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ABSTRACT

The 1982 Supreme Court decision in "Pico v. Island Trees Union Free School District" occasioned an ideological war over interpretation of the First Amendment, but a review indicates that it is an additional case in the long-standing attempt to find the proper balance between the amendment and the efficiencies of government. In "Pico," the issue was whether the amendment imposed limitations upon a school board's discretion to remove books from a school library. One ideological position promotes the First Amendment and an open society; a second position favors government dividing itself into special purposes and being vested with discretion to find the efficiencies to achieve its ends. The First Amendment positionists recognize the amendment's description as the indispensible condition of other freedoms. The cases upholding the First Amendment seem to emphasize two themes: (1) the function of freedom of speech in individual expression and development, and (2) the value of freedom of expression in a representative democracy. Those in favor of government performing specialized functions prefer absolute discretion because the realities dictate discriminating choices so that government's primary mission is not disrupted. The limited open forum cases allow courts to invade these special purpose government entities so that the First Amendment can survive, given the fluctuations of government. (CJH)

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Censorship: Post Pico

John David Terry, II

In *Pico v. Island Trees Union Free School District*,[1] the Supreme Court addressed the issue of whether the first amendment imposed limitations upon a school board's discretion to remove books from a school library.

The board members in *Pico* received a list of books at a politically-conservative conference; the list characterized the books as anti-American, anti-Christian, anti-Semitic, and just plain filthy. The board ordered the superintendent to remove the books from the district's libraries that were on the list. The superintendent objected to the board's directive, indicating that the board had already established a policy on this issue that the superintendent felt should be followed. (Note: Under this policy, the board was to appoint a committee, the committee was to study the issues and make recommendations to the board.) The board noted the superintendent's objections but insisted on the immediate removal of the books from the libraries.

In a pluralilty decision, the United States Supreme Court held there are limits to the discretion of school boards to remove books from their libraries.[2] In the court's view, school boards retain the right to remove books if they are educationally unsuitable, providing the decision of unsuitability was not decisively based upon the board's desire to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. The court said:

> If the [school board] intended by their removal decision to deny respondent's access to ideas with which [they] disagreed; and if this intent was the decisive factor in the board's decision, *then* the board [has] exercised their discretion in violation of the constitution.[3]

By decisive factor, the Court meant a substantial factor in the absence of which the opposite decision would have been reached. Since the Court felt the record was not clear on the decisive factor issue, the Court remanded the case to the district court for a trial. A legitimate question might be raised on the propriety of the Court remanding this case back

1. 457 U.S. 853 (1982).
2. Schimmel, *The Limits on School Board Discretion: Board of Education v. Pico*, 6 Educ. L. Rep. 285, 295 (1982).
3. 457 U.S. at 871.

to the district court on the issue of the board's motivation when there was substantial agreement by the parties that:

> the board acted not on religious principles but on *its conservative educational philosophy, and on its belief that the nine books removed from the school library and curriculum were irrelevant, vulgar, immoral, and in bad taste, making them educationally unsuitable for the district's junior and senior high school students.* (Emphasis added) 474 F. Supp. 387, 392 (1979)

The plurality, after making an independent examination of the whole record,[4] appeared to be persuaded by the fact that the removal proceedings were irregular and ad hoc.[5] The Court stated:

> The state must employ 'sensitive tools' in order to achieve a precision of regulation that avoids the chilling of protected activities... [T]he presence of such sensitive tools in [the board's] decision-making process would naturally indicate a concern on their part for the First Amendment rights of respondents, the absence of such tools might suggest a lack of such concern.[6]

The Court concluded that the board's failure to follow established procedures for book removals created a suspicion and genuine issue of a material fact (the board's motivation for the removal) which required the case to be remanded back to the district court for trial.

