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Is Virgil Proper Fare for Public Schools?:
The Application of Hazelwood v Kuhlmeier to School Board Curriculum Decisions

Robin M. Steans†

Determining the parameters of students' constitutional rights has posed ongoing problems for the United States Supreme Court. Central to the Court's struggle is the inherent tension between education officials' need to control the environment of public schools, on the one hand, and student rights of privacy, free expression of religion, and freedom of speech on the other hand. This tension is particularly acute in situations where school board decisions affect students' First Amendment rights. School board decisions which impact on students' freedom of speech implicate not only a school's ability to control the management of the educational process, but a school's ability to accomplish its central function of inculcating the values of its community.

In cases involving school board removal of material from a school curriculum, this tension between a school board's inculcative duty and a student's First Amendment rights, particularly the First Amendment "right to hear," is sharply underscored. While the Supreme Court has, to a certain degree, articulated the nature and extent of students' First Amendment rights in the school context, it has never directly addressed when a school board's decision to remove material from the school curriculum violates a student's right to hear.

Any decision by the Court on this issue will inevitably be imperfect, as the two goals of public education—inculcation of community values and promotion of free inquiry—are by their nature irreconcilable. That is, it is impossible to simultaneously inculcate


1 For the purposes of this Comment, curriculum material includes any material which is purchased by the school and made available for use by teachers. The material may be a book, a film, or a poster. It may be required reading, such as a textbook, or a poem on the approved optional reading list of an elective English class.

2 The Court first recognized public school students' "right to hear" in Board of Educ. v Pico, 457 US 853 (1982).
a community's values, which are by definition the values of the majority, and to fully protect a minority's freedom of expression. The best the Court can hope to do is to settle on a standard which balances these goals without completely sacrificing either.

The problem is additionally complex in that public school board decisions involve governmental bodies acting as providers of information, rather than in their traditional role as regulators of non-governmental providers of information. The Court has 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." Thus, with respect to the First Amendment, the government's interest when it inculcates social values is different than its interest when it regulates the constitutional rights of the general population. Accordingly, the government's interest in regulating the curriculum of public schools may demand a different constitutional standard than government regulation of the speech of the general adult population.

Due to the lack of guidance from the Supreme Court, lower courts have developed a variety of standards to determine when a school board's removal of curriculum material is unconstitutional. In an effort to establish a stable standard, one circuit court and one district court have applied the standard the Supreme Court articulated in Hazelwood School Dist. v Kuhlmeier, a case involving the constitutionality of school censorship of a student newspaper, to cases involving school board removal of curricular material. However, the Hazelwood standard was designed to address cases involving restriction of student expression, and the two lower courts failed to articulate a rationale which justifies Hazelwood's application to curriculum cases. Moreover, the Hazelwood standard is sufficiently ambiguous to permit circuits to continue to abide by their divergent pre-Hazelwood standards.

Rather than allowing the current circuit confusion to persist, and permitting Hazelwood to be misapplied or misconstrued with respect to curriculum decisions, the Supreme Court should rule directly on this issue. The Court should adopt a standard which gives broad discretion to local school board decisions, but holds

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* Id at 908 (Rehnquist dissenting), citing majority opinion in Pickering v Board of Educ., 391 US 563, 568 (1968) ("the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general").
* See Virgil v School Bd. of Columbia Cty., 862 F2d 1517 (11th Cir 1989); Krizek v Board of Educ., 713 F Supp 1131 (N D Ill 1989).
board decisions unconstitutional if the members were motivated by a desire to prescribe what ideas or values should be orthodox in the school.

Part I of this Comment outlines the historical development of students’ First Amendment right to hear and speak. Part II illustrates the existing circuit confusion and the problems which arise as circuits attempt to apply the Hazelwood standard to curriculum cases. Part III explains why the Court should adopt a standard which includes a subjective element similar to that applied by the Court to library-removal decisions in Board of Educ. v Pico. Finally, part IV describes how potential problems with applying a Pico-type standard to curriculum decisions can be addressed and minimized.

