounded by the level of his or her intellectual development."

This theory that access to the "marketplace of ideas" is reserved only to those who have the financial, physical, or mental capacity or the personal or professional interest to enter what the *Zykan* court described as "the rarefied atmosphere of the college or university" seems

fundamentally at variance with the great tradition of American public education. Of particular concern is the notion that the "need" for access to the marketplace of ideas is a function of intellectual development when most educators recognize such access as "indispensable" to intellectual development.

The plurality opinion in *Pico* rejects the concept that there are no limits to the measures or means which secondary school authorities may employ to inculcate values in their students. It does so by recognizing a constitutional "right to receive information." Specific recognition of the "right to receive information" is long overdue in what has now become a "knowledge society." Knowledge is power and access to knowledge is access to all our society has to offer.

The existence of the "right to receive information" does not negate the indoctrinative function of secondary schools. It merely requires that such function be performed by persuasion and example, by focus and emphasis, and by selection and presentation, rather than by suppression and excision.

The recognition in *Pico* of a "right to receive information," however limited in its support among the Justices, nevertheless constitutes another significant line of defense against censorship. The hope which *Pico* represents for the cause of intellectual freedom could not be more timely. Our historic institutions, values, and traditions are being buffeted by the winds of change. But the proper response to challenge is to defend our ideas with confidence and conviction born of knowledge.

Pico *(from p. 1)*

Court's decision. Excerpts from all seven separate opinions offered by the Justices follow:

Justice Brennan (with Justices Marshall and Stevens concurring):

We emphasize at the outset the limited nature of the substantive question presented by the case before us. . . . For as this case is presented to us, it does not involve textbooks, or indeed any books that Island Trees students would be required to read. Respondents do not seek in this Court to impose limitations upon their school board's discretion to prescribe the curricula of the Island Trees schools. On the contrary, the only books at issue in this case are *library* books, books that by their nature are optional rather than required reading. Our adjudication of the present case thus does not intrude into the classroom, or into the compulsory courses taught there. Furthermore, even as to library books, the action before us does not involve the *acquisition* of books. Respondents have not sought to compel their school board to add to the school library shelves any books that students desire to read. Rather, the only action challenged in this case is the *removal* from school libraries of books originally placed there by the school authorities, or without objection from them. . . .

The Court has long recognized that local school boards have broad discretion in the management of school affairs. . . .

At the same time, however, we have necessarily recognized that the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment. . . .

Of course, courts should not "intervene in the resolution of conflicts which arise in the daily operations of school systems" unless "basic constitutional values" are "directly and sharply implicate[d]" in those conflicts. But we think 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. Our precedents have focused "not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas." And we have recognized that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." In keeping with this principle, we have held that in a variety of contexts "the Constitution protects the right to receive information and ideas." This right is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution, in two senses. First, the right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them: "The right of freedom of speech and press . . . embraces the right to distribute literature, . . . and necessarily protects the right to receive it." "The dissemination of ideas can accomplish nothing if otherwise willing addresses are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." . . . In sum, just as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members. Of course all First Amendment rights accorded to students must be construed "in light of the special characteristics of the school environment." But the special characteristics of the school *library* make that environment especially appropriate for the recognition of the First Amendment rights of students.

A school library, no less than any other public library, is "a place dedicated to quiet, to knowledge, and to beauty." *Keyishian* v. *Board of Regents*, observed that "students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding." The school library is the principal locus of such freedom. . . .

Petitioners emphasize the inculcative function of secondary education, and argue that they must be allowed

unfettered discretion to "transmit community values" through the Island Trees schools. But that sweeping claim overlooks the unique role of the school library. It appears from the record that use of the Island Trees school libraries is completely voluntary on the part of students. Their selection of books from these libraries is entirely a matter of free choice; the libraries afford them an opportunity at self-education and individual enrichment that is wholly optional. Petitioners might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values. But we think that petitioners' reliance upon that duty is misplaced where, as here, they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway.

In rejecting petitioners' claim of absolute discretion to remove books from their school libraries, we do not deny that local school boards have a substantial legitimate role to play in the determination of school library content. We thus must turn to the question of the extent to which the First Amendment places limitations upon the discretion of petitioners to remove books from their libraries. In this inquiry we enjoy the guidance of several precedents.

