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JUDICIAL REVIEW OF STUDENT FIRST AMENDMENT CLAIMS: ASSESSING THE LEGITIMACY-COMPETENCY DEBATE

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I. INTRODUCTION

The Supreme Court ruled in *Board of Education, Island Trees Union Free School District No. 26 v. Pico*,[1] that the first amendment precludes school authorities from removing books from the school library because they disagree with the viewpoints represented in the books. The Court's opinion rested upon the proposition that, under our constitutional scheme, government may not suppress particular ideas. Although this proposition seems unexceptional in light of the evolution of first amendment jurisprudence, the Court has regularly been troubled by the application of this principle in particular con-

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1. 457 U.S. 853 (1982).

texts such as the public school setting. Indeed, four justices in *Pico* dissented from the Court's holding and concluded that school library book removal decisions do not present a constitutional issue.[2]

The plurality and dissenting opinions in *Pico* disagreed most sharply on the appropriateness of judicial review of decisions reached by local school authorities. The Court has consistently expressed the view that state and local officials are primarily responsible for educational matters, and that courts generally should defer to their decisions.[3] Underlying this proposition, as the dissent argues, is the fact that school boards are locally elected bodies, and thus, particularly reflective of and responsive to the will of the local community.[4] Moreover, in an area such as educational policy-making, where discretionary judgments are frequently necessary, there is reason to question whether courts are any better situated institutionally than school officials to resolve the difficult questions which arise. Not only might the courts lack the resources and expertise available to professional educators or elected officials, but they also may not be able to develop and articulate suitable standards for the resolution of educational issues.[5]

The *Pico* decision, therefore, presents the fundamental question of the appropriateness of judicial review of student first amendment claims challenging curriculum-related decisions reached by public school officials. The issue has been—and should be—framed in terms of legitimacy and competency.[6] The legitimacy issue addresses the judiciary's role in identifying and implementing constitutional values as a check on the authority of governmental officials.[7] The argument that judicial review is illegitimate in cases such as *Pico* assumes a properly functioning democratic decisionmaking process which is reflected in

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2. Five Justices voted to sustain the plaintiffs' claim that the Island Trees school board's decision to remove nine books from the junior high school and high school libraries posed first amendment problems. *Id.* at 875. Justice Brennan authored the Court's plurality opinion for himself and Justices Marshall and Stevens. *Id.* at 855-75. Justices Blackmun and White each concurred in separate opinions. *Id.* at 875-82 (Blackmun, J., concurring); *id.* at 883-84 (White, J., concurring). Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor each filed dissenting opinions. *Id.* at 885-93 (Burger, C.J., dissenting); *id.* at 893-903 (Powell, J., dissenting); *id.* at 909-20 (Rehnquist, J., dissenting); *id.* at 921 (O'Connor, J., dissenting).

3. *See, e.g.*, Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 507 (1969); Epperson v. Arkansas, 393 U.S. 97, 104 (1968); Meyer v. Nebraska, 262 U.S. 390, 402 (1923).

4. *Pico*, 457 U.S. at 894 (Powell, J., dissenting).

5. *Id.* at 894-95 (Powell, J., dissenting); *see also id.* at 890-91 (Burger, C.J., dissenting).

6. M. REBELL & A. BLOCK, EDUCATIONAL POLICYMAKING AND THE COURTS 3-5 (1982); Fiss, *Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 38 (1978). The article will treat the questions of legitimacy and competency separately but it has been forcefully argued that the two concepts are inherently interrelated. *See* M. REBELL & A. BLOCK, *supra* at 10 n.52; Fiss, *supra* at 38.

7. M. REBELL & A. BLOCK, *supra* note 6, at 5-10; L. TRIBE, AMERICAN CONSTITUTIONAL LAW 9 (1978); Fiss, *supra* note 6, at 34.

the school board and, by extension, in the officials and teachers retained to run the schools. The competency question relates to the ability of courts to provide a viable forum for the resolution of constitutional claims such as student first amendment challenges to library and curriculum decisions.[8] Each of these concerns goes to the heart of the judicial process and the proper role to be assumed by the courts in reviewing constitutional claims.

A considerable number of school library book removal incidents preceded the *Pico* litigation.[9] Similar incidents involving school library collections[10] as well as curriculum-related matters have continued in its wake.[11] It is thus troubling that the Court's *Pico* ruling reflects such sharp division among the Justices on the basic question of judicial review. Although the Court specifically limited its decision to the library book removal issue,[12] the four Justices in the majority who addressed the first amendment claims could not even agree on an appropriate rationale.[13] Perhaps the Court can be taken at its word and *Pico* should be narrowly construed as applicable only to the library book removal issue. Supreme Court precedent, however, is rarely regarded as so limited. Since a broader reading of *Pico* seemingly authorizes courts to consider challenges to library acquisition and curricular decisions, the courts can expect further litigation challenging the traditional authority of school officials.[14]

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8. *See* M. REBELL & A. BLOCK, *supra* note 6, at 11-15.

9. *See, e.g.,* 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, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 289, *cert. denied*, 409 U.S. 998 (1972); Bicknell v. Vergennes Union High School, 475 F. Supp. 615 (D. Vt. 1979), *aff'd*, 638 F.2d 438 (2d Cir. 1980); 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). *See generally* R. O'NEIL, CLASSROOMS IN THE CROSSFIRE (1981).

10. *See, e.g.,* Sheck v. Baileyville School Comm., 530 F. Supp. 679 (D. Me. 1982). *See generally* 32 NEWSLETTER ON INTELL. FREEDOM 137 (1983) [hereinafter cited as NEWSLETTER].

11. *See, e.g.,* Johnson v. Stuart, 702 F.2d 193 (9th Cir. 1983); Pratt v. Independent School Dist. No. 831, Forest Lake, Minn., 670 F.2d 771 (8th Cir. 1982). *See generally* NEWLETTER, *supra* note 10.

12. 457 U.S. at 862 (plurality opinion).

13. The Court carefully limited its consideration to the question of the removal of school library books. *Id.* at 862. Justice Brennan, writing for the plurality, concluded that students could claim a right to know based on the first amendment, *id.* at 868; Justice Blackmun specifically disavowed reliance upon the right-to-know doctrine, *id.* at 878 (Blackmun, J., concurring).

14. The cases to date have usually involved a first amendment challenge initiated by students and their parents dissatisfied with a particular decision reached by school officials or the school board, and, occasionally, a challenge commenced by teachers unhappy with school board encroachment into their teaching prerogatives. *See, e.g.,* Cary v. Board of Educ., Adams-Arapahoe School Dist., 598 F.2d 535 (10th Cir. 1979) (teachers); Minarcini v. Strongsville City School Dist., 541 F.2d 577 (6th Cir. 1976) (students and parents). Infrequently, students and teachers have joined together in litigation. *See, e.g.,* Johnson v. Stuart, 702 F.2d 193 (9th Cir. 1983). *Pico* was concerned

This article examines the limits of the *Pico* decision from the perspective of the judicial review debate. The article will initially outline the *Pico* decision. The article will then examine the parameters of the first amendment rights of secondary school students and suggest that *Pico* is consistent with the Court's earlier jurisprudence regarding children's first amendment rights. Next, the article will explore the government's interest in public education by examining the two models of public education that have emerged from the Supreme Court's opinions. The article will develop a multi-dimensional model of public education and determine whether judicial deference is an appropriate approach to first amendment controversies in the secondary schools in view of this model and related first amendment considerations. Finally, the article will address the judicial competency question by reexamining the *Pico* decision. This will include an attempt to define the parameters of judicial review under the first amendment of educational decisionmaking by appointed or elected officials involving library acquisitions and curriculum matters.

II. THE *Pico* Decision

The *Pico* controversy arose during 1976 in New York when the school board of the Island Trees Union Free School District No. 26 concluded that ten books contained within the secondary school libraries should be removed and deleted from the curriculum.[15] The board initially removed the books from the high school and junior high school libraries for review after three board members determined that the books were among those identified as "objectionable" by a conservative state-wide parental organization.[16] The superintendent of schools objected to the board's removal decision and argued that the school district should follow an established policy to review the questioned books. Although the board did not follow the superintendent's suggestion, it subse-

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exclusively with the question of student first amendment rights and this article, accordingly, will focus on this issue. *See generally* Hunter, *Curriculum, Pedagogy, and the Constitutional Rights of Teachers in Secondary Schools*, 25 WM. & MARY L. REV. 1 (1983) (providing detailed examination of teacher rights and interests in the secondary school setting).

15. Nine of the removed books were in the high school library: SLAUGHTER HOUSE FIVE, by Kurt Vonnegut, Jr.; THE NAKED APE, by Desmond Morris; DOWN THESE MEAN STREETS, by Piri Thomas; BEST SHORT STORIES OF NEGRO WRITERS, edited by Langston Hughes; GO ASK ALICE, of anonymous authorship; LAUGHING BOY, by Oliver LaFarge; BLACK BOY, by Richard Wright; A HERO AIN'T NOTHIN' BUT A SANDWICH, by Alice Childress; and SOUL ON ICE, by Eldridge Cleaver. One book, THE FIXER, by Bernard Malamud was included in the twelfth grade curriculum. One book was removed from the junior high school library: A READER FOR WRITERS, edited by Jerome Archer. 457 U.S. at 856-57.

16. Three Island Trees School District board members had attended a September 1975 conference sponsored by Parents of New York United, a politically conservative organization of New York parents concerned about educational matters. At the conference, a list of "objectionable" books was circulated. The Board relied on this list to identify the ten removed books. 457 U.S. at 856.

quently appointed a "Book Review Committee" to review the books and recommend whether they were suitable for use in the public schools.[17] The Committee eventually recommended that at least five of the books be retained in the library,[18] but the board rejected the recommendation and returned only one book to the library.[19]

Several students, supported by their parents, filed suit in federal district court alleging that the board's removal decision violated their first amendment rights. The district court granted summary judgment for the school board, concluding that judicial review of a school board's library book removal decision was inappropriate.[20] The court found that the school board's removal decision was based upon its conclusion that the books were "irrelevant, vulgar, immoral, and in bad taste."[21] The Second Circuit Court of Appeals reversed the district court decision, holding that the students had stated a first amendment claim in their challenge to the board's actions.[22] After granting certiorari, the Supreme Court divided evenly on the students' first amendment claims, but it upheld their right to pursue legal redress on the constitutional claim.[23]

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17. The Book Review Committee was composed of four Island Trees parents and four members of the Island Trees schools staff. The Committee was directed to read the ten books and recommend whether they should be retained on the basis of their "educational suitabililty," "good taste," "relevance," and "appropriateness to age and grade level." *Id.* at 857.

18. The Committee recommended that LAUGHING BOY, BLACK BOY, GO ASK ALICE, and BEST SHORT STORIES BY NEGRO WRITERS be retained in the school libraries, and that THE FIXER be retained in the twelfth grade curriculum. *Id.* at 858 n.5. The Committee also recommended that THE NAKED APE and DOWN THESE MEAN STREETS be removed. *Id.* at 858 n.6. It was unable to agree regarding the disposition of SOUL ON ICE and A HERO AIN'T NOTHIN' BUT A SANDWICH, *id.* at 858 n.7; it made no recommendation on A READER FOR WRITERS, *id.* at 858 n.8; and it recommended that SLAUGHTER HOUSE FIVE be retained for student use subject to prior parental approval. *Id.* at 858 n.9.

19. The Board returned LAUGHING BOY to the library, *id.* at 858 n.10, and it made BLACK BOY available subject to parental approval. *Id.* at 858 n.11.

20. Pico v. Board of Educ., Island Trees Union Free School Dist. No. 26, 474 F. Supp. 387 (E.D.N.Y. 1979), *rev'd*, 638 F.2d 404 (2d Cir. 1980), *aff'd*, 457 U.S. 853 (1982).

21. *Id.* at 392.

22. 638 F.2d 404 (2d Cir. 1980), *aff'd*, 457 U.S. 853 (1982). The court of appeals panel split two-one in voting to reverse the district court decision. Judge Sifton, writing for the court, concluded that the school board's intervention into library affairs was irregular and raised the possibility that board members had acted to suppress free speech notwithstanding their purported justifications. *Id.* at 417. Judge Newman concurred in the result and asserted that the case turned on whether as a question of fact the board had acted permissibly to remove books with sexually explicit material or vulgarity, or whether the board had acted impermissibly to suppress particular ideas. *Id.* at 436-37. Judge Mansfield dissented arguing that the factual record supported the district court's conclusion that the board had acted permissibly to remove books which were indecent and educationally unsuitable. *Id.* at 430.

23. *See supra* note 2. Justice White, who supplied the critical fifth vote to af-

Justice Brennan, writing the Court's plurality opinion, concluded that students' first amendment rights were "sharply and directly implicated" by the board's removal decision[24] and that these rights prevailed despite the board's inherent authority over educational matters. Justice Brennan asserted that minor students, like adults, are entitled to claim a right to receive information under the first amendment[25] and that the school library is uniquely situated as a conveyor of information in the school environment.[26] Since a school board decision to remove books from the library would infringe upon the students' right to receive information, the board's decision could be justified only if it was reached for some reason other than to suppress the ideas contained in the books. Justice Brennan indicated that the students were entitled to prevail on their first amendment claim if the board's removal decision was improperly motivated and based solely on its disagreement with the point of view expressed in the removed books.[27] However, he suggested that removal decisions based upon neutral criteria, such as "pervasive vulgarity" or "educational suitability," were constitutionally permissible.[28]

Justice Blackmun concurred, and he similarly concluded that the crucial first amendment inquiry was whether the school board removed the books because of its disagreement with the ideas contained within them.[29] Justice Blackmun, however, specifically disavowed reliance upon the right to receive information doctrine or the unique nature of the school library as a basis for

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firm the court of appeals judgment, argued that the Court should avoid addressing the first amendment issue raised in the case. Instead he felt that the matter should be remanded to the district court in accordance with the Second Circuit's directives to resolve the disputed factual issue regarding the motive for the school board's removal decision. *Id.* at 883-84.

24. 457 U.S. at 866. The Court originally articulated this threshold standard for the review of children's constitutional claims in Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

25. 457 U.S. at 866-67. Justice Brennan weaves several prior decisions together to extract the right to receive information doctrine from the first amendment and to justify its extension into the public school setting. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978); Kleindienst v. Mandel, 408 U.S. 753, 762-763 (1972); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 511 (1969) (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)); Lamont v. Postmaster General, 381 U.S. 301, 308 (1965) (Brennan, J., concurring); Griswold v. Connecticut, 381 U.S. 479, 482 (1965); Martin v. Struthers, 319 U.S. 141, 143 (1943); *see also* 9 WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910); *infra* note 151 and accompanying text.

26. 457 U.S. at 868-69. Justice Brennan relied on the 1978 district court decision in Right to Read Defense Comm. v. School Comm., 454 F. Supp. 703 (D. Mass. 1978) to attribute first amendment characteristics to the school library: "[A] student can literally explore the unknown, and discover areas of interest and thought not covered by the prescribed curriculum . . . . Th[e] student learns that a library is a place to test or expand upon ideas presented to him, in or out of the classroom." 454 F. Supp. at 715.

27. 457 U.S. at 871.

28. *Id.*

29. *Id.* at 879 (Blackmun, J., concurring).

the decision.[30] Instead, Justice Blackmun relied upon the first amendment principle of governmental neutrality[31] and argued that this doctrine was applicable in the school environment to restrain the decisionmaking authority of board officials.[32]

The four dissenting justices, each of whom offered an opinion, took issue with several of the conclusions reached by the prevailing plurality. The dissenters argued that the first amendment right to receive information doctrine was inapplicable in the public schools[33] and that the school library was indistinguishable from other aspects of the educational program.[34] They noted that the books removed from the school library were otherwise available to students.[35] The dissenters asserted that it was impossible to require "content neutrality" from school officials faced with book selection or removal decisions since these officials were vested with the discretion to make and implement educational decisions in accordance with prevailing community attitudes. They pointed out that constitutional doctrine had always accorded local officials considerable discretion in structuring academic and extracurricular school programs to fulfill the school's primary function of instilling students with fundamental values and preparing them for their roles as citizens.[36] Application of the plurality's doctrine, they argued, might affect the authority of school officials in areas outside the school library.

The dissenters also criticized the standards offered by Justice Brennan—particularly the "educational suitability" decisionmaking criterion—as imprecise, subjective, and unworkable.[37] Moreover, they asserted that judges lacked the expertise available to local school officials to assess the appropriateness of particular books in the school environment.[38] Finally, the dissenters argued that judicial review of local school board decisions was basically antidemocratic since it was likely to thwart representative governmental decisionmaking at the local level where political accountability was assured.[39]

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30. *Id.* at 878. Justice Blackmun was unwilling to conclude that school authorities had an affirmative duty to supply students with information or ideas. *Id.* Additionally, he asserted that if the public school curriculum could be designed to impart particular ideas and values to students, then the school library could likewise be enlisted in this process. *Id.*

31. *Id.* at 880; *see* Police Dep't v. Mosley, 408 U.S. 92, 95 (1972); Carey v. Brown, 447 U.S. 455, 465 (1980). *See generally* Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

32. 457 U.S. at 880 (Blackmun, J., concurring).

33. *Id.* at 887-89 (Burger, C.J., dissenting); *id.* at 910-15 (Rehnquist, J., dissenting).

34. *Id.* at 915 (Rehnquist, J., dissenting).

35. *Id.* at 886 (Burger, C.J., dissenting); *id.* at 915 (Rehnquist, J., dissenting).

36. *Id.* at 889 (Burger, C.J., dissenting); *id.* at 896 (Powell, J., dissenting); *id.* at 913-14 (Rehnquist, J., dissenting).

37. *Id.* at 890 (Burger, C.J., dissenting); *id.* at 895 (Powell, J., dissenting).

38. *Id.* at 890-91 (Burger, C.J., dissenting); *id.* at 894 (Powell, J., dissenting).

39. *Id.* at 891 (Burger, C.J., dissenting); *id.* at 897 (Powell, J., dissenting); *id.* at 921 (O'Connor, J., dissenting).

The *Pico* opinions reflect several different strands of constitutional doctrine developed by the Court in reviewing claims arising in the public education setting. The Court had previously recognized student first amendment rights, but it had not clearly extended first amendment doctrine to embrace student challenges to curriculum-related matters such as library book removal decisions. The Court takes this step in *Pico*, but it does not fully identify and assess secondary students' first amendment interests in the public school setting or reconcile its conclusions with its general approach to children's constitutional rights claims. Thus, the *Pico* decision should be re-evaluated from the perspective of general first amendment theory and from the perspective of previous decisions involving children's claims to constitutional protection. Furthermore, in *Pico* several members of the Court were reluctant to embrace a comprehensive view of public education which takes into account the societal and individual interests that are served by the public schools. In view of the first amendment considerations that underlie much educational decisionmaking, it is evident that the Court should not unduly limit its vision of the public education process. Therefore, the Court's concept of public education should be reviewed.