I. THE SCOPE OF STUDENTS’ FIRST AMENDMENT RIGHTS

The Supreme Court has ruled on the scope of students’ First Amendment rights in a variety of contexts. The Court has repeatedly held that local school boards properly have broad discretion in the management of school activities. Accordingly, “[c]ourts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.” At the same time, the Court has also recognized that public schools play a critical role in preparing our children to be good citizens by promoting the fundamental values necessary for students to participate in a democracy. Accordingly, while seeking to preserve local control


* This Comment will only address the question of when a curriculum decision violates a student's right to hear, not when a teacher's First Amendment freedom of expression has been violated. However, because courts have generally applied similar, if not identical, standards for determining the constitutionality of school board curriculum decisions to suits brought by teachers and to suits brought by students, the Comment will occasionally cite cases brought by teachers protesting restriction of curriculum material.

A teacher's free expression and a student's right to hear are two sides of the same issue: when may a school board constitutionally remove items from the curriculum. In generally applying the same standard to curriculum cases brought by teachers and students, courts have ignored the question of how exactly a student's right to hear intersects with a teacher's freedom of expression. No court has determined whether the constitutionality of a school board's removal of an item from the curriculum should be the same regardless of whether a teacher or a student brings the suit. However, these issues are beyond the scope of this Comment.


* Epperson v Arkansas, 393 US 97, 104 (1968).

and discretion, the Court has continually reaffirmed the notion that states and school boards must be careful not to make decisions which infringe upon the First Amendment and create a "pall of orthodoxy." That school boards 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."12

One of the first landmark cases addressing the First Amendment rights of students is Tinker v Des Moines School Dist...13 The facts of Tinker did not implicate the school curriculum directly. Instead, the Court held that a school policy forbidding students to wear black armbands to protest the Vietnam War violated the students' First Amendment rights where the students' expression did not "materially and substantially disrupt"14 classroom activities or infringe on the rights of others.

The Tinker Court reaffirmed the notion that "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."15 Because a democracy thrives on a robust exchange of views, "the classroom is peculiarly the 'marketplace of ideas.'"16 Accordingly, the Court stated that "[i]n our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate," nor may they be "confined to the expression of those sentiments that are officially approved."17

The Tinker holding established the proposition that students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."18 While suggesting that the rights of public school students are not the same as those of adults, the Tinker Court ruled that students are entitled to First Amendment protection that is in keeping with the special characteristics of the school environment.19

11 Pico, 457 US at 870, citing Keyishian v Board of Regents, 385 US 589, 603 (1967). This language was first used by the Court in Keyishian and has been routinely used in lower court curriculum decisions. See also Shelton v Tucker, 364 US 479, 487 (1960).
14 Id at 513.
15 Id at 512, quoting Keyishian, 385 US at 603 (citation omitted).
16 Id.
17 Tinker, 393 US at 511.
18 Id at 506.
19 Id at 506.
In 1982, *Board of Educ. v Pico* addressed the issue of whether a local school board’s removal of nine books from school libraries violated students’ First Amendment right to receive ideas. In a split decision, the plurality articulated a narrow holding:

> [W]e hold that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.” Such purposes stand inescapably condemned by our precedents.

Justice Brennan, writing for the plurality, reasoned that students had a First Amendment right to receive information. The plurality held that “the right to receive ideas is a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom.” Brennan then articulated when a school board could constitutionally infringe on this student right.

First, Brennan carefully distinguished the amount of deference owed school boards with respect to curriculum decisions from the deference owed school boards with respect to library decisions. The Justice did not favor giving absolute deference to school board decisions with respect to library materials, reasoning that “[s]tudents must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding,” and that “[t]he school library is the principal locus of such freedom.”

On the other hand, Brennan conceded that a school board’s duty to inculcate community values required discretion to make curriculum decisions. Brennan explained why the board’s discretion was limited to curriculum decisions:

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*457 US 853 (1982).*

*Id. at 858 n 3. The nine books removed from 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*, anonymous; *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.*

*Pico, 457 US at 872, quoting *Barnette*, 319 US at 642 (citation omitted) (student cannot be compelled to participate in the flag salute ceremony).*

*Pico, 457 US at 867 (emphasis in original).*

*Id. at 868, quoting *Keyishian*, 385 US at 603 (citation omitted).*

*Pico, 457 US at 868-69.*
We think that [the school board members'] reliance upon [their] duty [to inculcate] 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.26

Having distinguished between library and curriculum decisions, Brennan then concluded that the school board properly had the authority to determine the content of school libraries, but that the board could not use that authority to impose partisan viewpoints.27 Accordingly, the plurality held that where a school board's decision to remove a book from the library is motivated by partisan concerns, it violates students' right to receive information. Such removal would be unconstitutional if illicit intentions were "the decisive factor" in a board's decision.28 The Pico decision, however, expressly declined to apply this standard to curriculum decisions.

