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Censorship in the Public Schools: Why the Expert Testimony of Teachers Should be Considered in Book-Banning Cases

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NOTE

CENSORSHIP IN THE PUBLIC SCHOOLS: WHY THE EXPERT TESTIMONY OF TEACHERS SHOULD BE CONSIDERED IN BOOK-BANNING CASES*

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> . . . in reading great literature I become a thousand men and yet remain myself. Like the night sky in the Greek poem, I see with a myriad eyes, but it is still I who see. Here, as in worship, in love, in moral action, and in knowing, I transcend myself; and am never more myself than when I do.
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> -C.S. Lewis, *An Experiment in Criticism*

I. INTRODUCTION

There is another face to the First Amendment other than the loud, often harsh one that wants to speak its mind and voice its opinions. There is the quiet one that desires to read, learn new ideas, consider new perspectives, and look through the eyes of others — such as a man struggling along a Yukon trail on an icy winter night, a young boy rafting down the Mississippi River, or a chorus of Athenian women trying to persuade their husbands not to go to war.[1] Although this side of the First Amendment is seldom given much attention, except by literature scholars who winnow out less promising works from the more enlightening, this aspect of the First Amendment is endangered when social forces pressure schools into banning certain books from public high school courses.

Reports of censorship in America's public schools have increased in recent years.[2] Often a student's parents initiate the censorship effort, pressuring a school to remove certain "offensive" or "obscene" books from their

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1. Jack London's short story *To Build a Fire*, Mark Twain's *Huckleberry Finn*, and Aristophanes' *Lysistrata* are among the literary works which recently have been successfully challenged and removed from public junior and senior high school classrooms. JOAN DELFATTORE, WHAT JOHNNY SHOULDN'T READ (1992).

Other books frequently challenged include: *Anne Frank: Diary of a Young Girl*, by Anne Frank; *Black Like Me*, by John Howard Graham; *Brave New World*, by Aldous Huxley; *The Catcher in the Rye*, by J.D. Salinger; *The Chocolate War (and other novels)*, by Robert Cormier; *Deliverance*, by James Dickey; *The Electric Kool-Aid Acid Test*, by Tom Wolfe; *A Farewell to Arms*, by Ernest Hemingway; *Forever*, by Judy Blume; *Go Ask Alice*, Anonymous; *The Good Earth*, by Pearl S. Buck; *The Grapes of Wrath*, by John Steinbeck; *A Hero Ain't Nothing but a Sandwich*, by Alice Childress; *I Know Why the Caged Bird Sings*, by Maya Angelou; *Lord of the Flies*, by William Golding; *Love Story*, by Erich Segal; *1984*, by George Orwell; *Of Mice and Men*, by John Steinbeck; *The Scarlet Letter*, by Nathaniel Hawthorne; *A Separate Peace*, by John Knowles; *Slaughterhouse Five*, by Kurt Vonnegut, Jr.; and *To Kill a Mockingbird*, by Harper Lee. PEOPLE FOR THE AMERICAN WAY, ATTACKS ON THE FREEDOM TO LEARN: 1991-1992 REPORT 5 (1992) [hereinafter PEOPLE FOR THE AMERICAN WAY].

2. Reports of censorship increased by 50% in 1991 according to People for the American Way, a public interest group dedicated to documenting instances of censorship and protecting constitutional liberties, including freedom of speech. The group is based in Washington, D.C., and was founded by television executive Norman Lear. People for the American Way documented 348 incidents in which a parent, school official, or church group demanded that classroom or library books be removed or restricted from all students, up from 229 the previous year. The censors were successful in 41% of the cases. *See* PEOPLE FOR THE AMERICAN WAY, *supra* note 1; WASH. POST, Sept. 2, 1992, at A19; L. A. TIMES, Sept. 2, 1992, at A16; MIAMI HERALD, Sept. 6, 1992, at A18; GAINESVILLE SUN, Sept. 2, 1992, at B1.

son's or daughter's required reading lists.[3] School boards decide that certain materials chosen by high school faculty are inappropriate for classroom use.[4] In addition, outside groups, such as religious organizations, frequently contribute to censorship, arguing for the suppression of certain artistic works to protect children from sexually explicit or violent themes, or to further "family values."[5]

When literature is banned from high school English courses, or when schools replace challenged texts to avoid conflict,[6] the First Amendment right to learn is infringed. Therefore students, and possibly teachers, may have a First Amendment claim.[7] I use the terms "ban" and "censorship"

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3. DELFATTORE, *supra* note 1, at 6; DAVE MARSH, 50 WAYS TO FIGHT CENSORSHIP AND IMPORTANT FACTS TO KNOW ABOUT THE CENSORS (1991); PEOPLE FOR THE AMERICAN WAY, *supra* note 1; *see also* Virgil v. School Bd. of Columbia County, 862 F.2d 1517 (11th Cir. 1989) (high school student's parents filed complaint with school board against use of literature textbook); Krizek v. Board of Educ., 713 F. Supp. 1131 (N.D. Ill. 1989) (teacher dismissed after parental complaint about the teacher showing an R-rated film to high school English class).

4. DELFATTORE, *supra* note 1, at 7; PEOPLE FOR THE AMERICAN WAY, *supra* note 1; *see also* Fowler v. Board of Educ., 819 F.2d 657 (6th Cir. 1987) (school dismissed teacher for "conduct unbecoming a teacher" after she showed a high school English class Pink Floyd film *The Wall*); Bell v. U-32 Bd. of Educ., 630 F. Supp 939 (D. Vt. 1986) (school board prohibited a high school drama production of *The Runaways* due to its themes of drug abuse, alcoholism, prostitution, child abuse, and rape); Seyfried v. Walton, 668 F.2d 214 (3d Cir. 1981) (school production of *Pippin* discontinued after members of the school board objected to play's sexual content); Zykan v. Warsaw Community Sch. Corp., 631 F.2d 1300 (7th Cir. 1982) (school board prohibited a high school English teacher from using four books in her course "Women in Literature": *Go Ask Alice*; Sylvia Plath's *The Bell Jar*; Ira Levin's *The Stepford Wives*; and *Growing Up Female in America*); Minarcini v. Strongsville City Sch. Dist., 541 F.2d 577 (6th Cir. 1976) (school board removed Kurt Vonnegut's *Cat's Cradle* and *God Bless You, Mr. Rosewater* and Joseph Heller's *Catch-22* from the curriculum after a committee read the books and, contrary to faculty recommendations, determined they were "garbage").

5. DELFATORRE, *supra*, note 4, at 13-36; MARSH, *supra* note 3, at 65-70; PEOPLE FOR THE AMERICAN WAY, *supra*, note 1; Pratt v. Independent Sch. Dist. No. 831, 670 F.2d 771 (8th Cir. 1982) (group of concerned citizens objected to film version of the short story *The Lottery* by Shirley Jackson due to its negative impact on "family values"). National organizations that have initiated censorship efforts across the country include: Eagle Forum (founded by Phyllis Schlafly); Concerned Women for America (founded by Beverly LaHaye); National Legal Foundation (founded by Pat Robertson), which is the citizen group affiliated with the National Association of Christian Educators; Citizens for Excellence in Education; Educational Research Analysts (founded by Mel and Norma Gabler); and Focus on the Family (founded by James Dobson). PEOPLE FOR THE AMERICAN WAY, PROTECTING THE FREEDOM TO LEARN: A CITIZEN'S GUIDE 3 (1992).

6. In Virgil v. School Bd. of Columbia County, 862 F.2d 1517 (11th Cir. 1989), the school board appeased complaining parents by placing a volume of a humanities textbook in locked storage following the parents' objections that the text contained lewd passages.