III. The First Amendment and Children

In recent years the Court has extended various constitutional rights to minors, providing them with protection against arbitrary or overreaching governmental actions. For instance, minors facing juvenile delinquency proceedings are entitled to a plethora of due process protections.[40] A minor female who can demonstrate her maturity is entitled to procure an abortion without state or parental interference.[41] These rights, however, are not equivalent to those available to an adult in analogous circumstances.[42] It is the Court's perception—and society's traditional view—that minors generally are not mature enough to handle effectively all of the responsibilities that attach to adulthood and that they are potentially subject to exploitation at the hands of others.[43]

To determine which constitutional rights children might claim, the Court has examined the importance of the right to the individual child and the potential adverse consequences which might follow without its recognition.[44] Fur-

40. *See, e.g.*, Breed v. Jones, 421 U.S. 519 (1975); *In re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. 1 (1967).

41. Bellotti v. Baird, 443 U.S. 622 (1979); H.L. v. Matheson, 450 U.S. 398 (1981); City of Akron v. Akron Center for Reproductive Health, 103 S. Ct. 2481 (1983).

42. *See* McKeiver v. Pennsylvania, 403 U.S. 528 (1971). *Compare* Roe v. Wade, 410 U.S. 113 (1973) (constitutional right to abortion) *with* Bellotti v. Baird, 443 U.S. 622 (1979) (constitutional rights of minors cannot be equated with those of adults, but state cannot require parental consent for all abortions involving minors).

43. Bellotti v. Baird, 443 U.S. at 634.

44. In *Bellotti*, the Court concluded that a child's abortion decision was entitled to constitutional privacy protection because it portended long-term and severe conse-

thermore, the Court has balanced the child's individual interest against the state's paternalistic concern for the child and its support of parental autonomy in child-rearing matters. The clearest exposition of this approach is set forth in *Bellotti v. Baird*[45] where Justice Powell, speaking for the Court, articulated several reasons why minors could not claim full constitutional protection: their vulnerability; their inability to reach important decisions in a mature, reflective manner; and the critical role of their parents in child-rearing.[46] The Court has expressed similar reservations to justify limiting the scope of constitutional protection available to children in the first amendment area.[47] Nevertheless, the Court has held that children should receive some first amendment protection in the public school setting. The *Pico* decision, however, indicates that the Justices are not in agreement regarding the extension of first amendment protection into curricular matters. Therefore, it is necessary to examine why first amendment protection is important in the case of schoolchildren, and to determine whether traditional first amendment doctrine can be accommodated to the special legal status of children.

A. *First Amendment Theory and the Child*

The Supreme Court and legal scholars have recognized that the first amendment secures and advances several different values implicit in our democratic scheme of government. First amendment interpretation has emphasized not only the value of the amendment in protecting individual citizens against an overreaching state, but it also has recognized the role of the amendment in advancing the collective interests of the state's citizenry through the political process.[48] Constitutional theorists have argued that, among other things, the first amendment is designed to promote individual self-fulfillment, enhance the

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quences for her and it required a prompt resolution. *See id.* at 642-43. In *Carey*, the plurality and the concurring justices were concerned that refusal to safeguard a minor's access to nonhazardous contraception devices created the unreasonable risk of teenage pregnancy and its attendant difficulties. Carey v. Population Servs., Inc., 431 U.S. 678, 693-94 (1977) (plurality opinion).

45. 443 U.S. 622 (1979).

46. *Id.* at 634.

47. *See, e.g.*, Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 515 (1969) (Stewart J., concurring); Ginsberg v. New York, 390 U.S. 629, 639-40 (1968); *see also* Zykan v. Warsaw Community School Dist., 631 F.2d 1300, 1304 (7th Cir. 1980).

48. *Compare* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970) (applying the legal foundations for freedom of expression to the solution of concrete problems posed by modern conditions) *and* Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) ("Individual self-realization" is primary value of free speech; acceptance of this principle affects the level and form of constitutional protection given to expression) *with* A. MEIKELJOHN, POLITICAL FREEDOM (1960) (distinguishing between freedom to speak on public matters, which is protected by the first amendment, and "liberty" to speak on private matters which is protected by the due process clause) *and* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (constitutional protection should only be provided for political speech).

opportunity for individual participation in governmental decisionmaking, and advance knowledge and the discovery of truth.[49] The Court has not ascribed a definitive principal purpose to the first amendment; rather, it has relied upon general theories. In its decisions recognizing first amendment rights for children, the Court has alluded to one or more of these values as they relate to children—particularly secondary school children—to determine the extent to which they should receive first amendment protection in the school setting.[50]

The value of individual self-fulfillment implies personal growth and development to realize one's full potential. First amendment protection provides adults with a broad range of freedom to inquire, experiment, and sample society's intellectual and other offerings.[51] In many respects childhood and its experiences form the foundation—a very critical foundation according to psychologists—for the process of development into adulthood.[52] Without doubt the child's parents play the primary role during this developmental period, especially in the early stages preceding adolescence.[53] Additionally, the schools play an important role in this process, one which increases during adolescence.

If one goal to be served by the first amendment is the maturation of individual promise and the establishment of a sense of individual dignity, then it seems intuitively correct to conclude that the child should be provided some opportunity for experimentation and inquiry.[54] Certainly this makes sense as

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49. T. EMERSON, *supra* note 48, at 6-7; Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 23-26 (1975). It is not the purpose of this article to suggest a particular first amendment theory or to argue in support of one or more of the propounded theories. Rather, the article will examine the first amendment interests of children in relation to the general values recognized by Professor Emerson. Regarding the various theories suggested for the first amendment, see, e.g., Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978); BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 1 (1978); Bork, *supra* note 48; Redish, *supra* note 48.

50. Professor Garvey has addressed this question in detail in Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321 (1979). He argues that first amendment rights for children should serve instrumental purposes; that is, that children's first amendment rights should be defined with reference to the role which constitutional protection will play in assuring their growth and development into independent, autonomous beings. *Id.* at 344-49. This article agrees with Professor Garvey's basic proposition that constitutional protection must take account of the child's growth and development interests, but it also argues that the values underlying particular constitutional protections—like the first amendment—retain an independent vitality even in the case of children. Thus, the article argues for a broader view of children's first amendment rights—one that encompasses the intrinsic values reflected in the amendment.

51. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 756-57 (1978) (Powell, J., concurring); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73 (1973) (Douglas, J., dissenting); New York Times v. Sullivan, 376 U.S. 254, 269-70 (1964).

52. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 9-28 (1973); Watson, *Children, Families and the Courts: Before the Best Interests of the Child and* Parham v. J.R., 66 VA. L. REV. 653, 662-67 (1980).

53. Watson, *supra* note 52, at 664.

54. *See* Garvey, *supra* note 50, at 344-50.

the child matures and is able to assimilate and process different ideas against a background of accumulated experience and established judgment. While this rationale suggests that the child should enjoy some freedom from absolute parental control, it even more strongly suggests that the child should be assured freedom from undue state efforts through the educational process to narrow and limit his horizons, particularly at the secondary grade level.

Another major value attributed to the first amendment is its role in assuring individual participation in governmental decisionmaking processes.[55] This value serves the individual since it assures him an opportunity to engage in the public discourse, share in the marketplace of ideas, and enter the political arena. The value also promotes participatory democratic ideals since it is designed to open the channels of information gathering and sharing and, thus, facilitate individual involvement in the governing process. The most apparent means of effective participation in governmental decisionmaking is through the ballot box, but this first amendment value is not limited to assuring only this type of participation.[56] Rather, this value encompasses a full range of individual activities which have some bearing—immediate or otherwise—upon governmental decisionmaking.[57]

This is significant in the case of children since their participation in the political process is obviously limited until they reach voting age. Children presumably are exposed to the basic ideals underlying our governmental structure through their parents and the schools. In fact, the transmittal of fundamental social and political values has been recognized as one of the primary functions of public education.[58] Again, it makes sense to conclude that children should enjoy some freedom to experience opposing viewpoints on public issues (some of which have a direct bearing upon their lives) and to participate in the decisionmaking process even if their participation is limited.

It is difficult to imagine that a child who has been indoctrinated in demo-

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55. It should be noted that Professor Emerson attributes four functions (not three as suggested previously) to the first amendment. *See* T. EMERSON, *supra* note 48, at 7. The fourth function envisions the first amendment as critical to "achieving a more adaptable and hence stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus." *Id.* In many respects this value relates to the role which the first amendment plays in assuring societal growth and development through political and social channels open to the individual. For present purposes, it neither adds, nor detracts substantially from the discussion if this value is subsumed in the value of political participation.

56. Other constitutional provisions, including article I, § 2 and the fifteenth, nineteenth, twenty-fourth and twenty-sixth amendments, specifically safeguard franchise rights.

57. *See, e.g.*, Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) (door-to-door advocacy and solicitation of funds); Buckley v. Valeo, 424 U.S. 1 (1976) (expenditure of money); Police Dep't v. Mosely, 408 U.S. 92 (1972) (peaceful picketing); Tinker v. Des Moines Indep. School Dist., 393 U.S. 503 (1969) (symbolic protest); Martin v. Struthers, 319 U.S. 141 (1943) (leafletting).

58. *See, e.g.*, Ambach v. Norwick, 441 U.S. 68, 77 (1979); *see also infra* text accompanying notes 121-36.

cratic values can fully appreciate them if he has not been afforded the opportunity to confront conflicting views which test the strength of his commitment to his learned principles.[59] While the child's involvement in the political dialogue can be viewed as preparatory—anticipating his entry into the adult world—it is still worthwhile from the perspective of the child and society to extend first amendment protection. Society will ultimately be dependent upon the child, at least in some small measure, for his future participation and contributions. And, in the case of secondary students, it is evident that in a very short time they will be granted the right to participate in the political process.

A third major value ascribed to the first amendment is the role which it plays in advancing knowledge and discovering truth.[60] Much of what has been said about the individual and societal interests that are advanced by the other first amendment values can be repeated here: the individual develops his intellectual and analytical abilities through exposure to a broad range of information and open, frank discussion of ideas. Likewise, societal progress depends upon the aggregation of individual contributions to the community of knowledge.

While children sometimes may lack the maturity and experience to ferret out reliably the truth in the "marketplace of ideas" and to contribute significantly to the societal discourse, this does not justify limiting their exposure to various ideas and perspectives. Instead, these considerations again suggest that some degree of freedom is advisable to prepare the child for a more substantial participatory role once he achieves full maturity and gains additional experience. Sitting on the sidelines without the benefit of a spectrum of information hardly prepares the child for this role. Moreover, in the case of children the parallels between this first amendment value and the knowledge-imparting mission of the public schools are considerable.[61] Even carefully structured participation and exposure to the world of ideas for relatively young and immature children provides them with a base to develop an understanding and appreciation of the complexities of the world and various branches of knowledge.[62] Certainly, as the child matures and gains perspective, his opportunities to explore new fields and develop insights should not be foreclosed.

Although first amendment values should not be discounted in the case of a child, it is necessary to acknowledge certain limitations upon the extension of first amendment protection to children. Children rarely, if ever, go it alone

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59. *See* Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Garvey, *supra* note 50, at 348.

60. *See* J. MILL, *On Liberty*, in THE PHILOSOPHY OF JOHN STUART MILL 207-08 (M. Cohen ed. 1961) (1859 essay by John Stuart Mill).

61. *See* Meyer v. Nebraska, 262 U.S. 390, 400 (1923) ("The American people have always regarded education and the acquisition of knowledge as matters of supreme importance, which should be diligently promoted.").

62. *See* J. PHILLIPS, THE ORIGINS OF INTELLECT: PIAGET'S THEORY 139-61 (1975); CHILDREN AND THEIR PRIMARY SCHOOLS ("The Plowden Report"), *reprinted in* THE OPEN CLASSROOM READER 147 (C. Silberman, ed. 1973).

during their childhood in our society. Several particularly influential persons and institutions—parents, family members, and schools are among the most noteworthy—protect and assist the child in his development. Consequently, a child's opportunities for personal experiences are somewhat limited in the interest of protecting and nurturing him.[63] Too much freedom and opportunity for experimentation may be harmful; conversely, too little may retard and undermine the growth process. In either case, both the child and society suffer since his full potential is not realized. Some accommodation is required to provide the child with the opportunity for exposure to the larger world without setting him completely adrift.

The state, relying upon its inherent police power, has attempted this accommodation in two noteworthy ways. First, the state has established a dividing line between childhood and adulthood—the age of majority—after which the individual is granted full legal rights.[64] Secondly, the state has provided itself (through its schools and other relevant institutions) and parents with the responsibility and authority to supervise a child before he reaches adulthood.[65] But the courts should not simply defer to this scheme and regard children who are under the age of majority as without rights. Many children reach maturity well before the age of majority—usually during their secondary school years—and are capable of assuming adult responsibilities.[66] Furthermore, the guidance and direction which the child receives from the state and his parents is seldom value neutral.[67]

In the case of parents, it may make sense for the courts to support their value judgments in raising their children even if this dramatically affects (as it inevitably will) the child's development process.[68] Certainly, our society ac-

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63. *See* Prince v. Massachusetts, 321 U.S. 158 (1944); H.L. v. Matheson, 450 U.S. 398 (1981).

64. *See, e.g.*, WYO. STAT. 8-1-102(a) (iii) (B) (1977); *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1258 (1980) [hereinafter cited as *Developments*].

65. *See Developments*, *supra* note 64, at 1218-21. Of course, the parental right to direct and supervise the upbringing of children has a constitutional dimension as well. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

66. When this occurs the rationale for extending limited rights disappears. The child is able to reach considered decisions and is unlikely to be vulnerable to exploitation. Similarly, parental protection seems unnecessary. State reinforcement of parental authority could undermine the family structure. *See* H.L. v. Matheson, 450 U.S. 398, 436-39 (1981) (Marshall, J., dissenting). *See generally* Keiter, *Privacy, Children and Their Parents: Reflections On and Beyond the Supreme Court's Approach*, 66 MINN. L. REV. 459 (1982).

67. *See* H.L. v. Matheson, 450 U.S. 398, 438 n.24 (1981) (Marshall, J., dissenting); Epperson v. Arkansas, 393 U.S. 97 (1968); West Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); *see also* van Geel, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197, 239-62 (1983) (arguing that students should be constitutionally protected by the first amendment freedom of belief doctrine to guard against state efforts to transmit ideologically-inspired ideas and beliefs).

68. In Pierce v. Society of Sisters, 268 U.S. 510 (1925), the Court invalidated

cords parents considerable deference in this regard. Only in limited circumstances—generally when the child can demonstrate maturity—does the first amendment or any other constitutional provision undercut this position.[69] In the case of the state, however, it is far from clear that governmental value judgments, except those which fall within certain general categories,[70] should prevail and direct adolescent development in a particular manner in the face of a first amendment claim.[71]

B. *The* Tinker-Ginsberg *Dichotomy*

As noted previously, the Court has addressed some of these issues, and it has ruled in favor of extending first amendment protection to children. This is particularly true in respect to efforts by the state to limit the child's opportunity to participate in the public discourse or to gain exposure to viewpoints

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an Oregon statute requiring all children in the state to attend public schools. In doing so, the Court pointedly observed that parents, not the state, were primarily responsible for raising their children:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Id. at 535. Thus, while the state can compel school attendance, it cannot foreclose the option of private schools which limits government's impact upon the development of children—at least in the case of those children who attend private school. *See also* Garvey, *supra* note 50, at 322-33.

69. H.L. v. Matheson, 450 U.S. 398 (1981) (emancipated and demonstrably mature minors entitled to make abortion decision without parental notification); Bellotti v. Baird, 443 U.S. 622 (1979) (fourteenth amendment provides minor child with a privacy right respecting her abortion decision); *cf.* Wisconsin v. Yoder, 406 U.S. 205, 241-46 (Douglas, J., dissenting in part) (arguing that the Amish school children are entitled to overrule their parental decision regarding their education).

70. *See* Ginsberg v. New York, 390 U.S. 629 (1968) (lower obscenity threshold authorized for minors); FCC v. Pacifica Found., 438 U.S. 726 (1978) (minors can be protected from sexually explicit speech).

71. There is a very real likelihood that the child will be joined by his parent in opposition to value-laden state policies that are viewed as inimical to the child's welfare. This pits both the parent and child against the state and reinforces the validity of the child's claim for constitutional protection. All of the aforementioned cases raising children's first amendment claims which were sustained by the Supreme Court involved situations where the child's parent served as his next-friend to initiate the litigation. *See, e.g.*, Tinker v. Des Moines Indep. School Dist., 393 U.S. 503 (1969); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). It should be noted that the Court has not addressed a child's first amendment claim in the setting where the interests of parent and child clashed as, for instance, in the abortion context. *See* Bellotti v. Baird, 443 U.S. 622 (1979); H.L. v. Matheson, 450 U.S. 398 (1981); *cf.* Wisconsin v. Yoder, 406 U.S. 205, 241-46 (1972) (Douglas, J., dissenting in part) (arguing that the child's right to decide regarding his education prevails over a contrary parental decision). It is beyond the scope of this article to undertake that task here.

regarded as inappropriate. The Court, however, has been disinclined to accept first amendment claims asserted on behalf of children when it has perceived that the restraining governmental regulation is intended to safeguard children against exposure to pornographic material. In this area, the Court has accepted more willingly governmental assertions that children should be protected from this material. The Court has concluded that governmental regulatory efforts against pornographic material meets with broad-based parental approval and reinforces parental authority.

The Court's ruling in *Tinker v. Des Moines Independent School District*[72] represents the Court's strongest endorsement of first amendment rights for children. The *Tinker* rationale also reflects a keen sensitivity to the value considerations justifying first amendment protection for children in the public school setting. In *Tinker*, several school children challenged the authority of school administrators to expel them for wearing black armbands to express their opposition to the Vietnam War. After concluding that the first amendment extended to this type of expressive activity, the Court stated:

> Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the state must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.[73]

The Court concluded that students who expressed their opinions on current, controversial topics in the public school setting could be restrained only if school officials demonstrated that their activities threatened to disrupt materially the school environment or infringe the rights of others.[74]

In *Tinker* the Court was acutely aware of the unique role the school plays in introducing students to constitutional values and reinforcing them. The Court recognized that although children might not presently participate in the political process, it is appropriate for the state through its schools to foster an appreciation and understanding on their part of the political and social milieu and the dynamics of change. The Court observed:

> . . . [T]he classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."[75]

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72. 393 U.S. 503 (1969).