In 1986, the Supreme Court, in Bethel School Dist. v Fraser,29 upheld the constitutionality of disciplining a student for delivering a campaign speech rife with sexual innuendo and double entendre. The Court distinguished Fraser from Tinker on the grounds that Tinker addressed a student's right to express his political views, while Fraser addressed a student's right to use "vulgar and lewd"30 speech.31 The Court then held that "[t]he schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy."32

Notably, the Court did not use the Tinker standard of "material disruption" to arrive at this holding. Instead, the Court distinguished between protected and unprotected expression,33 concluding that a school board may properly restrict the latter and

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26 Id at 869.
27 Id at 870-71.
28 Id at 871.
30 Id at 685.
31 Id at 680.
32 Id at 683.
33 The Court did not discuss what constituted protected and unprotected language, but implied that protected expression included political expression such as that found in Tinker, and that unprotected expression included vulgar or obscene language.
apparently limiting \textit{Tinker} to those cases involving the former.\textsuperscript{34} In his concurrence, Justice Brennan, the author of the \textit{Pico} plurality, took pains to apply the \textit{Tinker} analysis, arguing that "the Court's holding concerns only the authority that school officials have to restrict a high school student's use of disruptive language in a speech given to a high school assembly."\textsuperscript{35}

In 1988, the Court, in \textit{Hazelwood v Kuhlmeier},\textsuperscript{36} upheld the constitutionality of a school principal's decision to censor two pages of a student newspaper. The Court determined that the newspaper, a product of student efforts in a journalism class, was a part of the curriculum. Justice White, writing for the majority, distinguished "personal expression that happens to occur on the school premises," which would be governed by \textit{Tinker}, from "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."\textsuperscript{37} In the latter case, the school may act to disassociate itself from inappropriate speech, and "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."\textsuperscript{38} The court then indicated that control over speech that is vulgar or inappropriate for the maturity level of its intended audience constitutes a legitimate pedagogical concern.\textsuperscript{39}

Despite its discussion of school regulation of student speech in a journalism class, \textit{Hazelwood} did not directly address the constitutional parameters of a student's right to protest the removal of material from the school curriculum. The Court's failure to rule directly on this issue, leaves intact the existing circuit confusion on this matter.

\textbf{II. THE SUPREME COURT MUST CLARIFY THE STANDARD FOR CURRICULUM REMOVAL DECISIONS}

\textbf{A. Pre-\textit{Hazelwood} Circuit Standards in Curriculum Cases}

Prior to \textit{Hazelwood}, circuits applied a wide-ranging variety of standards to determine when a school board violated First Amend-

\textsuperscript{34} \textit{Fraser}, 478 US at 682-83.
\textsuperscript{35} Id at 689 (Brennan concurring) (emphasis added).
\textsuperscript{36} 484 US 260 (1988).
\textsuperscript{37} Id at 271.
\textsuperscript{38} Id at 273.
\textsuperscript{39} Id at 272.
ment rights by removing curriculum items. Though most circuits seemed to recognize that local school boards properly controlled curriculum decisions as long as they did not create a “pall of orthodoxy” within the school, the circuits diverged on the issue of when such a “pall of orthodoxy” existed.

For example, in *Pratt v Indep. School Dist.*, the Eighth Circuit determined that a school board was not promoting a substantial governmental interest where it eliminated films from the curriculum simply “because the majority of the board agreed with those citizens who considered the films’ ideological and religious themes to be offensive.” Rather, the court held that the board’s action violated students’ First Amendment right to receive information. Conversely, in *Zykan v Warsaw Community School Corp.*, the Seventh Circuit held that while the discretion of a school board in controlling curriculum is bounded by the need to prevent “imposing a ‘pall of orthodoxy’ on the offerings of the classroom,” “it is in general permissible and appropriate for local boards to make educational decisions based upon their personal social, political and moral views.”

Another decision suggested that the *Tinker* standard ought to apply to curricular decisions. In *Parducci v Rutland*, the court held that the school board violated a teacher’s First Amendment rights to academic freedom when it fired her for assigning a short story containing vulgar language and sexually explicit material. The court found that the story was not inappropriate, and that restrictions on First Amendment rights could not be justified where there was no material disruption of classroom activities.

