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Abstract

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ABSTRACT

Unpackaging *Island Trees* for the Principal Practitioner

School administrators face a plenitude of issues throughout the course of a career, many of which necessitate some working knowledge of school law. Administrators are not lawyers, after all, and do not possess anywhere near their level of expertise. Parental and community concerns are often a source of frustration and make for problematic situations that need an administrative response sooner rather than later. It is imperative for the administrator to have a legal approach action plan in place for every contingency possible. When a parent, or more likely a group of parents, ask that a certain book be removed from the classroom library or the school library, how should the principal, classroom teacher, or school librarian respond? The purpose of this study is to examine the very ambiguous relevancy of the U.S. Supreme Court decision of *Island Trees School District v. Pico* (1982) and specifically examine real life scenarios and possible solutions concerning censorship for the school principal.

Keywords: *Island Trees School District v. Pico*, censorship in public school libraries, *stare decisis*, First Amendment, local control

INTRODUCTION

As did many citizens, I watched with some fealty the Senate hearings for the confirmation of Brett Kavanaugh to become a Supreme Court jurist. One of the many poignant moments in the hearing was when California Senator Feinstein asked Kavanaugh about *Roe v. Wade*, the Supreme Court case that made abortion legal, as to whether or not he considered it 'settled law.' Kavanaugh proceeded in his response to Feinstein saying that *Roe v. Wade* is indeed an important precedent, but not all legal scholars refer to *Roe* as settled law, although *stare decisis* is relevant (Biskupic).

The point of Kavanaugh's testimony concerning his views of *Roe* are instructive for school principals in considering *stare decisis* and the precedent of prior Supreme Court cases. *Stare Decisis* is a Latin term that means "to stand by that which was decided." *Stare decisis* is not inviolable by any means, however the courts are not supposed to overturn a previously decided case unless it can be shown that there is good cause for overturning the decision (Gifis).

History is replete with examples of the Supreme Court reversing a previous decision made by the court that was considered to be settled law. In the area of public education a famous example is the Supreme Court's repudiation and reversal of the separate but equal doctrine of the *Plessy v. Ferguson* decision of (1896) with the *Brown v. Board of Education* (1954) decision. *Plessy* placed a hold on segregated education as an example of racial separation that did not violate the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court's *Brown* decision utilized the equal protection clause of the Fourteenth Amendment to eradicate patterns of racial discrimination in public schools. *Plessy* and the doctrine of separate but equal was settled law for five decades until it wasn't.

A second example of a settled educational issue being reversed by the Supreme Court is *Minersville School District v. Gobitis* (1940) decision that it was not a First Amendment violation for schools to expel a Jehovah's Witness (or any student) for refusing to recite the pledge of allegiance. No comment in the 8-1 decision favoring the school district gained more notoriety than a portion of Justice Frankfurter's assertion that if the Court had invalidated the district's

salute requirement, it would have succeeded in transforming the Supreme Court into a national school board.

Three years after the *Gobitis* decision, the Supreme Court reversed course completely in *West Virginia State Board of Education v. Barnette* (1943) declaring in a 6-3 majority that it was unconstitutional for public schools to expel students because they refused to salute the American flag.

For the non-lawyer I believe that the concept of 'settled law' can be explained as a court ruling that exists in the present, but may be overturned at some future point in time by the Supreme Court, and sometimes in very short order. Therefore, calling something 'settled law' is a misnomer. What we understand to be acceptable education procedures today in regard to U.S. Supreme Court decisions can become inaccurate tomorrow should the Supreme Court revisit a prior decision.

It is important for the principal to understand that a ruling of an educational decision by the Supreme Court of the United States is a decision to be faithfully followed until the Supreme Court reverses or modifies the decision. Lower courts, both federal and state, will not overturn an existing Supreme Court decision, but may place a unique spin on a decision if the case presents alternative and unique facts. Schimmel, Eckles and Militello are adamant in their belief that the principal of the school is the chief law instructor for the building and must be a conscious, informed, and effective school law teacher for the staff (Schimmel, et.al.).