73. *Id.* at 511.

74. *Id.* at 513. While under *Tinker* officials cannot regulate the content of what a student says, they can clearly regulate when, where, and how he expresses himself. Thus, it is appropriate to equate the *Tinker* "substantial disruption" standard with the more traditional first amendment time, manner, and place regulatory doctrine.

75. *Id.* at 512 (citing Keyishian v. Board of Regents, 385 U.S. 589, 603

Additionally, the Court recognized that schools ran the risk of "strangl[ing] the free mind at its source"[76] if they did not carefully safeguard the constitutional freedoms of students. The Court thus found the public school setting to be largely consistent with the intrinsic values embraced by the first amendment.

The *Tinker* requirement of official neutrality in regulating the content of student speech, while consistent with the first amendment doctrine generally,[77] is also consistent with other decisions addressing first amendment and related constitutional claims arising in the school environment. The early *Meyer v. Nebraska*[78] decision struck down a Nebraska law prohibiting the teaching of foreign languages in the state's public schools. Although the Court based its holding on substantive due process concepts protective of parents' and teachers' interests, it recognized the important role played by educational instruction in exposing children, even at relatively young ages, to a broad range of material.[79] Consequently, the state could not single out a particular subject or area and preclude its instruction. Similarly, in *Pierce v. Society of Sisters*,[80] the court relied upon substantive due process doctrine to strike down an Oregon law which required that all students attend public schools. The Court recognized that the state had considerable supervisory authority over education, including the right to design the curriculum of schools, but it held that the state may not deny children and their parents the opportunity to seek an alternative educational experience in private schools: "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only."[81]

In *West Virginia State Board of Education v. Barnette*,[82] the Court ruled that the first amendment prohibited school officials from requiring students to salute the flag because it invaded an area of belief and conscience reserved to the individual. Justice Jackson, writing for the Court, suggested that secular education should avoid the adoption of particular ideological disciplines[83] and he admonished that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or for citizens to confess by word or act their faith therein."[84] Furthermore, in *Barnette* the Court recognized the critical role of the school as a forum for the

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(1967)).

76. *Id.* at 507 (citing West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

77. *See* Police Dep't v. Mosely, 408 U.S. 92 (1972); Carey v. Brown, 447 U.S. 455 (1980); *see also infra* text accompanying notes 201-06.

78. 262 U.S. 390 (1923).

79. *Id.* at 399.

80. 265 U.S. 510 (1925).

81. *Id.* at 535.

82. 319 U.S. 624 (1943).

83. *Id.* at 637.

84. *Id.* at 642.

introduction and conveyance of first amendment principles to students: "That they [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to . . . teach youth to discount important principles of our government as mere platitudes."[85]

More recently, in *Epperson v. Arkansas*,[86] the Court relied upon the first amendment's proscription against government entanglement with religion to overturn an Arkansas statute prohibiting public school teachers from teaching evolutionary theories. The Court required Arkansas to adopt a neutral position on the instruction of evolution in its public schools. The Court asserted that judicial intervention in the public school system, while requiring restraint, was appropriate "to safeguard the fundamental values of freedom of speech and inquiry and of belief."[87]

The *Tinker* line of cases reflects several different strands of first amendment doctrine. First, the cases recognize that students have expressive rights, which include the right to speak on various topics and the right to refrain from speaking.[88] Students have the right to express themselves within school so long as there is no substantial disruption of the school routine. Second, the cases require governmental neutrality when school authorities endeavor to regulate appropriate student expressive activities. The decisions impose a neutrality obligation on officials—at least in a very broad sense—when they structure the school curriculum and program. Third, *Tinker* itself can be read to support the proposition that the characteristics of the public school are sufficiently akin to a traditional public forum to render it a particularly appropriate setting for the exercise of first amendment rights.[89]

In *Tinker* and its predecessors, the Court did not seem particularly troubled about extending these first amendment protections to school children despite their diminished legal capacity. The Court apparently concluded—at least impliedly—that the *Bellotti* considerations did not supersede the first amendment values at stake in the cases.[90] First, the Court was not convinced that the state was protecting the children from exploitation by others. The

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85. *Id.* at 637.

86. 393 U.S. 97 (1968).

87. *Id.* at 104.

88. *See* Wooley v. Maynard, 430 U.S. 705 (1977) (recognizing a first amendment right not to speak predicated upon the 1943 *Barnette* decision).

89. *See infra* text accompanying notes 155-60.

90. It should be pointed out that Bellotti v. Baird, 443 U.S. 622 (1979), had not been decided when *Tinker* and earlier decisions were rendered, but the Court had already articulated several of the *Bellotti* factors as a justification for limiting the constitutional protections available to children. *See, e.g., Tinker*, 393 U.S. 503, 515 (1969) (Stewart, J., concurring); Ginsberg v. New York, 390 U.S. 629 (1968). This article relies upon the *Bellotti* considerations in evaluating the Court's treatment of the first amendment issue because *Bellotti* represents the Court's most comprehensive treatment of the question of the scope of children's constitutional rights. *See supra* text accompanying notes 45-47.

Court perceived that the state itself was the exploiter since it was relying upon its authoritative position to restrict impermissibly the expressive activities of the students. Second, the Court was persuaded that children were mature enough that they should be provided the opportunity to confront and consider the important matters called into question by the government's regulatory efforts. Third, the Court did not confront a situation where children and their parents were in conflict; consequently, the government was not necessarily lending a hand to parental authority by its regulatory activity. In each of these cases, parents sided with their children in the legal challenge. Thus, *Tinker* and the earlier cases can be easily reconciled with the Court's more recent approach to the question of the scope of children's constitutional rights.

In a separate line of children's first amendment cases, however, the Court has been disinclined to extend constitutional protection. When the state has sought to regulate pornographic materials or activities to limit children's access, the Court has generally deferred to the state's efforts. In *Ginsberg v. New York*,[91] the Court held that the State of New York could apply a lower obscenity standard in the case of children exposed to pornographic material. The Court noted that the state had an independent interest in protecting the welfare of children to assure their growth into mature, productive citizens.[92] The Court also observed that parents are primarily responsible for the growth and well-being of their children and, accordingly, parents are entitled to state legislative support to assist them in these efforts.[93] The Court, therefore, concluded that it was reasonable for the legislature to adopt a variable obscenity standard in the case of minors to safeguard them from potential harm from exposure to this type of material.[94]

More recently, in *FCC v. Pacifica Foundation*,[95] the Court ruled that the FCC could preclude the radio broadcast of "patently offensive sexual and excretory speech" during regular daytime broadcasting hours. The Court's decision was based in part upon its concern that children who might be unsupervised were likely to be in the audience.[96] Although *Pacifica* did not deal with the obscenity issue, the Court noted that under *Ginsberg* the government could regulate speech directed toward children on a more flexible basis than under the adult obscenity standard.[97] The court reiterated the governmental interest in safeguarding the welfare of children and supporting parental authority.[98] In *New York v. Ferber*,[99] the Court upheld a New York statute prohibiting the use of children in the production of child pornography. The

91. 390 U.S. 629 (1968).
92. *Id.* at 640.
93. *Id.* at 639.
94. *Id.* at 641-42.
95. 438 U.S. 726 (1978).
96. *Id.* at 749-50.
97. *Id.*
98. *Id.* at 749.
99. 458 U.S. 747 (1982).

defendants challenged the *Ginsberg* variable obscenity standard on first amendment grounds and asserted the overbreadth doctrine. The Court observed that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."[100]

These decisions demonstrate that, in the areas of obscenity and pornography, the Court has given considerable credence to the *Bellotti* factors to justify limiting first amendment protection in the case of children. The court was clearly concerned about the possibility that children might be exploited and that they might lack the judgmental capacity to respond maturely or knowledgeably to obscene-like material. Perhaps more importantly, the Court could conclude that its ruling generally comported with parental interests in this aspect of childrearing.

The *Ginsberg* line of cases, however, does not undercut the rationale developed in the *Tinker* line of cases for extending first amendment protection to children. In the case of adults, the Court has ruled that obscene material is unprotected under the first amendment because it has no social value.[101] If obscene speech is so lightly regarded for adults, the Court can and should similarly depreciate its value in the case of children. Obscene or pornographic material is unlikely to contribute to children's developmental growth or enhance their social-political contributions.[102] Thus, a state policy limiting children's access can be viewed as consistent with the first amendment goal of promoting individual growth and development. Such a policy will not undermine children's ability to contribute to the political discourse or to develop an appreciation for the political process. Therefore, the *Ginsberg* line of decisions is not inconsistent with the first amendment values which the Court has otherwise sought to advance in the case of children.

The *Bellotti* considerations also cut differently in the *Tinker* and *Ginsberg* line of cases. In *Ginsberg*, *Pacifica*, and *Ferber* the Court had little difficulty concluding that the government's interests closely paralleled parental interests. By giving effect to the governmental policy, therefore, the Court was simultaneously advancing parental interests. In the *Tinker* line of cases, however, the parent and child were invariably aligned in opposition to the challenged state regulatory policy. The Court uniformly supported the combined parent-child interests against the government because the Court perceived that the government was adopting an ideological position which conflicted with parental views and the child's interest in independent growth and development.[103] The Court thus protected the child against potential ideological ex-

100. *Id.* at 757.

101. Miller v. California, 413 U.S. 15, 26 (1973); Roth v. United States, 354 U.S. 476, 484-85 (1957).

102. *See* Garvey, *supra* note 50, at 344-49; *supra* text accompanying notes 48-62.

103. *See also* Wisconsin v. Yoder, 406 U.S. 205 (1972). In *Yoder*, the Court invalidated a criminal conviction obtained by Wisconsin against Amish parents for violation of the state's compulsory education law. The Court ruled that the state's interest

ploitation by the state and it likewise protected parental child-rearing interests. Furthermore, in the *Tinker* line of cases older and relatively more mature children often were the ones primarily affected by the governmental policy. The Court was therefore able to extend constitutional protection to these children on the underlying theory that they were capable of exercising independent judgment.[104]

C. *The* Pico *Reconciliation*

In many respects, the *Pico* decision achieves a rough accommodation of the considerations set forth in these earlier decisions. The *Pico* holding can be viewed as consistent with the judicial review philosophy and general first amendment principles reflected in the *Tinker* line of decisions. Whereas the *Meyer* and *Epperson* decisions sanctioned judicial review of public school curriculum policies, *Pico* is actually more limited since it only provides for judicial review of library book removal decisions. In *Tinker* and the related decisions, the Court relied upon the concept of neutrality to provide first amendment protection. *Pico* similarly extends student first amendment rights into the school library context by relying largely upon the principle of government neutrality to restrain educational authorities from limiting the materials and viewpoints available to students.[105] Viewed from this perspective the *Pico* holding, therefore, is not a dramatic departure from precedent.

Viewed from another perspective, however, the *Pico* plurality opinion noticeably extends first amendment doctrine by recognizing a student's right to receive information in the public school setting. The right to receive information is built upon the Court's prior rulings recognizing the value that individuals and society derive from public access to information.[106] The importance of free speech values in the case of children likewise seems to justify adoption of a right of access to information or ideas for secondary students. But the *Pico* dissenters were particularly troubled by this aspect of the plurality's opinion.[107] The crux of the disagreement between the plurality and dissent centers on whether the public school or public school library is an appropriate forum for recognition of a student's constitutional right to receive information. Given the nature of the public education process, the plurality appears correct in its conclusion that at least a limited version of the first amendment right to know

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in its attendance laws could not prevail over the first amendment claims of the parents and their children who relied upon their individual religious beliefs to defend against a state enforcement proceeding.

104. *See* Bellotti v. Baird, 443 U.S. 622 (1979); Wisconsin v. Yoder, 406 U.S. 205, 241-46 (1972) (Douglas, J., dissenting in part).

105. 457 U.S. at 865, 879-80 (Blackmun, J., concurring).

106. *See, e.g.*, First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978); Martin v. Struthers, 319 U.S. 141, 143 (1943); *see also* Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1.

107. 457 U.S. at 887 (Burger, C.J., dissenting); *id.* at 910 (Rehnquist, J., dissenting); *see also id.* at 878 (Blackmun, J., concurring).

doctrine should extend to secondary students in this setting.[108] The information distributing function of the public schools is too important from the perspective of students and society to justify foreclosing constitutional protection. Thus, the dissenters' response that students can receive the information from other sources is simply inadequate and shortsighted.[109] Nevertheless, the right to know doctrine is probably not crucial to the resolution of most *Pico*-related disputes. Justice Blackmun's concurring opinion demonstrates that it is possible to resolve the dispute by relying upon less controversial aspects of traditional first amendment doctrine.

It is possible to reconcile the *Pico* ruling with the *Bellotti* considerations that have caused the Court to restrict the scope of constitutional protection available to children. In *Pico*, the Court confronted the prospect of possible exploitation of school children from two different perspectives. The Court was concerned that local education officials might attempt to sanitize the school library of materials with which they disagreed, thus engaging in a type of ideological exploitation.[110] On the other hand, the Court was unwilling to restrain local officials who sought to protect children from pornographic-type materials and other materials without educational merit. Consequently, the Court relied upon the *Tinker* principle of government neutrality to prohibit school officials from removing materials just because they disagreed with their point of view. The Court also drew from the *Ginsberg* line of cases to enable school officials to remove materials which they perceived to be of *de minimus* value in the educational mission, either because the materials were "pervasively vulgar" or "educationally unsuitable."[111] The "pervasive vulgarity" standard is consistent with the standard enunciated by the Court in *FCC v. Pacifica Foundation*,[112] while the "educational suitability" standard can be

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108. *See infra* Part IV(A); *see also* van Geel, *supra* note 67.

109. 457 U.S. at 915 (Rehnquist, J., dissenting). Moreover, the argument that students may search out the information from other sources overlooks the importance of the factor of timeliness in determining whether constitutional protection is available to children. *See* Bellotti v. Baird, 443 U.S. 622, 642-43 (1979).

110. 457 U.S. at 870-71. *See* Right to Read Defense Comm. v. School Comm., 454 F. Supp. 703, 714 (D. Mass. 1978); M. YUDOFF, WHEN GOVERNMENT SPEAKS 226 (1982).

111. 457 U.S. at 871.

112. 438 U.S. 726 (1978). Justice Steven's plurality opinion in *Pacifica* adds nonobscene "patently offensive sexual and excretory language" which is "vulgar" and "shocking" to the list of types of speech which are of limited social utility, and thus not entitled to full first amendment protection. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). In *Pacifica*, the Court concluded that the FCC could regulate the broadcast of this type of language (George Carlin's Seven Dirty Words Monologue) to channel it to the times of day when children and unwilling adult listeners were least likely to be in the audience. Although Justice Powell, who concurred in the *Pacifica* ruling, attempted to avoid passing judgment on the content of the "speech" at issue, he still characterized the monologue as employing "vulgar" and "offensive" language in a manner that created a "verbal shock treatment." 438 U.S. at 757 (Powell, J., concurring). The *Pico* standard of "pervasive vulgarity" is tantamount to this *Pacifica* standard, particularly since the Court's underlying concern in both cases was

analogized to the "substantial disruption" standard adopted by the Court in *Tinker*. If the material is unsuitable for educational purposes, then it threatens the integrity of the educational process in much the same way that disruptive, unrestrained student speech threatens the same process.[113]

The *Pico* accommodation between the *Tinker* and *Ginsberg* principles also protects students who might lack judgment and maturity from exposure to materials which could be harmful to them. Since officials are authorized to remove materials which are "pervasively vulgar" or "educationally unsuitable," students, regardless of their judgmental capacities, are unlikely to suffer adverse consequences from exposure to divergent and conflicting viewpoints reflected in the library collection. Should the student select a book which introduces him to troublesome (but nonetheless educationally appropriate) ideas, he can turn to his parents, teachers, or the school librarian[114] for additional information to assist him in making an informed judgment on the matter. Indeed, this is a vital part of gaining maturity and perspective. Since students voluntarily select their library reading materials, however, those who are offended or suspicious of certain materials can simply avoid them or consult with their parents or others.

The *Pico* accommodation does not necessarily place the state at odds with parental interests in child-rearing matters. While the *Pico* litigation and similar cases have been triggered by parents who were unhappy with school library reading materials,[115] some (perhaps many) parents did not subscribe to the views of those who protested. Since parents inevitably disagree on many as-

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the potential harm to children which might result if the appropriate officials were unable to regulate on this basis.

113. *Cf.* 457 U.S. at 919-20 (Rehnquist, J., dissenting) (arguing that library removal challenges could be decided under the *Tinker* standard of "material and substantial interference" with the educational process). It is true that application of the *Pico* "educational suitability" standard involves some consideration of the content of the material at issue and, thus, poses the possibility of censorship based upon official disagreement with the viewpoint expressed. Nevertheless, there are several, basically objective factors which can be relied upon in making a determination of "educational suitability" regarding library materials: grade level and sophistication of the material; relevance of the material to educational goals and the curricular program; and the quality of the material as related to educational goals (i.e., grammar used properly, etc.). Moreover, it is ordinarily not that difficult to ferret out impermissible motivations underlying a removal decision. *See infra* text accompanying notes 210-16.

114. An "unsanitized" school library should enable the student to secure information challenging, refuting or confirming whatever is troubling him. *Pico*, 457 U.S. at 869 (citing Right to Read Defense Comm. v. School Comm., 454 F. Supp. 703, 715 (D. Mass. 1978)); *cf.* Minarcini v. Strongsville City School Dist., 541 F.2d 577, 582 (6th Cir. 1976) (student can consult school library to supplement classroom work or discussions).

115. It has not invariably been the parents of schoolchildren who complained about library materials; occasionally school board members and others without children in the public schools have initiated the complaint. *See* Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980); Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269 (D.N.H. 1979).

pects of public education, including the content of much that is taught, local officials cannot accommodate all viewpoints. At least in managing the school library, the *Pico* ruling insures that school officials will not take sides in various local controversies since they must manage the library in a neutral fashion. Parents can be assured, however, that school officials have sufficient control over the library collection to see that it supplements rather than disrupts the school's educational mission. Beyond this, the state cannot act practically on behalf of parents without overlooking the constitutional interests of the students and undermining the cultural pluralism and diversity of opinion which prevails in most communities. If parents object to educationally-related materials that their children select from the school library, this matter should be resolved between parent and child.[116]

The *Pico* ruling reasonably adapts first amendment doctrine to the special circumstances presented by the public school library book removal controversy. Drawing upon precedent, the Court in *Pico* articulated standards that it has previously applied to students in the public school setting or that are analogous to such standards. Thus, lower courts that will be called upon to implement *Pico* should be able to apply the standards appropriately.[117] Viewed from this perspective, then, *Pico* simply represents further fine-tuning of first amendment jurisprudence in the public school environment.[118] Moreover, the Court's rationale reflects a broad-based view of the public education process which complements the first amendment values that the Court seeks to protect.