Many cases have relied on *Pico* as the case governing the rule for summary judgement.[7]

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4. Federal courts, when dealing with first amendment rights, are required to make an independent examination of the record to insure that the lower court's judgment does not constitute a forbidden intrusion on the field of free expression. Base Corp. v. Consumer's Union of U.S., Inc., 104 S. Ct. 1949 (1984). Grove v. Mead School Dist. No. 354, 753 F.2d 1528 (9th Cir. 1985) illustrates the concept. In *Grove*, the parents sought the removal of *The Learning Tree* by Gordon Parks from their daughter's English literature course on religious grounds. Concurring in the decision to deny the parents' first amendment claim, Judge Canby stated:

> We must remain sensitive to claims that government is either interfering with a religion or is supporting a competing religion. See *Crowley v. Smithsonian Institution*, 636 F.2d at 743. Neither is the case here. On the contrary, if we were to grant the relief sought by plaintiffs and remove *The Learning Tree* from the curriculum because of plaintiffs' hostility to its ideas, our action would itself threaten first amendment values. "Our Constitution does not permit the official suppression of ideas." *Board of Educ. v. Pico*, 457 U.S. 853, 871 (1982) (Brennan, J.) (plurality opin.). We are bound to respect that command as well.

5. Thomas, *Board of Education, Island Trees Union Free School District No. 26 v. Pico; Interpretation and Projection*, 6 Educ. L. Rep. 277, 279 (1982).

6. 457 U.S. 874 n.26.

7. Wood v. City of Dayton, Ohio, 574 F. Supp. 689, 692 (S.D. Ohio 1983); Akin v. General Motors Corp., 573 F. Supp. 1188, 1191 (S.D. Ohio 1983); Elam v. Montgomery County, 573 F. Supp. 797, 801 (S.D. Ohio 1983); Podlesnick v. Airborne Express, Inc., 550 F. Supp. 906, 908 (S.D. Ohio 1982); Sommer v. City of Dayton, Ohio, 556 F. Supp. 427, 429 (S.D. Ohio 1982); Daily Herald v. Munro, 758 F.2d 350, 352 (9th Cir. 1984); Kuzinick v. County of Santa Clara, 689 F.2d 1345 (9th Cir. 1982).

Other courts have cited *Pico* in their analysis of equal access and other first amendment religious questions.[8] The religious questions posed in these cases are beyond the scope of this article. This article focuses on the impact that *Pico* has had on subsequent decisions. The reader must be careful not to ascribe too much value to *Pico* as a precedent, since it was a plurality decision. In *Muir v. Alabama Educational Television Commission*,[9] the court decided that the *Pico* case does not take precedence over the first amendment issues presented in the case.[10]

The *Muir* case is a good place to begin reviewing the post-*Pico* cases, because it exemplifies the difficulty courts have had in trying to decide what *Pico* had as its major premise. The courts have held that *Pico* stands for either (1) the concept of a limited open forum, or (2) the concept that government, when performing certain "special functions," may make discriminatory choices between various ideas, or (3) the concept that government, when performing certain "special functions," may make discriminatory choices between various ideas as long as those choices are not decisively based on a determination of what is orthodox in politics, nationalism, religion, or other matters of opinion.

In *Muir v. Alabama Educational Television*, the court addressed the novel issue of whether individual viewers of a public television station have a first amendment right to compel the station to broadcast a previously-scheduled program which the station had decided to cancel. The case arose when the Alabama Educational Television Commission (AETC) decided not to air *Death of a Princess* which had been scheduled for broadcast in May of 1980. The program was one of thirteen in the series *World*. The program dramatized the investigation of the circumstances surrounding the execution of a Saudi Arabian princess and her commoner lover for adultery.