7. The Supreme Court has defined the right to receive ideas, or the right to learn, as "an inherent corollary of the rights of free speech and press," or the right to teach. Board of Educ. v. Pico, 457 U.S. 853, 867 (1982). In other words, the right to learn assumes the existence of a willing speaker or teacher. William E. Lee, *The Supreme Court and the Right to Receive Expression*, 7 SUP. CT. REV. 303, 324 (1987). However, because this author believes that the right to learn should exist regardless of whether a right to teach exists, this note focuses exclusively on the First Amendment rights of students to receive information contained in books censored from English courses.

The Supreme Court has recognized a right to receive information in a number of contexts. *Pico*, 457 U.S. at 866 (students are beneficiaries of First Amendment right of access to information in school li-

broadly to include any challenge by parents, school authorities, or outside groups that results in removal of certain texts or materials from use in high school classrooms. Although the Supreme Court has not addressed the precise issue of whether a school board may constitutionally remove a book from a high school literature course, the 1988 Supreme Court case of *Hazelwood School District v. Kuhlmeier* suggested that a school board may do so, under certain conditions.[8] Cases prior to *Hazelwood* concerning the issue of book banning in high schools had mixed results.[9] But lower court cases after *Hazelwood* have tended to give great deference to school boards and administrators.[10]

Recognizing that varying theories of the value of secondary education through literature are involved in these conflicts,[11] this note argues that

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brary); First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) (right to receive information from corporation about ballot issues cannot be denied by state); Stanley v. Georgia, 394 U.S. 557 (1969) (First Amendment protects reading obscenity the in privacy of one's home); Griswold v. Connecticut, 381 U.S. 479 (1965) (receipt of information regarding contraception protected); Martin v. Struthers, 319 U.S. 141 (1943) (receipt of door-to-door distribution of religious literature protected); Lamont v. Postmaster Gen., 381 U.S. 301 (1965) (right to receive requested delivery of communist propaganda protected).

8. 484 U.S. 260 (1988) (school may censor articles in student newspaper which was part of the curriculum for purposes reasonably related to legitimate pedagogical concerns); *see also* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (school may prohibit lewd or vulgar speech aimed at students if it offends the sensibilities of students); *Pico*, 457 U.S. at 853 (school may remove books from the library if for legitimate purposes of limiting students' exposure to vulgarity or on other bases of educational suitability).

9. Grosser v. Woollett, 341 N.E.2d 356 (Ohio C. P. 1974) (novels assigned in high school English class — *Manchild in the Promised Land* and *One Flew Over the Cuckoo's Nest* — violated Ohio anti-obscenity statute, and use of these books was enjoined unless parental consent was provided); *Zykan*, 631 F.2d at 1300 (First Amendment claim of students not to remove *Go Ask Alice*, Sylvia Plath's *The Bell Jar*, *The Stepford Wives*, and *Growing Up Female in America* from high school English curriculum dismissed); *Fowler*, 819 F.2d at 657 (teacher's dismissal for showing high school English class Pink Floyd's film *The Wall* upheld); *Bell*, 630 F. Supp at 939 (banning of high school drama production of *The Runaways* upheld); *Seyfried*, 668 F.2d at 214 (banning of high school production of *Pippin* upheld); Bicknell v. Vergeness Union High Sch., 638 F.2d 438 (2d Cir. 1980) (suit challenging removal of *Dog Day Afternoon* and *The Wanderers* dismissed).

But c.f. Pratt v. Indiana Sch. Dist. No. 831, 670 F.2d 45 (8th Cir. 1982) (banning of film used in high school English course, *The Lottery*, enjoined); *Minarcini*, 541 F.2d at 577, 581 (banning of Kurt Vonnegut's *Cat's Cradle* and *God Bless You, Mr. Rosewater* and Joseph Heller's *Catch-22* enjoined); Todd v. Rochester Community Sch., 200 N.W.2d 90 (Mich. App. 1972) (parents' challenges to assigning the book *Slaughterhouse Five* in high school literature class dismissed).

10. *See, e.g., Virgil*, 862 F.2d 1517 (school board's banning of humanities text after parental challenge upheld); *Krizek*, 713 F. Supp. 1131 (teacher's dismissal for showing high school English class film the *About Last Night* upheld); Poling v. Murphy, 872 F.2d 757 (6th Cir. 1989) (school officials did not violate student's First Amendment rights when it disqualified him from student council elections for making "discourteous" and "rude" remarks about the principal during assembly); Miles v. Denver Pub. Sch., 944 F.2d 1060 (10th Cir. 1991) (school did not violate a high school teacher's First Amendment rights by placing him on paid leave for four days and putting a letter of reprimand in his personnel file after the teacher made comments in class regarding rumored sexual activity of two students).

11. Deanne Bogdan, *A Case Study of the Selection/Censorship Problem and the Educational Value of Literature*, 170 J. EDUC. 2, 39 (1988); Tyll van Geel, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197 (1983); Bruce C. Hafen, *Hazelwood School District*

teachers, professors or others knowledgeable about book selection should testify as experts in cases involving the removable of books. Although deference should be given to school boards, who generally represent the views and values of parents, the boards should not have unlimited discretion unchecked by the First Amendment rights of students. Expert testimony from teachers concerning a work's literary merit would reveal why it may be unreasonable to deprive students of the opportunity to learn from a work by removing it from the curriculum. In order to protect students' rights to read and to learn, under the *Hazelwood* standard[12] courts should do more than merely accept a school board's removal decision. Instead, courts should apply the principles set forth by the Supreme Court in *Tinker v. Des Moines Independent School District*,[13] *Board of Island Trees School District v. Pico*,[14] *Bethel School District v. Fraser*[15] and *Hazelwood v. Kuhlmeier*[16] by considering the reasonableness of the school's removal decision not only in light of the school administration's motives in removing the books, but also in light of the teachers' purposes in selecting the books.

In Part II, this note chronicles the source of a high school student's right to know or to learn, and the state of the law as set forth in Supreme Court opinions. Part III describes the results of two recent lower court opinions following the key Supreme Court opinion of *Hazelwood* and suggests the likely results of book banning cases brought in the future. Part IV analyzes the current standards used by the federal courts and urges courts to admit the expert testimony of teachers when fashioning their orders in book-banning cases. Finally, Part V of this note concludes that the standards set forth by the Supreme Court are sufficient, if applied after considering the testimony of teachers and in light of the standards of *Tinker* and *Pico*, as well as those of *Bethel* and *Hazelwood*. This note concludes that federal courts should

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and the Role of First Amendment Institutions, 1988 DUKE L.J. 685; Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1 (1990); Stanley Ingber, *Socialization, Indoctrination, or the "Pall of Orthodoxy": Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15; Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647 (1986); Mark G. Yudof, *Library Book Selection and the Public Schools: The Quest for the Archimedean Point*, 59 IND. L.J. 527 (1984).

12. In the district court opinion of Virgil v. School Bd. of Columbia County, 677 F. Supp. 1547 (M.D. Fla. 1988), *aff'd*, 862 F.2d 1517 (11th Cir. 1989), Judge Black acknowledged that "the School Board's decision reflects its own restrictive views of the appropriate values to which Columbia High School students should be exposed," and expressed difficulty in "apprehend[ing] the harm which could conceivably be caused to a group of eleventh- and twelfth-grade students by exposure to Aristophanes and Chaucer." *Id.* at 1552. Nevertheless, the court held that the deferential standard established by the Supreme Court in Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988), required upholding the school board's decision. *Id.*

13. 393 U.S. 503 (1969).

14. 457 U.S. 853 (1982).

15. 478 U.S. 675 (1986).

