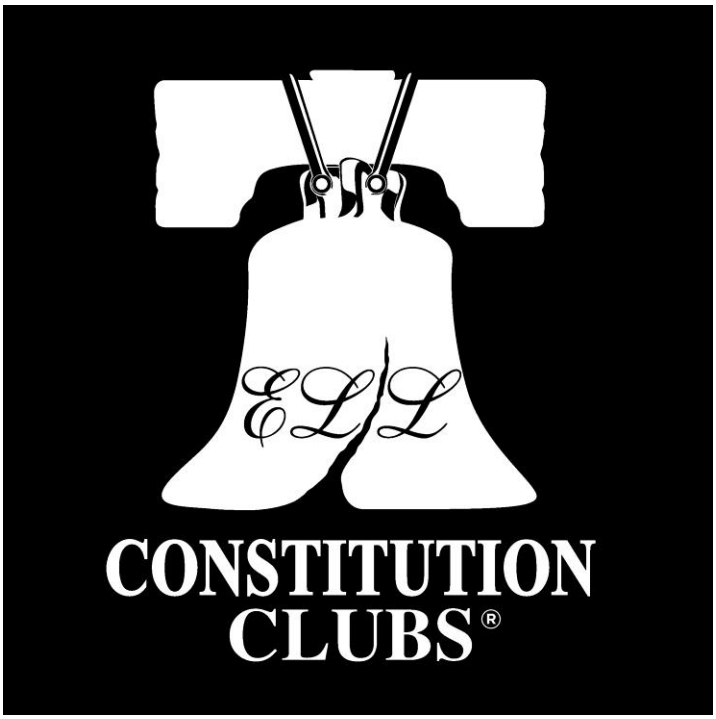

BOARD OF EDUCATION v. PICO

SUPREME COURT OF THE UNITED STATES
457 U.S. 853
June 25, 1982
[5 - 4]

OPINION: Justice BRENNAN/MARSHALL/STEVENS/BLACKMUN (in part). The principal question presented is whether the First Amendment imposes limitations upon the exercise by a local school board of its discretion to **remove** library books from high school and junior high school libraries. Petitioners are the Board of Education of the Island Trees Union Free School District No. 26, in New York…Respondents are…students at the High School…and…Junior High School.

In September 1975, [members of the Board] attended a conference sponsored by Parents of New York United (PONYU), a politically conservative organization of parents concerned about education legislation in the State of New York. At the conference these petitioners obtained lists of books described…as "objectionable" and…as "improper fare for school students." It was later determined that the High School library contained nine of the listed books, and that another listed book was in the Junior High School library. In February 1976,…the Board gave an "unofficial direction" that the listed books be removed from the library shelves and delivered to the Board's offices, so that Board members could read them. **When this directive was carried out, it became publicized, and the Board issued a press release justifying its action. It characterized the removed books as "anti-American, anti-Christian, anti-Semitic, and just plain filthy," and 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."**

A short time later, the Board appointed a "Book Review Committee"…to read the listed books and to recommend to the Board whether the books should be retained, taking into account the books' "educational suitability," "good taste," "relevance," and "appropriateness to age and grade level." In July, the Committee made its final report to the Board, recommending that five of the listed books be retained and that two others be removed from the school libraries. As for the remaining four books, the Committee could not agree on two, took no position on one, and recommended that the last book be made available to students only with parental approval. The Board…decided that only one book should be returned to the High School library without restriction, that another should be made available subject to parental approval, but that the remaining nine books should "be removed from elementary and secondary libraries and [from] use in the curriculum." The Board gave no reasons for rejecting the recommendations of the Committee that it had appointed.

[The Students]…alleged that [the Board] had "ordered the removal of the books from school libraries and proscribed their use in the curriculum **because particular passages in the books offended their social, political and moral tastes and not because the books, taken as a whole, were lacking in educational value.**"

We're not talking Huck Finn, here. Just wait until you see the real excerpts.

[The Students]…asked the court for a declaration that the Board's actions were unconstitutional, and for preliminary and permanent injunctive relief ordering the Board to return the nine books to the school libraries and to refrain from interfering with the use of those books in the schools' curricula. **The District Court granted summary judgment in favor of [the Board]. In the court's view, "<u>the parties substantially agreed</u> about the <u>motivation</u> behind the Board's actions,"—namely, that "the board acted not on religious principles but on its conservative educational philosophy, and on its belief that the nine books removed from the school library and curriculum were <u>irrelevant</u>, <u>vulgar</u>, <u>immoral</u>, and <u>in bad taste</u>, making them <u>educationally unsuitable</u> for the district's junior and senior high school students.**"

…Noting that statutes, history, and precedent had vested local school boards with a **broad discretion** to formulate educational policy, **the court concluded that it should not intervene in "the daily operations of school systems" unless "basic constitutional values" were "sharply implicated,"** and determined that the conditions for such intervention did not exist in the present case. Acknowledging that the "removal [of the books]…<u>clearly was content based</u>," the court nevertheless found no constitutional violation of the requisite magnitude: "The Board has restricted access only to certain books which the Board believed to be, in essence, vulgar. While removal of such books from a school library may…reflect a misguided educational philosophy, **it does not constitute a sharp and direct infringement of any first amendment right.**"

A three-judge panel of the…Court of Appeals…<u>reversed</u> the judgment of the District Court, and remanded the action for a trial on [the Students'] allegations…Delivering the judgment of the court, Judge Sifton treated the case as involving "an unusual and irregular intervention in the school libraries' operations by persons not routinely concerned with such matters," and concluded that [the Board was] obliged to demonstrate a reasonable basis for interfering with [the Students'] First Amendment rights. He then determined that, at least at the summary

judgment stage, [the Board] had not offered sufficient justification for their action, and concluded that [the Students] "should have…been offered an opportunity to persuade a finder of fact that the ostensible justifications for [the Board's] actions…were simply pretexts for the suppression of free speech." **Judge Newman…viewed the case as turning on the contested factual issue of whether [the Board's] removal decision <u>was motivated</u> by a justifiable desire to remove books containing vulgarities and sexual explicitness, or rather by an impermissible desire to suppress ideas.** We granted certiorari.

All books contain "ideas." I am lost. A motivation to remove filth is justifiable, but suppressing "ideas" is not? What do we do about the "ideas" found within the four corners of the filth that would otherwise justify their exclusion?

…Our precedents have long recognized certain constitutional limits upon the power of the State to control even the curriculum and classroom. But the current action does not require us to re-enter this difficult terrain which *Meyer* and *Epperson*[1] traversed without apparent misgiving. For as this case is presented to us, it does not involve textbooks, or indeed any books that Island Trees students would be <u>required to read</u>…[T]he only books at issue in this case are library books, books that by their nature are <u>optional</u> rather than required reading. Our adjudication of the present case thus does not intrude into the classroom, or into the compulsory courses taught there. Furthermore, even as to library books, the action before us does not involve the **acquisition** of books. [The Students] have not sought to compel their school Board to **add** to the school library shelves any books that students desire to read. Rather, the only action challenged in this case is the **removal** from school libraries of books originally placed there by the school authorities, or without objection from them.

