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Mark G. Yudof

University of Texas at Austin, School of Law

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Library Book Selection and the Public Schools: The Quest for the Archimedean Point

MARK G. YUDOF*

[T]he perplexing and difficult demands of the Archimedean point [are] to find a standpoint neither compromised by its implication in the world nor dissociated and so disqualified by detachment. "We need a conception that enables us to envision our objective from afar... but not too far; the desired standpoint is "not a perspective from a certain place beyond the world, nor the point of view of a transcendent being; rather it is a certain form of thought and feeling that rational persons can adopt within the world."**

I. INTRODUCTION

Traditional theories of liberty and autonomy do not fit well when the subjects are children and education. For adults, democratic governments generally seek to abide by the Kantian maxim that each person should be treated as a kingdom of ends—treated with respect for his or her autonomy, rationality, and human worth—and not as a means or an instrument of another person’s will.1 Children, however, are rightfully perceived as both ends in themselves, evolving autonomous beings, and as instruments of larger societal purposes. Those purposes include the assimilation of the child into the larger culture, for the intergenerational, exogenetic transmission of values, knowledge, language, and customs is essential to the preservation of community and to

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* Dean and James A. Elkins Centennial Chair in Law, University of Texas at Austin, School of Law. I wish to thank my able research assistant, Dia Wolkow Epstein, for her assistance in preparing this article.


the definition of persons within community. Paradoxically, education both promotes autonomy and, in a sense, denies it by shaping and constraining present and future life choices.\(^2\)

The education of children, in any form, whether compulsory or not, inevitably raises conflict. Children are not born with an appreciation of literature and democratic institutions, and they, including the most precocious among them, certainly are unlikely to discover geometry, computers, or quantum mechanics without the benefit of the accumulated wisdom of the past. Professor Tawney once described children as a “new race of souls” that bursts upon us every year, who stand “on the threshold with the world at their feet, like barbarians grazing upon the time-worn plains of an ancient civilization.”\(^3\)

But, if one substitutes pejorative words like propaganda, indoctrination, and brainwashing for an acceptable word like education, one gets a sense of the conflict. Children need to be socialized to societal norms, but they also need to grow up to be relatively autonomous beings within the confines of culture. Basic knowledge and values should be communicated to them while attempting, as best one can, to give the young “ample opportunity of making the decisions upon which these principles are based, and by which they are modified, improved, adapted to changed circumstances, or even abandoned if they become entirely unsuited to the new environment.”\(^4\)

The conflict between acculturation and autonomy inevitably leads to consideration of the concept of justifiable paternalism. Education is a form of affirmative liberty. Children are socialized though subjection to coercive and persuasive measures that enable them to become autonomous as adults—that is, they are socialized for their own good. Education can expand the mind or it can contract it, and mind-expanding education facilitates adult autonomy. Upon reaching adulthood, the subjects of the earlier paternalism would express gratitude, not indignation, for their treatment. But, however justifiable the paternalism for those who have not fully matured into personhood, there remains the problem of balance. If the education is too narrow and all-encompassing, then autonomous citizens will not be produced. Words like domination and constraints on choice creep into the analysis. If autonomy is stressed at the price of education, then there is a justifiable fear of loss of community, alienation, and ignorance.

The pursuit of the ideal education, like the pursuit of justice, requires objectivity, reflection, detachment, and also immersion in actual experience and in the contingent world inhabited by social beings. Both educators and

philosophers "need an 'Archimedean point' from which to assess the basic structure of society:"

The problem is to give an account of where such a point could conceivably be found. Two possibilities seem to present themselves, each equally unsatisfactory: if the principles of justice are derived from the values or conceptions of the good current in the society, there is no assurance that the critical standpoint they provide is any more valid than the conceptions they would regulate since, as a product of those values, justice would be subject to the same contingencies. The alternate would seem a standard somehow external to the values and interests prevailing in society. But if our experience were disqualified entirely as the source of such principles, the alternative would seem to be reliance on a priori assumptions ... [which] would be arbitrary because groundless.  6

Philosophers have long debated the position of the Archimedean point. For David Hume, for example, justice derives only from human conventions and society; 7 for Kant, however, justice must be premised on transcendental moral deductions that reject appeals to "contingent human circumstances." 8 John Rawls' modern theory of justice 9 may be perceived as seeking to combine Humean empiricism with Kantian metaphysics; his "original position," in which persons choose principles of justice, requires them to be ignorant of contingent natural and social circumstances and to be knowledgeable about their common interests and desires. 10 Michael Walzer's more recent effort to define "spheres of justice" 11 implicitly embraces the Humean empirical perspective.

The ideal education necessarily requires the location of an Archimedean point, a point positioned somewhere between critical reflection and grounding in the contingent circumstances of society. To demonstrate this fact and the link between education and justice, one need look no further than Rawls' artificial construct, the original position. If persons in the original position were first children, there would be no reason to suppose that they would be aware of their common interests, rights, and liberties. Nor could one assume ignorance of their individual social, economic, and political conditions. If, as adults, they can only choose rational principles of justice with a certain combination of knowledge and ignorance, then there must be an antecedent educational experience that prepares them for those choices. But that educational experience must be philosophically rooted in some conception of an Archimedean point. The discovery of commonalities presumably would require

6. Id. at 17.
7. Id. at 36 (citing D. Hume, An Enquiry Concerning the Principles of Morals 20 (1966)).
8. Id. (citing I. Kant, Groundwork of the Metaphysics of Morals 109 (H.J. Paton trans. 1956)).
both detached reflection and empirical inquiry; the "veil of ignorance" of contingent personal circumstances would require rejection of much knowledge about society and the status of individuals within it.

How, then, is society to account for and to achieve the Archimedean point in education? Realistically viewed, there may be no optimal, theoretical balance between basic education and an all-pervasive indoctrination. Instead, there may only be an evolutionary process, worked at day by day, and guided by common sense, moderation, and an appreciation of conflicting values. An analogy can be drawn to sailing. Apart from the general forward movement, the boat itself is never still in the water. It is constantly moving up and down on the waves, from side to side with the wind and current. The sailor constantly adjusts the tiller and sheets to maintain the boat's balance. The same kind of constant adjustment may be required of school officials and society to achieve the best balance of assimilation and autonomy. Children must be integrated into the community but should not be stifled. The desire to create informed citizens who understand the world in which they were born and live must be tempered by the realization that much of what society achieves depends on individuals who do not or will not conform to the prevailing wisdom. As John Updike recently expressed the point, "[o]ur artistic heroes tend to be those self-exercisers, like Picasso, and Nabokov, and Wallace Stevens, who rather defiantly kept playing past dark." Children must learn the rules of the game, but that learning must stop short of an orthodoxy that playing after dark is always forbidden.

Controversies over school library book policies are a modern manifestation of society's collective discomfort with these issues. The critical questions are who will control socialization of the young, what are the values to which they will be socialized, and how will cultural grounding and critical reflection be accommodated. The Supreme Court wrestled with these problems in Board of Education v. Pico, but the Court was not quite up to the historic occasion. Five Justices agreed to remand the case for trial, concluding that a summary judgment for the defendant school district was improper. But the Justices, like the Delphic oracle, spoke in contradictory terms. To find consensus, one must learn to be something of a Kremlinologist of the judiciary, relying on the unspoken and tacit, taking advantage of every hint and aside. But before embarking on this task, one needs to have a better understanding of the Archimedean difficulty in education and of the present structure of decisionmaking in public schools.

II. AUTONOMY AND COMMUNITY

The problem of children and education runs deeper than a reification of

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the conflict between socialization and autonomy. The question cannot be whether children ought to be socialized, that is, whether their autonomy should be simultaneously constrained and nourished. To paraphrase Professor C. Edwin Baker, to the extent that adults create a reality for children, an acceptable theory must concern itself with questions of who socializes children and how. A world will be created for children, for they are not born with a particular cultural orientation. The relevant questions is who will write on the slates, not whether they will be written on at all. If there was no formal education in public institutions, values and beliefs would continue to be instilled by family, church, peers, and life experiences.

But the antinomy between socialization and autonomy may not only distort analysis by ignoring the inevitability of acculturation, it may also give a false impression of autonomy and the concept of self that underlies it. The assumption is that a person can abstract himself or herself from the cultural milieu—that the layers of cultural artifacts may be unpeeled, revealing a human essence untainted by communitarian constraints. But the metaphor of the peeled onion may strike wide of the mark. To anthropologist Clifford Geertz, there is no such thing as a human nature independent of culture. Culture is the link between what we are and what we are capable of becoming, and our "plasticity," our "capacity for learning," as much demonstrates our dependence on cultural definition as our ability to adapt and to change over time. "Becoming human is becoming individual, and we become individual under the guidance of cultural patterns, historically created systems of meaning in terms of which we give form, order, point, and direction to our lives." A person's self-conception is inherently interreactional, dependent on defining a self and others. As Janet Radcliffe Richards articulated this point in relation to gender identity,

You cannot distinguish between the woman as she now is and what is supposed to be the "true" woman by pointing to the way society has shaped her. It is absolutely inevitable that the adult woman should be as she is partly as a result of social influence, and it is a thing that we cannot possibly object to unless we are to suggest people should be sent to grow up among wolves . . . . We cannot say of social pressures in general that they turn the woman into something which is not her true self; on the contrary, they cannot be anything other than a contribution to what she actually is.