Many court decisions as well as administrative decisions are political decisions in the age of "Kardashian politics where noise is followed by noise followed by hysteria followed by more noise (Coppins)." Otherwise seemingly irrelevant matters to the majority are often turned into community disruptions which dramatically impact the outside perception of the local school, the board and the administration.

In the school library, parents, community members, or school board officials sometimes encounter books that they believe should not be read by kids and try to have them removed from the shelves. If there is any lodestar decision made by the Supreme Court it is *Little Trees v. Pico*. The decision of *Little Trees* ruling is difficult to understand without a deep dive into the case. When I ask graduate students to read the case in school law class and determine if school officials may

indeed remove books from the school library, the class is normally split right down the middle, some saying yes and some indicating no, and several concluding that it depends. "It depends" is seemingly the appropriate response to the *Island Trees* decision.

Books are objected to for a variety of reasons. Typically, objections arise from parents or other members of the community taking certain passages contained in the book out of context from the message of the book. Most pressures for censorship come from parents who disapprove of language or ideas that differ from their personal views and values, but demands for censorship can emerge from anywhere across the religious, political, and ideological spectrum. Overall literacy and educational value is ignored. Religious grounds have long been cited as a reason for censoring books as parents, ministers, and religious organizations object to works that discuss sex, evolution, witchcraft, or themes of the occult.

Books are often challenged for the language they contain, despite the fact that profanity is often used in literature to convey social or historical context, local dialect, or simply to better depict reactions to real-life situations. *Huckleberry Finn* by Mark Twain has been the subject of banishment from the curriculum many times.

The use of sex and sexuality as depicted in many of the works of Judy Blume have caused concern among parents. *The Diary of a Young Girl* by Anne Frank has been challenged by school boards because of certain sexual passages that they feel are inappropriate to young children. Children's literature such as *It's Perfectly Normal* by Robbie Harris and Leslea Newman's *Heather Has Two Mommies* often face demands for removal for their frank discussion about sexual health or focus on LGBT issues.

The conclusion of the Supreme Court is far from crystal clear and the ruling may open the door to censorship shenanigans by school officials. *Island Trees* is far from settled law and the conclusions of the Supreme Court should be considered very carefully by the school district when reading materials are challenged by citizens. Censorship demands require the balance of First Amendment rights against such concerns as "maintaining the integrity of the educational program, meeting state educational requirements, respecting the judgements of professional staff and respecting reputable literary analysis (The First Amendment in Schools)."

Although the *Island Trees v. Pico* decision gives school officials some direction on how a contentious book may be removed from the shelves, it raises many, if not more, questions for school administrators than it answers (Kraus, p. 343).

As with many issues in school law, the answer to a legal question is "it depends" based on the specific facts of a question. Administrators may make reasonable guesses based on past court decisions, however, concerning censorship issues aligned with *Island Trees v. Pico* there are some slippery slopes, as attorneys enjoy saying. The availability of the school board or administration to ban a book from the shelves depends largely on their motives.

READING AS A FIRST AMENDMENT RIGHT

No reputable legal scholar or school administrator disputes the fact that the portion of the First Amendment to the U.S. Constitution's clause about Congress shall make no law....."abridging the freedom of speech, or of the press" includes the right of the individual to read. Several court decisions over the years have interpreted the First Amendment to include not only the freedom of speech but also the free and open access to speech. This translates into what is commonly known as the freedom to read.

As with most issues, in regard to the right to read material, an important distinction should be made between a challenge to a book and the ban of a book. A challenge is an attempt to remove or restrict materials, based upon the objections of a person or group. A banning of reading material from a library is the subsequent removal of those materials.