16. 484 U.S. 260 (1988).

apply these standards, giving respect to students' First Amendment rights and balancing the pedagogical purposes of the inculcation of shared community values with the appreciation of multiple perspectives and the autonomy of the individual.[17]

II. SOURCES OF HIGH SCHOOL STUDENTS' RIGHT TO LEARN

A. *The "Materially and Substantially Disrupts" Standard*

The Supreme Court in 1969 recognized that high school students have a free speech right under the First Amendment in *Tinker v. Des Moines Independent Community School District*.[18] In *Tinker*, three students, ages 13, 15 and 16, were suspended for wearing black armbands to school to protest the Vietnam war until they returned to school without the armbands.[19] The students sued the school, claiming their First Amendment right to political expression had been violated.[20] The Supreme Court held for the students, ruling that a school may only limit a student's right of expression when the speech or expressive conduct "materially and substantially disrupt[s] the work and discipline of the school."[21] Because the Court found that the simple wearing of a small circle of black cloth around a student's arm did not disrupt classwork, cause substantial disorder or invade the rights of others, the Court held the school's punishment of the speech to be unconstitutional.[22]

Justice Fortas, writing for the majority, made the famous statement: "It hardly can be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years."[23] Fortas noted that students in school and outside of school are "persons" under the Constitution who are entitled to the same protections from the Bill of Rights as are adults.[24] Alluding to the educational philosophy of John Stuart Mill, Fortas' opinion declared that the classroom was "peculiarly the marketplace of ideas" and that the nation's future depends on students' exposure to "that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection."[25] He further stated:

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17. *See* Ingber, *supra* note 11, at 17-21 (recognizing the dilemma of the public schools in both teaching civic values, such as civility and respect for authority, while also encouraging autonomy and respect for diverse perspectives).

18. *Tinker*, 393 U.S. at 503.

19. *Id.* at 504.

20. *Id.*

21. *Id.* at 513.

22. *Id.* at 513-14.

23. *Id.* at 506.

24. *Id.* at 511.

25. *Id.* at 512.

"In our system, state-operated schools may not be enclaves of totalitarianism. . . . In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."[26]

The majority opinion suggested that anti-Vietnam views had been singled out by the school administration for prohibition, an act which is constitutionally impermissible.[27] *Tinker* has implications for book-banning decisions in that it defines a broad realm of First Amendment protection in which students may discuss diverse, and perhaps unpopular, views and ideas at school, as long as school work is not disrupted and discipline is maintained.

Tinker further has implications for book-banning cases by suggesting that particular viewpoints or ideas may not be excluded from the public high school environment. That the Court required a school to show a "substantial" disruption before it could limit students' speech is important, because by requiring a showing of a "substantial," rather than a mere "reasonable," interest, the Court accorded students' rights a high level of protection.[28]

B. *The "Motivation for Removal" Test*

The Supreme Court expanded upon students' First Amendment rights in 1982 when it recognized that students have a right to receive information in *Board of Education, Island Trees Union Free School District v. Pico*.[29] In *Pico*, members of the Island Trees school board removed several books from the school library after determining that the books were "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy."[30] The Supreme Court denied the defendant school board's motion for summary judgment and held that a genuine issue of material fact existed as to whether the board's removal of the books was based on constitutionally permissible or impermissible motives.[31]

The *Pico* Court, in a divided opinion,[32] held that if a school board in-

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26. *Id.* at 511.

27. *Id.* The Court noted that the record showed that students in some of the schools wore buttons relating to national political campaigns and the Iron Cross, traditionally a symbol of Nazism, yet were not subject to punishment by the schools. *Id.*

28. *Id.* at 503.

29. *Pico*, 457 U.S. at 867.

30. *Id.* at 857. The nine books removed from the high school library were: *Slaughterhouse Five* by Kurt Vonnegut, Jr.; *The Naked Ape* by Desmond Morris; *Down These Mean Streets* by Piri Thomas; *Best Short Stories by Negro Writers*, edited by Langston Hughes; *Go Ask Alice*; *Laughing Boy* by Oliver LaFarge; *Black Boy* by Richard Wright; *A Hero Ain't Nothin' But a Sandwich* by Alice Childress; and *Soul On Ice* by Eldridge Cleaver. The book removed from the junior high library was *A Reader for Writers*, edited by Jerome Archer. The book *The Fixer* by Bernard Malamud also was listed to be removed from a 12th grade literature course.

31. *Id.* at 875.

32. The *Pico* decision consisted of a three-Justice plurality (Justices Brennan, Marshall, and Stevens), two concurrences (Justices Blackmun and White, concurring on different grounds), and a four-Justice dissent (Justices Burger, Rehnquist, Powell, and O'Connor). *Id.* at 853.

tends by its removal decision to deny students access to ideas with which the school board disagrees, then the board has exercised its discretion in violation of the First Amendment.[33] However, the Court further stated that removal of books because they were "pervasively vulgar" or on the basis of "educational suitability" would be constitutionally permissible.[34]

Justice Brennan, in delivering the plurality opinion in *Pico*, acknowledged that one function of public education is to prepare "individuals for participation as citizens" and to "inculcat[e] fundamental values necessary to the maintenance of a democratic political system."[35] The Court agreed with the defendant that schools have a duty to teach community values, including respect for authority.[36] At the same time, however, Justice Brennan's opinion acknowledged the importance of encouraging autonomy of thought.[37] Justice Brennan also noted that educating children about a variety of perspectives prepares students for self-governance or "for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members."[38] Because this autonomy of thought and appreciation of diverse perspectives is so important, the *Pico* Court stated that the First Amendment protects students by upholding their right to receive ideas.[39]

The Court described the students' right to receive ideas as a check on school boards' discretion in book removal.[40] The Court emphasized that the First Amendment limits the school board's ability to exclude books that

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33. *Id.* at 871.

34. *Id.*

35. *Id.* at 864.

36. *Id.*

37. *Id.* at 866 ("our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this . . . often disputatious society." *Id.* Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 508-09 (1969)); *see also* Ingber, *supra* note 11, at 19 (an educational philosophy must account for the fact that much of what society achieves depends on individuals who do not or will not conform to the prevailing system's values); Yudof, *supra* note 11; *see generally* AYN RAND, THE FOUNTAINHEAD (for the proposition that individual autonomy and independent thinking, rather than over-concern with community values and what society thinks, is the basis of all great human achievement).

38. *Pico*, 457 U.S. at 868; *see also* JAMES MADISON, THE WRITINGS OF JAMES MADISON 103 (1910) ("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."); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26-27 (1948) ("Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good.").

39. *Pico*, 457 U.S. at 867 (citing Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("the Constitution protects the right to receive information and ideas"); *Bellotti*, 435 U.S. at 765 (for the proposition that "the First Amendment . . . afford[s] the public access to discussion, debate, and the dissemination of information and ideas); Griswold v. Connecticut, 381 U.S. at 482 ("the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge").

40. *Id.* at 866.

contain ideas or ideologies with which the board disagrees or of which the board disapproves.[41] The Court repeated the language of *West Virginia Board of Education v. Barnette*: "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. . . ."[42]

The Court also referred to *Epperson v. Arkansas* for the proposition that "the First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom."[43] Thus, the Court concluded that the First Amendment prohibits schools from banning books merely because the ideas they contain are considered disagreeable or unorthodox.[44]

Although not commanding a majority on the Court at the time, then-Chief Justice Burger and Justice Rehnquist, in their dissents, enunciated the view that high school students do not have a First Amendment right to receive information.[45] Both Chief Justice Burger and Justice Rehnquist would have upheld the board's removal decision under the theory that the inculcation of knowledge and moral, political, and social values is the *primary* function of public education.[46] Because both Justices believed that the purpose

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41. *Id.* at 865.

42. *Id.* at 870 (quoting West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)) (First Amendment protects public school children from compelled flag salute).

43. *Id.* (quoting Keyishan v. Board of Regents, 385 U.S. 589, 601 (1967)).

