

Too Much Information is a Bad Thing:
Keep the Right to Receive Information Out of Public Schools

By Justin Malenius

“It is a myth to say that a person has a constitutional right to say what he pleases, where he pleases, and when he pleases.”¹ That quote, taken from Justice Black’s dissent in Tinker, effectively summarizes a serious misconception that people have about their First Amendment right of freedom of speech. A specific example of this is a child in a public school. They not only should be limited in what they say to their fellow classmates and faculty, but also shall be subject to restrictions as to what speech they can access in a school environment. In Pico, the court incorrectly gave the public middle and high school students a right to receive information.² Luckily, this mistake was very limited at its inception and has been effectively eliminated in later Supreme Court decisions.

This paper is broken down into three parts. Part One deals with the right to receive information that was given to public school students in Pico. Part Two shows how that right to receive information has been effectively eliminated in the public school setting. The final part of this paper will discuss why this right to receive information should not exist in the public school system.

I. The Creation of the Right to Receive Information in Public Schools

In Pico, the Court introduced the right to receive information into the public school system.³ Although seen in other contexts regarding the availability of certain government

¹ Tinker v. Des Moines, 393 U.S. 503, 522 (1969).

² Board of Education, Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853, 867 (1982). Justice Breyer’s description of the right to receive information.

³ Id.

information, the application of the right to receive information into public schools appeared to be a major victory for students' First Amendment rights.⁴ However, further analysis shows that this right was extremely limited and therefore a potential misnomer.⁵

Pico involved a local school board's decision to remove books from its middle and high school libraries.⁶ The books were said to be removed because they were "objectionable" and "improper fare for school students."⁷ The case was brought by students that alleged that the removal of the books was not due to their questionable educational value, but instead due to the books offending the social, political, and moral tastes of the school board.⁸

The Court had to analyze two questions to determine whether the removal of the books was constitutional.⁹ First, the Court had to determine whether the First Amendment imposed any limitations upon the discretion of the school board to remove books from its libraries?¹⁰ If the Court found in the affirmative for that question, they then would need to determine if the school board exceeded those constitutional limits in their removal of the books.¹¹

A plurality of the Court held that the First Amendment does impose some restrictions upon the removal of books from a public school library.¹² Specific to this case, the Court reasoned that while the school board possessed a significant amount of discretion in determining the content of their libraries, they could not exercise that discretion in a narrow partisan or

⁴ Jamie Kennedy, *The Right to Receive Information: The Current State of the Doctrine and the Best Application for the Future*, 35 *Seton Hall L. Rev.* 789, 790 (2005).

⁵ *Id.* at 808; Pico, 457 U.S. at 872.

⁶ Pico, 457 U.S. at 857.

⁷ *Id.* at 856.

⁸ *Id.* at 858-59.

⁹ *Id.* at 863.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 871.

political manner.¹³ Therefore, if the decisive factor in removing the books was due to a conflict with the school board's ideals, then the removal was a violation of the Constitution.¹⁴ However, if the books were removed solely because the board found them to be vulgar or lacking educational suitability, then the Constitution would not have been violated.¹⁵ Lastly, the holding specifically dealt only with library books and not course books, hinting at the idea that removal of a course book would be judged on an even more lenient standard.¹⁶

So what does this decision define as a right to receive information? The Court discussed the right to receive information in this context as dealing with both the author's freedom of speech to write his book and the student's right to be able to read that book.¹⁷ While this reasoning appears to cement a right to receive information in the public school system, it is important to compare this discussion of the right to receive information with the actual holding in the case.

The holding in Pico states that a school board may not remove a book from its library unless they deem that it is too vulgar or not educationally suitable.¹⁸ Although the holding limits the removal of books from a public school library, there are a few important shortcomings on the protection of this right to receive information. First, by allowing removal for vulgarity and lack of educational suitability, the Court left a fairly large opening for school boards to continue removing books from its libraries without violating the First Amendment.¹⁹ Second, by only focusing on the removal of books, the Court appears to create a watered-down version of a right

¹³ Id. at 870.

