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The Island Trees Decision: The Constitutional Burden of School Boards

Elaine Price

Notes and Comments

The *Island Trees* Decision: The Constitutional Burden of School Boards

I. Introduction

In *Board of Education, Island Trees Union Free School District No. 26* v. *Pico*[1] a sharply divided Supreme Court affirmed a Second Circuit Court of Appeals' ruling which held that first amendment rights were implicated by a local school board's removal of books from school libraries.[2] *Island Trees* was the first Supreme Court decision recognizing the constitutional right of junior and senior high school students to receive information within the school environment.[3] The decision, although narrowly drawn, expands the scope of judicial intervention within the school setting[4] and encroaches upon the plenary powers of the local school board.[5]

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1. 102 S. Ct. 2799 (1982).

2. Pico v. Board of Educ., Island Trees Union Free School Dist. No. 26, 638 F.2d 404 (2d Cir. 1980). A three judge panel of the United States Court of Appeals for the Second Circuit reversed the judgment of the district court and remanded the action for a trial on the respondent students' allegations. Judge Sifton, in announcing the opinion of the court, said that the case involved "an unusual and irregular intervention in the school libraries' operations by persons not routinely concerned with such matters." *Id.* at 414-15. He concluded that the petitioner school board had to show a "reasonable basis" for interfering with respondents' first amendment rights. *Id.* at 417. Judge Newman concurred in the result. He stated that the case centered on the issue of whether the removal decision was prompted by the legitimate desire to remove books containing "vulgarities" and "sexual explicitness" or by the unconstitutional motive of suppressing ideas. *Id.* at 436-37.

3. *See generally* Note, *Right to Receive Information*, 55 TEX. L. REV. 511 (1977). Although courts had never given it separate consideration, the right to receive information has been viewed as the necessary complement to the right of free expression. The first Supreme Court case to recognize this independent right was Martin v. Struthers, 318 U.S. 141 (1943). *See infra* notes 43-48 and accompanying text.

4. Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 102 S. Ct. 2799, 2801 (1982) [hereinafter cited as Island Trees v. Pico].

5. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 402 (1923); Pierce v. Society of Sisters,

While attending a conference sponsored by a conservative parents' organization, four members of the Island Trees Education Board received a list of objectionable books.[6] Nine of these books were in the Island Trees High School library and one was in the Junior High School library.[7] The Board ordered that the designated books be removed from the library for review.[8] Reacting to school and public pressure, the Board appointed a book review committee whose final recommendation to the Board was rejected without explanation.[9] The Board ordered that one book be returned to the library, to be accessible only

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268 U.S. 519, 543 (1925); Epperson v. Arkansas, 393 U.S. 97 (1968) where the Court declared that "public education in our Nation is committed to the control of state and local officials." *Id.* at 101. *See also* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) where the Supreme Court noted that it has repeatedly stated that "the comprehensive authority of the states and of local school officials . . . prescribe and control conduct in the schools." *Id.* at 507.

6. Pico v. Board of Educ. Island Trees Union Free School Dist., 474 F. Supp. 387, 389 (E.D.N.Y. 1979). The conference was sponsored by Parents of New York United (PONYU), a politically conservative group of parents concerned about education legislation in New York. *Id.*

7. *Id.* The nine books in the high school library were: *Slaughterhouse 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* by Anonymous; *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. The book in the junior high school library was *A Reader for Writers* edited by Jerome Archer. *Id.* at nn.2-3.

8. *Id.* at 390. When this order was effectuated, the Board sent out a press release justifying its actions. The books were portrayed as "anti-American, anti-Christian, anti-Semetic, and just plain filthy." *Id.* The press release concluded that "[i]t is our duty, our moral obligation, to protect the children in our schools from this moral danger as surely as from physical and medical dangers." *Id.* The Superintendnet of Schools objected to the Board's removal on the basis that it was contrary to the procedures established by the Board. Pico v. Board of Educ., Island Trees Union Free School Dist. No. 26, 638 F.2d 404, 409 (2d Cir. 1980). The procedures call for the complaints to go directly to the Superintendent. He then appoints a committee to study the books and make recommendations. *Id.* Under N.Y. EDUC. LAW § 1711(d)(3) (McKinney Supp. 1982), the Superintendent of Union Free Schools has the authority to "recommend suitable lists of textbooks and . . . to have supervision and direction over libraries . . . under the management, direction, and control of the board of education." Whether the superintendent's authority includes book removal decisions is left open by the statute. Moreover, the statute does not describe procedures for book removal.

9. The report submitted by the committee recommended that four books be returned to the libraries, and two be removed. The committee could not agree on the other four books, but recommended that one be accessible only with parental approval. Pico v. Board of Educ., Island Trees Union Free School Dist., 474 F. Supp. 387, 391 (E.D.N.Y. 1979).

with parental approval,[10] and that the other nine books be removed.[11] Apparently, no Board member had read all of the nine books;[12] the members had relied instead on "excerpts" and "quotations" to reach their decision.[13] Plaintiff students[14] brought this action against the School Board charging that its removal of these books violated their first amendment rights since it was based on "social, political, and moral tastes" rather than on the books' lack of educational value.[15] The district court granted summary judgment for defendant, stating that the book removal "did not sharply and directly implicate first amendment values."[16] The court of appeals, in a two-to-one decision, reversed the district court and remanded the case for a trial on the merits.[17] The Supreme Court granted *certiorari*.[18]

Part II of this Note presents the legal background of the constitutional issues and educational concerns which were involved in the *Island Trees* decision. Part III presents the opinions of the Supreme Court justices. Part IV analyzes the reasoning of the plurality and dissenting opinions and presents criteria which aid in shaping the term "educational suitability." Part V considers the impact of the decision for the courts, educators, and the public. Part VI concludes that the inability of the jus-

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10. *Id.*

11. *Id.*

12. *Id.* It is inferred from the facts that no committee member had read all of the books. The School Board never contested the allegation that the books were removed solely because they were on the PONYU lists; *See* Brief of *Amicus Curiae* The Long Island Library Association Coalition In Support of Respondents at 5, Island Trees v. Pico, 102 S. Ct. 2799 (1982).

13. *Id.*

14. The students were represented by their parents as "next friends." Pico v. Board of Educ., Island Trees Union Free School Dist., 474 F. Supp. 387, 393 (E.D.N.Y. 1979).

15. *Id.*

16. *Id.* at 398. The court declared that the Board had acted in its conservative educational philosophy and that in its judgment the books were in "bad taste" and therefore educationally unsuitable. *Id.* at 396-97. The court continued by stating that although this philosophy may be misguided, it does not involve a "sharp and direct infringement of a first amendment right." *Id.* at 397.

17. Pico v. Board of Educ., Island Trees Union Free School Dist. No. 26, 638 F.2d 404 (2d Cir. 1980). The court of appeals noted that "[a] trial is required to determine what happened, why it happened, and whether . . . the School Board's actions . . . created a sufficient risk of suppressing ideas to constitute a violation of the first amendment." *Id.* at 438.

18. Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 454 U.S. 891 (1981).

tices to establish a firm foundation for the right to receive information in schools and to provide criteria for shaping the phrase "educational suitability" undermines this new constitutional right.

