AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 10: The Reagan Era – Democratic Rights/Free Speech

**Board of Education, Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853** (1982)

*In 1976, members of the school board for a public school district in New York asked the principals of the high school and junior high to remove several books from the school libraries that the board members thought were “Anti-American, anti-Christian, anti-Semitic, and just plain filthy.” The nine books singled out by the school board members included Kurt Vonnegut’s* Slaughter House Five*, Richard Wright’s* Black Boy*, Alice Childress’s* A Hero Ain’t Nothin’ But a Sandwich*, and Eldridge Cleaver’s* Soul on Ice*. The school superintendent and staff disagreed with the school board, but only one of the nine books was returned to the library after further public debate of the issue.*

*A group of students filed suit in federal district court, arguing that the removal of the books violated their First Amendment rights. The district court agreed with the students, but a circuit court reversed, concluding that the district court should have provided the school board members an opportunity to justify their decision. In a 5-4 decision, the U.S. Supreme Court affirmed the circuit court and sent the case back for further proceedings. The majority of the Court could not coalesce around a single opinion, however. Writing for a plurality, Justice Brennan argued that the students had a constitutional right of access to information in the school library, while the dissenters were emphatic that a school board had discretion to shape the substantive content of information conveyed to students in a primary and secondary school environment.*

JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion.

. . . .

The Court has long recognized that local school boards have broad discretion in the management of school affairs. *Meyers v. Nebraska* (1923). . .

At the same time, however, we have necessarily recognized that the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment. *West Virginia Board of Education v. Barnette* (1943). . . .

. . . .

Of course, courts should not "intervene in the resolution of conflicts which arise in the daily operation of school systems" unless "basic constitutional values" are "directly and sharply implicate[d]" in those conflicts. But we think that the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library. Our precedents have focused "not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas." *First National Bank of Boston v. Bellotti* (1978). And we have recognized that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." In keeping with this principle, we have held that in a variety of contexts "the Constitution protects the right to receive information and ideas." . . .

In sum, just as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members. Of course all First Amendment rights accorded to students must be construed "in light of the special characteristics of the school environment." But the special characteristics of the school *library* make that environment especially appropriate for the recognition of the First Amendment rights of students.

. . . . Petitioners 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 petitioners' reliance upon that duty is misplaced where, as here, they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway.

. . . .

Petitioners rightly possess significant discretion to determine the content of their school libraries. But that discretion may not be exercised in a narrowly partisan or political manner. If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books. The same conclusion would surely apply if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration. Our Constitution does not permit the official suppression of *ideas.* Thus whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution. To permit such intentions to control official actions would be to encourage the precise sort of officially prescribed orthodoxy unequivocally condemned in *Barnette.* On the other hand, respondents implicitly concede that an unconstitutional motivation would *not* be demonstrated if it were shown that petitioners had decided to remove the books at issue because those books were pervasively vulgar. And again, respondents concede that if it were demonstrated that the removal decision was based solely upon the "educational suitability" of the books in question, then their removal would be "perfectly permissible." In other words, in respondents' view such motivations, if decisive of petitioners' actions, would not carry the danger of an official suppression of ideas, and thus would not violate respondents' First Amendment rights.

. . . .

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

. . . .

*Affirmed*.

JUSTICE BLACKMUN, concurring in part.

. . . .

In my view, we strike a proper balance here by holding that school officials may not remove books for the *purpose* of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by the officials' disapproval of the ideas involved. It does not seem radical to suggest that state action calculated to suppress novel ideas or concepts is fundamentally antithetical to the values of the First Amendment. At a minimum, allowing a school board to engage in such conduct hardly teaches children to respect the diversity of ideas that is fundamental to the American system. In this context, then, the school board must "be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," *Tinker* v. *Des Moines School Dist.* (1969), and that the board had something in mind in addition to the suppression of partisan or political views it did not share.

As I view it, this is a narrow principle. School officials must be able to choose one book over another, without outside interference, when the first book is deemed more relevant to the curriculum, or better written, or when one of a host of other politically neutral reasons is present. These decisions obviously will not implicate First Amendment values. And even absent space or financial limitations, First Amendment principles would allow a school board to refuse to make a book available to students because it contains offensive language, or because it is psychologically or intellectually inappropriate for the age group, or even, perhaps, because the ideas it advances are "manifestly inimical to the public welfare." And, of course, school officials may choose one book over another because they believe that one subject is more important, or is more deserving of emphasis.

. . . .

JUSTICE WHITE, concurring.

. . . .

CHIEF JUSTICE BURGER, with whom JUSTICE POWELL, JUSTICE REHNQUIST, and JUSTICE O’CONNOR join, dissenting.

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

. . . . Here, however, no restraints of any kind are placed on the students. They are free to read the books in question, which are available at public libraries and bookstores; they are free to discuss them in the classroom or elsewhere. Despite this absence of any direct external control on the students' ability to express themselves, the plurality suggests that there is a new First Amendment "entitlement" to have access to particular books in a school library.

. . . .

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

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

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

. . . .

Whatever role the government might play as a conduit of information, schools in particular ought not be made a slavish courier of the material of third parties. The plurality pays homage to the ancient verity that in the administration of the public schools "`there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.'" If, as we have held, schools may legitimately be used as vehicles for "inculcating fundamental values necessary to the maintenance of a democratic political system," school authorities must have broad discretion to fulfill that obligation. Presumably all activity within a primary or secondary school involves the conveyance of information and at least an implied approval of the worth of that information. How are "fundamental values" to be inculcated except by having school boards make content-based decisions about the appropriateness of retaining materials in the school library and curriculum. In order to fulfill its function, an elected school board *must* express its views on the subjects which are taught to its students. In doing so those elected officials express the views of their community; they may err, of course, and the voters may remove them. It is a startling erosion of the very idea of democratic government to have this Court arrogate to itself the power the plurality asserts today.