With respect to the present case, the message of these precedents is clear. Petitioners rightly possess significant discretion to determine the content of their school libraries. But that discretion may not be exercised in a narrowly partisan or political manner. If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books. The same conclusion would surely apply if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration. Our Constitution does not permit the official suppression of *ideas*. Thus whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution. To permit such intentions to control official actions would be to encourage the precise sort of officially prescribed orthodoxy unequivocally condemned in *Barnette*. On the other hand, respondents implicitly concede that an unconstitutional motivation would *not* be demonstrated if it were shown that petitioners had decided to remove the books at issue because those books were pervasively vulgar. And again, respondents concede that if it were demonstrated that the removal decision was based solely upon the "educational suitability" of the books in question, then their removal would be "perfectly permissible." In other words, in respondents' view such motivations, if decisive of petitioners' actions, would not carry the danger of an official suppression of ideas, and thus would not violate respondents' First Amendment rights.

As noted earlier, nothing in our decision today affects in any way the discretion of a local school board to choose books to *add* to the libraries of their schools. Because we are concerned in this case with the suppression of ideas, our holding today affects only the discretion to *remove* books. In brief, we hold that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." Such purposes stand inescapably condemned by our precedents.

. . . This would be a very different case if the record demonstrated that petitioners had employed established, regular, and facially unbiased procedures for the review of controversial materials. But the actual record in the case before us suggests the exact opposite. Petitioners' removal procedures were vigorously challenged below by respondents, and the evidence on this issue sheds further light on the issue of petitioners' motivations. Respondents alleged that in making their removal decision petitioners ignored "the advice of literary experts," the views of "librarians and teachers within the Island Trees School system," the advice of the superintendent of schools, and the guidance of "publications that rate books for junior and senior high school students." Respondents also claimed that petitioners' decision was based solely on the fact that the books were named on the PONYU list received by petitioners Ahrens, Martin, and Hughes, and that petitioners "did not undertake an independent review of other books in the [school] libraries." Evidence before the District Court lends support to these claims. In sum, respondents' allegations and some of the evidentiary materials presented below do not rule out the possibility that petitioners' removal procedures were highly irregular and ad hoc—the antithesis of those procedures that might tend to allay suspicions regarding petitioners' motivations.

Justice Blackmun:

In combination with more generally applicable First Amendment rules . . . the cases outlined above yield a general principle: the State may not suppress exposure to ideas—for the sole *purpose* of suppressing exposure to those ideas—absent sufficiently compelling reasons. Because the school board must perform all its functions "within the limits of the Bill of Rights," this principle necessarily applies in at least a limited way to public education. Surely this is true in an extreme case: as the

plurality notes, it is difficult to see how a school board, consistent with the First Amendment, could refuse for political reasons to buy books written by Democrats or by Negroes, or books that are "anti-American" in the broadest sense of that term. Indeed, Justice Rehnquist appears "cheerfully [to] concede" this point.

In my view, then, the principle involved here is both narrower and more basic than the "right to receive information" identified by the plurality. I do not suggest that the State has any affirmative obligation to provide students with information or ideas, something that may well be associated with a "right to receive." And I do not believe, as the plurality suggests, that the right at issue here is somehow associated with the peculiar nature of the school library; if schools may be used to inculcate ideas, surely libraries may play a role in that process. Instead, I suggest that certain forms of state discrimination *between* ideas are improper. In particular, 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.

Certainly, the unique environment of the school places substantial limits on the extent to which official decisions may be restrained by First Amendment values. But that environment also makes it particularly important that *some* limits be imposed. The school is designed to, and inevitably will, inculcate ways of thought and outlooks; if educators intentionally may eliminate all diversity of thought, the school will "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." As I see it, then, the question in this case is how to make the delicate accommodation between the limited constitutional restriction that I think is imposed by the First Amendment, and the necessarily broad state authority to regulate education. In starker terms, we must reconcile the schools' "inculcative" function with the First Amendment's bar on "prescriptions of orthodoxy."

In my view, we strike a proper balance here by holding that school officials may not remove books for the *purpose* of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by the officials' disapproval of the ideas involved. It does not seem radical to suggest that state action calculated to suppress novel ideas or concepts is fundamentally antithetical to the values of the First Amendment. At a minimum, allowing a school board to engage in such conduct hardly teaches children to respect the diversity of ideas that is fundamental to the American system. In this context, then, the school board must "be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," and that the board had something in mind in addition to the suppression of partisan or political views it did not share.

