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A School Board's Authority Versus a Student's Right to Receive Information

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A School Board's Authority v. A Student's Right to Receive Information—*Board of Education, Island Trees Union Free School District No. 26 v. Pico*

In *Board of Education, Island Trees Union Free School District No. 26 v. Pico*[1] the United States Supreme Court considered to what extent the first amendment imposes limitations upon the exercise by a local school board of its discretion to remove library books from junior and high school libraries.[2] The Justices agreed that school boards have broad discretion in the management of school affairs; however, such discretion must be exercised in a manner not inconsistent with the first amendment.[3] The school board may not remove books from the school library shelves simply because the board members dislike the ideas contained in those books, thereby restricting access to the political ideas, social perspectives, and religious views expressed in the books.[4]

Earlier the Supreme Court had held in *Tinker v. Des Moines School District*[5] that students do not shed their rights to freedom of speech or expression at the schoolhouse gate.[6] Relying on *Tinker*, the *Island Trees* plurality[7] extended students' rights to include the right to receive information as a guarantee of the first amendment. The plurality opin-

1. 102 S. Ct. 2799 (1982).
2. *Id.* at 2801.
3. *Id.*
4. *Id.* at 2814.
5. 393 U.S. 503 (1969). *Tinker* dealt with students who wore armbands to show their disapproval of the Vietnam war. The school board had adopted a regulation prohibiting the wearing of armbands to school and providing for the suspension of any student refusing to remove the band. After a claim that such regulation was an unconstitutional denial of students' rights of expression of opinion, the United States Supreme Court held that the wearing of armbands for purposes of expressing certain views was symbolic speech and was within the protection of the first amendment. Relating *Tinker* to the facts in *Island Trees*, the attorney for the plaintiff-students argued that "if the school board may not ban anti-war symbols, by what conceivable logic would it have the right to ban anti-war books? Or anti-American or anti-Christian books?" Brief for Respondent at 16, *Island Trees*. *See also* Procunier v. Martinez, 416 U.S. 396 (1974) and Kleindienst v. Mandel, 408 U.S. 753 (1972), cases which establish the first amendment right to know. Minarcini v. Strongsville City School District, 541 F.2d 577 (6th Cir. 1976) is the first case to apply the right to know as a primary basis for deciding student rights cases.
6. *Tinker*, 393 U.S. at 506.
7. The Court split into minute fractions. Justice Brennan wrote the court's opinion, joined by Justices Marshall and Stevens, and in all but Part II-A (1) by Justice Blackmun. Justices Blackmun and White wrote concurring opinions. Chief Justice Burger and Justices Rehnquist, Powell, and O'Connor dissented. Rather than attempt to detail each Justices' views and explore their interplay, this comment concentrates on the plurality opinion, assuming that it will have substantial weight in future decisions. For further discussion of the divergent opinions, see sections IV. A. and IV. C. *infra* and text accompanying notes 139-175.

ion in *Island Trees* asserted that the first amendment rights of students must be construed in light of the special circumstances of the school environment; the special circumstances of the school library make that environment especially appropriate for the recognition of the right to receive information.[8]

This note examines the considerations which led the United States Supreme Court to determine that a school board's authority over the administration of the schools is not absolute if the exercise of this authority violates the constitutional rights of the students. Second, the note explores the development of a student's right to receive information through a school library as a guarantee of the first amendment, a right that cannot be ignored by a school board when the board removes books which it considers to be inappropriate either because of the ideas presented in the books or because of the local community's moral, political, and religious opinions. Third, even though the *Island Trees* decision offers no final determination on the "right to receive" information issue, this note will point out how the alignment and the analyses of the Justices will influence the future determination of the issue.

I. FACTS OF THE CASE

In September 1975 three members of the Board of Education of the Island Trees Free School District[9] attended a three-day conference sponsored by Parents of New York United.[10] At the conference the three members of the board received a collection of excerpts from "objectionable books."[11] The three members of the board did not act upon the list until November 7, 1975 when they searched the card catalog of the Island Trees High School library.[12] There, they found cards for nine "objectionable books;"[13] the principal of the junior high school, acting upon a request from the president of the board, found one addi-

8 *Island Trees*, 102 S Ct at 2809.

9 Richard Ahrens, President of the Board; Frank Martin, Vice-President of the Board, and Patrick Hughes, another member of the board.

10. PONY-U, as described by Richard Ahrens, President of the Board, is a conservative organization . composed of parents concerned about the education legislation in the state of New York. Record at A-5, *Island Trees*.

11 "Objectionable" is used to designate those books objected to by PONY-U. No assessment of the quality of the books by educational associations or teachers' groups was used to determine this designation.

12. Ahrens and Martin attended "Winter School Night" on November 7, 1975 at the district's high school. After the event, they "asked" the custodian to let them in the school library. Once inside, they compared the list of "objectionable books" received from PONY-U to the library's card catalog. Record at A-7, *Island Trees*.

13. K VONNEGUT, SLAUGHTER HOUSE FIVE; D. MORRIS, THE NAKED APE; P. THOMAS, DOWN THESE MEAN STREETS; L HUGHES, BEST STORIES BY NEGRO WRITERS, GO ASK ALICE, LAFARGE, LAUGHING BOY, R WRIGHT, BLACK BOY, A CHILDRESS, A HERO AINT NOTHING BUT A SANDWICH; and E. CLEAVER, SOUL ON ICE.

tional "objectionable book" in the junior high school library.[14] Subsequently, another school official discovered an eleventh "objectionable book," included in the approved reading list for a twelfth grade literature course.[15]

The entire board met informally in February 1976 to discuss the "objectionable books" and issued a directive to the principals of the district schools: the "objectionable books" must be removed from the library shelves. The president of the school board later presented the superintendent of the district schools with a request that the eleven books be permanently removed from the libraries. Superintendent Richard Morrow issued a memorandum to the board and objected to the removal of the books without proper procedures and without further information.[16]

After an extended controversy, involving the school board, the superintendent, the newspapers and a board-appointed Book Review Committee, over the suitability of the books, the board permanently removed nine of the "objectionable books" from the library shelves,[17] returned one book to the shelves with no restrictions,[18] and returned one book to restricted shelves in the libraries, requiring parental approval before a student could obtain the book.[19]

Several junior high and high school students, including Steven Pico,[20] brought an action under 42 U.S.C. section 1983[21] in the District

14 J. ARCHER, A READER FOR WRITERS.

15 B. MALAMUD, THE FIXER.

16. "My objections to direct action banning all the books on the list purchased at Watkins Glen [location of the September 1975 PONY-U three-day conference] is that we don't know who developed the list, nor the criteria they used.

. we already have a policy . . . calls for the Superintendent upon receiving an objection to a book or books, to appoint a committee to study them and make recommendations." Record at A-10, *Island Trees*.

The responsibilities of the Superintendent are clearly described by New York law. One section of the statutory provisions explains that the Superintendent shall have "supervision and direction over the enforcement and observance of the courses of study, the examination and promotion of pupils and over all matters pertaining to . . . libraries . . . and all other educational activities under the management, direction and control of the board of education." N.Y. EDUC. LAW § 2508(6) (McKinney 1981).