### B. The Application of *Hazelwood* to Curriculum Cases

In 1989, the Eleventh Circuit, in *Virgil v School Bd. of Columbia Cty.*, noted that there was no consensus among courts as to

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40 *Keyishian v Board of Regents*, 385 US 589, 603 (1967).
41 670 F2d 771 (8th Cir 1982).
42 The films were an enactment of the short story “The Lottery” by Shirley Jackson and its accompanying trailer. Id at 773.
43 Id at 778.
44 631 F2d 1300 (7th Cir 1980).
45 Id at 1306, quoting *Keyishian*, 385 US at 603.
47 “Welcome to the Monkey House,” by Kurt Vonnegut, Jr.
48 See note 7.
49 *Parducci*, 316 F Supp at 356.
50 862 F2d 1517 (11th Cir 1989).
the amount of discretion school boards should have to remove items from the curriculum.\textsuperscript{51} The court cited conflicting circuit and district court decisions,\textsuperscript{52} and concluded that "[t]he most direct guidance from the Supreme Court is found in the recent case of Hazelwood."\textsuperscript{53}

In determining that the removal of Lysistrata and The Miller's Tale from the curriculum did not violate students' rights to receive information, the Eleventh Circuit held that recommended reading in a textbook used in an elective course was fairly part of the curriculum, and that the board's decision was reasonably related to the vulgarity of the pieces.\textsuperscript{54} However, the court failed to analyze the appropriateness of applying a standard designed to address regulation of student expression to a situation involving regulation of what students may hear. Instead, the court implied that if student expression that is part of the curriculum could be constitutionally constrained where reasonably related to legitimate pedagogical concerns, then curriculum items could be similarly restricted.

Furthermore, the Virgil court sidestepped the issue of how Hazelwood would, or should, apply if the school board members were using the stories' vulgarity as a pretext for removing them simply because they found them offensive to their personal sense of morality. The court stated that the parties' stipulation regarding the reasons behind the removal indicated that the board was acting based on the works' vulgarity, not their ideological content.\textsuperscript{55} The court stated in a footnote that it made "no suggestion as to the appropriate standard to be applied in a case where one party has demonstrated that removal stemmed from opposition to the ideas contained in the disputed materials."\textsuperscript{56}

Shortly after the Virgil decision, the district court in the Northern District of Illinois applied Hazelwood in a similar fashion.\textsuperscript{57} In Krizek v Board of Educ., the court held that failure to renew a non-tenured teacher's contract for showing an R-rated film\textsuperscript{58} to her class of high school juniors would not violate her First

\textsuperscript{51} Id at 1520-21.
\textsuperscript{52} Id.
\textsuperscript{53} Id at 1521.
\textsuperscript{54} Virgil, 862 F2d at 1522-23.
\textsuperscript{55} Id.
\textsuperscript{56} Id at 1523 n 8.
\textsuperscript{57} Krizek v Board of Educ., 713 F Supp 1131 (N D Ill 1989).
\textsuperscript{58} "About Last Night."
Amendment rights, because a school board could reasonably find that showing the film offended legitimate pedagogical concerns, namely that the film was inappropriate for the maturity level of the students. Again, the court neglected to explain the rationale underlying the application of the Hazelwood standard in a factually distinct situation.

C. Problems with Applying Hazelwood to Curriculum Cases

In 1988, a commentator posited that Hazelwood "teaches that Tinker does not apply to expressive activities that are school-sponsored," and that Hazelwood "clearly will stand for much more, but it is not so clear what that will be." The Virgil court's application of Hazelwood in the factually distinct situation of a board's removal of materials from the curriculum highlights the ambiguity of the actual and intended scope of the Hazelwood decision. Additionally, the application of Hazelwood to curriculum decisions fails to eliminate circuit confusion regarding board curricular decisions, and raises questions as to the exact nature of a student's "right to hear."