As I view it, this is a narrow principle. School officials must be able to choose one book over another, without outside interference, when the first book is deemed more relevant to the curriculum, or better written, or when one of a host of other politically neutral reasons is present. These decisions obviously will not implicate First Amendment values. And even absent space or financial limitations, First Amendment principles would allow a school board to refuse to make a book available to students because it contains offensive language, or because it is psychologically or intellectually inappropriate for the age group, or even, perhaps, because the ideas it advances are "manifestly inimical to the public welfare." And, of course, school officials may choose one book over another because they believe that one subject is more important, or is more deserving of emphasis. . . .

Concededly, a tension exists between the properly inculcative purposes of public education and any limitation on the school board's absolute discretion to choose academic materials. But that tension demonstrates only that the problem here is a difficult one, not that the problem should be resolved by choosing one principle over another. As the Court has recognized, school officials must have the authority to make educationally appropriate choices in designing a curriculum: "the State may 'require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty, which tend to inspire patriotism and love of country.'" Thus school officials may seek to instill certain values "by persuasion and example," or by choice of emphasis. That sort of positive educational action, however, is the converse of an intentional attempt to shield students from certain ideas that officials find politically distasteful.

Justice White:

. . . The unresolved factual issue, as I understand it, is the reason or reasons underlying the school board's removal of the books. I am not inclined to disagree with the Court of Appeals on such a fact-bound issue and hence concur in the judgment of affirmance. Presumably this will result in a trial and the making of a full record and findings on the critical issues.

The Court seems compelled to go further and issue a dissertation on the extent to which the First Amendment limits the discretion of the school board to remove books from the school library. I see no necessity for doing so at this point. When findings of fact and conclusions of law are made by the District Court, that may end the case. If, for example, the District Court concludes after a trial that the books were removed for their vulgarity, there may be no appeal. In any event, if there is an appeal, if there is dissatisfaction with the subsequent Court of Appeals' judgment, and if certiorari is sought and granted, there will be time enough to address the First Amendment issues that may then be presented.

Chief Justice Burger:

The First Amendment, as with other parts of the Constitution, must deal with new problems in a changing world. In an attempt to deal with a problem in an area traditionally left to the states, a plurality of the Court, in a lavish expansion going beyond any prior holding under the First Amendment, expresses its view that a school board's decision concerning what books are to be in the school library is subject to federal court review. Were this to become the law, this Court would come perilously close to becoming a "super censor" of school board library decisions. Stripped to its essentials, the issue comes down to two important propositions: *first*, whether local schools are to be administered by elected school boards, or by federal judges and teenage pupils; and *second*, whether the values of morality, good taste, and relevance to education are valid reasons for school board decisions concerning the contents of a school library. . . .

I agree with the fundamental proposition that "students do not 'shed their rights to freedom of speech or expression at the schoolhouse gate.' " For example, the Court has held that a school board cannot compel a student to participate in a flag salute ceremony, or *prohibit* a student from expressing certain views, so long as that expression does not disrupt the educational process. Here, however, no restraints of any kind are placed on the students. They are free to read the books in question, which are available at public libraries and bookstores; they are free to discuss them in the classroom or elsewhere. Despite this absense of any direct external control on the students' ability to express themselves, the plurality suggest that there is a new First Amendment "entitlement" to have access to particular books in a school library.

. . . The apparent underlying basis of the plurality's view seems to be that students have an enforceable "right" to receive the information and ideas that are contained in junior and senior high school library books. This "right" purportedly follows "ineluctably" from the sender's First Amendment right to freedom of speech and as a "necessary predicate" to the recipient's meaningful exercise of his own rights of speech, press, and political freedom. No such right, however, has previously been recognized. . . . In short, even assuming the desirability of the policy expressed by the plurality, there is not a hint in the First Amendment, or in any holding of this Court, of a "right" to have the government provide continuing access to certain books.