16. Id. at 52.
17. Id. at 49.
18. Id. at 52.
20. J.R. Richards, The Sceptical Feminist: A Philosophical Enquiry 80 (1980). Wallace Stevens, himself a player after dark, captured the paradoxes of the self in his poem The Idea of Order at Key West:
Thus, the self in the concept of autonomy is partially defined by the culture; the antithesis between autonomy and indoctrination is an oversimplification because the self has links to and is defined in the context of communicated community norms. The converse is also true. The community and its indoctrination efforts may be shaped by many selves, for there is a mutually affecting relationship between community and individual. The interdependence of self and community does not require the "disappearance of man' and the linked notions of selfhood, individual action, and responsibility." Nor does it mean, as many critical legal theorists maintain, that autonomy is an illusion or that cultural limits are largely contingent and avoidable. An educational system that ignored autonomy and emphasized only indoctrination to communal norms would be thoroughly totalitarian and destructive of human values.

In the context of public schooling and beyond, the key to unraveling the paradoxes of education of the young lies neither in the reification of autonomy nor in the mysticism of transcendental communities. Children are autonomous individuals, and they are members of groups. Their selves are in part defined

The sea was not a mask. No more was she.
The song and water were not medleyed sound
Even if what she sang was what she heard,
Since what she sang was uttered word by word.
It may be that in all her phrases stirred
The grinding water and the gasping wind;
But it was she and not the sea we heard.

... And when she sang, the sea,
Whatever self it had, became the self
That was her song, for she was the maker...

W. STEVENS, SELECTED POEMS 77-78 (1953).


22. See generally Davis, supra note 19 at 447. Ironically, critical theorists often assert that they are demystifying philosophical and legal theory by illuminating the relationship between self and community. See, e.g., Kennedy, The Structure of Blackstone's Commentaries, 28 BUFalo L. REV. 205, 221 (1979). In dialectical fashion, they seek to transcend individuality and community and to deny that contradictions between individual and group would exist in their ideal community. Professor Tushnet, for example, speaks of two worlds—the world external to us with social boundaries, and the world constructed by us as we interact with others. Tushnet, Deviant Science in Constitutional Law, 59 TEX. L. REV. 815, 816 (1981). He asserts that we view ourselves as autonomous agents and as interdependent members of groups and he accuses the philosophy of individualism for leaving each person to confront the external world in isolation. He labels as utopian his solution "to construct a society in which both experiences can be simultaneously and forcefully affirmed." Id. at 824. He is curiously short of details on the ideal community—it is difficult to imagine educational institutions in his New Jerusalem, but he comforts himself with a "rhetorical mode" of Marxism that sets him at some distance from conventional legal thinkers. Id. at 826. The tie between his Marxism and his quest for utopian community, apart from the self-avowed and successful effort to jangle the nerves of liberal theorists, is entirely unclear. He appears left with a neo-Kantian perspective that rejects present cultural experiences as contingent, while embracing forms of romantic community that are rooted only in his own reflective, and many would urge arbitrary, aspirations. See generally Shiffrin, Liberalism, Radicalism, and Legal Scholarship, 30 UCLA L. REV. 1103 (1983).
by social relations, but social relations are also in part defined by their personalities. The self and community cannot be completely separated, but they also cannot be completely integrated. The “good” has both particular and universal aspects. Not every cultural influence or imperative constitutes domination. Cultures do and should constrain.

A nagging problem for both liberal philosophers and critical theorists is the need to differentiate between unacceptable constraints on individuality, leading to a loss of autonomy and creativity, and acceptable communitarian constraints that reduce alienation and enhance the cultured definition of self. Unless and until the epistemological millenium is approached, wisdom lies in a pragmatic recognition of the dynamic, uncertain, and complex relationship between cultural authority and individuality. That recognition entails frequent and numerous adjustments in institutional and social arrangements, in an atmosphere of tolerance and epistemological optimism. Contradictions will still abound. The culture, with its educational institutions, provides the raw materials for autonomy and community life. But, as Ruth Benedict sagely remarked, “no civilization has in it any element which in the last analysis is not the contribution of an individual.”

What types of institutions and traditions are necessary to locate and hold to this Archimedean point? The answer is more aesthetic than empirical or scientific. In Alasdair MacIntyre’s memorable phrase, institutions and social conventions must “embody continuities of conflict.” There must be continuity with the forms of community, and also a movement “forward from . . . [moral] particularity” to the search for universal good. That search inherently produces conflict, but conflict within a “socially embodied argument.” In other words, the socialization process should involve the inculcation of “living traditions” in which there is a narrative or story to be learned, but that narrative should be treated as unfinished or incomplete. If the society and its institutions and traditions are to remain vital, there needs to be an adequate grasp “of those future possibilities which the past has made available to the present.”

III. PUBLIC EDUCATION: WHO DECIDES?

Turning from the grand abstractions to life in the trenches, what is the structure of decisionmaking on socialization issues in public schools? Who determines what is to be taught and what books are to be acquired? Who

26. Id. at 205.
27. Id. at 207.
28. Id.
29. Id.
balances autonomy and acculturation? For the most part, elected representatives, school board members, school administrators, librarians, and teachers share responsibility and are, at least in theory, accountable to the citizenry for their performance. There is no necessary reason for arranging affairs this way; many have proposed alternatives that would enhance, for example, either the power of families or the power of professional librarians or teachers to make educational choices. But the basic structural decisions have already been made, and these are reflected in existing legal and institutional arrangements.

This structure necessarily puts the state in the business of editing the curriculum. "Of necessity, elementary and secondary educators must separate the relevant from the irrelevant, the appropriate from the inappropriate." This task involves selecting books for inclusion in the school library and for optional or required reading in designated courses. If no such authority existed, if disgruntled parents and others had a "right" to equal time to reply to the state's program, and if public schools were public forums in the fullest sense of the phrase (like public parks for example), the education mission of the schools, including acculturation, would become impossible. As a general matter, despite some wishful thinking to the contrary, schools are not subject to the various balancing-of-the-message doctrines, including fairness, a right to reply, and equal time. As Professor Canby has stated,

"[E]diting is what editors are for; and editing is the selection and choice of material." To forbid the managers of (public communication) enterprises to select material for inclusion and, necessarily, exclusion would for all practical purposes destroy these endeavors.

If one pauses a moment to reflect on these matters, it becomes clear why curricular and book purchasing decisions generally should be left to the state under current institutional arrangements. Merely because the government owns and operates an enterprise devoted to communication does not mean that the


government cannot, in good faith, carry out its editorial functions. Where time and resources are scarce, selectivity is inherent in communication. There is a myth in constitutional lore that government is nearly always forbidden from making content distinctions. Such a notion has some plausibility when applied to government regulation of private activity. Where the government is itself communicating, or making available scarce resources to enhance private speech, the general ban on taking content into account is unsound.

Not every government communication facility is a public forum. A municipal auditorium is not a park or street, and government policies may favor orchestral performances over dramatic productions. So too, a publicly-owned and operated social science library is not constitutionally forbidden if books on chemistry and physics are routinely rejected for inclusion in the collection. Justice Stevens illuminated this point beautifully in his concurring opinion in *Widmar v. Vincent*, a case involving access to facilities at a public university:

> In performing their learning and teaching missions, the managers of a university routinely make countless decisions based on the content of communicative materials. They select books for inclusion in the library, they hire professors on the basis of their academic philosophies, they select courses for inclusion in the curriculum, and they reward scholars for what they have written. . . .
> . . . I should think it obvious, for example, that if two groups of 25 students requested the use of a room at a particular time—one to view Mickey Mouse cartoons and the other to rehearse an amateur performance of *Hamlet*—the First Amendment would not require that the room be reserved for the group that submitted its application first. . . .
> . . . I do not subscribe to the view that a public university has no greater interest in the content of student activities than the police chief has in the content of a soapbox oration on Capitol Hill.

As Justice Stevens later notes, some types of content decisions may be forbidden even when government is the facilitator of private communications: “the University could not allow a group of Republicans or Presbyterians to meet while denying Democrats or Mormons the same privilege.” But a blanket ban on content distinctions, irrespective of the mission of the governmental institution, is constitutionally and practically absurd.

A person does not have a constitutional right to publish his or her article in the law review of a state university; that would undermine the mission of

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40. *Id.* at 281 (Stevens, J., citing Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 Geo. L.J. 727 (1980)).
Neither should prison rehabilitation programs, state-sponsored psychiatric programs for the mentally infirm, or, for that matter, the President's State of the Union Address be subject to dilution by requirements of fairness, balance, or access as a matter of constitutional law. Such standards for government communications have sometimes been voluntarily adopted by statute, regulation, or practice. But if one concedes that public schooling, prison rehabilitation programs, military training, and other government communication efforts are legitimate and, indeed, essential for public well-being, then government cannot be denied the editorial power that is a necessary precondition to the achievement of its objectives.