44. *Id.* at 870. The *Pico* plurality, consisting of three Justices, based its holding on three grounds: that students have a First Amendment right to receive information and ideas; that the right exists in relation to the school library, due to its unique role as a place of voluntary inquiry; and because school boards may not limit access of students to ideas with which the boards do not agree morally, politically, or socially. *Id.* at 868-71. Justice Blackmun, in a separate concurrence, would not have granted students a right to receive information under the First Amendment; rather, he would have decided the case on the sole ground that a school board may not limit students' access to ideas for the sole purpose of suppressing exposure to those ideas. *Id.* at 879.

45. *Id.* at 910 (Burger, C.J., dissenting). Chief Justice Burger asked: "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. . . ." *Id.* at 889. The Chief Justice also was concerned that in school book cases, judges would ultimately be substituting their own tastes, views, and morals for those of the school board in deciding whether or not to retain a book. *Id.*

Similarly, Justice Rehnquist stated: "When it acts as an educator, at least at the elementary and secondary school level, the government is engaged in inculcating social values and knowledge in relatively impressionable young people." *Id.* at 909 (Rehnquist, J., dissenting).

46. *Id.* at 890 (Burger, C.J., dissenting); *id.* at 909 (Rehnquist, J., dissenting). The term "inculcate" is used in all of the *Pico* Justices' opinions to describe the nature of public education and is defined as: "to teach and impress by frequent repetitions and admonitions." MERRIAM WEBSTER, WEBSTER'S NEW COLLEGIATE DICTIONARY (1981). The term connotes an authoritarian style of instruction where knowledge is learned by rote, as opposed to the "self-education and individual enrichment" description of learning by Justice Brennan, *Pico*, 457 U.S. at 869, which connotes an openness to new ideas and independent student thought.

The Court repeatedly has stated that public schools are important "in the preparation of individuals for participation as citizens" and as vehicles for "inculcating fundamental values necessary to the mainte-

of elementary and secondary education is to inculcate knowledge and values in children, they stated that the schools should have broad discretion in carrying out this function.[47]

According to Justice Rehnquist, not only is it the job of public schools to inculcate values in students, but it is constitutionally permissible for school boards to base educational decisions on their own "personal social, political and moral views."[48] Justice Rehnquist differentiated the role of the state as sovereign from the state as educator and explained that the state as educator need not be as responsive to pluralistic concerns and individual rights as when the state acts as sovereign.[49] Further, Justice Rehnquist did not believe that students had a First Amendment right to receive information, because under the inculcative theory of education, students only have a right of access to information which the school decides the students should receive.[50] Under Justice Rehnquist's theory, "the First Amendment right to receive information simply has no application to the one public institution that, by its very nature, is a place for the selective conveyance of ideas."[51]

Despite this conflict within the Court over the purpose of secondary education and a student's right to learn, *Pico* in fact gave students a right to

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nance of a democratic political system." *See e.g.*, Ambach v. Norwick, 441 U.S. 68, 76-77 (1979).

47. *Pico*, 457 U.S. at 889 (Burger, C.J., dissenting); *id.* at 909 (Rehnquist, J., dissenting). However, this theory of inculcative education, at least at the secondary school level, is contrary to the prevailing notions of educators about the purposes of education and the nature of adolescence. Ingber, *supra* note 11, at 17 (values should be taught at home or at religious institutions, not in the public high schools); A.S. NEILL, SUMMERHILL: A RADICAL APPROACH TO CHILD REARING (1960) (the purpose of education is to allow children to develop their own individuality and interests at their own rate, without much authoritarian instruction or control).

The views of educators support the statement by Chief Justice Burger that judges should not exercise discretion in choosing which books are appropriate for use in classrooms and that these decisions should be left to educators. *Pico*, 457 U.S. at 819; *see* C. David Lisman, *Yes, Holden Should Read These Books*, 16 ENG. J. 14 (1989) (adolescence is a period of forced childhood status for teens due to economic and societal factors, such as lack of employment opportunities due to child labor laws; reading can help adolescents understand their place in the "youth culture" and help them develop their ability to make mature, adult decisions); Deanne Bogdan, *A Case Study of the Selection/Censorship Problem and the Educational Value of Literature*, 2 J. EDUC. 39 (1988) (literature has value not only in learning "that's how life is," but also in learning "there are alternative views out there" regarding the way "life is" that need not be accepted but which should be respected).

48. *Pico*, 457 U.S. at 909 (Rehnquist, J., dissenting) (quoting *Zykan*, 631 F.2d at 1305). Justice Rehnquist not only saw nothing wrong with educators making decisions about books based on their own personal views, but indeed found it to be inevitable. *Id.*

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

50. *Id.* at 914 (Rehnquist, J., dissenting). Justice Rehnquist stated that the notion that students have a right of access to information "is contrary to the very nature of an inculcative education. . . . 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." *Id.* at 914-15. Justice Rehnquist also pointed out that the school was not literally limiting students' access to ideas or information, because the removed books were available at any public library, university library, in book stores, in college courses, or on loan from a friend. *Id.* at 915.

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

receive information and is precedent that lower courts may confidently follow in deciding book-banning cases. Although the *Pico* decision applied narrowly to a school board's ability to remove library books already acquired, *Pico* supports a student's right to learn from materials already available, includes as legitimate pedagogical goals the development of individual autonomy and the appreciation of diverse points of view, and protects against the removal of materials based on their ideological content.

C. *The "Intrudes Upon . . . the Sensibilities of Others" Standard*

The Supreme Court backed away from its support of students' expressive rights in the 1986 decision of *Bethel School District v. Fraser*.[52] In *Bethel*, school administrators suspended a high school senior after he gave a "vulgar" and "sexually explicit" student political campaign nominating speech at a required school assembly where junior high school students as young as age 14 were present.[53] The record revealed that during the speech some students "hooted and yelled," others appeared "bewildered and embarrassed," and the next day one teacher felt it necessary to spend part of the class time discussing the speech.[54]

The student, Matthew Fraser, sued the school under the First Amendment.[55] The Supreme Court, in an opinion by then-Chief Justice Burger, held that the school did not violate Fraser's First Amendment rights, because a school may limit students' speech if the speech "intrudes upon the work of the schools, or the rights of other students."[56] The Court reasoned that because the work of the schools includes teaching fundamental democratic values such as "civility" and "manners," and because intruding upon the rights of others includes offending other students' "sensibilities," a school constitutionally may punish students who offend the " 'habits and manners of civility' essential to a democratic society."[57]

Although *Bethel* dealt with a student's right to speak, rather than

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52. 478 U.S. at 675.

53. *Id.* at 677. The student gave the following speech:

> I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be.

Id. at 687 (Brennan, J., concurring in the judgment).

54. *Id.* at 678.

55. *Id.* at 677-79.

56. *Id.* at 680 (quoting *Tinker*, 393 U.S. at 508).

57. *Id.* at 681.

students' right to learn, the case applies to book-banning disputes because it allowed a school to censor language aimed at students on the basis of its vulgar or sexual content.[58] *Bethel* implied that high school students are too immature and sensitive to handle vulgar or sexually-explicit language. The opinion also implied that because the function of the schools is to inculcate values, the schools may ban such language from the school environment in order to protect students from its harmful effects.[59] *Bethel* also is significant in that it modifies the standard of *Tinker*. Rather than requiring a showing of "substantial" interference with school work or discipline, a school after *Bethel* need merely show that the speech in question offended the sensibilities of some students. Thus, the standard is less protective of students' right to know.