17 THE FIXER; SLAUGHTER HOUSE FIVE; GO ASK ALICE; BEST SHORT STORIES BY NEGRO WRITERS; THE NAKED APE, DOWN THESE MEAN STREETS; SOUL ON ICE; A HERO AINT NOTHING BUT A SANDWICH, and A READER FOR WRITERS.

18 LAUGHING BOY

19 BLACK BOY.

20. Steven Pico (by his next friend Frances Pico); Jacqueline Gold (by her next friend Rona Gold), Russell Rieger (by his next friend Samuel Rieger); Glenn Yarris (by his next friend Richard Yarris); and Paul Sochinski (by his next friend Henry Sochinski).

21. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . shall be liable to the party injured in an action at law, suit in equity" 42 U.S.C. § 1983 (1976).

Court for the Eastern District of New York. The students alleged that the board's actions, taken because of offense to its social, political and moral tastes, denied the students their rights under the first amendment of the United States Constitution.[22] The district court granted summary judgment for the board, concluding that the board acted not on religious principles, but on its conservative education philosophy and on its belief that the books removed from the school libraries and curriculum were irrelevant, vulgar, immoral, and in bad taste, making them educationally unsuitable.[23] The United States Court of Appeals for the Second Circuit reversed the judgment of the district court,[24] holding that material fact issues existed concerning whether the school board members, in ordering the removal of the books, acted solely because of political interest and the ideas expressed in the books. The court of appeals concluded that the students had a right to persuade the court that the motivations for removal were simply pretexts for the suppression of speech, and that summary judgment was thus improper.[25] The United States Supreme Court granted certiorari.[26]

II. BACKGROUND

A. *Historical Development of School Board Authority*

Control of the administration and operations of local schools has tra-

22 "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or of the right of people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. *See also* Gitlow v. New York, 268 U.S. 652 (1925), which expressly holds that the first amendment prohibitions against infringement of free speech are applicable to the states through the due process clause of the fourteenth amendment.

23 Pico v. Board of Educ., Island Trees Union Free School Dist., 474 F. Supp. 387 (E.D.N.Y. 1979), *rev'd*, 638 F.2d 404 (2d Cir. 1980), *aff'd*, 102 S. Ct. 2799 (1982).

24 Pico v. Board of Educ., Island Trees Union Free School Dist. No. 26, 638 F.2d 404 (2d Cir. 1980), *aff'd*, 102 S. Ct. 2799 (1982).

25 638 F.2d at 417. Each judge on the three judge panel of the United States Court of Appeals for the Second Circuit filed a separate opinion. Judge Sifton delivered the judgment of the court. He treated the case as involving an unusual and irregular intervention in the school libraries' operations by persons who are not routinely involved in such matters. The school board members, he concluded, must be able to show some reasonable basis for their interference in matters where they are not normally concerned. *Id.* at 414-15. The plaintiff-students should have been offered an opportunity to persuade a finder of fact that the "ostensible justifications for the actions of the school board members . . . were simply pretexts for the suppression of free speech." *Id.* at 417.

Judge Newman concurred in the result: "the use of governmental power to condemn a book touches the central nervous system of the First Amendment." *Id.* at 432. Judge Newman viewed the case as turning on the factual issue of whether the removal decision was motivated by the desire to remove books containing vulgarities and sexual explicitness, or rather by an impermissible desire to suppress ideas. *Id.* at 436-37.

Judge Mansfield dissented, arguing that the effect of the majority's decision is "to substitute a court's view of what student curriculum is appropriate for that of the Board." *Id.* at 419.

26 Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 102 S. Ct. 385 (1981).

ditionally been the province of school boards.[27] School boards, governed by statutory provisions,[28] have the authority to select the curriculum,[29] choose appropriate textbooks,[30] hire and fire teachers,[31] and enter into contracts involving millions of dollars.[32] Additionally, in principle, the power to select books for school libraries in the district rests with the school board,[33] although this power, in effect, is normally delegated to the district's librarians. Where school boards follow rational and detailed book selection policies,[34] they may unquestionably

27 An analysis of the authority of school boards to supervise educational operations is found in Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. PA. L. REV. 373 (1969).

28 Statutory provisions have expressly conferred certain powers and duties to school boards *See* ALA. CODE §§ 16-3-1 to -37 (1975); ALASKA STAT. §§ 14.07.075-.170 (1982); ARIZ. REV. STAT. ANN. §§ 15-541 to -548 (1956), ARK. STAT. ANN. §§ 80-101 to -158, 80-201 to -237 (1980); CAL. EDUC. CODE §§ 33000-080, 35100-350 (West 1978); COLO. REV. STAT. §§ 22-2-105 to -109 (1978), CONN. GEN. STAT. §§ 10-1 to -46 (1977), DEL. CODE ANN. tit. 14, §§ 101-10, 121-31 (1981), D.C. CODE ANN. §§ 31-101 to -119 (1981), FLA. STAT. ANN. §§ 229.011-.131 (West 1977), GA. CODE ANN. §§ 32-401 to -445 (1976), HAWAII REV. STAT. § 296-2 (1976), IDAHO CODE § 33-101 to -127 (1981), ILL. ANN. STAT. ch. 122, §§ 10-1 to -23.7 (1961); IND. CODE. ANN. §§ 20-1-1-1 to -11-5 (Burns 1975), IOWA CODE ANN. §§ 257.1 - 10 (West 1972); KAN. STAT. ANN. §§ 72-120 to -134 (1977), KY. REV. STAT. §§ 156.030- 112 (1980), LA. REV. STAT. ANN. §§ 17:1-17.4 (West 1982), ME. REV. STAT. ANN. tit. 20, §§ 51-57, 211-12 (1965); MD. EDUC. CODE ANN. §§ 2-102, 2-201 to -206, 3-101 to 4-121 (1978), MASS. ANN. Laws ch. 15, §§ 1A, 1G, 1I, 1J (Michie/Law Co-op. 1973), MICH. STAT. ANN. §§ 15.1023(11)-(16) (Callaghan 1979); MINN. STAT. ANN. §§ 121.02- 47 (West 1960), MISS. CODE ANN. §§ 37-1-1 to -9 (1972); MO. ANN. STAT. §§ 161.022-.102 (Vernon 1965), MONT. CODE ANN. §§ 20-2-101 to -131 (1979); NEB. REV. STAT. §§ 79-321 to -330 (1981); NEV. REV. STAT. §§ 385.021 to .125 (1979); N.H. REV. STAT. ANN. §§ 186:1-11 (1976); N.J. STAT. ANN. §§ 18A:4-3 to 4-20 (West 1968); N.M. STAT. ANN. §§ 22-2-1 to -16 (1978); N.Y. EDUC. LAW §§ 1701-10 (McKinney 1969), N.C. GEN. STAT. §§ 115C-10 to -21, 115C-35 to -48 (1983), N.D. CENT. CODE §§ 15-10-01 to -34, 15-29-01 to -14 (1981); OHIO REV. CODE ANN. §§ 3313.01 to .99 (Page 1980), OKLA. STAT. ANN. tit. 70, §§ 5-101 to -135 (West 1972); OR. REV. STAT. §§ 326.011-.081 (1981), PA. STAT. ANN. tit. 24, §§ 3-301 to -327 (Purdon 1962); R.I. GEN. LAWS §§ 16-1-1 to -7 (1956), S.C. CODE ANN. §§ 43-1 to -23 (Law. Co-op. 1977); S.D. CODIFIED LAWS ANN. §§ 13-1-1 to -39 (1982), TENN. CODE ANN. §§ 49-106 to -116 (1977); TEX. REV. CIV. STAT. ANN. art. 2664-2675c-2 (Vernon 1965), UTAH CODE ANN. §§ 53-1-11 to -17 (1981); VT. STAT. ANN. tit. 16, §§ 161-76 (1974 & Supp. 1982), VA. CODE §§ 22.1-8 to 1-20, 1-28 to 1-87 (1980), WASH. REV. CODE ANN. §§ 28A.04.010 to .285 (1970), W. VA. CODE §§ 18-2-1 to -25 (1977), WIS. STAT. ANN. §§ 40.25- 30 (West 1960), WYO. STAT. §§ 21-2-301 to -306 (1977).