This logic is bolstered in the case of public elementary and secondary schooling by the fact that school children are a captive audience for the purpose of accomplishing particular educational objectives. They are in school because the electorate has decided, through democratic processes, that they should be there, and that hence, the duly elected and appointed representatives of the people should make the basic editorial decisions. The loss of liberty to parents and children that compulsory education causes is difficult to justify if the students are held captive to private communicators who have their own educational or indoctrination agenda. As Professor Shiffrin succinctly writes, "To make education compulsory was itself to challenge liberal ideology. The essence of compulsory education is that the state and not the parents will ultimately decide what is best for children."

But there are risks. The power of government to make these selections, to control communications, is also the power to destroy the underpinnings of government by consent, since that consent can be manipulated out of or into existence.

Freedom of expression and association are critical to the process of consent, which government speech may threaten by impairing independence of judgment—through indoctrination, withholding of vital information, and preventing the communication of political judgments among individuals. The structure of American constitutional government and the underlying historical assumptions about the relationship between the governed and

42. See M.G. Yudof, supra note 34, at 295.
43. Id.
44. See id. at 242.
the governors buttress the view that the first amendment encompasses limits on government expression.\textsuperscript{47} If the reflective, informed citizen, participating in governance decisions, is a philosophical root of freedom of expression, then government domination of communications networks is potentially as destructive of that concern as government censorship of private speech.\textsuperscript{48} Governments, staffed by self-interested politicians and bureaucrats, may aim for self-perpetuation and uncritical acceptance of the status quo and not for the Archimedean point.\textsuperscript{49} Because of this danger, letting the government control education may be like letting the fox guard the henhouse. That is why the boundaries of state power need to be probed. But the denial of the power to edit, to determine what shall or shall not be taught and assigned, is inherently incompatible with the public schooling enterprise.

IV. History of Textbook Protests

The established decisionmaking structure of public education has not prevented text and library book selection policies from generating conflicts over the limits of prohibited orthodoxy and legitimate indoctrination.\textsuperscript{50} Apart from the state agencies that have the power to approve the state’s textbooks, and therefore to influence their content, private interest groups also have been successful in commanding publishers’ attention and in securing changes in books.\textsuperscript{51}

Textbook challenges date back to the mid-1800’s, but they increased in number and intensity after World War I, about the same time that secondary education became universal. In the latter era, miscellaneous elements of the political right voiced their objections to slanted textbooks, as they complained of inattentiveness to military history, pro-Jewish, Catholic, and British sentiment, and discussions of evolution. During the Depression, protests faded while a progressive era in textbook writing proceeded. The anti-Communist upheavals of the 1950’s gave rise to more extreme protests. A member of the Indiana State Textbook Commission believed Robin Hood was a communist and wanted all mention of his legend purged from the state’s text-

\textsuperscript{47} M.G. Yudof, \textit{supra} note 34, at 160.
\textsuperscript{49} Yudof, \textit{supra} note 48, at 700.
\textsuperscript{51} F. Fitzgerald, \textit{America Revised} (1979).
books, while the John Birch Society "blamed the textbooks for the North Koreans' success in 'brainwashing' a handful of prisoners of war."

By the 1960's, however, the textbook protests came from the opposite end of the political spectrum—the left and civil rights groups, which wanted fairer, more accurate representation of minority contributions to society and the elimination of patronizing and derogatory references. In this period and thereafter, textbooks became the "lightning rods" of American society. As Frances FitzGerald notes, textbook protests used to occur only during times of rapid political or social change. Today, the process of criticism is almost institutionalized:

Now a great number of organizations and informal groups take an interest in the content of texts . . . [and] a multitude of educational and civil-rights groups have research departments devoted exclusively to the analysis of textbooks. Many of these departments—on the right and on the left—have with experience become sophisticated both in their analyses of text materials and in their methods of approaching publishers, school boards, and the federal bureaucracy. The public battle over texts is thus more intense and more complicated than it has ever been before."

One reason textbooks became "lightning rods," at least for racial and ethnic minorities, was the perceived need to change the public's image of and attitudes toward them. Attacking those attitudes and images through various media, including textbooks, was complementary to a strategy of affirming political and economic equality in schools, in housing, and at the workplace.

During the 1970's, political conservatives and religious fundamentalists began to challenge the changes made in the 1960's. For example, in Kanawha County, West Virginia, parents and other citizens protested against some books that had recently been acquired for classroom and library use. The parents complained that the books contained stories by black writers that were critical of whites, an anti-war poem, and Mark Twain's satire on the Book of Genesis. They succeeded in shutting down the schools with their demonstrations. Afterward, a study was done by the National Education Association, which concluded that the protest boiled down to a cultural conflict between liberal or progressive secular values and the community's fundamental religious beliefs. At least one publisher revised a literary anthology to meet the Kanawha County standards. Similar clashes over texts sporadically arose around the country, one of which gave rise to the Pico litigation. By 1981, the American Library Association's Office for Intellectual Freedom reported over 900 book removal controversies a year.

52. Id. at 38.
53. Id. at 42.
54. Id.
57. Id. at 41.
While textbook protests are nothing new, constitutional challenges to public school library and textbook decisions have increased in the last ten years. Before this time, only a handful of such cases had reached any state or federal court. Many reasons exist for this increase. Dispute resolution in the public schools is increasingly dominated by rules, formal procedures, legislation and lawsuits. It seems natural, or at least unavoidable, that the creeping legalization apparent in collective bargaining, student records, desegregation, and treatment of the handicapped, should spill over into the textbook area. Public opinion polls also show declining confidence in professionals and public officials, perhaps reflecting less acceptance of decisions made by experts or elected school representatives. The view that public schools are above politics has been rejected by many as a pervasive dissensus in values; the role of women, for example, has taken hold. These forces may result in an increased willingness of the political-process losers to battle in the courts. A current example is the movement to dismantle whatever barriers have “separated government from personal morality and religion.” As the Public Agenda Foundation suggested in a recent study,

This mode of thinking can be seen . . . in increasing demands for “reviews” of school text books. Many Americans have come to feel that the state cannot be neutral to questions of lifestyle; they believe that the forces of government should be harnessed to bring the country back to a particular moral and religious standard.

Textbook controversies arise from the clash of those who have influence over curricular choices. School administrators assert their wisdom in educating

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60. See generally Yudof, Legalization of Dispute Resolution, Distrust of Authority, and Organizational Theory: Implementing Due Process for Students in the Public Schools, 1981 Wisc. L. REV. 891.

61. See Yudof, supra note 60, at 894-96. The distrust of school authority is amply reflected in the recent report of the Secretary of Education’s Commission. The NATIONAL COMMISSION ON EXCELLENCE IN EDUCATION, A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (1983).


64. Id. See also Gabler & Gabler, Mind Control Through Textbooks, 64 PHI DELTA KAPPAN 96 (1982).
the young. Elected officials often perceive of themselves as conduits for transporting community values into the schools. Writers, editors, and publishers are gravely concerned with their freedom of expression (and profits), and they fear government efforts to eliminate particular ideas and perspectives from school classrooms. Parents seek to direct the upbringing of their children and to inculcate particular secular and nonsecular values. Teachers and librarians demand academic freedom—the right to be reasonably autonomous in carrying out their professional responsibilities. Students may assert a right to know, read, learn, acquire information, or a right not to be subjected to materials they find fundamentally objectionable.

There are also concerns about government itself, the need to limit the impact of government expression, and such concerns are now emerging in academic freedom litigation. Government may take advantage of its captive and immature audience in public schools to indoctrinate children to values that enhance the status quo and to undermine their ability to act in the future as "self-controlled" citizens who express their own reflective preferences about political, economic, and social questions. The public school's capacity to shape student beliefs and attitudes may be more destructive of democratic values than regulation of student expression. Government may accomplish this through its teacher selection policies, its reliance on symbols and rituals, and its regulation of teacher expression in the classroom. Library book selec-

65. See, e.g., T. van Geel, Authority to Control the School Program (1976); F. Wirt & M. Kirst, The Political Web of American Schools (1972); F. Fitzgerald, supra note 51; E.M. Root, Brainwashing in the High School (1958); O'Neil, supra note 59.
72. See M.G. Yudof, supra note 34. See also Shiffrin, supra note 46, at 647-53; Kamenshine, supra note 33.
tion for public schools is another excellent example of a policy arena in which such dangers lurk. But for all its importance, courts have reacted tentatively, inconsistently, and sometimes incoherently, notwithstanding (or perhaps because of) the delicate and important nature of the problem.77

V. THE PICO LITIGATION

A. The Decision

In Board of Education v. Pico,78 the Supreme Court faced the public school library book selection policies issue for the first time. The nine Justices filed seven opinions. But despite the apparent chaos, there may be more consensus than one would expect. Examining each of the opinions with care, one discovers that a majority of the Justices do not believe that school boards have unrestrained freedom to select library books; so there is a constitutional line out there somewhere that may not be crossed. The fuzziness of the line and the various interpretations of the facts create the confusion.