The Supreme Court further retreated from its supportive stance on students' First Amendment rights in the 1988 case of *Hazelwood School District v. Kuhlmeier*.[60] In *Hazelwood*, the high school principal censored two full pages from the students' six-page newspaper without first consulting student editors or writers about possible changes before the printing deadline.[61] The principal banned the pages because he found articles on teen pregnancy and divorce contained on those pages to be inappropriate for high school readers and possibly injurious to some members of the school community.[62] Student members of the newspaper staff sued the school, alleging denial of their First Amendment rights.[63]

The Supreme Court, in an opinion by Justice White, held that because the student newspaper was a school-sponsored activity that was part of the curriculum, and not a public forum, the school could limit the students' expression so long as the school's actions were "reasonably related to legitimate pedagogical concerns."[64] The Court found that the newspaper was part

58. *Id.* at 683. The Court noted that children's need for protection from vulgar and sexually explicit language has justified a lower level of First Amendment protection for children than is granted to adults in other contexts. *Id.* at 682; *see also* FCC v. Pacifica Found., 438 U.S. 726 (1978) (FCC regulation limiting the airing of broadcasts deemed indecent but not obscene upheld because the broadcasts were aired at times when children were in the audience); Ginsberg v. New York, 390 U.S. 629 (1968) (state law prohibiting sale of pornographic magazines to minors upheld, although magazines were not obscene under adult standards of the First Amendment).

59. 478 U.S. at 687 (Brennan, J., concurring in the judgment).

60. 484 U.S. at 260. The shift away from the supportive stance for students' rights in *Tinker* and *Pico* and toward deference to schools in *Hazelwood* and *Bethel* can most likely be attributed to a change in Justices on the Court.

61. *Id.* at 264.

62. *Id.* Specifically, the principal objected to an article on divorce because a student who was identified was quoted as complaining about her father, without giving the father an opportunity to respond. *Id.* The principal found the teen pregnancy article objectionable because, inter alia, its "references to sexual activity and birth control were inappropriate for some of the younger students at the school." *Id.* at 263.

63. *Id.* at 264.

64. *Id.* at 273.

of the curriculum and not a public forum in that the school funded the paper in large part, the faculty advisor made editorial decisions without consulting students, and students received class credit and a grade for participation.[65] The *Hazelwood* Court found that the school's action was reasonable to protect the privacy of a student's parents and to protect young children from exposure to sexual topics.[66]

The *Hazelwood* Court further enunciated factors that a school official could consider in deciding whether to limit student expression including: the quality of the work or expression, the emotional maturity of the students or audience, the shared values of society (i.e., whether the speech advocates drug or alcohol use or irresponsible sex), and the political views of the speech (i.e., whether the expression associates the school "with any position other than neutrality on matters of political controversy").[67] Thus, after *Hazelwood*, school officials have broad discretion, limited only by reasonableness considerations, to prohibit school-sponsored student speech. Although the holding specifically applied to school-sponsored student newspapers, *Hazelwood* has implications in the book banning context in that it requires educators to show merely a "reasonable" basis, rather than a "substantial" basis, for limiting student speech that arises in the curriculum. Because *Hazelwood* dealt with curricular materials, whereas *Pico* dealt with extracurricular library book use, *Hazelwood* applies with greater force in the curricular book banning context.

III. LOWER COURT BOOK-BANNING DISPUTES AFTER *HAZELWOOD*

After *Hazelwood*, lower courts have favored school boards in book-banning cases at the expense of high school students' right to learn. However, this note argues that the Supreme Court cases provide sufficient protection for students' right to learn if lower courts consider the testimony of teachers, or the value of the books at issue, and apply the *Hazelwood* standard in light of the educational purposes set forth in *Tinker* and *Pico*.

A. Virgil v. School Board of Columbia County[68]

In *Virgil v. School Board of Columbia County*, a high school student's parents, the Reverend and Mrs. Fritz M. Fountain, filed a complaint with the Columbia County school board concerning two works included in their daughter's assigned humanities textbook, Aristophanes' *Lysistrata* and Chaucer's *The Miller's Tale*.[69] In response to the complaint, the school

65. *Id.* at 268.
66. *Id.* at 276.
67. *Id.* at 271-72.
68. 862 F.2d 1517 (1989).
69. *Id.* at 1519. Aristophanes, a Greek dramatist, wrote *Lysistrata* in approximately 411 B.C. Geoffrey

board adopted a new policy for handling such complaints. Under the policy a committee of the board recommended that *Lysistrata* and *The Miller's Tale* not be required reading.[70] When the school removed the text from the curriculum and placed the humanities volume in locked storage pursuant to the committee's recommendations, parents and students at Columbia High School sought an injunction of the removal and a declaration that the action violated the students' First Amendment rights.[71]

The district court refused to grant plaintiffs' requested injunction and upheld the school board's action, applying *Hazelwood* to find that the board's action was constitutional because it was reasonably related to the legitimate pedagogical concerns of preventing students' exposure to obscenity and vulgarity.[72] The district court reasoned that under *Hazelwood*'s deferential standard, school boards are entitled to broad discretion in all matters pertaining to school-sponsored or curricular activity, even though the court found it difficult to understand how exposure to Aristophanes or Chaucer would be harmful to high school students.[73]

The Eleventh Circuit Court of Appeals affirmed, holding that the textbook removal decision did not violate the students' First Amendment rights.[74] The Eleventh Circuit stated:

Chaucer, a British poet, wrote *The Miller's Tale* in approximately 1380 A.D. *Id.* The school board removed the two works because they contained references to sex; were "excessively vulgar;" were "immoral, insofar as the selections involved graphic, humorous treatment of sexual intercourse and dealt with sexual intercourse out of wedlock;" were "offensive to a substantial portion of the Columbia County populace;" were "inappropriate to the age and maturity" of students in those courses; and were unnecessary for "adequate instruction" in the courses. Virgil v. School Bd. of Columbia County, 677 F. Supp. 1547, 1549 (M.D. Fla. 1988). *Lysistrata* concerns the attempt by the women of a community to put an end to the ongoing Peloponesian Wars by denying the men sex; *The Miller's Tale* concerns a sexual affair between a divinity student and his landlord's wife. *Id.* at 1553.

70. *Virgil*, 862 F.2d at 1519.

71. *Id.* The banned texts were placed in a locked storage room following the School Board's order.

72. *Virgil*, 677 F. Supp. at 1547. An example of "vulgarity" from *Lysistrata* includes:

> LYSISTRATA Lampito: all of you women: come, touch the bowl, and repeat after me: "I WILL HAVE NOTHING TO DO WITH MY HUSBAND OR MY LOVER. . . . I WILL BE AS COLD AS ICE AND NEVER MOVE. . . . I WILL NOT LIFT MY SLIPPERS TOWARD THE CEILING. . . . OR CROUCH ON ALL FOURS LIKE THE LIONESS IN THE CARVING. . . ."

Id. at 1553, n.7.

An example from *The Miller's Tale* includes a passage in which the parish clerk Absalon attempts to kiss the landlord's wife at her bedroom window:

> The night was dark as pitch, black as coal, and out the window she thrust her hole. And Absalon, as Fortune had in store for him, with his mouth kissed her naked ass with relish before he knew what was happening. He started back and thought something was wrong, for he knew well that women do not have beards and he had felt something rough and long-haired.

Id. at n.8.

73. *Id.*

74. *Virgil*, 862 F.2d at 1525.