IV. Public Education and the Courts

The Supreme Court has recognized the substantial state interest in the maintenance and administration of its public school system by referring to the

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116. *Pico* does not present the first amendment claim in the context of a parent-child clash. Instead the minor plaintiffs in *Pico* proceeded with the litigation through their parents as next friends. In effect, then, by sustaining the first amendment claim the Court is reinforcing the child-rearing decisions of a segment of the Island Trees parents. While this does not reflect the views of other Island Trees parents who prefer their children shielded from the library books, it does not necessarily impose the views of the state or others over these parents and their children. Since library use is optional, it simply puts the government in a neutral position and places responsibility for the reading decision on the parent and child. While it is certainly possible that a child might subvert parental wishes by securing a forbidden book at the school library—thus effectively elevating the child's first amendment right over the parental child-rearing right—this situation is probably beyond the effective reach of the law since it indicates that considerable problems most likely are present in the parent-child relationship. This calls for a familial resolution, not a judicial-legislative solution. *See* Keiter, *supra* note 66, at 508-15.

117. *See infra* Part V.

118. *See* Schauer, *Codifying the First Amendment:* New York v. Ferber, 1982 Sup. Ct. Rev. 285, 308-17.

provision of public education as among the state's most important functions.[119] The Court has particularly emphasized the importance of public education to society since the public schools play a vital role in transmitting fundamental values to students and preparing them to assume citizenship responsibilities. Relying upon this value inculcation model of public education, the Court has concluded that judicial intrusion in public education matters is generally inappropriate. But in the first amendment area, the Court has adopted a broader view of public education, sanctioning judicial intervention on behalf of students to protect important constitutional values. While the plurality opinions in *Pico* reflect this more expansive view of public education, they do not fully present the case in support of a multi-dimensional model of public education and they do not adequately demonstrate the inappropriateness of a judicial nonintervention posture in this type of dispute.

This section will re-examine the Court's traditional assumptions concerning public education and the legitimacy of judicial review of educational disputes.[120] It will suggest that a multi-dimensional model of public education represents a more complete view of the contemporary educational process and more accurately reflects the individual and community interests affected by the public schools. The section then will re-evaluate the Court's deferential judicial review posture in view of these conclusions and the influence of present day realities on local governance of the public schools. It will conclude that compelling arguments exist to sanction active judicial review of student first amendment claims.

A. *The Multi-Dimensional Model of Education*

Although the plurality and dissenting justices in *Pico* offered differing perceptions of public education, they acknowledged and accepted the validity of the value inculcative model of public education. They agreed that the public schools serve an important governmental interest by transmitting and inculcating basic values and traditions. The value inculcative model of public education has been long recognized by the Court and seems consistent with American tradition.[121] In *Brown v. Board of Education*,[122] the Court emphasized "the importance of public education to our democratic society" by asserting

119. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 221 (1982); Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

120. The Court has presumed that education-related decisions implemented by local officials reflect majority community sentiments and values. If not, according to the Court, the local political process is readily available to check unnecessary governmental excesses. *See, e.g.*, *Pico*, 457 U.S. at 891 (Burger, C.J., dissenting); Epperson v. Arkansas, 393 U.S. 97, 104 (1968); *see also* Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 509 (1981); *infra* text accompanying footnotes 219-22.

121. *See* Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925); Diamond, *supra* note 120, at 506.

122. 347 U.S. 483 (1954).

that it forms the "very foundation of good citizenship."[123] The Court stated that the public school is "a most vital civic institution for the preservation of a democratic system of government."[124] The public school's function, as set forth by the Court, involves introducing students to traditional democratic values and ideals to prepare them for participation in the political system.[125] Scholars examining the role of public education also support this view of the public schools.[126]

Justice Powell particularly has expounded this value inculcation model of public education. For instance, in *Goss v. Lopez*,[127] he dissented from the majority view imposing due process safeguards on school suspension decisions by asserting that the state's interest in education was properly served when students were acquainted with the need for discipline: "Education in any meaningful sense includes the inculcation of an understanding in each pupil of the necessity of rules and obedience thereto. This understanding is no less important than learning to read and write."[128] In *Ambach v. Norwick*,[129] Justice Powell concluded for the Court that public school teachers perform a task that "goes to the heart of representative government" and he held, therefore, that alien residents could be disqualified from teaching in a state's public education system.[130] He emphasized that the public schools were responsible for preserving cultural values and transmitting them to the students to assure maintenance of our social and political institutions.[131] More recently, in *Plyler v. Doe*,[132] Justice Powell joined four other Justices to invalidate the Texas statute which denied free public education to illegal alien school children on the ground that implementation of the statute threatened to create "an underclass of future citizens and residents."[133] Justice Powell's dissenting opinion in *Pico* relies, in part, on his view that the plurality decision undermines future efforts by local school boards to impart ideas and values which it believes are consis-

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123. *Id.* at 493.

124. Plyler v. Doe, 457 U.S. 202, 221 (1982) (quoting Abington School Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring)).

125. *See, e.g.*, Ambach v. Norwick, 441 U.S. 68, 76 (1979); Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

126. *See, e.g.*, J. DEWEY, DEMOCRACY & EDUCATION 26 (1929); N. EDWARDS & H. RICHEY, THE SCHOOL IN THE AMERICAN SOCIAL ORDER 623-24 (2d ed. 1963).

127. 419 U.S. 565 (1975); *cf.* BeVier, *Justice Powell and the First Amendment's Societal Function: A Preliminary Analysis*, 68 VA. L. REV. 177 (1982) (the author argues that Justice Powell's first amendment opinions have emphasized the role of the amendment in assuring the integrity of the political process, rather than its role in promoting individual self fulfillment).

128. 419 U.S. at 593 (Powell, J., dissenting).

129. 441 U.S. 68 (1979).

130. *Id.* at 80-81.

131. *Id.* at 76-77.

132. 457 U.S. 202 (1982).

133. *Id.* at 239 (Powell, J., concurring); *see also Pico*, 457 U.S. 853, 896 (1982) (Powell, J., dissenting).

tent with community views.[134]

The value inculcation model of public education is directly related to societal interests in the maintenance of the existing social order and established community values. This perception of public education promotes the collective welfare of society since it insures stability and continuity in basic institutional structures.[135] Additionally, the inculcative model recognizes that students benefit as individuals from the public educational system. The model perceives students as future participants within the democratic process and it seeks to prepare them for their roles as voting citizens and societal leaders through exposure to traditional values and beliefs.[136] Since the inculcative model is largely premised upon a collectivist view of society and its institutions, the Court has indicated that courts generally should defer to the majoritarian political judgments reached by local communities as reflected by school board policies and educational practices.

The inculcative model of public education, however, is one dimensional and presents too limited a view of the role and function of education in American society. The Court has recognized a broader concept of education, particularly at the university and secondary grade level, that emphasizes the importance of education to students as individuals. This model of education—which can be identified as the analytical model—focuses on the role which education plays in assuring student growth and development through broad exposure to various ideas and beliefs.[137]

The origins of the analytical model can be traced to the Court's decisions addressing first amendment claims in the context of university education. In *Sweezy v. New Hampshire*,[138] the Court sustained a first amendment academic freedom claim with the assertion that in American universities "[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[139] Similarly, in *Keyishian v. Board of Regents*[140] the

134. 457 U.S. at 896 (Powell, J., dissenting).

135. *See* J. TUSSMAN, GOVERNMENT AND THE MIND (1977). *But see* van Geel, *supra* note 67, at 262-89. Professor van Geel sets forth a strong challenge to most of the basic assumptions underlying the value inculcation model as it relates to the government's interests in the educational process. For present purposes it is not necessary to address this question since this article adopts the view that public education should mean much more than just inculcating students with traditional beliefs and widely shared values.

136. *See* Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 512 (1969); *see also* Garvey, *supra* note 50, at 338-42.

137. The term "analytical model" was identified and applied to this type of educational process by Professor Goldstein in a 1969 lecture. *See* Goldstein, *Reflections on Developing Trends in the Law of Student Rights*, 118 U. PA. L. REV. 612, 614 (1970). The historical evolution of the analytical model in public education is set forth succinctly in Note, *Academic Freedom in the Public Schools: The Right to Teach*, 48 N.Y.U. L. REV. 1176, 1176-82 (1973).

138. 354 U.S. 234 (1957).

139. *Id.* at 250; *see also* Shelton v. Tucker, 364 U.S. 479, 487 (1960) ("The

Court reaffirmed its commitment to the analytical model of public education when it invalidated portions of the New York teacher loyalty plan as it applied to university faculty. The Court concluded that the first amendment safeguarded academic freedom and assured open classroom discussion of all ideas.[141]

The Court has relied upon *Sweezy* and its progeny to extend its university model of education into the public secondary school setting. The Court's expanded perception of secondary public education has been developed for the most part in the context of first amendment litigation. In *Tinker v. Des Moines Independent School District*,[142] the Court recognized the very real likelihood that student opinion might create disharmony or unrest within the school. Yet it still asserted: "In our system students may not be regarded as closed-circuit recipients of only that which the state chooses to communicate."[143] In *Epperson v. Arkansas*,[144] the Court observed that the first amendment does not permit local authorities to adopt educational policies which "cast a pall of orthodoxy over the classroom."[145] The *Pico* plurality view also relies upon this broader conception of public education and the individual interests that it serves. Justice Brennan notes the importance of access to ideas to students as individuals[146] and the role which the school library plays in providing "an opportunity at self-education and individual enrichment."[147] Justice Blackmun relies upon the *Keyishian* decision when he characterizes the public school classroom as the "marketplace of ideas" and concludes that school officials may not eliminate particular ideas from the curriculum because they disagree with them.[148]

Not only does the analytical model serve the individual interests of students but it serves broader societal interests as well. The Court has asserted that an open educational environment is important to assure that the nation develops competent future leaders: "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discov-

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vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.").

140. 385 U.S. 589 (1967).

141. *Id.* at 603.

142. 393 U.S. 503 (1969).

143. *Id.* at 511; *see also* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

144. 393 U.S. 97 (1968).

145. *Id.* at 105 (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)).

146. 457 U.S. at 868. Justice Brennan states:

> 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.

Id.

147. *Id.* at 869.

148. *Id.* at 877 (Blackmun, J., concurring); *see also id.* at 879-80.

ers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection."[149] By exposing students to divergent ideas and views, the public schools acquaint them with the parameters of public debate on issues which they will face as adult citizens either as voters or leaders. Furthermore, when the educational program is not narrowly circumscribed, students can be introduced to the pluralistic tradition and nature of our society, and they can be exposed to the values of tolerance and understanding.

The inculcative and analytical models of education should not be perceived as mutually exclusive conceptions of the functions of the public school system at the secondary level. Indeed, in those cases when the Court has relied upon the analytical model it has also recognized that inculcation of values is an important aspect of the educational process. Justices Brennan and Blackmun both take this position in their *Pico* opinions. They recognize and accept the "socializing" function of public schools.[150] Both Justices, however, also expressly expand their conception of public education to recognize that individual student interests must be taken into account.[151] Justice Blackmun relies upon the 1943 *Barnette* decision to synthesize the value inculcation and analytical models by noting that, "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.' "[152] Justice Blackmun correctly perceives the likelihood that a regimented public education program linked exclusively to value transmittal goals runs the risk of undermining that goal since our democratic system tolerates—even encourages—diverse opinions and social pluralism. By harmonizing the inculcative and analytical models into a multi-dimensional model of public education, the *Pico* plurality opinions set forth a more complete picture of the contemporary secondary level educational process as it relates to the overlapping individual and societal interests that it is intended to serve.

The multi-dimensional model of public education actually rests upon the

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149. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), cited and quoted with approval in Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 512 (1969)); *see also* Sweezey v. New Hampshire, 354 U.S. 234, 250 (1957) ("To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.").

150. "We are therefore in full agreement . . . that local school boards must be permitted 'to establish and apply their curriculum in such a way as to transmit community values . . . .' " 457 at 864 (plurality opinion). "Because of the essential socializing function of schools, local education officials may attempt to promote civic virtues . . . and 'to awake[n] the child to cultural values.' " *Id.* at 876 (Blackmun, J., concurring) (citation omitted).

151. *See id.* at 864-65 (plurality opinion); *id.* at 876-77 (Blackmun, J., concurring).

152. *Id.* at 879 (Blackmun, J., concurring).

same basic concerns which have animated most first amendment theories.[153] The value inculcation model emphasizes the important role which education plays in preparing students for political participation. The first amendment is also designed to protect and enhance political participation and public debate of issues.[154] Moreover, the first amendment is a vital part of our society's political and cultural heritage. The analytical model stresses the importance of education to students to assure their individual growth and to promote the search for truth and knowledge. First amendment theory likewise recognizes these goals as among the important values served by the amendment.

The *Pico* plurality opinion highlights the relationship between the public schools and the first amendment by attributing public forum-like characteristics to the school library without labeling it a traditional public forum. Justice Brennan regards the school library as fulfilling a unique role in the educational process since it affords students the opportunity to explore ideas voluntarily.[155] He links the library to first amendment interests by relating the library's function to the student's right of access to ideas.[156] While Justice Brennan is careful to distinguish the library from the classroom, the Court earlier in *Tinker* characterized the public school classroom as the "marketplace of ideas."[157] The metaphor has obvious first amendment and public forum connotations.[158] Accordingly, several commentators have concluded that public schools should at least be regarded as semi-public forums.[159] For present purposes, however, it is not necessary to resolve this question. The important point is that since first amendment public forum doctrine has at least

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153. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 690 (1978). *But see* Diamond, *supra* note 120, at 497 ("the public school is an institution largely designed for concerns similar to those of the first amendment . . . . Thus, from one point of view, the public schools embody in all their aspects the denial of first amendment rights.").

154. This is not to suggest that the first amendment interests of the student and the adult voting citizen are identical, or that they have the same interests in the political process. But the student has a considerable interest in developing his abilities to participate effectively and knowledgeably in the political arena. *See supra* text accompanying notes 55-59.

155. 457 U.S. at 869. Notably, Justice Blackmun is unwilling to attribute any special status or constitutional significance to the school library. *Id.* at 878 (Blackmun, J., concurring).

156. *Id* at 867; *accord* Brown v. Louisiana, 383 U.S. 131 (1966); Minarcini v. Strongsville City School Dist., 541 F.2d 577 (6th Cir. 1976) (school library recognized as a semi-public forum).

157. 393 U.S. at 512 (quoting *Keyishian*, 385 U.S at 603); *see supra* text accompanying note 75.

158. *See* Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

159. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 690 (1978); Nahmod, *Beyond* Tinker: *The High School as an Educational Public Forum*, 5 HARV. C.R.-C.L. L. REV. 278 (1970); Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 885 (1979); *see also* Harpaz, *A Paradigm of First Amendment Dilemmas: Resolving Public School Library Censorship Disputes*, 4 W. NEW. ENGL. L. REV. 1, 51 (1981).

some limited application in the public school environment, this lends additional support to the concept of a multi-dimensional model of education. Furthermore, recognition of the clear parallels between the public school and the Court's perception of a public forum illustrates how far off the mark Justice Rehnquist was in his *Pico* dissent when he argued that the government should be treated differently for first amendment purposes when it is acting as an educator rather than as the sovereign.[160]

Integration of the inculcative and analytical models of public secondary education into a multi-dimensional model also is particularly appropriate because of the role assumed by the public schools in today's society. The number of students graduating from high school and attending college has increased tremendously in recent years. Whereas high school graduation and college matriculation was the exception rather than the rule before the mid-1900's, this pattern has been reversed during the past three decades.[161] The high school educational experience provides important and necessary training for a substantial number of students who will pursue college studies. This, of course, has influenced the nature of the public education process. Public school curriculums have been revised to meet college preparation demands. This has eroded the provincial nature of many public school curriculums because they have often proven inadequate to provide the required educational foundation for college study.[162] It is a mistake, therefore, to draw a bright line between the secondary school experience and the college experience, and to urge a simplistic view which perceives secondary education as completely (or even largely) devoted to value inculcation goals.[163] Furthermore, for those students who do not pursue a college education, high school represents their last opportunity for exposure to different ideas and perspectives through the educational process before they assume adult responsibilities in the community.

Finally, adoption of the multi-dimensional model is supported by the fact that the state enjoys a monopoly-like power over the educational curriculum and program. Under the one-dimensional model of public education the state is in a position to exploit its position and severely limit the material available to students. However, adoption of the multi-dimensional model recognizes that the public school's instructional task involves a multi-faceted undertaking and

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160. 457 U.S. at 908-09 (Rehnquist, J., dissenting); *see* Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, (1983), wherein the Court concludes that even when a forum falls into the least-protected public forum category, the government must abide by the neutrality standard. *Id.* at 46; *see also infra* text accompanying notes 203-06.

161. D. RAVITCH, THE TROUBLED CRUSADE: AMERICAN EDUCATION, 1945-1980 324 (1983). During the mid-1940's approximately 40 out of 100 high school students actually graduated and 16 of these graduates entered college. By 1980, approximately 75 out of every 100 students graduated from high school, and 45 of these graduates entered college. *Id.*

162. *Id.* at 230-32.

163. *See, e.g., Pico*, 457 U.S. at 914 (Rehnquist, J., dissenting); Diamond, *supra* note 120, at 498.

provides at least a limited first amendment counterweight to the state and any overzealous ideological aspirations that it might possess.[164] It was appropriate, therefore, for the Court to rely upon the broader model of public education in *Pico* to reject assertions that the school library—and secondary schools generally—could eliminate particular materials in order to expose students only to widely accepted views and traditional beliefs. Moreover, additional considerations also support the Court's decision to intervene in *Pico*, and perhaps more broadly in educational matters touching upon student first amendment interests.

B. *The Case for Judicial Intervention*

The case against judicial intervention in public education matters rests heavily upon the value inculcation model of education and the underlying assumptions respecting local political control over public schools. Not only is this limited vision of the public education process inadequate, but the underlying assumptions do not accurately reflect the current situation in most communities. On the other hand, the multi-dimensional model of public education can be reconciled with a less deferential judicial approach to educational controversies implicating student first amendment interests. This section attempts to develop the arguments supporting limited judicial review of student claims challenging ideologically inspired educational policies and demonstrate that such judicial intervention is legitimate.

