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Board of Education, Island Trees Union Free School District No. 26 v. Pico

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COMMENT

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT NO. 26 v. PICO

CONSTITUTIONAL LAW—*A school board's decision to remove books from the public school library will infringe upon the students' first amendment rights if the school board's motivation for the book removal is the suppression of the ideas contained in the books with which the school board disagrees.* 457 U. S. 853 (1982).

If we are to . . . let our students explore the many visions of truth available in literature, we have to fight the censor. To fight the censor with any hope of success, we must prepare carefully before censorship strikes, not in the panic of battle. If we do not prepare in advance, or if we do not care enough to prepare, we will lose, and we will wind up losing everything, our books and our students and our freedom.¹

I. INTRODUCTION: THE CONTRAST BETWEEN CONVENTIONAL AND FUNCTIONAL JURISPRUDENCE

Public school educators and librarians from all sections of the country have reported an increasing number of efforts “to challenge or restrict the books and teaching materials available to students in the classroom and the school library.”² *Board of Education, Island*

1. Donelson, *Censorship in the 1970's: Some Ways to Handle It When It Comes (And It Will)*, in *DEALING WITH CENSORSHIP* 167 (J. Davis ed. 1979).

2. THE ASSOCIATION OF AMERICAN PUBLISHERS, THE AMERICAN LIBRARY ASSOCIATION, AND THE ASSOCIATION FOR SUPERVISION AND CURRICULUM DEVELOPMENT, *LIMITING WHAT STUDENTS SHALL READ—BOOKS AND OTHER LEARNING MATERIALS IN OUR PUBLIC SCHOOLS: HOW THEY ARE SELECTED AND HOW THEY ARE REMOVED* (1981) [hereinafter cited as *SURVEY*].

Judith Krug, the Executive Director of the Office For Intellectual Freedom of the American Library Association, recently estimated that in the late 1970's and early 1980's there were approximately 300 reported censorship attempts annually, while in the period from 1980-1982, the figure escalated to 1000 reported censorship attempts annually. Ms. Krug further estimated that only 20% of all censorship incidents are reported annually, bringing the actual number of attempts closer to 5000 annually. Telephone interview with Judith Krug, Director,

*Trees Union Free School District No. 26 v. Pico*³ represents a qualified response by the United States Supreme Court to the problem of book censorship in American public schools.

The *Island Trees* case was also the occasion for a complex and provocative analytic effort by the Supreme Court at two related levels. The first, more conventional level of analysis draws upon vocabulary and concepts familiar to virtually every American lawyer and student of American constitutional law. Thus, the plurality asks as part of its contribution to a more conventional constitutional jurisprudence: "[W]hether 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[?]"⁴ At one level, the plurality's qualified answer, after an explicit and familiar balancing of values characteristic of modern conventional first amendment jurisprudence, employed the first amendment as an instrument of restraint upon "state action."⁵

At another level, however, the plurality opinion made a more important analytic contribution. It apparently sought both to clarify and ultimately to prescribe roles or functions for a public education system in general and, more specifically, for certain component parts of that system. The plurality, enriched by a "functional" perspective, focused upon three zones of public school power: curriculum planning, classroom teaching, and school libraries. Constrained by the facts of the case, the *Island Trees* plurality limited its conclusions to the role and function of public school libraries.⁶

Office for Intellectual Freedom, The American Library Association (Sept. 24, 1982).

3. 457 U.S. 853 (1982).

4. *Id.* at 855-56 (footnote omitted).

The first amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

The first amendment is made applicable to the states through the fourteenth amendment, see *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936); *Gitlow v. New York*, 268 U.S. 652, 666 (1925), which reads, in pertinent part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

U. S. CONST. amend. XIV.

5. For a traditional or conventional constitutional case analysis see generally, J. NOWAK & R. ROTUNDA, *HANDBOOK ON CONSTITUTIONAL LAW* (1978); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 576-736 (1978).

6. 457 U.S. at 862. The plurality notes that "the special characteristics of the school

The plurality, therefore, engaged in a form of functional analysis. While terminology such as "functional analysis" or "functionalism" has been used with a variety of meanings in a number of disciplines, ranging from mathematics to biology to sociology, it is utilized in this comment to indicate a judicial emphasis upon the consequences or effects of particular social or institutional arrangements.⁷ A functional analysis or emphasis may have both descriptive (positive) and prescriptive (normative) dimensions.⁸ More specifically, the plurality in *Island Trees* offered provocative descriptions of the historic role and effects of public education in general and various component parts of the system in particular. In an even more provocative way, the plurality effectively prescribed an analytic role or function for public school libraries.

The *Island Trees* plurality did more, however, than simply make a modest contribution to first amendment jurisprudence as it affects the administration of our public schools. At a deeper, institutional level, the plurality reached debatable conclusions about the consequences and effects of public school systems and their component parts. In this respect, the *Island Trees* plurality opinion may represent an ambitious judicial effort both to describe and prescribe functions for at least a portion of a public education system.

This comment first explores the case in conventional terms, by reviewing the facts and litigation history of the *Island Trees* case as well as the major cases that were in conflict on this issue prior to the Supreme Court's decision.⁹ The issues are explored in this section by using the conventional constitutional vocabulary of the plurality as it verbalized both the issues and answers as a set of conventional propositions. The utility of these conventional propositions is also discussed. Emphasis is placed on the process of library book removals and the contribution that it makes towards defining the role of stu-

library make that environment especially appropriate for the recognition of the First Amendment rights of students." *Id.* at 868 (emphasis omitted).

7. A functional statement describes an entity, element or institution in terms of its consequences or effects. For a description of functional methods in a legal context, see Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821 (1935).

8. A functional orientation or method of analysis may be used to explain, in a "positive" sense, what is or has been. The same analytic method, emphasizing effects, consequences, and implications, may also be put to "normative" uses—what those effects "ought to be." For a general discussion of uses of economic analysis with respect to legal subject matter, see Gellhorn & Robinson, *The Role of Economic Analysis in Legal Education*, 33 J. LEG. EDUC. 247, 266 (June, 1983) and R. POSNER, *ECONOMIC ANALYSIS OF LAW* § 2.2 (2d ed. 1977). See also Hart, *Positivism and The Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

9. See *infra* text accompanying notes 41-64.

dent as consumer, school board as supplier, and court as reluctant arbiter. The comment then changes focus and approaches the case by looking at a series of functional contributions that the plurality made in assigning functions to the three operating zones.¹⁰ Lastly, this comment critically analyzes the problems created by this decision.¹¹ The plurality's distinctions and arbitrary allocation of functions to educational zones and the external impacts that this case may have because of these unfounded allocations are also examined. Furthermore, the plurality sent imperfect and undeveloped process signals to school boards grappling with the problems of challenges to school library collections.¹² This comment indicates that the plurality's opinion will generate additional uncertainty and will likely be the catalyst for future litigation over the real issue in dispute—the proper functional role of the public school in America today.¹³

II. THE FACTS BEHIND THE *Island Trees* DISPUTE AND ITS CONVENTIONAL CONTRIBUTIONS

A. *The Litigative Facts*

In September 1975, while attending a conference of Parents of New York United ("PONYU"), a politically conservative educational organization,¹⁴ three members¹⁵ of the Island Trees Board of Education ("Board") obtained a list of books which were described by one board member as "improper fare for school students."¹⁶ Those members attending the conference subsequently examined the school library index to determine whether the books in question could be found in the library. Nine of the books on PONYU's list

10. See *infra* text accompanying notes 132-62.

11. See *infra* text accompanying notes 163-94.

12. See *infra* text accompanying notes 103-30.

13. See *infra* text accompanying notes 163-94.

14. Parents of New York United (PONYU) is "a politically conservative organization of parents concerned about education legislation in the State of New York." 457 U.S. at 856. The facts appearing herein are taken from both the district court opinion, 474 F. Supp. 387 (E.D.N.Y. 1979) and the Supreme Court opinion, 457 U.S. 853 (1982).

15. The three members of the Island Trees Board of Education that attended the conference and obtained lists of books considered objectionable by PONYU were: Richard Ahrens, President of the Board, Frank Martin, Vice-President, and Patrick Hughes. 457 U.S. at 856.

16. *Id.* (quoting Board Vice-President Frank Martin). At no time, however, did the Board argue that the books were obscene. *Id.* at 856 n.2 (quoting 474 F. Supp. 387, 392 (E.D.N.Y. 1979)).