The Court in Hazelwood held that school authorities can constitutionally "[exercise] editorial control over . . . student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." In applying Hazelwood, the Virgil court omitted the reference to "student speech," and cited as the relevant standard that "Hazelwood established a relatively lenient test for regulation of expression which 'may fairly be characterized as part of the school curriculum.'" The omission of the adjective "student" to modify the

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**Footnotes:**

60 While in Krizek the district court applied Hazelwood to a case involving abridgement of a teacher's rights, rather than a student's right to hear, the Seventh Circuit has not explicitly distinguished between suits brought by teachers and suits brought by students protesting removal of curriculum material or removal of a teacher. The district court accordingly asserted that the "protection [of a teacher's academic freedom in the classroom] is primarily for the benefit of the student. . . . [I]t protects the student's 'right to hear.'" Krizek, 713 F Supp at 1137. Given these indications that the parameters of a student's right to hear delimits the constitutionality of board curriculum decisions, regardless of the party bringing the suit, Krizek's application of the Hazelwood standard to a suit brought by a teacher indicates that the Krizek court would likely apply the Hazelwood standard in a student "right to hear" action.


63 Virgil, 862 F2d at 1521, quoting Hazelwood, 484 US at 271.
type of speech to be regulated may be the result of a genuine desire by the Eleventh Circuit to discern a Supreme Court precedent that would illuminate a murky area of the law. The omission may also be viewed as a distortion of the Hazelwood holding which ignores the clear limiting language of the decision.

Hazelwood is ambiguous in two respects. First, it is unclear whether the Court intended Hazelwood to apply to curriculum cases. Second, if Hazelwood does properly apply to curriculum cases, it is unclear exactly how the standard should be interpreted and applied. That Krizek took Virgil's cue and also applied Hazelwood "to challenges against school administration rules regarding curriculum contents," suggests that circuits will be willing and able to interpret Hazelwood to apply to curricular decisions if that suits their interests. Circuits may read Hazelwood narrowly to apply only to cases involving student expression, or broadly, as the court did in Virgil, to include board decisions regarding curriculum. In general, Hazelwood's ambiguity allows lower courts to continue to abide by local precedent in deciding general curriculum cases.

Should a circuit read it broadly to apply to a school board's curriculum decisions, Hazelwood is ambiguous enough to allow for a variety of interpretations and applications. This ambiguity allows circuits to interpret Hazelwood to bolster pre-Hazelwood circuit standards. Krizek made this point clear by holding that "the court agrees with [Virgil's] application, and finds that the [Hazelwood] standard . . . blends well with the standard previously articulated in this circuit." Circuits which prior to Hazelwood favored a more deferential approach to board curriculum decisions could interpret the holding to permit any decision which is "reasonably related" to a legitimate pedagogical concern, regardless of whether the board is motivated by personal distaste for an item's ideas. These circuits, faced with plaintiff charges that the board's stated legitimate reasons are mere pretexts for attempts to impose personal orthodoxy, may claim that Hazelwood prevents judicial meddling where there is any legitimate educational purpose served by the board's decision, regardless of motivation. In fact, these circuits may look to Hazelwood's holding that "[i]t is only when the decision to censor a school-sponsored publication . . . or other vehicle of student expression has no valid educational purpose that the First Amend-

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44 Krizek, 713 F Supp at 1139.
45 Id.
ment is so 'directly and sharply implicate[d],' as to require judicial intervention to protect students' constitutional rights.'

This language certainly permits the interpretation that where an educational purpose is served, be it pretextual or not, removal of a book does not violate the First Amendment.

Circuits which previously favored a less deferential approach to curriculum decisions may interpret the decision to hold that where a board's decision is at all motivated by personal partisanship, it is not reasonably related to legitimate pedagogical concerns. These circuits may argue that where a board is attempting to impose its orthodoxy, its decision, regardless of pretextual motivations, has "no valid educational purpose." By emphasizing the board's purpose in removing material from the curriculum, these circuits can read into Hazelwood a subjective element similar to that applied to library decisions by the Court in Board of Educ. v Pico.

The Supreme Court needs to clarify the appropriate standard for curriculum removal cases. If Hazelwood does not properly apply to board curriculum decisions, then the circuit confusion will persist. If Hazelwood does apply to board curriculum decisions, it is ambiguous enough to allow lower courts to use it to support locally developed pre-Hazelwood standards. Accordingly, the circuit confusion which existed prior to Hazelwood will continue.