¹⁴ Pico, 457 U.S. at 871.

¹⁵ Id.

¹⁶ Id. at 869; Glenn Kubota, Public School Usage of Internet Filtering Software: Book Banning Reincarnated?, 17 Loy. L.A. Ent. L.J. 687, 711 (1997).

¹⁷ Id. at 867.

¹⁸ Id. at 871.

¹⁹ Id.

to receive information. If the holding truly gave the students a full right to receive information, then the notion raised by Justice Rehnquist in his dissent would hold true that the library would be required to add all books to its library so that a student had complete access to all information.²⁰ While that sounds impossible for many reasons, with space and cost being at the top of that list, it does logically follow that if the right to receive information fully existed in the public school system, that impossibility would need to be overcome.

What does a watered down version of a right to receive information look like? This right provides that a school board may not remove a book from its library based on the viewpoint that the book asserts.²¹ This should not come as a surprise, since it has been recognized that the government may only discriminate against private speech based on its content and never its viewpoint.²²

Can a watered down version of a right to receive information exist? That's a difficult question for a few reasons. For starters, two of the Justices that joined in the plurality did not even cite to the existence of a right to receive information in their concurring opinions.²³ Those two are in addition to the two dissenting opinions in Pico, by Justices Rehnquist and Burger, which explicitly refused to recognize a right to receive information in the public school system.²⁴ Additionally, if this alleged right to receive information truly existed, Justice Rehnquist argued that the motive behind its removal should be a non-issue.²⁵ However, the plurality clearly states that if the board removed the books based on them not being educationally suitable or vulgar, no

²⁰ Pico, 457 U.S. at 912.

²¹ Richard J. Peltz, Use 'The Filter You Were Born With': The Unconstitutionality of Mandatory Internet Filtering For The Adult Patrons of Public Libraries, 77 Wash. L. Rev. 397, 443 (2002).

²² Id. at 444; Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 811 (1985).

²³ Kennedy at 808.

²⁴ Id.

²⁵ Id. at 809; Pico, 457 U.S. at 917-18.

constitutional violation would have occurred.²⁶ That does not sound like strict or intermediate scrutiny that usually applies to one's constitutional rights.²⁷ It barely even resembles a reasonableness standard. Instead, you have a standard that appears easy to meet due to the vagueness of educational suitability.²⁸ Therefore, even at its inception, the existence and form of a right to receive information in public schools was questionable.

II. The Elimination of the Right to Receive Information in the Public School System

The decision in ALA vs. United States effectively ended any thought that a right to receive information can exist in a public school system. In ALA, the American Library Association challenged CIPA (Children's Internet Protection Act) as violating the First Amendment.²⁹ This First Amendment challenge was broken down into two parts: the library's First Amendment right to choose the content they put on display and also the patron's right to receive information.³⁰

CIPA was the third attempt by the government to regulate public access to the internet.³¹ Unlike the prior two unsuccessful attempts, CIPA dealt with conditioning federal funds, instead of direct regulation.³² In this case, CIPA put a condition on public libraries that required them to install filters on their internet terminals to prevent obscenity and other harmful contact from being exposed to children.³³ Basically, the library was to block or remove certain sites from their

²⁶ Pico, 457 U.S. at 871.

²⁷ Peltz at 443-44.

²⁸ Pico, 457 U.S. at 871.

²⁹ United States v. American Library Association, Inc., 539 U.S. 194, 199 (2003).

³⁰ Kennedy at 814; Am. Library Ass'n, 539 U.S. at 200

³¹ Richard J. Peltz, Pieces of Pico: Saving Intellectual Freedom in The Public School Library, 2005 B.Y.U. Educ. & L.J. 103, 145 (2005).

³² *Id.* at 145.