The actions of the three board members support the plurality's notion that the process utilized by this Board to remove the books was highly irregular. These actions might also indicate that the Board was dominated by an impulsive minority.

were found in the high school, and one in the junior high school.¹⁷

At a meeting in February 1976, the Board gave “unofficial direction” to the superintendent and principals of the high school and junior high school to remove the books from the library shelves and deliver them to the Board’s office so that the Board members could read them.¹⁸ The superintendent of schools objected to the Board’s actions, and indicated that the school district had a formal policy and a set of procedures for dealing with such a problem, which should have been followed.¹⁹ When the Board’s directive and actions were publicized it became necessary for it to issue a press release explaining its actions.²⁰ The press release characterized the books removed as “anti-American, anti-Christian, anti-Sem[i]tic and just plain filthy”²¹ 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.”²²

Soon thereafter, the Board appointed a “Book Review Committee,” (“Committee”) consisting of four Island Trees parents and four staff members.²³ The Committee’s task was to make recommend-

17. *Id.* at 856.

The nine books in the High School library were: *Slaughter House Five*, by Kurt Vonnegut, Jr.; *The Naked Ape*, by Desmond Morris; *Down These Mean Streets*, by Piri Thomas; *Best Short Stories of Negro Writers*, edited by Langston Hughes; *Go Ask Alice*, of anonymous authorship; *Laughing Boy*, by Oliver LaFarge; *Black Boy*, by Richard Wright; *A Hero Ain’t Nothin’ But A Sandwich*, by Alice Childress; and *Soul On Ice*, by Eldridge Cleaver. The book in the Junior High School library was *A Reader for Writers*, edited by Jerome Archer. Still another listed book, *The Fixer* by Bernard Malamud, was found to be included in the curriculum of a 12th - grade literature course. 474 F. Supp., at 389, and nn. 2-4.

Id. at 856 n.3.

18. *Id.* at 856-57. This ad hoc and unofficial direction for the removal of the books from the library shelves is another example of the irregular process used by this school board.

19. *Id.* at 857 n.4. The Island Trees School Board’s refusal to follow established policy and procedures with regard to book removals may have triggered the plurality’s concern for a regular prescribed rational process for such actions.

20. *Id.* at 857. A press conference was convened by the Island Trees School Board on March 19, 1976 to correct what it labeled

“[the] distortions, misinformation, and the obvious attempt by the New York Daily News in a cartoon published [that] morning, to characterize two members of the Board as a pair of shady hoods who surreptitiously sneak into school buildings under cover of darkness to snatch library books.”

474 F. Supp. at 390. The press release went on to explain the Board’s actions in removing the books. It explained that the books contained materials “offensive to Christians, Jews, Blacks, and Americans in general. In addition these books contain obscenities, blasphemies, brutality, and perversion beyond description.” *Id.*

21. 457 U.S. at 857 (quoting 474 F. Supp. at 390).

22. *Id.*

23. *Id.*

ations to the Board after reading and evaluating the books on the basis of their "educational suitability," "good taste," "relevance," and "appropriateness to age and grade level."²⁴ The Committee recommended that five of the books be retained in the libraries,²⁵ that two others be removed from the shelves,²⁶ and that another be made available to students only with parental approval.²⁷ As to the remaining three books, the Committee could not agree on two,²⁸ and took no position on the other.²⁹

The Board, however, rejected the Committee's recommendations³⁰ and concluded that it would return only one book³¹ to the shelves without restriction, that another would be returned to the shelves subject to parental approval,³² and that the remaining nine books would be removed from the school libraries of the district and from any use in the curriculum.³³ The Board gave no reasons for rejecting the recommendations of the Committee it had created.³⁴ The Board's process for the book removals was clearly punctuated by irregular behavior.

The Board's decision precipitated a lawsuit brought by the students and their parents under section 1983 of title 42 of the United States Code³⁵ in the United States District Court for the Eastern

24. *Id.*

25. *Id.* at 858. The books that the Committee recommended for retention were: *The Fixer*, *Laughing Boy*, *Black Boy*, *Go Ask Alice*, and *Best Short Stories by Negro Writers*. *Id.* at 858 n.5.

26. *Id.* at 858. The two books the Committee recommended for removal were: *The Naked Ape* and *Down These Mean Streets*. *Id.* at 858 n.6.

27. *Id.* at 858. The Committee recommended that *Slaughter House Five* be made available to students with parental approval. *Id.* at 858 n.9.

28. *Id.* at 858. The Committee could not agree on the disposition of *Soul on Ice* and *A Hero Ain't Nothin' But A Sandwich*. *Id.* at 858 n.7.

29. *Id.* at 858. The Committee took no position on *A Reader For Writers* due to the fact that all the members of the Committee did not have the opportunity to read the book. *Id.* at 858 n.8.

30. *Id.* at 858.

31. The Island Trees School Board decided that *Laughing Boy* would be reshelfed without restriction. *Id.* at 858 n.10.

32. *Black Boy* was to be reshelfed and made available to students subject to parental approval. *Id.* at 858 n.11.

33. *Id.* at 858.

34. *Id.*

35. 42 U.S.C. § 1983 (Supp. V 1981). The statute states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in

District of New York.³⁶ The plaintiffs contended that the Board had ordered the removal of the books from the school libraries and had prohibited their use in the curriculum not because the books lacked educational value, but merely because certain portions of the books were offensive to their personal tastes.³⁷ The plaintiffs claimed that their first amendment rights were being denied by the actions of the Board.³⁸ Based on these claims, the plaintiffs sought preliminary and injunctive relief in the form of a court order to force the Board to return the nine books to the school libraries and permit their use in the school curriculum.³⁹ The district court granted summary judgment in favor of the Board,⁴⁰ relying heavily upon the precedent set by the United States Court of Appeals for the Second Circuit in *Presidents Council, District 25 v. Community School Board No. 25*.⁴¹

The district court posed the issue in conventional terms: [t]he issue is whether the first amendment requires a federal court to forbid a school board from removing library books which its members find to be inconsistent with the basic values of the community that

equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

36. 474 F. Supp. 387 (E.D.N.Y. 1979), *rev'd and remanded*, 638 F.2d 404 (2d Cir. 1980), *aff'd*, 457 U.S. 853 (1982).

37. 457 U.S. at 858-59.

38. *Id.* at 859. The structure and vocabulary of the plurality's opinion is a response to the structure and vocabulary employed by the plaintiffs. If the plaintiffs characterize this case as a first amendment case, then a responsible Court must respond to the plaintiffs' characterization of the fight.

39. *Id.*

40. 474 F. Supp. at 398.

41. 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972). In *Presidents Council*, the Second Circuit held that a school library book which was improperly selected "for whatever reason" could be removed "by the same authority which was empowered to make the selection in the first place." *Id.* at 293.

Judge Mulligan of the Second Circuit stated:

[S]ome authorized person or body has to make a determination as to what the library collection will be. It is predictable that no matter what choice of books may be made by whatever segment of academe, some other person or group may well dissent. The ensuing shouts of book burning, witch hunting and violation of academic freedom hardly elevate this intramural strife to first amendment constitutional proportions. If it did, there would be a constant intrusion of the judiciary into the internal affairs of the school. Academic freedom is scarcely fostered by the intrusion of three or even nine federal jurists making curriculum or library choices for the community of scholars.

Id. at 291-92.

elected them.”⁴² The court concluded that the first amendment does not so require. The court also found that the Board was motivated and 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 irrelevant, vulgar, immoral, and in bad taste, making them educationally unsuitable for the district’s junior and senior high school students.”⁴³ In effect, the court decided that the process employed was reasonable. The district court noted that local school boards have long been granted broad discretion to formulate educational policy,⁴⁴ and concluded that the courts should not intervene in “‘the daily operations of school systems’”⁴⁵ unless “‘basic constitutional values’” are “‘sharply implicate[d].’”⁴⁶ The court concluded that such conditions for judicial intervention did not exist in this case because while the Board’s decision might have “reflect[ed] a misguided educational philosophy,”⁴⁷ its actions did not rise to the level of a “sharp and direct infringement of any first amendment right.”⁴⁸

Predictably, the *Island Trees* decision was appealed. The result, however, was not so predictable in light of the Second Circuit’s previous stance in *Presidents Council*.⁴⁹ The United States Court of Appeals for the Second Circuit reversed the district court and remanded the matter for trial.⁵⁰ The reversal was based upon the court of appeals’ concern with both the apparent motivation of the Board in directing the removal of the books and the procedures used by the Board in arriving at its determination. Judge Sifton, writing for the court, criticized the Board’s “unusual and irregular intervention in the school libraries’ operations by persons not routinely concerned

42. 474 F. Supp. at 396-97.

43. *Id.* at 392.

44. *Id.* at 395-97.

45. *Id.* at 395 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

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

47. *Id.* at 397.