III. The Supreme Court Should Apply the Pico Standard to Curriculum Removal Decisions

The Supreme Court should squarely address the issue of when a school board may constitutionally remove items from the curriculum. In addressing this issue, the Court should adopt the standard used in Board of Educ. v Pico to determine when school board removal of library books violates students' First Amendment rights. In Pico, the Court ruled that where improper motives are a decisive factor in the removal of a library book, that removal decision violates the Constitution. The application of this standard to curriculum cases would allow school boards broad discretion to control curriculum and to remove material as long as removal is reasonably related to legitimate pedagogical concerns. The standard would further provide that where a significant purpose under-
lying a board's actions is to prohibit ideas which its members find personally offensive, removal of the material violates students' First Amendment right to receive information.\(^{68}\) Thus, school board removal of curriculum items should be constitutional when it is reasonably related to legitimate pedagogical concerns, unless plaintiff(s) can show that such concerns are merely pretexts for a board's attempt to remove an item based on personal dislike or disagreement with its content.

To be sound, any curricular standard must place the role of educational decisionmaking in locally elected school officials. As the Supreme Court has repeatedly noted, the inculcation of community values of good citizenship is a critical function of public education.\(^{70}\) Allowing the majority to control the development and implementation of local curriculum permits the transmission of those values the community deems important. Accordingly, school boards may exercise discretion over curriculum decisions as long as the decisions are reasonably related to legitimate pedagogical concerns.

At the same time, schools serve the equally critical function of encouraging students to think independently and critically, so that they may flourish in a democracy which thrives on the free exchange of thought in an open marketplace of ideas.\(^{71}\) Where student exposure to challenging ideas and/or minority ideas is stifled, the very essence of free expression is stifled. The courts are uniquely positioned to ensure that minority viewpoints are permitted in the marketplace of ideas.

A school board bent on rooting out ideas that it finds offensive could easily create a variety of "legitimate pedagogical" reasons for removing certain materials from a school curriculum. Therefore, if the Court's repeated attempts to prevent a "pall of orthodoxy" from shrouding public schools is to be maintained, courts must be allowed, as they are under Pico, to look beyond "pretextual" reasons for removal, and to forbid removal of material designed to impose a school board's personal moral, social and political tastes. Thus, where legitimate pedagogical concerns are mere pretexts for

\(^{68}\) This standard requires that improper motives be a "decisive factor" in the removal decision. Id at 871. Therefore, in cases where the majority (or the majority of the majority) of a split board was improperly motivated, plaintiffs would be able to block the removal of a curriculum item. There is no danger here that properly motivated board members will suffer any liability.

\(^{70}\) See text accompanying notes 8-12.

\(^{71}\) Id. See also Note, Academic Freedom in the Public Schools: The Right to Teach, 48 NYU L Rev 1176, 1195 (1973).
dislike of a curriculum item's content, a school board's curriculum decision should be unconstitutional.

One of the concerns raised by Justice Burger's dissent in *Pico* was the danger that the courts would become super-censors of decisions that are more appropriately left to the discretion of the locally elected school boards. Clearly there is a possibility under a *Pico* standard that parents, students, and teachers who are dissatisfied with school board decisions would be able to take their case to the courts for review. However, this concern should not prevent the adoption of a *Pico*-type standard to curriculum cases since it is possible to limit frivolous curriculum cases by means of appropriately allocating the burden of proof in such cases.

As discussed below, there is a rebuttable presumption that removal of an item from the curriculum is suspect. However, a school board may rebut this presumption by asserting a legitimate pedagogical reason for the removal, a burden which is quite easy to meet. The plaintiff will then have the burden of proving that the board was unconstitutionally motivated, rather than requiring the board to prove that it was motivated by legitimate concerns. Such an allocation of burdens is consistent with the notion that courts should only become involved in school board decisions where the constitution is sharply implicated. Moreover, such an allocation is workable given the fact that curriculum decisions are invariably the product of a public process with transcripts readily available for scrutiny.

**IV. Potential Problems When Applying *Pico* to Curriculum Decisions**

The application of the *Pico* standard to curriculum decisions raises questions as to the legitimacy of certain distinctions drawn by the plurality in *Pico*. The plurality held that the discretion granted to a school board in matters of curriculum did not extend to school libraries, where "voluntary inquiry" holds sway. The plurality also limited the right to hear to cases involving the removal of books, suggesting that the right to hear did not permit a student to demand that a certain book be acquired. While the distinction between library and curriculum decisions seems uncom-

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82 457 US at 890-91 (Burger dissenting).
83 See text accompanying notes 85-86.
84 See *Epperson v Arkansas*, 393 US 97, 104-05 (1968).
85 *Pico*, 457 US at 869.
86 Id at 862.
fortable at best, the distinction between removal and acquisition of books has useful and sound bases.