II. Constitutional Rights Within the School Setting

A. *Freedom of Expression*

Local school boards have long enjoyed expansive administrative and educational control in the operation of the community school system.[19] This authority, usually relegated to school boards through state constitutions,[20] reflects the state's interest in preparing citizens to function in a democratic society.[21] Parents and concerned citizens who serve on school boards are clearly the most motivated to effectuate the goals and objectives of the state and community.[22] Occasionally, the definition and means of implementing state and community aspirations produce divergent views among the school board, teachers, and students.[23] This lack of consensus has created the need to look to a higher, more neutral arbiter, the court, to reconcile these incompatible positions.

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19. *See, e.g.*, N.Y. EDUC. LAW § 1711(d)-(e) (McKinney Supp. 1982), which provides: "The said board of education of every union free school district . . . to have in all respects the superintendent, management and control of said union free school"; Epperson v. Arkansas, 393 U.S. 97 (1968). "By and large, public education is committed to the control of state and local authorities." *Id.* at 104.

20. *See, e.g.*, N.Y. CONST. art. XI, § 1 which requires the establishment and maintenance of a public school system by the state; WIS. CONST. art. X, § 1 which establishes that the setting up and operation of public schools is a governmental function of the state; *See also* Note, *Schoolbooks, School Boards, and the Constitution*, 80 COLUM. L. REV. 1092, 1095 (1980).

21. *See, e.g.*, Ambach v. Norwich, 441 U.S. 68 (1976). In that case the Supreme Court acknowledged the importance of the public schools "in the preparation of individuals for participation as citizens, and in the preservation of values on which our society rests." *Id.* at 76; Brown v. Board of Educ., 347 U.S. 483, 493 (1954). *But cf.* Comment, *Challenging Idealogical Exclusion of Curriculum Material: Rights of Students and Parents*, 14 HARV. C.R.-C.L. L. REV. 485, 493 (1979) which questions the Court's decision in *Ambach*.

22. *See* Note, *Schoolbooks, School Boards, and the Constitution*, 80 COLUM. L. REV. 1092, 1097 (1980); Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321, 344-45 (1979).

23. *See* Comment, *Censorship in the Public School Library—State, Parent and Child in the Constitutional Area*, 27 WAYNE L. REV. 167, 184 (1980). *See generally* R. O'NEIL, CLASSROOMS IN THE CROSSFIRE 110-37 (1981).

Although the courts have been reluctant to intervene in the historical arenas of state and local control, such as education, they have recognized the obligation to do so when constitutional rights have been "directly and sharply implicated."[24] The rights protected by the first amendment are frequently implicated when controversies rage over school book selection[25] or the freedom of teachers and students to express unpopular views.[26] The first amendment of the United States Constitution guarantees freedom of speech and press[27] and its unequivocal language strongly suggests that state regulation of expression is prohibited.[28] Moreover, the Supreme Court has consistently recognized the first amendment's protection of academic freedom.[29]

The Supreme Court in *Tinker* v. *Des Moines Independent Community School District* declared that "[t]he vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools."[30] The issue in *Tinker* was the students' right to freedom of expression "in wearing black arm bands within the classroom in protest of the Vietnam War."[31] The Court, in holding that the school's disciplinary action inter-

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24. Epperson v. Arkansas, 393 U.S. 97 (1968). "Courts do not and cannot intervene in the resolution of conflicts . . . which do not directly and sharply implicate basic constitutional values." *Id.* at 104.

25. *See, e.g.*, Cary v. Board of Educ., 598 F.2d 535 (10th Cir. 1979); Minarcini v. Strongville City School Dist., 541 F.2d 577 (6th Cir. 1976); Presidents Council, Dist. 25 v. Community School Bd., 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 989 (1972).

26. *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589 (1967); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969).

27. U.S. CONST. amend. I. The amendment provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of the press." It operates on the states through the fourteenth amendment. Gitlow v. New York, 268 U.S. 652, 666 (1925).

28. Keyishian v. Board of Regents, 385 U.S. 589 (1967). "Because first amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.* at 603-04 (quoting N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963)).

29. *See* Keyishian v. Board of Regents, 385 U.S. 589 (1967), in which the Supreme Court struck down a New York loyalty oath policy which prevented "subversives" from teaching in the state's universities. The Court stated: "The classroom is peculiarly the marketplace of ideas. The nation's future depends on leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, than through any kind of authoritative selection." *Id.* at 603. *See generally Developments in the Law—Academic Freedom*, 80 HARV. L. REV. 1045, 1054 (1968).

30. 393 U.S. 503, 512 (1969).

31. *Id.* at 505.

fered with the students' right to silent speech, said that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[32] In the majority opinion, Justice Fortas wrote that for fifty years, the Court has held that first amendment rights exist for teachers and students within the school setting:[33] "Students . . . are 'persons' under our Constitution . . . [and] may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."[34] Although conceding that under certain circumstances schools may validly regulate first amendment rights,[35] Justice Fortas declared that in this instance the school has the burden of showing that the edict against arm bands was prompted by more than the desire to eliminate the ramifications of expressing a controversial opinion.[36]

In *West Virginia v. Barnette,* first amendment considerations overrode a school board's policy which was designed to foster patriotism.[37] The Supreme Court held that forcing students to pledge allegiance to the flag was an overstepping of the board's constitutional limitations.[38] The Court reasoned that such action impinged on the intellectual and spiritual domain of the student which must remain outside the purview of official control.[39]

B. *The Right to Receive Information*

Although *Tinker* and *Barnette* held that the first amendment protections extend to the school environment,[40] the issues in those cases were confined to the students' right of free expression.[41] The right to receive information has historically been

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32. *Id.* at 506.

33. *Id.*

34. *Id.* at 511.

35. *Id.* at 509.

36. *Id.* The Court went on to say that when there is no evidence that the questioned conduct would seriously interfere with the necessary discipline in the operations of the school the "prohibition cannot be sustained." *Id.*

37. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

38. *Id.* at 642.

39. *Id.*

40. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

41. In both these cases, the right of free expression was "silent speech"—black arm

viewed as the necessary counterpart of free speech[42] although it was never treated as a distinct right by the courts. The Supreme Court in 1943 recognized this independent right for the first time in *Martin v. Struthers* which held that the first amendment protects the right to distribute and receive literature.[43]

Since then, the Court has espoused varying versions of this right within several contexts including radio and television broadcasts,[44] public speeches,[45] and mail distribution.[46] The common denominator in all these right to receive information cases was the direct connection between the communicator and the recipient; the person being denied the information had a direct relationship to the disseminator of this information.

The requirement of a direct connection between the communicator and the recipient was modified in a 1976 Supreme Court decision, *Viriginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, where the Court struck down a state statute which made it illegal for pharmacists to advertise drug prices.[47] The Court ruled that a first amendment right to receive information protects the purchaser's access to information on drug prices[48] even though there is no direct relationship between the pharmacist and the buyer. Thus, even an attenuated relationship between the communicator and the recipient was sufficient to invoke the right to receive information.

Although the dimensions of the right to receive information have continued to grow, the Supreme Court has never held that the right extends to the school setting. This lack of guidance from the Court has left the federal courts split. The Sixth Circuit and two district courts in the First Circuit have upheld the right of students to receive information within the school li-

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bands in *Tinker* and not pledging allegiance to the flag in *West Virginia*.

42. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council Inc., 425 U.S. 748 (1976).

43. 319 U.S. 141 (1943).

44. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

45. Kleindienst v. Mandel, 408 U.S. 753 (1972) (Court recognized the right of citizens to hear a Marxist lecture; however, United States laws governing alien entry into the country had to prevail).

46. Lamont v. Postmaster General, 381 U.S. 301 (1965); Martin v. Struthers, 319 U.S. 141 (1943).

47. 425 U.S. 748 (1976).

48. *Id.* at 772.

brary.[49] In contrast, the Second and Seventh Circuits have held that there is no first amendment infringement in the unshelving of library books.[50]

C. *Federal Court Decisions Upholding the Constitutionality of Book Removal*

Presidents Council, District 25 v. *Community School Board*, No. 25, decided by the Second Circuit Court of Appeals, was the first case to consider the constitutional implications of book removal decisions.[51] Initially, the School Board decided to remove *Down These Mean Streets* by Piri Thomas from junior high school libraries because it contained "explicit sexual interludes."[52] The Board later modified its decision and retained the book to be used only on direct parent loans.[53] The court, in ruling that the book restriction was constitutionally permissible, stressed that the first amendment protection was available only to speakers and writers, and not to recipients.[54] Significantly, this decision was rendered five years prior to *Virginia Pharmacy* which welcomed readers and listeners into the first amendment embrace.[55]

Eight years later in *Zykan* v. *Warsaw Community School Corp.* the Seventh Circuit Court of Appeals, in dicta, alluded to the existence of a limited constitutional right of students to receive information.[56] According to the court, however, this right must remain secondary to the primary goal of establishing sound educational policies.[57] While the court declared that personal,

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49. Minarcini v. Strongsville City School Dist., 541 F.2d 577 (6th Cir. 1976); Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269 (D.N.H. 1979); Right to Read Defense Comm. v. School Comm. of Chelsea, 454 F. Supp. 703 (D. Mass. 1978).

50. Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980); Presidents Council, Dist. 25 v. Community School Bd., 457 F.2d 289 (2d Cir. 1972).

51. 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972); *See generally* Note, *What Are The Limits To A School Board's Authority To Remove Books from School Library Shelves?*, WISC. L. REV. 417, 446 (1982).

52. Presidents Council, Dist., 25 v. Community School Bd., 457 F.2d at 291.

53. *Id.*

54. *Id.* at 293.

55. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). It is interesting to speculate that the conclusion in *Presidents Council* might have turned out differently if *Virginia Pharmacy* had been decided earlier.

56. 631 F.2d 1300, 1304 (7th Cir. 1980).

57. *Id.* at 1304, 1305.

social, political, and moral views can be the basis for educational decisions,[58] its holding does not stand for unfettered discretion of the school board. The court emphatically stated that "rigid and exclusive indoctrination"[59] is unconstitutional although it did not clarify the factors which would constitute "rigid indoctrination."

D. *Federal Court Decisions Asserting the Unconstitutionality of Book Removal*

Minarcini v. Strongsville City School District was the first case to hold that students have a first amendment right to receive information within the school environment.[60] The School Board had ordered Kurt Vonnegut's *Cat's Cradle* and Joseph Heller's *Catch 22* removed from the high school library,[61] justifying this action on the basis of a quote in the minutes of the Board meeting which described the books as "completely sick" and "garbage."[62] In holding that the books should be returned to the library shelves, the court applied the following reasoning: first, the right to receive information has been well established since the *Virginia Pharmacy* decision;[63] second, since the ability to read a book is an important adjunct to the constitutionally protected right to discuss it, book removal predicated on the personal, social or political tastes of board members is unconstitutionally blocking both ends of the communication process.[64]

The courts in *Right to Read Defense Committee* v. *School Committee of Chelsea,*[65] and *Salvail v. Nashua Board of Educa-*

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58. *Id.* at 1306. The court stated the because members reflect the values of their community, the board must take the responsibility to foster the societal goals which will permit the students to function in the community. *Id.* at 1304.

59. *Id.* at 1306.

60. 541 F.2d 577 (6th Cir. 1976).

61. *Id.* at 581.

62. *Id.*

63. *Id.* at 583.

64. *Id.* at 582. The court held that book removal was unconstitutional if it was based on the Board's objection to its content. *Id.* This decision does not take into consideration the necessity of making decisions on the basis of what is being taught. Moreover, it is not clear whether the court would have found any interest substantial enough to justify removing the books.

65. 454 F. Supp. 703 (D. Mass. 1978).

tion[66] reaffirmed a student's right to receive information in secondary schools. Both courts also placed a burden on the School Board to demonstrate a substantial state interest before the student's constitutional right could be curtailed.[67]

In *Right to Read Defense Committee,* the Chelsea School Committee, reacting to a parent complaint about offensive language in a single poem, banned an entire anthology of adolescent writings.[68] Without reviewing the other selections, the committee chairman unilaterally made the decision to remove the anthology.[69] The court noted that not every book removal implicates first amendment rights, but that here, those rights were affected since the removal was based on the personal and moral tastes of a school committee.[70] Applying a substantial state interest test, the court held that the board's interest in protecting students from foul language was not substantial enough to warrant a restriction on the right to receive information.[71]

The holding in *Salvail*[72] and the court's interpretation of what constitutes a substantial state interest was broader than in *Right to Read Defense Committee.* In *Salvail,* a complaint from a board member prompted a school committee to remove *Ms. Magazine* from the high school library.[73] After finding that the removal was politically motivated,[74] the court said that the student's constitutional right to receive information could not be restricted since political and social tastes of board members did not equate with a substantial state interest.[75]

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66. 469 F. Supp. 1269 (D.N.H. 1979).

67. Right to Read Defense Comm. v. School Comm. of Chelsea, 454 F. Supp. 703, 713 (D. Mass. 1978); Salvail v. Nashua Bd. of Educ. 469 F. Supp. 1269, 1275 (D.N.H. 1979). The court in *Right to Read Defense Committee* based this substantial state interest test on the "substantial disruption test" as set forth in *Tinker supra* note 36. The court in *Salvail* followed suit one year later.

68. Right to Read Defense Comm. v. School Comm. of Chelsea, 454 F. Supp. 703, 708 (D. Mass. 1978).

69. *Id.*

70. *Id.* at 712.

71. *Id.* at 713. The court, in minimizing the state interest, looked at the contested poem in its entirety to judge its suitability.

72. Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269 (D.N.H. 1979).

73. *Id.* at 1272.

74. *Id.*

75. *Id.* The court went beyond the personal views of parents. "We do not question the good faith of the defendants in believing that some parents have been offended. With

The necessity of harmonizing the state's role as educator with first amendment considerations raises complex and emotional reactions.[76] The issue of which books children read and who shall make those decisions has generated debate within many school communities.[77] With the controversies showing no signs of abating and court challenges increasing throughout the nation,[78] the stage has been set for the Supreme Court's involvement.

III. The Decision

Clear cut divisions emanated from the Court in the *Island Trees* decision. Justices Marshall and Stevens joined Justice Brennan in the plurality opinion. Justice Blackmun concurred in the judgment and concurred in part with the reasoning of the plurality opinion. Justice White concurred in the judgment only. Chief Justice Burger filed a dissenting opinion in which Justices Powell, Rehnquist and O'Connor joined. Justices Powell, Rehnquist, and O'Connor, in turn, each wrote a separate dissenting opinion. Chief Justice Burger and Justice Powell joined in Justice Rehnquist's opinion.[79]

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the greatest respect to such parents, their sensibilities are not the full measure of what is proper education." *Id.* at 1275. The holding of the court was diametrically opposite to *Zykan* which was decided one year later. *See supra* notes 56-57 and accompanying text.