48. *Id.*

49. See *supra* note 41 and accompanying text. In *Presidents Council*, the court was willing to accept the book removal authority of school boards. The court noted that state law had given the board the power to make book selections and therefore the board had to remain free to manage its library collection without judicial interference. The book under attack was *Down These Mean Streets* by Piri Thomas. The court depicted the novel as an account of a boy growing up in Spanish Harlem, and stated that it contained considerable profanity, as well as episodes dealing with violence, sex and drug use. 457 F.2d at 290-92.

50. 638 F.2d 404 (2d Cir. 1980), *rev’g and remanding* 474 F. Supp. 387 (E.D.N.Y. 1979), *aff’d*, 457 U.S. 853 (1982).

with such matters”⁵¹ and held that the Board members were obligated to demonstrate a reasonable basis for interfering with the students’ first amendment rights.⁵² According to the Second Circuit, the Board had not offered sufficient justification for its actions.⁵³ The court of appeals, in essence, emphasized the absence of a rational process in the Board’s removal of the books. The Board’s criteria for removal were considered by the court to “suffer from excessive generality and overbreadth,”⁵⁴ and the procedures used were viewed as “erratic, arbitrary and free-wheeling.”⁵⁵ As stated by Judge Sifton:

Where . . . as in this case, evidence that the decisions made were based on [the Board’s] moral or political beliefs appears together with evidence of procedural and substantive irregularities sufficient to suggest an unwillingness on the part of school officials to subject their political and personal judgments to the same sort of scrutiny as that accorded other decisions relating to the education of their charges, an inference emerges that political views and personal taste are being asserted not in the interests of the children’s well-being, but rather for the purpose of establishing those views as the correct and orthodox ones for all purposes in the particular community.⁵⁶

For the students, however, the court of appeals’ decision to remand represented a partial victory. It provided an opportunity for a new trial which would presumably expose the motivation behind the Board’s removal of the library books. Before trial, however, the Supreme Court granted certiorari upon the petition of the Board.⁵⁷

It is not entirely clear why the Supreme Court granted certiorari in a case in which summary judgment had been reversed and the case remanded for trial and development of a record.⁵⁸ It may be inferred, however, that the Court’s desire to resolve an issue which had sharply divided three circuits influenced the granting of certiorari in this case. Prior to the *Island Trees* decision, the issue of a

51. *Id.* at 414.

52. *Id.* at 414-15.

53. *Id.* at 416.

54. *Id.* Note the court’s use of conventional first amendment vocabulary.

55. *Id.*

56. *Id.* at 417.

57. 454 U.S. 891 (1981).

58. In fact, Justice White, although he concurred in the judgment of the plurality, would have preferred the Court to follow precedent and allow the case to be remanded for trial. Justice White believed that constitutional questions should not be decided until it is necessary to do so. 457 U.S. at 883-84 (White, J., concurring). *But cf.* 457 U.S. at 904 n.1 (Rehnquist, J., dissenting) (granting of certiorari makes case ripe for decision).

local board of education's power to remove books from school libraries had been treated inconsistently by the Sixth Circuit in *Minarcini v. Strongsville City School District*,⁵⁹ by the Second Circuit in *Presidents Council*,⁶⁰ *Island Trees*⁶¹ and *Bicknell v. Vergennes Union High School Board of Directors*,⁶² and by the Seventh Circuit in *Zykan v. Warsaw Community School Corp.*⁶³ Furthermore, as chal-

59. 541 F.2d 577 (6th Cir. 1976). In *Minarcini*, the Sixth Circuit strongly supported and protected students' rights in book removal situations. The court took the opposite tact from that taken by the Second Circuit in *Presidents Council*. The court examined the right of the student to receive information and applied that doctrine to the school library, stating that a board could not condition the privileges of library use on the "social or political tastes of board members," but must operate using criteria which are "neutral in First Amendment terms." *Id.* at 582. The school board in *Minarcini* had removed Joseph Heller's *Catch 22* and Kurt Vonnegut's *God Bless You, Mr. Rosewater* and had prohibited their use or discussion in class. Central to the *Minarcini* approach is the theory that when a book removal cannot be explained in content-neutral terms (i.e., worn binding, newer edition available, or lack of shelf space), there has been an infringement of the students' first amendment rights to receive information. *Id.*

60. 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972). *See supra* notes 41, 49 and accompanying text.

61. 638 F.2d 404 (2d Cir. 1980), *aff'd*, 457 U.S. 853 (1982). *See supra* notes 48-52 and accompanying text.

62. 638 F.2d 438 (2d Cir. 1980) *aff'd*, 457 U.S. 853 (1982). In *Bicknell*, the companion case to *Island Trees*, the court held that student plaintiffs had failed to state a cause of action by their allegations that the board's decision to remove Richard Price's *The Wanderers* from the library and to place Patrick Mann's *Dog Day Afternoon* on a restricted shelf violated their first amendment rights. Judge Newman's opinion revealed three factors present in *Bicknell* that compelled a different result from that in *Island Trees*: 1) the board's action was taken following parental complaints of vulgarity and indecency in the language contained in the books; 2) the plaintiffs' complaint acknowledged that the board acted because the books contained vulgar and indecent language; and 3) the school officials had the power to regulate vulgarity and explicit sexual content. *Id.* at 440-41. Furthermore, Judge Newman noted that the complaint contained no allegations that the books were removed because of the ideas contained in them or that the Board "acted because of political motivation." *Id.* at 441.

63. 631 F.2d 1300 (7th Cir. 1980). The Seventh Circuit in *Zykan* upheld the actions of the defendant school officials. The plaintiffs in *Zykan* alleged the following school board actions as unconstitutional: the removal from the high school library of *Go Ask Alice*, the board's discontinuance of the use of *Values Clarification* as a textbook and the orders by the high school principal to an English teacher not to use *Growing Up Female in America*, *Go Ask Alice*, *The Stepford Wives* and *The Bell Jar* in a course dealing with women in literature. *Id.* at 1302 & nn.3 & 4.

The Seventh Circuit approached the plaintiffs' book removal and related claims on an academic freedom theory. The court stated that academic freedom is a concept that recognizes the importance of keeping the academic community free from ideological coercion. *Id.* at 1304. The court noted, however, that this theory has little relevance at the high school level because of the students' limited intellectual and emotional maturity and because of the public school's traditional role in encouraging and instilling basic community values. Contrary to the position in *Minarcini*, the *Zykan* court stated that local school boards, in an effort to transmit their community values, are free "to make educational decisions based upon their personal social, political and moral views." *Id.* at 1305. The court further stated that actions based on

lenges to school board authority increased with the upsurge in censorship attempts across the United States,⁶⁴ *Island Trees* presented the Court with an opportunity to explore and possibly resolve an issue of increasing importance.

B. *The Issues Verbalized in First Amendment and Other Conventional Terms*

The principal issue posed by the Supreme Court in *Island Trees* was "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."⁶⁵ The *Island Trees* decision generated seven separate opinions. Justice Brennan, writing for the plurality made a concerted effort to limit the nature of the substantive question before the Court,⁶⁶ presumably wishing to limit the significance of the case as future precedent. Justice Brennan explicitly listed the categories that were not at issue as well as the sole issue to be resolved.⁶⁷ In exploring the limits of the local school board's discretionary power, Justice Brennan was not concerned with curriculum decisions,⁶⁸ textbook acquisitions or removals,⁶⁹ or required reading materials.⁷⁰ Rather, he limited the analysis to school library books which were available for optional student reading and that were subject to removal decisions.⁷¹ Furthermore, Justice Brennan was not concerned with decisions of school boards regarding library book acquisitions.⁷²

Justice Brennan concluded that students in schools possess a protectable first amendment right to receive information.⁷³ He further held that school boards cannot remove books from the public school library shelves simply because the board disagrees with the

such views are generally "neither capricious nor arbitrary nor unreasonable." *Id.* at 1307 n.8. The outer limit of this discretion however is "flagrant abuse" when a board attempts to impose exclusive indoctrination into one way of thinking. *Id.* at 1306.

64. See SURVEY, *supra* note 2, at 3-9; Telephone interview with Judith Krug, Director, Office for Intellectual Freedom, The American Library Association (Sept. 24, 1982); *supra* notes 1-2 and accompanying text.

65. 457 U.S. at 855-56 (footnote omitted).

66. See *id.* at 861.

67. *Id.* at 861-62.