The events leading to Pico began in September 1975, when three school board members attended a conference sponsored by a politically conservative parents organization. While attending the conference they obtained a list of objectionable books, including works by Malamud, Vonnegut, and Eldridge Cleaver, ten of which they later found in their district’s libraries. In February 1976, the board gave an “unofficial direction” that these books be removed from the libraries and placed in the board’s offices so the members could read them. Word of the board’s move leaked out. The board issued a press release to justify its action and characterized the books as “anti-American, anti-Christian, anti-Semitic, and just plain filthy.”79 The superintendent objected to the action, reminding the board that it had a procedure for handling complaints, which required the appointment of a committee to study the books. The board refused to follow the procedure at first; but, later, after the books had been removed and the board had made its views public, it appointed a committee to study the books and to make recommendations. The committee later reported its findings, recommending retention of at least five books, placement of another on a restricted shelf, and removal of two others. The committee either could not agree on or took no position on the remaining books. The board substantially rejected the report, voting to retain only one book and citing no reasons for its action.

77. Joseph DeMaistre once admonished that the pure of heart and righteous do not need books; precepts are “imprinted by grace in our hearts.” It is only because of our sinful ways that “books and laws became necessary.” J. DeMaistre, ON GOD AND SOCIETY 30 (1959).
79. Id. at 857.
The respondents, several students in the high school and the junior high school, filed suit under 42 U.S.C. § 1983,8 claiming their first amendment rights had been violated by the books' removal. The district court granted summary judgment, saying that no first amendment rights were implicated. The Second Circuit Court of Appeals disagreed and remanded the case for a full trial.81 Five Justices of the Supreme Court agreed with the circuit court and voted to remand the case for trial. But Justice White did not join the other four in their discussion of constitutional limits on the board. He wrote:

The unresolved factual issue, as I understand it, is the reason or reasons underlying the school board's removal of the books. I am not inclined to disagree with the Court of Appeals on such a fact-bound issue and hence concur in the judgment of affirmance. . . .

The Court seems compelled to go further and issue a dissertation on the extent to which the First Amendment limits the discretion of the school board to remove books from the school library. I see no necessity for doing so at this point.82

Justice Brennan wrote for the Justices in the plurality, but Justice Blackmun disagreed with Brennan's analysis of a student's right to receive information so he wrote his own opinion concerning that issue. Thus, with only two of his colleagues in tow, Justice Brennan spells out what he believes is a right of students to receive information, but he limits the exercise of that right to the school library. He concedes that school boards have broad discretion in the management of school affairs and that schools are vehicles for "inculcating fundamental values necessary to the maintenance of a democratic political system."83 Yet, he cites several Supreme Court cases84 to show not only that students retain their first amendment rights, but also that a right to receive information is inherent in that constitutional guarantee. Justice Brennan, however, cautiously circumscribes this right to receive information:

Of course all First Amendment rights accorded to students must be construed "in light of the special characteristics of the school environment." Tinker v. Des Moines School Dist. . . . But the special characteristics


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 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.


82. Pico, 457 U.S. at 883 (White, J., concurring).

83. Id. at 864 (Brennan, J., citing Ambach v. Norwick, 441 U.S. 68 (1979)).

of the school library make that environment especially appropriate for the recognition of the First Amendment rights of students. 15

The plurality then asserts that "[o]ur Constitution does not permit the official suppression of ideas," 16 and states the following test:

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. 17

Justice Brennan limits this test to book removal decisions and does not address book acquisition policies, presumably because the latter issue was not in the case. He concludes by saying there is a question of material fact as to the Board's intentions that should be considered by the trial courts on remand.

The plurality's opinion draws fire from Justices Blackmun, Burger, and Rehnquist, all three of whom criticize the intelligibility and correctness of the right to receive information in school libraries. But while Chief Justice Burger seems to believe that school boards have unlimited authority in this area, Justices Blackmun and Rehnquist both admit some limit exists which school boards may not venture beyond.

Justice Blackmun's opinion is sensitive to the subtleties and complexities of the issue before the Court. He argues that the primary question is "how to make the delicate accommodation between the limited constitutional restriction that I think is imposed by the First Amendment, and the necessarily broad state authority to regulate education. In starker terms, we must reconcile the schools' 'inculcative' function with the First Amendment's bar on 'prescriptions of orthodoxy.'" 18 The principle, Justice Blackmun believes, is "narrower and more basic" than any right to receive information.

I do not suggest that the State has any affirmative obligation to provide students with information or ideas, something that may well be associated with a "right to receive." And I do not believe, as the plurality suggests, that the right at issue here is somehow associated with the peculiar nature of the school library; if schools may be used to inculcate ideas, surely libraries may play a role in that process. Instead, I suggest that certain forms of state discrimination between ideas are improper. In particular, our precedents command the conclusion that the State may not act to deny access to an idea simply because state officials disapprove of that idea for partisan or political reasons. 19

85. Pico, 457 U.S. at 868.
86. Id. at 871.
87. Id.
89. Pico, 457 U.S. at 878-79 (citations omitted).
Accordingly, the school itself, and not just the library, is a unique environment. But, precisely because of that, it is important that some limit, even a symbolic one, be established as a means of balancing the two opposing goals—inculcating values and educating free minds.

Justice Blackmun retains the motivation test; he appears to believe that judges must satisfy themselves that school officials are aiming for the Archimedean point. But he carefully explains that a motivation approach leaves school boards with wide discretion. When the reason given for a removal decision is politically neutral, the first amendment will not be violated. *FCC v. Pacifica Foundation* would allow school boards to remove a book because of offensive language, and *Pierce v. Society of Sisters*, in his view, would allow for removal if the book is thought to be psychologically or intellectually inappropriate for an age group.

Justice Rehnquist also criticizes the right to receive information and the illogical limits that Justice Brennan places on it. Although he joins Justice Burger's dissenting opinion and harshly critiques Justice Brennan's position, Justice Rehnquist appears to agree that school board discretion over library books is limited. For example, he "cheerfully" concedes the hypothetical case where a Democratic school board, motivated by party affiliation, removes all books written by or in favor of Republicans, and the case of an all-white school board removing all books which were written by blacks, or which advocate racial equality or integration. Justice Rehnquist, however, does not believe that such extreme cases would ever arise. His disagreement with Justices Blackmun and Brennan in this particular case appears to be in his interpretation of the record: Justice Rehnquist does not see the procedural irregularities and conflicting reasons for the books' removal by the school board in *Pico* as evidence that the board could have been attempting to impose an orthodoxy. With Justice Powell, he believes that offensive language in the forbidden books justified the school board's decision.

Chief Justice Burger's opinion does not address the extreme political hypotheticals. Instead, he relies on the judgment that federal courts have no business becoming super-censors and deciding how local schools are to be run. He concedes that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," but asserts

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91. 268 U.S. 510 (1925).
93. *Id.* at 907.
94. *Id.* at 908.
95. *Id.* at 897 (Powell, J., dissenting).
96. *Id.* at 885 (Burger, C.J., dissenting).
97. *Id.*
98. *Id.* at 886 (citing *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969)).
that this doctrine does not apply in *Pico* because no external restraints have been placed on the students or their ability to express themselves. He dogmatically declines to recognize the relationship between government communication and freedom of expression, a relationship that nearly all of his colleagues perceive. He also asks why, if a right to receive information is so important, it should be limited to students. "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."100

**B. A Right to Receive Information**

Although Justice Brennan aspires to define some limit on school boards' actions, basing the limit on a right to receive information does not work, theoretically or practically. A board's loss of power to select textbooks and courses is inherently incompatible with the schooling enterprise. Justice Rehnquist notes this in his dissenting opinion:

> The idea that such students have a right to 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.101

The "right to know," as articulated by the Supreme Court, is no more than artistic camouflage to protect the interest of the willing speaker who seeks to communicate with a willing listener. Authors, editors, and publishers do not have a constitutional right to have their books purchased by the state for dissemination in public schools. No court has arrived at such a holding. Justice Rehnquist called such a result "ludicrous." Yet all previously recognized rights to receive information were predicated on the author's right to speak. The right to receive information would effectively place the power to edit the curriculum in the hands of private, disinterested parties—neither parents nor the state—and they would have an audience captured for them by governmental coercion.