76. Mailloux v. Kiley, 323 F. Supp. 1387 (D. Mass), *aff'd*, 451 F.2d 1242 (1st Cir. 1971).

> The secondary school more clearly than the college or university acts *in loco parentis* with respect to minors. . . . Most parents, schoolboards, students and members of the community usually expect the secondary school to concentrate on transmitting basic information, teaching the best that is known and thought in the world, training by established techniques, and, to some extent at least, indoctrinating in the mores of surrounding society.

Id. at 1392. *See, e.g.*, Police Dep't v. Mosley, 408 U.S. 92 (1972), where the Court pointed out that states require that the school boards make choices involving regulation of expression that the first amendment seems to prohibit. *Id.* at 95-6.

77. Hechinger, *The Essence of Censorship in the Schools*, N.Y. Times, Oct. 27, 1981, at C5, cols. 1, 3: "What is wrong and occasionally frightening, is the absence of effective procedures to decide what materials are to be used. This absence exposes the schools to tactics of intimidation and encourages censorship by quiet surrender."

78. *Calls for Banning of Library Books Rise Sharply Since Reagan Victory*, N.Y. Times, Dec. 11, 1980, at A28, col. 2.

79. Island Trees v. Pico, 102 S. Ct. at 2802.

A. *Plurality Opinion*

Justice Brennan, writing for the plurality in *Island Trees,* stressed that the substantive and procedural issues to be decided were limited to the following: 1) does the first amendment constrain the Board of Education from removing library books from the Island Trees junior and senior high schools and; 2) if so, do the "evidentiary materials" which were before the district court, raise a genuine issue of fact which forecloses summary judgment for the petitioner School Board?[80]

In resolving the first issue, the plurality's underlying premise was that local school boards must have broad discretion to establish community values and aspirations.[81] Accordingly, there can be no judicial intervention unless "basic constitutional values are directly and sharply implicated."[82] Citing *Tinker v. Des Moines School District* and *West Virginia v. Barnette* as precedent, Justice Brennan declared that students possess a first amendment right of free expression.[83]

Justice Brennan then proceeded to show that students' first amendment rights may be "sharply implicated" by the removal of library books.[84] According to Justice Brennan, book removal sets into motion a triad of first amendment principles: (1) the right to receive information, (2) which follows from the sender's right to transmit this information, (3) and which is indispensable to the receiver's right to exercise his freedom of speech.[85] Justice Brennan utilized the following syllogism: the right to receive information has been recognized as a first amendment right by the Court many times beginning with *Martin v. Struthers;*[86] since students have first amendment protection, the right to receive information must be an inherent part of that

80. *Id.* at 2806.

81. *Id.* Justice Brennan cites three cases to establish this concept: Epperson v. Arkansas, 393 U.S. 97, 101 (1968); Pierce v. Society of Sisters, 268 U.S. 510, 528 (1925); Meyer v. Nebraska, 262 U.S. 390, 402 (1923).

82. *Id.* at 4835 (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).

83. Both of these cases held for a symbolic representation of free expression. *See supra* note 41.

84. Island Trees v. Pico, 102 S. Ct. at 2808.

85. *Id.*

86. *Id.* Martin v. Struthers, 319 U.S. 141 (1943).

right.[87]

Justice Brennan further stated that the School Board's undisputed authority over the mandatory classroom situation does not extend into the library domain.[88] Justice Brennan declared that the Board's concededly substantial role in determining library content will not rise above constitutional considerations.[89] While removal based on educational suitability is clearly permissive,[90] removal based on a narrowly partisan or political dogma translates into an unconstitutional suppression of ideas.[91] Justice Brennan expanded upon this theme by declaring that the school library is a particularly effective setting to trigger the first amendment triad.[92] Voluntary rather than compulsory, self-enlightening rather than limiting, the library is where "a student can . . . explore the unknown . . . test or expand upon ideas presented to him in or out of the classroom."[93]

Justice Brennan concluded by noting that book acquisition is outside the ambit of this decision.[94] Suppression of ideas is linked to removal, not the purchase or addition of books to the library.[95] Thus, in answering the substantive constitutional issue, the Court held that "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books . . . ."[96]

Turning to the procedural issue, Justice Brennan evaluated the record before the Court and enumerated three factors which indicate that a genuine issue of material fact existed as to whether the Board exceeded its contitutional limitations in removing books from the library:[97]

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87. *Id.* Justice Brennan quoted President Madison: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. . . ." *Id.*

88. *Id.* at 2809.

89. *Id.*

90. *Id.* at 2810. Justice Brennan never explained, however, what he meant by educational suitability.

91. *Id.*

92. *Id.*

93. *Id.* (quoting Right to Read Defense Comm. v. School Comm. of Chelsea, 454 F. Supp. 703, 715 (D. Mass. 1978)).

94. *Id.* at 2810.

95. *Id.*

96. *Id.*

97. *Id.* at 2811.

(1) no impartial procedures were utilized;
(2) judgment of selected committees and specialists were ignored; and
(3) the books were removed on the basis of personal morals and tastes.[98]

Thus, in affirming the court of appeals' decision, the Court remanded the case to the district court to resolve the factual issues regarding the Board's reasons for removing the books.

B. *Concurring Opinions*

Justice Blackmun in his concurring opinion stated that the issue is more fundamental than the "right to receive" doctrine as articulated by the plurality.[99] Justice Blackmun asserted that the state does not have a duty to provide students with information.[100] Nor did he find this right interconnected with the nature of the school library.[101] Justice Blackmun focused instead on the impropriety of the state's "discrimination between ideas" which arises from hindering access to social or political concepts simply because of disapproval by state officials.[102] He declared that state action to suppress diversity of thought is inconsistent with first amendment principles since it may " 'strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.' "[103] Thus, Justice Blackmun minimized two aspects of Justice Brennan's opinion: the existence of the "right to receive" in the school environment and the logical connection of this right to the school library.[104]

Justice White in his concurring opinion stated that an unresolved factual issue existed regarding the reasons for the Board's removal of the books.[105] He noted that if the district

98. *Id.*
99. *Id.* at 2813-14 (Blackmun, J., concurring).
100. *Id.* at 2814 (Blackmun, J., concurring).
101. *Id.* (Blackmun, J., concurring).
102. *Id.* (Blackmun, J., concurring).
103. Justice Blackmun declared that the issue is not the right to receive information but rather that the "state may not act to deny access to an idea simply because state officials disapprove of that idea for partisan or political reasons." *Id.* This, in effect, is the essential component of the right to receive information as articulated by Justice Brennan.
104. *Id.* at 2812-16 (Blackmun, J., concurring).
105. *Id.* at 2816. (White, J., concurring).

court on remand finds that the books were removed because of their vulgarity, for instance, the possibility exists that there would be no appeal.[106] Thus, according to Justice White, the case turned on procedural questions and the constitutional questions need not have been raised.[107]

C. *Dissenting Opinions*

Chief Justice Burger, joined by Justices Powell, Rehnquist, and O'Connor, raised four points in his dissent. First, neither the first amendment nor the Court has ever conferred a "right" to have the government provide access to library books.[108] Justice Burger stated that the right to receive information and ideas, previously recognized by the Court, does not spawn the right to have this information furnished by the government at a designated place.[109] The Court has never held that the government has an obligation to provide permanent access to library books; the first amendment does not imply it.[110]

Second, discretionary decisions pertaining to book removal must be made by a competent authority, such as the school board, and not the Court.[111] Justice Burger asserted that school boards in fulfilling their obligation to instill "fundamental values necessary to the maintenance of a democratic political system," must look at book content to evaluate their worth.[112] In so doing, the board is determining the "educational suitability" of the book, a phrase used by Justice Brennan. According to Justice Burger, however, "educational suitability" is a standardless phrase, since any content-based decision regarding a book can be justified by invoking this term.[113]

Third, the parents and not the courts provide the mecha-

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106. *Id.* (White, J., concurring).