29 *See, e.g.*, Ambach v. Norwick, 441 U.S. 68 (1979); Concerned School Patrons & Taxpayers v. Ware County Bd. of Educ., 245 Ga. 202, 263 S.E.2d 925 (1980), *In re* Winters, 208 Misc. 953, 146 N.Y.S.2d 107 (1955), State v. Shaver, 294 N.W.2d 883 (N.D. 1980).

30 Grosser v. Worsllett, 75 Ohio Op. 2d 243, 341 N.E.2d 356 (1974).

31 Big Sandy School Dist. No. 100-J, Elbert County v. Carroll, 164 Colo. 173, 433 P.2d 325 (1967), Riley County Educ. Ass'n v. Unified School Dist. No. 378, 225 Kan. 385, 592 P.2d 87 (1979), Magenheim v. Board of Educ. of the School Dist. of Riverview Gardens, 347 S.W.2d 409 (Mo. 1961).

32. Sims v. Etowah County Bd. of Educ., 337 So. 2d 1310 (Ala. 1976); Surrette v. Galiardo, 323 So. 2d 53 (Fla. App. 1975); Dean v. Armstrong, 246 Iowa 412, 68 N.W.2d 51 (1955); Board of Coop. Educ. Servs. of Nassau County v. Gaynor, 60 Misc.2d 316, 303 N.Y.S.2d 183 (1969); Appeal of Black, 47 Wash. 2d 42, 287 P.2d 96 (1955).

33. *See, e.g.*, Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980); *See also* Comment, *Schoolboard, Schoolbooks and the Freedom to Learn*, 59 YALE L.J. 28 (1950).

34 *See generally* E. MOON, BOOK SELECTION AND CENSORSHIP IN THE SIXTIES (1969), which discusses criteria needed for an effective book selection policy. *Compare* N.Y. ADMIN. CODE, tit.

exercise this power and the courts have generally refused to intervene.[35] Even before *Island Trees*, however, there were questions about the power of the boards to later remove from the district's libraries books which have been previously selected and added to the collection. If a board attempts to exercise this type of power, it must perform within the limits of the United States Constitution, specifically the first amendment.[36] When alleged violations of first amendment rights[37] are involved, the courts may enter the controversy to ascertain if a school board has abused its discretion and exceeded its delegated powers.

The reluctance of courts to intervene in actions of local school boards and officials is based on the related doctrines of *in loco parentis*[38] and indoctrination.[39] Additionally, some courts base their reluctance to intervene on the theory that board members are elected officials and will therefore reflect the community's values and needs.[40]

1. *In Loco Parentis*

Originating in the English common law, the *in loco parentis* doctrine[41] holds that school officials stand in the place of parents and therefore exercise parental authority to direct student academic, moral, and intellectual development and the authority to control student behavior. This English common law view was adopted by the American courts[42] as the course of authority under which the school officials punish students for misbehavior.[43] In addition, the courts were inclined to allow the schools to exercise broad parental authority in order to regulate the morals, welfare and safety of students.[44] Schools were later

S. § 91 1(b) (1966). "The book collection in the secondary school shall consist of books approved as satisfactory for (1) supplementing the curriculum, (2) reference and general information, (3) appreciation, and (4) pleasure reading. . . . Books of established quality and authority in sufficient quantity to meet all school needs are recognized as necessary tools and materials of instruction."

35 President's Council Dist. No. 25 v Community School Bd. No. 25, 457 F 2d 289 (2d Cir.), *cert. denied*, 409 U S. 998 (1972).

36 *See supra* note 22

37 Swart v. South Burlington Town School Dist., 122 Vt. 177, 167 A 2d 514, *cert. denied*, 366 U S 925 (1961)

38 *In loco parentis* (Lat.)—In the place of a parent; instead of a parent, charged, fatitiously, with a parent's rights, duties, and responsibilities. BLACK'S LAW DICTIONARY (5th ed. 1979). In the place of a parent: as, the master stands toward his apprentice *in loc parentis*. BOUVIER'S LAW DICTIONARY (3d revision 1914).

39 *President's Council*, 457 F.2d 289 (2d Cir. 1972).

40. East Hartford Educ. Ass'n v. Board of Educ., 562 F.2d 838 (2d Cir. 1977).

41. Mawdsley, *In Loco Parentis: a Balancing of Interests*, 61 ILL. B.J. 638 (1973).

42. *Id.* at 639.

43 Peck v. Smith, 41 Conn. 442 (1874); Ingraham v. Wright, 430 U.S. 651 (1977); Gordon v Oak Park School Dist., 24 Ill. App. 3d 131, 320 N.E.2d 389 (1974). For a discussion of cases dealing with the school's authority to discipline students for various types of misbehavior, see Annot., 43 A.L.R.2d 469 (1955).

44. Baker v. Downey City Bd. of Educ., 307 F Supp. 517 (C.D. Cal. 1969); Palmyra Bd. of

given these rights and responsibilities through the enactment of specific statutes.[45] State statutory provisions also create school boards as the body fundamentally responsible for the direction of the schools;[46] therefore, *in loco parentis* rights and responsibilities were merely extended from the school officials to the school boards. However, support of the *in loco parentis* doctrine is diminishing;[47] courts are recognizing that schools and boards may not assume complete duties of the parents.[48] Furthermore, the schools may not interfere with students' private lives through the *in loco parentis* doctrine.[49] The boards must, therefore, seek alternative theories to establish complete authority over students.

2. Indoctrination Theory

The second theory, indoctrination, is partially based on legislative authorization.[50] Legislative bodies and the courts recognize that schools perform socialization and indoctrination functions.[51] Local school boards must be given broad discretion to shape the minds of the students to accomplish this socialization goal. Some courts have adopted this view. In *James v. Board of Education*[52] the Second Circuit Court of Appeals concluded that the principal function of public education is indoctrinative—to transmit basic values of the community to the students.[53] School board decisions may, moreover, properly reflect local community views and values in the determination of educational content and analysis used by the schools.[54] The indoctrinative nature of the schools is not limited to the curriculum.[55] Schools may legiti-

Educ v Hansen, 56 N J. Super 567, 153 A.2d 393 (1959). *See also* Annot., 53 A.L.R 3d 1124 (1973), which discusses the teacher's and the school's control over the non-academic activities of students

45 *See supra* note 28

46. *See* Comment, *Schoolboards, Schoolbooks and the Freedom to Learn*, 59 YALE L J 928, 930 (1950)

47 The school board is not simply the parent to the children of the school district. It is also an agency of the state. Unlike parents, it must operate within the constraint of the Constitution. Although children have no first amendment rights while at home, they do when they are at school. *Tinker*, 393 U.S at 503 (1969).