> [T]he Supreme Court has held that the rights of students in public schools are not automatically coextensive with the rights of adults . . . and has recognized the central role of public schools in transmitting values necessary to the development of an informed citizenry. . . . In matters pertaining to the curriculum, educators have been accorded greater control over expression than they may enjoy in other spheres of activity.[75]

The court of appeals read *Hazelwood* as establishing "a relatively lenient test for regulation of expression which 'may fairly be characterized as part of the school curriculum.' Such regulation is permissible so long as it is 'reasonably related to legitimate pedagogical concerns.' "[76] The appeals court found, first, that the board's decision was curricular in nature, so that *Hazelwood* applied.[77] Second, the Court found that removal of *Lysistrata* and *The Miller's Tale* to be reasonably related to the legitimate pedagogical concerns of protecting students from works that are "pervasively vulgar" or "educational[ly] [un]suitable."[78] The Eleventh Circuit reasoned, "School officials can 'take into account the emotional maturity of the intended audience in determining the appropriateness of potentially sensitive topics' such as sex and vulgarity."[79]

While the Eleventh Circuit analogized the school newspaper decision of *Hazelwood* to the schoolbook removal decision in *Virgil*, the court failed to see any analogy between the library book removal decision of *Pico* and classroom book removal in the instant case.[80] The *Virgil* court disregarded the analogy by stating that the Supreme Court pointed to the "unique role" of a school library in promoting "voluntary inquiry" as a basis for its extension of First Amendment protection to library books.[81] Further, the court stated that *Pico* did not apply because the parties had stipulated that the removal was based on the legitimate pedagogical concerns of exposing students to vulgarity and sexuality, and not because the board disagreed with or did not like the ideas in the works.[82] Thus, the *Virgil* court left open the possibility that *Pico* may be applied in future curricular book removal cases where the pleadings argue that the works were removed due to disagreement with the ideas contained in the works.[83]

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75. *Id.* at 1520.
76. *Id.* at 1521.
77. *Id.* at 1522.
78. *Id.* (quoting *Pico*, 457 U.S. at 871; and *Bethel*, 478 U.S. at 675).
79. *Id.* at 1523 (quoting *Hazelwood*, 484 U.S. at 260).
80. *Id.* at 1523, n.8.
81. *Id.*
82. *Id.*
83. Some have argued that book removals based on vulgarity or sexuality necessarily are removals based on ideas or ideology. As Professor Mark Yudof points out:

B. Krizek v. Cicero-Stickney Township High School[84]

In *Krizek v. Cicero-Stickney Township High School*, the District Court for the Northern District of Illinois upheld the dismissal of a high school English teacher for showing the film *About Last Night* to a class of high school seniors, even though no school policy existed against showing R-rated films to students, and even though students met the R-rating age requirement of seventeen or above.[85] The teacher was dismissed following the complaint of a parent.[86] The teacher had selected the film for the purpose of presenting it as a modern day parallel to Thornton Wilder's play *Our Town*.[87] The district court applied the standard of *Hazelwood*, stating that the Cicero-Stickney Township High School could prohibit the use of materials in the classroom if the prohibition is "reasonably related to legitimate pedagogical concerns."[88] The court found that the school had a "legitimate concern" about exposing students to scenes of vulgarity and sex, and that "the explicit sexual scenes, frequent vulgarity, and explicit references to sexual acts are such that a reasonable person could find the movie inappropriate for high school students in their third year."[89] Thus, the court reasoned that the school could have made a "pedagogic choice" that the showing of such a film was conduct unbecoming a teacher and could fail to renew the teacher's employment contract.[90]

Besides removing an interesting learning tool which might have generated valuable student discussions from the high school class, *Krizek* had the additional unhappy result of causing high school English teachers to fear for their positions over their choice of course materials. *Krizek* has the effect of strengthening school administrators' discretion even more than *Virgil* because the prospect of getting fired over a curricular choice is a greater deterrent

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> Why is [exclusion of sexually oriented books] not as much of an imposition of values as is implicit in the exclusion of a feminist, religious, or civil rights point of view? Why is the inculcation of standards of morality and sexual behavior somehow more legitimate? Why is not the judicial attitude toward sexually oriented books inconsistent with the premise that school authorities may not pass on the ideological appropriateness of books for youngsters in the schools?

Yudof, *supra* note 11, at 563.

Other commentators point out that because it is difficult to separate the words used with their message, or the form from the substance, eliminating works with profanity or obscenity necessarily eliminates particular ideas or ideologies. For example, as Professor Ingber notes, without vulgarity, can one fully understand and appreciate the feelings and perceptions of those who live in America's inner cities? Ingber, *supra* note 11, at 66.

84. 713 F. Supp. 1131 (N.D. Ill. 1989).
85. *Id.* at 1139.
86. *Id.* at 1135.
87. *Id.* at 1133.
88. *Id.* at 1139.
89. *Id.*
90. *Id.*

than mere removal of a book. After *Krizek*, public school teachers will be more hesitant to try new things in the classroom.

C. *Probable Results in Future Cases*

As in *Virgil*, the *Krizek* court emphasized the discretion of the school administrators in the content of the curriculum, without giving much consideration to students' First Amendment right to receive ideas or information.[91] The *Krizek* court, like the *Virgil* court, did not consider the application of the principles of *Pico* or *Tinker*, such as whether the work substantially interfered with school discipline, or whether the motivation of the administrators was impermissible.[92]

To the contrary, rather than requiring the school to prove that its reasons for dismissing the teacher over the showing of a film were pedagogic in nature, the court, after viewing the film *in camera*, assumed that the school was motivated by legitimate concerns.[93] Further, although the *Krizek* court made note of the teacher's purpose in showing the film, the court apparently did not allow the teacher to explain her purpose in any detail, as this was not a factor in the court's consideration of the case.[94] Thus, both *Krizek* and *Virgil* demonstrate that the likely result of future book-banning decisions after *Hazelwood* will be to continue to extend extreme deference to school officials, virtually always approving the schools administrations' curricular decisions.

IV. A PROPOSED SOLUTION FOR DEALING WITH WOULD-BE BOOK-BANNERS

As an alternative to giving school administrators complete discretion in curricular matters, this note proposes that courts fully investigate the motives behind the assignment and the removal of books in book-banning disputes, utilizing the testimony of teachers in determining the educational value or suitability of the works in controversy.

A. *The State as Sovereign versus the State as Educator*

The different levels of protection for adults and children under the Constitution stems from the notion that until children reach age 18, the state as *parens patriae* owes children a duty to nurture and protect them; in some cases the state is presumed to know better than the children, or even their parents, about what is best for them.[95] Justice Rehnquist described this dif-

91. *Id.* at 1131.
92. *Id.*
93. *Id.* at 1139.
94. *Id.*
95. The Court in New Jersey v. T.L.O., 469 U.S. 325 (1985), stated that the constitutional rights of

ferent treatment in the education context in his *Pico* dissent as the difference between the state as sovereign and the state as educator.[96] The theory is that the state as educator acts under its *in loco parentis* power and may instill certain values in children and protect them from certain offensive forms of speech.[97] Thus, although a high level of protection is accorded when the First Amendment rights of adults are implicated,[98] a mere showing of "reasonableness" generally is all that is required when children's First Amendment rights are involved.[99]

While this presumption about the state's role with regard to children is pervasive and affects children in other areas of the law besides the First Amendment right to education,[100] the reasonableness standard need not be-

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students in public school are not automatically coextensive with the rights of adults in other settings. In *T.L.O.*, the Court held that the school's search of a student's purse without probable cause and without consent, the seizure of marijuana from her purse and the punishment of contacting the police did not violate the student's Fourth Amendment rights. *Id.* Similarly, in Goss v. Lopez, 419 U.S. 565 (1975), the Court held that a student's suspension for up to 10 days due to misconduct implicated the due process clause, yet only the most minimal procedural due process requirements were mandated, namely: notice of charges against the student and an opportunity for the student to be heard. *Id.* at 581.

This different treatment of children by use of different constitutional standards is seen in other areas of law besides education cases. *See, e.g., In re* Gault, 387 U.S. 1 (1967) (minors not entitled to all of the due process protections of criminal trials in juvenile delinquency proceedings); *Ginsberg*, 390 U.S. at 629 (only rational basis must be shown to uphold a statute prohibiting pornography sales to minors); Prince v. Massachusetts, 321 U.S. 158 (1944) (state prohibition of proselytizing by minors on street corners is not a violation of the Free Exercise Clause); Bellotti v. Baird, 332 U.S. 622 (1979) (state's requiring parental notification, or judicial bypass procedure, before a minor may obtain an abortion is not an unconstitutional deprivation of privacy).