Further, it is one thing for the government to censor books and limit their distribution, and quite another to require the state to purchase books in the name of the first amendment rights of their authors. Surely absolutists such as Justices Black and Douglas, who did not believe that federal and state

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100. Id. at 888.
103. See *Pico*, 457 U.S. at 912 (Rehnquist, J., dissenting).
governments had any authority to ban books on obscenity, national security, or other grounds, would blanch at requiring governments to purchase *Fanny Hill*, *Ulysses*, or *The Pentagon Papers*. By analogy, state officials may not ban a magazine with offensive pictures or works of art, but this does not necessarily mean that they are required to fund the magazine or to provide a state-owned place to exhibit the art work.\textsuperscript{105} Even if this analogy is debatable, qualitative judgments are an inherent part of the funding process—unless one’s position is that the state must support all magazine publishers and struggling artists who seek state subsidies, if it supports any.\textsuperscript{106}

Practically, there are other problems. If students have a right to know, then they should have a constitutional right to demand courses in public schools that are not offered for financial or other reasons.\textsuperscript{107} Any question in a class, as a constitutional matter, would require an answer—no matter that the question relates to the French Revolution and is asked in an algebra class, or that no other student in the class has the desire to acquire such information at that time and place. Justice Rehnquist poses an additional classroom problem: will a teacher’s absence from school due to illness constitute a denial of access to information if part of the lesson plan must be dropped? Students, presumably, would be entitled to choose their own books at government expense. Librarians could not refuse to purchase a book sought by a student. This right to receive information could be extended to non-school spheres. Public libraries devoted to particular subjects, such as natural sciences, would be required to purchase 19th-century Russian novels if requested to do so by patrons. Requiring similar purchases by museum collections would logically follow.

\begin{center}
\textbf{C. Is the School Library Unique?}
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An offshoot of the debate between Justices Brennan and Rehnquist over whether students have a right to receive information is the question of whether school libraries are unique. Justice Brennan argues that the school library does play a unique role, and quotes a district court opinion that says that, in the school library, students can explore the unknown and discover areas of interest not covered in the classroom. Justice Rehnquist argues that this uniqueness is a figment of Justice Brennan’s imagination, that the school library is merely a supplement to the curriculum, and that, as such, school boards have as much discretion in determining the library’s content as they do in determining course content. Justice Rehnquist notes that, by limiting

\begin{itemize}
\item \textsuperscript{105} See Advocates for Arts v. Thomson, 532 F.2d 792 (1st Cir. 1976); Close v. Lederle, 424 F.2d 988 (1st Cir. 1970). \textit{See generally} Shiffrin, \textit{supra} note 46, at 640-47.
\item \textsuperscript{106} See Shiffrin, \textit{supra} note 46, at 640-47.
\item \textsuperscript{107} See, \textit{e.g.}, State v. School Dist., 31 Neb. 552, 48 N.W. 393 (1891). \textit{See generally} YUDOF, KIRP, VAN GEELE, & LEVIN, \textit{supra} note 66, at 176; Moskowitz, \textit{supra} note 67.
\end{itemize}
the right to receive information to school libraries, Justice Brennan shows how uncomfortable he really is with the doctrine.

If communication inherently involves selectivity, and if library books and classroom presentations are but two forms of communication, Justice Rehnquist's analysis has much to commend it. Why should school officials have less discretion in stocking school libraries than in allocating classroom time? But classrooms and libraries are means of communication that have quite different attributes. In the classroom, a teacher directs the transmission of knowledge and values to a group of students. The same information generally goes to all the students. The teacher can focus on only one subject at a time, and therefore all students generally must focus on the same subject. But the library is different. No one person is in charge of the learning; students proceed on an individual basis, learning on their own. The library is a repository of many books, not just a single book for a single course. In other words, books may convey conflicting messages to many readers at the same time; the multiplicity of "voices" does not prevent effective communication. A din of actual voices in the classroom, however, paralyzes the communications process.

Libraries are filled with more than just classroom textbooks; they contain popular and classical novels, nonfictional and fictional works written expressly for children or teenagers, magazines, periodicals, and newspapers. The difference between library collections and classroom texts reflects alternative approaches to how competing views and perspectives should be balanced. Textbooks attempt to achieve this balance in one volume. They are "developed" by teams of people, not written solely by one or two people. The name of a distinguished scholar frequently appears on the textbook, presumably to add legitimacy or authority to the book. This can be seriously misleading. Sometimes the historians named on the cover died years before the current edition was published. Also, because history texts undergo frequent revisions, a later edition may contain ideas opposite to or at least "foreign" to those of the original author-historian. These revisions incorporate new points of view as their publishers try to appeal to as many groups as possible. Because the development of a new text is so expensive, publishers can economically produce only one or two on the market at any one time.

Consequently, all of them try to compete for the center of the market, designing their books not to please anyone in particular but to be acceptable to as many people as possible. . . . What a textbook reflects is thus a compromise, an America sculpted and sanded down by the pressures of diverse constituents and interest groups.

109. F. Fitzgerald, supra note 51, at 22.
110. See id. at 21.
111. Id. at 46.
112. Id. at 46-47.
“Regular” books, on the other hand, are usually written by individuals, not teams, who may have no desire to temper their views or to give space to competing ideas. The author writes what he or she wants, not what fifteen interest groups want. The author may wish to convey the truth as he or she sees it, not some watered-down version of reality; or, the author may simply wish to sell books by appealing to a mass or specialized audience. But a balance of conflicting views within a single volume is rarely the objective. Balance for the individual is achieved, if at all, by exposure to the whole array of books. In the library, competing perspectives are accommodated by virtue of the breadth of the collection. An analogy can be drawn to the single newspaper and the whole communications market: one may not be able to get all viewpoints from one newspaper, but elsewhere in the market, in competing newspapers and magazines and from radio and television stations, the rest of the spectrum of opinion may be available. In this sense, libraries cannot help but bring a greater diversity of views to students, and they can serve as a safeguard against indoctrinating students from a single point of view.

The difference in the two types of books also stems from their purposes. Textbooks are deliberately written with the indoctrination of children in mind. History textbooks have functions and traditions independent of academic history writing. First, they are nationalistic, recounting the history of America as a nation-state, and not as an extension of civilization as it has already developed. Second, the texts instruct and make no attempt to explore. “This information is not necessarily what anyone considers the truth of things. Like time capsules, the texts contain the truths selected for posterity.” This selection of truths for deliberate socialization of the reader differs significantly from the purpose of “regular” books, which generally have more modest and tentative goals than to indoctrinate a whole generation of youngsters to a common historical and cultural heritage.

The book selection process also varies in classrooms and libraries. Roughly half of the states have statewide textbook adoption laws, but library book selection is generally left to the local school districts and their librarians. The problem of an orthodoxy imposed by the school board remains, but is certainly preferable to statewide book selection, where the potential for imposed orthodoxy has more serious and far-reaching consequences.

**D. Motivation Test**

The *Pico* Court—at least in the plurality opinion—ultimately tries to resolve

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114. F. Fitzgerald, supra note 51, at 47.
115. Id.
116. Id. at 32.
the book selection issue on the basis of a motivation test. As Professor Stone has urged, motivation analysis in freedom of expression cases is particularly appealing where we have reason to suspect government bias or prejudice.\(^{117}\) Such an analysis is less an effort to locate an Archimedean point between indoctrination and autonomy than it is a determination that public officials have failed to pursue the Archimedean objective. But determining motivation is a sticky business. The test is not easy to apply. And, as Justice Rehnquist points out, if one is concerned about denial of access to information, a motivation test is the wrong test.

\[
\text{Bad motives and good motives alike deny access to the books removed.}
\]

If Justice Brennan truly recognizes a constitutional right to receive information, it is difficult to see why the reason for the denial makes any difference. Of course Justice Brennan's view is that intent matters because the First Amendment does not tolerate an officially prescribed orthodoxy. \(\ldots\) But this reasoning mixes First Amendment apples and oranges. The right to receive information differs from the right to be free from an officially prescribed orthodoxy. Not every educational denial of access to information casts a pall of orthodoxy over the classroom.\(^{118}\)

In spite of its fragmentation in \textit{Pico}, it is in the area of motivation that the Court appears to reach some consensus. A majority of the Justices support two underlying themes that could refine Justice Brennan's motivation test. The first is the idea that blatant political orthodoxy will not be tolerated.\(^{119}\) The second is that a school board's removal decision is legitimate if it is based on the educational suitability of the books.\(^{120}\) Objections to obscene words or sexual themes in a book are viewed as premised on educational and not political or ideological grounds. The relationship between these two themes and the quest for the Archimedean balance is complex.

By identifying political orthodoxy as a category for intense examination, the assumptions may be that there are few political truths (or at least that there is more dissensus as to those truths), that government is less trustworthy to assess and promote political truths (given its interest in self-perpetuation),\(^{121}\) and that politics is an identifiable category\(^{122}\) (and not an ubiquitous element in all aspects of education). By creating a category of educational suitability, the Justices implicitly contend that education is or should be above politics,\(^{123}\) that educational truths are more easily discerned than political truths,\(^{124}\) and

\(^{119}\) \textit{Id}.
\(^{120}\) \textit{Id}.
\(^{121}\) \textit{See generally} F. \textit{Schauer, Free Speech: A Philosophical Enquiry} 81-82 (1982).
that government is to be trusted more in the educational sphere. All of these propositions are controversial, but perhaps the most controversial assumption is that sexual morality should be classified with education and not with politics. This assumption presumably reflects the view that there is more consensus on sexual morality than political morality and that government can be trusted to "edit" the library collection and curriculum to bring forth those consensual truths.

If the law legitimizes educational suitability as a basis for book removal, the practical result of Pico may be that school boards can often immunize their book selection decisions from constitutional attack simply by invoking the proper educational ground. Rather than merely labeling books as "anti-American, anti-Christian, anti-Semitic, and just plain filthy," the school board will learn to pronounce objectionable books as "poor pedagogical tools" or "lacking educational value." These magic words will suffice unless judges, in the light of the evidence adduced, perceive that the articulated reasons are a subterfuge for illegitimate reasons. The board in Pico realized this, but not until it was too late in the game.

In this light, consider Zykan v. Warsaw Community School Corp., a case in which the school board was apparently attempting to eliminate feminist teaching and literature from its high schools. The school board removed a values clarification textbook from school premises, giving the book to a senior citizens' group for public burning. It also refused to allow four books that had been ordered for a "Women in Literature" course to be used. Under a new policy prohibiting reading materials that might be objectionable, the board also excised portions of Student Critic and permanently removed Go Ask Alice from the school library. Furthermore, the board failed to follow its established school procedures for book selection decisions, eliminated seven courses from the curriculum, and did not rehire the English teacher who planned to offer the "Women in Literature" course.