Those that make challenges against reading materials in school libraries often do so with the best of intentions in mind. Challenges to remove books from schools are meant to protect the student, frequently young children, from uncomfortable or difficult ideas and information. It is not always the case, but typically most challenges involve some components of language, sexual or racial references, which the parent does not view as appropriate. More insidious is the challenge that occurs because a political viewpoint or idea is not palatable from the parent or community's point of view. In this instance, school board or administrative interference is likely to be motivated by officials' lust for power, misguided insecurity, or their misguided responsiveness to minority prejudice, anger, or panic (Waldron, p. 20).

When reading materials are banned or access is blocked based on the opinion of a minority it is tantamount to censorship and in violation of the First Amendment rights according to the Supreme Court decision in the *Island Trees v. Pico* ruling in 1982.

UNPACKAGING ISLAND TREES FOR THE PRINCIPAL PRACTITIONER

In September of 1975 three members of the Island Trees School District attended a conference sponsored by a politically conservative organization of parents. At this same conference the three board members obtained lists of books described by the conference sponsors as objectionable reading fare for students. In a covert operation one of the school board members examined the books in the high school and junior high school library to determine if any of the books listed from the conference were in fact found in the school district's libraries (First American Library).

The Court has long recognized that local school boards have a very broad discretion in the management of school affairs. The *Epperson* decision reaffirmed that, to a great extent, "public education in our Nation is committed to the control of state and local authorities (*Epperson v. Arkansas*)." The *Ambach v. Norwick* decision stated that the Court was in full agreement that local school boards must be permitted to establish and apply their curriculum in such a way as to transmit community values and that there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political (*Ambach*).

The decision of *West Virginia v. Barnette* recognized that while school boards had wide latitude in local decision making in matters of education, the decisions made "must be exercised in a manner that comports with the imperatives of the First Amendment" (*West Virginia*). The decisions of the Court in *Epperson*, *Ambach*, and *West Virginia* all confirm that the local board of education has relevancy when establishing local school policies, yet the First Amendment cannot be violated by school board authority.

The board member determined that nine of the listed inappropriate literary works were in the high school library and one other listed book was found in the junior high school library. (Subsequently, it was determined that another book on

the list had been approved by the board for inclusion in a twelfth-grade literature course). A meeting of the board members, the superintendent, and the principals was called to review what the member had found in terms of the listed objectionable books. The board gave the "unofficial directive" that the ten titles were to be removed from the shelves and taken to the board office so that the members could read and access them as to their educational appropriateness.

The superintendent expressed to the board that there was a district policy in place designed to expressly handle such literary challenges. The superintendent recommended that the decision to remove the books be approached through the existing policy. Ignoring the superintendent, the school board then appointed a committee of parents, school officials, and other members of the community to read and review the books. The committee was to take into account the books' educational suitability, good taste, relevance, and appropriateness to age and grade level (Pelman and Lynch).

The committee recommended the return, subject to parental approval, of one of the books to the library and the curriculum; that four books remain in the library without any type of restriction, the return to the library of one book that could be read by parental approval; that two books be removed, and no conclusion could be reached by the committee on the other two books.

After the directive to review the books was carried out by the committee it became public knowledge and the board issued a press release rejecting the findings of the committee and ordered that all nine library books be removed. The board characterized the removed books as "anti-American, anti-Christian, anti-Semitic, and just plain filthy," and concluded that it was the board's duty and moral obligation to protect the children in the Island Trees School District from this moral danger as surely as from physical and medical dangers (First American Library).

A group of high school students filed a suit in response to the action of the school board. A federal district court upheld the board's right to remove the materials, citing the legal authority of local school boards to determine and direct educational policies. Appealing the decision to the U.S. Federal Court of Appeals, the court overturned the decision of the district court's ruling and ordered a new trial in which the merits of the removed books should be considered.

The Federal Court's decision was to remand the case back to the federal district court for a hearing on the merits of the students' claims. The school board then appealed this decision to the U.S. Supreme Court.