The plurality concludes that under the Constitution school boards cannot choose to retain or dispense with books if their discretion is exercised in a "narrowly partisan or political manner." The plurality concedes that permissible factors are whether the books are "pervasively vulgar," or educationally unsuitable. "Educational suitability," however, is a standardless phrase. This conclusion will undoubtedly be drawn in many — if not most — instances because of the decisionmaker's content-based judgment that the ideas contained in the book or the idea expressed from the author's method of communication are inappropriate for teenage pupils.

. . . .

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

We can all agree that as a matter of *educational policy* students should have wide access to information and ideas. But the people elect school boards, who in turn select administrators, who select the teachers, and these are the individuals best able to determine the substance of that policy. The plurality fails to recognize the fact that local control of education involves democracy in a microcosm. In most public schools in the United States the *parents* have a large voice in running the school. Through participation in the election of school board members, the parents influence, if not control, the direction of their children's education. A school board is not a giant bureaucracy far removed from accountability for its actions; it is truly "of the people and by the people." A school board reflects its constituency in a very real sense and thus could not long exercise unchecked discretion in its choice to acquire or remove books. If the parents disagree with the educational decisions of the school board, they can take steps to remove the board members from office. Finally, even if parents and students cannot convince the school board that book removal is inappropriate, they have alternative sources to the same end. Books may be acquired from bookstores, public libraries, or other alternative sources unconnected with the unique environment of the local public schools.

. . . .

JUSTICE POWELL, dissenting.

. . . .

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

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

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

JUSTICE REHNQUIST, with whom CHIEF JUSTICE BURGER and JUSTICE POWELL join, dissenting.

. . . .

Considerable light is shed on the correct resolution of the constitutional question in this case by examining the role played by petitioners. Had petitioners been the members of a town council, I suppose all would agree that, absent a good deal more than is present in this record, they could not have prohibited the sale of these books by private booksellers within the municipality. But we have also recognized that the government may act in other capacities than as sovereign, and when it does the First Amendment may speak with a different voice. . . . *Pickering v. Board of Education* (1968).

With these differentiated roles of government in mind, it 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. Obviously there are innumerable decisions to be made as to what courses should be taught, what books should be purchased, or what teachers should be employed. In every one of these areas the members of a school board will act on the basis of their own personal or moral values, will attempt to mirror those of the community, or will abdicate the making of such decisions to so-called "experts.” . . . [I]t is "permissible and appropriate for local boards to make educational decisions based upon their personal social, political and moral views." In the very course of administering the many-faceted operations of a school district, the mere decision to purchase some books will necessarily preclude the possibility of purchasing others. The decision to teach a particular subject may preclude the possibility of teaching another subject. A decision to replace a teacher because of ineffectiveness may by implication be seen as a disparagement of the subject matter taught. In each of these instances, however, the book or the exposure to the subject matter may be acquired elsewhere. The managers of the school district are not proscribing it as to the citizenry in general, but are simply determining that it will not be included in the curriculum or school library. In short, actions by the government as educator do not raise the same First Amendment concerns as actions by the government as sovereign.

. . . .

. . . . [T]his Court has never held that the First Amendment grants junior high school and high school students a right of access to certain information in school. It is true that the Court has recognized a limited version of that right in other settings. . . . But not one of these cases concerned or even purported to discuss elementary or secondary educational institutions. . . .

. . . .

"The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, has long been recognized by our decisions." *Ambach* v. *Norwick* (1979). Public schools fulfill the vital role of teaching students the basic skills necessary to function in our society, and of "inculcating fundamental values necessary to the maintenance of a democratic political system." The idea that such students have a right of access, *in the school,* to information other than that thought by their educators to be necessary is contrary to the very nature of an inculcative education.

Education consists of the selective presentation and explanation of ideas. The effective acquisition of knowledge depends upon an orderly exposure to relevant information. Nowhere is this more true than in elementary and secondary schools, where, unlike the broad-ranging inquiry available to university students, the courses taught are those thought most relevant to the young students' individual development. Of necessity, elementary and secondary educators must separate the relevant from the irrelevant, the appropriate from the inappropriate. Determining what information *not* to present to the students is often as important as identifying relevant material. This winnowing process necessarily leaves much information to be discovered by students at another time or in another place, and is fundamentally inconsistent with any constitutionally required eclecticism in public education.

. . . .

As already mentioned, elementary and secondary schools are inculcative in nature. The libraries of such schools serve as supplements to this inculcative role. 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. . . .

After all else is said, however, the most obvious reason that petitioners' removal of the books did not violate respondents' right to receive information is the ready availability of the books elsewhere. Students are not denied books by their removal from a school library. The books may be borrowed from a public library, read at a university library, purchased at a bookstore, or loaned by a friend. The government as educator does not seek to reach beyond the confines of the school. Indeed, following the removal from the school library of the books at issue in this case, the local public library put all nine books on display for public inspection. Their contents were fully accessible to any inquisitive student.

. . . .

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

. . . .

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

JUSTICE O’CONNOR, dissenting.

If the school board can set the curriculum, select teachers, and determine initially what books to purchase for the school library, it surely can decide which books to discontinue or remove from the school library so long as it does not also interfere with the right of students to read the material and to discuss it. . . .

I do not personally agree with the Board's action with respect to some of the books in question here, but it is not the function of the courts to make the decisions that have been properly relegated to the elected members of school boards. It is the school board that must determine educational suitability, and it has done so in this case. . . .