Whatever role the government might play as a conduit of information, schools in particular ought not be made a slavish courier of the material of third parties. The plurality pays homage to the ancient verity that in the administration of the public schools "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.' " If, as we have held, schools may legitimately be used as vehicles for "inculcating fundamental values necessary to the maintenance of a democratic political system," school authorities must have broad discretion to fulfill that obligation. Presumably all activity within a primary or secondary school involves the conveyance of information and at least an implied approval of the worth of that information. How are "fundamental values" to be inculcated except by having school boards make content-based decisions about the appropriateness of retaining materials in the school library and curriculum. In order to fulfill its function, an elected school board *must* express its views on the subjects which are taught to its students. In doing so those elected officials express the views of their community; they may err, of course, and the voters may remove them. It is a startling erosion of the very idea of democratic government to have this Court arrogate to itself the power the plurality asserts today.

The plurality concludes that under the Constitution school boards cannot choose to retain or dispense with books if their discretion is exercised in a "narrowly partisan or political manner." The plurality concedes that permissible factors are whether the books are "pervasively vulgar," or educationally unsuitable. "Educational suitability," however, is a standardless phrase. This conclusion will undoubtedly be drawn in many—if not most—instances because of the decisionmaker's content-based judgment that the ideas contained in the book or the idea expressed from the author's method of communication are inappropriate for teenage pupils.

The plurality also tells us that a book may be removed from a school library if it is "pervasively vulgar." But why must the vulgarity be "pervasive" to be offensive? Vulgarity might be concentrated in a single poem or a single chapter or a single page, yet still be inappropriate. Or a school board might reasonably conclude that even "random" vulgarity is inappropriate for teenage school students. A school board might also reasonably conclude that the school board's retention of such books gives those volumes an implicit endorsement.

Further, there is no guidance whatsoever as to what constitutes "political" factors. This Court has previously recognized that public education involves an area of broad public policy and " 'go[es] to the heart of representative government.' " As such, virtually all educational decisions necessarily involve "political" determinations.

What the plurality views as valid reasons for removing a book at their core involve partisan judgments. Ultimately the federal courts will be the judge of whether the motivation for book removal was "valid" or "reasonable." Undoubtedly the validity of many book removals will ultimately turn on a judge's evaluation of the books.

Discretion must be used, and the appropriate body to exercise that discretion is the local elected school board, not judges.

We can all agree that as a matter of *educational policy* students should have wide access to information and ideas. But the people elect school boards, who in turn select administrators, who select the teachers, and these are the individuals best able to determine the substance of that policy. The plurality fails to recognize the fact that local control of education involves democracy in a microcosm. In most public schools in the United States the *parents* have a large voice in running the school. Through participation in the election of school board members, the parents influence, if not control, the direction of their childrens' education. A school board is not a giant bureaucracy far removed from accountability for its actions; it is truly "of the people and by the people." A school board reflects its constituency in a very real sense and thus could not long exercise unchecked discretion in its choice to acquire or remove books. If the parents disagree with the educational decisions of the school board, they can take steps to remove the board members from office. Finally, even if parents and students cannot convince the school board that book removal is inappropriate, they have alternative sources to the same end. Books may be acquired from book stores, public libraries, or other alternative sources unconnected with the unique environment of the local public schools.

Today the plurality suggests that the *Constitution* distinguishes between school libraries and school classrooms, between *removing* unwanted books and *acquiring* books. Even more extreme, the plurality concludes that the Constitution *requires* school boards to justify to its teenage pupils the decision to remove a particular book from a school library. I categorically reject this notion that the Constitution dictates that judges, rather than parents, teachers, and local school boards, must determine how the standards of morality and vulgarity are to be treated in the classroom.

Justice Powell:

The plurality opinion today rejects a basic concept of public school education in our country: that the States and locally elected school boards should have the responsibility for determining the educational policy of the public schools. After today's decision any junior high school student, by instituting a suit against a school board or teacher, may invite a judge to overrule an educational decision by the official body designated by the people to operate the schools.

School boards are uniquely local and democratic institutions. Unlike the governing bodies of cities and counties, school boards have only one responsibility: the education of the youth of our country during their most formative and impressionable years. Apart from health, no subject is closer to the hearts of parents than their children's education during those years. For these reasons, the governance of elementary and secondary education traditionally has been placed in the hands of a local board, responsible locally to the parents and citizens of school districts. Through parent-teacher associations (PTAs), and even less formal arrangements that vary with schools, parents are informed and often may influence decisions of the board. Frequently, parents know the teachers and visit classes. It is fair to say that no single agency or government at any level is closer to the people whom it serves than the typical school board.