The plaintiffs, while conceding that AETC has some editorial discretion in operating the television station, argued that the discretion to cancel a previously-scheduled program could not be based upon the political content of that program. The plaintiffs cited *Pico* for the proposition that program restrictions based upon their political consent are presumptively unconstitutional.[11] In distinguishing *Pico*, the court held that school libraries are distinguishable from a broadcast station. The court observed that (1) the maintenance of one book on a library shelf does not (absent space limitations) preempt other existing books, whereas in broadcasting there can be only one transmission at one time; (2) there is no counterpart vis-a-vis libraries to the Federal Communication Commission's Fairness Doctrine; and (3) the right to cancel a program is far more integral to a television station than the decision to

8. Bender v. Williamsport Area School Dist., 741 F.2d 558 (3rd Cir. 1984); Bell v. Little Axe Indep. School Dist. No. 79, 766 F.2d 1391 (10th Cir. 1985); Grove v. Mead School Dist. No. 354, 753 F.2d 1528 (9th Cir. 1984).

9. 688 F.2d 1033 (10th Cir. 1982).

10. *Id.* at 1045.

11. *Id.* at 1044.

remove a library book, since there are few legitimate reasons to remove a book, once acquired.[12] The court then concluded that the decision to cancel *Death of a Princess* could not properly be characterized as censorship.[13]

In the concurring decision, Judge Rubin observed:

> The sensitive and important issues in this case cannot be resolved simply by attempting to decide whether a [public] television station ... is, or is not a public forum. That term is but a label, developed to describe a location, the use of which is open to the public. It does not express a definition, but a conclusion.

For Rubin, the issue in the case to be decided was:

> whether an individual viewer has a right to compel a television station operated by a state agency to broadcast a single program previously scheduled by an employee of the agency, that a higher ranking ... official has decided, because of its content, to cancel.[14]

This issue apparently drove at the crucial issue of: How does the first amendment control the state when the state is operating a television station? In addressing this issue, Rubin indicated that all of the opinions in *Pico*[15] either implicitly or expressly recognized the distinction between the application of the first amendment to limitations on the use of a public forum *and* the restrictions it may impose on governmental action in conducting a particular activity.[16] In Rubin's view:

> *Pico* seemed to endorse the view that the nature of the activity determines the strictures of the first amendment places on government action.[17]

When the state's action is devoted to a specific function, rather than general new dissemination or the free exposition of ideas, the state may regulate content so that its specific function is not impaired.[18]

Judge Kratch dissented because he felt that any government decision to withdraw a program is presumed to be unconstitutional if the decision was made "on the basis of substantive content *with the intent to restrict access to political ideas or social perspectives.*[19]

The final dissenting judge in *Muir* was of the view that allegations or censorship in a public television station were entitled to greater scrutiny than allegations involving a school's regulation of students' reading

12. Pico v. Board of Educ., 638 F.2d 404, 436 (2nd Cir. 1980).
13. 688 F.2d at 1046-47.
14. *Id.* 1048.
15. 457 U.S. 853 (1982).
16. *Id.* 1051.
17. *Id.* 1052.
18. *Id.* 1049.
19. *Id.* 1053.

material.[20] Thus, under *Pico*, he would have found a constitutional violation.

In *Oslen v. State Board of Community Colleges*,[21] the student body terminated the funding for a student newspaper that was approved by the college's governing body. Olsen was the faculty advisor to the newspaper. She was responsible for the monitoring of the printing costs, the advertising revenue resulting from the publication of the paper, and the review of articles for libelous or obscene material. Exclusive of these functions, Olsen did not exercise any control over the content of the newspaper. The student body terminated the funding for the paper because:

> [the paper was] always down on the school and they never printed any happy news. The [paper] drug out subjects that really did not need to be drawn into depth... [The paper] just kept saying the same things over and over, and that there were some misquotes in the paper.[22]