The substantive question before us is still further constrained by the procedural posture of this case. [The Board was] granted summary judgment by the District Court. The Court of Appeals reversed that judgment, and remanded the action for a trial on the merits of [the Students'] claims. We can reverse the judgment of the Court of Appeals, and grant [the Board's] request for reinstatement of the summary judgment in their favor, only if we determine that "there is no genuine issue as to any material fact," and that [the Board is] "entitled to a judgment as a matter of law."…

Perhaps a mini-lesson in civil procedure is in order. Summary judgment (a victory for one of the parties without putting on evidence) is appropriate for the winner if the court agrees that there is no rational difference of opinion as to the truth of the facts underling the allegations or defenses.

In sum, the issue before us…may best be restated as two distinct questions. First, does the First Amendment impose any limitations upon the **discretion** of [the Board] to **remove** library books from the Island Trees High School and Junior High School? Second, if so, do the affidavits and other evidentiary materials before the District Court, construed most favorably to [the Students], raise a genuine issue of fact whether petitioners might have exceeded those limitations? If we

[1] Case 1A-R-12 on this website.

answer either of these questions in the negative, then we must reverse the judgment of the Court of Appeals and reinstate the District Court's summary judgment for [the Board]. If we answer both questions in the affirmative, then we must affirm the judgment below. We examine these questions in turn.

The Court has long recognized that local school boards have broad discretion in the management of school affairs. *Epperson v. Arkansas* reaffirmed that, by and large, "public education in our Nation is committed to the control of state and local authorities," and that federal courts should not ordinarily "intervene in the resolution of conflicts which arise in the daily operation of school systems." *Tinker*[2] noted that we have "repeatedly emphasized…the comprehensive authority of the States and of school officials…to prescribe and control conduct in the schools." **We have also acknowledged that public schools are vitally important "in the preparation of individuals for participation as citizens," and as vehicles for "inculcating fundamental values necessary to the maintenance of a democratic political system."** *Ambach v. Norwick* (1979). **We are therefore in full agreement with petitioners that local school boards must be permitted "to establish and apply their curriculum in such a way as to transmit community values," and that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political."**

By now you perhaps have learned that the foregoing strong statements in support of local school boards means that the outcome of this case is not likely going to favor the Board.

At the same time, however, we have necessarily recognized that the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment. In *West Virginia Board of Education v. Barnette* (1943)[3], we held that under the First Amendment a student in a public school could not be compelled to salute the flag. We reasoned: "Boards of Education…have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."

Later cases have consistently followed this rationale. Thus *Epperson* invalidated a State's anti-evolution statute as violative of the Establishment Clause, and reaffirmed the duty of 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." And *Tinker* held that a local school board had infringed 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 Viet Nam; we stated there that the "comprehensive authority…of school officials" must be exercised "consistent with fundamental constitutional safeguards." In sum, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" and therefore local school boards must discharge their

[2] Case 1A-R-12 on this website.
[3] Case 1A-S-9 on this website.

"important, delicate, and highly discretionary functions" within the limits and constraints of the First Amendment.

The nature of students' First Amendment rights in the context of this case requires further examination. [In *West Virginia Board of Education v. Barnette*], the Court held that students' liberty of conscience could not be infringed in the name of "national unity" or "patriotism." We explained that "the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." Similarly, *Tinker* held that students' rights to freedom of expression of their political views could not be abridged by reliance upon an "undifferentiated fear or apprehension of disturbance" arising from such expression…In short, "First Amendment rights, applied in light of the special characteristics of the school environment, are available to…students."

Of course, courts should not "intervene in the resolution of conflicts which arise in the daily operation of school systems" unless "basic constitutional values" are "directly and sharply implicate[d]" in those conflicts. *Epperson.* But **we think that the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library.** Our precedents have focused "not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas." And we have recognized that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Griswold v. Connecticut*. In keeping with this principle, we have held that in a variety of contexts "the Constitution protects **the right to receive information** and ideas." *Stanley v. Georgia*. This right is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution, in two senses. First, the right to receive ideas follows **ineluctably** from the sender's First Amendment right to send them: "The right of freedom of speech and press…embraces the right to distribute literature, and necessarily protects the right to receive it." *Martin v. Struthers*. "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."

Ineluctable: Not to be avoided, changed or resisted.

More importantly, 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. **Madison** admonished us:

> **"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. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."**

…In sum, just as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members. Of course all First Amendment rights accorded to students must be construed "in

light of the special characteristics of the school environment." *Tinker*. But the special characteristics of the school library make that environment especially appropriate for the recognition of the First Amendment rights of students.

A school library, no less than any other public library, is "a place dedicated to quiet, to knowledge, and to beauty." *Keyishian v. Board of Regents* observed that "students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding." The school library is the principal locus of such freedom. As one District Court has well put it, in the school library "a student can literally explore the unknown, and discover areas of interest and thought not covered by the prescribed curriculum…The student learns that a library is a place to test or expand upon ideas presented to him, in or out of the classroom."

[The Board emphasizes] the inculcative function of secondary education, and argue[s] that [it] must be allowed unfettered discretion to **"transmit community values"…**But that sweeping claim overlooks the unique role of the school library. It appears from the record that use of the Island Trees school libraries is completely voluntary on the part of students. Their selection of books from these libraries is entirely a matter of free choice; the libraries afford them an opportunity at self-education and individual enrichment that is wholly optional. **[The Board] might well defend [its] claim of absolute discretion in matters of curriculum by reliance upon their duty to inculcate community values. But we think that [the Board's] reliance upon that duty is misplaced where, as here, they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway. In rejecting [the Board's] claim of absolute discretion to remove books from their school libraries, we do not deny that local school boards have a substantial legitimate role to play in the determination of school library content. We thus must turn to the question of the extent to which the First Amendment places limitations upon the discretion of [the Board] to <u>remove</u> books from their libraries.** In this inquiry we enjoy the guidance of several precedents. *West Virginia Board of Education v. Barnette* stated: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion…If there are any circumstances which permit an exception, they do not now occur to us." This doctrine has been reaffirmed in later cases involving education. For example, *Keyishian v. Board of Regents* noted that "the First Amendment…does not tolerate laws that cast a pall of orthodoxy over the classroom."…**With respect to the present case, the message of these precedents is clear. [The Board] rightly possess[es] significant discretion to determine the content of their school libraries. But that discretion may not be exercised in a narrowly <u>partisan or political</u> manner.** If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books. The same conclusion would surely apply if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration. **<u>Our Constitution does not permit the official suppression of ideas</u>**.

My main problem with the concept of "suppression of ideas" when it comes to school library shelves is that any decision not to buy a book is necessarily a suppression of ideas. Must a school board, therefore, buy ALL available books?