I therefore view today's decision with genuine dismay. Whatever the final outcome of this suit and suits like it, the resolution of educational policy decisions through litigation, and the exposure of school board members to liability for such decisions, can be expected to corrode the school board's authority and effectiveness. . . .

The plurality's reasoning is marked by contradiction. It purports to acknowledge the traditional role of school boards and parents in deciding what should be taught in the schools. It states the truism that the schools are "vitally important 'in the preparation of individuals for participation as citizens,' and as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system.' " Yet when a school board, as in this case, takes its responsibilities seriously and seeks to decide what the fundamental values are that should be imparted, the plurality finds a constitutional violation.

. . . A school board's attempt to instill in its students the ideas and values on which a democratic system depends is viewed as an impermissible suppression of other ideas and values on which other systems of government and other societies thrive. Books may not be removed because they are indecent; extoll violence, intolerance and racism; or degrade the dignity of the individual. Human history, not the least of the twentieth century, records the power and political life of these very ideas. But they are not our ideas or values. Although I would leave this educational decision to the duly constituted board, I certainly would not *require* a school board to promote ideas and values repugnant to a democratic society or to teach such values to *children*.

In different contexts and in different times, the destruction of written materials has been the symbol of despotism and intolerance. But the removal of nine vulgar or racist books from a high school library by a concerned local school board does not raise this specter. For me, today's decision symbolizes a debilitating encroachment upon the institutions of a free people.

Justice Rehnquist:

Considerable light is shed on the correct resolution of the constitutional question in this case by examining the

role played by petitioners. Had petitioners been the members of a town council, I suppose all would agree that, absent a good deal more than is present in this record, they could not have prohibited the sale of these books by private booksellers within the municipality. But we have also recognized that the government may act in other capacities than as sovereign, and when it does the First Amendment may speak with a different voice. . . .

With these differentiated roles of government in mind, it is helpful to assess the role of government as educator, as compared with the role of government as sovereign. When it acts as an educator, at least at the elementary and secondary school level, the government is engaged in inculcating social values and knowledge in relatively impressionable young people. Obviously there are innumerable decisions to be made as to what courses should be taught, what books should be purchased, or what teachers should be employed. In every one of these areas the members of a school board will act on the basis of their own personal or moral values, will attempt to mirror those of the community, or will abdicate the making of such decisions to so-called "experts." In this connection I find myself entirely in agreement with the observation of the Court of Appeals for the Seventh Circuit in *Zykan* v. *Warsaw Community School Corp.*, that it is "permissible and appropriate for local boards to make educational decisions based upon their personal social, political and moral views." In the very course of administering the many-faceted operation of a school district, the mere decision to purchase some books will necessarily preclude the possibility of purchasing others. The decision to teach a particular subject may preclude the possibility of teaching another subject. A decision to replace a teacher because of ineffectiveness may by implication be seen as a disparagement of the subject matter taught. In each of these instances, however, the book or the exposure to the subject matter may be acquired elsewhere. The managers of the school district are not proscribing it as to the citizenry in general, but are simply determining that it will not be included in the curriculum or school library. In short, actions by the government as educator do not raise the same First Amendment concerns as actions by the government as sovereign.

Justice Brennan would hold that the First Amendment gives high school and junior high school students a "right to receive ideas" in the school. This right is a curious entitlement. It exists only in the library of the school, and only if the idea previously has been acquired by the school in book form. It provides no protection against a school board's decision not to acquire a particular book, even though that decision denies access to ideas as fully as removal of the book from the library, and it prohibits removal of previously acquired books only if the remover "dislike[s] the ideas contained in those books," even though removal for any other reason also denies the students access to the books. . . .

Education consists of the selective presentation and explanation of ideas. The effective acquisition of knowledge depends upon an orderly exposure to relevant information. Nowhere is this more true than in elementary and secondary schools, where, unlike the broad-ranging inquiry available to university students, the courses taught are those thought most relevant to the young students' individual development. Of necessity, elementary and secondary educators must separate the relevant from the irrelevant, the appropriate from the inappropriate. Determining what information *not* to present to the students is often as important as identifying relevant material. This winnowing process necessarily leaves much information to be discovered by students at another time or in another place, and is fundamentally inconsistent with any constitutionally required eclecticism in public education. . . .