68. *Id.* at 862.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 863-69.

ideas contained in them; a school board's motivation behind the book removal cannot be the suppression of the ideas contained in the book.⁷⁴

Justice Blackmun concurred, agreeing with the plurality that the school board's motivation behind the book removal cannot be the suppression of ideas.⁷⁵ He expressly refused to recognize, however, that students possess a first amendment right to receive information in school.⁷⁶ Justice White concurred in the reversal of the summary judgment, but would have waited to resolve the constitutional issues presented until a record had been fully developed at trial.⁷⁷ Chief Justice Burger dissented, joined by Justices Powell, Rehnquist, and O'Connor, concluding that the school board had the authority to remove the books from the public school library shelves.⁷⁸

C. *The Propositions and Answers Stated in Conventional Terms*

The plurality opinion, if viewed from a conventional constitutional perspective, offered modest answers to its narrowly focused inquiry. The *Island Trees* plurality decision articulated four major propositions relating to the student's first amendment rights in school: (1) school boards have broad discretionary powers to manage the daily operations of the schools; (2) in school students possess certain first amendment rights that cannot be infringed upon by the school board's exercise of its discretionary powers; (3) the school board's discretionary powers must be balanced against the student's first amendment rights; and (4) courts will exercise judicial restraint when called upon to interfere with the daily functioning of the school system unless basic constitutional values are implicated.

The first proposition that the plurality recognized is that local school boards have broad discretion in the management of school affairs.⁷⁹ Local school boards have been given the authority, by stat-

74. *Id.* at 870-72.

75. *Id.* at 875-83 (Blackmun, J., concurring in part and concurring in judgment).

76. *Id.* at 877-79 (Blackmun, J., concurring in part and concurring in judgment).

77. *Id.* at 883-84 (White, J., concurring in judgment).

78. *Id.* at 885-93 (Burger, C.J., dissenting). Justices Powell, Rehnquist and O'Connor each wrote their own dissenting opinion. *Id.* at 893 (Powell, J., dissenting); *id.* at 904 (Rehnquist, J., dissenting); *id.* at 921 (O'Connor, J., dissenting).

79. *Id.* at 863. See *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (striking down a state law that prohibited the teaching of the Darwinian theory of evolution in any state-supported school); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) (striking down a state law which provided that no child between the ages of eight and sixteen could attend a private school); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) (striking down a state law that prohibited the teaching of modern foreign languages in public and private schools).

ute, not only to prescribe the curriculum for the schools, but also to control student conduct.⁸⁰ The plurality acknowledged that a vital role of the public school is to prepare the students for participation in society as citizens. The plurality thus viewed the school as the vehicle for the inculcation of the values necessary to maintain a political system in a democracy.⁸¹ The plurality established that local school boards, in fulfilling this inculcative function, must have the ability to prescribe and apply the curriculum in a manner that will best transmit community values. Thus, the plurality recognized that a legitimate and substantial community interest exists for promoting respect for the traditional community values, whether those values are social, moral, or political.⁸²

The second major proposition recognized by the plurality is that, in school, students have certain first amendment rights that may not be abridged by the discretionary functions of local school boards. The plurality recognized that:

“Boards of Education . . . have . . . 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.”⁸³

The *Island Trees* plurality by emphasizing the notion that students do not “‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,’”⁸⁴ reaffirmed the existence of some measure of student first amendment rights. The nature of these rights, however, is limited insofar as they are “‘applied in light of

80. See 457 U.S. at 864; *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 507 (1969). State laws occasionally create authority in local school boards by enumerating the powers and duties of such boards. *E.g.*, N.Y. EDUC. LAW § 1709 (McKinney 1969).

81. See 457 U.S. 866-68; *id.* at 876 (Blackmun, J., concurring in part and concurring in judgment). The dissenting justices also recognize that the primary function of the public school is to inculcate community values. See *id.* at 889 (Burger, C.J., dissenting); *id.* at 909 (Rehnquist, J., dissenting); see also *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979).

82. 457 U.S. at 864.

83. *Id.* at 864-65 (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

84. *Id.* at 865 (quoting *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 506 (1969)). The court in *Tinker* held that a local school had infringed the free speech rights of high school students by suspending them from school for wearing black armbands in class as a protest against the government's policies in Vietnam.

the special characteristics of the school environment.' ”⁸⁵

The plurality also relied upon *West Virginia State Board of Education v. Barnette*,⁸⁶ where the Court had previously held that local school boards could not compel students to salute and pledge allegiance to the flag without invading “the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”⁸⁷

The Supreme Court has consistently committed itself to safeguarding the fundamental values of freedom of speech and inquiry in the educational system. The *Island Trees* plurality reaffirmed the existence of the student’s first amendment rights in school.⁸⁸ The plurality concluded that, in school, students possess a right to read and a right to receive information, arguing as follows: (1) the first amendment is viewed as the protector of the public’s access to the dissemination of information and ideas;⁸⁹ (2) similarly, the first amendment prohibits the state from “‘contract[ing] the spectrum of available knowledge;’ ”⁹⁰ (3) since it has been determined that first amendment protection extends to the right to receive information,⁹¹ “the right to receive ideas follows ineluctably from the *sender’s* First Amendment right to send them;”⁹² (4) unless a person is free to receive information and ideas from others, the first amendment’s protection of the dissemination of ideas would be meaningless;⁹³ and (5) the right to receive information is extended to students in public schools since they “‘may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.’ ”⁹⁴ This, in turn, translates into a “right to read.” The logical force of the plurality’s argument rests, therefore, on a foundation of well recognized first amendment ideas and established precedent. A student’s first

85. *Id.* at 866 (quoting *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 506 (1969)). The plurality noted that students’ rights to freedom of expression could not be abridged because of an “‘undifferentiated fear or apprehension of disturbance’ ” but could be limited when such expression posed a real threat to the peaceful functioning of the school. *Id.* (quoting *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 508 (1969)).

86. 319 U.S. 624 (1943).

87. *Id.* at 642, quoted in *Island Trees*, 457 U.S. at 865.

88. 457 U.S. at 865.

89. *Id.* at 866 (citing *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978)).

90. *Id.* (quoting *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965)).

91. *Id.* at 867 (citing *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)).

92. *Id.* (emphasis in original).

93. *Id.* (citing *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring)).

94. *Id.* at 868 (quoting *Tinker v. Des Moines School Dist.* 393 U.S. 503, 511 (1969)).

amendment right, however limited it may be in certain contexts, must include the right to read.

Somehow, the Court's respect for a school board's discretion must be reconciled with a student's right to read. A school board's discretion to make educational decisions must be exercised in compliance with first amendment values.⁹⁵ This tension thus leads to the third proposition put forth by the *Island Trees* plurality:

Our Constitution does not permit the official suppression of *ideas*. Thus whether [the school board's] removal of books from their school libraries denied [students] their First Amendment rights depends upon the motivation behind [the board's] actions. If [the board members] *intended* by their removal decision to deny [students] access to ideas with which [the board members] disagreed, and if this intent was the decisive factor in [the board's] decision, then [the board members] have exercised their discretion in violation of the Constitution.⁹⁶

The motivation or intent of the school board is, therefore, the controlling factor.⁹⁷ As an explanation and limitation, the plurality accepted plaintiffs' opinion that "an unconstitutional motivation would *not* be demonstrated if it were shown that [the school board] had decided to remove the books at issue because the books were pervasively vulgar . . . [or if] the removal decision was based solely upon the 'educational suitability' of the books in question."⁹⁸ This line of reasoning is consistent with the decision in *Minarcini v. Strongsville City School Board District*.⁹⁹

The fourth and final proposition articulated by the plurality relates to the appropriate scope of judicial review. Courts should abstain from intervening in the conflicts that arise in the day-to-day

95. *Id.* at 866.

96. *Id.* at 871 (emphasis in original) (footnote omitted). The plurality noted that "by 'decisive factor' we mean a 'substantial factor' in the absence of which the opposite decision would have been reached." *Id.* at 871 n.22 (citing *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (involving the firing of a non-tenured teacher who exercised his first amendment rights and claimed that this was the decisive factor in the decision to fire him)).

97. *See also id.* at 879-80 (Blackmun, J., concurring in part and concurring in judgment).

98. *Id.* at 871 (emphasis in original) (citations omitted).

99. 541 F.2d 577 (6th Cir. 1976) (holding that students have a right to receive information and ideas and school boards must explain library book removals in first amendment neutral terms). *See supra* note 59. First amendment neutral terms in the context of book removals include, but are not limited to, the removal of worn books, books due to the limitations of physical space, outdated editions, and vulgar or educationally unsuitable works for a particular age or grade level.

operation of the school system, unless the school board's decisions directly infringe on "basic constitutional values."¹⁰⁰ The plurality, therefore, reaffirmed the concept of judicial restraint in decisions relating to challenges of a school board's discretionary powers. The proper scope of review is to be limited and confined to cases involving only the most serious first amendment breaches,¹⁰¹ for otherwise there might be damaging judicial interferences with largely autonomous school boards.