A. The Pico Standard is Equally Applicable to Curriculum and Library Decisions

The Pico plurality drew a clear distinction between curriculum and library decisions. In so doing, Justice Brennan emphasized the compulsory nature of the classroom and the voluntary inquiry encouraged in the library. Another possible distinction is that curriculum selections, in an effort to remain current, must be regularly revised, with items necessarily being removed and replaced, while library updating can be accomplished by adding books without necessarily removing older selections.

These arguable differences between curriculum and library decisions do not seem to provide a theoretically sound basis for treating these decisions differently when considering a student’s First Amendment rights. These distinctions do not substantively affect the nature of a student’s constitutional right to be protected from school board imposition of a “pall of orthodoxy.”

Justice Burger, in his dissent in Pico, criticized Justice Brennan’s distinction between the proper level of discretion to be exercised by a school board with respect to curriculum decisions as opposed to library decisions. Burger argued that “[i]t would appear that required reading and textbooks have a greater likelihood of imposing a ‘pall of orthodoxy’ over the educational process than do optional reading.” The plurality, in attempting to balance the school’s competing goals of cultural transmission and encouragement of free, independent inquiry, thought to relegate one goal—inuculation—primarily to the classroom, and to relegate the other—inquiry—to the library. Such a notion would justify permitting greater discretion for an elected school board in the former realm, and greater protection of minority viewpoints in the latter.

However, the distinction is an uncomfortable one at best. If, as Justice Blackmun in his concurrence suggests, “state action calculated to suppress novel ideas or concepts is fundamentally antithetical to the values of the First Amendment,” it follows that it is equally to be prevented in the classroom as it is in the library. In other words, the school’s inculcating role and the First Amendment’s opposition to prescribed orthodoxy must be reconciled

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78 Id at 880 (Blackmun concurring).
throughout the school, rather than by dividing the school into 'inculcating' and 'non-orthodox' areas.

By applying the Pico standard throughout the school, to removal of library and curriculum items alike, one creates a more theoretically sound approach to balancing First Amendment and cultural transmission goals. Furthermore, one continues to grant school boards broad discretion in selecting materials for student consumption. Judicial intervention would only be appropriate where partisan motivations are a "decisive factor" in school board decisions.79

B. Pico's Distinction Between Removal and Acquisition is Sound

Several Justices on the Pico court criticized the Pico plurality for artificially limiting the right to receive information to cases involving removal of materials. Justice Burger queried that "if the First Amendment commands that certain books cannot be removed, does it not equally require that the same books be acquired?"80 He then noted that "[i]t does not follow that the decision to remove a book is less 'official suppression' than the decision not to acquire a book desired by someone."81 Justice Blackmun voiced similar concerns, writing that he "also [had] some doubt that there is a theoretical distinction between removal of a book and failure to acquire a book."82

However, Blackmun articulated what he felt was a sound practical distinction. Blackmun noted that removal was more likely to connote unconstitutional motivations than failure to acquire.83 He further stated that while there were numerous legitimate reasons for not acquiring a book, there were few reasons for removing a book that had already been purchased.84 Certainly the cost involved in purchasing new books differentiates acquisition from the relatively costless removal of material. The ease of retaining a book creates a presumption of illegitimacy when a board chooses to remove it.

This presumption of illegitimacy is stronger with respect to the removal of books from the library than for removing and re-
placing a book in the curriculum. A library may simply allow a
book to remain on the shelf while updating the selection with new
books. However, any curriculum must be continually updated and
revised, while there is only a limited amount of time available for
the teaching of any given course. Consequently, books within the
curriculum are, and must be, routinely removed and replaced.

This situation suggests that the circumstances of curriculum
removal should be taken into account. Accordingly, the presump-
tion of illegitimacy should be easier to rebut in curriculum cases
than in library cases. Similarly, removal of textbooks should be
treated differently than removal of items from an optional reading
list, given the ease with which previously approved materials can
be maintained on such a list. In any event, the standard itself
should remain constant, and its application should accommodate
those facts relevant to determining the underlying motivation and
legitimacy of the decision to remove the given item.