Thus whether [the Board's] removal of books from their school libraries denied [the Students] their First Amendment rights depends upon the **motivation** behind [the Board's] actions. **If [the Board] intended by their removal decision to deny [the Students] access to ideas with which [the Board] disagreed, and if this intent was the decisive factor in [the Board's] decision, then [the Board has] exercised their discretion in violation of the Constitution. To permit such intentions to control official actions would be to encourage the precise sort of officially prescribed orthodoxy unequivocally condemned in *Barnette.* On the other hand, [the Students] implicitly concede that an unconstitutional motivation would not be demonstrated if it were shown that [the Board] had decided to remove the books at issue because those books were pervasively vulgar. And again, [the Students] concede that if it were demonstrated that the removal decision was based solely upon the "educational suitability" of the books in question, then their removal would be "perfectly permissible." In other words, in [the Students'] view such motivations, if decisive of [the Board's] actions, would not carry the danger of an official suppression of ideas, and thus would not violate [the Students'] First Amendment rights.**

I may be alone on this, but I do not understand the "motivation" test. It seems to me that if a book is constitutionally improper for grade school (i.e., "pervasively vulgar" (whatever that means) or "educationally unsuitable" (whatever that means)), the Board's "motivation" (even if otherwise improper) should be irrelevant.

First, I don't know how one proves "motivation," especially after the Board is tipped off on what "motivation" supports them and what does not. Second, as an extreme example, let us suppose that, somehow, the students prove that the true motivation to remove books that everyone agrees are "pervasively vulgar" was "impermissible political orthodoxy." Apparently, this Majority would order known "pervasively vulgar" books to remain on the shelves. Right?

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

Fairly loose language for the very sentence that states the "holding" of the case. Does "simply" mean "solely"? Yes, according to Webster's Dictionary. There is, therefore, no way of getting around the true holding. A Board absolutely "may" remove books even if their reasoning, in part, is founded on an impermissible dislike of the political thinking found therein, as long as some of their reasoning is based upon constitutionally valid objects, such as "educational unsuitability" or "pervasive vulgarity." If the Majority really did intend to use the word "simply," they have taken all of the wind out of the students' victory. Disagreement? Anyone?

We now turn to the remaining question presented by this case: Do the evidentiary materials that were before the District Court, when construed most favorably to [the Students], raise a genuine issue of material fact whether [the Board] exceeded constitutional limitations in exercising their discretion to remove the books from the school libraries? We conclude that the materials do raise such a question, which forecloses summary judgment in favor of [the Board].

Before the District Court, [the Students] claimed that [the Board's] decision to remove the books "was based on their **personal values, morals and tastes**" [and] that [the Board] objected to the books in part because excerpts from them were "anti-American." The accuracy of these claims was partially conceded by [the Board] and [their] own affidavits lent further support to [the Students'] claims…Furthermore, while the Book Review Committee appointed by [the Board] was instructed to make its recommendations based upon criteria that appear on their face to be permissible—the books' "educational suitability," "good taste," "relevance," and "appropriateness to age and grade level"—the Committee's recommendations that five of the books be retained and that only two be removed were essentially rejected by [the Board] without any statement of reasons for doing so. Finally, while [the Board] originally defended their removal decision with the explanation that "these books contain obscenities, blasphemies, brutality, and perversion beyond description," one of the books, A Reader for Writers, was removed even though it contained no such language.

Standing alone, this evidence respecting the substantive motivations behind [the] removal decision would not be decisive. This would be a very different case if the record demonstrated that [the Board] had employed established, regular, and facially unbiased procedures for the review of controversial materials. But the actual record in the case before us suggests the exact opposite. [The] removal procedures were vigorously challenged below by [the Students], and the evidence on this issue sheds further light on the [Board's] motivations. [The Students] alleged that in making their removal decision [the Board] ignored "the advice of literary experts," the views of "librarians and teachers within the Island Trees School system," the advice of the Superintendent of Schools, and the guidance of publications that rate books for junior and senior high school students. [The Students] also claimed that [the Board's] decision was based solely on the fact that the books were named on the PONYU list received…and that [the Board] "did not undertake an independent review of other books in the [school] libraries." Evidence before the District Court lends support to these claims. The record shows that immediately after [the Board] first ordered the books removed from the library shelves, the Superintendent of Schools reminded them that "we already have a policy…designed expressly to handle such problems," and recommended that the removal decision be approached through this established channel. But the Board disregarded the Superintendent's advice, and instead resorted to the extraordinary

procedure of appointing a Book Review Committee—the advice of which was later rejected without explanation. In sum, [the Students'] allegations and some of the evidentiary materials presented below do not rule out the possibility that [the] removal procedures were highly irregular and ad hoc—the antithesis of those procedures that might tend to allay suspicions regarding [the Board's] motivations.

Construing these claims, affidavit statements, and other evidentiary materials in a manner favorable to [the Students], we cannot conclude that [the Board was] "entitled to a judgment as a matter of law." The evidence plainly does not foreclose the possibility that [the Board's] decision to remove the books rested **decisively** upon disagreement with **constitutionally protected ideas** in those books, or upon a desire on [the Board's] part to impose upon the students of the Island Trees High School and Junior High School a political orthodoxy to which [the Board] and their constituents adhered. Of course, some of the evidence before the District Court might lead a finder of fact to accept [the Board's] claim that their removal decision was based upon constitutionally valid concerns. But that evidence at most creates a genuine issue of material fact on the critical question of the credibility of [the Board's] justifications for their decision: On that issue, it **simply** cannot be said that there is no genuine issue as to any material fact…

This is "simply" a terribly written opinion. Earlier the holding specifically used the word "simply" to describe the test of constitutionality. Now, we have the word "decisively" thrown into the mix. An improper decisive motivation can clearly be just one of several motivations that are not decisive. And, yet, the improper motivation would not be the "sole" motivation; i.e., it would not "simply" be the only motivation. And, the result? Ambiguity. It is very difficult to discern what the Plurality means by its ruling. Additionally, someone please tell me how you can divorce yourself from your own "personal values, morals and tastes" when properly determining whether or not a book is "pervasively vulgar" or "educationally unsuitable."

"*double talk*" or "*double speak*": language that appears to be earnest and meaningful but in fact is a mixture of sense and nonsense; often deliberately ambiguous. Webster's Dictionary.

CONCURRENCE: Justice BLACKMUN…In combination with more generally applicable First Amendment rules, most particularly the central proscription of content-based regulations of speech, [our] cases…yield a general principle: the State may not suppress exposure to ideas—for the sole purpose of suppressing exposure to those ideas—absent sufficiently compelling reasons. Because the school board must perform all its functions "within the limits of the Bill of Rights," *Barnette*, this principle necessarily applies in at least a limited way to public education. Surely this is true in an extreme case: as the plurality notes, **it is difficult to see how a school board, consistent with the First Amendment, could refuse for political reasons to buy books written by Democrats or by Negroes, or books that are "anti-American" in the broadest sense of that term.** Indeed, Justice REHNQUIST appears "cheerfully [to] concede" this point.

In my view, then, the principle involved here is both narrower and more basic than the "right to receive information" identified by the plurality. **I do not suggest that the State has any affirmative obligation to provide students with information or ideas, something that may**

well be associated with a "right to receive." And I do not believe, as the plurality suggests, that the right at issue here is somehow associated with the peculiar nature of the school library; if schools may be used to inculcate ideas, surely libraries may play a role in that process. Instead, I suggest that certain forms of state discrimination between ideas are improper. In particular, our precedents command the conclusion that the State may not act to deny access to an idea **simply** because state officials **disapprove of that idea for partisan or political reasons**.