48 Baker v. Owen, 395 F. Supp. 294 (M.D.N.C. 1975).

49. Westley v Rossi, 305 F. Supp. 706 (D. Minn. 1969).

50. *Id.*

51. *See* Nahmod, *First Amendment Protection for Learning and Teaching: the Scope of Judicial Review*, 18 WAYNE L. REV. 1479 (1972).

52. 461 F.2d 566 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972).

53. *Id.* at 573. *See also* Ambach v. Norwick, 441 U.S. 68 (1979) (upholding a New York statute forbidding permanent certification as a public school teacher of any person who is not a United States citizen unless that person has manifested an intention to apply for citizenship. The *Ambach* court reasoned that education was an important state function and all teachers must help fulfill the function of promoting civic virtues and understanding).

54. 461 F 2d 566, 573 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972).

55 *Id.* at 573.

mately be used as a vehicle for inculcating fundamental values.[56] The goal of indoctrination will justify control by the school board over most educational policies unless there is evidence that fundamental values or rights are being violated.[57]

3. Elected Official Presumption

The final theory which gives power to some school boards is the reliance on the democratic process of election.[58] Parents and other community persons elect most local school boards. Thus, the assumption follows that the persons elected reflect the general morals and thoughts of the community. The courts again are reluctant to interfere with the decisions of elected school authorities if there is any reasonable educational basis for the board's decisions.[59] For example, in upholding a dress code specified by the local school board, the Second Circuit Court of Appeals asserted that control of the public schools is committed to officials who are elected. This commitment requires significant public control over what is said and done to be placed in the hands of the school boards.[60]

B. *Restrictions on the Exercise of Authority*

Although the courts recognize the school board's need to operate free from judicial intrusion,[61] the courts cannot allow an abuse of discretion which violates students' fundamental rights.[62] Early cases decided by the federal courts recognized that neither the *in loco parentis* doctrine nor the indoctrination theory was sufficient to justify an abuse of discretion and to sustain a violation of first amendment rights.[63] The

56 *Ambach*, 441 U.S. at 77.

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

58 East Hartford Educ. Ass'n v. Bd. of Educ., 562 F.2d 838 (2d Cir. 1977). *See also* Chief Justice Burger's dissent in Board of Educ. v. Island Trees Union Free School Dist. No. 26 v. Pico, 102 S. Ct. 2799 (1982), which supports the view that parents have a great voice in the administration of the schools. Justice Burger reasoned that a school board is truly "of the people and by the people," reflecting the constituency in a very real sense and therefore could not exercise unchecked discretion. Parents can take steps to remove the elected officials. *Id.* at 2820-21.

59 *Epperson*, 393 U.S. at 104.

60 *East Hartford*, 562 F.2d at 856. *But see* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943), which states that "[t]he very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitude 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."

61. President's Council Dist. No. 25 v. Community School Bd. No. 25, 457 F.2d 289 (2d Cir. 1972). For a discussion of *President's Council*, see Salem, *Removal of Public School Library Books: The First Amendment Versus the Local School Boards*, 34 VAND. L. REV. 1407 (1981).

62 Meyer v. Nebraska, 262 U.S. 390 (1923), invalidating a state law which did not allow the teaching of a foreign language to a student unless he had successfully passed the eighth grade.

63 *Barnette*, 319 U.S. 624 (1943) (holding that a school board could not require the saluting of a flag). Brown v. Board of Educ., 347 U.S. 483 (1954) reasoning that education was the principal instrument in awakening the child to cultural values, in preparing him for later professional

Supreme Court in 1943[64] concluded that "they [school boards] are educating the young for citizenship is reason enough for scrupulous protection 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."[65] Continuing for the majority, Justice Jackson stated that no official has the right "to prescribe what shall be orthodox in politics, nationalism, religion or matters of opinion."[66] The role of the first amendment is important to assure individualism and cultural diversity in our society[67] and individual rights cannot be made subordinate to the views of the majority.[68]

The importance of freedom of expression in the school was reaffirmed in *Keyishian v. Board of Regents*,[69] which asserted that there must be vigilant protection of constitutional freedom in the American schools, "the marketplace of ideas."[70] The "future of the country depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of the multitude of tongues [rather] than through a kind of authoritative selection.' "[71] In *Tinker*, the Court used even stronger language: "In our system, state-operated schools may not be enclaves of totalitarianism."[72] School officials do not possess absolute authority over the students; their authority must be exercised within justifiable limits in order not to violate fundamental rights. Students in school as well as out of school are persons under the Constitution, with guarantees of certain fundamental rights which the state must respect.[73]

training, and in helping him to adjust normally to his environment. Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966) (holding that school officials could not prevent students from wearing "freedom buttons" and that school officials cannot infringe on students' rights to free and unrestricted expression as guaranteed to them under the first amendment).

64 *Barnette*, 319 U.S. 624 (1943).

65 *Id.* at 637.

66 *Id.* at 642. Actions of a state making it compulsory for children in the public schools to salute the flag and pledge allegiance violated the first and fourteenth amendments. The flag salute cases invade the sphere of intellect and spirit which it is the purpose of the first amendment of the United States Constitution to reserve from all official control.

67 *Id.* at 641-42.

68 *Id.* at 638.

69 385 U.S. 589 (1967). In *Keyishian*, faculty members of the State University of New York brought an action for declaratory and injunctive relief, claiming that New York's teacher loyalty oath laws were unconstitutional. The Supreme Court invalidated the provisions of the New York laws and stressed the importance of safeguarding academic freedom, freedom of transcendent value to all and not merely to the teachers concerned. "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.' " *Id.* at 603 (quoting from United States v. Associated Press, 52 F. Supp. 363, 372 (S.D.N.Y. 1943)).

70 385 U.S. at 603.

71 *Id.* (quoting United States v. Associated Press, 52 F. Supp. 363, 372 (S.D.N.Y. 1943)).

72 *Tinker*, 393 U.S. at 511.

73 *Id.* The *Tinker* court asserted that students may not be regarded as "closed-circuit recipients" of only that which the State chooses to communicate.