The Court traditionally has been reluctant to intervene in public education disputes because it has perceived that educational decisionmaking is largely a local matter. The value inculcation model supports this position since the school's role is characterized by the transmission of shared community beliefs and values to the students. Consequently, the local political process, rather than the federal court, is regarded as the appropriate forum available to dissatisfied citizens who wish to challenge educational policies which they find unacceptable.[165] Chief Justice Burger reiterates this view in his *Pico* dissent when he characterizes the political aspect of local school board affairs as "democracy in a microcosm."[166] Justice Powell similarly concludes that "no single agency of government at any level is closer to the people whom it serves than the typical school board."[167] Both Justices emphasize the extent to which parents generally are able to participate in educational decisionmaking through involvement with school board elections, the board itself, and various related organizations such as parent-teacher associations.[168] They conclude, therefore, that decisionmaking in local school matters should reside with school boards and administrators, and that the courts should defer to judgments reached by

164. *See* Yudof, *supra* note 159, at 885.
165. *See* Epperson v. Arkansas, 393 U.S. 97, 104 (1968).
166. 457 U.S. at 891 (Burger, C.J., dissenting).
167. *Id.* at 894 (Powell, J., dissenting).
168. *Id.* at 891 (Burger, C.J., dissenting); *id.* at 894 (Powell, J., dissenting).

these bodies regarding such matters as the content of a school library.

Despite the *Pico* dissenters' perception that school board policies mirror community sentiment, there is reason to question the representativeness of many school boards and whether their policies are truly reflective of community views and values. Although school board elections are open to all local citizens,[169] board elections are characterized by low voter turnouts.[170] Affluent citizens in the community are more likely to participate in the election than their less affluent counterparts.[171] Most board elections are non-partisan; they are often uncontested and rarely reflect ideological differences between the candidates.[172] Incumbents usually can be expected to win re-election.[173] Local citizens generally demonstrate a low level of knowledge about public education issues and the local school system.[174] Occasionally a school board election will raise a controversial issue stirring considerable public interest and a high voter turnout rate, but this is not representative of most board elections.[175] Zeigler and Jennings conclude in their comprehensive study, *Governing American Schools*, that the school board election process does not reflect "democracy in a microcosm" and might be regarded as inherently discriminatory: "It is patent that, when measured against the yardstick of a classic democratic theory of leadership selection, school district governance hardly comes through with flying colors."[176] Furthermore, interest groups, such as parent-teacher associations, that seek to influence local educational policies are rarely representative of the community as a whole and they are frequently ineffective.[177] Perhaps the anti-democratic nature of school board governance can be explained partially by Professor Wirt's observation that educational issues involve "marginal politics" since most major educational matters tend to be resolved beyond the local level.[178]

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169. *See, e.g.*, Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969).

170. F. WIRT & M. KIRST, THE POLITICAL WEB OF AMERICAN SCHOOLS 10, 76 (1972); L. ZEIGLER & M. JENNINGS, GOVERNING AMERICAN SCHOOLS: POLITICAL INTERACTION IN LOCAL SCHOOL DISTRICTS 249 (1974).

171. Mann, *Participation, Representation and Control,* in THE POLITICS OF EDUCATION 74 (J. Scribner, ed. 1977).

172. *See* L. ZEIGLER & M. JENNINGS, *supra* note 170, at 244-45; F. WIRT & M. KIRST, *supra* note 170, at 62-64; Stelzer, *School Board Receptivity—A Representation Study*, 5 EDUC. & URB. SOC'Y, 67, 78 (1972); Nielsen & Robinson, *Partisan School Board Elections: New Evidence to Support the Case for Them*, 29 ADMINISTRATOR'S NOTEBOOK, No. 3 (1981).

173. *See* L. ZEIGLER & M. JENNINGS, *supra* note 170, at 244; F. WIRT & M. KIRST, *supra* note 170, at 64.

174. Mann, *Democratic Theory and Public Participation in Educational Policy Decision Making,* in THE POLICY OF THE SCHOOL 6-12 (F. Wirt, ed. 1975).

175. Wirt, *School Policy Culture and State Decentralization,* in THE POLITICS OF EDUCATION 186 (J. Scribner, ed. 1977).

176. L. ZEIGLER & M. JENNINGS, *supra* note 170, at 244-45.

177. *Id.* at 245-46; F. WIRT & M. KIRST, *supra* note 170, at 76; Mann, *Participation, Representation and Control,* in THE POLITICS OF EDUCATION 78-90 (J. Scribner, ed.) (1977).

178. F. WIRT & M. KIRST, *supra* note 170 at 186; *see also infra* text accompa-

While education has historically been largely administered and supervised at the local level,[179] this tradition has changed dramatically over the past thirty years. Just as the Court in *Brown v. Board of Education*[180] could note the remarkable evolution in education during the fifty year period preceding the decision,[181] today a similar evolution has occurred in public education to diminish the extent of local control over educational matters. There has been significant recent federal involvement in education with the passage of legislation such as the Elementary and Secondary Education Act of 1965[182] and the establishment of the Department of Education as a separate cabinet level executive department.[183] The federal courts have a lengthy record of intervention in local school district affairs during the past thirty years in support of desegregation efforts.[184] Several national organizations wield considerable political muscle in Congress and elsewhere, and they are increasingly influential in directing educational policy at the national and local level.[185]

State involvement in educational matters that previously were handled at the local level has also increased noticeably. A number of states, often responding to adverse court decisions, have revised local property tax based educational financing schemes to equalize expenditures throughout the state.[186] This has necessarily increased state involvement in educational financing matters. During the past thirty years, there has been a notable trend toward the consolidation of school districts which has undercut the tradition of local control and the insularity of many local school systems, particularly when rural districts have joined with their urban neighbors.[187] Many states have retained a significant degree of control over a variety of educational matters including accreditation standards, teacher certification requirements, and curricular and

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nying footnotes 179-88.

179. There are approximately 15,000 school districts in the country and approximately three quarters of them are governed by locally elected school boards. *Pico*, 457 U.S. at 891 n.6 (Burger, C.J., dissenting); Diamond, *supra* note 120, at 509 n.142.

180. 347 U.S. 483 (1954).

181. *See id.* at 489-90.

182. 20 U.S.C. § 236 *et seq.*

183. 20 U.S.C. § 1221(a) *et seq.*

184. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1972); Cooper v. Aaron, 358 U.S. 1 (1958); Goldstein, *supra* note 137, at 614.

185. In 1960, the American Federation of Teachers (AFT) represented more than 50,000 teachers; by 1978 the AFT had over 500,000 members. The National Education Association (NEA) had over 700,000 members in 1960, and by 1978 its ranks had increased to 1,700,000 members. "By the mid-1970's, there was nothing tenuous about the position of teacher unions . . . . Indeed, both the AFT and the NEA had become major powers, not only in their school districts but in state legislatures and in the nation . . . ." D. RAVITCH, *supra* note 161, at 313-15.

186. *See, e.g.*, Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

187. Between 1945 and 1980, the number of school districts dropped from 100,000 to 16,000. While student enrollment practically doubled during this time, the number of schools dropped from 185,000 to 86,000. *See* D. RAVITCH, *supra* note 161, at 327.

textbook decisions.[188]

All of this suggests that outside intervention, including judicial intervention, into local educational affairs to implement values other than those recognized by local authorities is not as unusual an intrusion as it may once have appeared. This undermines the argument supporting judicial deference to local educational judgments since local interests are no longer necessarily reflected in many educational policies. Furthermore, given the dynamics of the local political processes in school board elections, it is incorrect to conclude that a judicial order overturning an educational decision inevitably conflicts with community views. Such intervention is at least likely to meet with considerable minority support.

The Court has correctly indicated that judicial review of student constitutional challenges to public education policies should be limited to those instances when paramount national values supersede local interests.[189] This approach is inherently consistent with the role assumed by the Court in protecting the constitutional rights of individual citizens against the majoritarian political process.[190] The Court relied upon this countermajoritarian rationale for judicial intervention in *Barnette* when it overturned a state board of education compulsory flag salute policy:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to . . . free speech . . . may not be submitted to vote . . . .[191]

Similarly, the *Tinker* and *Pico* decisions can be understood as cases where the constitutional values were too important to subordinate to the value judgments of local school officials, regardless of whether they enjoyed widespread public support for their position.

The limited judicial intervention in public school matters sanctioned by the Court to protect student first amendment interests supports the conclusion that the courts should evaluate these types of claims in light of the multi-dimensional model of education. In fact, judicial acceptance of the multi-dimensional model of education further undercuts much of the strength of the argument against intervention since the model regards the inculcation of community values as only one aspect of the educational process. The multi-dimensional model also attaches considerable significance to individual interests—the same sort of individual interests which the first amendment is designed to protect.[192] Therefore, by relying upon the multi-dimensional model

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188. *See* Diamond, *supra* note 120, at 506 n.130. *See generally* Wirt, *What State Laws Say About Local Control*, 59 PHI DELTA KAPPAN 517, 517-20 (1978).

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

190. *See* J. ELY, DEMOCRACY & DISTRUST 75-77 (1980).

191. 319 U.S. 624, 638 (1943); *see also* Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 507 (1969).

192. *See supra* notes 153-54 and accompanying text.

the Court has embraced the view that educational decisionmaking should reflect individual as well as communitarian considerations, and it has signaled its willingness to intervene to protect both of these interests.

If the Court adopted a deferential approach and refused to intervene in educational controversies, including those based on first amendment claims, there is a serious risk that constitutional values would be devalued in the public school setting. Such an approach would undercut even those aspects of the educational mission which are designed to impart societal values and norms.[193] Certainly the first amendment is a central tenet in our political heritage, and the public schools should not ignore its presence either in their instructional programs or administrative practices. Moreover, a policy of judicial deference would assure a high degree of uniformity and conformity within the public schools. Of course, this is precisely the goal of the value inculcation model.[194] Professor Diamond, who argues for judicial deference to local educational policies even in the face of first amendment claims, acknowledges as much when he characterizes the public schools as "value inculcators for creating the *proper* citizen."[195] But the courts need not adopt such a limited vision of the public education process.

The multi-dimensional model of education envisions a broad role for the secondary schools—one that introduces students to the values of free and open inquiry, diversity of opinion, and tolerance in a pluralistic society based upon open and vigorous debate. The first amendment places a premium on these same values. By judging educational decisionmaking from the perspective of the multi-dimensional model, courts can protect against policies which directly frustrate student first amendment interests. In fact, unless courts are willing to intervene in appropriate cases to protect constitutional interests, society runs the risk that the public education system could effectively stymie student initiative and blunt individual growth in order to further the narrow interest of majoritarianism. When the values at stake are this important, judicial deference without critical consideration of the individual and educational interests

193. "That [school officials] 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." West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943); *see also Pico*, 457 U.S. at 879 (1982) (Blackmun, J., concurring).

194. It is hard otherwise to explain the Court's result in Ambach v. Norwick, 441 U.S. 68 (1979), sustaining New York's statute prohibiting aliens from teaching in the public schools. *See* Yudof, *supra* note 159, at 879-82.

195. Diamond, *supra* note 120, at 509 (emphasis added). In addition, Professor Diamond comments on the societal role of the public schools and observes: ". . . virtually every purpose that the school serves is concerned with conveying information . . . and indoctrinating the participants with the *correct* notions about information." *Id.* at 497 (emphasis added); *see also* Goldstein, *supra* note 137, at 614. While he admits exaggeration, Professor Goldstein states that in the inculcative model of education "truths" are conveyed from teacher to student and "[b]oth teacher and student appear almost as automatons." *Id.*

involved simply does not make sense, unless, of course, the courts lack the institutional capacity to adequately formulate and apply legal standards for the resolution of such controversies.

V. JUDICIAL REVIEW

A. *The Competency Considerations*

The question of judicial review of student first amendment claims ultimately must take account of the institutional capacity of the courts to implement constitutional values in resolving *Pico*-like claims. Rebell and Block, in their study of litigation concerning educational issues, identify several important considerations underlying the judicial intervention decision. Their study indicates that judicial involvement seems appropriate in those cases which can be decided as a matter of principle or on a constitutional value judgment rather than by balancing policy considerations.[196] The authors note, however, that "in order to assess properly the basic claims of principle, courts must become involved in factual and policy issues directly subsumed in the principle issues."[197] Thus, judicial resolution of an educational controversy requires the court to articulate a workable principle or standard to resolve the immediate dispute and to guide future actions by the parties. It also means that the Court should be capable of hearing from all of the interested parties, receiving and assimilating the relevant evidence, and resolving evidentiary conflicts. Finally, the Court must be able to develop and implement a workable remedy.[198]

The Rebell and Block study concludes that courts which conscientiously evaluate their competence in these terms before entering a public education-related dispute can provide an effective forum for resolution of the controversy. In fact, the study suggests that in several respects courts may offer a superior forum for resolution of these matters. This is particularly true for those disputes based upon questions of principle that allow the courts to avoid policy considerations.[199] But the study notes that courts are capable of evaluating social science evidence as well as more traditional factual evidence.[200] The *Pico* decision, therefore, should be re-examined from the perspective of these judicial competency considerations, and the potential limits of the *Pico* ruling likewise should be explored.

B. Pico *and Judicial Review*

The *Pico* litigation raised a relatively straightforward first amendment is-

196. M. REBELL & A. BLOCK, *supra* note 6, at 201.
197. *Id.* This explains the studies' hybrid category of principle/policy issues. *Id.* at 200. The authors concluded that 80% of the 65 educational reform cases studied fell into this category. *Id.*
198. *See generally* M. REBELL & A. BLOCK, *supra* note 6, at 3-15, 199-216.
199. *Id.* at 201.
200. *Id.* at 209.

sue which turned upon the principle of governmental neutrality in regulating the content of speech. There is perhaps no more strongly established first amendment doctrine than the principle that government may not regulate speech because it disagrees with its point of view or content.[201] The *Pico* matter was troubling, however, because it required application of the neutrality doctrine in the public school setting and, thus, confronted the Court with the question of whether the first amendment protection available to students precluded the removal of school library books. Outside of this setting the government would clearly face constitutional restraints on its efforts to remove a book or similar material from the public domain unless the work contained unprotected speech or was otherwise subject to regulation to realize a paramount governmental interest, such as national security.[202]

The Court recently has made it clear that the neutrality doctrine applies regardless of the nature of the forum where the speech activity occurs. In *Perry Education Association v. Perry Local Educator's Association*,[203] the Court concluded that even when the forum falls within the least protected category of public forums the neutrality principle still applies.[204] The Court held that in this case government "may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[205] As argued previously, the multi-dimen-

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201. *See, e.g.*, Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949); New York Times Co. v. Sullivan, 376 U.S. 254, 270-71 (1964); Police Dep't v. Mosley, 408 U.S. 92, 95 (1972); *see also* Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975). Of course the principle of neutrality is not universally true since the Court has recognized that certain types of speech fall outside the ambit of first amendment protection: obscenity, libel, advocacy creating a clear and present danger, fighting words, and excessively profane speech.

202. *See, e.g.*, Bantam Books v. Sullivan, 372 U.S. 58, 66 (1963); *cf.* Snepp v. United States, 444 U.S. 507, 512-13 (1980) (recognizing government has a compelling interest in protecting against the disclosure of secret information regarding national security matters).

203. 460 U.S. 37 (1983); *cf.* FCC v. Pacifica Found., 438 U.S. 726, 743 n.18 (1978) (arguing that prohibiting the broadcast of excessively profane language will affect mostly the form rather than content of communication).

204. *Perry*, 460 U.S. at 46. The Court distinguished between these different categories of public forums. *Id.* at 45-46. In the first and most protected category of public forums, the Court included places, like streets and parks, which have historically been devoted to speech activities. *See, e.g.*, Hague v. CIO, 307 U.S. 496 (1939). In the second category the Court placed public property which had been opened by the state for expressive purposes like university meeting facilities and municipal theatres. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981); Southeastern Promotions v. Conrad, 420 U.S. 546 (1975). The third category included public places which had not been opened by the government to the public for communicative purposes. *See, e.g.*, Greer v. Spock, 424 U.S. 828 (1976). At the very least the public school should fall within this third category of public forums. *See supra* notes 155-60 and accompanying text.

205. 460 U.S. at 46. *Pico* can also be reconciled with the reasonableness dimension of the *Perry* test. *Pico* provides that library book removal decisions may take account of the "pervasive vulgarity" or "educational suitability" of the book. 457 U.S. at

sional model of education, and the first amendment values which are implicit within it, support the extension of such a fundamental first amendment principle as the neutrality doctrine into the school and its library. When the government otherwise controls the flow of information within a forum like a public school, there are compelling reasons for assuring neutrality: students are quasi-captive audiences and teachers have considerable control and influence over the students.[206] Finally, since the Court has previously recognized the principle of neutrality in *Epperson* (a school curriculum case) and *Tinker* (a student speech/discipline case), it is not an extension of constitutional doctrine to apply the principle in the school library context.

This is not to say that policy considerations did not play a role in the resolution of the *Pico* controversy. The Court in *Pico* recognized that the student first amendment interests must be weighed against the governmental interest in maintaining sufficient control over the school library to assure accomplishment of basic educational goals. The case, thus, fits the mixed principle-policy category identified by Rebell and Block. By limiting the dispute to the library book removal issue, the plurality opinion noted that the school board's educational mission was not severely impacted by application of the neutrality doctrine, since initial acquisition decisions were unaffected and the holding did not extend to curriculum decisions.[207] Given the voluntary nature of school library use, the Court is surely correct in assuming that a requirement of neutrality would have no greater effect on the overall educational program than the similar neutrality requirement imposed by the Court in *Tinker* to limit administrative efforts to curb student speech. Moreover, the Court carved out two exceptions to the neutrality requirement—books might be removed if they are "educationally unsuitable" or "pervasively vulgar"—which represent an accommodation of the government's interests.[208] Thus, the Court was able to base its decision in *Pico* on a broad constitutional principle and adapt its ruling to reflect countervailing policy considerations.

The *Pico* dissenters, however, argued that the Court had not successfully articulated manageable standards to govern the resolution of library book removal disputes. But the neutrality standard seems eminently workable, and one that should be familiar to courts since it is a bedrock first amendment principle. The dissenters were also troubled by the uncertainty which inheres in the terms "pervasive vulgarity" and "educational unsuitability."[209] They contended that interpretation of these standards required subjective judgments which could not be effectively reviewed by courts.

The dissenters are correct in suggesting that application of the neutrality

871. This represents a kind of reasonableness test adapted to the public school setting.

206. *See* Yudof, *supra* note 159, at 875. *But see* Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 579 (1980).

207. 457 U.S. at 871-72.

208. *See supra* note 205.