The court, in rejecting Olsen's claimed first amendment right to be the faculty advisor for the newspaper, relied upon *Pico* for the proposition that the decision of the school "as to what subjects will be taught and what resources will be available to the teacher must be made in a manner that comports with the transcendent imperatives of the first amendment." The court observed that the administration of a school, *at whatever level*, in the educational continuum involves a constant process of selection and winnowing based not only on educational needs, but also on the financial resources of the school. Therefore, the official responsible for directing an educational program must be allowed to decide how the limited resources of an institution can be best used to achieve the goals of educating students. That decision will invariably involve the acceptance or rejection of some values over others. Therefore, the court held that under the circumstances, Olsen's right to teach did not encompass a constitutionally-protected interest in the publication of the newspaper as an instructional instrument. The court in *Daly v. Sprague*,[23] dealt with another employee's first amendment claim. There a doctor of a public hospital had his clinical privileges removed for intending to speak and associate with his patients. The court held that the doctor's rights were clearly subsumed within and subservient to the regulations of the state hospital governing medical practitioners. The court cited *Pico* for the position that courts should not interfere in the resolution of conflicts that arise in the daily operation of school systems unless basic constitutional values are directly and sharply implicated. The court said the same considerations appear to apply to the University Medical Center in view of the state's extensive authority to regulate the practice of medicine.

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20. *Id.* 1058.
21. 753 P.2d 1531 (Colo. 1984).
22. *Id.* at 1534.
23. 742 F.2d 896.

The *Olsen* and *Daly* cases, when taken together, seem to stand for the view that plaintiffs suing a governmental entity, absent a public forum analysis, will have difficulty in overcoming the discretion vested in governmental officials when they are conducting the operations of special governmental functions.[24] Other cases recognizing *Pico* for this purpose are: *Logan v. Warren County Board of Education*,[25] *Whittenberg v. School District of Greenville County*,[26] *Bell v. Little Axe Independent School District No. 79*,[27] and *Fraser v. Bethel School District No. 403*.[28]

The *Fraser* case is interesting because the court seems to have inferred a limited open forum in an assembly in which a student gave a sexually-suggestive campaign speech. The school district in *Fraser*, taking action to correct what it felt was a disruptive situation, relied upon *Pico* for the proposition that the courts would not be involved in the case because basic constitutional values were not directly and sharply indicated. The district apparently impressed the dissent with this argument,[29] but not the majority. The majority said:

> The Bethel School District's reliance on [*Pico*] is misplaced because, as Justice Brennan said speaking for the plurality, school boards may not "extend their claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway." A voluntary student election assembly is even further removed from the "compulsory environment of the classroom" than a library.[30]

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24. The *Bender* case implicitly suggests that when an open forum of some nature exists, the government must assume the responsibility to explain its exclusion of a qualified group or idea. For an idea or group to be qualified, it must fall within the objective parameters that the government has established for the particular public forum. If the idea or group meets the previously established criteria, then the idea or group cannot be constitutionally excluded, unless it is decisively inconsistent with the special mission and or function of the government. *See Bender* at 741 F.2d at 546.

If there is validity to the *Bender* analysis, then the Island Trees Union Free School District lost its discretion to inculcate community values when the students left "the compulsory environment of the classroom" and went into the library which was completely voluntary in terms of attendance and inquiry. *See* 457 U.S. 469. From a constitutional standpoint making government adhere to the strictures of the first amendment once a limited open forum is found is quite consistent with the special purposes for which a high school is intended—the preparation of youths for adult life and adult decisions. 741 F.2d at 549.

25. 549 F. Supp. 145, 149 (S.D. Ga. 1982) (local authorities vested with broad discretion in the management of school affairs).

26. 607 F. Supp. 289, 302 (D.S.C. 1985).

27. 766 F.2d 1391 (10th Cir. 1985) (inferring discretion from the special mission of a high school to inculcate fundamental values necessary to the maintenance of a democratic political system).

28. 755 F.2d 1356 (9th Cir. 1985) (schools have discretion to control the content of the school curriculum).

29. *Id.* at 1366.

30. 457 U.S. at 869.

