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GOVERNMENT SPEECH, FREE SPEECH, AND EDUCATION: THE CONSTITUTIONAL CHALLENGE TO THE MASSACHUSETTS GENOCIDE EDUCATION GUIDE

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In 1999 the Massachusetts Board of Education issued a guide containing guidelines and recommended materials for the teaching of genocide and human rights issues, including the Armenian Genocide. Six years later, a group of students and teachers challenged the guide on constitutional grounds, arguing that the First Amendment required the insertion of certain materials—removed from an earlier version of the guide—that asserted that the Armenian Genocide was not a genocide. A federal district court dismissed the case and the U.S. Court of Appeals for the First Circuit will soon decide the plaintiffs' appeal. The case raises issues regarding limitations on the governmental authority to teach and commemorate the Armenian Genocide and other matters of public importance.

A. THE MASSACHUSETTS GENOCIDE EDUCATION GUIDE

In 1998, the Massachusetts Legislature enacted Chapter 276 of the Acts and Resolves of 1998, which provides in relevant part:

The board of education shall formulate recommendations on curricular material on genocide and human rights issues, and guidelines for the teaching of such material. *Said material and guidelines may include, but shall not be limited to, the period of the transatlantic slave trade and the middle passage, the great hunger period in Ireland, the Armenian genocide, the holocaust and the*

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Mussolini fascist regime and other recognized human rights violations and genocides. In formulating these recommendations, the board shall consult with practicing teachers, principals, superintendents, and curricular coordinators in the commonwealth, as well as experts knowledgeable in genocide and human rights issues. *Said recommendations shall be available to all school districts in the commonwealth on an advisory basis,* and shall be filed with the clerk of the house of Representatives, the clerk of the Senate, and the House and Senate chairmen of the joint committee on education, arts, and humanities not later than March 1, 1999.¹

Pursuant to this mandate, the board of education issued “The Massachusetts Guide to Choosing and Using Curricular Materials on Genocide and Human Rights Issues” (“the Guide”). The Guide states that it “offers recommendations for locating and selecting curriculum materials on genocide and human rights issues, and guidelines for the teaching of such materials.”² The Guide also emphasizes the Commonwealth’s decision that the teaching of genocide is important, stating that “[k]nowing the past is a precondition to making responsible choices in the present.”³ With respect to the history of genocide in particular, the Guide states:

Learning about genocide in history and its persistence into the present day is important for today’s students. Although most students learn about the Nazi Holocaust, they may regard it as an isolated phenomenon, and do not learn that many such incidents of intentional mass killings have occurred all over the world and throughout history. . . .

. . . .

In the study of genocide and human rights issues, students and their teachers confront some of the most difficult and dreadful aspects of human behavior: hatred, prejudice, cruelty, suffering, legalized discrimination, and mass murder. The study of episodes such as the Armenian Genocide and the Holocaust often causes students and teachers to question why such atrocities occurred, whether they could occur elsewhere, and how they might be prevented.⁴

As directed by Chapter 276, the Guide contains recommendations of specific materials that teachers may (but need not) consult in building a curriculum. The Guide states that “[t]he Massachusetts Department of

1. 1998 Mass. Acts 1154 (emphasis added).

2. MASS. DEP’T. OF EDUC., THE MASSACHUSETTS GUIDE TO CHOOSING AND USING CURRICULAR MATERIALS ON GENOCIDE AND HUMAN RIGHTS ISSUES 3 (1999).

3. *Id.* at 20 (quoting MASS. DEP’T. OF EDUC., MASSACHUSETTS HISTORY AND SOCIAL SCIENCE FRAMEWORK 64 (1997)).

4. *Id.* at 3–4.