The predictable reliance of the plurality opinion upon first amendment precedent and fundamental constitutional and institutional concepts produced a modest and qualified conclusion. The plurality, using a conventional vocabulary, asked: Does the first amendment prohibit boards of education from removing books from school libraries? The answer offered by the plurality was, in effect, "maybe."¹⁰²

III. PROCESS FOR REMOVALS

A. *The Need for a Rationally Structured Process for Removals*

A major contribution of the *Island Trees* decision is that it sent a signal to all local school boards around the nation that library book removals must avoid the substantive effect of suppressing ideas. School boards, therefore, in order to avoid judicial intervention and to assure the courts that the abridgement of a student's first amendment right to read is not the hidden agenda, must employ a rational and structured process for the removal of books.¹⁰³ The plurality indicated that *Island Trees* would have been "a very different case if

100. 457 U.S. at 866 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

101. Serious first amendment breaches are illustrated by *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (impermissible to suspend students for wearing armbands in school as a protest against governmental policy); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (invalidating a state anti-evolution statute); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (impermissible to require students to salute the flag). The Supreme Court clearly wishes to restrict its exercise of judicial review and permit local autonomy, unless basic constitutional values are directly and sharply implicated.

102. The removal of library books by school boards violates the first amendment rights of students when the removal is motivated by the school board members' disapproval of the ideas contained in the books. *Island Trees*, 457 U.S. at 872. In order to determine if there is a constitutional violation, the school board's motivation for the removal must first be determined. *Id.* at 870-71. The plurality, however, does not indicate clearly who has the burden of proving the board's motivation, or even how one proves motivation in general. Justice Blackmun, in his concurrence, believes that the school board bears this burden. *See id.* at 877 (Blackmun, J., concurring in part and concurring in judgment).

103. *Id.* at 872-75.

the record demonstrated that [the Board] had *employed established, regular and facially unbiased procedures for the review of controversial materials*.¹⁰⁴

The plurality expressly noted the inadequacies in the school board's removal process.¹⁰⁵ In *Island Trees*, the School Board ignored the advice of literary experts, the views of librarians and teachers within the school district, the advice of the superintendent of schools, and the guidance of professional literary publications that rate books for junior and senior high schools.¹⁰⁶ The Board also ignored a specific school board policy and procedure in existence for the removal of books,¹⁰⁷ as well as the superintendent's recommendation that the established policy be followed.¹⁰⁸ The Board "instead resorted to the extraordinary procedure of appointing a Book Review Committee—the advice of which was later rejected without explanation."¹⁰⁹ The Island Trees School Board's removal procedures were so "irregular and *ad hoc*"¹¹⁰ that the plurality questioned the Board's motivation for the book removals. The plurality implicitly suggested that school boards should articulate their reasons for a decision to remove school library books from the shelves.¹¹¹ The plurality also suggested that the Board should have conducted an independent review of other books in its school libraries.¹¹² In effect, the plurality was reacting to the Board's lack of independent decision-making since the Board members were provided the list of "objectionable" books by a politically conservative educational organization.¹¹³ The plurality further indicated that such removal decisions

104. *Id.* at 874 (emphasis added).

105. *Id.* at 874-75.

106. *Id.* See also *supra* text accompanying notes 23-34.

107. 457 U.S. at 874-75.

108. See *id.* at 857 n.4:

The superintendent of schools objected to the Board's informal directive, noting that:

"[W]e already have a policy . . . designed expressly to handle such problems. It calls for the Superintendent, upon receiving an objection to a book or books, to appoint a committee to study them and make recommendations. I feel it is a good policy—and it is Board policy—and that it should be followed in this instance. Further, I think it can be followed quietly and in such a way as to reduce, perhaps avoid, the public furor which has always attended such issues in the past."

Id.

109. *Id.* at 875.

110. *Id.*

111. See *id.* at 858.

112. See *id.* at 874.

113. *Id.*

must be free of political influence.¹¹⁴ Creating tension with this last concern, however, is the plurality's recognition that local school boards should reflect community values rather than the individual value preferences of the board members.¹¹⁵

B. *The Utility of this Process*

Although the plurality inferred that a rational book review process is a "constitutional" necessity,¹¹⁶ it failed to articulate one in concrete terms. The plurality intimated, instead, that in making a removal decision, a school board should seek the advice of literary experts, librarians, teachers, and publications that rate books for schools.¹¹⁷ A board should also adhere to the book review policy, if any, adopted in the school district.¹¹⁸ Finally, a board should explicitly articulate its reasons for the removal decision.¹¹⁹

There are many advantages to employing a specific book review process prior to deciding that controversial materials should be removed from school library shelves. First, a rational process has an evidentiary value. Even the general review process suggested by the plurality in *Island Trees* may provide the necessary evidence of a school board's motivation for the library book removals. In addition, departure from a prescribed process allows for an inference of improper motivation.¹²⁰ The second rationale for employing an "established, regular and facially unbiased"¹²¹ procedure for the review of controversial materials is to provide a process that can resolve disputes without the need to resort to the courts. The use of an established process can settle disputes and reduce, if not eradicate, judicial intervention.¹²² Third, the use of a process encompassing some sort of group decision-making minimizes the risk that the school li-

114. *Id.* at 870-71.

115. *Id.* at 864. *See id.* at 872 & nn. 23-24.

116. *See supra* text accompanying notes 105-15.

117. *See supra* text accompanying note 106.

118. *See supra* notes 107-09 and accompanying text.

119. *See supra* text accompanying note 111.

120. *See Village of Arlington Hts. v. Metropolitan Housing Dev.*, 429 U.S. 252, 267 (1977). In *Village of Arlington*, the Supreme Court, in considering the purpose underlying the Village's refusal to rezone, noted: "Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly [when] the decision maker strongly favor[s] a decision contrary to the one reached." *Id.*

121. *Island Trees*, 457 U.S. at 874.

122. Examples of established processes employed to make peace and avoid judicial or other types of intervention are: labor arbitration and mediation; sessions of the United Nations Security Council; and the use of grievance committees.

brary will be used by ideologues for the indoctrination of students. Open group decision-making allows for a diversity of viewpoints and this diversity will more likely result in a decision to allow a wider range of materials to remain shelved.¹²³ The use of an established review process in this last instance can arguably be seen as moderating influence, affecting the substance of a decision either to remove or allow a book to remain shelved.

The *Island Trees* plurality stopped short of explicitly mentioning some additional positive rewards in utilizing a process for book removals. For example, a book removal process serves as protection for both the students' first amendment rights and for the school board. Extended regularized deliberation about challenged books, along with the expression of diverse viewpoints, tends to be protective; the students' right to read is protected from impulsive board decisions and school board members are protected from misguided popular pressure.¹²⁴ An established review process slows down the process of making book removal decisions and arguably allows the passions of the moment to cool over time. Popular pressure to censor and remove materials not only comes from parents within the community, but also emanates from national organizations such as the Moral Majority, Phyllis Schlafly's Eagle Forum, and the Gablers of Longview, Texas.¹²⁵ It is the magnitude of the censorship problem and the pressure it places on school board members that should encourage school boards to create policies and procedures to stave off intemperate attempts to contract the available range of viewpoints contained in library resources.¹²⁶ An ongoing process is more likely

123. A group of people, each expressing his or her individual view, is arguably more likely to reflect a variety of viewpoints. This diversity will be reflected in the decision each member individually makes about the educational suitability of the materials being reviewed. By sharing reactions and reflections on the materials being reviewed, other members will have an opportunity to reexamine and reevaluate their own impressions. In this way, it is more likely that some members of the committee will be willing to have a questioned book remain shelved.

124. See *Thomas v. Board of Educ., Granville Central School Dist.*, 607 F.2d 1043, 1051 (2d Cir. 1979), *cert. denied*, 444 U.S. 1081 (1980) (court expresses concern about school officials who attempt to win community approval by making decisions impinging on the first amendment rights of students).

125. See Doyle, *Censorship and the Challenge To Intellectual Freedom*, 61 *PRINCIPAL* 8, 9 (Jan. 1982); see also B. Parker, *Your Schools May Be the Next Battlefield In the Crusade Against "Improper" Textbooks*, *THE AM. SCH. BOARD J.* 21-26 (June 1979).