107. *Id.* at 2817. (White, J., concurring).

108. *Id.* at 2818. (Burger, C.J., dissenting).

109. *Id.* at 2817. (Burger, C.J., dissenting).

110. *Id.* (Burger, C.J., dissenting).

111. *Id.* at 2821 (Burger, C.J., dissenting).

112. *Id.* at 2819 (Burger, C.J., dissenting) (quoting Ambach v. Norwick, 441 U.S. 68, 77 (1979)).

113. *Id.* at 2820. (Burger, C.J., dissenting). Burger declared that whenever a decision-maker judges ideas inappropriate in a book for whatever reason, the term "educational suitability" will be invoked.

nism to harness an overactive school board.[114] Chief Justice Burger regarded school boards as reflections of grass roots democracy at work:[115] "A school board is not a giant bureaucracy far removed from accountability for its actions; it is truly of the people and by the people."[116] The parents have much input into the decision-making process of the school system. Not only do they reflect the attitudes and values of the board members, but they can influence decisions and remove members from office if not satisfied with educational programs.[117]

Fourth, the plurality's distinction between book acquisition and removal is not constitutionally mandated.[118] According to Justice Burger, if "official suppression" is the constitutional violation, as the plurality stated, then the removal of a book is no more or no less suppression than the decision not to obtain it.[119] Thus, he reasoned that if the first amendment forbids removal of a book, it must logically also mandate its acquisition;[120] neither proposition is justified on the basis of precedent or an interpretation of the constitution.[121]

Justice Powell's dissent reiterated Justice Burger's disapproval of a constitutionally based right to receive information in public schools.[122] He was critical of the fact that when the Board, in exercising its legitimate function, tried to transmit fundamental values by removing offensive books, the plurality translated that into "suppression of ideas."[123] The Court's holding, according to Justice Powell, corrodes the authority of school boards which are the most competent agents to carry out the

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114. *Id.* at 2821 (Burger, C.J., dissenting).
115. *Id.* at 2820 (Burger, C.J., dissenting).
116. *Id.* at 2821 (Burger, C.J., dissenting).
117. *Id.* (Burger, C.J., dissenting).
118. *Id.* (Burger, C.J., dissenting).
119. *Id.* (Burger, C.J., dissenting).
120. *Id.* (Burger, C.J., dissenting).
121. *Id.* (Burger, C.J., dissenting).
122. *Id.* (Powell, J., dissenting).
123. *Id.* at 4843 (Powell, J., dissenting). Justice Powell drew the reader's attention to the trial court's summary of excerpts from the contested books which is incorporated into his opinion. These excepts are from: *Soul on Ice* by Eldridge Cleaver; *A Hero Ain't Nothing But A Sandwich* by Alice Childress; *The Fixer* by Bernard Malamud; *Go Ask Alice* by Anonymous; *Slaughterhouse Five* by Kurt Vonnegut, Jr.; *Best Short Stories by Negro Writers* edited by Langston Hughes; *Black Boy* by Richard Wright; *Laughing Boy* by Oliver LaFarge; *The Naked Ape* by Desmond Morris. *Id.* at 4843-45.

state's and parents' interest in educating children.[124]

After discussing the procedural issues raised by the case,[125] Justice Rehnquist turned to the constitutional issues and noted the distinction between the state acting as a sovereign and as an educator. According to Justice Rehnquist, when the government

> acts as an educator, at . . . the secondary school level, [it] is engaged in inculcating social values and knowledge in relatively impressionable young people. . . . [t]here are innumerable decisions to be made. . . . [In] these areas the members of the school board will act on the basis of their own personal or moral values.[126]

To support his contention, Justice Rehnquist relied on *Zykan v. Warsaw Community School Corp.* which held that it is the school board's legitimate function to make choices based on personal, political, social or moral views.[127] He viewed these criteria as providing the proper basis for a determination of the educational suitability of a book; a determination within the legitimate discretion of school boards.[128]

Justice Rehnquist devoted most of his dissent to the right to receive information set forth by the plurality. Echoing the theme of previous dissenters, he could find no support for this right either in precedent or by analogy.[129] Justice Rehnquist declared that the cases cited by Justice Brennan to support this

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124. *Id.* at 2823 (Powell, J., dissenting).

125. *Id.* at 2827 (Rehnquist, J., dissenting). Rule 9(g) of the local rules of the Eastern District of New York provides:

> Upon any motion for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.
>
> The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried. *Id.* n.2.

FED. R. (E.D.N.Y.) 9(g). Justice Rehnquist stated that the only facts that should have been reviewed were the ones contained in the respondents' Rule 9(g) statement; therefore, Justice Brennan's overreach in examining evidentiary materials was inappropriate.

126. Island Trees v. Pico, 102 S. Ct. at 2829 (Rehnquist, J., dissenting);

127. *Id.* at 2829-30 (Rehnquist, J., dissenting); Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980).

128. Island Trees v. Pico, 102 S. Ct. at 2830 (Rehnquist, Jr., dissenting).

129. *Id.* (Rehnquist, J., dissenting).

right involved neither students nor the educational setting.[130] He also asserted that analogizing the right to receive cases to the school setting is ineffective for three reasons. First, in the Court cases articulating the right to receive information, the issue was total prohibition of ideas; whereas in *Island Trees,* the students had alternative sources for these books.[131] Second, a valid right to receive does not delineate between book acquisition and removal.[132] The failure to purchase and the order to remove equally deny a right to information. Third, although the right to receive follows from "the sender's first amendment right to send," it is not logical to pronounce that all authors have a mandate to have their works placed in the school library. Without this right, however, the right to receive cannot mature.[133]

Justice Rehnquist concluded by stating that the term "suppression of ideas," as articulated by the plurality, is too vague to serve as a guideline in these circumstances.[134] Justice Rehnquist did not propose that the Constitution permits the suppression of ideas, but rather that any discretionary action by a school board, whether in the realm of the classroom or the library, could be logically labeled suppression of ideas.[135]

Justice O'Connor, in a brief dissent, asserted that the government's role as an educator gives it the right to remove books concomitant with the power to determine "educational suitability."[136]

IV. Analysis of the Decision

The two concurring opinions and the four separate dissenting opinions reflect the discord that the *Island Trees* decision engendered among the justices. The two issues which generated the sharpest schism were the right to receive information within the school environment and the definition of "educational suita-

130. *Id.* (Rehnquist, J., dissenting).

131. *Id.* (Rehnquist, J., dissenting).

132. *Id.* at 2831-32. (Rehnquist, J., dissenting).