³³ Am. Library Ass'n, 539 U.S. at 201.

internet terminals in order to receive the necessary federal funding.³⁴ That concept of removal of access sounded quite familiar to Justices Souter and Ginsberg but not to the five other Justices that concurred with the opinion of the court written by Justice Rehnquist.³⁵

The plurality, written by Justice Rehnquist, upheld the constitutionality of CIPA and found no impermissible restriction on the First Amendment.³⁶ The plurality equated the actions of the library selecting what sites to add to its internet terminals to its ability to add library books to its collection.³⁷ By making no distinction between adding books and selecting websites, the court was able to apply and meet a reasonableness test.³⁸ Most importantly, the plurality rejected any comparison to Pico and did not cite any conflict with a right to receive information.³⁹

By refusing to discuss Pico in the plurality, Justice Rehnquist essentially set aside a decision that he fought at its inception.⁴⁰ The analogy that removing access to web sites is more akin to adding, instead of removing books, is flawed.⁴¹ In fact, the dissent specifically calls Justice Rehnquist out on that analogy and states that Pico should have been an authority used in this decision.⁴² Instead the plurality handed out a decision that when taken into context with Pico creates very confusing precedent.

Since Justice Rehnquist ignored, but did not definitively overrule Pico, the standard established in ALA could grant public school children more First Amendment protection than

³⁴ Id.

³⁵ Kennedy at 819.

³⁶ Am. Library Ass'n, 539 U.S. at 214.

³⁷ Id. at 235.

³⁸ Id. at 216.

³⁹ Kennedy at 816.

⁴⁰ Peltz at 147.

⁴¹ Kennedy at 819-20.

⁴² Am. Library Ass'n, 539 U.S. at 236-37.

adults.⁴³ If Pico is still good law, then students' First Amendment rights are protected in the form of prohibiting a school from removing books from their school library if they are educationally suitable and not vulgar.⁴⁴ In contrast, ALA establishes that an adult in a public library has limited First Amendment protection when it comes to his ability to access information online.⁴⁵ This seems to confirm the idea that First Amendment rights of students in a public school "are not automatically co-extensive with the rights of adults in other settings."⁴⁶ However, instead of the logical result of public school children having fewer First Amendment rights, we are left with a precedent that affectively gives them more rights in their school than an adult in a public library.

III. There Should Not Be a Right to Receive Information in the Public School System

If the right to receive information still exists in the public school system, it exists in the original, very limited context in which it was introduced.⁴⁷ Public schools may not remove extra-curricular books from their library, unless they deem them to lack educational suitability or to be vulgar.⁴⁸ However, due to this limited scenario, it is easier and more appropriate to characterize this not as a right to receive information for public school students, but instead a mere limit on the power of a school board to control their educational system. By looking at the decision in Pico in that context, as opposed to a case involving a right to receive information, the decision in ALA makes much more sense. Especially when you consider the fact that Justice

⁴³ Peltz at 147.

⁴⁴ Pico, 457 U.S. at 871.

⁴⁵ Am. Library Ass'n, 539 U.S. at 242.

⁴⁶ Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 266 (1988).

⁴⁷ Peltz at 150.

⁴⁸ Pico, 457 U.S. at 871

Rehnquist, who wrote the plurality for ALA, believed that a right to receive information should never have existed in the first place.⁴⁹

This conflict in decisions shows that Justice Rehnquist was correct in that there never should have been a right to receive information in a public school. While some may argue that the First Amendment must protect this right for the student, it is important to note that restricting a student's First Amendment rights in a public school is not a new concept.

“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁵⁰ This quote, from the Court's decision in Tinker, makes one assume that the Courts grant full protection to one's constitutional rights on a public school campus. While the actual holding in Tinker did uphold protection of a student's First Amendment rights, it also hinted that in the future the Court may end up allowing the school board to restrict those rights.⁵¹

Tinker was a case about students wearing black armbands to show their support for the protests of the Vietnam War.⁵² Five students that wore the armbands were suspended, despite no evidence of causing any disruption within the school.⁵³ The court's holding established a test for determining whether the school could limit the students' right of freedom of speech.⁵⁴ That test stated that the school may impair those rights if the expression of them would lead to either a “material or substantial interference with schoolwork or discipline,” or to avoid an “invasion of

⁴⁹ Id. at 895.