126. Books and magazines such as Arthur Miller's *Death of a Salesman*, Mark Twain's *Huckleberry Finn*, *National Geographic* and *Ms.* magazine are coming under attack by censors who claim that they are "immoral, anti-American, anti-Christian, or just plain filthy." Doyle, *Censorship and the Challenge to Intellectual Freedom*, 61 *PRINCIPAL* 8 (Jan. 1982).

to establish useful standards. An orderly process honors our commitment to due process¹²⁷ and provides challengers with evidence of the

School boards can protect themselves as well as the students they serve by drafting formal policies and procedures for handling challenges to instructional materials such as textbooks and library materials. *See, e.g.,* Donelson, *supra* note 1, at 165. A written policy, clearly defining the method for dealing with complaints, should be part of the school board's policy. One jurisdiction has established such policies and procedures. *See* Bartlett, *The Iowa Model Policy and Rules For Selection of Instructional Materials*, in *DEALING WITH CENSORSHIP* 202 (J. Davis ed. 1979) [hereinafter *The Iowa Model*]. A review process, similar to the one established in Iowa, should provide that complaints initially be dealt with in an informal manner. The teacher, department chairman or principal should explain to the complainant the school's selection process, criteria and the particular place the controversial materials have in the context of the overall school curriculum. *Id.* at 207. The written policy should also include a "request-for-review" form indicating, in writing, the objector's specific concerns. *Id.* at 208. These comments may be considered by the board when the challenged materials are subsequently evaluated. *Id.* at 210. It is key to the process that the challenged materials remain shelved and in use until a final determination as to their suitability is made. *Id.* at 208. Immediate removal should be resisted. If challenged materials are removed as soon as an objection is filed, a complainant would achieve success in censoring the material by simply filing the objection. Immediate removals are ad hoc and are specifically the type of questionable conduct the *Island Trees* plurality was seeking to prevent. *See* 457 U.S. at 872-75. Therefore, challenged materials should be presumed to have an educational value until the contrary is established through a second-level removal process. At this second level, a permanent "Reconsideration Committee" should be established by the Board of Education to determine the "appropriateness of the [challenged] material for its intended educational use." *The Iowa Model, supra*, at 210. The committee should receive the complainant's written request for reconsideration, allow the complainant an opportunity to present his or her request for removal orally, read professionally prepared reviews of the material, and actually read the materials in question. *See id.* A written decision and its justification should be forwarded to the superintendent who will communicate the resulting report to the school board. *See id.* at 210-11.

The "Reconsideration Committee" should consist of a membership that fully represents all segments of the community, (i.e., political, ethnic, racial, economic, and age groups including young couples with young school-age children, older couples with high school children, retired people, etc.). *See id.* at 208-09. More specifically, the committee should be composed of at least one teacher, one school media specialist (librarian), one member of the central administrative staff, five members of the community appointed by school Parent-Teacher-Student Associations, and three high school students selected for one-year terms by a student advisory body. *See id.* at 208-10. The emphasis on a heavy lay composition in the membership is predicated on the need to establish the credibility of this group in the community. *Id.* at 209. This is a "legitimizing" strategy to induce obedience in all of the affected constituencies. Most communities are suspicious of professional decision-making and are more likely to respond favorably to a group that represents their values. *See id.*

It is essential that the "Reconsideration Committee" be a regular, ongoing entity that establishes its credibility and continuity over time. *See id.* Emergency meetings called because of a sudden furor over a particular book fuels and distorts the entire process. Impulsive and speedy action by a committee called into emergency session is likely to miss evidence and overreact to passionate and unthinking protests.

127. The essential elements of due process of law are notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case, thereby requiring that every man [book] have the protection of a day in court. *Di Maio v. Reid*, 132 N.J.L. 17, 37 A.2d 829, 830 (1944). Due process of law implies the right "in its most comprehensive

school board's motivation, if, in fact, a removal does occur.¹²⁸

In a recent censorship survey sponsored by the Association of American Publishers, the American Library Association, and the Association for Supervision and Curriculum Development, it was discovered that only one-half of the school districts that responded to the survey had formal written policies for the selection and reconsideration of challenged materials.¹²⁹ In addition,

[t]he percentage of respondents reporting challenges was substantially *higher* among administrators and librarians *with* a written selection policy (in most cases, the selection policy entails reconsideration procedures as well) than among those *without* a formal policy. But both administrators and librarians *with* a policy (as compared to those *without*) *more often reported that challenges were overruled*; while administrators *without* a written selection policy (as compared to those *with*) *more often reported that challenged materials were removed from the school*. . . .¹³⁰

One can conclude from these findings that a student's first amendment rights with regard to school library books are better protected in school districts that have and adhere to written policies and a specific process. For those school boards and communities that resent judicial intervention into local school board decision-making, there is a method available to them for limiting the degree of judicial review. According to the *Island Trees* plurality, decisions made in the context of "established, regular and facially unbiased procedures for the review of controversial materials,"¹³¹ would receive judicial deference.

IV. *Island Trees*' FIRST FUNCTIONAL CONTRIBUTION: THE DUAL FUNCTION OF PUBLIC EDUCATION IN GENERAL

A. *The Great Debate Over Functions In General*

Whatever new contribution the plurality opinion makes to first amendment jurisprudence, there is little doubt that the various opinions make a second, more subtle contribution. At a second, less visible level, below the first amendment rhetoric and debate over consti-

sense; to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved." BLACK'S LAW DICTIONARY 449 (5th ed. 1979).

128. See *supra* note 120 and accompanying text.

129. SURVEY, *supra* note 2, at 5-6.

130. *Id.* at 6 (emphasis in original).

131. 457 U.S. at 874.

tutional values, the plurality also appears to have been debating the functions of a system of public education and its various component parts.

There has been a heated debate for many years over the appropriate functions of public education at the primary and secondary levels. With some necessary simplifications, this debate has principally been between two basic and competing functional philosophies: those educators who view public education as fulfilling an indoctrinative or prescriptive model¹³² and those who believe that education involves an analytic model.¹³³ Professor Goldstein has described the two models of education in the following statement:

In the prescriptive [indoctrinative] model, information and accepted truths are furnished to a theoretically passive, absorbent student. The teacher's role is to convey these truths rather than to create new wisdom. Both teacher and student appear almost as automatons. Analytic education, however, signifies the examination of data and values in a way that involves the student and teacher as active participants in the search for truth. While these polar models represent only a theoretical paradigm that can never exist in pure form, we have traditionally conceived of pre-college public education as essentially prescriptive and college and post-graduate studies as analytic.¹³⁴

The indoctrinative function views the public school as a mechanism for instilling into students basic information and values that the community believes to be important.¹³⁵ The development of skills in the indoctrinative model is secondary to the mastery of pre-selected bodies of knowledge or information. The teacher's role is to pour the pre-selected body of knowledge and values of the community, as defined by the school board, into the student.¹³⁶

In recent years, however, certain educators have argued that the indoctrinative model improperly views the student as an empty vessel

132. E.g., Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293, 1297 (1976).

133. See *infra* notes 137-39 and accompanying text.

134. Goldstein, *Reflections on Developing Trends in the Law of Student Rights*, 118 U. PA. L. REV. 612, 614 (1970).

135. Traditional education's emphasis on the indoctrinative function has as its basis a concern for the mastery of static knowledge. See generally H. COLE, *PROCESS EDUCATION* 3-5 (1972). See also C. SILBERMAN, *CRISES IN THE CLASSROOM* 113-57 (1970).

136. W. GLASSER, *SCHOOLS WITHOUT FAILURE* 34 (1969). See generally Nahmod, *First Amendment Protection for Learning and Teaching: The Scope of Judicial Review*, 18 WAYNE L. REV. 1479, 1480 (1972).

into which the teacher pours information.¹³⁷ These writers collectively support the analytic model as a dynamic interplay of continuous student-teacher interactions which generate curiosity, controversy, self-learning, critical thinking, awareness, and learning through a "hands-on," "open classroom" approach.¹³⁸ Those educators who stress the analytic model believe that certain process skills are essential for daily life. An educated man, in their view, "is a rational man skilled in reasoning and analytic thinking."¹³⁹

B. *The Island Trees Plurality—Dual Functions*

The plurality opinion in *Island Trees* honors both the indoctrinative¹⁴⁰ and analytic functions of public education. The plurality views public education as having multiple functions and verbalizes its respect for the indoctrinative function by concluding that the state and local school boards have comprehensive authority "to prescribe and control conduct in the schools."¹⁴¹ Furthermore, the plurality recognizes 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.'"¹⁴² The plurality agrees with the Board that "school boards must be permitted 'to establish and apply their curriculum in such a way as to transmit community

137. W. GLASSER, *supra* note 136, at 34.

138. Among the supporters of the analytic model are writers such as: B. S. BLOOM, *TAXONOMY OF EDUCATIONAL OBJECTIVES, HANDBOOK I COGNITIVE DOMAIN* (1956); J.S. BRUNER, *THE PROCESS OF EDUCATION* (1960); J.S. BRUNER, *TOWARD A THEORY OF INSTRUCTION* (1968); H. COLE, *supra* note 135; W. GLASSER, *supra* note 136; C. ROGERS, *ON BECOMING A PERSON* (1961); C. SILBERMAN, *supra* note 135; J. WITTMER & R. MYRICK, *FACILITATIVE TEACHING: THEORY AND PRACTICE* (1974).