209. 457 U.S. at 890 (Burger, C.J., dissenting); *id.* at 917 (Rehnquist, J., dissenting).

test with the exceptions noted could require courts to inquire into the subjective motivations which animated a school board or an official to action. But, courts regularly review the subjective motivation surrounding various governmental actions in resolving constitutional issues. In *Epperson v. Arkansas*,[210] the Court held that a first amendment establishment clause violation could be based upon a finding of impermissible legislative motivation.[211] With its decision in *Washington v. Davis*[212] the Court held that a case of racial discrimination could be established under the fourteenth amendment equal protection clause only if governmental officials intentionally engaged in discriminatory activities.[213] In *Arlington Heights v. Metropolitan Housing Development Corporation*,[214] the Court articulated a set of factors for courts to scrutinize in determining the motive underlying an official decision.[215] The *Pico* case illustrates the usefulness and applicability of these factors in the book removal controversy situation. The Island Trees School Board ignored its established procedures in reviewing the challenged library books and it ignored the advice of various librarians, teachers, and administrators.[216] Motive analysis, therefore, does not present courts with an inherently unworkable or unfamiliar standard; rather it neatly squares with constitutional doctrine that has evolved in several areas.

This does not mean that courts will find it easy to divine improper motive when reviewing library book removal decisions purportedly based upon the "pervasive vulgarity" or "educational suitability" criteria. The "pervasive vulgarity" standard seems to require that courts scrutinize a work as a whole to determine whether profane language is used excessively.[217] While there may not be a bright line between the excessive use of profanity and its acceptable use, *Pico* illustrates that isolated uses of profane words, including sexual refer-

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210. 393 U.S. 97 (1968).

211. *Id.* at 109; *see* J. ELY, DEMOCRACY AND DISTRUST 141 (1980); *cf.* Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 514 (1969) (first amendment violation because school officials suppressed students' controversial views on the Viet Nam war).

212. 426 U.S. 229 (1976).

213. In *Washington*, the Court rejected the argument that a showing of racial imbalance standing alone constituted a violation. *Id.* at 239; *cf.* Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979) (intent required to establish sex discrimination claim under the equal protection clause).

214. 429 U.S. 252 (1977).

215. *Id.* at 265-68. The Court identified six potential sources of evidence to establish impermissible decisionmaking motivation: the historical background, the specific sequence of events preceding the challenged decision, departures from the normal procedural sequences, substantive departures from prior resolutions, legislative or administrative history, and testimony from the decisionmakers.

216. 457 U.S. at 874.

217. The "pervasive vulgarity" standard also would sanction removal of library materials containing pornographic illustrations or pictures, when these materials had little or no relationship to the educational program. *Cf.* New York v. Ferber, 458 U.S. 747, 756 (1982) (state may apply reduced obscenity standard to regulate pornographic depictions of children); Ginsberg v. New York 390 U.S. 629, 638-39 (1968) (same).

ences, are probably insufficient to meet the "pervasive vulgarity" standard and, thus, to justify book removal in the high school setting.[218] With younger students, however, courts may draw the line more restrictively.[219] This does not present the courts with an unresolvable dilemma because the courts can draw upon the expertise and experience of educators to assist in reaching these decisions. There is no reason why a court presented with the informed views of librarians, teachers, or school administrators regarding the appropriateness of a particular work which they have reviewed should not give credence to that judgment so long as it appears to be rational.[220] And, on the rare occasion when a court might be confronted with conflicting professional judgments, the court would simply have to evaluate independently the evidence presented concerning the book just as it does in other disputed fact situations and resolve the conflict accordingly. Although this might appear to be the position of the *Pico* dissenters in disguise—deference to reasonable educational judgments—this type of review assures that the Court will be fully informed regarding the merits of the work. Resolution of the controversy will turn upon the considered judgments of educators, and perhaps others, who have reviewed the material, rather than the passionate appeals of a segment of the community and some of its elected or appointed officials.[221]

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218. *See* 457 U.S. at 897-903 (appendix attached to the dissenting opinion of Justice Powell); *see also* Right to Read Defense Comm. v. School Comm., 454 F. Supp. 703 (D. Mass. 1978).

219. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 749-50 (1978); Ginsberg v. New York, 390 U.S. 629, 638-39 (1968).

220. Alternatively, the court could accept the reasoned judgment of an appointed review committee that included trained educators. *See* Comment, *The Public School as a Public Forum*, 54 TEX. L. REV. 90, 113 (1975); *cf.* Hunter, *Curriculum, Pedagogy, and the Constitutional Rights of Teachers in the Secondary Schools*, 24 WM. & MARY L. REV. 1, 75-78 (1983) (arguing for a due process based approach to curricular decisionmaking to assure all sides [teachers, parents, students, school board members and others] the opportunity to participate with the expectation that this should result in a decision which properly takes account of all interests). In *Pico*, the Island Trees School Board had an established review procedure available, but refused to follow it. 457 U.S. at 874-75. After appointing an ad hoc committee which included teachers to review the books, the school board largely rejected their recommendations for no apparent reason. *Id.* at 875. Justice Brennan was troubled by the school board's unwillingness to accept the judgment of the educational professionals who had reviewed the challenged books. He concluded that this called into question the board's motivation for the removal decision. *Id.* at 874-75. A similar pattern can be seen in other removal cases. *See, e.g.*, Zykan v. Warsaw Community School Dist., 631 F.2d 1300 (7th Cir. 1980); Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269 (D.N.H. 1979).

This approach is not as unwieldy as it might seem at first. Many school districts have established procedures, including review committees, to examine allegedly unsuitable books to determine whether they should be removed from the library. In a sense this insures a kind of due process hearing for challenged works. And, in doing so, it assures that a relatively neutral and experienced decisionmaking body will be involved in the process.

221. This is not to suggest that the school board should have no authority to act if it believes that books are inappropriate under the *Pico* standards. The board clearly

Similarly, courts can be expected to determine whether particular books slated for library removal are "educationally unsuitable." The court can again rely upon the informed judgments of experienced educators so long as the court is satisfied that the judgment reflects familiarity with the work and the affected educational program. This approach does not differ significantly from the judicial review function assumed by courts confronted with a *Tinker* issue[222] and, in most cases, it will enable the court to avoid weighing conflicting evidence. A review of the earlier book removal cases indicates that there was rarely any real disagreement among the educators regarding the appropriateness of particular works.[223]

Since school officials will most likely respond to book removal litigation by arguing that their removal decision was reasonably based upon educational considerations and reached after consideration of these factors, the court can utilize the summary judgment device to defeat challenges that are not well-founded.[224] This approach also answers one of the *Pico* dissenters' major concerns: the fear of extensive litigation precipitated by students or their parents unhappy with library book removal decisions.[225] Actual application of the *Pico*

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has the authority to review books. But, in doing so, the board should at least consult with those persons who have some experience and training in evaluating library and other educational materials. In those cases when the school board disagreed with the educators or a review committee's determination that books should be retained, however, the board would face the burden of establishing that it was motivated by neutral considerations. The board also would face the task of demonstrating that the judgment of the educators or review committee was unreasonable or simply wrong under the applicable criteria in the event that litigation ensued.

222. In both cases courts are confronted with the question of whether school officials could reasonably reach the conclusion that they did: in *Tinker* that the student speech presented the likelihood of substantial disruption, and in *Pico* that the book was educationally unsuitable. If the challenged judgment rests on a basis related to the applicable standard—rather than a subjective disapproval of the speech or book—then the decision should withstand judicial scrutiny.

223. *See, e.g.*, 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).

224. *See* Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 287 (1977) (school board decisions dismissing teacher for exercise of first amendment rights can be sustained if the board would reach the same decision for constitutionally permissible reasons). In fact, the lower federal courts have relied on *Pico* for relevant standards for summary judgment proceedings. *See, e.g.*, Sommer v. City of Dayton, 556 F. Supp. 427, 429 (S.D. Ohio 1983); Podlesnick v. Airborne Express, Inc., 550 F. Supp. 906, 908 (S.D. Ohio 1982).

225. 457 U.S. at 895 (Powell, J., dissenting). Justice Powell also envisioned litigation in other areas, including library acquisition decisions and curriculum content policies. *Id.* If *Pico* extends that far, and it is this Article's view that it does, the same reasonableness standard should govern a court's review. The device of summary judgment is readily available to avoid litigation in those instances when the school's decision is reasonably well-founded. *See infra* Part V(C). Additionally, it should be noted that, despite dire predictions to the contrary, the Court's decision in Goss v. Lopez, 419 U.S. 565 (1975), extending due process rights to students facing suspension, has not generated much litigation in its aftermath. *See* Timar, *The Aftermath of* Goss *in the Fed-*

standards, therefore, is unlikely to prove nearly as troublesome as suggested by the dissenters.

Judicial competency to engage in the task of reviewing the motivation underlying a school board library book removal decision requires consideration of whether a court can be assured that it will receive all of the relevant evidence bearing upon the issue and whether it can adequately assimilate the evidence and resolve any ambiguities or conflicts. As in most educational disputes, there most likely will be only two sides in a book removal dispute—those advocating removal and those opposing it.[226] While there may be additional groups beyond the immediate parties interested in participating in the litigation,[227] their involvement is not likely to alter the bipolar nature of the controversy and their participation is likely to complement the positions presented by the principal protagonists. This presents the court with litigation in its traditional format, and it also enhances the likelihood that the court will receive all relevant evidence relating to the dispute.[228]

As noted earlier, courts are accustomed to receiving evidence on motivation questions in resolving constitutional issues. It seems apparent that Justice Stevens' observation in *Washington v. Davis*[229] will hold true in this area: most often proof of what happened in reaching a removal decision will be determinative of whether the decision was based upon official disapproval of the viewpoint presented in the work.[230] Certainly this was the case in *Pico* and several earlier removal controversies.[231] In those rare instances when this is not the case, the courts may have to assess the reasonableness of educational judgments. This ordinarily should only require the courts to determine whether there is sufficient evidence from educational professionals supportive of the decision to justify concluding that the decision was reasonable. This is an evidentiary task which the courts commonly perform, and it does not require any particular expertise in educational philosophy or pedagogy.

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eral Courts, 9 NOLPE SCH. L.J. 123, 139 (1980).

226. In their study, Rebell and Block conclude that in most educational disputes, even if many parties are involved, party representation will usually be bipolar, i.e. two conflicting positions presented to the court. M. REBELL & A. BLOCK, *supra* note 6, at 203.

227. Interested groups could include teacher unions, library organizations, the ACLU, parent groups, and other school boards.

228. There is no reason to assume that book removal litigation, even with additional interested parties participating (probably only as amicus curiae), will approach the complexity, evidentiary or otherwise, of structural reform suits aimed at institutional change. *See generally* Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982).

229. 426 U.S. 229 (1976).

230. *Id.* at 253 (Stevens, J., concurring).

231. *See, e.g.*, Minarcini v. Strongsville City School Dist., 541 F.2d 577, 582 (6th Cir. 1976); Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269, 1273 (D.N.H. 1979); *cf.* Stanley v. Magrath, 719 F.2d 279 (8th Cir. 1983) (finding state board of regents was motivated by hostility to the content of the student newspaper when it revised the paper's funding system).

Given the bipolar nature of *Pico*-like controversies and the limited relief requested—usually restoration of the book to the library shelves—there is little reason to question the ability of courts to provide an adequate remedy to resolve the controversy. Ordinarily, as in *Pico*, plaintiffs will request declaratory relief to establish that defendants violated constitutional norms and injunctive relief to compel defendants to reinstate the book and, occasionally, to restrain them from future illegitimate removal decisions. Courts should not have any difficulty providing this type of traditional equitable relief, and they should be able to frame a remedy that is not too intrusive.[232] An order restraining defendants from removing a book from the library is not likely to intrude significantly into the educational process, particularly since it will have no direct impact on the curriculum because library use is voluntary.[233] Furthermore, a judgment in plaintiff's favor is unlikely to require the school district to expend any resources. Some courts have fashioned relief in this area to take account of such factors as a student's age and parental approval.[234] While this might complicate administration of the injunction, these are factors which school officials regularly are concerned with and consider in a variety of different contexts within the educational program. Consequently, the type of equitable relief required in a *Pico*-like dispute seems well within the traditional province of courts, and it can be structured in such a manner that the court's intrusion into the everyday affairs of a school will be minimized.

It is possible that courts could be confronted with damage claims in library book removal controversies. Justice Powell worried about this in his dissenting opinion in *Pico*.[235] But, as with equitable relief, courts have considerable experience dealing with damage claims for constitutional violations even in the public education setting. In *Wood v. Strickland*,[236] the Court set forth the standard governing liability for school board members under 42 U.S.C. § 1983. In *Strickland*, the Court extended qualified immunity to school officials unless the official:

> knew or reasonably should have known that the action he took . . . would

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232. Generally, courts confronted with a constitutional or statutory violation by public education officials will attempt to frame a remedy that does not substantially intrude into the day-to-day operations of the schools. *See* M. REBELL & A. BLOCK, *supra* note 6, at 210.

233. It could be argued that judicial review of this type of educational decision is always disruptive of the educational process because it creates a controversy and distracts attention away from the educational mission. But the same effect—controversy and distraction—can be expected when a school board or other official reviews and removes material from the library for questionable reasons. Thus, the court cannot be blamed for this impact, since its involvement comes only after the controversy has been precipitated.

234. *See, e.g.*, Sheck v. Baileyville School Comm., 530 F. Supp. 679, 692 (D. Me. 1982). The Island Trees School Board restored the removed books to the school library shelves after the case was remanded, but the Board required parental approval for students to check out the books. 222 PUBLISHER'S WEEKLY 260 (1982).

235. 457 U.S. at 894 (Powell, J., dissenting).

236. 420 U.S. 308 (1975).

> violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. That is not to say that school board members are "charged with predicting the future course of constitutional law."[237]

Since *Pico* establishes the relevant constitutional principle governing library book removal decisions, school officials can reasonably be charged with knowledge of the applicable standard and it does not seem unfair to impose liability in the unlikely event that they deliberately ignore such clearly established constitutional rights.[238] Proof of actual malice necessitates an inquiry into motive as required under the constitutional standard enunciated in *Pico*, but this should not present any greater difficulty than determination of the constitutional violation in the first instance.[239]

Although *Pico*-related litigation raises the specter that potential damage claims might inhibit school officials in the performance of their jobs, there are several reasons why this is unlikely. Nearly all of the actions challenging library book removal decisions have requested only injunctive relief to restore the book to the shelves, and not damages. This is not surprising since these cases represent "principle" type cases, and plaintiffs have been mainly concerned with vindicating first amendment values. Actual damages are often virtually impossible to assess and prove.[240] Generally, education officials can be expected to comply with established constitutional standards,[241] so it is the exceptional case which might call for a damage award in the aftermath of *Pico*. Also, since *Pico* requires a showing of an improper motive to succeed in a challenge to a book removal decision, it places plaintiffs in the position of meeting a high initial evidentiary burden. This and the difficulty of establishing damages should discourage all but the most committed ideological plaintiffs from commencing litigation. In the event that a "strike suit" is filed, the summary judgment device is available to deal with it.[242]

On balance, implementation of the *Pico* decision should not unduly tax the institutional competence of the courts. Since the claim largely turns on an

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237. *Id.* at 321-22.

238. It is unlikely that a court would impose pre-*Pico* liability in view of the highly unsettled state of the law in this area. *Compare* Minarcini v. Strongsville City School Dist., 541 F.2d 577 (6th Cir. 1976) *with* Presidents Council, Dist. 25 v. Community School Bd. No 25, 457 F.2d 289 (2d Cir.), *cert. denied,* 409 U.S. 998 (1972). *See generally* Procunier v. Navarette, 434 U.S. 555, 561-65 (1978) (standards used to determine whether judicial decisions should create retroactive liability).

239. *See supra* notes 210-16 and accompanying text.

240. *See Developments—Section 1983 and Federalism,* 90 HARV. L. REV. 1133, 1226 (1977); *cf.* Carey v. Piphus, 435 U.S. 247, 267 (1978) (students awarded one dollar in damages after establishing a violation of their procedural due process rights when they were suspended from school).

241. *See* M. REBELL & A. BLOCK, *supra* note 6, at 199; *cf.* Regents of the Univ. v. Bakke, 438 U.S. 265, 318-19 (1978) (asserting that courts should presume that university will abide by constitutional requirements in implementing its admissions system).

242. *See supra* notes 224-25 and accompanying text.

issue of first amendment principle, it does not unduly enmesh the courts in educational policy determinations. The constitutional standard established by the Court, while somewhat amorphous on its face, should not prove unworkable in practice if courts draw upon the expertise and knowledge of educators. The evidentiary inquiry into the underlying motivation of school officials does not differ appreciably from the sort of inquiry which courts routinely make in constitutional cases. Finally, courts should be able to provide plaintiffs with adequate relief in this area without significantly interfering with the educational process or causing a dramatic reallocation of resources. Therefore, judicial review of a student's first amendment challenge to a library book removal decision should not be regarded as an inappropriate extension of judicial power.

C. *Judicial Review After* Pico

The *Pico* dissenters expressed considerable concern that the plurality's rationale, despite its carefully limited holding, would extend judicial review authority into other areas of the school program. The *Pico* rationale might apply to library book acquisition decisions, and it might impose some limitations on the ability of school boards and administrators to structure school curriculums. Both of these areas require some examination in light of the first amendment principles articulated in *Pico* and the vision of public education which is suggested by the multi-dimensional model. The question of judicial review should take account of the institutional competence of the courts to articulate and apply the relevant standards in the different contexts presented.

1. Library Acquisition Decisions

Although the *Pico* plurality opinion is limited specifically to the library book removal issue, both the concurring and dissenting justices perceive that the underlying first amendment principle applies equally to library acquisition decisions.[243] Similarly, if the multi-dimensional model of education supports first amendment protection in the removal context, then it is hard to see why it should not also support constitutional limitations in the acquisition context since the same danger of homogenization of ideas is present. Acquisition decisions, however, generally are not made in the same public setting where removal decisions are made and, thus, are not subject to public scrutiny in

243. 457 U.S. at 878 n.1 (Blackmun, J., concurring); *id.* at 911-12 (Rehnquist, J., dissenting). As Justice Rehnquist notes, the plurality's "right to receive" doctrine seems to apply with equal force to the acquisition decision since this is the stage at which the government makes the initial determination whether to make information available to students. But the courts can avoid any problems associated with the "right to receive" doctrine by relying upon the more limited first amendment concept of governmental neutrality. This still assures that educational decisions are made in a manner compatible with first amendment principles. *See* 457 U.S. at 879-80 (Blackmun, J., concurring); *supra* notes 105-08 and accompanying text.

nearly the same fashion.[244] Nevertheless, various groups have recently expressed concern about library acquisition policies, and they have been quite active in the textbook selection area for some time.[245] There is, therefore, a definite prospect of future litigation in this area.