…As I see it, then, the question in this case is how to make the delicate accommodation between the limited constitutional restriction that I think is imposed by the First Amendment, and the necessarily broad state authority to regulate education. In starker terms, we must reconcile the schools' "inculcative" function with the First Amendment's bar on "prescriptions of orthodoxy."

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

As I view it, this is a narrow principle. School officials must be able to choose one book over another, without outside interference, when the first book is deemed more relevant to the curriculum, or better written, or when one of a host of other politically neutral reasons is present. These decisions obviously will not implicate First Amendment values.

There you have it --- an admission that all the Board needs, even if their decisive motivation is impermissible is "something in mind" that is permissible. I disagree with the Plurality and the concurrence for much different reasons, but if this is the test, when would a school board's decision ever fail it? Only when the board's decision is **solely** based on an improper motivation? Or, in other words, likely never. So, why send this case back for trial?

And even absent space or financial limitations, First Amendment principles would allow a school board to refuse to make a book available to students because it contains offensive language, *FCC v. Pacifica Foundation* (1978)[4], or because it is psychologically or intellectually inappropriate for the age group, or even, perhaps, because the ideas it advances are "manifestly inimical to the public welfare." *Pierce v. Society of Sisters*[5]. And, of course, school officials may choose one book over another because they believe that one subject is more important, or is more deserving of emphasis.

[4] Case 1A-S-30 on this website.
[5] Case 1A-R-2 on this website.

As is evident from this discussion, I do not share Justice REHNQUIST's view that the notion of "suppression of ideas" is not a useful analytical concept. Indeed, Justice REHNQUIST's discussion itself demonstrates that "access to ideas" has been given meaningful application in a variety of contexts. And I believe that tying the First Amendment right to the purposeful suppression of ideas makes the concept more manageable than Justice REHNQUIST acknowledges. Most people would recognize that refusing to allow discussion of current events in Latin class is a policy designed to "inculcate" Latin, not to suppress ideas. Similarly, removing a learned treatise criticizing American foreign policy from an elementary school library because the students would not understand it is an action unrelated to the purpose of suppressing ideas. In my view, however, removing the same treatise because it is "anti-American" raises a far more difficult issue.

It is not a sufficient answer to this problem that a State operates a school in its role as "educator," rather than its role as "sovereign," for the First Amendment has application to all the State's activities. While the State may act as "property owner" when it prevents certain types of expressive activity from taking place on public lands, for example, few would suggest that the State may base such restrictions on the content of the speaker's message, or may take its action for the purpose of suppressing access to the ideas involved. And while it is not clear to me from Justice REHNQUIST's discussion whether a State operates its public libraries in its "role as sovereign," surely difficult constitutional problems would arise if a State chose to exclude "anti-American" books from its public libraries—even if those books remained available at local bookstores.

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

CONCURRENCE: Justice WHITE…[Not provided as irrelevant to the constitutional issues.]

DISSENT: Chief Justice BURGER/POWELL/REHNQUIST/O'CONNOR…The First Amendment as with other parts of the Constitution, must deal with new problems in a changing world. **In an attempt to deal with a problem in an area traditionally left to the states**, a plurality of the Court, in a lavish expansion going beyond any prior holding under the First Amendment, expresses its view that a school board's decision concerning what books are to be in the school library **is subject to federal-court review**. Were this to become the law, **this Court would come perilously close to becoming a "super censor" of school board library decisions**.

Stripped to its essentials, the issue comes down to two important propositions: first, **whether local schools are to be administered by elected school boards, or by federal judges and teenage pupils; and second, whether the values of morality, good taste, and relevance to education are valid reasons for school board decisions concerning the contents of a school library**. In an attempt to place this case within the protection of the First Amendment, the plurality suggests **a new "right" that, when shorn of the plurality's rhetoric, allows this Court to impose its own views about what books must be made available to students.**

I agree with the fundamental proposition that "students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."…Here, however, no restraints of any kind are placed on the students. They are **free to read** the books in question, which are available at public libraries and bookstores; **they are free to discuss them in the classroom or elsewhere.** Despite this absence of any direct external control on the students' ability to express themselves, the plurality suggests that there is a new First Amendment "entitlement" to have access to particular books in a school library.

The plurality…relies on [*Meyer*...and *Epperson* and other cases] to establish the previously unheard of "right" of access to particular books in the public school library. The apparent underlying basis of the plurality's view seems to be that students have an enforceable "right" to receive the information and ideas that are contained in junior and senior high school library books. This "right" purportedly follows "ineluctably" from the sender's First Amendment right to freedom of speech and as a "necessary predicate" to the recipient's meaningful exercise of his own rights of speech, press, and political freedom. **No such right, however, has previously been recognized.**

It is true that where there is a willing distributor of materials, the government may not impose unreasonable obstacles to dissemination by the third party. *Virginia Pharmacy Board v. Virginia Citizens Consumer Council* (1976). And where the speaker desires to express certain ideas, the government may not impose unreasonable restraints. *Tinker*. It does not follow, however, that a school board must affirmatively aid the speaker in his communication with the recipient. In short the plurality suggests today that if a writer has something to say, the government through its schools must be the courier. None of the cases cited by the plurality establish this broad-based proposition.

First, the plurality argues that the right to receive ideas is derived in part from the sender's First Amendment rights to send them. Yet we have previously held that a sender's rights are not absolute. *Rowan v. Post Office Dept*.[6] Never before today has the Court indicated that the government has an obligation to aid a speaker or author in reaching an audience.

Second, the plurality concludes that "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." However, **the "right to receive information and ideas" does not carry with it the concomitant right to have those ideas affirmatively provided at a particular place by the government**…**We all agree with Madison, of course, that knowledge is necessary for effective government.** Madison's view, however, does not establish a right to have particular

[6] Case 1A-S-19 on this website.

books retained on the school library shelves if the school board decides that they are inappropriate or irrelevant to the school's mission. **Indeed, if the need to have an informed citizenry creates a "right," why is the government not also required to provide ready access to a variety of information? This same need would support a constitutional "right" of the people to have public libraries as part of a new constitutional "right" to continuing adult education.**

The plurality also cites *Tinker*...But…*Tinker* notes only that school officials may not prohibit a student from expressing his or her view on a subject unless that expression interferes with the legitimate operations of the school. The government does not "contract the spectrum of available knowledge." *Griswold*. By choosing not to retain certain books on the school library shelf; it simply chooses not to be the conduit for that particular information. In short, even assuming the desirability of the policy expressed by the plurality, there is not a hint in the First Amendment, or in any holding of this Court, of a "right" to have the government provide continuing access to certain books.