The court had previously stated:

> The assembly, which was run by a student, was a voluntary activity in which students were invited to give their own speeches, not speeches prescribed by school authorities as part of the educational program. Attendance, moreover, was not compulsory; students were free to attend a study hall instead.[31]

Clearly, *Pico* and *Fraser* can be analyzed under the limited open forum analysis articulated by *Bender v. Williamsport Area School District.* The *Bender* case, while citing *Pico* for the proposition that the secondary schools are permitted to inculcate fundamental values necessary to maintain a democratic political system,[32] recognized that schools could create limited open forums within their curriculums. The court said:

> The best indication of the accommodation afforded ... to the students comes from the school district's own description of the activity period in which he states that "*any student activity or club which is considered to contribute to the intellectual, physical or social development of the students*" would be likely approved.
> ....
> Thus, the latitude allowed to student groups, and the manner in which it encourages student groups to exercise independent judgement, supports the conclusion that Williamsport Area School District did indeed create a forum — albeit a limited one — restricted to high school students at Williamsport and also restricted to the extent the proposed activity promoted the intellectual, physical or social development of the students.[33] (Emphasis by the court)

Another example of an open forum existed in *Kulhmeir v. Hazelwood School District.*[34] In this case, the school decided not to publish articles written for the student newspaper. The articles included stories on

> teenage pregnancy, personal accounts of three pregnant Hazelwood East students, the causes of divorce, the difficulties of teenage marriage, the reasons why teenagers run away from home, and the proposed federal regulation requiring parents of minors to be notified if the minor receives birth control devices from a federally-funded clinic.

The students sued, alleging that:

> defendants' negligent, willful, and intentional acts, policies and omissions violated plaintiffs' first and fourteenth amendment rights to freedom of speech, freedom of expression and freedom of press.

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31. 755 F.2d at 1364.
32. 741 F.2d at 548.
33. *Id.* at 549.
34. 578 F. Supp. 1288 (E.D. Mo. 1984).

The school relied on *Pico* for the proposition that if the student newspaper was part of the school's curriculum, then the school had the absolute discretion to remove the articles from the newspaper. The court disagreed with the school for two reasons. First, the court found that since the plaintiffs had alleged in their complaint that the school newspaper was an adjunct to the school's curriculum, it could be assumed, after construing the complaint most favorably to plaintiff, that the paper was a public forum rather than an integral part of the school's curriculum.[35]

Second, the court rejected the school's argument that if the paper was a part of the curriculum, the first amendment values could not be implicated. The court indicated that even though *Pico* allows for discretion, there are limits to that discretion. Therefore, the court did not dismiss the case and ordered further proceedings to determine if the first amendment had been violated.

In *Cinevision Corp. v. City of Burbank*,[36] the allegation was that entertainers were denied access to a public forum, in violation of the first amendment, on the basis of their expression and other arbitrary factors. The city disapproved of a "hard rock" concert that was being proposed since it had the authority to reject any proposals that had "the potential of creating a public nuisance or ... would violate state law or city ordinance." The court, citing *Pico*, said the city standard did not meet the requirements of the first amendment. The city council's objection to the hard rock concert centered on the content of the music which it wanted to exclude from the Starlight Bowl. The council argued it had the discretion to inculcate the proper community values in its youth by presenting family entertainment. The court indicated that the desire to inculcate Americanism or proper community values in its youth cannot justify Burbank's efforts to ban hard rock music from the Starlight Bowl. The first amendment limits the government efforts to inculcate values, at least when such efforts serve to suppress or stifle other forms of protected expression.[37]

Similarly, in speaking of the governmental responsibility that goes with inculcating values, the concurring opinion by Justice Marshall in *New Jersey v. T.L.O.*,[38] stated:

> It would be incongruous and futile to charge teachers with the task of imbuing their students with an understanding of our system of constitutional democracy, while at the same time immunizing those teachers from the need to respect constitutional protection.[39]
> ....

35. *Id.* at 1286.
36. 745 F.2d 560 (9th Cir. 1984).
37. *Pico*, 457 U.S. at 872.
38. 105 S. Ct. 733 (1985).
39. *Id.* at 864-865.