Clearly, the courts may intervene in the resolution of conflicts which arise in the daily operations of school systems and which directly and sharply implicate basic constitutional values.[74] The courts must, therefore, determine what kind of test should be used to determine if basic constitutional rights are being violated. The *James* decision supports the view that any limitation on the exercise of constitutional rights can be justified only by a conclusion, "based . . . on reasonable inferences flowing from concrete facts and not abstractions, that the interests of discipline or sound education are materially and substantially jeopardized."[75] This test would require two factors: (1) a showing that the school's action violates the students' right to expression; and (2) a showing that the school's action is not reasonably related or necessary to the performance by the school of its educational function.[76]

C. *Development of First Amendment Rights for Students*

1. Applicability of the First Amendment to Students

Having determined that school board actions may be violative of the first amendment if the exercise of authority disregards constitutional rights, the courts extend the protection of the first amendment to students. The extension of the first amendment to students began on a limited basis in 1923[77] and reached its peak in 1969.[78] In 1923, the Supreme Court struck down a state law that forbade the teaching of German in public and private schools.[79] Twenty years later, a student's right not to salute the flag was protected by the first amendment.[80] In 1968, the Supreme Court declared unconstitutional a state law that prohibited the teaching of Darwinian theory of evolution in any state-supported school,[81] affirming the duty of the federal courts "to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry."[82] In *Tinker v. Des Moines School District* the Court held that a local school board had infringed on the free speech rights of high school and junior high school students by suspending them from school for wearing black armbands in class as a protest against the government's policy in Vietnam: "the authority . . . of school officials . . .

74. *Epperson*, 393 U.S. at 104.
75. *James*, 461 F.2d at 571.
76. *Id.* at 573-74.
77. Meyer v. Nebraska, 262 U.S. 390 (1923).
78. Tinker v. Des Moines Indep. Community School, 393 U.S. 503 (1969).
79. *Meyer*, 262 U.S. at 390. A state statute in this case prohibited the teaching of German in the public and private schools and was prompted by the anti-German feelings in World War I.
80. West Virginia v. Barnette, 319 U.S. 624 (1943).
81. Epperson v. Arkansas, 393 U.S. 97 (1968).
82. *Id.* at 104.

must be exercised consistent with fundamental constitutional safeguards."[83] Students do not shed their rights to freedom of speech or expression at the entrance of the schools.[84] Thus, the school boards must discharge their important, delicate, and highly discretionary functions within the limits and constraints of the first amendment.[85]

2. Historical Basis for the Right to Receive

The right to receive information has been supported by the United States Supreme Court in some form since 1943.[86] That year the Court invalidated an Ohio anti-soliciting ordinance, implying that the first amendment protected a right to hear or receive information.[87] In 1965, this view was re-affirmed by the Court in *Lamont v. Postmaster General*.[88] Mr. Justice Brennan stated that the right to receive information should be perceived as a fundamental personal right necessary to make the express guarantees of the first amendment fully meaningful.[89] Justice Brennan analogizes the dissemination of ideas to the buyer-seller market: "it would be a barren marketplace . . . that had only sellers and no buyers."[90] Similarly, the dissemination of ideas can accomplish nothing if willing recipients of the information are not free to accept the ideas and consider them.[91] Finally, the Supreme Court strengthens the foundation for the right to receive information in the commercial speech cases. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[92] the Court extended first amendment protection to commercial speech, arguing that freedom of speech presupposes a willing speaker. Moreover, the willing speaker is meaningless unless the protections of the first amendment are afforded to the communication, to the speaker, and to the potential recipients:[93] it is a reciprocal

83 *Tinker*, 393 U.S. at 507
84 *Id.* at 506
85 *Id.*
86 Martin v. City of Struthers, 319 U.S. 141 (1943).
87 *Id.* at 146-47
88 381 U.S. 301 (1965)
89 *Id.* at 308
90 *Id.*
91 *See generally* Stanley v. Georgia, 394 U.S. 557 (1969) and Kleindienst v. Mandel, 408 U.S. 753 (1972), supporting the view that the state's attempt to control the content of an individual's thoughts is incompatible with the underlying principles of the first amendment. The *Stanley* court supported the plaintiff's view that he has "the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home." 394 U.S. at 565. The Supreme Court would not later extend Stanley's right to have and peruse obscene materials in the privacy of his own home to allow the protection of a seller of these materials. "Whatever the scope of the 'right to receive' referred to in *Stanley*, it is not so broad as to immunize the dealings" of routinely disseminating obscenity through the mails. United States v. Reidel, 402 U.S. 351, 355 (1971)
92 425 U.S. 748 (1976)
93 *Id.* at 756

right that can be asserted by the recipient as well as the sender.[94]

Unfortunately, the courts have not ruled consistently regarding the right to receive information in a school setting.[95] In three major decisions,[96] federal courts concluded that removal of books from the school library and/or curriculum violates the first amendment rights of students. Conversely, three other recent decisions[97] support the view that removal of books does not alone constitute a violation of first amendment rights.

These six decisions recognize a basic assumption: when first amendment values are implicated, local officials removing a book from a school library must demonstrate some substantial and legitimate government interest.[98] These decisions do, however, arrive at different conclusions after that initial assumption. In *President's Council, District 25 v. Community School Board No. 25* the court held that the removal of books from a school library because of educational inappropriateness does not infringe on first amendment rights of students.[99] Moreover, a book that was improperly selected "for whatever reason" could be removed by the same authority which was empowered to make the selection in the first place, namely the school board.[100] In *Zykan v. Warsaw Community School Corporation*, the court concluded that the removal from the library simply did not rise to the level of constitutional violations. "[I]t is permissible and appropriate for local boards to make educational decisions based upon their personal social, political and moral views."[101]

The Sixth Circuit Court of Appeals dissented strongly from this view. In *Minarcini v. Strongsville City School District*, the court held that neither the State of Ohio nor the Strongsville School Board "was under any federal constitutional compulsion to provide a library for the students or to choose any particular books".[102] However, once they created such a privilege for the benefit of the students, neither body

94 *Id.*

95. Right to know and right to receive information are phrases which are used interchangeably by the courts, both denoting that the receiver of the information should have certain first amendment protections in order to make the first amendment rights of speech and press valuable to the communicator.

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

97. President's Council, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 289 (2d Cir. 1972); Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980); Bicknell v. Vergennes Union High School Bd. of Directors, 638 F.2d 438 (2d Cir. 1980).

98. *Right to Read Defense Comm.*, 454 F. Supp. at 713.

99. 457 F.2d 289, 292 (2d Cir. 1972).

100. *Id.* at 293.

101. 631 F.2d at 1305.

102. *Minarcini*, 541 F.2d at 582.

could place conditions, related solely to the social or political tastes of the school board members, on the use of the library. Removal of library books is a serious burden and that burden cannot be minimized by a claim that the book is available elsewhere; the library serves as "a mighty resource in the free marketplace of ideas, specially dedicated to broad dissemination of ideas."[103] The court relied on the theory of the "right to receive" from *Virginia State Board of Pharmacy* to conclude that the students' right to receive information was unconstitutionally infringed upon when the board removed books because of content.[104]

In *The Right to Read Defense Committee of Chelsea v. School Committee of Chelsea*[105] the plaintiffs challenged the removal from the school library of an anthology containing allegedly "offensive" language. The court agreed that the school board had broad discretion over the curriculum; however, the board abused this discretion by "sanitizing" the school library of views divergent from their own.[106] At stake, the court held was the "right to read and be exposed to controversial thoughts and language—a valuable right subject to First Amendment protection."[107] In *Salvail v. Nashua Board of Education*,[108] the court ordered the return of MS magazine to the high school library, holding that the reasons for the removal[109] did not demonstrate substantial and legitimate government interests.[110] Dissents in these cases argue that the right to receive cannot be interpreted as a fundamental right; such a right has not been accepted by the court and therefore becomes nothing more than a "curious entitlement."[111]

III. ANALYSIS OF *ISLAND TREES*

With the lower courts so badly split on the issue, with no unified method of analysis, the stage was properly set for a Supreme Court decision to resolve the conflict and provide direction for the federal courts. The *Island Trees* library removal closely parallels the removals in those cases: objectionable books were removed from the library shelves by school board members for reasons which were personal, philosophical, religious and political. Because of the conflicting views

103 *Id.* at 582-83

104 *Id.* at 583

105 454 F. Supp. 703 (D. Mass. 1978).