…The plurality pays **homage** to the ancient verity that in the administration of the public schools "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political." If, as we have held, schools may legitimately be used as vehicles for "inculcating fundamental values necessary to the maintenance of a democratic political system," **school authorities must have broad discretion to fulfill that obligation.** Presumably all activity within a primary or secondary school involves the conveyance of information and at least an implied approval of the worth of that information. **How are "fundamental values" to be inculcated except by having school boards make content-based decisions about the appropriateness of retaining materials in the school library and curriculum.** In order to fulfill its function, an elected school board must express its views on the subjects which are taught to its students. **In doing so those elected officials express the views of their community; they may err, of course, and the <u>voters</u> may remove them. <u>It is a startling erosion of the very idea of democratic government to have this Court arrogate to itself the power the plurality asserts today</u>…**

"Educational suitability"…is a standardless phrase. This conclusion will undoubtedly be drawn in many—if not most—instances because of the decisionmaker's content-based judgment that the ideas contained in the book or the idea expressed from the author's method of communication are inappropriate for teenage pupils.

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

Further, there is no guidance whatsoever as to what constitutes "political" factors. This Court has previously recognized that public education involves an area of broad public policy and "goes to

the heart of representative government." As such, **virtually all educational decisions necessarily involve "political" determinations.**

What the plurality views as valid reasons for removing a book at their core involve partisan judgments. Ultimately the federal courts will be the judge of whether the motivation for book removal was "valid" or "reasonable." Undoubtedly the validity of many book removals will ultimately turn on a judge's evaluation of the books. Discretion must be used, and **the appropriate body to exercise that discretion is the local elected school board, not judges.**

Bingo!
For those who disagree with the foregoing, I ask you to explore one question:
Which avenue provides the most freedom to Americans:
placing the responsibility of book selection and de-selection with local elected folks
or
placing the ultimate responsibility with the Supreme Court in Washington, D.C.?

We can all agree that as a matter of educational policy students should have wide access to information and ideas. But the people elect school boards, who in turn select administrators, who select the teachers, and these are the individuals best able to determine the substance of that policy…**If the parents disagree with the educational decisions of the school board, they can take steps to remove the board members from office.** Finally, even if parents and students cannot convince the school board that book removal is inappropriate, they have alternative sources to the same end. Books may be acquired from bookstores, public libraries, or other alternative sources unconnected with the unique environment of the local public schools.

No amount of "limiting" language could rein in the sweeping "right" the plurality would create. The plurality distinguishes library books from textbooks because library books "by their nature are optional rather than required reading." **It is not clear, however, why this distinction requires greater scrutiny before "optional" reading materials may be removed.** It would appear that required reading and textbooks have a greater likelihood of imposing a "pall of orthodoxy" over the educational process than do optional reading. In essence, the plurality's view transforms the availability of this "optional" reading into a "right" to have this "optional" reading maintained at the demand of teenagers.

Isn't that true? Wouldn't it seem that "optional" books are of a lesser concern to First Amendment principles than required books?

The plurality also limits the new right by finding it applicable only to the removal of books once acquired. Yet if the First Amendment commands that certain books cannot be removed, does it not equally require that the same books be acquired? Why does the coincidence of timing become the basis of a constitutional holding? According to the plurality, the evil to be avoided is the "official suppression of ideas." **It does not follow that the decision to remove a book is less "official suppression" than the decision not to acquire a book desired by someone.** Similarly, a decision to eliminate certain material from the curriculum,

history for example, would carry an equal—probably greater—prospect of "official suppression." **Would the decision be subject to our review?**

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

DISSENT: Justice POWELL…**The plurality opinion today rejects a basic concept of public school education in our country: that the States and locally elected school boards should have the responsibility for determining the educational policy of the public schools.** After today's decision any junior high school student, by instituting a suit against a school board or teacher, may invite a judge to overrule an educational decision by the official body designated by the people to operate the schools…It is fair to say that no single agency of government at any level is closer to the people whom it serves than the typical school board.

I therefore view today's decision with genuine dismay. Whatever the final outcome of this suit and suits like it, **the resolution of educational policy decisions through litigation, and the exposure of school board members to liability for such decisions, can be expected to corrode the school board's authority and effectiveness.** As is evident from the generality of the plurality's "standard" for judicial review, the decision as to the educational worth of a book is a highly subjective one. **Judges rarely are as competent as school authorities to make this decision; nor are judges responsive to the parents and people of the school district.**

People complain about how litigious our society has become. I could debate the negative connotation of that proposition; however, I have to agree with Justice Powell on some aspects of our courthouse combativeness. It would seem that the Supreme Court itself (the majority in some cases) has created and, indeed, encouraged some types of litigation by their rulings. In my estimation, this is one of them.

The new constitutional right, announced by the plurality, is described as a "right to receive ideas" in a school…[but] finds no support in the First Amendment precedents of this Court…[and] is framed in terms that approach a **meaningless generalization**. It affords **little guidance to courts**, if they—as the plurality now authorizes them—are to oversee the inculcation of ideas. The plurality does announce the following standard: A school board's "discretion may not be exercised in a narrowly partisan or political manner." But **this is a standardless standard** that affords no more than subjective guidance to school boards, their counsel, and to courts that now will be required to decide whether a particular decision was made in a "narrowly partisan or political manner."…

If a 14-year-old child may challenge a school board's decision to remove a book from the library, upon what theory is a court to prevent a like challenge to a school board's decision not to purchase that identical book? And at the even more "sensitive" level of "receiving

ideas," **does today's decision entitle student oversight of which courses may be added or removed from the curriculum, or even of what a particular teacher elects to teach or not teach in the classroom?** Is not the "right to receive ideas" as much—or indeed even more—implicated in these educational questions?

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

…A school board's attempt to instill in its students the ideas and values on which a democratic system depends is viewed as an impermissible suppression of other ideas and values on which other systems of government and other societies thrive. **Books may not be removed because they are indecent; extol violence, intolerance, and racism; or degrade the dignity of the individual.** Human history, not the least that of the 20th century, records the power and political life of these very ideas. But they are not our ideas or values. **Although I would leave this educational decision to the duly constituted board, I certainly would not require a school board to promote ideas and values repugnant to a democratic society or to teach such values to children.**

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

The following five-plus pages are presented in their unabridged form, just as they are shown in the Court's Opinion. For me, it is hard to believe the Supreme Court of the United States sent this case back for a trial.

Attached as an Appendix hereto is Judge Mansfield's summary of excerpts from the books at issue in this case.

APPENDIX TO OPINION OF POWELL, J., DISSENTING…

1) SOUL ON ICE by Eldridge Cleaver

PAGE QUOTE…157-158…There are white men who will pay you to fuck their wives. They approach you and say, "How would you like to fuck a white woman?" "What is this?" you ask. "On the up-and-up," he assures you. "It's all right. She's my wife. She needs black rod, is all. She has to have it. It's like a medicine or drug to her. She has to have it. I'll pay you. It's all on the level, no trick involved. Interested?"

You go with him and he drives you to their home. The three of you go into the bedroom. There is a certain type who will leave you and his wife alone and tell you to pile her real good. After it is all over, he will pay you and drive you to wherever you want to go. Then there are some who like to peep at you through a keyhole and watch you have his woman, or peep at you through a window, or lie under the bed and listen to the creaking of the bed as you work out. There is another type who likes to masturbate while he stands beside the bed and watches you pile her. There is the type who likes to eat his woman up after you get through piling her. And there is the type who only wants you to pile her for a little while, just long enough to thaw her out and kick her motor over and arouse her to heat, then he wants you to jump off real quick and he will jump onto her and together they can make it from there by themselves.