The decision of the Supreme Court was hardly pellucid. *Pico* divided the Supreme Court 5-4, but even the closeness of the decision understates the degree of division. The nine justices produced six different opinions, and no one opinion claimed a majority. No single opinion commanded a majority of the Court, or announced any legal binding rule. Justice Brennan announced the judgement of the Court joined by Justices Marshall and Stevens, and joined in part by Justice Blackmun.

Although Justice White concurred in the majority decision and provided the necessary fifth vote for the bottom-line result, his reasoning was different from the other four justices in that he rejected the need to speak about the board's decision to remove the books until there were facts determined by the lower court that might conclude the case. As a consequence the Justices split 4-4 on the First Amendment question, and thus *Island Trees v. Pico* set no precedent for future cases.

Justice Brennan in a plurality opinion joined by Marshall, Stevens and in part by Blackmun believed that the First Amendment rights of the students had been violated. Brennan noted that the Court had previously held that students do not "shed their rights to freedom of speech or expression at the schoolhouse gate (*Tinker*)." Brennan's conclusion was that the First Amendment in this case included the right to read library books of the student's choosing.

Justice Brennan reasoned that the school board's book removal violated the students' First Amendment right. Brennan's decision made it clear that the opinion only addressed book excision and not book acquisition. Brennan wrote in *Pico*, "We hold that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion (Driver, p. 113)."

Justice Blackmun in another opinion written by a member of the plurality in *Pico*, wrote that there are times when the removal of books can be easily understood. Stating what seems to be the obvious, Blackmun stated that books

may be removed without question if they are worn or if the space can be used by a more popular book. Books may also be removed if it can be demonstrated that they are "educationally inappropriate." Justice Blackmun further stated that he approved the removing of a "learned treatise" from the elementary school library which criticized American Foreign Policy was appropriate because students would not understand the criticism.

"Not being able to understand the criticism or content" begs the question of whether or not the book by Pulitzer Prize winning historian Joseph J. Ellis that is critical of the hypocritical sexual activities of President Thomas Jefferson and his pronounced views of slavery, would find a place on a high school library shelf (Ellis, pp. 28-30).

Four Justices offered dissents to the case. Chief Justice Burger along with Justices Powell, Rehnquist, and O'Connor joined in Burger's dissent in which he famously stated that were "this to become the law, this Court would come perilously close to becoming a super censor of school board decisions (*Island Trees v. Pico*, 457 U.S. at 885, Burger dissenting). In his dissent Burger states:

"Presumably all activity within a primary or secondary school involves the conveyance of information and at least an implied approval of the worth of that information. How are fundamental values to be inculcated except by having school boards make content-based decisions about the appropriateness of retaining materials in the school library and curriculum? In order to fulfill its function, an elected school board must express its views on the subjects which are taught to its students. In doing so those elected officials express the views of their community; they may err, of course, and the voters may remove them. It is a startling erosion of the very idea of democratic government to have this Court arrogate to itself the power the plurality asserts today (Ibid. at 889.)"

Burger concludes his disagreement with the plurality's decision categorically rejecting the notion that the Constitution dictates that judges, rather than parents, teachers, and local school boards, must determine how the standards of morality and vulgarity are to be treated in the classroom.

Expressing similar sentiments as Burger, Justice O'Connor's dissent included the following: "If a school board can set the curriculum, select teachers, and determine initially what books to purchase for the school library, it surely can decide which books to discontinue or remove from the school library so long as it does not also interfere with the right of students to read the material and discuss it (Ibid. at 921)."

Pico's bottom line has meant that public schools may not banish volumes for overtly ideological reasons. In their desire to remove books with 'certain ideas,' often the school board will show their hand by making insensitive statements as to why the book should be removed. The federal district in Kansas found that a school board violated the First Amendment by requiring its schools to purge copies of Nancy Garden's *Annie on My Mind*. This is a young adult novel that described a romantic relationship between two seventeen-year-old girls. In finding that the school board violated the First Amendment, the district court quoted extensively from the blatantly homophobic testimony school board members offered in their decision to remove this book. As an example, one board member testified that engaging in a gay lifestyle can lead to death, destruction, disease, emotional problems (*Case*).