Education does not endorse or mandate any curriculum materials, but offers the guidelines below.”⁵ The Guide then provides a series of recommended criteria for educators to consider in choosing curricular materials,⁶ questions that Internet users should ask in conducting independent research,⁷ and a selection of resources for teaching about genocide and human rights issues.⁸

B. THE LAWSUIT

In October 2005, over six years after the Guide was issued, three Massachusetts public high school students, along with their fathers, two public high school teachers, and a Turkish-American advocacy group called the Assembly of Turkish-American Associations (ATAA), filed a lawsuit in the U.S. District Court for the District of Massachusetts. The operative complaint names as defendants the Massachusetts Department of Education and its Commissioner, David P. Driscoll, and the Massachusetts Board of Education and its Chairman, James Peyser.⁹ The complaint seeks a declaration that the defendants violated the First Amendment by removing from the Guide references to materials that dispute that the Armenian Genocide was in fact genocide and requests an injunction ordering the restoration of those materials to the Guide.¹⁰

The plaintiffs’ allegations are closely tied to the process by which, they allege, the Guide came into being. According to the complaint,¹¹ Commissioner Driscoll provided members of the board of education with a draft version of the Guide in January 1999.¹² That draft guide recommended materials that discussed the Armenian Genocide.¹³ The Turkish American Cultural Society of New England (TACS-NE), an organization that is part of ATAA, wrote to Driscoll, asking that the Guide be revised to include references to materials arguing the Armenian Genocide did not result from “a deliberate plan of genocide against the Armenians by the Ottoman Empire.”¹⁴ Members of TACS-NE later made a presentation to the Board and, at Commissioner Driscoll’s request, proposed certain “contra-genocide” materials for inclusion in the Guide. Although the board of

5. *Id.* at 30.

6. *Id.*

7. *Id.* at 31.

8. MASS. DEP’T. OF EDUC., *supra* note 2, at 32–38.

9. Second Amended Complaint at 1–2, *Griswold v. Driscoll*, No. 05-12147 (D. Mass. Oct. 31, 2006) [hereinafter Second Amended Complaint].

10. *Id.* at 29.

11. Because the case is only at the motion to dismiss stage, the parties have taken the factual allegations in the Plaintiffs’ complaint as true.

12. Second Amended Complaint, *supra* note 9, at 10 (citation omitted).

13. *Id.* at 10–11.

14. *Id.* at Exhibit 2.

education never formally voted to include those materials, the version of the Guide submitted to the Massachusetts Legislature in March 1999 included four “contra-genocide” websites.¹⁵

In June 1999, various Armenian-American groups wrote to the Massachusetts Governor, stating that inclusion of contra-genocide materials in the Guide violated Chapter 276, which specifically recognized the Armenian Genocide and referred to it as such. Driscoll then removed the four contra-genocide websites from the Guide. Both ATAA and TACS-NE wrote to Driscoll protesting the removal. Driscoll responded that inclusion of materials that denied the Armenian Genocide was contrary to the language of Chapter 276 and noted that the issue could be pursued further through “state legislative channels.”¹⁶ Six years later, responding to an inquiry by plaintiffs’ counsel, Peysner reiterated that position, stating that Chapter 276 did not authorize the board “to adopt curricular guidelines that call into question whether the various atrocities enumerated in the statute actually occurred.”¹⁷

The plaintiffs’ theory, as asserted in their court filings, is that the act of *removing* the contra-genocide websites from the Guide for allegedly “political” reasons was a violation of their First Amendment right to freedom of speech. The plaintiffs compared the removal of the websites from the Guide to the removal of books from school libraries in *Board of Education v. Pico*.¹⁸ In *Pico*, a board of education in New York had decided to remove books from a school library, characterizing the books as “anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy” and stating that “[i]t is our duty, our moral obligation, to protect the children in our schools from this moral danger as surely as from physical and medical dangers.”¹⁹ Students challenged the book removal on First Amendment grounds. The district court in *Pico* granted summary judgment, ruling that local school boards had “broad discretion to formulate educational policy” and that “the board acted not on religious principles but on its conservative educational philosophy.”²⁰ On appeal, however, a Second Circuit panel reversed and remanded the case for trial. The lead opinion ruled that the plaintiffs were entitled to an opportunity to demonstrate “that the ostensible justifications for [the board’s] actions . . . were simply pretexts for the

15. The Board of Education did, however, vote to remove two appendices from the draft guide, one of which included a historical description of the Armenian Genocide. *Id.* at Exhibit 1, Exhibit 3.