The plaintiffs alleged that these actions were taken largely because particular words in the books offended the school board's social, political, and moral tastes. The court found this allegation insufficient, however, because school boards are supposed to act on such tastes and beliefs in making book selection, curricular, and other decisions. In the court's words, "the amended complaint nowhere suggests that in taking these actions defendants have been guided by an interest in imposing some religious or scientific orthodoxy to eliminate a particular kind of inquiry generally." Apparently, if one is to

126. 631 F.2d 1300 (7th Cir. 1980).
127. The books were Growing Up Female in America, Go Ask Alice, The Bell Jar, and The Stepford Wives.
128. Zykan, 631 F.2d at 1302-03.
129. Id. at 1302.
130. Id. at 1306.
credit the court's account of the case, plaintiffs erred in not specifically alleging that the board was attempting to eliminate feminist thought from the public schools. The court was thus spared the unpleasant and difficult task of distinguishing between judgments based on educational suitability and those designed to impose an impermissible orthodoxy.

_Pico_ and _Zykan_ both show the kind of conjunction of facts that shed light on a school board’s motivation to censor or to edit. The book selection decisions clearly did not rest on considerations of economy or scarce resources. No one urged that the books were too expensive to dust. The reasonable evidentiary presumption, that the failure of the board to abide by its own procedures is a sign that it is engaging in censorship, was not rebutted by the extrinsic evidence. In _Zykan_, a series of related but ad hoc determinations all pointed in the direction of eliminating all feminist thought from the schools, while in _Pico_, the switch in reasons given for removing the books was evidence that the board was trying to cover its tracks. In _Zykan_ and _Pico_, the school boards were not selecting from among disciplines or subjects so much as they were addressing themselves to a current and controversial political issue that cut across many disciplines. As Professor Schauer has noted, free speech concerns vary "in direct proportion to the degree of uncertainty inherent in the category of proposition involved." Removing books on Lysenkoism may not be the constitutional equivalent of removing books on the New Deal or civil rights.

The use of the motivation test as a check on school boards' authority in extreme cases implies that school boards and librarians will necessarily have to consider the constitutionality of their actions. By setting an outer limit they may not exceed, they should ask themselves if they are removing a book because they genuinely believe it is not suitable for children or because they disagree with its underlying philosophy. This notion conforms to the theory that the courts do not have a monopoly on constitutional interpretation and that all public officials who swear or affirm their allegiance to upholding the Constitution are obligated to consider the Constitution in their decision making.

Support for this theory comes from the fact that there is no judicial supremacy clause in the Constitution and from the idea that a court's reliance on "a presumption of constitutionality" of official acts is meaningless unless

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131. See _id._ at 1309 (Swygert, J., concurring in part).
132. See also _Bicknell v. Vergennes Union High School Bd._, 638 F.2d 438, 442 n.6 (2d Cir. 1980) (opinion of Newman, J.).
133. _Zykan_, 631 F.2d at 1309 (Swygert, J., concurring in part).
134. _F. Schauer_, _ supra_ note 121, at 30. See also _Scanlon_, _ supra_ note 122.
the officials involved have actually contemplated constitutional requirements.\textsuperscript{137} Professor Morgan believes that the judicial supremacy theory could only be based on some uniqueness in the judicial process or in judges' capabilities.\textsuperscript{138} But the elements of constitutional interpretation are not unique. Constitutional interpretation, as Professor Morgan argues, involves institutional attributes and procedures that have been successfully employed by non-judicial institutions as they confront constitutional questions that may never reach the courts.\textsuperscript{139} These involve an attitude toward interpretation that is characterized by thoroughness and by an effort to disentangle policy questions from the constitutional issues. The participants must be qualified. Legal training helps, but is not necessary if the participants are moderate, willing to reason and deliberate, and have some concept of constitutional leadership.

Whatever the mode of consideration, there must be a fair representation of all interests or geographical regions, and there must be adequate rules and procedures that promote discussion, minimize polarization, and lead to an effective juxtaposition of the issues involved. Morgan cites examples to show that when all or most of these elements were present, Congress or its committees thoughtfully dealt with constitutional issues and members were able to reach decisions based on the competing principles presented, as opposed to the policies and politics involved.\textsuperscript{140}

This theory of multi-institutional, constitutional interpretation is eminently suited to decisionmaking by school boards in book selection controversies. School boards generally are of manageable size, and they generally consider issues as a committee of the whole.\textsuperscript{141} Because many decisions will never be challenged in court, or because, if they are, the courts are likely to defer to the school board's wisdom on educational suitability, board members may often be the only people seriously considering the constitutional issues. In the light of judicial deference to their book selection decisions,\textsuperscript{142} school board members have a particular responsibility to assess the constitutionality of their actions—only board members can exercise the self-restraint that will prevent the extreme cases from arising.

This underlying theme of \textit{Pico} suggests that perhaps the most important limit on school board book selection policies will be symbolic. The courts should not be involved in the school's day-to-day decisionmaking on book selection. Some lower court opinions read like book reviews, with the court deciding the case on the basis of whether its evaluation of a book is favorable or unfavorable.\textsuperscript{143} This kind of petty decisionmaking is unprincipled and

\textsuperscript{138} D. MORGAN, \textit{Congress and the Constitution} 335 (1966).
\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{142} See, e.g., Cary v. Board of Educ., 598 F.2d 535 (10th Cir. 1979).
substitutes judicial discretion for that of duly elected and appointed school officials. But if school boards know that the courts will sometimes get involved, even if only in extreme cases, and if they take their constitutional responsibilities seriously and restrain themselves accordingly, *Pico* may serve as an effective constitutional limit, even if that limit is poorly defined and mostly symbolic and self-enforced.

**VI. BEYOND UNCONSTITUTIONAL MOTIVATION: UNCONSTITUTIONAL DELEGATIONS AND DUE PROCESS OF LAW**

There are other judicial approaches to book selection policies, some more probable than others, that would not rely on a motivation test. One is premised on the doctrine of irrevocability of delegated authority: school boards, having generally delegated authority over book selection to others, may not invoke that delegation in particular cases simply because of their disagreement with the specific results produced by the previously mandated process. Another approach, which is more speculative and less appealing, would call for limited application of notions of procedural due process. The two alternatives are explored below, in greater detail.

**A. Irrevocable Delegations**

Analysis of the delegation doctrine requires focusing on what is meant by such words as government, state, and public officials. Governments are made up of people who have different perspectives and different places in the official hierarchy. Realistically, government communication powers and activities are so extensive that, inevitably, editorial responsibility is delegated to professional editors, those "street-level bureaucrats" who are responsible for the actual delivery of services. In the education context, the state legislature could apply its editorial judgments and vote on each book to be used in every school in the state. Instead, authority is delegated to state departments of education, state textbook commissions, local school boards, principals, teachers, and school librarians. This delegation of editorial authority, which often parallels the balkanization of governments responsible for education, is a bulwark against the centralized orchestration of a publicly established orthodoxy that Justice Jackson warned us about more than forty years ago. Safety lies in keeping politicians too busy to intervene in daily decisions about library books, though they may and should direct overall policy. What is to be feared are hyperkinetic politicians who seek to intervene in day-to-day book selection and curricular decisions.

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145. See generally M.G. Yudof, *supra* note 34, at 243.
The concept of delegated editorial responsibility is a powerful one. Consider, for example, the doctrine of academic freedom for teachers. The cases in which the doctrine has been applied seem difficult to justify, and the Supreme Court has never embraced the doctrine explicitly or adequately distinguished it from traditional first amendment doctrine. Should the fortuity of speaking and teaching for a living entitle an instructor to some special autonomy that other government employees do not share? Is it because they deal in words? May librarians assert a right to academic freedom? Why should a government employee who purchases books have any greater latitude than a government supply officer responsible for ordering paper and office equipment? Part of the answer, surely, is that books and words have a peculiarly important position in a democracy. But this answer could equally support an argument for greater supervision of teachers and librarians in public schools. What students learn is more important than which copying machine is purchased by a state highway department. If the government is truly an editor, then why should the government not have the same rights that private schools, newspapers, and broadcast stations have to control, hire, and fire? The answer lies in the place that teachers and librarians occupy in the system of government expression. The greater the ability of higher echelon officials to control what goes on in each school environment, library, and classroom, the greater the danger of the promulgation of a uniform message to captive listeners will be. If teachers were automatons, required to adhere rigidly to lesson plans and book selections, and if librarians were responsible only for processing book orders, with no discretion over what was ordered, ideological indoctrination would become more likely. In practice, varying discretion is given to teachers and librarians and the system works tolerably well.