The legitimacy-competency considerations which support judicial review of removal decisions apply equally to the acquisition decision, except additional considerations confront a court facing an acquisition challenge. The basic first amendment principle of content neutrality should govern the acquisition decision and, as in the removal area, courts should be familiar with application of this principle. However, the acquisition area presents courts with potential policy considerations which are not as evident in a removal controversy. The acquisition decision involves a choice of one or more books among many whereas a removal decision focuses on one or a few books. Consequently, in the acquisition area courts could be called upon to examine the decision against the backdrop of a range of possible decisions which might have been made. Courts could become mired in the dilemma of judging the relative quality of various works. But this is not inevitable, since the initial question is whether the decision not to acquire a particular book or type of book was made for impermissible reasons—disapproval of the form or substance of the works which cannot be explained in terms of "educational suitability" or other neutral criteria.[246] The evidence that a court would receive to make this determination is basically the same type of evidence that it would receive in the removal context; and it should not prove unduly difficult for a court to assimilate and resolve this evidence.[247] So long as the court is convinced that the decision was reasonably reached in light of neutral criteria or educational considerations supported by educators who have reviewed the

244. None of the contemporary cases challenge library acquisition decisions. *See* Harpaz, *supra* note 159, at 93. This may well be explained by the practical evidentiary problems that confront plaintiffs who might object to the decision. *See* Pico v. Board of Educ., 638 F.2d 404, 436 (2d Cir. 1980) (Newman, J., concurring), *aff'd*, 457 U.S 853 (1982).

245. The Moral Majority has initiated a campaign to review the collections of public libraries to determine whether the collections adequately reflect conservative political doctrine. *See* NEWSLETTER ON INTELL. FREEDOM 103 (1982). Texas has been the focus of considerable controversy regarding the school textbook selection process. *See* Gabler & Gabler, *Mind Control Through Textbooks*, 64 PHI DELTA KAPPAN 96 (1982); 12 FREEDOM TO READ FOUND. NEWS 6 (1983).

246. It should be noted that the "educational suitability" and "pervasive vulgarity" exceptions to the neutrality rule adopted by the Court in *Pico* apply as well in the acquisition area. Additionally, other considerations could explain an acquisition decision in neutral terms: cost, shelf space, and existing coverage in the same area. An acquisition determination based on any of these factors should also pass constitutional muster under the first amendment since the decision cannot be related to disagreement with the ideas or viewpoints expressed.

247. *See supra* notes 210-16 and accompanying text; *see also* Harpaz, *supra* note 159, at 101.

work, there should be no first amendment problem.[248]

Somewhat more troublesome in the acquisition area is the problem of formulating an adequate remedy that is not overly intrusive. A court could enforce a decision finding a constitutional violation by requiring school officials to purchase additional books. This would differ considerably from the equitable remedies applicable in the removal case since it would require the expenditure of school resources and could redirect funds that were committed elsewhere in the educational program.[249] It also could involve the court in the book selection process. But a court could avoid this unseemly intrusion by framing an injunction to prohibit school officials from adhering to the impermissible acquisition policy in the future and to require officials to expend at least a portion of the remaining current acquisition budget to remedy the violation. Given the court's explicit omission of the acquisition decision from its *Pico* holding, and the dearth of case law on this point, it is unlikely that a monetary damage award under the *Strickland* criteria would be appropriate.[250]

There is, therefore, not as great a difference between judicial review of the removal and acquisition decision as might initially appear. Courts should be able to apply the first amendment neutrality standard in this context although the evidentiary inquiry might prove a bit more difficult. If the courts exercise their usual restraint in framing an appropriate remedy, this aspect of the litigation should not present an insurmountable problem. The added difficulty is certainly justified in order to assure that the first amendment principles underlying the multi-dimensional educational model are honored in fact as well as in theory in the school library.

2. Curriculum Decisions

In *Pico*, the plurality expressly excluded curriculum decisions from its ruling.[251] Justice Brennan observed that the school board "might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values."[252] Justice Blackmun similarly concluded that curriculum decisions generally should not be governed by the first amendment neutrality principle since school officials are entitled to exercise

248. *See supra* notes 217-25 and accompanying text; *cf.* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (teacher dismissal case).

249. While this type of remedy would differ from the remedy in *Pico*, it is not unusual for courts to utilize their equitable powers in remedying constitutional violations by requiring governmental entities to expend resources. *See, e.g.*, Little v. Streater, 452 U.S. 1 (1981) (state required to provide blood tests for indigent defendant in paternity suit); Milliken v. Bradley, 433 U.S. 267 (1977) (court may order compensatory or remedial education programs for children who have been subjected to segregation).

250. *See supra* notes 235-39 and accompanying text.

251. 457 U.S. at 862.

252. *Id.* at 869.

discretionary judgment in this area.[253] The *Pico* dissenters, however, observe that the plurality's rationale seems to apply with greater force to school curricular decisions than to the library setting. Chief Justice Burger, for example, observes that "[i]t would appear that required reading and textbooks have a greater likelihood of imposing a 'pall of orthodoxy' over the educational process than do optional reading."[254]

The dissent's concern is certainly legitimate. Since the school library serves as an adjunct to the curriculum,[255] library-related decisions cannot be entirely divorced from curriculum-related decisions. Both are designed to promote student learning and development. Nevertheless, as Justice Brennan notes in *Pico*, school library use is optional in most instances,[256] so students are under no compulsion requiring them to read or assimilate particular information. The same cannot necessarily be said regarding courses or materials which comprise a school curriculum. Unless the course or assignment is optional, a student will be exposed to the material and, in most instances, expected to master it. It is hard to understand, therefore, why school officials should enjoy virtually free rein in making curriculum decisions which will have a direct impact on all students, and find their discretion limited when they make library-related decisions which will affect indirectly only a segment of the student population. If first amendment values are important enough to warrant protection in the school library, then they should also warrant protection in the classroom—where it really matters.

The Court has sanctioned judicial intervention to overturn local educational decisions in cases where it perceived constitutional values were threatened by ill-conceived curricular requirements. In *Meyer v. Nebraska*[257] and *Epperson v. Arkansas*,[258] the Court upheld constitutional challenges to state statutes limiting public school curriculums. While neither of these decisions rested upon first amendment free speech doctrine, the Court's underlying

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253. *Id.* at 878 n.1 (Blackmun, J., concurring). Justice Blackmun noted that:

> As a practical matter, however, it is difficult to see the First Amendment right that I believe is at work here playing a role in a school's choice of curriculum. The school's finite resources—as well as the limited number of hours in the day—require that education officials make sensitive choices between subjects to be offered and competing areas of academic emphasis; subjects generally are excluded simply because school officials have chosen to devote their resources to one rather than another subject.

Justice Blackmun also worries that student first amendment challenges to curricular decisions could reach "intolerable levels if public participation in the management of the curriculum becomes commonplace." *Id.*; *see also id.* at 880.

254. *Id.* at 892 (Burger, C.J., dissenting). Justice Powell observes that the plurality's reasoning would sanction student oversight concerning the addition or removal of courses from the curriculum. *Id.* at 895 (Powell, J., dissenting).

255. *Pico*, 457 U.S. 853, 915 (Rehnquist, J., dissenting).

256. *Id.* at 869 (majority opinion).

257. 262 U.S. 390 (1923).

258. 393 U.S. 97 (1968).

rationale in both cases can be traced to such concerns.[259] This suggests that the first amendment might be applied as a meaningful constitutional restraint in reviewing curricular decisions. The first amendment neutrality principle, as demonstrated by its application in the school library setting, provides a plausible standard for judicial review of such decisions. Moreover, a curriculum which is unduly structured along partisan, value-laden lines is inherently inconsistent with the multi-dimensional model of education. But, before concluding that judicial review of student first amendment challenges to such curricular decisions is appropriate, it is necessary to consider carefully the nature of curricular decisionmaking in the public schools and the approaches which lower courts have adopted in resolving challenges to curriculum decisions. The consideration will involve review and application of the judicial competency factors as they relate to first amendment challenges to curriculum decisions.

School boards and officials responsible for curriculum decisions are required to make a myriad of decisions allocating finite resources and classroom time among many subjects and materials that are appropriate for instruction. Such determinations require difficult judgments concerning the scope, emphasis, and treatment of the subjects, as well as decisions to incorporate, eliminate, or revise subjects and materials.[260] In many instances, curriculum decisions are made against the backdrop of state legislation that sets forth basic standards and requirements for the school system while allowing local officials some flexibility to structure their programs within broadly defined limits.[261] State and local officials charged with the responsibility of shaping and implementing the curriculum ordinarily can be expected to base their decisions on educational goals. The Supreme Court accordingly has indicated that such officials must be granted broad discretion in curricular matters, and that judicial review authority is limited.[262]

Challenges to educational curriculum decisions can arise in several contexts and involve many different parties. As in the library setting, school curriculum decisions which might prove controversial and objectionable tend to involve acquisition and removal-type decisions. For example, students or their parents might object to state regulatory legislation establishing such things as required courses or standards for textbook selection.[263] Or they might question

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259. *See* Epperson v. Arkansas, 393 U.S. 97, 105 (1968) (first amendment does not tolerate laws that cast a "pall of orthodoxy over the classroom;" quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)); Meyer v. Nebraska, 262 U.S. 390, 401 (1923) ("Evidently the legislature has attempted materially to interfere . . . with the opportunites of pupils to acquire knowledge.").

260. *Pico*, 457 U.S. at 878 n.1, 880 (Blackmun, J., concurring).

261. *See, e.g.*, MO. REV. STAT. § 170.011 (1978); N.C. GEN. STAT. § 115C-81 (1983); WYO. STAT. § 21-9-102 (1977).

262. Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

263. *See, e.g.*, Johnson v. Stuart, 702 F.2d 193 (9th Cir. 1983) (challenge to Oregon textbook selection statute); Cornwell v. State Bd. of Educ., 428 F.2d 471 (4th Cir. 1970) (challenge to Maryland requirement implementing sex education classes); *cf.* Epperson v. Arkansas, 393 U.S. 97 (1968) (challenge to Arkansas statute preclud-

the elimination of courses or materials from the state's curriculum.[264] Alternatively, they might object to local decisions to add or drop courses,[265] select or discontinue textbooks,[266] and use or reject various instructional materials.[267] In several instances teachers, rather than students or parents, have asserted first amendment constitutional rights to challenge these types of curriculum decisions.[268]

For the most part, lower courts have adopted a deferential approach in reviewing challenges to curricular decisions. The courts have been particularly reluctant to review course selection or content decisions. In *Mercer v. Michigan State Board of Education*,[269] the three judge district court rejected a teacher's first amendment challenge to a state statute that prohibited instruction in the subject of birth control and allowed parents to withdraw students from sex education classes.[270] In *Zykan v. Warsaw Community School Corp.*,[271] the court of appeals deferred to a school board decision eliminating seven courses from the high school curriculum despite the allegation that the board's action was based exclusively upon the personal, political, and moral views of the members.[272]

Similarly, the courts have been reluctant to second guess school board or textbook commission decisions concerning the adoption or rejection of particu-

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ing teaching of evolution in the public schools).

264. *See, e.g.*, Loewen v. Turnipseed, 488 F. Supp. 1138 (N.D. Miss. 1980) (challenge to Mississippi textbook selection procedure and refusal to authorize particular state history text); Mercer v. Michigan State Bd. of Educ., 379 F. Supp. 580 (E.D. Mich.) (challenge to Michigan statute prohibiting instruction in subject of birth control), *aff'd mem.*, 419 U.S. 1081 (1974).

265. *See, e.g.*, Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980).

266. Cary v. Board of Educ., Adams-Arapahoe School Dist., 598 F.2d 535 (10th Cir. 1979).

267. Pratt v. Independent School Dist. No. 831, Forest Lake, 670 F.2d 771 (8th Cir. 1982); Seyfried v. Walton, 668 F.2d 214 (3d Cir. 1981).

268. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97 (1968); Cary v. Board of Educ., Adams-Arapahoe School Dist., 598 F.2d 535 (10th Cir. 1979); Mercer v. Michigan State Bd. of Educ., 379 F. Supp. 580 (E.D. Mich.), *aff'd mem.*, 419 U.S. 1081 (1974). *See generally* Hunter, *Curriculum, Pedagogy, & the Constitutional Rights of Teachers in Secondary Schools*, 25 WM. & MARY L. REV. 1 (1983).

269. 379 F. Supp. 580 (E.D. Mich.) (three judge court), *aff'd mem.*, 419 U.S. 1081 (1974).

270. *Cf.* Epperson v. Arkansas, 393 U.S. 97, 111 (1968) (Black, J., concurring) (Justice Black arguing that local school officials may eliminate higher mathematics, astronomy, biology, or virtually any subject from the curriculum without running afoul of the first amendment); *id* at 115-16 (Stewart, J., concurring) (Justice Stewart observing that: "The States are most assuredly free 'to choose their own curriculums for their own schools' "); Cornwell v. State Bd. of Educ., 428 F.2d 471 (4th Cir.) (unsuccessful parental challenge to state board of education bylaw requiring local school systems to implement sex education programs in the curriculum), *cert. denied*, 400 U.S. 942 (1970).

271. 631 F.2d 1300 (7th Cir. 1980).

272. *Id.* at 1302.

lar books for the classroom.[273] In *Cary v. Board of Education*,[274] for example, the court of appeals ruled against teachers who asserted a first amendment violation when the school board deleted ten books from the elective language arts curriculum for political reasons which were "influenced by the personal views of the members."[275] In *Zykan*, the court also rejected a student challenge to the school board's textbook removal authority by according school officials considerable latitude to impose their personal views over curriculum matters so long as they did not establish a rigid, indoctrinative system.[276] Courts have also deferred to official decisions in other curricular areas, such as the appropriateness of student dramatic productions[277] or the use of classroom audio-visual equipment,[278] and have rejected challenges to those aspects of the curriculum.

The courts, however, have entertained some challenges to curriculum-related decisions. In *Loewen v. Turnipseed*,[279] the district court ruled that the Mississippi textbook approval scheme and the rating committee's refusal to approve a particular state history textbook violated first and fourteenth amendment rights.[280] The court observed that parents, teachers, and students had "a fundamental [first amendment] interest in maintaining a free and open educational system that provides for the acquisition of useful knowledge."[281] Mississippi's scheme violated first amendment rights because it provided no procedure for review of the discretionary judgment of the textbook rating committee.[282] In *Pratt v. Independent School District No. 831*,[283] the court of ap-

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273. *See, e.g.*, Minarcini v. Strongsville City School Dist., 541 F.2d 577 (6th Cir. 1976). In *Minarcini*, the court rejected a first amendment challenge to the school board's textbook selection decisions by observing that state law empowered school boards, not teachers or students, to exercise this authority. *Id.* at 579-80.

274. 598 F.2d 535 (10th Cir. 1979).

275. *Id.* at 544. The court was clearly troubled by the arbitrary nature of the school board's decision. The court noted, however, that the parties had stipulated that there was no systematic effort "to exclude any particular type of thinking or book." *Id.* Concurring, Judge Doyle argued for a standard that would prohibit boards from reaching such decisions on a purely arbitrary basis; he would require the board to provide a reason for its decision to facilitate judicial review if it were sought. *Id.* (Doyle, J., concurring).

276. 631 F.2d at 1306.

277. Seyfried v. Walton, 668 F.2d 214 (3rd Cir. 1981).

278. Davis v. Page, 385 F. Supp. 395, 402 (D.N.H. 1974).

279. 488 F. Supp. 1138 (N.D. Miss. 1980).

280. The *Loewen* litigation arose when the Mississippi textbook rating committee reviewing ninth grade history textbooks refused to certify for adoption the book MISSISSIPPI: CONFLICT & CHANGE, which discussed the history of slavery and race relations in Mississippi. The court noted that the book had been favorably reviewed by several scholars and in one study it had been ranked as the superior book available on the subject. *Id.* at 1149. The court concluded that the reasons given by the committee for rejecting the text evidenced a racially discriminatory motive. *Id.* at 1154.

281. *Id.* at 1153.

282. *Id.* at 1153-54.

283. 670 F.2d 771 (8th Cir. 1982).

peals sustained a student first amendment challenge to a school board decision deleting the use of a film in high school English classes. The court concluded that the school board had ordered the film removed because it disagreed with the film's ideological and religious themes.[284] Recently, the court of appeals in *Johnson v. Stuart*[285] extended standing to parents and students to raise a first amendment challenge to Oregon's American history textbook selection statute that precluded the adoption of any book which "speaks slightingly of the founders of the republic or of those who preserved the union. . . ."[286]

In many respects, the *Loewen* and *Pratt* decisions can be compared favorably to the *Pico* ruling. Factually, *Loewen* and *Pratt* focused on the decision of whether to approve or remove a particular book or film for educational use and both alleged that the decision had been based upon impermissible criteria. Both involved challenges to highly visible, public decisions reached after some heated controversy concerning the material. In both cases, a respected body of educational professionals concluded that the material was appropriate for use in the curriculum; nevertheless, this position was rejected by the authorized decisionmakers. The legal analysis was similar in each instance. The courts relied upon first amendment neutrality principles to review the challenged decisions, and the courts implicitly adopted the multi-dimensional model of public education by rejecting the argument that curriculums can selectively reflect narrow, value-laden choices. In *Pratt*, the court pointedly rejected any distinction between the library book removal cases and the curriculum challenge involved there:

> That is because the effect of banning the films due to their ideological and religious content is the same as the effect of removing books from a library for the same reasons. In both situations, the action of the school officials clearly indicates that the ideas contained in the banned materials are unacceptable and, hence, the exercise of First Amendment freedoms is inhibited.[287]

This suggests that the *Pico* holding has some currency in the curriculum area, and that judicial competency considerations—at least when first amendment

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284. *Id.* at 776-77. The school board disregarded the recommendation of its Committee for Challenged Materials which was composed of two citizens, two teachers, one media person, one administrator and one student and was established to review complaints about curricular materials. *Id.* at 774. In rejecting the Committee's recommendation, the board failed to provide any reasons for its decision. Subsequently, the board adopted a resolution condemning the film because it unduly emphasized violence and bloodshed. *Id.* at 774-75. The district court rejected the resolution as evidence of the board's motivation, and ordered the film reinstated in the curriculum. *Id.* at 775.

285. 702 F.2d 193 (9th Cir. 1983).

286. OR. REV. STAT. § 337.260 (1983). Since the plaintiffs' complaint had been dismissed by the district court for lack of standing, the court did not reach the merits of the first amendment claim. The court did, however, sustain the district court decision denying standing to Oregon teachers to challenge the textbook selection statute. *Id.* at 194-95.

287. 670 F.2d at 776 n.6.

constitutional values are clearly implicated—do not preclude judicial review of curriculum decisions.