Little Trees has been interpreted to allow school boards some latitude in choosing to remove a book. The four justices in the plurality agreed that pervasive vulgarity or lack of educational suitability could be reasons for book removal. These two standards were supported by only four justices with Justice White allowing his name to be added for a majority of 5-4.

A few basic ideas may be gleaned from *Little Trees*. School boards and administrators are responsible for supervising the education of students in their care and can remove materials that are deemed educationally unsuitable or pervasively vulgar. Secondly, school boards cannot impede the student's right to read a book just because the board objects to a certain view point or idea expressed in the book. Thirdly, school boards need to follow established procedures to remove materials from school libraries or classrooms,

In *Counts v. Cedarville School District*, a federal district court in Arkansas invalidated the principal's plan, which was enacted at the school board's request, to restrict access to J. K. Rowling's Harry Potter books after a person in the community objected that all of the books taught witchcraft and the occult.

Although the principal allowed the students access to the books with signed parental permission, the district court in Arkansas found that this arrangement still violated the First Amendment rights of students (*Counts*).

In *Minarcini v. Strongsville City School District* decision, the Sixth Federal Circuit concluded in 1976 (six years before *Island Trees*) that the school district could not remove *Catch-22* and *Cat's Cradle* from the library, reasoning that the "library is a storehouse of knowledge" and students have the First Amendment right to receive information and the librarian has a right to disseminate it (*Minarcini*).

A later case also from the Sixth Circuit ruled that a book mentioning telekinetic and magical powers could not be removed from the curriculum because it offended the religious beliefs of complaining parents. The Sixth Circuit stated that the book "was merely required reading and not required worship (*Mozert*)."

These decisions seem to fall within the guidelines of Justice O'Connor's dissent, stating that the right of students to read material and discuss should not be abridged.

THE CONTENTIOUS BOOKS OF *ISLAND TREES* V. *PICO*

Most are curious as to what the contested books were in this case. Should one wish to read all of the rather provocative writing contained in the books I would suggest going to the Cornell law website (Cornell). The synopsis of why the book was considered inappropriate by the school board of *Island Trees* has been carefully abbreviated as to not offend the reader. Whether or not a school board or administrator would retain these books should they be in the school library and be objected to by someone is a decision that can be made at the local level according to *Island Trees*, without being in violation of the First Amendment.

- 1) *Soul on Ice* by Eldridge Cleaver. Contains very graphic sexual scenes and references.
- 2) *A Hero Ain't Nothing But A Sandwich* by Alice Childress. Use of the F*** word.
- 3) *The Fixer* by Bernard Malamud. Sexual scenes, bad language and use of the F*** word.
- 4) *Go Ask Alice* by Anonymous. Inappropriate sexual references and language.

- 5) *Slaughterhouse Five* by Kurt Vonnegut, Jr. Sexual references and inappropriate language.
- 6) *The Best Short Stories by Negro Writers*, edited by Langston Hughes. Inappropriate language.
- 7) *Black Boy* by Richard Wright. Discriminatory references and inappropriate language.
- 8) *Laughing Boy* by Oliver LaFarge. Inappropriate language.
- 9) *The Naked Ape* by Desmond Morris. References to human sexual activities.
- 10) *A Reader for Writers* edited by Jerome Archer. The *Island Trees v. Pico* decision offered no reason for the proposed exclusion of this book.

Some sources include the book *Down These Mean Streets* by Piri Thomas as being part of the *Little Trees* case (Crutcher).

Among the 'Top 100 Banned/Challenged Books of 2000-2009 include many famous and popular literary works. A random sampling of the challenged titles with their numbered position follows.