What happens if editorial authority is not delegated to teachers or librarians? Is there a constitutional rule, derived from the first amendment concern for government established orthodoxy, that would require such delegations? Tempting though another answer might be, the answer is no. If, for example, a school board establishes firm rules in advance which allow it to make


150. See Goldstein, supra note 68.


154. See M.G. Yudof, supra note 34, at 244.
judgments about textbook and library acquisitions, and if the school board in fact makes such decisions over time, then its decisionmaking apparatus should not be subject to constitutional attack on the ground that delegation and division of authority over textbooks and library books is required.155 The student newspaper cases, however, implicitly reach a contrary result.156 Once a public school establishes a newspaper, although it need not have done so, most courts have held that it may not interfere with the editorial judgments of the student editors.157 The cases do not appear to turn on how much editorial discretion was given the students or whether faculty supervision was established in advance through duly promulgated rules.

How then does one explain cases like Parducci v. Rutland158 in which Judge Johnson upheld the teacher’s right to select a book of her students over the protestations of school authorities? Cary v. Board of Education,159 a recent Tenth Circuit case, begins to provide the answer. Judge Logan, in referring to Parducci and similar academic freedom cases, noted that

[i]n the cases which held for the teachers and placed emphasis upon teachers’ rights to exercise discretion in the classroom, seemed to be situations where school authorities acted in the absence of a general policy, after the fact, and had little to charge against the teacher other than the assignment with which they were unhappy.160

If higher authorities have no policy on book assignment or selection and thereby delegate such authority on de facto basis to teachers and librarians, they cannot later intervene in an ad hoc manner to limit the dissemination of the books or their acquisition. Similarly, where school authorities have promulgated in advance a set of rules delegating authority to teachers, librarians, or special textbook committees, they should not be able to undo that delegation on a selective basis merely because they are dissatisfied with the results of that delegation in a particular instance.161 In other words, the first amendment should be construed to embody a doctrine of irrevocable delegations of authority in book selection policies, at least where the revocation operates retroactively or on an ad hoc basis.

The irrevocable delegation doctrine is rooted in Supreme Court opinions that require federal agencies to follow their own procedures, even if those

159. 598 F.2d 535 (10th Cir. 1979).
160. Id. at 541.
procedures would not be constitutionally required in the first instance under the due process clause. One might argue that established procedures for book selection and removal create a sort of property interest, relying upon expectations which are embodied in positive law as to how the state will behave. A student may not have a "right to know" and a publisher may have no right to government largesse, but they should have a right to compel a government entity to honor the procedures that have been established for determining what is taught and which books will be used.

Less technically, an analogy may be drawn to the obscenity area where, as Professor Monaghan has noted, "the Court has placed little reliance upon the due process requirements of the fifth and fourteenth amendments, but instead has turned directly to the first amendment as the source of rules." In both situations the fundamental problem is a distrust of government decisionmaking relating to sensitive free speech issues. Obscenity may become a catch-all label for censoring objectionable political and literary works. Educational suitability may become an excuse for imposing an ideological orthodoxy. If government communication in schools may so overwhelm students that they risk losing their ability to think critically and independently, then the irrevocable delegation doctrine may make good sense. Courts are not put in the position of deciding what is indoctrination and what is education. The public schools remain free to alter prospectively their decisional structure. Having created a structure which is conducive to decentralized, balkanized, professional decisionmaking about schoolbooks (whether intended or not), school authorities should be required to abide by that structure. If they wish to take on the job of editing the school curriculum and selecting books, it should be a full-time job.

From a delegation perspective, it should make no difference whether the decision in question deals with book removal or book selection. In Pico, Justice Brennan limits his analysis to book removals. The extension of the right to book acquisition opens a can of worms that he wishes to avoid. But as Justice Rehnquist noted,

[If a school board's removal of books might be motivated by a desire to promote favored political or religious views, there is no reason that its acquisition policy might not also be so motivated. And yet the "pall of orthodoxy" cast by a carefully executed book-acquisition program apparently would not violate the First Amendment under Justice Brennan's view.]

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165. See M.G. Yudof, supra note 34, at 240-45.
An irrevocable delegation approach could manageably apply to both removal and acquisition of library books.

The irrevocability doctrine has not always been clearly applied by the courts. In the Cary case, the school board had established a High School Language Arts Text Evaluation Committee to review materials for language arts courses. The committee consisted of teachers, administrators, parents, and students, and apparently was charged with reporting its book recommendations to the school board. The books were not to be purchased by the district, but rather, by individual students. Only one book was rejected by a majority of the committee, but nine more were rejected in a minority report. The school board approved 1,275 books for the language arts classes, but rejected ten others—only six of which were listed in the minority report. The excluded books included *Clockwork Orange* (Anthony Burgess), *The Exorcist* (William P. Blatty), *Coney Island of the Mind* (Lawrence Ferlinghetti), and *Kaddish and Other Poems* (Allen Ginsberg).

The court upheld the exclusions, reasoning that if the board could decide not to offer contemporary poetry and if it could select the major textbook for the course, it could also prevent the assignment of other books. But the relevant question might well have been framed in terms of an irrevocable delegation doctrine. The board established a review procedure, and it is not all clear that the board had abided by it. The case should have been remanded for such a determination. For example, was the board required to select books on the basis of the information provided by the majority and minority reports? If it was free to disregard all recommendations, then what was the point of the procedure? Was the board, like the committee members, required to follow established standards and to give reasons for rejecting particular books? References to the general statutory powers of school boards do not answer these questions.

Perhaps the most plausible explanation of the Cary case is that the parties stipulated that the books were not obscene, that no systematic attempt had been made to exclude any particular philosophy, and that a "constitutionally proper decision-maker" might well determine that the books were proper for high school language arts classes. The presumption of censorship of ideas that an ad hoc revocation of the Committee's book selection authority normally entails, assuming that this was the case, was rebutted by plaintiffs' own concessions. The only plausible reason for the exclusion was a judgment about the educational appropriateness of the books. Defendants conceded that students were not prohibited from reading the books and that teachers were free to comment upon them and to recommend them. Only protracted discussion, which would in effect reinstate the forbidden books, was prohibited.

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168. Id. at 538.
169. Id. at 543.
But even so, the Cary court might have held the board to its own rules, thereby retaining a structure which preserved first amendment values.

In contrast to Cary, the court in Salvail v. Nashua Board of Education\textsuperscript{170} relied heavily on the failure of the board of education to follow its own procedures\textsuperscript{171} in a decision to remove all and then parts of Ms. magazine from the school library. In that case, the board approved guidelines for the selection of instructional materials, delegating its editorial function to the "professionally trained personnel employed by the school district."\textsuperscript{172} The guidelines contained criteria for selection, including quality of presentation, appropriateness for age, subject, ability levels, and literary quality. The guidelines also provided that the chosen books should help students be aware of the contributions of both sexes and of various religious, ethnic, and cultural groups, and that on controversial issues, the collection should be balanced and insure the representation of various points of view.

In the event of a citizen complaint or question about book selection, the guidelines provided for appeals to an Instructional Materials Reconsideration Committee, with subsequent appeals to the superintendent and school board.\textsuperscript{173} Bypassing these procedures, a board member presented a formal resolution to remove Ms. magazine from the school library, and the resolution was approved by the board despite the protestations of the superintendent that the established procedures should be followed. The court held that the board "was required to follow [the guidelines] in its attempt at removal of Ms. magazine from the shelves of the high school library."\textsuperscript{174} This conclusion was sufficient to support the court's order against banning the magazine from the school library. It was unnecessary for the court to address broader censorship issues, relating to whether the alleged "sexual overtones" of the magazine were simply a pretext for banning an objectionable point of view.\textsuperscript{175}

The irrevocability doctrine could have been the basis for the Supreme Court's decision in Pico. Ten books, including The Fixer, Slaughterhouse Five, The Naked Ape, and Soul on Ice, were removed from the school libraries. This was accomplished, as Judge Sifton in the lower court noted with amusing understatement, through "unusual and irregular intervention in school libraries' operations by persons not routinely concerned with such matters."\textsuperscript{176} Over the repeated objections of the superintendent, the board then bypassed normal selection and removal procedures and banned the books. The board eventually appointed a committee to read the books and make recommendations to

\textsuperscript{170} 469 F. Supp. 1269 (D.N.H. 1979).
\textsuperscript{171} But see Bicknell v. Vergennes Union High School Bd., 638 F.2d 438 (2d Cir. 1980).
\textsuperscript{172} Salvail, 469 F. Supp. at 1271.
\textsuperscript{173} Id.
\textsuperscript{174} Id. at 1273.
\textsuperscript{175} Id. at 1274.
the board, but not until after the board has issued a press release condemning the books. After the lawsuit was filed, the board members emphasized that their decision was premised on "the repellent and vulgar language present in the books."\(^{177}\)

If the board had followed its own procedures from the beginning, rather than circumventing them at every turn, its decisions would have been more insulated from legal attack. This process would have required a full investigation into the books and a hearing; it would have resulted in less of an appearance of prejudgment by the board. Perhaps observance of the procedures would have led to a more timely and thorough exploration of the constitutional issues. But the disregard of its procedures strengthened the inference that the board was improperly motivated to remove ideologically objectional books.