96. *Pico*, 457 U.S. at 907 (Rehnquist, J., dissenting).

97. *Id.* In *Bethel*, the Court recognized the need for the school acting *in loco parentis* "to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech." *Bethel*, 478 U.S. at 682. Similarly, in *Bellotti*, the Court listed teenagers' vulnerability, immaturity and need for parental authority as reasons for treating them differently regarding the abortion decision. *Bellotti*, 443 U.S. at 634. Professor Bruce Hafen also argues that because high school students lack the mature capacity for decision making, schools must engage in "institutional nurturing" by instilling values of the community. Hafen, *supra* note 11, at 700.

98. The First Amendment guarantees wide freedom in matters of adult public discourse. *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971) (adult held to have a First Amendment right to wear a jacket bearing the slogan "Fuck the Draft" in public place); Stanley v. Georgia, 394 U.S. 557 (1969) (adults have a First Amendment right to possess and read obscenity in the privacy of their own home); Schenck v. United States, 249 U.S. 47 (1919) (government may not punish private citizens' distribution of anti-draft leaflets unless the speech poses a clear and present danger of interference with the workings of government); Brandenburg v. Ohio, 395 U.S. 444 (1969) (state may not punish threatening speech unless speech is directed to incite imminent lawless action and is likely to incite such action); New York Times v. Sullivan, 376 U.S. 254 (1964) (actual malice must be shown before press rights may be restricted as to public figures in defamation actions).

99. *See, e.g., Hazelwood*, 484 U.S. at 269; *Bethel*, 478 U.S. at 675; *Pacifica Found.*, 438 U.S. at 726; *Ginsberg*, 390 U.S. 629 (1968); *see also* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 501-02 (1970) ("We are left . . . with little more than a due process test—that the restriction [on children's First Amendment rights] be a reasonable one. . . . [P]resently the courts can probably do little more than accept the legislative standard if it comes within the broad contours of reasonableness.").

100. *See, e.g., supra* note 95.

come a tool whereby school boards may censor books that teachers and parents believe to be important in a high school education. This deferential approach assumes that school boards, elected by parents and others in the community, know the best way to educate students. Yet reasonable people have different opinions about the educational value of certain books or films, as well as about the maturity level of high school students.[101] Assuming that the school board is always right ignores the views of those with the expertise, experience, knowledge and training in the fields of education, child development and literature and who are in a better position to evaluate the merits of literary works: the teachers. Therefore, rather than giving such complete deference to school board decisions, courts should consider not only the factors set forth in *Tinker*, *Pico*, *Bethel* and *Hazelwood*, but also the reasons that the high school teacher selected the book or film for study.

Such consideration would be a fairly simple matter. A court would simply consider a work and ask, as required by *Tinker*, does it substantially interfere with class work or discipline?[102] If not, it passes the *Tinker* standard. The court would then consider whether the work offends the sensibilities of some students, especially younger students, under *Bethel*.[103] If the students' sensibilities would not likely be offended, the work would meet the *Bethel* standard. Next, the court must determine under *Hazelwood* if the board's removal is reasonably related to pedagogical concerns, considering such factors as: the quality of the work or expression, the emotional maturity of the students or audience, the shared values of society and any political views of the speech.[104] Further, under *Pico* the court should consider whether the book was removed for the impermissible purpose of suppressing ideas contained in the book.[105] Even though lower court cases such as *Virgil* and *Krizek* have held *Pico* to be inapplicable in curricular disputes, *Pico* can and should be applied to curricular decisions because *Pico* enunciated that individual autonomy and appreciation of diverse perspectives are legitimate pedagogical concerns. Finally, because courts do not have time to read all of the works in question, courts should rely on the expert testimony of teachers or professors in determining whether the books meet the standards set forth in these cases.

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101. *Krizek*, 713 F. Supp. at 1134 (recognizing that reasonable people could differ about whether viewing *About Last Night* would have a harmful effect on a class of high school seniors).

102. In *Tinker*, the Supreme Court focused on whether the student expression was substantially disruptive to classwork or school discipline. *Tinker*, 393 U.S. at 514.

103. In *Bethel*, the Court held that educators may consider the sensibilities of other students when determining whether the limitation of speech is necessary. *Bethel*, 478 U.S. at 680.

104. *Hazelwood*, 484 U.S. at 271.

105. In *Pico*, the Court looked at the factors of whether the motivation of the school in removing a library book was based on the book's ideological content or on such legitimate pedagogical concerns as limiting immature children's access to sexuality and vulgarity, and a work's educational suitability. *Pico*, 457 U.S. at 872.

B. *Why Teachers Should Have a Voice*

As former Chief Justice Burger queried in *Pico*, what makes federal judges more able than teachers to decide what books students should read?[106] Courts are familiar with rules and rights, laws and liberties; teachers are familiar with the day-to-day decision making about what books belong in high school courses. Few courts have the time or interest to examine individual books and decide whether the removal decision was appropriate or reasonable.[107] By allowing teachers a voice, book-banning decisions may be solved in keeping with current educational standards.

Moreover, allowing teachers a voice would foster discussions of the literary worth of certain works whereby the people who understand the meaning and messages set forth in literary art could explain the books' value in court and why such works should be retained. Without the input of humanities professionals, persons without knowledge of the educational value of literary works (i.e., judges, parents and even school administrators) would make censorship decisions without the benefit of comprehending the meaning of such authors as Chaucer, Aristophanes, Twain or Vonnegut. Perhaps if provided with an explanation of the value of the work and the purposes for which it will be used, parents, administrators and judges would understand why the work should remain. Finally, by factoring in faculty views, greater protection would be accorded the students' right to learn what the teacher and the works have to offer.

Under the present system of adjudication, such literary discussions do not occur. Supreme Court and federal court opinions rarely mention the content of the works, except in brief reference without discussion or comment;[108] teachers are referred to as "so-called 'experts.' "[109] The remarks of some of the Justices reveal an attitude that such cases are silly, laughable or not worthy of dignity.[110] Indeed, the holdings of *Virgil* and *Krizek* demonstrate al-

106. *Id.* at 896 (Burger, C.J., dissenting).

107. *Id.*

108. *See, e.g., Pico*, 457 U.S. at 895-904; *Krizek*, 713 F. Supp. at 1133-34 (containing excerpts of dialogue from *About Last Night* without judicial comment); *Virgil*, 677 F. Supp. at 1553.

109. *Pico*, 457 U.S. 907 (Rehnquist, J., dissenting) (addressing the observation by Justice Brennan that the school board ignored the recommendations of experts, or teachers and librarians, regarding the book removal, Justice Rehnquist referred to the teachers and librarians as "so-called 'experts' " and suggested that the opinions of such "experts" would add nothing to a book removal decision).

110. "Frankly, my dear, I don't give a damn," was the way Justice Stevens began his dissenting opinion in *Bethel*, suggesting perhaps his own personal opinion of the case. *Bethel*, 478 U.S. at 689 (Stevens, J., dissenting). Moreover, the tone of Justice Stevens' opinion is light and humorous. Justice Stevens analogized the student's vulgar speech to "a pig in the parlor instead of the barnyard. . . . Vulgar language, like vulgar animals, may be acceptable in some contexts and intolerable in others." *Id.* at 696.