139. H. COLE, *supra* note 135, at 5. Professor Cole continues:

Skills of learning, of relating to others, of empathy, of analyzing and synthesizing information and experience, of planning and implementing action, of conceptualizing, generalizing, expressing, and valuing are a few of those by which we live. *People do not live by information. The information is needed, but, without the skills to act on the information, the person is crippled. The power lies not so much in the information as in the skills to organize and use it, to make meaning from it.*

Id. at 4 (emphasis in original).

140. The Court in *Island Trees* uses the word "inculcative" which is synonymous with the terms indoctrinative or prescriptive. *E.g.*, 457 U.S. at 869 (plurality opinion); *id.* at 879 (Blackmun, J., concurring in part and concurring in judgment); *id.* at 889 (Burger, C.J., dissenting); *id.* at 895 (Powell, J., dissenting); *id.* at 909, 915 (Rehnquist, J., dissenting). All of these terms express a concern for information and value-laden curriculum and learning.

141. *Id.* at 864 (quoting *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 507 (1969) (emphasis added)).

142. *Id.* (quoting *Ambach v. Norwich*, 441 U.S. 68, 76-77 (1979)).

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.'"¹⁴³

The plurality opinion also evidences respect for the analytic function. The plurality, quoting from *Tinker v. Des Moines School District*,¹⁴⁴ states: "In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."¹⁴⁵ Implicit in the plurality's insistence upon a student's right to receive information and ideas is the student's right to read.¹⁴⁶ The plurality views such student access to ideas and information as preparation for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.¹⁴⁷

The plurality's "dual" commitment to both the indoctrinative and analytic function of public education are clearly not shared by Justice Rehnquist. In a scathing dissent, Justice Rehnquist accuses Justice Brennan of creating a new doctrine out of whole cloth. He states that "[i]t is the very existence of a right to receive information, in the junior high school and high school setting, which [is] wholly unsupported by our past decisions and inconsistent with the necessarily selective process of elementary and secondary education."¹⁴⁸ Justice Rehnquist rejects the notion articulated by the plurality that public schools have other than inculcative functions.¹⁴⁹ The assumption that only the inculcative function exists is evidenced by the following statement:

[I]t is helpful to assess the role of government as educator, as compared with the role of government as sovereign. 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.¹⁵⁰

143. *Id.* (quoting Brief for Petitioners Island Trees Board of Education at 10, *Island Trees*, 457 U.S. 853 (1982)).

144. 393 U.S. 503 (1969).

145. 457 U.S. at 868. (quoting *Tinker*, 393 U.S. at 511).

146. *Id.* at 867-69; see *supra* text accompanying notes 88-96.

147. 457 U.S. at 868.

148. *Id.* at 910 (Rehnquist, J., dissenting).

149. *Id.* at 914 (Rehnquist, J., dissenting).

150. *Id.* at 909 (Rehnquist, J., dissenting). In a recent article, Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEXAS L. REV. 477 (1981), the author points out that public schools at the primary and secondary level have only one function. He states, "Virtually every activity that occurs in public school, and virtually every purpose that school serves, is concerned with conveying information, assessing the

Justice Rehnquist rejects the notion that the library has a unique role (i.e. an analytic function) and claims that this is merely "one of Justice Brennan's own creation."¹⁵¹ Justice Rehnquist, however, fails to recognize that these two models operate on a shifting continuum.¹⁵² Certainly, the analytic ability of a six year old first grader and an eighteen year old high school senior cannot be equated.

V. *Island Trees'* SECOND FUNCTIONAL CONTRIBUTION: THE ALLOCATION OF THE TWO FUNCTIONS

A. *A Division of the Public School's Total Operation into Component Parts*

The plurality honored both the indoctrinative and analytic functions of public education by allocating these two functions to different "zones" that operate simultaneously in the division of the public school's total operation. The three major relevant component parts recognized by the plurality consist of: (1) planning curriculum; (2) implementing curriculum (consisting of the mandatory classroom interaction of teacher and student); and (3) school libraries as the optional, non-indoctrinative zone.¹⁵³ The plurality specifically stated that it was not concerned with curriculum decisions.¹⁵⁴ Furthermore, in the library zone, the plurality was only concerned with book removals and not book acquisitions.¹⁵⁵

B. *The Analytic Function Is Assigned To The School Library*

The plurality articulated these functional divisions as it rejected the Board's emphasis on indoctrinative functions in secondary education. The Board claimed that it must be given "*unfettered* discretion to 'transmit community values.'"¹⁵⁶

The plurality concluded, however, that

[such a] sweeping claim overlooks the unique role of the school library . . . use of [the library] is completely voluntary on the part of [the] students. Their selection of books . . . is entirely a

effects of the conveyance of information, and *indoctrinating* the participants with the correct notions about information." *Id.* at 496-97 (emphasis added).

151. 457 U.S. at 914 (Rehnquist, J., dissenting).

152. Professor Goldstein points out that prescriptive and analytic models are never polar models that exist in isolated pure form. *See supra* text accompanying note 134.

153. *See* 457 U.S. at 858 n.12; *see also id.* at 861-62.

154. *Id.* at 862.

155. *Id.*

156. *Id.* at 869 (emphasis in original).

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 their 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 on 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.*¹⁵⁷

By assigning the library's function within the school to the analytic mode, the plurality was stating that the school board's indoctrinative function is left largely to the planning of curriculum and the ordering of required textbooks. Thus, the plurality justified placing a limitation upon its intervention into the library zone. The library becomes the zone that functions to neutralize and balance the indoctrinative function of the rest of the public school environment. From this arbitrary allocation of functions flows the notion that students have expanded first amendment rights in the optional setting of the library and restricted rights in the more coercive mandatory classroom zone.

By carving out a distinct library zone committed to the analytic function, the plurality could more readily explain its seemingly precious distinction between library book removals and library book acquisitions.¹⁵⁸ The initial selection of educationally suitable library books from among thousands of possible titles is viewed differently from the focus on particular books for removal purposes. The book removal carries with it the danger of an "official suppression of ideas."¹⁵⁹ The holding in *Island Trees* "affects only the [school board's] discretion to *remove* books. . . . [L]ocal 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.'"¹⁶⁰ This concern for maintaining the school library as the zone set aside for the analytic function in the educational environment also explains the plurality's insistence that a school board's motivation for the removal of library books be con-

157. *Id.* (emphasis added and in original).

158. *Id.* at 862; *see also id.* at 870-72.

159. *Id.* at 871 (emphasis in original).

160. *Id.* at 872. (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (emphasis in original)).

sistent with the first amendment rights of the students in this setting.¹⁶¹ The plurality emphatically stated: “our Constitution does not permit the official suppression of *ideas*.”¹⁶²

VI. THE PROBLEMS WITH THE *Island Trees* DECISION

A. *The Court Chooses an Analytic Functional Orientation*

The plurality opinion in *Island Trees* gave lip service to the traditional notion that public education at the primary and secondary levels serves mainly an indoctrinative function.¹⁶³ The plurality’s uncritical acceptance of the indoctrinative function in curriculum planning and classroom teaching¹⁶⁴ and the analytic function in the library¹⁶⁵ put a judicial imprimatur on one theory and rejected another without either educational authority or explanation. The plurality recognized that state and local school boards “have broad discretion in the management of school affairs,”¹⁶⁶ and that local school boards must be permitted “‘to establish and apply their curriculum in such a way as to transmit community values.’”¹⁶⁷ Public schools are viewed as the mechanism for preparing students to take their place in society as responsible citizens. Thus, schools serve the vital function of “‘inculcating fundamental values necessary to the maintenance of a democratic political system.’”¹⁶⁸

Beyond these mere platitudes, however, the plurality’s real emphasis was on preserving and expanding the analytic function within the public school setting. The plurality’s uncritical acceptance of the analytic function in the library setting is even more striking in the face of the long standing debate in the educational community.¹⁶⁹ The plurality’s failure to cite to the existing educational literature indicates either its insensitivity, ignorance, or determination to override expert and community regard for the indoctrinative model. The plurality failed to explain its choice and the opinion has a deeply intrusive effect by making an important policy choice. Evidence of the plurality’s emphasis on the analytic model appears throughout the opinion. The plurality emphasized that while schools educate

161. *Id.* at 871.

162. *Id.* (emphasis in original).

163. *E.g., id.* at 864.

164. *See id.* at 869.

165. *See id.* at 868-69.

166. *Id.* at 863.

167. *Id.* at 864 (quoting Brief for Petitioners at 10).