Application of the *Pico* ruling in the curriculum area would require courts reviewing first amendment challenges to apply the neutrality principle and examine the motivation underlying official curricular decisions. Since most curriculum decisions are based upon policy considerations that bear some relation to the schools' educational mission, courts also might have to evaluate the "educational suitability" of particular curriculum decisions. Courts, thus, run the distinct risk of entangling themselves in educational policy considerations when they attempt to review curricular decisions. But, while this suggests caution, it does not mean that judicial review should always be rejected in this area. Given the mandatory nature of at least part of most school curriculums, the potential consequences of narrow, partisan curricular decisions are considerably more troublesome than those which may arise in the case of library decisions. And, if curricular decisions were entirely insulated from judicial review, the multi-dimensional model of education could be undermined in such a manner as to render its application in the school library context virtually meaningless.

The neutrality principle can be applied to review curricular decisions which unduly contract or limit subjects solely because officials disagree with the point of view or content of the material or course. Application of the neutrality doctrine in the curriculum area simply requires courts to make the same evidentiary inquiry which they are required to make in evaluating library book removal decisions.[288] If the challenged curriculum decision involves the removal of material from the curriculum, as in the *Pratt* case, the court will have to make a relatively narrow inquiry to examine the board's motivation regarding the relevant material. If the objection is that officials have not included particular material in the curriculum, as in the *Loewen* case when a history textbook was rejected, the court may face a broader inquiry. The court might have to evaluate the relevant material against the range of possible choices which might have been made—much as would occur in the library acquisition case. The evidentiary inquiry, however, would still focus on the board's motive regarding the material at issue, and often this can be divined easily by examining objective factors surrounding the decision.[289]

Most curricular decisions can or would be defended as reasonable educational judgments. A court confronted with an "educational unsuitability" explanation regarding a challenged curricular matter, thus faces the prospect of deferring to this explanation or inquiring further and possibly miring itself in a policy matter which defies principled judicial resolution. But a court is not inherently incapable of determining whether the decision can be justified on the basis of educational considerations. For example, in *Pratt* the court rejected the school board's after-the-fact explanation and noted that the board's

288. *See supra* notes 210-16 and accompanying text.
289. *See supra* notes 228-30 and accompanying text.

established review committee—which included several educators among its members—had recommended retention of the controversial film and that other testimony from educators supported use of the film as an educational tool.[290] In *Seyfried v. Walton*,[291] on the other hand, the court sustained a school board decision to cancel a scheduled play which was regarded as an "integral part" of the school's curriculum despite a student first amendment challenge.[292] The court concluded that the board's decision was based upon concern over the play's sexual content,[293] and there was no evidence to suggest any ulterior motive. There was also no evidence presented to the court clearly indicating that any educational professionals disagreed with the decision.[294] These decisions illustrate that judicial scrutiny of an "educational unsuitability" defense may only require the court to examine the factual circumstances surrounding adoption of the curriculum decision. If the court must inquire further, however, the decisions also suggest that the court can utilize the testimony of educational professionals—or the absence of professional dissent as in the *Seyfried* case—to determine the validity of "educational unsuitability" claims, thus avoiding the difficulty of resolving this type of issue without adequate guidance.

As in the library area, courts should not face any unusual problem receiv-

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290. 670 F.2d at 774, 777; *see also* Loewen v. Turnipseed, 488 F. Supp. 1138 (N.D. Miss. 1980). The *Loewen* court similarly rejected after-the-fact testimony of textbook rating committee members and credited the testimony of independent educational professionals who rated the book highly. *Id.* at 1147, 1149.

291. 668 F.2d 214 (3d Cir. 1981).

292. *Id.* at 216. In *Seyfried*, parents of three student cast members of the play "Pippin" sued the local school board when it upheld the district superintendent's decision cancelling production of the play. Rehearsal of the play had already commenced under the supervision of an English teacher, and the assistant principal had approved an edited script. Nevertheless, upon review, the superintendent concluded that the sexual content of the play was inappropriate and the school board agreed after considering the views of interested parents. The suit alleged a first amendment violation in the cancellation decision, but the court concluded that constitutional values were not "directly and sharply implicate[d]." *Id.* at 217. The court's decision granted educational officials considerable leeway in structuring the school's curriculum, noting that choices must be made in allocating finite resources, and that some of these choices would inevitably suggest a preference for one set of values over another. *Id.*

293. *Id.* at 215-16. The concurring judge noted that state officials have traditionally been given greater leeway under the first amendment to regulate sexually oriented material in the case of minors. *Id.* at 220 (Rosenn, J., concurring). He, therefore, also concluded that the cancellation decision was appropriate. *Id.* It can certainly be argued that the *Pico* "pervasive vulgarity" standard might apply in this case to sustain the board's action, as well as the "educational suitablity" standard. *See Pico*, 457 U.S. at 871.

294. It could be inferred that the teacher-sponsor of the production and the vice principal who approved the script disagreed with the cancellation decision. Yet neither of them participated in the litigation or testified. Absent contrary evidence from educational professionals, the court could legitimately accept the board's proffered rationale for the cancellation and conclude that it represented a reasonable educational judgment. *See supra* notes 222-31 and accompanying text.

ing and resolving evidence regarding disputed curriculum decisions. Most curriculum disputes are likely to present a bipolar controversy, thus party alignment will not prove difficult.[295] In unusual cases courts may have to resolve conflicting evidence from educational professionals regarding the merits of a particular curriculum decision, but this would simply mean that the court must evaluate the credibility of the proffered testimony—a customary task for courts.[296] In this situation, it would be appropriate for courts to resolve the matter in favor of the school officials whose decision is challenged if they can offer an acceptable and credible neutral explanation for their actions which is related to the educational program.[297] For instance, if relevance considerations or resource limitations dictated a particular revision in the curriculum, the school officials should be entitled to judgment although other professionals might disagree with their decision.

The problem of framing an appropriate remedy in challenges to decisions to remove a text or material or to delete a course from the curriculum presents little more difficulty than in the library book removal area. A judgment finding a first amendment violation can be enforced by an injunction requiring retention of the challenged material or course. This should not present a financial burden to the school system since the material has already been purchased. Similarly, it should not prove a burden on the allocation of resources since the system had previously provided for curricular coverage and teaching resources, therefore, should be available.

A challenge to a curriculum decision which could be remedied only with additions to the existing curriculum, on the other hand, presents the likelihood that a court injunction would require school officials to reallocate financial or other resources.[298] The court must be sensitive to the resource problem in framing an injunction for plaintiffs. Two options are readily apparent. The court could require school officials to restructure the existing curriculum to include the improperly omitted material and to redirect already committed resources to accomplish this objective. Or the court could require officials to remedy the deficiency in the future by relying upon future resources to accomplish the task. When sensitive considerations of this nature are involved, the court could invite the direct participation of school officials to see that the

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295. If additional parties might have some interest in the dispute, they can be accommodated through intervention or participation as amicus curiae.

296. *See, e.g.*, Loewen v. Turnipseed, 488 F. Supp. 1138 (N.D. Miss. 1980).

297. *See, e.g.*, Seyfried v. Walton, 668 F.2d 214 (3d Cir. 1981); *cf.* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (school board dismissal of teacher which violated the teacher's first amendment rights can be sustained if the board would have dismissed for other, permissible reasons).

298. If officials had already decided to add to the curriculum and the lawsuit only required the court to weigh the challenged decision against other possible decisions (i.e. one set of textbooks was selected rather than another set), then a judgment and injunction upholding the challenge would not involve the additional expenditure of resources. The court would just order the officials to redirect the available and already committed resources.

remedy was appropriately framed under the circumstances.[299] Consequently, while remedial problems might present themselves when courts confront curriculum challenges, the problems are not insurmountable and, thus, courts should not be regarded as incompetent institutions for resolving such claims.[300]

Since courts are capable of utilizing the *Pico* criteria to address first amendment challenges to curricular decisions it is appropriate to re-evaluate the pre-*Pico* decisions rejecting such challenges to determine whether the claims were properly rejected. In *Zykan* and *Cary*, the courts adopted a deferential stance in reviewing school board decisions deleting particular books or courses from the curriculum.[301] In each instance, the court was persuaded that the school board enjoyed broad discretion to determine the high school curriculum. The courts observed that book or course deletion decisions based on the personal, political, or moral views of school board members did not raise first amendment issues, so long as the board did not act to impose a rigid, doctrinaire course of study or eliminate entirely particular lines of inquiry.[302]

The *Pico* neutrality standard, however, suggests that the courts may have been too deferential in their review. Curricular decisions which are based on hostility to the ideas or point of view presented in the book or course may run afoul of the first amendment unless they can be justified on the basis of educational considerations.[303] While education officials clearly are entitled to make curriculum decisions with a view toward transmitting local political and social values, they do not enjoy unlimited discretion to impose their own beliefs over the curriculum.[304] Since these cases involved challenges to the removal of particular books and courses it should not be too difficult for the courts to inquire into the underlying motivation of the school board.[305] The school board's failure to follow an established review procedure, as in *Zykan*, should cause a

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299. This approach is routinely utilized in institutional reform and school desegregation litigation. *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1298-1302 (1976).

300. Since the Supreme Court has not directly addressed a student first amendment challenge to curriculum decisions, a damage award would be inappropriate under the doctrine enunciated in Wood v. Strickland, 420 U.S. 308 (1975). *See supra* notes 235-39 and accompanying text.

301. *See supra* notes 271-76 and accompanying text (detailed discussion of the facts and the court's analysis in each case).

302. *See* Zykan v. Warsaw Community School Corp., 631 F.2d 1300, 1306 (7th Cir. 1980); Cary v. Bd. of Educ., Adams-Arapahoe School Dist., 598 F.2d 535, 544 (10th Cir. 1979); *see also* Minarcini v. Strongsville City School Dist., 541 F.2d 577, 580-83 (6th Cir. 1976).

303. *Pico*, 457 U.S. at 871.

304. *Cf. id.* at 869. The plurality in *Pico* expressly limits the discretionary authority of the school board in the case of library book removal decision, but the plurality suggests that school board discretion might be greater in the classroom setting.

305. In fact, in *Cary* the court had no difficulty concluding that the school board deleted the books in question from the curriculum precisely because members' personal tastes were offended by the books. Cary v. Board of Educ., Adams-Arapahoe School Dist., 598 F.2d 535, 544 (10th Cir. 1979).

court to examine carefully the board's proffered explanation for its actions.[306] If the school board justified its decision on educational grounds, it then would be appropriate for the court to consider the views of professional educators and others who had reviewed the books and courses, assuming such evidence was available and offered.[307] In both cases, teachers had endorsed the material which the school board ultimately eliminated. Thus, unless the school board could otherwise demonstrate that its decision was educationally reasonable or that additional independent and neutral reasons existed, the court should find a first amendment violation.[308] In granting relief in *Zykan* and *Cary* the court would only have to order reinstatement of the material into the curriculum and, therefore, the school districts would not face significant depletion of their financial resources.

The controversy in *Mercer* presents a different problem in determining whether judicial intervention based on the *Pico* standard is appropriate. In *Mercer*, a teacher challenged a Michigan statute that prohibited instruction, advice, or information on birth control in the state's sex or health education classes.[309] A court applying the *Pico* criteria, thus, would be confronted with determining the motive or purpose of the state legislature in adopting the statute—a task which is considerably more difficult than that involved in uncovering the motivation of a smaller administrative body, such as a school board.[310] On its face, the statute appears to violate the first amendment neutrality principle since it prohibits virtually any recognition or discussion of the subject of

306. 631 F.2d at 1302, 1306-07. The plaintiffs objected that the school board had failed to adhere to the "Croft policy" for review of curricular decisions. The court, however, concluded that the policy did not officially constrain the school board under established state law or constitutional due process requirements. *Id.* at 1307. The significant fact is not the legal force of the policy, but the motivational inferences that can be drawn from the board's failure to adhere to it. *See Pico*, 457 U.S. at 874-75. Moreover, in *Zykan* the court observed that school officials turned the controversial books over to a local senior citizens group which publicly burned the books. 631 F.2d at 1302 n.2. As the court properly observed, this fact also bears some relevance in discerning the motivations of the school board. *Id.*; *see also id.* at 1309 (Swygert, J., concurring) (Judge Swygert notes that several of the deleted books dealt with the subject of feminism and he infers from this a possible motive to suppress "a particular kind of inquiry generally.").

307. *See Pico*, 457 U.S. at 874.

308. *See supra* notes 222-32 and accompanying text. The school board could, of course, offer the testimony of other educational professionals to justify the removal decision. In that case the court would have to evaluate the conflicting testimony, as well as other evidence, to determine the validity of the board's explanation.

309. 379 F. Supp. 580, 582 n.* (E.D. Mich. 1974) (three judge court), *aff'd mem.*, 419 U.S. 1081 (1974).

310. *See* O'Brien v. United States, 391 U.S. 367, 383 (1968) ("Inquiries into congressional motives or purposes are a hazardous matter."). *But see* Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265-66 (1977) ("when there is proof that a discriminatory purpose has been a motivating factor in the [legislative or administrative] decision, this judicial deference is no longer justified."); Loewen v. Turnipseed, 488 F. Supp. 1138, 1148-49 (N.D. Miss. 1980).

birth control. Justice Stewart addressed this problem in his *Epperson* concurrence when he observed:

> It is one thing for a State to determine that [particular subjects] shall or shall not be included in its public school curriculum. It is quite another thing for a State to make it a criminal offense for a public school teacher so much as to mention the very existence of an entire system of respected human thought.[311]

Of course, the state could still argue that neutral educational considerations prompted the ban on the discussion or mention of birth control, but this argument loses its force since the state had otherwise sanctioned sex education classes. The legislative purpose was apparently based on hostility to the topic—an educationally appropriate subject in the context of a high school sex education course. Therefore, if the statute were interpreted to preclude mention or discussion of birth control in the sex education classes, a court would be justified in finding a first amendment violation and enjoining operation of the statute.

In *Johnson v. Stuart*,[312] the court of appeals held that students and parents have standing to challenge an Oregon textbook selection statute which prohibits the use of any history text that "speaks slightingly of the founders of the republic or of those who preserved the union or which belittles or undervalues their work."[313] The statute is clearly antagonistic to a legitimate point of view and to particular information and material (some of which might be verified as historically accurate). The statute is therefore inconsistent with the first amendment neutrality principle. Moreover, the statutory proscription cannot be reconciled with the multi-dimensional model of public education. Perhaps the state will advance neutral educational considerations to justify the statutory restriction, but any such justifications should be carefully scrutinized. In this event, it would be appropriate for the court to examine the opinions of educators and historians on the subject to determine whether legitimate educational goals can be attributed to the statute. If the court voids the statute on first amendment grounds, this should not present difficult remedial problems since the court can issue a prospective injunction against enforcement of the statute. By framing the injunction prospectively, the court could minimize disruption of the educational process and avoid imposing costly remedial requirements on the districts such as the replacement of existing textbooks.[314] Thus,

311. Epperson v. Arkansas, 393 U.S. 97, 116 (1968) (Stewart, J., concurring).

312. 702 F.2d 193 (9th Cir. 1983).

313. *Id.* at 194; *see* OR. REV. STAT. § 337.260 (1983). The sweep of the statute is potentially very broad. For example, the statute seems to preclude adoption of a history textbook which contains the accurate statement that Thomas Jefferson was a slaveholder.

314. On July 24, 1984, the United States District Court for the District of Oregon entered a prospective injunction against the Oregon State Board of Education and the Oregon State Textbook Commission restraining them from thereafter enforcing the challenged statutory selection criteria. The court did not issue a written opinion, although the transcript of the summary judgment hearing indicates that the judge relied upon the *Pico* decision to conclude that the statute violated the students' first amend-

so long as state officials and local districts did not base future selection decisions on the illegal criteria, they would retain considerable flexibility in selecting textbooks and structuring the curriculum.

Despite the *Pico* plurality's reluctance to extend its holding to embrace judicial review of curriculum decisions on first amendment grounds, the Court's rationale can be extended to curricular matters since courts are not inherently incapable of undertaking the task. Re-evaluation of the lower court curriculum decisions suggests that review under the *Pico* criteria might have led to different results in several cases, but this is only true if the education officials were unable to offer a reasonable, neutral explanation related to educational considerations for their actions. Absent such an explanation, it is fair to conclude that the challenged actions represent serious instances of school board abuse of discretion. If so, then under the *Pico* standard, students and their parents should be able to turn to the first amendment to challenge narrowly partisan decisions which undermine the multi-dimensional model of education. Judicial review of curriculum decisions under these circumstances would protect constitutional values and guard against the excesses of majoritarianism in the classroom, as well as the school library.

This does not mean that courts will find themselves intervening regularly in educational controversies. School officials usually can be expected to adhere to their legal responsibilities in administering curriculum matters in a nonpartisan manner and to conform to established procedures in reviewing curriculum revisions. Students, their parents, and education professionals are unlikely to undertake lightly the rigors of litigation except for flagrant instances of abuse of official discretion. Thus, except for these rare cases, curricular decisionmaking is most likely to remain in the hands of local officials and beyond the pale of judicial oversight. When officials have exceeded or approached the limits of their authority, however, judicial review should not be foreclosed since the courts can present an appropriate forum for vindication of constitutional principles even when curricular considerations are involved.

VI. CONCLUSION

The Supreme Court reached the correct result in *Pico* despite the fact that a majority of the Court was unwilling to endorse the plurality's broad view of student first amendment rights and the school library. By relying upon traditional first amendment doctrine and precedent, the Court demonstrated that constitutional protections should apply in the public school setting. The Court properly rejected the argument that judicial review of school board decisionmaking is illegitimate and exceeds the institutional capacities of the courts. Instead the Court adopted the position that students are entitled to invoke the first amendment to advance its core values. Moreover, by recogniz-

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ment rights. A notice of appeal was filed by the state on August 23, 1984. Johnson v. Stuart, Civil No. 78-770-BU (D. Or. 1984).

ing that the first amendment applied in the public school environment the Court correctly embraced a multi-dimensional model of the public education system which is consistent with fundamental constitutional values. The Court's decision should actually advance the state's educational interests and enhance its relationship with its minor citizens.

Some difficulties may attend application of the *Pico* standards in library book removal controversies, but these problems should not exceed those which the courts ordinarily face in enforcing the first amendment. Furthermore, extension of the *Pico* ruling to authorize judicial review of library acquisition and curriculum decisions reached by school officials would not unduly tax the judicial competence of the courts. Rather, it would provide a limited check on the otherwise discretionary authority of public officials entrusted with the truly delicate task of educating our children. It also would give true meaning to the first amendment constitutional values which are so inextricably related to the public education process.