133. *Id.* (Rehnquist, J., dissenting). Justice Rehnquist stated that Justice Brennan "fails to explain the constitutional or logical underpinnings of a right to hear ideas in a place where no speaker has the right to express them." *Id.*

134. *Id.* at 2835 (Rehnquist, J., dissenting).

135. *Id.* (Rehnquist, J., dissenting).

136. *Id.* (O'Connor, J., dissenting).

bility." All the justices were in accord that educational suitability provides legitimacy to the authority of the school board to remove library books.[137]

A. *The Right to Receive Information in Schools*

The plurality devoted most of its opinion to establishing the right to receive information under the first amendment. Justice Brennan laid the groundwork by effectively substantiating the first amendment protection of free expression for students, citing *Tinker v. Des Moines Independent Community School District*[138] and *West Virginia v. Barnette*.[139] He then cited several cases where the Court acknowledged the right to receive information within several contexts other than the school setting.[140] He concluded that since the Court has established that the right to receive information is a corollary of free expression, and free expression was upheld for students in *Tinker*, it necessarily follows that the right to receive information is available to students.[141] Moreover, according to Justice Brennan, the voluntary school library is an effective nesting place for this right.[142]

The dissenters focused on three reasons why Justice Brennan's espousal of the right to receive information within the school setting was without merit. First, Justice Brennan's use of *Tinker* as an illustration of the right to receive information within the secondary schools was inaccurate; second, the accessibility of books elsewhere in *Island Trees* precluded the assertion that students are denied a right to receive information; and third, a government obligation to provide books for students is illogical as well as not constitutionally required.

Justice Rehnquist's dissent was the most effective in articu-

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137. In the opinion, there is no suggestion by the justices that a decision reached on the basis of educational suitability will not be upheld.

138. Island Trees v. Pico, 102 S. Ct. at 2807 (J. Brennan citing Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969)).

139. *Id.* (J. Brennan citing West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)).

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

141. Island Trees v. Pico, 102 S. Ct. at 2808.

142. *Id.* at 209.

lating the concerns of the minority, particularly on the right to receive information issue. He, as well as Justice Burger,[143] was critical of Justice Brennan's attempt to glean from *Tinker* a right to receive information[144] thereby establishing the precedent with the school setting. According to Justice Rehnquist,[145] although *Tinker* remains the cornerstone for the first amendment right of free expression for students, it does not stand for a right to receive information either within the classroom or the library. Justice Rehnquist's analysis of *Tinker* seems accurate, since its opinion is devoid of any mention of a right to receive information.

A close reading of *Tinker* and Justice Brennan's opinion, however, demonstrates that Justice Rehnquist as well as Justices Burger and Blackmun misstated Justice Brennan's position. Justice Brennan did not perceive a literal right to receive in *Tinker*. Instead, he employed deductive reasoning to effectuate this right. In order for students to exercise their right of expression recognized in *Tinker*, they must be able to receive knowledge and ideas.[146]

According to Justice Rehnquist, there is another reason why the right to receive information cannot come to fruition in the school setting. In *Island Trees*, the access to the objectionable books had not been foreclosed. Since students could obtain these books in public libraries and book stores, the students' right to receive information has not been denied.[147] Justice Rehnquist noted, however, that in the precedent established by the Court, the denial of information had to be absolute before the first amendment was compromised and the right to receive information was invoked.[148]

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143. *See supra* notes 108-10 and accompanying text.

144. Island Trees v. Pico, 102 S. Ct. at 2831. Justice Rehnquist goes on to state "[o]ne might read *Tinker* in vain to find any recognition of a First Amendment right to receive information." *Id.*

145. *Id.* The discussion in *Tinker* was based solely on the students' right to express their political views.

146. *Id.* at 2808.

147. *Id.* at 2831.

148. In First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1981), corporate opinions on ballot issues not directly involving the corporation were prohibited by Massachussetts law; in Kleindienst v. Mandel, 408 U.S. 753 (1972), the issue was whether potential recipients of Mandel's views were totally denied the "particular qualities inher-

Justice Rehnquist's criticism is overstated. In *Martin v. Struthers* an ordinance prohibiting door-to-door distribution of religious literature did not foreclose the possibility of receiving the information from another source.[149] Yet, the Court held this ordinance to be an unconstitutional violation of the right to receive information.[150] The availability of information or literature from another source was not a factor relied on by the Court in establishing a first amendment violation.[151]

Furthermore, in his concurring opinion in the court of appeals decision in *Island Trees*[152] Judge Newman declared that the "availability of books elsewhere is not decisive."[153] He explained that the image of book burning produces a chilling effect not because every copy is being destroyed but because of the symbolic representation of intolerance for opposing views.[154] Judge Newman pointed out that the School Board in *Island Trees* had used its authority and prestige to indicate dislike for certain books and that the effect of its decision on a captive audience of impressionable minds should not be underestimated.[155]

Justices Blackmun,[156] Burger,[157] and Rehnquist[158] also faulted Justice Brennan for creating a constitutional mandate that the State provide access to books. Yet, Justice Brennan

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ent in sustained, face to face debate, discussion and questioning"; in Stanley v. Georgia, 394 U.S. 557 (1969), the statute in issue criminalized all private possession of obscene material; while in Griswold v. Connecticut, 381 U.S. 479 (1965), the statute had proscribed all contraceptive devices. In Martin v. Struthers, 319 U.S. 141 (1943), the statute had prohibited door-to-door distribution of religious literature; whereas the statute in Lamont v. Postmaster General, 381 U.S. 301 (1965), required persons receiving communist propaganda in the mails to affirmatively state their desire to receive this mail.

149. Martin v. Struthers, 319 U.S. 141, 144 (1943). The analogy can be made between the "special environment" of the school setting in *Island Trees* and the "special environment" of the home setting.

150. *Id.* at 149.

151. *Id.*

152. Pico v. Board of Educ., Island Trees Union Free School Dist. No. 26, 638 F.2d 404, 428 (2d Cir. 1980) (Newman, J., concurring).

153. *Id.* at 434.

154. *Id.* at n.5. Book burning is not as rare an occasion as one might think. In Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980), the books were given to a local senior citizens group for a public burning.

155. Pico v. Board of Educ., Island Trees Union Free School Dist. No. 26, 638 F.2d at 433-34.

156. Island Trees v. Pico, 102 S. Ct. at 2814 (Blackmun, J., concurring).

157. *Id.* at 2818 (Burger, C.J., dissenting).

158. *Id.* at 2831 (Rehnquist, J., dissenting).

neither stated nor inferred that the government must provide access to books.[159] What Justice Brennan implied was that the author's right to send and the receiver's right to receive have ripened through the book selection process.[160] It is not that the government must provides access, but that when it does, the right to receive information attaches. Three recent federal court cases more clearly articulate this concept. In *Minarcini v. Strongsville City School District,*[161] *Salvail v. Nashua Board of Education,*[162] and the *Right to Read Defense Committee v. School Committee of Chelsea,*[163] the courts held that once a library book had been selected, the school board could not remove it because its members disliked some of its content.

In *Salvail,* the court summarized the reasoning of the *Minarcini* court in stating that

> It is, of course, clear that the Board is required neither to provide a library for the Nashua senior high school nor to choose any particular books therefor, but once having created such a privilege for the benefit of its students, it could not place conditions on the use of the library related solely to the social or political tastes of Board members.[164]

The court in *Right to Read Defense Committee* was equally explicit in underscoring the timing of the right to receive information:

> The Committee was under no obligation to purchase *Male* and *Female* but it did. It is a familiar constitutional principle that a state, though having acted when not compelled, may consequently create a constitutionally protected interest.[165]

In all these cases, the right to receive information had been activated by the government through the acquisition of the library books.