168. *Id.* (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)).

169. *See supra* notes 132-39 and accompanying text.

“the young for citizenship, [this] is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source”¹⁷⁰ The plurality further emphasized that it is in our “‘educational system where [it is] essential to safeguard the fundamental values of freedom of speech and inquiry.’”¹⁷¹ Most significantly, the plurality, in creating an analytic zone, chose the “school library [as] the principal locus of such freedom.”¹⁷² It did not limit the analytic function but merely noted that the library is the principal, but not sole, locus of such a function.¹⁷³ The plurality stated that “‘students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding.’”¹⁷⁴

The plurality’s emphasis on the analytic function can be further implied from its requirement that an acceptable process be utilized for the removal of school library books. The consequence of such a requirement is arguably that an appropriate process will force a diversity of viewpoints, which, in turn, might lead to compromise.

B. *The Contention Over Basic Functional Values Will Generate Litigation*

The plurality opinion protects a student’s right to read in the library. Chief Justice Burger, in his dissent,¹⁷⁵ correctly noted that if 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.”¹⁷⁶ When the dispute involves a matter of fundamental values, recurrent litigation can be predicted.¹⁷⁷ The Chief Justice noted that all activity in public schools involves the conveyance of information and values.¹⁷⁸ The question becomes one of the

170. 457 U.S. at 864-65 (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

171. *Id.* at 865 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

172. *Id.* at 868-69.

173. *See id.*

174. *Id.* at 868 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

175. *Id.* at 885 (Burger, C.J., dissenting). Chief Justice Burger was joined in his dissent by Justices Powell, Rehnquist, and O'Connor.

176. *Id.* at 889 (Burger, C.J., dissenting) (quoting *Ambach v. Norwick*, 441 U.S. 68, 77 (1979)).

177. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973) (right to an abortion) and its progeny, *e.g., Bellotti v. Baird*, 443 U.S. 622 (1979) (minor’s right to an abortion) and *H.L. v. Matheson*, 450 U.S. 398 (1981) (minor’s right to an abortion).

178. 457 U.S. at 889 (Burger, C.J., dissenting).

scope of the protected analytic function. The Chief Justice perceived no distinction between school boards' indoctrinative decisions encompassed in the content of curriculum, and the decisions concerning the appropriateness of retaining materials in the school library.¹⁷⁹ He questioned why the right to read is exclusively located in the school library,¹⁸⁰ noting that "a decision to eliminate certain material from the curriculum, history for example, would carry an equal—probably greater—prospect of 'official suppression' "¹⁸¹ than would the removal of optional materials from the school library. The Chief Justice further stated that school board decisions regarding "required reading and textbooks [would] have a greater likelihood of imposing a 'pall of orthodoxy' over the educational process than do optional reading."¹⁸² While Chief Justice Burger recognized "that as a matter of *educational policy* students should have wide access to information and ideas"¹⁸³ i.e., the free market place of ideas concept, it is the "people [who] elect school boards, who in turn select administrators, who select teachers . . . [who are] best able to determine the substance of that policy."¹⁸⁴ Future litigation will have to deal with the expansion of students' first amendment rights with regard to curriculum content, textbook selection, and classroom content. The right to read cannot be contained within the four walls of a physical space labeled "library."

C. *The Arbitrary Allocation of Analytic Function to School Libraries.*

The plurality argued that the school library is a special place that makes it particularly appropriate for the recognition of students' first amendment rights.¹⁸⁵ The plurality viewed the library as the place where students are free to "explore the unknown, and discover areas of interest and thought not covered by the prescribed curriculum" ¹⁸⁶ and as the proper locus for a "regime of voluntary

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

180. *See id.* at 892 (Burger, C.J., dissenting).

181. *Id.* at 892-93 (Burger, C.J., dissenting).

182. *Id.* at 892 (Burger, C.J., dissenting) (quoting *Island Trees*, 457 U.S. at 870 (plurality opinion)).

183. *Id.* at 891 (Burger, C.J., dissenting) (emphasis in original).

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

185. *Id.* at 868.

186. *Id.* at 869 (quoting *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 715 (D. Mass. 1978)).

inquiry.”¹⁸⁷ Assigning the analytic function exclusively to the library, however, has no educationally sound justification. In addition, the allocation of the analytic function to a limited zone contradicts the basic commitment to analytic education. Professional educators will point out that it is the teacher, in a dynamic interchange with students, who can motivate, stimulate, and encourage students to explore, evaluate, question, and synthesize materials from a wide range of resources not limited to a school library.¹⁸⁸

Community values are not exclusively conveyed through the indoctrinative function of curriculum selection.¹⁸⁹ Community values are conveyed to students by the local media, by the teachers selected for them, and by budget choices, (e.g., the commitment of school funds to library extensions or the refurbishing of football stands in the high school playing field). To allocate an indoctrinative function to classrooms and curriculum and an analytic function exclusively to the library is to set arbitrary and unrealistic divisions that do not exist. The plurality's distinction between expanded student first amendment rights in the library zone and contracted rights in the other zones¹⁹⁰ is a practical impossibility. The classroom and the library zone contain within them mixed functions. The analytic and indoctrinative models exist on a continuum, seldom existing in pure form.¹⁹¹ Over the thirteen year span of a student's life in public school, from kindergarten through senior high school, the mix of indoctrinative and analytic models is constantly shifting. A six year old's ability to read, interpret, analyze, and synthesize material is vastly different from the twelve year old's or the seventeen year old's. These analytic skills do not magically emerge when a student enters college. They develop slowly over the entire educational life of the child. Certainly, the seventeen or eighteen year old high school student is capable of the broad-ranging inquiry associated with the analytic zone. Furthermore, this mix is often encouraged or discouraged by individual teachers or librarians. The classroom teacher is far from an automaton who spews forth unedited curriculum, and a good librarian will often steer a student into making book selections

187. *Id.*

188. *See supra* note 138 and accompanying text.

189. *See supra* notes 134-37 and accompanying text.

190. *Compare* 457 U.S. at 864 (school boards permitted to establish curriculum according to community values) *with id.* at 868-69 (school library has a unique role in the educational scheme).

191. *See supra* note 134 and accompanying text.

in the library. The plurality's distinct allocation of specific functions to specific zones is unsupported by respectable professional opinion and is difficult to understand. The only possible justification for such an allocation is the plurality's concern that the extension of the analytic "zone" to the classroom would create additional litigation and judicial intrusion into the local educational system.

D. The Plurality's Emphasis On Process Without Specific Content

The plurality's concern over school board motives in library book removals¹⁹² is, in effect, a concern for a rational process. The plurality implicitly approves of school boards that employ "established, regular and facially unbiased procedures for review of controversial materials."¹⁹³ This approval is a basis for judicial deference to school board decisions. The plurality, however, stopped short of giving any specific guidance to school boards as to what type of process would satisfy the plurality's concern with unconstitutional infringements on students' first amendment rights in the area of library book removals. The plurality offered little concrete guidance to school boards and has invited additional litigation by failing to indicate a satisfactory process.

A glaring omission in the plurality's analysis relates to its vagueness in assigning the burden of proof, i.e., who has the burden of proving the school board's motivation in deciding to remove books from the shelves. In other cases, the Supreme Court has explicitly assigned the burden of proof to a specific party.¹⁹⁴

The plurality also failed to consider the notion that politically astute school boards can establish procedures and a process that can manipulate a facially rational process to camouflage the real motivations behind their actions. A simple example of this would be, a school board's retention of the ability to select members (both professional and lay people) to sit on a particular book review committee. Another example would be to reduce the time period for reconsideration of the challenged books.

192. 457 U.S. at 872-75; see *supra* notes 103-26 and accompanying text.

193. See 457 U.S. at 872-75.

194. In *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977), the Court held the first amendment applicable to a local school board in upholding the board's refusal to renew a non-tenured teacher's employment contract. The school board was assigned the burden of proving "by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." *Id.* at 287, quoted in *Island Trees*, 457 U.S. at 870.

VII. CONCLUSION

The *Island Trees* decision may well be a “wolf in sheep’s clothing.” The conventional constitutional analysis in traditional first amendment language made only a modest contribution to clarifying students’ rights vis-a-vis school board library book removals. The case broke new ground in functional terms. The plurality masked its true functional and institutional orientations in conventional constitutional rhetoric. It never mentioned zones per se, but assigned different rights and obligations to both the school board and students in relation to the curriculum, the classroom, and the school library. The plurality’s perception of *Island Trees* as a vehicle for functional and institutional conclusions is bound to generate additional cases and controversies. The foundational question and key to the continuing battle that the courts will of necessity have to grapple with is a determination of what the proper role and function of the public schools are in America today.

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