Similarly, Justice White explained a school's need to protect high school students from sensitive topics as analogous to the need to protect younger children from discovering the truth about Santa Claus. *Hazelwood*, 484 U.S. at 271.

most a callous indifference to whether certain works are retained in the classroom, thus demonstrating the courts' apparent perception that such disputes are unimportant or that the purposes of the teachers in using the works are irrelevant. The attitudes of the courts may be symptomatic of a more general derogatory attitude of society toward the study of literature.[111]

C. *Why Should Students Read These Books Anyway?*

Book-banning cases can be tied to the academic debate over the most effective educational strategies, described in the popular media as a debate between conservative traditionalists and a more liberal, "politically correct" style of teaching.[112] On one side commentators argue that requiring students to be exposed to a multiplicity of perspectives and lifestyles ironically is a "closing," rather than an opening, of the mind, because it forces a liberal ideological view on students, to the exclusion of other views.[113] Such writers argue that educators today may be exacerbating a cultural conflict by painting a world view in which values are relative, there is no such thing as truth, the individual is more important than the community, and society is a spiritual "waste land."[114] Some have even advocated that in order to shield students from inculcation into a liberal orthodoxy, parents should put their children in private religious schools or teach them in home schools.[115]

However, the counter to this argument is that throughout history, since the Middle Ages, the purpose of education through literature has been to enlighten students by exposing them to a wide range of ideas, views, problems, personalities and modes of thinking.[116] Controversy over the content of literary teaching is nothing new in the tradition of American secular edu-

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111. ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND 371-76 (1987) (arguing that literary classics and the humanities in general are too frequently ignored and unappreciated by society, including by educators).

112. *See id.*; *Political Correctness*, NEWSWEEK, Dec. 24, 1990, at 48-55 (detailing movement in higher education to teach students cultures and traditions other than those of Western civilization, alongside Plato, Shakespeare and Locke).

113. *See generally* BLOOM, *supra* note 111; RUSH LIMBAUGH, THE WAY THINGS OUGHT TO BE (1992); Hafen, *supra* note 11, at 685.

114. *See generally* BLOOM, *supra* note 111; *see also* ROBERT N. BELLAH ET AL., HABITS OF THE HEART (1985) (exploring how the spirit of individualism is causing Americans to lose touch with their sense of community, their contacts with family and with any truly overriding principles or morals); MICHAEL MEDVED, HOLLYWOOD VS. AMERICA: POPULAR CULTURE AND THE WAR ON TRADITIONAL VALUES (1992) (making the same argument about movies as is made by some about liberal education: that popular culture causes us to question our values and religious beliefs and is biased against certain religious sects).

115. Cal Thomas, *Don't Resurrect the "Religious Right,"* GAINESVILLE SUN, Nov. 11, 1992, at A10 ("Public schools have been invaded and captured by an alien philosophy. With their emphasis on 'multiculturalism,' rewriting history and 'alternative lifestyles,' they are hothouses in which young seedlings are converted into towering liberal oaks. These schools cannot be revived. They must be shunned by those with traditional values if those values and ideas are to be preserved"). *Id.*

116. BLOOM, *supra* note 111.

cation.[117] Over time, those who initially resisted curricular changes have come to respect the novel modes of teaching.[118]

In addition, rather than causing spiritual dislocation or psychic dismay, reading works containing varying perspectives, including negative views of life or adult themes, can have the beneficial effect of teaching teens that life is not perfect, that one's view does not always prevail, and that one must come to terms with life and take responsibility for one's actions.[119] By teaching that one must be willing to live with less-than-perfect people in a less-than-perfect world, literature can aid teens in the passage to emotional maturity.[120]

Further, merely reading a book that espouses a particular view obviously is not the equivalent of forcing a student to accept the view.[121] As C.S. Lewis has written, the value of literature is to "be more than ourselves. . . . The question, 'What is the good of reading what anyone writes?' is very like the question 'What is the good of listening to what anyone says?' . . . We want to see with other eyes, to imagine with other imaginations, to feel with other hearts, as well as with our own."[122]

But C.S. Lewis emphasized that in reading literature, we still remain ourselves.[123] Family values, religious principles, morals or standards to live

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117. *Id.*; *Executive Council, Modern Language Association, Statement on the Curriculum Debate, printed in*, 3 A NEWSLETTER OF THE NATIONAL COALITION AGAINST CENSORSHIP, Issue 40, 1991 (pointing out that controversy over appropriate teaching materials in literature courses has long existed: in 1883, the introduction of English and other modern languages to a curriculum dominated by Latin and Greek was protested; after World War I the teaching of American Literature as distinct from English literature was called a sacrifice of educational standards to popular taste; and 50 years ago there was opposition to the introduction of works by James Joyce, Franz Kafka, Virginia Woolf, Federico Garcia Lorca and William Faulkner). The National Coalition Against Censorship is a national organization, based in New York City.

118. *Id.* According to Stanley Fish, Duke's Distinguished Professor of English, all of the conservative academic critics have the same message or plot, which is

> until recently the body of knowledge was whole and entire. The cultural community had a coherence that was both reassuring and powerfully integrative. Now, however, we've lost our sense of unity and purpose. We have forgotten the core of common standards that must be recovered before we turn into a society so degenerate that salvation will be impossible . . . I distrust this plot. It's too old. . . . [A]n older coherence has been undermined, but a new coherence is emerging. . . . [T]hat's the notion of difference.

Political Correctness, NEWSWEEK, Dec. 24, 1990, at 50.

119. Lisman, *supra* note 47, at 14 (defending the use of *Lord of the Flies*, *A Separate Peace* and *Catcher in the Rye* as works that teach the necessity of balancing freedom with accepting responsibility).

120. *Id.* at 17.

121. Bogdan, *supra* note 47, at 39 (arguing that there are two purposes to the study of literature: (1) to learn about life, and (2) to learn about alternative views of life, without accepting those views); C.S. LEWIS, AN EXPERIMENT IN CRITICISM (1961) (differentiating between two types of equally valid literary experiences: "egoistic castle-building," in which the reader puts himself in the place of a character in the fiction and has the experience of, "How true!" and "disinterested castle-building," in which the reader cannot relate to the experiences in the fiction and may have the reaction of "How strange!").

122. LEWIS, *supra* note 121, at 131-40.

123. *Id.* at 140.

by do not come from English courses or books, but from family, church, friends, outside readings and other aspects of one's heritage and life experiences.[124] Encountering new ideas that may be foreign, frightening, infuriating, or repulsive, and forming opinions about those ideas distinct from those of one's family and community, is a part of the learning process that can occur while reading good books.[125] Good books thus contribute to autonomous thinking and decision making, which are essential traits for a self-governing society.[126]

V. CONCLUSION

The standards for school book removal set forth by the Supreme Court in *Tinker*, *Pico*, *Bethel* and *Hazelwood* are sufficient to protect high school students' First Amendment rights to read and learn from challenged literary works. However, because reasonable people differ about the educational value of a work, as well as about the emotional maturity of high school students, courts should apply these standards in light of the testimony of teachers, to protect the rights of students and parents who disagree with the educational philosophy of the school boards. Teacher testimony will enable courts to better assess the educational value of works at issue. Moreover, teacher testimony will enable courts to better protect the simultaneously legitimate pedagogical goals of instilling youth with shared community values, enlightening them to different perspectives and encouraging autonomous decisionmaking.

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124. Ingber, *supra* note 11, at 15.

125. Of course, teachers should not close their eyes to the concerns of parents or religious groups who would prefer that their children not be exposed to vulgarity, sexuality, bigotry, or other offensive themes. Teachers should select reading materials with a sensitivity and respect for all views on child rearing and education, which are often based on profoundly-held religious convictions. Respecting all religious and ideological views should not require, however, that teachers provide some students alternate reading list or excuse some students from class on days an objectional work is discussed, if parents object to certain materials. Not only would alternative reading lists cause a needless burden on the teacher, but the message would be sent that learning respect for alternative views is important for some students, but not for all. DELFATTORE, *supra* note 1.

126. *See supra* notes 38-39 and accompanying text.