As already mentioned, elementary and secondary schools are inculcative in nature. The libraries of such schools serve as supplements to this inculcative role. Unlike university or public libraries, elementary and secondary school libraries are not designed for free-wheeling inquiry; they are tailored, as the public school curriculum is tailored, to the teaching of basic skills and ideas. Thus, Justice Brennan cannot rely upon the nature of school libraries to escape the fact 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.

After all else is said, however, the most obvious reason that petitioners' removal of the books did not violate respondents' right to receive information is the ready availability of the books elsewhere. Students are not denied books by their removal from a school library. The books may be borrowed from a public library, read at a university library, purchased at a bookstore, or loaned by a friend. The government as educator does not seek to reach beyond the confines of the school. Indeed, following the removal from the school library of the books at issue in this case, the local public library put all nine books on display for public inspection. Their contents were fully accessible to any inquisitive student.

Intertwined as a basis for Justice Brennan's opinion, along with the "right to receive information," is the statement that "our Constitution does not permit the official suppression of *ideas*." There would be few champions, I suppose, of the idea that our Constitution *does* permit the official suppression of ideas; my difficulty is not with the admittedly appealing catchiness of the phrase, but with my doubt that it is really a useful analytical tool in solving difficult First Amendment problems. Since the phrase appears in the opinion "out of the blue," without any reference to previous First Amendment decisions of this Court, it would appear that the Court for years has managed to decide First Amendment cases without it.

A school board which publicly adopts a policy forbid-

ding the criticism of United States foreign policy by any student, any teacher, or any book on the library shelves is indulging in one kind of "suppression of ideas." A school board which adopts a policy that there shall be no discussion of current events in a class for high school sophomores devoted to second-year Latin "suppresses ideas" in quite a different context.

In the case before the petitioners may in one sense be said to have "suppressed" the "ideas" of vulgarity and profanity, but that is hardly an apt description of what was done. They ordered the removal of books containing vulgarity and profanity, but they did not attempt to preclude discussion about the themes of the books or the books themselves. Such a decision, on respondents' version of the facts in this case, is sufficiently related to "educational suitability" to pass muster under the First Amendment.

Justice O'Connor:

If the school board can set the curriculum, select teachers, and determine initially what books to purchase for the school library, it surely can decide which books to discontinue or remove from the school library so long as it does not also interfere with the right of students to read the material and to discuss it. . . .

I do not personally agree with the board's action with respect to some of the books in question here, but it is not the function of the courts to make the decisions that have been properly relegated to the elected members of school boards. It is the school board that must determine educational suitability, and it has done so in this case.

Copies of all the opinions (73 pages total) are available from the Freedom to Read Foundation for $5.00, prepaid. Please make checks payable to the Freedom to Read Foundation, 50 East Huron Street, Chicago, Illinois 60611.

1982 Election

Three New Trustees Chosen, Two Re-elected

Three new trustees were elected to serve two-year terms on the Board of Trustees of the Freedom to Read Foundation in balloting held in May. Lee B. Brawner, Executive Director of the Metropolitan Library System, Oklahoma City, Oklahoma; Peter Scales, Director of Education, Planned Parenthood Federation of America, New York, New York; and Russell Shank, University Librarian, University of California Library, Los Angeles, formally participated in their first FTRF annual meeting on July 8 in Philadelphia.

Elected to second terms were Burton Joseph, Attorney, Lipnick, Barsy and Joseph, Chicago, Illinois; and William D. North, Senior Vice-President and General Counsel, National Association of Realtors.

New Officers Elected

At its initial organizing meeting, the 1982-1983 Board unanimously reelected William D. North, as president of the Foundation. Henry R. Kaufman was unanimously elected vice-president, and Burton Joseph was unanimously elected treasurer. J. Dennis Day and Ella G. Yates-Edwards were elected to join the three officers on the Executive Committee.

Other members of the 1982-1983 Board of Trustees are Lester Asheim, Professor, School of Library Science, University of North Carolina at Chapel Hill; Richard P. Kleeman, Vice-President, Association of American Publishers and Director of the AAP Washington office; Carol A. Nemeyer, ALA President; Brooke Sheldon, ALA Vice-President/President-elect; and Robert Wedgeworth, ALA Executive Director.

At the close of the 1982 Annual Meeting, the terms of office of trustees Daniel Casey, Joan Collett, and L.B. Woods expired.

Freedom to Read Foundation
50 E. Huron Street
Chicago, IL 60611

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