16. *Id.* at 19.

17. *Id.* at 23, Exhibit 18.

18. 457 U.S. 853 (1982).

19. *Id.* at 857 (plurality opinion of Brennan, J.) (citing *Pico v. Bd. of Educ.*, 474 F. Supp. 387, 390 (E.D.N.Y. 1979)).

20. *Id.* at 859.

suppression of free speech.”²¹ The Supreme Court of the United States affirmed the decision to remand for trial regarding the motivations of the officials who ordered the book removal.²² There was no opinion of the Court, but Justice Brennan, writing for a plurality of three Justices, concluded that a trial was needed because there was “a genuine issue of material fact on the critical question of the credibility of [the school board’s] justifications for the[] decision.”²³ The plaintiffs in *Griswold v. Driscoll* argued that, for similar reasons, a trial was required to determine the motivations of Commissioner Driscoll and others in removing the contra-genocide materials from the Guide.²⁴

The Commonwealth moved to dismiss. The district court heard argument on September 18, 2006 and took the case under advisement.

C. THE DISTRICT COURT DECISION

On June 10, 2009, the district court granted the Commonwealth’s motion to dismiss.²⁵ The court began by noting that it was required to reach the plaintiffs’ constitutional arguments and could not dismiss the case on other grounds.²⁶ The court accordingly addressed, and rejected, the merits of the plaintiffs’ First Amendment challenge.²⁷

The court’s primary reasoning was that the curriculum guide is “a form of government speech” and, as such, “is generally exempt from First Amendment scrutiny.”²⁸ The court also cited cases making plain that state and local governments have particularly broad discretion to make decisions concerning curriculum.²⁹ While the First Amendment’s Establishment Clause forbids school authorities from promoting a particular religion or religious teaching—as would be the case, for instance, if a school board required the teaching of creationism or banned the teaching of evolution³⁰—

21. *Id.* at 860.

22. *Id.* at 875.

23. *Id.*

24. *Griswold v. Driscoll*, 625 F. Supp. 2d 49, 58–60 (D. Mass. 2009).

25. *Id.* at 49.

26. *Id.* at 57–58.

27. The Commonwealth had urged that the claims could be dismissed as time-barred. The court agreed as to plaintiff ATAA, which “knew in August, 1999, of the removal of the contra-genocide websites” and therefore did not timely file suit within the three-year statute of limitations. *Id.* at 58 nn.2–3. However, the complaint did not make clear when the individual plaintiffs learned of the removal of the websites from the Guide. *Id.* at 57–58. And although the Commonwealth had challenged the plaintiffs’ standing to sue on the basis that none had been injured, the court held that determining injury required determining whether a constitutional right was violated. *Id.* at 58 (citing ERWIN CHERMERINSKY, FEDERAL JURISDICTION 71 (5th ed. 2007)).

28. *Id.* at 59, 61.

29. *See id.* at 59, 61.

30. *See, e.g., Epperson v. Arkansas*, 393 U.S. 97 (1968) (invalidating, on Establishment Clause grounds, statute prohibiting the teaching of evolution in public schools); *Kitzmiller v.*

there was no religion-related claim in the case. Nor was this a case in which students were compelled to speak or forbidden from expressing any particular viewpoint; on the contrary “it is not alleged that the Curriculum Guide in any way restricts the plaintiff students’ right to speak.”³¹ Nor was there any claim that the plaintiff *teachers* had been restricted in their ability to teach any particular material or viewpoint, even though the state would have greater latitude in restricting speech by a teacher in the classroom.³² Furthermore, the plaintiffs did not allege that either the students or teachers had been “denied access in school to the contra-genocide websites that were removed from the Curriculum Guide or comparable information.”³³ The most the complaint alleged was that the students “*may be* denied the opportunity to receive contra-genocide viewpoints in school.”³⁴