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159. *Id.* at 2806-12.

160. *Id.* at 2801. Justice Brennan stated that "Petitioners possess significant discretion to determine the content of their school libraries, but that discretion may not be exercised in a narrowly partisan or political manner." *Id.*

161. 541 F.2d 577, 583 (6th Cir. 1976).

162. 469 F. Supp. 1269, 1274 (D.N.H. 1979).

163. 454 F. Supp. 703, 714 (D. Mass. 1978).

164. Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269, 1272 (D.N.H. 1979).

165. Right to Read Defense Comm. v. School Comm. of Chelsea, 454 F. Supp. 703, 712 (D. Mass. 1978).

Although the dissent's criticism of this right to receive information in schools is not well developed, Justice Brennan's reasoning does raise questions. His analysis, though persuasive, is unfinished. Justice Brennan's reliance on cases upholding the right to receive information is misplaced. While these cases do hold that this right exists, none has involved school children or the school setting, as Justice Rehnquist emphatically pointed out.[166] To deduce a logical nexus to the school setting is not necessarily inappropriate; yet, had Justice Brennan discussed constraining factors such as the age of the children,[167] parental prerogatives,[168] and the school functioning as "in loco parentis,"[169] his opinion would have been more effective.

The age of the children is the qualifying factor which most merits discussion. Although the Court has held that children are "persons" under the Constitution,[170] their rights are not deemed

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166. Island Trees v. Pico, 102 S. Ct. at 2830-31 (Rehnquist, J., dissenting). *See supra* note 148. *First Nat'l Bank of Boston v. Bellotti* involved the right of corporations to make expenditures or contributions to influence ballot issues; *Kleindienst v. Mandel* involved the first amendment rights of citizens who wished to hear a Marxist theoretician; *Stanley v. Georgia* held that the first amendment prohibits states from making the private possession of obscene material a crime; *Griswold v. Connecticut* held that the right of privacy prohibits states from denying the use of contraceptives; *Martin v. Struthers* held that the first amendment protects the door-to-door distribution of religious literature; *Lamont v. Postmaster General,* in which Justice Brennan delivered a concurring opinion, involved the constitutionality of postal statutes.

167. *See, e.g.,* Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969), in which the court found that high school students are mature enough to handle disputed materials (issue here was the word "mother fucker") without harm; *but cf.* Brubaker v. Board of Educ., 502 F.2d 973 (7th Cir. 1974), where the school board dismissed three teachers for handing out a poem about the Woodstock rock festival to their eighth grade class. The court upheld the dismissal because (1) there was no connection between the contested material and the curriculum, and (2) the relative age of the students.

168. *See* R. O'NEIL, CLASSROOMS IN THE CROSSFIRE 59-61 (1981); *See, e.g.,* Cornwell v. State Bd. of Educ., 314 F. Supp. 340 (D. Md. 1969), which held that the state's interest in the well being of the child overcame the parent's right to control in the school setting.

169. Literally the phrase means "in the place of a parent," charged with all the rights and responsibilities of a parent. The common law doctrine of *in loco parentis* meant that parental approval was not necessary to establish a school curriculum which fulfilled the educational and societal needs of the majority. Comment, *School Library Censorship: First Amendment Guarantees and the Student's Right to Know,* 57 U. DET. J. URB. L. 523, 526 (1980). Today this doctrine has largely been replaced by statutory regulations of secondary education. *See* R. O'NEIL, CLASSROOMS IN THE CROSSFIRE 59-61 (1981).

170. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 511 (1969).

to be co-extensive with adults.[171] The unwillingness of the majority to broach this issue weakens the foundation of this newly recognized right to receive information in schools.[172]

The debate on the right to receive information in *Island Trees* is flawed on all sides. The plurality does not dedicate itself to examining the issue in detail. The dissenters overstate their arguments and misstate the plurality's position.

B. *Criteria for Determining Educational Suitability*

The more difficult question to be settled in *Island Trees* is epitomized by Justice Brennan's statement that "discretion to remove books may not be exercised in a narrowly partisan or political manner,"[173] and by Justice Rehnquist's contrary statement that "personal values, morals and tastes" determine whether a book is educationally suitable.[174] Permissible inculcation versus indoctrination: the fine line separating these methodologies must be drawn and standards established if the term "educational suitability" is to be more than a glittering generality. The opinion in *Island Trees,* several federal court cases and the state's role as educator will be relied on to assist in shaping the contours of this amorphous phrase.

1. *The opinion*

In the opinion, Justice Brennan acknowledged that school boards have substantial authority to select library books.[175] All the justices were in accord that this authority must be exercised in respect to the state's objective in transmitting fundamental values to the student community.[176] Therefore, once the decision to acquire books is made, there is implicit recognition of educational suitability which is further buttressed by several presumptions as to the personnel in the decision making process and the right to receive information in schools.

The participation of professionals in the evaluation of li-

171. *See supra* note 167.
172. *See supra* notes 167-69.
173. Island Trees v. Pico, 102 S. Ct. at 2810.
174. *Id.* at 2830 (Rehnquist, J., dissenting).
175. *Id.* at 2809.
176. This proposition was set out in Ambach v. Norwich, 441 U.S. 68, 76-77 (1979).

brary books operates as a check on the school boards if they attempt to impose their own partisan philosophy.[177] The standards promulgated by the American Association of School Libraries recommend that "each local school board adopt its own written statement of policy regarding selection procedures which would . . . specifically delegate the selection of library materials to the professional staff . . . ."[178] Although it is not clear from the *Island Trees* decision who made the initial decision to acquire the contested books, it can be inferred that the librarians were the designated authority.[179] Furthermore, the New York State Education Law places the supervision and direction of libraries in the hands of the superintendent of schools,[180] a professional educator.

Still another presumption gives rise to an acknowledgement of educational suitability when library books are acquired. As was discussed earlier in this Note, the right to receive information attaches once the government has made the decision to acquire books.[181] Where the government has acted in such a way as to trigger a first amendment right to students, a presumption of educational suitability logically follows.[182]

This presumption of educational suitability cuts into Justice Rehnquist's argument that personal, social, political and moral views can validly shape educational suitability.[183] The personal convictions of concerned laymen who generally comprise school boards do not hold sway over the professional judgments utilized in determining library book acquisition. To be sure, underlying personal values influence both professionals and laymen. Teachers, librarians and school administrators, however, comprehend the educational need of students; they have been educated and

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177. *See* Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 874-82 (1979).

178. Standards of the American Association of School Libraries (quoted in Brief of *Amicus Curiae* The Long Island Library Association Coalition In Support Of Respondents, at 20, Island Trees v. Pico, 102 S. Ct. 2799 (1982).

179. Neither the School Board nor the Superintendent made claims that they were involved in the initial selection.

180. *See supra* note 8.

181. *See supra* notes 161-65 and accompanying text.

182. *See* Note, *Schoolbooks, School Boards and the Constitution*, 80 COLUM. L. REV. 1092, 1117 (1980).