⁵⁰ Tinker v. Des Moines, 393 U.S. 503, 506 (1969).

⁵¹ Id. at 513. Stating that the student's freedom of speech could be restricted if it caused a material and substantial interference with schoolwork or invaded the rights of others.

⁵² Id. at 504.

⁵³ Id.

⁵⁴ Id. at 509.

the rights of others.”⁵⁵ Again, while the test on its face appears to defend the idea that students are not “closed circuit recipients of only that which the State chooses to communicate,” it also opens the door for schools to restrict their students’ rights if either, not both, parts of the test are met.⁵⁶ Additionally, this case did not have any evidence that the students caused or were feared to cause any disruption in school.⁵⁷ Had there been any evidence of a disturbance, it appears as if Justice Black’s dissent stating “[i]t is a myth to say that a person has a constitutional right to say what he pleases, where he pleases, and when he pleases,” might have guided the majority decision.⁵⁸

While Tinker, decided more than a decade before Pico, protected the students’ First Amendment rights; Hazelwood, decided a few years after Pico, began restricting those rights. The Court’s decision in Hazelwood is significant to the right to receive information analysis in two ways. First, it introduced the concept that students do not have the same rights as adults in other settings.⁵⁹ Second, in its restriction of the students’ First Amendment rights, the Court only applied a reasonableness test, instead of intermediate or strict scrutiny.⁶⁰

Hazelwood involved a school principal removing two pages from a school newspaper that contained articles about divorce and teen pregnancy.⁶¹ The court held that the school’s principal acted reasonably in removing the students’ articles from the school newspaper because the school’s newspaper was not a public forum.⁶² The court determined that the newspaper was

⁵⁵ Id. at 513.

⁵⁶ Id. at 511.

⁵⁷ Tinker, 393 U.S. at 514.

⁵⁸ Id. at 522.

⁵⁹ Hazelwood, 484 U.S. at 266.

⁶⁰ Id. at 270.

⁶¹ Id. at 262-63.

⁶² Id. at 270.

not a public forum due to it not being readily accessible to the general public.⁶³ This reasoning provides insight on the decision in Pico in that it demonstrates that the principal within a school environment can restrict the students' content-based freedom of speech. In other words, this holding shows that students' rights can be limited in comparison to adults' rights in public and further that the restriction of the students' rights will be adjudicated on a lower level of scrutiny.

Those two decisions show that a student's First Amendment rights can be limited in a public school. When ALA is factored in, it logically follows that even an adult's First Amendment rights can be limited in a public library. What does not make sense is the idea that a student has a First Amendment right to receive information that an adult does not have in a public library. Therefore, one can conclude that outside of a very limited fact pattern, a public student does not have a right to receive information.⁶⁴ The only question left then is whether this is a good thing.

Public school students not having a First Amendment right to receive information is best for both the faculty and the students. While the decisions prior to ALA were decided in a world without internet, their analysis has provided current school boards with adequate protection to limit their students' access to potentially harmful information. Now that is common to incorporate technology into schools, it is safe to assume that in the very near future, schools will begin providing wireless internet access to their students for their laptops or iPads. This is a good thing. Few can argue against the positive impact that the internet has had on our educational system. However, like other First Amendment rights, the access of the internet must be restricted within the public school.

⁶³ Hazelwood, 484 U.S. at 269.

⁶⁴ Peltz at 150.

How can a teacher effectively teach if a student is listening to music on Pandora.com or communicating with friends on Facebook while she lectures? Additionally, how can a student learn in that scenario? While online music is a mere distraction, what would the outcome be if a student accessed pornographic material in school? Questions like these will certainly be addressed by school boards in the near future as they attempt to utilize technology in the classroom. The good news is that the decision in ALA seems to establish a significant amount of deference for local school boards when it comes to restricting students' access to information.⁶⁵ A right they never should have had in the first place.

⁶⁵ Am. Library Ass'n, 539 U.S. at 208. By equating internet filters to the addition and not removal of books, the Court will only adjudicate challenges under a reasonableness test instead of intermediate or strict scrutiny.