106 *Id.* at 714.

107. *Id.*

108. 469 F. Supp. 1269 (D.N.H. 1979).

109. Certain school board members objected to advertisements in MS, plus references to a "communist" periodical and "communist folk singers."

110. 469 F. Supp. at 1275.

111 Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 102 S. Ct. 2799, 2830 (1982)

within the Supreme Court decision itself, it is doubtful that *Island Trees* can provide that direction.

A. *District Court*

The district court rejected the student's right to receive by adopting a book tenure concept.[112] That court held that school boards cannot be required to allow all books to remain on library shelves simply because the books were purchased and because of the purchase deserved to be kept on the library shelves. This concept, declared the district court, would "infringe on an elected school board's discretion in determining what community values were to be transmitted."[113] Thus, the district court affirmed that school boards may make decisions which transmit the values and morals of the community. Moreover, the court concluded that restrictions on the use and/or removal of library books deny no students the right to speech,[114] and refused to recognize the right to receive ideas. The district court distinguished *Island Trees* from *Tinker*, stating that *Tinker* clearly involved symbolic speech and no such claim could be made in *Island Trees*.[115]

B. *Court of Appeals*

The Court of Appeals for the Second Circuit recognized a first amendment right involved in *Island Trees*,[116] but determined that the "concern for first amendment rights must be considered with a cautious deference to the expertise of educational officials within the academic environment."[117] Simplistic formulas for balancing these interests by the courts cannot be determined. The best approach, therefore, is "to discern lines of analysis and advance formulations sufficient to bridge past decisions with new facts."[118] Thus, reasoned the court, bare allegations are not sufficient; allegations must be combined with the unusual and irregular intervention[119] in the school libraries' operations by persons who are not routinely concerned with such matters.[120] Agree-

112. 474 F Supp 387, 395 (E.D.N.Y 1979).
113. *Id* at 396.
114. *Id*
115. *See supra* note 5
116. *See supra* notes 24-25
117. 638 F.2d at 412 (quoting Thomas v. Board of Educ., 607 F.2d 1043, 1050 (2d Cir. 1979), *cert. denied*, 444 U.S. 1081 (1980)).
118. Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 804 n.1 (2d Cir. 1971).
119. 638 F.2d 404 (1980). The court pointed out specific procedural irregularities: confusion over the substantive reasons for removal of the books; a three-month delay before any action was taken; the *ex-post facto* appointment of the Book Review Committee; the Superintendent's opposition to the board's actions; and, the lack of adherence to established book review procedures specially developed for situations like *Island Trees*. *Id.* at 417-18.
120. *Id.* at 414

ing with the plaintiff-students, the court noted that the books were removed before any concerned school officials had read the books and the removal was based on mimeographed quotations collected by anonymous readers.[121] The board's erratic and free-wheeling procedures will only result in guesswork; students, teachers, librarians, and parents have no clear guidelines to follow.[122]

The court of appeals adopted a two-part test to determine if the school board violated the first amendment rights of the students. The first part of the test was a consideration of whether the school board has demonstrated an adequate substantive basis for the removal. The board may justify potential intrusions into the students' first amendment rights by bringing into action one of the exceptions: protection of classroom order; protection of the rights of others; promotion of the psychological well-being of the young; or promotion of standards of civility and decency among school children.[123] The second part of the test looked to whether the procedures used by the board to remove the books were precise and sensitive enough to prevent "chilling" the students' exercise of their legitimate first amendment rights. The removal must be conducted in a manner that does not express an official policy of disapproval of ideas if that policy cannot be justified on substantive grounds.[124] The court experienced difficulty applying its own two-part test, but the court did conclude that a trial was necessary to determine precisely "what happened, why it happened, and whether, in the circumstances of this case, the school board's action . . . created a sufficient risk of suppressing the ideas to constitute a violation of the first amendment."[125]

C. *The United States Supreme Court*

The United States Supreme Court's review of the decision affirmed the decision of the court of appeals: the students deserve a trial on the fact; thus, a remand to the district court for trial is necessary.[126] The Supreme Court did reveal its thoughts about the development of the right to receive information as a fundamental right. Initially, Justice Brennan, writing the judgment of the Court,[127] said that the Court can limit the number of questions presented by this case to two: (1) whether the books originally placed in the school library by school

121. *Id.* at 416.
122. *Id.*
123. *Id.* at 415-16.
124. *Id.* at 416-17
125. *Id.* at 438.
126. 102 S. Ct. 2799 (1982)
127. *See supra* note 7.

authorities may be removed;[128] (2) whether the court can reverse the court of appeals on the grounds that there is no genuine issue as to any material facts.[129] Thus, the Supreme Court deals with the limitations placed on school boards concerning the removal of books and the amount of evidence that the respondents have raised.[130]

Discussing the limitations placed on school boards, Justice Brennan concluded that first amendment rights of students may be directly and sharply implicated by the removal of books from the school library. Removal of books limits self-expression, restricts development, and limits access to discussions, debates, and the dissemination of information and ideas.[131] Furthermore, the right to receive ideas and information is an inherent corollary to the rights of free speech and press, rights that are explicitedly guaranteed by the Constitution.[132] In addition, the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom.[133] Students need a guarantee of the right to receive in order to prepare themselves for active and effective participation in the society in which they will be members; they must always remain free to inquire, to study, to evaluate, and to gain maturity and understanding.[134] The library is one of the most effective places for students to develop this maturity and this understanding: the library is the locus of such freedom.[135]

Justice Blackmun and Justice White concurred in the decision to affirm the court of appeals decision, but for different reasons. Justice Blackmun suggests that the principle of the case involves a narrower and more basic right than the right to receive information: the State may not suppress exposure to ideas for the sole purpose of suppression of exposure to those ideas without sufficiently compelling reasons.[136] Justice White refused to consider the constitutional question presented. Quoting Justice Jackson's opinion in *Kennedy v. Silas Mason Company*,[137] Justice White stated that it is "good judicial administration to withhold decision of the ultimate questions involved in this case until

128 *Island Trees*, 102 S Ct at 2805.

129 *Id* at 2806.

130 *Id*

131 *Id.* at 2808.

132 *See supra* note 22. This argument is supported by the view that the right to receive follows from the sender's first amendment rights to send ideas.

133 *Island Trees*, 102 S. Ct. at 2808.

134 Sweezy v New Hampshire, 354 U.S 234, 250 (1957) is cited by the Court to support this proposition.

135. *Island Trees*, 102 S Ct. at 2809.