2) A HERO AIN'T NOTHING BUT A SANDWICH by Alice Childress

PAGE QUOTE…

10 'Hell, no! Fuck the society.'

64-65 'The hell with the junkie, the wino, the capitalist, the welfare checks, the world . . . yeah, and fuck you too!'

75-76 'They can have back the spread and curtains, I'm too old for them fuckin bunnies anyway.'

3) THE FIXER by Bernard Malamud

PAGE QUOTE

52 'What do you think goes on in the wagon at night: Are the drivers on their knees fucking their mothers?'

90 'Fuck yourself, said the blinker, etc.'

92 'Who else would do anything like that but a motherfucking Zhid?'

146 'No more noise out of you or I'll shoot your Jew cock off.'

189 'Also there's a lot of fucking in the Old Testament, so how is that religious?'

192 'You better go fuck yourself, Bok, said Kogin, I'm onto your Jew tricks.'

215 'Ding-dong giddyap. A Jew's cock's in the devil's hock.'

216 'You cocksucker Zhid, I ought make you lick it up off the floor.'

4) GO ASK ALICE by Anonymous

PAGE QUOTE

31 'I wonder if sex without acid could be so exciting, so wonderful, so indescribable. I always thought it just took a minute, or that it would be like dogs mating.'

47 'Chris and I walked into Richie and Ted's apartment to find the bastards stoned and making love to each other . . . low class queer.'

81 'shitty, goddamned, pissing, ass, goddamned beJesus, screwing life's, ass, shit. Doris was ten and had humped with who knows how many men in between . . . her current stepfather started having sex with her but good . . . sonofabitch balling her'

83 'but now when I face a girl its like facing a boy. I get all excited and turned on. I want to screw with the girl. . . .'

84 'I'd rather screw with a guy . . . sometimes I want one of the girls to kiss me. I want her to touch me, to have her sleep under me.'

84 'Another day, another blow job . . . If I don't give Big Ass a blow he'll cut off my supply . . . and LittleJacon is yelling, "Mama, Daddy can't come now. He's humping Carla."

85 'Shit, goddamn, goddamn prick, son-of-a-bitch, ass, pissed, bastard, goddamn, bullshit

94 'I hope you have a nice orgasm with your dog tonight.'

110 'You fucking Miss Polly pure

117 'Then he said that all I needed was a good fuck.'

146 'It might be great because I'm practically a virgin in the sense that I've never had sex except when I've been stoned. . . .'

5) <u>SLAUGHTERHOUSE FIVE by Kurt Vonnegut, Jr.</u>

PAGE QUOTE

29 'Get out of the road, you dumb motherfucker.' The last word was still a novelty in the speech of white people in 1944.

It was fresh and astonishing to Billy, who had never fucked anybody . . .'

32 'You stake a guy out on an anthill in the desert—see? He's facing upward, and you put honey all over his balls and pecker, and you cut off his eyelids so he has to stare at the sun till he dies.'

34 'He had a prophylactic kit containing two tough condoms 'For the prevention of disease only!' . . . He had a dirty picture of a woman attempting sexual intercourse with a shetland pony.'

94 & 95 'But the Gospels actually taught this: Before you kill somebody, make absolutely sure he isn't well connected . . . The flaw in the Christ stories, said the visitor from outer space, was that Christ who didn't look like much, was actually the son of the Most Powerful Being in

the Universe. Readers understood that, so, when they came to the crucifixion, they naturally thought . . . Oh boy—they sure picked the wrong guy to lynch this time! And that thought had a brother: There are right people to lynch. People not well connected. . . . The visitor from outer space made a gift to Earth of a new Gospel. In it, Jesus really WAS a nobody, and a pain in the neck to a lot of people with better connections then he had . . . . So the people amused themselves one day by nailing him to a cross and planting the cross in the ground. There couldn't possibly be any repercussions, the lynchers thought . . . since the new Gospel hammered home again and again what a nobody Jesus was. And then just before the nobody died . . . . The voice of God came crashing down. He told the people that he was adopting the bum as his son . . . God said this: From this moment on, He will punish horribly anybody who torments a bum who has no connections.'

99 'They told him that there could be no Earthling babies without male homosexuals. There could be babies without female homosexuals.'

120 'Why don't you go fuck yourself? Don't think I haven't tried . . . he was going to have revenge, and that revenge was sweet . . . It's the sweetest thing there is, said Lazzaro. People fuck with me, he said, and Jesus Christ are they ever fucking sorry.'

122 'And he'll pull out a gun and shoot his pecker off. The stranger'll let him think a couple of seconds about who Paul Lazzaro is and what life's gonna be like without a pecker. Then he'll shoot him once in the guts and walk away. . . . He died on account of this silly cocksucker here. So I promised him I'd have this silly cocksucker shot after the war.'

134 'In my prison cell I sit . . . With my britches full of shit, And my balls are bouncing gently on the floor. And I see the bloody snag when she bit me in the bag . . . Oh, I'll never fuck a Polack any more.'

173 'And the peckers of the young men would still be semi-erect, and their muscles would be bulging like cannonballs.'

175 'They didn't have hard-ons . . . Everybody else did.'

177 'The magazine, which was published for lonesome men to jerk off to.'

178 'and one critic said. . . . 'To describe blow-jobs artistically."

6) <u>THE BEST SHORT STORIES BY NEGRO WRITERS Ed. by Langston Hughes</u>

PAGE QUOTE

176 'like bat's shit and camel piss,'

228 'that no-count bitch of a daughter of yours is up there up North making a whore of herself.'

237 'they made her get out and stand in front of the headlights of the car and pull down her pants and raise her dress they said that was the only way they could be sure. And you can imagine what they said and what they did—.'

303 'You need some pussy. Come on, let's go up to the whore house on the hill.'

'Oh, these bastards, these bastards, this God damned Army and the bastards in it. The sons of bitches!'

436 'he produced a brown rag doll, looked at her again, then grabbed the doll by its legs and tore it part way up the middle. Then he jammed his finger into the rip between the doll's legs. The other men laughed. . . .'

444 'The pimps, hustlers, lesbians, and others trying to misuse me.'

462 'But she had straight firm legs and her breasts were small and upright. No doubt if she'd had children her breasts would be hanging like little empty purses.'

464 'She first became aware of the warm tense nipples on her breasts. Her hands went up gently to clam them.' 'In profile, his penis hung like a stout tassle. She could even tell that he was circumcised.'

406 'Cadillac Bill was busy following Luheaster around, rubbing her stomach and saying, "Magic Stomach, Magic Stomach, bring me a little baby cadillac." 'One of the girls went upstairs with Red Top and stayed for about forty five minutes.'

7) <u>BLACK BOY by Richard Wright</u>

PAGE QUOTE

70-71 'We black children—seven or eight or nine years of age used to run to the Jew's store and shout:

. . . Bloody Christ Killers

Never trust a Jew

Bloody Christ Killers

What won't a Jew do . . .

Red, white and blue

Your pa was a Jew

Your ma a dirty dago

What the hell is you?'

265 'Crush that nigger's nuts, nigger!' 'Hit that nigger!' 'Aw, fight, you goddam niggers!' 'Sock 'im, in his f-k-g-piece!' 'Make 'im bleed!'