- 1) *Harry Potter* (series), by J.K. Rowling.
- 5.) *Of Mice and Men*, by John Steinbeck
- 13.) *Captain Underpants* (series), by Dav Pilkey
- 14.) *The Adventures of Huckleberry Finn*, Mark Twain
- 19.) *Catcher in the Rye*, by J.D. Salinger
- 32.) *Bless Me, Ultima*, by Rudolfo Anaya
- 36.) *Brave New World*, by Aldous Huxley
- 46.) *Slaughterhouse-Five*, by Kurt Vonnegut
- 52.) *The Great Gilly Hopkins*, by Katherine Paterson
- 67.) *A Time to Kill*, by John Grisham
- 73.) *What's Happening to My Body Book*, by Lynda Madaras
- 81.) *Black Boy*, by Richard Wright
- 88.) *The Handmaid's Tale*, by Margaret Atwood
- 89.) *Friday Night Lights*, by H.G. Bissenger (Top 100)

Most enlightened educators might ask "Why is that book being banned or challenged?"

Island Trees v. Pico majority opinion concluded that books may not be removed from the library shelves simply because the board or school officials dislike the political perspectives or social ideas discussed in the books, when the action is motivated simply by the officials' disapproval of the ideas involved. (As noted in the prior decisions of *Case* and more recently in *Counts*, the courts will take a hard look at the motivations for the censorship of books).

School boards are advised to have a procedure in place, perhaps a standing committee with a title such as "Materials Reconsideration Committee," whose members not only include two school board members, but also the school's librarian, a few teachers and the principal. The complainant would be asked to fill out a form listing the title, pages numbers, and the reason why the objection is being made. This form would then be delivered to the members of the committee and a time would be scheduled to consider the complaint within a reasonable time. Whether or not the committee would meet in closed session along with the complainant(s) if they would so choose, would depend on the Open Meeting Act interpretation.

The *School Code of Illinois* states that "school boards have broad authority to manage the schools, including the authority to select or remove textbooks from the curriculum and to determine courses of study." The First Amendment imposes limitations on the discretion of a school board to remove library books from the schools or otherwise limit student access to ideas (Braun, p. 105). The *School Code* utilizes *Little Trees v. Pico* as the Supreme Court reference.

For the sake of argument, it appears that most any book might be removed if it is not age appropriate or engages in excessive inappropriate language or sexual material. What constitutes "excessive" is still an opinion of the local school board.

The book *Soul on Ice* by Eldridge Cleaver absolutely has a place on many library shelves, but it is a rough read in terms of sexual content in the eyes of adults in many communities. If a complaint about this book was initiated in many localities it would seem to be reasonable to consider it for elimination from the shelves. The prudent principal in a smaller rural community might be advised not to fight this fight. It would be a progressive community indeed that would add *Soul on Ice* to the required reading list for high school students, and yet in some urban high schools it is required reading.

CONCLUSION

It is still a local decision when a book is challenged, whether or not to remove it or let it be. If a second grade teacher wishes to have the students read one of the *Walter the Farting Dog* series to better explain flatulence to the students, and a parent complain, should the principal allow students to read this book as it references a human condition; or disallow the book because of the word "fart (Kotzwinkle)?" The book is highly recommend for ages 5 through 8. This is a local decision and the principal may be tempted just to ask the teacher not to utilize it again. Should a lawsuit be initiated by parents opposed to the book if the principal decides to retain it, or should the principal conform to the request to eliminate the book, would another group of parents file a lawsuit to retain the book? There does not seem to be one answer for this dilemma.

With more than five-hundred-thousand different book titles published in the United States each year it, would not be beyond imagination that someone could conceivably find something to object to in each book.

J.B. O'Neil has written several books of gross-out humor for grades three and four. One of my grandson's favorite series is *The Disgusting Adventures of Milo Snotrocket*. His favorite in that particular series is one entitled *Ninja Farts*, and no, it is not in his classroom library. He owns the series. I can only wonder the outcome should he bring this book to school to share. Lots of possibilities might ensure, I might actually be surprised that high interest books are encouraged. Pitch it where they can hit it, when it comes to reading, is a philosophy of mine.

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