> Schools are places where we inculcate the values essential to meaningful exercise of rights and responsibilities by a self-governing citizenry. *Pico v. Island Trees Union Free School District.*[40]

There are many post-*Pico* decisions dealing with a variety of issues. Many of those cases are grouped below under subjects addressed in the *Pico* decision.

Decisive Factor Test — In *Games v. Fair*,[41] a prisoner wrote sexually explicit poems to a female staff member at the prision. When he was reclassified to a different section of the prison, he sued. The court in holding there was no evidence to show the inmate was reclassified as a result of the prison's desire to thwart or limit the inmate's right to write poetry, cited *Pico* for the proposition that the inmate would have to show that intent to deny him access to free expression, rather than prison discipline, was the decisive factor for his reclassification.[42]

Ad hoc procedures as a basis for suspicion — The court in *AREO Corp. v. Department of the Navy*,[43] felt that a suspicion existed as to the Navy's motivations when the Navy, contrary to normal practices, had "[not] yet [sic] explained why the onsite team was given only a few days to prepare a competitive package or how and why the dissent and criticisms were ultimately resolved the way they were."

Impermissible discrimination among ideas based on Blackmun's concurring opinion — There was one case, *White House Vigil v. Clark*,[44] which cited the Blackmun rule as the test.

Recipient's right to receive ideas — There were two cases in this area. The first was *Belcher v. Mansi*,[45] where the plaintiff sought to tape record the committee meetings of the governing body where taping was prohibited without the governing body's consent. The plaintiff asserted the rights of the listener to enhance his comprehension by the means of recording the public meeting. The court said plaintiff's contention was grounded in the right to know and right of access cases like *Pico*. The court said it need not resolve these arcane issues, because the case could be decided upon the Rhode Island statutes governing open public meetings.

The second case, *American Future Systems v. Pennsylvania*,[46] cited *Pico* for the position that where there is constitutionally-protected free speech, "the protection afforded is to the communication, to its source, and to its recipient's both."

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40. *Id.* at 876, 880.
41. 738 F.2d 517, 527-528 (1st Cir. 1984).
42. Sunmat v. Manson, 554 F. Supp. 1363, at 1373 (D. Conn. 1983) (for the same proposition).
43. 558 F. Supp. 404, 422 (D.D.C. 1983).
44. 746 F.2d 1518 (D.C. Cir. 1984).
45. 569 F. Supp. 379, 382 (D.R.I. 1983).
46. 568 F. Supp. 666, 670 (M.D. Penn. 1983).

Summary and Conclusions

The *Pico* case and cases in its aftermath are still waging an ideological war between degrees of two competing positions. On the one hand, one has the first amendment and an open society. On the other hand, one has government constantly expanding and dividing itself into special purposes and being vested with almost absolute discretion to find the efficiencies to achieve its ends. Those arguing in favor of the first amendment recognize that it has been described as the indispensible condition of nearly every other form of freedom.[47] The cases upholding the first amendment seem to emphasize two prominent themes: (1) the function of freedom of speech in individual self-expression and the development of individual potential, and (2) the value of freedom of expression in our representative democracy and system of self-government.[48]

Those in favor of government performing its specialized functions are in favor of absolute discretion because the realities dictate discriminating choices so that the primary mission of the government will not be disrupted.[49]

The limited open forum cases allow courts to invade these special purpose governmental entities so that the first amendment can survive, given the changing nature of the way the government operates.

After reviewing the cases, this writer concludes that *Pico* seems to be another one of the cases in the never-ending battle of trying to find the proper balance between the first amendment and the efficiencies of government.

47. Palko v. Connecticut, 302 U.S. 319, (1937).
48. *See* Gunther, Constitutional Law 1044 (1975).
49. *See* e.g., Spock v. Greer, 424 U.S. 828 (1976); Jones v. North Carolina Prisoner's Labor Union, Inc., 433 U.S. 119 (1977); Lehiman v. City of Shaker Heights, 488 U.S. 298 (1974).