8) LAUGHING BOY by Oliver LaFarge

PAGE QUOTE

38 'I'll tell you, she is all bad; for two bits she will do the worst thing.'

258-9 'I was frightened when he wanted me to lie with him, but he made me feel all right. He knew all about how to make women forget themselves, that man.'

9) THE NAKED APE by Desmond Morris

PAGE QUOTE

73-74 'Also, the frontal approach provides the maximum possibility for stimulation of the female's clitoris during the pelvic thrusting of the male. It is true that it will be passively, stimulated by the pulling effect of the male's thrusts, regardless of his body position in relation to the female, but in a face-to-face mating there will in addition be the direct rhythmic pressure of the male's pubic region on to the clitoral area, and this will considerably heighten the stimulation . . .' 'So it seems plausible to consider that face-to-face copulation is basic to our species. There are, of course, a number of variations that do not eliminate the frontal element: male above, female above, side by side, squatting, standing, and so on, but the most efficient and commonly used one is with both partners horizontal, the male above the female. . . '

80 '. . . This broadening of the penis results in the female's external genitals being subjected to much more pulling and pushing during the performance of pelvic thrusts. With each inward thrust of the penis, the clitoral region is pulled downwards and then with each withdrawal, it moves up again. Add to this the rhythmic pressure being exerted on the clitoris region by the pubic region of the frontally copulating male, and you have a repeated massaging of the clitoris that—were she a male—would virtually be masturbatory.'

94-99 '. . . If either males or females cannot for some reason obtain sexual access to their opposite numbers, they will find sexual outlets in other ways. They may use other members of their own sex, or they may even use members of other species, or they may masturbate. . . .'

10) READER FOR WRITERS . . .

638 F.2d 404, 419-422, n. 1 (CA2 1980) (Mansfield, J., dissenting).

DISSENT: Justice REHNQUIST/BURGER/POWELL … Justice BRENNAN's opinion … launches into a confusing, discursive exegesis on these constitutional issues as applied to junior high school and high school libraries and only thereafter does it discuss the state of the record before the Court…Considering only the [Students'] description of the factual aspects of [the Board's] motivation, Justice BRENNAN's apparent concern that the Board's action may have been a sinister political plot "to suppress ideas" may be laid to rest. The members of the Board, in deciding to remove these books, were **undoubtedly influenced by their own "personal**

values, morals, and tastes," just as any member of a school board is apt to be so influenced in making decisions as to whether a book is educationally suitable. [The Students] essentially conceded that some excerpts of the removed books "contained profanities, some were sexually explicit, some were ungrammatical, some were anti-American, and some were offensive to racial, religious or ethnic groups."

[The Students] also agreed that, "[a]lthough the books themselves were excluded from use in the schools in any way, [the Board has not] precluded discussion about the themes of the books or the books themselves." Justice BRENNAN's concern with the "suppression of ideas" thus seems entirely unwarranted on this state of the record, and his creation of constitutional rules to cover such eventualities is entirely gratuitous…

In the course of his discussion, Justice BRENNAN…[posits the specter of Democratic school boards removing Republican books or an all white school board removing books authored by blacks.] I can cheerfully concede all of this, but as in so many other cases the extreme examples are seldom the ones that arise in the real world of constitutional litigation. In this case the facts taken most favorably to respondents suggest that **nothing of this sort happened**. The nine books removed undoubtedly did contain "ideas," but in the light of the **excerpts…**, it is apparent that eight of them contained demonstrable amounts of vulgarity and profanity and the ninth contained nothing that could be considered partisan or political. As already demonstrated, [the Students] admitted as much. [The Board] did not…run afoul of the First and Fourteenth Amendments by removing these particular books from the library in the manner in which they did. I would save for another day—**feeling quite confident that that day will not arrive**—the extreme examples posed in Justice BRENNAN's opinion…

Had [the Board] been the members of a town council, I suppose all would agree that…they could not have prohibited the sale of these books by private booksellers within the municipality. But we have also recognized that the government may act in other capacities than as sovereign, and when it does the First Amendment may speak with a different voice:

> "[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education* (1968).

By the same token, expressive conduct which may not be prohibited by the State as sovereign may be proscribed by the State as property owner: "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley v. Florida* (1966) (upholding state prohibition of expressive conduct on certain state property)…

In *Adderley*, a 5-4 majority upheld the convictions for trespass as to protestors who would not leave the non-public driveway of a jail. Because the sheriff was acting to maintain access to the jail and not because he objected to the speech of the protestors, there was no First Amendment violation.

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

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

The right described by Justice BRENNAN has never been recognized in the decisions of this Court and is not supported by their rationale…Neither the District Court nor the Court of Appeals found that petitioners' removal of books from the school libraries infringed respondents' right to speak or otherwise express themselves.

Despite Justice BRENNAN's suggestion to the contrary, this Court has never held that the First Amendment grants junior high school and high school students a right of access to certain information in school…[He cites] *Tinker* for the proposition that "students too are beneficiaries of this [right-to-receive] principle." But *Tinker* held no such thing. **One may read *Tinker* in vain to find any recognition of a First Amendment right to receive information. *Tinker,* as already mentioned, was based entirely on the students' right to express their political views.**

Nor does the right-to-receive doctrine recognized in our past decisions apply to schools by analogy. Justice BRENNAN correctly characterizes the right of access to ideas as "an inherent corollary of the rights of free speech and press" which "follows ineluctably from the sender's First Amendment right to send them." But he then fails to recognize the predicate right to speak from which the students' right to receive must follow. It would be ludicrous, of course, to contend that all authors have a constitutional right to have their books placed in junior high school and high school libraries. And yet without such a right our prior precedents would not recognize the reciprocal right to receive information. Justice BRENNAN disregards this inconsistency with our prior cases and 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.

Justice BRENNAN also correctly notes that the reciprocal nature of the right to receive information derives from the fact that it "is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom." But the denial of access to ideas inhibits one's own acquisition of knowledge only when that denial is relatively complete. **If the denied ideas are readily available from the same source in other accessible locations, the benefits to be gained from exposure to those ideas have not been foreclosed by the State.** This fact is inherent in the right-to-receive cases relied on by Justice BRENNAN, every one of which concerned the complete denial of access to the ideas sought. Our past decisions are thus unlike this case where the removed books are readily available to students and non-students alike at the corner bookstore or the public library…

Public schools fulfill the vital role of teaching students the basic skills necessary to function in our society, and of "inculcating fundamental values necessary to the maintenance of a democratic political system." **The idea that such students have a right of access, in the school, to information other than that thought by their educators to be necessary is contrary to the very nature of an inculcative education.**

Education consists of the selective presentation and explanation of ideas…Of necessity, elementary and secondary educators must separate the relevant from the irrelevant, the appropriate from the inappropriate. Determining what information not to present to the students is often as important as identifying relevant material. This winnowing process necessarily leaves much information to be discovered by students at another time or in another place, and is fundamentally inconsistent with any constitutionally required eclecticism in public education.