Limiting the "right to hear" to removal of materials seems pe-
culiarly appropriate in the context of public schools, where materi-
als would never have made it into the library or the curriculum
without the review and approval of local school authorities. Ac-
cordingly, where the library is not filled to capacity, one may pre-
sume that removal indicates partisanship, where one may not
make the same assumption regarding a school's failure to acquire a
book.

The distinction between removal and acquisition can also rest
on the notion that a person's right to hear is contingent upon the
existence of a willing speaker. In Virginia State Bd. of Pharmacy v
Virginia Citizens Consumer Council, Inc., the Supreme Court,
elaborated on the First Amendment "right to hear," stating that
"[f]reedom of speech presupposes a willing speaker. But where a
speaker exists, . . . the protection afforded is to the communica-
tion, to its source and to its recipients both." Accordingly, one
could argue that if a school chooses to remove an item from a li-
brary or curriculum there is no "willing speaker," and conse-
quently, no student "right to hear."

The Pico plurality, however, clearly had a different concept of
what constitutes a willing speaker. In holding that a student's right

** Id at 756.
*** Pico, 457 US at 887 (Burger dissenting). Justice Burger highlights the distinction
between requiring that the government not block a person's receipt of information and the
requirement that the government supply information it is unwilling to supply.
to hear was violated when a school removed certain books from the library, the Court implicitly recognized that it was not the willingness of the school that was at issue. The plurality did not indicate who the willing speaker was. However, one might usefully consider the *book* the speaker. Accordingly, in the school context of library and curriculum, there must be a book present for there to be a willing speaker. If a book has never been purchased, it cannot be said to be a willing speaker for the purposes of creating an attendant right to hear. Accordingly, a student may not sue for the acquisition of a book, but can sue for the right to continue to "hear" the speech of a book that is already available in the curriculum or library.

The application of the *Pico* standard to *Virgil* would not have changed the outcome of that case. Because the parties stipulated that the books in question were removed because of their vulgarity and not as a result of improper board motives, the subjective element imported from *Pico* would not pertain in *Virgil*. Like *Hazelwood*, then, the *Pico* standard would afford local school boards broad discretion over curriculum decisions.

Use of the subjective element, however, might well have changed the court's ruling in *Zykan v Warsaw Community School Corp.*. In *Zykan*, the plaintiffs asserted that the school board members' decisions regarding certain curriculum items stemmed from their personal political, social and moral tastes and not from educational criteria. Under the standard articulated in this Comment, the board could have rebutted the presumption of illegality by citing the works' vulgarity or inappropriateness. The plaintiffs, with the aid of pertinent transcripts, would then have had the burden of demonstrating that the board was motivated by a desire to squelch the content of the literature. If there was enough evidence that the board was removing the books because of their content, rather than their vulgarity or inappropriateness, the plaintiffs would have won the case. In sum, applying *Pico* to curriculum decisions affords judicial recourse to students, unavailable under possible interpretations of *Hazelwood*, when school boards remove items because of their content and try to disguise this illicit motivation with pedagogically acceptable pretexts.

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88 631 F2d 1300 (1980).
89 Id at 1306.
Prior to Hazelwood there was significant circuit confusion with respect to the appropriate standard by which to determine when a school board's removal of material from the curriculum infringes a student's First Amendment right to hear. The Supreme Court has failed to directly address this issue, leaving courts to either develop their own standards or divine some guidance from other Supreme Court decisions relating to First Amendment rights in public schools.

The Eleventh Circuit in Virgil and the district court of the Northern District of Illinois in Krizek did the latter, applying the Hazelwood decision in factually distinct situations. The ambiguity of Hazelwood permits this application. Once Hazelwood is applied to the removal of items from a curriculum, it is possible for circuits to interpret it to support the standards they developed prior to Hazelwood. Accordingly, it is likely that nothing will be done to clarify the appropriate standard.

To solve the circuit confusion and clarify the bounds of the relatively new First Amendment "right to hear," the Supreme Court needs to directly address and rule on the constitutional parameters of a student's right to challenge a school board's removal of items from the curriculum. This Comment suggests that the Court adopt the Pico standard. It further suggests that the Court eliminate the uncomfortable distinction between library and curriculum decisions and support and explicate the distinction between the First Amendment's prohibition of partisan removal of a book and the First Amendment's failure to require that certain books be acquired.