183. Island Trees v. Pico, 102 S. Ct. at 2830.

trained to make evaluations based on educational content. Consequently, objective educational criteria and professional evaluations, rather than personal views, emerge as the dominant factors in the selection process.

If the acquisition of library books connotes educational suitability and sets into motion a first amendment right for students, then an overriding of this educational judgment, evidenced by book removal, suggests that noneducational considerations were operative.[184] Thus, the authority removing the books has the burden of showing objective educational criteria if constitutional values are not to be "sharply implicated."[185]

While not explicitly advancing the motions of presumptions and objective educational criteria, Justice Brennan did conclude that the Board's motives were suspect since "established, regular, and facially unbiased procedures" were not employed.[186] The books were taken from the shelves because they were on a list containing quotes and limited excerpts from the books. Only one Board member had read some of the books. Procedures implemented by the Superintendent and the Board were ignored, a committee which had been established to review the books was not listened to, and the previous educational evaluation of librarians was not considered in the decision to remove the books.[187] To eliminate professionally approved ideas, concepts, and language within a school library, without utilizing available administrative procedures and objective educational standards, is to raise valid first amendment considerations.

2. *Federal court cases*

To support his position, Justice Rehnquist relied on *Zykan v. Warsaw Community School Corp.* which held that educational suitability can be predicated on personal, social, moral, and political views.[188] The *Zykan* court, in upholding the constitutionality of the removal of certain books from the high school

184. *See* Note, *Schoolbooks, School Boards and the Constitution,* 80 COLUM. L. REV. 1092 116-17 (1980).

185. *Id.*

186. Island Trees v. Pico, 102 S. Ct. at 2811.

187. *Id.* Respondents claim that the school board's decision was based solely on the fact that the books were on the PONYU list was not disputed by the school board.

188. 631 F.2d 1300 (7th Cir. 1980). *See supra* notes 56-59 and accompanying text.

library, provided little guidance on how to interpret personal, social, political and moral views within the context of the case. Instead, the court based its conclusion on the following rationale: that the limited space of the library necessitates periodic removal;[189] and that nothing in the constitution prevents educational judgments from being based on personal views.[190]

Justice Rehnquist's reliance on *Zykan* was curious since the *Zykan* court neither raised nor resolved any substantive issues. Undeniably, there are times when book removal is a benign decision prompted by lack of library space, obsolescence, or student disinterest. These issues were not present in the other book removal cases, however, and were not present in *Island Trees*. Another weakness in the *Zykan* opinion is evidenced by the court's citation of three federal cases that found library book removal to be a violation of the first amendment.[191] Yet nowhere in the opinion did the *Zykan* court attempt to distinguish, critique or debate any of the issues raised or conclusions reached in these cases. Instead, the court justified its holding by merely pointing to two other decisions that have upheld the constitutionality of book removal.[192]

The district court opinion in *Salvail* provides better guidance for identifying the criteria which determine the educational suitability of a book.[193] In *Salvail,* the court determined that the removal of *Ms. Magazine* from the school library was politically motivated and, therefore, impermissible.[194] The School Board protested that the magazine's sexual overtone was the basis for removal; but the court did not find this argument persuasive since several other periodicals in the library with similar implications were not disputed.[195] The court declared that the issue to be addressed in determining educational suitability is whether the magazine, "taken as a whole," lacks serious literary,

189. *Id.* at 1306.

190. *Id.* at 1308.

191. *Id.*

192. *Id.* "We join with these courts in rejecting the suggestion that a particular book can gain a kind of tenure on the shelf merely because the administrators voice some objections to its content." *Id.*

193. Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269 (D.N.H. 1979).

194. *Id.* at 1274.

195. *Id.*

artistic, political or scientific value.[196]

According to the *Salvail* court, the process for determining which books are educationally suitable must begin by evaluating the books "as a whole."[197] The policies and procedures adopted by the American Association of School Libraries to deal with complaints on books reflect the same position as the *Salvail* court. These policies and procedures recommend that a review committee read the contested material, check the professional reviews and evaluate the work "as a whole."[198] The necessity of evaluating a book "as a whole" becomes apparent upon considering the effects of failure to do so. Evaluated in a vacuum, almost any phrase in any book could be subject to disapproval or censorship. Street language incorporated into a book's content might be offensive to some, yet be the necessary element in understanding the rage and despair of certain minority or disadvantaged groups within our society. Indeed, the message might be hopeful and uplifting but unless the book is read in its entirety, that determination cannot be made.[199]

3. *The state's role*

The state's role as educator also sheds light on the proper criteria for determining educational suitability. The state's interest in "preparing informed citizens capable of functioning in a democratic society" has been emphasized by the Supreme Court on several occasions.[200] This interest runs counter to Justice Rehnquist's proposition that personal, social, moral and political views determine educational suitability. For example, a library tailored solely to a politically conservative philosophy not only prevents the nurturing of educated citizens but debases the differing political and social views of other individuals by refusing to give them due recognition. As the Court stated in *Island*

196. *Id.* at 1273.

197. *Id.*

198. Brief of *Amicus Curiae* The Long Island Library Association Coalition In Support Of Respondents, at 20, Island Trees v. Pico, 102 S. Ct. 2799 (1982).

199. For instance, the author of a book review on *Soul on Ice* by Eldridge Cleaver noted that "[T]here is anger, outrage, bitterness and despair . . . . Nevertheless the book is hopeful . . . a plea for a better world . . . for us all." *Id.* at (A) 3 (quoting Yamashita, LIBR. J. Oakland Public Library, Calif. (1968)).

200. *See supra* note 21 and accompanying text.

Trees,

> any word that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take the risk. . . . [T]his sort of hazardous freedom . . . is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this often disputatious society.[201]

According to the Court, dispute and debate lead to the understanding necessary to be an informed and capable citizen. Furthermore, Justice Rehnquist's assertion that personal views can determine educational suitability would have been more easily reconciled with the state's objectives if he had attempted to qualify or define the permissible intensity and extent of these personal views.

V. Impact of the Decision

The *Island Trees* decision is unlikely to have a strong impact on future cases due to the lack of unanimity among the justices. Shrewd censors and citizens harboring strongly partisan political and social views may still prevail. They will be able to couch their objections to books they deem offensive in terms designed to avoid constitutional confrontations. "Educational suitability" could become a catchall phrase used by any partisan group to justify its position.

The decision could also produce more direct attacks on the book acquisition process. Rules and procedures could be probed and qualifications of committee members examined in order to challenge the selection or potential selection of a particular book.

Nevertheless, this decision does place all interested parties on notice that there are constitutional limitations on library book removal and that a cavalier approach to the removal process may evoke judicial scrutiny.

VI. Conclusion

The plurality's espousal of the constitutional right to re-

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201. Island Trees v. Pico, 102 S. Ct. at 2807 (quoting Tinker v. Des Moines Indep. Community School Dist. 393 U.S. 503, 508-09 (1969).

ceive information in schools lacks the careful analysis necessary to launch this right on an even course. The dissenters are no more persuasive in their negative appraisal of this right within the school environment.

Moreover, the Court's inability or unwillingness to grapple with the forces forming the phrase "educational suitability" undermines this new constitutional right for students. Although neither the plurality nor the dissenters elucidated these factors; adherence to procedures established by professionals, the evaluation of literary works in their entirety, and the state's interest in creating educational objectives best suited to a heterogenous society, all operate to inject the phrase "educational suitability" with some relevance.

Elaine Price