136 *Id* at 2813

137 334 U S. 249 (1948).

this or another record shall present a more solid basis of findings."[138]

IV. APPLICABILITY OF *ISLAND TREES*

Several crucial factors effectively restrict any affirmation of the right to receive ideas as a fundamental right for students. First, the Court did not reach a majority decision. Secondly, the plurality decision plus the two concurring opinions only remand the case to the district court where the case will be decided after the plaintiff-students present their evidence. Thirdly, neither the plurality opinion nor the two concurring opinions carefully develop the right to receive as a guarantee of the first amendment. The dissenting opinions, in addition, clearly show strong contrary views which will limit the effect of the plurality's opinion. Finally, even if one accepts the initial contention that the right to receive is a first amendment right, the Court does not clearly enunciate a standard or test to assist other courts in the determination of the restrictions placed on the actions of school boards.

A. *Plurality Decision*

The Supreme Court in *Island Trees* presented a fractured view of the right to receive information. Justice Brennan delivered the opinion of the Court, joined by Justices Marshall and Stevens. Justices Blackmun and White filed opinions concurring in the judgment. Justice Blackmun would not agree with the court's discussion of the right to receive information as a fundamental right, arguing that state discrimination between ideas is improper.[139] He concluded strongly that the State may not deny access to ideas simply because state officials disapprove of the ideas for partisan or political reasons.[140] Furthermore, he reasoned, the focus of the plurality's opinion is the failure to provide information; however, he viewed the singling out of certain ideas for disapproval and then the denial of access to those disapproved ideas as the major problem.[141] Justice White refused to side with the plurality or the dissenters concerning the first amendment rights issue[142] and is accordingly attacked in Justice Rehnquist's dissent.[143]

Chief Justice Burger wrote a dissent, joined by Justices Powell, Rehnquist, and O'Connor.[144] Justice Burger initially argued a poten-

138. *Island Trees*, 102 S. Ct. at 2816 (quoting Kennedy v. Silas Mason Co., 334 U.S. 249, 257 (1948)).
139. *Island Trees*, 102 S. Ct. at 2814.
140. *Id.* at 2814.
141. *Id.* at 2814 n.2.
142. *See supra* note 132 and accompanying text.
143. *Island Trees*, 102 S. Ct. at 2827 n.1.
144. *Id.* at 2817.

tial question of mootness since the students have graduated.[145] Moreover, he asserted that the decision will have no precedential authority on the constitutional issues presented.[146] Justices Powell, Rehnquist, and O'Connor each completed dissenting opinions,[147] with Justice Rehnquist delivering the stronger attack on the plurality's logic and reasoning.

B. *Remand to the District Court for Consideration of the Facts*

The Justices looked closely at the evidentiary materials to determine if the respondents presented sufficient facts to maintain an action. Since the evidence regarding the substantive motivations behind the board's removal decision would not be decisive,[148] the plaintiff/students must meet other requirements. The students must demonstrate that the board did not use established, regular, and facially unbiased procedures for the review of the materials.[149] The students here did present evidence to question the methods used by the board. Other facts also supported the students' claim: disregard for the advice of the superintendent; disregard for the recommendations of the Book Review Committee; and the unreliability of the list obtained from PONY-U.[150] This evidence created a genuine issue concerning the critical question of the credibility of the school board's justification for the decision to remove the books.[151]

C. *The Plurality's "Right to Receive" Argument*

1. Basis of the Right to Receive

The right to receive information proposed by the plurality suffers from inadequate formulation and the limitations placed on the doctrine by Justice Brennan. These problems are revealed by a careful analysis of the dissent of Justice Rehnquist. According to Justice Rehnquist, the reliance on prior cases to develop the right to receive information is

145. *Id.* at 2818 n.2

146. *Id.*

147. Justice Powell argued that the decision of the plurality invites a judge to overrule an educational decision by the official body designated by the people to operate the schools. 102 S. Ct. at 2822. Justice Rehnquist accused Justice Brennan of "newly discovering" a right that is not substantiated by previous court decisions and points out the problems with Brennan's statements about acquisitions and removals. *Id.* at 2827-35. Justice O'Connor merely affirms the view that the school board must surely be able to remove books from the library shelves since it has the authority to set the curriculum, select teachers, and determine initially what books to purchase. She did, however, qualify the authority: "as long as it does not also interfere with the right of students to read the materials and to discuss it." *Id.* at 2835.

148. *Id.* at 2811.

149. *Id.*

150. *See supra* notes 10-11 and accompanying text.

151. *Island Trees*, 102 S. Ct. at 2812.

misplaced: the Court never recognized this right. Rather, past decisions have only concerned freedom of speech and expression, not the right of access to particular ideas.[152] He distinguished *Tinker*, claiming that *Tinker* did not deal with the right to receive information, but rather with the right to express political views,[153] a legitimate and recognized first amendment right.

The plurality, Rehnquist further argued, should not attempt to apply cases like *Minarcini*, *The Right to Read Defense Committee*, and *Virginia State Board of Pharmacy* by analogy.[154] Justice Brennan may correctly assert that the right of access to ideas is an important corollary to the rights of free speech and press,[155] but he failed to recognize the predicate right to speak from which the students' right to receive must follow. This failure reveals a serious inconsistency. The Court could certainly never hold that all authors have a constitutional right to have their books placed in junior and high school libraries. Yet, this is the logical extension of the reciprocal right to receive information.[156] Thus, Justice Rehnquist argued that the right to receive argument will only succeed when there is a complete denial of access.[157] Furthermore, the books which the school board removed from the library shelves in *Island Trees* were readily available elsewhere (public libraries and bookstores). Without complete denial of access, there can be no violation of the students' rights.[158]

2. Public School's Purpose

Another serious gap in the plurality's opinion, according to Justice Rehnquist, is the lack of recognition of the public school's importance in the preparation of individuals for participation as citizens.[159] To accomplish this goal, the public schools must hold a vital role in the socialization of individuals. Basic skills about society must be taught to students. In addition, public schools must be able to selectively present relevant information. The plurality's opinion ignored the fact that education "consists of the selective presentation and explanation of ideas."[160] Educators[161] must have the authority to separate relevant

152. *Id.* at 2830.
153. *Id.* at 2831
154. *Id.*
155. *Id.* at 2808.
156. *Id.* at 2831.
157. *Id.*
158. *Id. Compare* Justice Blackmun's opposing view that the availability of the books elsewhere should make no difference. He argued that difficult constitutional problems would arise if a state chose to exclude books, even if those books remained at local bookstores. *Id.* at 2815.
159. *Id.* at 2832 (citing Ambach v. Norwick, 441 U.S. 68, 71 (1979)).
160. *Id.*
161. Note that Justice Rehnquist does not use the term school board members, rather he care-

information from the irrelevant. Logically, therefore, the schools can only present exposure to limited ideas. Other information and ideas must be discovered by the students on their own and at places other than the schools and school libraries.[162] Justice Rehnquist's dissent reflects the reasoning of the Seventh Circuit Court of Appeals in *Zykan v. Warsaw Community School Corporation*.[163]

3. Limitations on the Right to Receive

Perhaps the most serious problems with the right to receive concept, as presented by Justice Brennan, are the limitations placed on the concept by Justice Brennan himself. First, Brennan confined the right to the school library: "the special circumstances of the school library made that environment especially appropriate for the recognition of the first amendment rights of students."[164] He explored the idea of the library as a place where students find knowledge, read new material, and expand ideas.[165] The use of the Island Trees school libraries was voluntary and the students used free choice regarding the selection of what they would read; thus, the library afforded them an opportunity at self-evaluation and individual enrichment that is wholly optional. Justice Brennan suggested that school officials should not be able to extend their discretion beyond the compulsory environment of the classroom.[166] His comments are all legitimate; however, he gives no reasons why he would limit this right to receive information to the library setting only.