**B. Procedural Due Process**

Apart from bolstering the voluntary delegation of school board authority, one may think about applying more traditional due process techniques to the book selection process. Only one court has adopted this position. In *Loewen v. Turnipseed*,\(^{178}\) a case arising in the Northern District of Mississippi, a rating committee, appointed by the Governor and the State Superintendent of Education, approved only one book, *Your Mississippi*, for purchase by the State Textbook Purchasing Board. Although the board could adopt up to five books, the rating committee refused to rate the other book under consideration, *Mississippi: Conflict and Change*. The latter was a new book that, "unlike the old textbook . . ., discussed racial conflict frankly and pointed out the contributions that black people had made to the state."\(^{179}\) It was written by faculty and students at Tougaloo and Millsaps Colleges. Several textbook publishers had turned it down, presumably because it was too controversial, but the authors finally found a willing publisher at Random House. Even though other text allegedly had not been updated for ten years and did not discuss racial conflict, the rating committee vote to rate it and to not rate the new book.\(^{180}\) The vote split clearly along racial lines: the five white members of the committee voted for the old book and the two black members voted to rate both books. The purchasing board was constrained to purchase only those books rated by the committee. The court held that the selection was motivated by racial discrimination, was intended to perpetuate segregation, and was, therefore, unconstitutional.\(^{181}\)

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177. *Id.* at 411.
179. F. FITZGERALD, supra note 51, at 29.
180. *Id.*
Along the way, the court held that the rating committee procedure for selecting textbooks was also unconstitutional. Mississippi law did not provide for review of the rating committee’s decision; thus, it declined to give “those adversely affected by it a voice in the matter.” Since the publishers of the books were given an opportunity to present their positions to the committee, presumably the court was referring to the authors, students, faculty, and school districts across the state. Indeed, they were the plaintiffs.

The Loewen holding appears difficult to sustain, for book purchasing decisions appear to be a legislative, and not an adjudicative, matter. A governmental body is not constitutionally required to hold an adversary hearing in deciding to award a construction contract for a public building. But, perhaps, as in the case of the irrevocable delegation doctrine, first amendment interests might trigger doctrinal innovation under the due process clause.

The stigma or stigma plus cases, decided under the due process clause, may provide a rough parallel. Where governmental communications may stigmatize a person and where that person is simultaneously deprived of some entitlement, the government may be required to hold a hearing to determine the facts of the matter. The notion suggests that a liberty interest has been violated. A classic case would be the dismissal of a public employee, accompanied by publicized charges that he had engaged in some reprehensible behavior. As I have argued elsewhere, these cases are best understood from the perspective of government expression that may do significant damage to an individual’s life chances. In a modern industrial society, widely publicized government accusations may harm a person as much as the loss of liberty through incarceration or the taking of his physical property. A hearing requirement does not mean that the government may not speak badly about individuals, but only that, under some circumstances, it must abide by procedures designed to insure the accuracy of the government’s remarks.

In Loewen, government may be viewed as expressing itself through its textbook selections; the potential reputational harm to authors, students, and others is great, and perhaps a due process hearing makes sense despite the lack of fit between these facts and prior due process decisions. This aspect of Loewen, among others, is dubious. The reputational harm is no greater than that from any governmental decision to buy from one private contractor rather than from another. Even affirmance of the due process approach would require the delineation of some limiting principles. Surely, governments are

182. Id. at 1153.
185. See Monaghan, supra note 163.
188. See L. Tribe, supra note 163, at §§ 10-11.
189. M.G. Yudof, supra note 34, at 263-80.
not required to hold a due process hearing every time they wish to make a
decision about funding research, purchasing a book, subsidizing the arts, or
publishing a manuscript at the Government Printing Office.

A distinction might be drawn between books that may be marketed only
in schools, and those that have a more general market. Or, an inquiry might
be made into the reasons for rejection of a textbook. Some reasons are more
stigmatizing and financially devastating than others. But, in the last analysis,
the due process approach does not appear to be very promising, as the element
of communication is minimal in book selection decisions.

Finally, one should note that, in Loewen, the court did not order the rating
committee to alter its procedures to conform to its opinion. Rather, the court
ordered the defendants to approve the new textbook. The practical result
of the case was that both books under consideration were approved, and that
local Mississippi school districts and dioceses were free to choose the one that
they preferred. This is indeed a Solomonic remedy. But more importantly,
the decision effectively placed the power to make textbook selections in the
hands of local communities and local school officials. Not only is this consis-
tent with the irrevocable delegation doctrine, but also it has overtones of struc-
tural due process.

Perhaps, as in the Supreme Court’s pornography,192 school financing,193
and zoning194 cases, the district court intended to emphasize the need for
community, and not statewide, decisionmaking.195 If schools are to reflect
the values of the communities in which they are located, then each community
should be able to determine its own standards for schoolbooks. Parents and
publishers do not decide, but neither should distant state officials. While the
constitutional underpinnings of the result are highly questionable, community
decisionmaking is consistent with both the mission of schools and the first

190. Loewen, 488 F. Supp. at 1155.
191. As Professor Tribe has explained structural due process,
   we may begin by observing that all . . . of the constitutional models thus far
   examined have been concerned with ways of achieving substantive ends through
   variations in governmental structures and processes of choice.
   . . . [A structural justice] model [is] concerned [with] . . . match[ing] decision
   structures with substantive human ends.
   . . . I mean [then] the approach to constitutional values that either mandates
   or at least favors the use of particular decisional structures for specific substantive
   purposes in concrete contexts, without drawing on any single generalization about
   which decisional pattern is best suited, on the whole, to which substantive aims.
Tribe, The Emerging Reconnection of Individual Rights and Institutional Design: Federalism,
   e.g., Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935); Hampton v. Mow Sun Wong, 426 U.S.
195. See generally L. Tribe, supra note 163, at 974-90.
amendment interest in avoiding wholesale indoctrination through a centralized decisionmaking process.

VII. RESERVATIONS AND REFLECTIONS


With regard to traditional due process guarantees, recent Supreme Court decisions do not bode well for their extension even to a limited class of book selection cases.\footnote{99. See supra note 191.} Interestingly enough, the structural due process approach, requiring that local communities make book decisions, is highly consistent with the prevailing philosophy of many of the Justices.\footnote{But see supra note 191.} But the precedents are few, they are easily distinguishable, and it is far from certain that the Court will accept the structural due process positions of such scholars as Professor Laurence Tribe and Professor (now Justice) Hans Linde.\footnote{99. See supra note 191.}

But what remains of the motivation test embraced by the \textit{Pico} Court? It remains an open question whether the sorts of motivation lines that the Supreme Court and the circuit courts have sought to draw are workable or desirable. How does one know an "orthodoxy" when one sees it? Is not all education centered on establishing certain orthodoxies and editing out of the curriculum ideas and facts that are deemed wrong or unimportant by the electorate?

When Justice Stevens states that "a university legitimately may regard some subjects as more relevant to its educational mission than others," one can hardly dissent. When he further notes that a university "may not allow its
agreement or disagreement with the viewpoint of a particular speaker" to be decisive, one begins to wonder whether the distinction between relevance and disagreement is naive and illusive. To raise a specific example, the *Pico* and *Zykan* decisions assume that the exclusion of sexually oriented books or books with dirty words is constitutionally permissible. Why is this not as much of an imposition of values as is implicit in the exclusion of a feminist, religious, or civil rights point of view? Why is the inculcation of standards of morality and sexual behavior somehow more legitimate? Why is not the judicial attitude toward sexually oriented books inconsistent with the premise that school authorities may not pass on the ideological appropriateness of books for youngsters in the schools? On the other hand, if sexually explicit books may be removed, why cannot other offensive books be removed? Why should public schools be constitutionally forbidden from honoring the views of parents in a particular community who may not wish that their sons and daughters be subjected to deviant political perspectives?

The Court’s motivation test essentially boils down to a classification of government expression; current political ideology is more suspect than past political ideology (that of the “Founding Fathers”), sexual morality, civic virtue, science, and language. With this one exception, born of a distrust of government efforts to speak to current political controversies, the Court eschews any effort to locate the Archimedean point between critical reflection and socialization to cultural values. Perhaps even this modest effort goes too far, for a categorization of such expression is not a substitute for a conceptualization of the Archimedean balance. But the inability of judges to resolve an ancient enigma suggests what everyone should realize: the primary restraints on excessive government communication activities and on the promulgation of official orthodoxies, in the schools and elsewhere, are political, social, and attitudinal. A society must nurture and sustain its own living traditions; philosophers and judges alone will not define our future possibilities.

Restraint depends on the independence of private publishers and their willingness to battle for their first amendment beliefs. It depends on persuading public officials and the public itself that ideological censorship is not the solution. It depends on revitalizing traditions of local control of education and on keeping state and federal governments as far removed as possible from schoolbook decisions. More broadly, the accommodation of autonomy and cultural transmission, individuality and community, negative liberty and positive liberty, ultimately requires dedication to traditional liberal values of civility and tolerance.

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201. See generally M.G. Yudof, *supra* note 34, ch. 7.
But the education of the young can never fully escape from the Archimedean dilemma, even if it is informed by a spirit of toleration. Perhaps it is true, as Umberto Eco admonished the villain in *The Name of the Rose*, a book about a medieval library, "the Devil is the arrogance of the spirit, faith without smile, truth that is never seized by doubt." Education, however, confronts more than one devil. Without accepted truths and conventions, a society risks ignorance: "[W]hen I saw that [Cicero] . . . doubted everything, I concluded I knew as much as he and did not need anybody in order to be ignorant."

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