Justice BRENNAN['s]…**reasoning misapprehends the function of libraries in our public school system…**Unlike university or public libraries, elementary and secondary school libraries are not designed for freewheeling inquiry; they are tailored, as the public school curriculum is tailored, to the teaching of basic skills and ideas. Thus, Justice BRENNAN cannot rely upon the nature of school libraries to escape the fact that the First Amendment right to receive information simply has no application to the one public institution which, by its very nature, is a place for the selective conveyance of ideas.

…**[T]he most obvious reason that petitioners' removal of the books did not violate respondents' right to receive information is the ready availability of the books elsewhere.** Students are not denied books by their removal from a school library. The books may be

borrowed from a public library, read at a university library, purchased at a bookstore, or loaned by a friend. The government as educator does not seek to reach beyond the confines of the school. Indeed, following the removal from the school library of the books at issue in this case, the local public library put all nine books on display for public inspection. Their contents were fully accessible to any inquisitive student.

Justice BRENNAN's own discomfort with the idea that students have a right to receive information from their elementary or secondary schools is demonstrated by the artificial limitations which he places upon the right—limitations which are supported neither by logic nor authority and which are inconsistent with the right itself. The attempt to confine the right to the library is one such limitation, the fallacies of which have already been demonstrated.

As a second limitation, Justice BRENNAN distinguishes the act of removing a previously acquired book from the act of refusing to acquire the book in the first place…If Justice BRENNAN truly has found a "right to receive ideas," however, **this distinction between acquisition and removal makes little sense. The failure of a library to acquire a book denies access to its contents just as effectively as does the removal of the book from the library's shelf.** As a result of either action the book cannot be found in the "principal locus" of freedom discovered by Justice BRENNAN.

The justification for this limiting distinction is said by Justice BRENNAN to be his concern in this case with "the suppression of ideas." Whatever may be the analytical usefulness of this appealing sounding phrase, the suppression of ideas surely is not the identical twin of the denial of access to information. Not every official act which denies access to an idea can be characterized as a suppression of the idea. Thus unless the "right to receive information" and the prohibition against "suppression of ideas" are each a kind of Mother-Hubbard catch phrase for whatever First Amendment doctrines one wishes to cover, they would not appear to be interchangeable.

Justice BRENNAN's reliance on the "suppression of ideas" to justify his distinction between acquisition and removal of books has additional logical pitfalls. Presumably the distinction is based upon the greater visibility and the greater sense of conscious decision thought to be involved in the removal of a book, as opposed to that involved in the refusal to acquire a book. But if "suppression of ideas" is to be the talisman, one would think that a school board's public announcement of its refusal to acquire certain books would have every bit as much impact on public attention as would an equally publicized decision to remove the books. And yet only the latter action would violate the First Amendment under Justice BRENNAN's analysis.

The final limitation placed by Justice BRENNAN upon his newly discovered right is a motive requirement: the First Amendment is violated only "if the Board intended by their removal decision to deny [the Students] access to ideas with which [the Board] disagreed." But bad motives and good motives alike deny access to the books removed. **If Justice BRENNAN truly recognizes a constitutional right to receive information, it is difficult to see why the reason for the denial makes any difference**. Of course Justice BRENNAN's view is that intent matters because the First Amendment does not tolerate an officially prescribed orthodoxy. **But this reasoning mixes First Amendment apples and oranges.** The right to

receive information differs from the right to be free from an officially prescribed orthodoxy. Not every educational denial of access to information casts a pall of orthodoxy over the classroom.

It is difficult to tell from Justice BRENNAN's opinion just what motives he would consider constitutionally impermissible. I had thought that the First Amendment proscribes content-based restrictions on the marketplace of ideas. See *Widmar v. Vincent* (1981). **Justice BRENNAN concludes, however, that a removal decision based solely upon the "educational suitability" of a book or upon its perceived vulgarity is "'perfectly permissible.'" But such determinations are based as much on the content of the book as determinations that the book espouses pernicious political views.**

Moreover, Justice BRENNAN's motive test is difficult to square with his distinction between acquisition and removal. If a school board's removal of books might be motivated by a desire to promote favored political or religious views, there is no reason that its acquisition policy might not also be so motivated. And yet the "pall of orthodoxy" cast by a carefully executed book-acquisition program apparently would not violate the First Amendment under Justice BRENNAN's view.

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

I would think that prior cases decided under established First Amendment doctrine afford adequate guides in this area without resorting to a phrase which seeks to express "a complicated process of constitutional adjudication by a deceptive formula." **A school board which publicly adopts a policy forbidding the criticism of United States foreign policy by any student, any teacher, or any book on the library shelves is indulging in one kind of "suppression of ideas." A school board which adopts a policy that there shall be no discussion of current events in a class for high school sophomores devoted to second-year Latin "suppresses ideas" in quite a different context. A teacher who had a lesson plan consisting of 14 weeks of study of United States history from 1607 to the present time, but who because of a week's illness is forced to forgo the most recent 20 years of American history, may "suppress ideas" in still another way.**

I think a far more satisfactory basis for addressing these kinds of questions is found in the Court's language in *Tinker v. Des Moines School District*, where we noted:

> "[A] particular symbol—black armbands worn to exhibit opposition to this Nation's involvement in Viet Nam—was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible."

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

The inconsistencies and illogic of the limitations placed by Justice BRENNAN upon his notion of the right to receive ideas in school are not here emphasized in order to suggest that they should be eliminated. They are emphasized because they illustrate that **the right itself is misplaced in the elementary and secondary school setting.** Likewise, the criticism of Justice BRENNAN's newly found prohibition against the "suppression of ideas" is by no means intended to suggest that the Constitution permits the suppression of ideas; it is rather to suggest that such a vague and imprecise phrase, while perhaps wholly consistent with the First Amendment, is simply too diaphanous to assist careful decision of cases such as this one…

[T]he role of government as sovereign is subject to more stringent limitations than is the role of government as employer, property owner, or educator. It must also be recognized that the government as educator is subject to fewer strictures when operating an elementary and secondary school system than when operating an institution of higher learning. *Tilton v. Richardson* (1971) (opinion of BURGER, C. J.). **With respect to the education of children in elementary and secondary schools, the school board may properly determine in many cases that a particular book, a particular course, or even a particular area of knowledge is not educationally suitable for inclusion within the body of knowledge which the school seeks to impart.** Without more, this is not a condemnation of the book or the course; it is only a determination akin to that referred to by the Court in *Village of Euclid v. Ambler Realty Co.* (1926): "A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard."

Accepting as true [the Students'] assertion that [the Board] acted on the basis of their own "personal values, morals and tastes," I find the actions taken in this case hard to distinguish from the myriad choices made by school boards in the routine supervision of elementary and secondary schools. "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Epperson v. Arkansas* (1968). In this case [the Students'] rights of free speech and expression were not infringed, and by [their] own admission no ideas were "suppressed." I would leave to another day the harder cases.

DISSENT: Justice O'CONNOR…I do not personally agree with the Board's action with respect to some of the books in question here, but <u>it is not the function of the courts to make the decisions that have been properly relegated to the elected members of school boards</u>. It is the school board that must determine educational suitability, and it has done so in this case. I therefore join THE CHIEF JUSTICE's dissent.