Justice Rehnquist, on the other hand, argued that elementary and secondary school libraries are not designed for free-wheeling inquiry.[167] These libraries, unlike public libraries, are tailored to the public school curriculum and to the teaching of basic skills and

fully uses terms like "school officials," "educators," and "teachers." The implication is, of course, that educators are trained to determine what is appropriate for students. School board members are elected and specific educational training is not a requirement.

162. 102 S. Ct. at 2832.

163. 631 F.2d 1300 (7th Cir. 1980). In *Zykan*, the court of appeals suggested that academic freedom of students was limited by two factors. First, the students' right to receive and the need to know information is restricted by the level of intellectual development of the student. Secondly, the role of the secondary schools in the development of intellectual faculties is "only one part of a broad formative role encompassing the encouragement and nurturing of those fundamental social, political, and moral values that will prepare a student to take his place in the community." *Id.* at 1304. Therefore, the community has a legitimate, if not vital, interest in the choice of, the adherence to, and the limitations on a suitable curriculum for the benefit of the students in that community. The library should, furthermore, support that curriculum through the selection of materials adaptable to the same social, political and moral values.

164. *Island Trees*, 102 S. Ct. at 2809.

165. *Id.*

166. *Id.*

167. *Id.* at 2832.

ideas.[168] Justice Brennan's artificial restriction on the right to the school library created the possibility of such an attack by the dissent. A concrete and unqualified affirmation of the right to receive information would have been more difficult for the dissent to destroy.

The second limitation on the right to receive is the distinction between the act of removal of previously acquired books and the act of refusing to acquire a book in the first place. "Nothing in our decision today affects in any way the discretion of a local school board to choose books to add to the libraries of their schools,"[169] wrote Justice Brennan. Once again, the reasoning of the plurality opinion made the attack of the dissenters easier. Either way (whether removed after purchase or whether refusal to purchase), argued Justice Rehnquist, the students will not have access to the information.[170] Brennan's reliance on the "suppression of ideas" theory neither supported his view nor invalidated Rehnquist's concerns. Certainly a board's action in publicly refusing to acquire a certain book would be interpreted as a suppression of ideas, a suppression that is just as restrictive as removal from the libraries of a previously purchased book.[171]

The final limitation on the right to receive information concept is the use of the motive test. Brennan specified that the first amendment is violated ONLY if the school board members intended by their actions to deny access to the ideas with which the board members disagreed.[172] A forceful affirmation of the right to receive information as a fundamental right would not be subjected to such motive requirement. Restrictions on the right to receive would simply be unconstitutional and the court would not have to ascertain the intent of the board members. Otherwise the court will always be confronted with the problem of determining if the books were removed because they were "educationally unsuitable"[173] or because they presented ideas with which the Board disagreed.[174]

Also, the motive requirement is inconsistent with the distinction between the acquisition and removal. A school board's acquisition policy might well be motivated by a desire to promote certain political and/or religious ideas. Yet, according to Brennan's motive test, this policy would not violate fundamental rights. Violations would occur only when the board members attempted to remove books for political or

168. *Id.*
169. *Id.* at 2810.
170. *Id.* at 2833.
171. *Id.*
172. *Id.* at 2810
173 *Id.* at 2833.
174 *Id.* at 2810

religious veiws.[175]

D. *Standard to Apply in Right to Receive Cases*

The *Island Trees* decision does not provide clear guidelines or standards for other courts. It will not help students determine when their rights have been violated. Nor will it help school boards know what restrictions are placed on their authority. Justice Brennan does imply that a balancing test would be appropriate,[176] balancing the rights of the local school boards to establish and apply their curriculum in such a way as to transmit community values with the rights of school students to receive information as an inherent corollary to the first amendment. Brennan does not, however, specify the degree of permissible intrusion allowed by school boards,[177] nor does he specify whether the actions of the school boards would be subjected to minimum review or to strict scrutiny.[178]

175. *Id.* at 2834

176. *Id.* at 2806-07

177. *Id.*

178. Justice Rehnquist would recommend that courts not intervene into the actions of school boards. He argued that the school board in this case is acting in a special role as an educator and must not be subjected to intervention by the courts unless basic constitutional values are directly and sharply involved. He would only review first amendment claims arising in the public school setting with a minimum rationality standard, a standard similar to the review of governmental actions that do not implicate fundamental rights. *Island Trees*, 102 S. Ct. at 2829-30. The courts cannot become the "super censor" of school board library decisions, and thus, decide all issues of censorship. Justice Rehnquist's view is furthered by several commentators, including Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477 (1981).

Other commentators suggest the development of guidelines to prevent the need for judicial intervention and the rules to follow if judicial intervention becomes necessary. The first commentator lists three steps: (1) school boards should exercise great care in the initial purchase of school books, (2) school boards should follow established internal procedures for the review of challenged materials, and (3) boards should develop some objective criteria to evaluate disputed materials. This analysis reasons that the boards' actions would be presumptively valid, plus the procedures would help to avert removal challenges, especially if students were allowed the opportunity to view and comment upon the evaluation processes. Comment, *Removal of Public School Library Books: The First Amendment Versus the Local School Boards*, 34 VAND. L. REV. 1407, 1434 (1981).

The second example suggests that school boards may not exclude an entire system of thought or viewpoint; may not discourage student investigation of ideas contained in particular books, and should adopt procedural safeguards which specify routine and systematic review of the curriculum and the book selection policies. This process, judicial review would only be necessary to define the parameters of the balancing of interests and to enforce those boundaries in particular factual situations. Note, *School Board Removal of Books from Libraries and Curricula*, 30 U. KAN. L. REV. 146 (1981).

Another commentator recommends the reasonable educational judgment standard, a three-part test for the courts to use if the procedural safeguards do not prevent confrontations. First, the courts should regard selection decisions as presumptively constitutional, with the burden on the plaintiffs to show that the decision was not supported by reasonable education judgment. Secondly, the school board's burden would be a showing that the actions were taken as a result of reasonable educational policy determination. Thus, the balance of these interests would recognize

V. CONCLUSION

In *Island Trees* the Supreme Court lost a perfect opportunity to enlarge its support for the first amendment rights of individuals and to clear up the difficult issues of book removal and the right to receive information. The decision does not settle either issue, neither the school board's authority to remove books from library shelves nor the right to receive information as a first amendment right of students. The decision does, however, reveal the present reasoning of the Supreme Court Justices and does provide some insight into how the issues may be settled in the future.

TIMOTHY L. COGGINS

the greater risk of first amendment infringement in the context of book removals when the school board's motives are more difficult to detect and its educational policy judgments are preferred. Note, *Schoolbooks, Schoolboards, and the Constitution*, 80 COLUM. L. REV. 1092, 1123-24 (1980).