The court concluded that the plaintiffs’ reliance on the *Pico* decision was unpersuasive, for four primary reasons. First, the court indicated that *Pico*’s status as precedent was uncertain. Four Justices had stated that a purely political decision to remove the books would be unlawful,³⁵ but the fifth vote to remand was provided by Justice White, who was unwilling to go that far. Justice White wrote that the case posed “difficult First Amendment issues in a largely uncharted field” and believed that the best course was to defer consideration of the constitutional question until a record was developed.³⁶ The district court in *Griswold* therefore concluded that *Pico* had no precedential value even with respect to a decision to remove library books.³⁷

Second, the court noted that even the Justices in the *Pico* plurality drew a sharp distinction between the library and the classroom for purposes of determining the State’s control of content. Justice Brennan contrasted “the school library and the regime of voluntary inquiry that there holds sway” with the “compulsory environment of the classroom.”³⁸ Justice Blackmun, in a separate concurring opinion, likewise noted that, although the First Amendment might prohibit a State from denying access to an idea because officials disapproved of it for partisan or political reasons, “it is difficult to

Dover Area Sch. Dist., 400 F. Supp. 2d 707 (M.D. Pa. 2005) (holding that school district violated the Establishment Clause by requiring the teaching of “intelligent design”).

31. *Griswold*, 625 F. Supp. 2d at 60.

32. *Id.*

33. *Id.*

34. Complaint and Jury Demand at 44, *Griswold v. Driscoll*, 625 F. Supp. 2d 49 (D. Mass. Oct. 26, 2005) (emphasis added).

35. See *Pico*, 457 U.S. at 853–75 (plurality opinion of Brennan, J.); *id.* at 875–82 (Blackmun, J., concurring in part and concurring in the judgment).

36. *Id.* at 884 (White, J., concurring in the judgment).

37. See *Marks v. United States*, 430 U.S. 188, 193 (1977) (“the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds” (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976))).

38. *Pico*, 457 U.S. at 854 (plurality opinion of Brennan, J.).

see the First Amendment right that I believe is at work here playing a role in a school's choice of curriculum."³⁹ The *Griswold* court took these statements to mean that even the most expansive view of the First Amendment expressed in *Pico* would not have reached a curricular guide like that issued in Massachusetts.⁴⁰

Third, the court rejected the notion that the Guide was a "limited public forum," similar to a student newspaper, such that educators could only restrict its content for "reasons reasonably related to legitimate pedagogical concerns."⁴¹ Rather, the Guide was "school sponsored speech," which courts have held is not subject to forum analysis.⁴²

Finally, the court rejected the plaintiffs' central contention that the First Amendment would prevent the Commonwealth from reacting to "political pressure" in determining the contents of its education guide. The court noted that, after *Pico*, the Supreme Court had emphasized in other cases that, when the government speaks "as to matters of curriculum, its choices are generally immune from First Amendment challenge . . ."⁴³ Thus, even if the Guide's contents were determined "based only on political rather than educational considerations," that determination was constitutionally permissible, and the government is accountable for it in "the political arena," not through the courts.⁴⁴

D. CONTENTIONS ON APPEAL

The plaintiffs appealed to the U.S. Court of Appeals for the First Circuit. The plaintiffs' principal appellate contention is a two-pronged attack on the district court's treatment of *Pico*. They first argue that, contrary to the district court's ruling, *Pico* is binding precedent that books cannot be removed from a school library for political reasons. They argue that the district court should have taken as true their claim that the Guide was "the equivalent of an electronic library," not an expression of "official views."⁴⁵ They base this argument on the claim that Justice White, by

39. *Id.* at 879 n.1 (Blackmun, J., concurring in part and concurring in the judgment).

40. *Griswold*, 625 F. Supp. 2d at 54.

41. *Id.* at 63 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)).

42. *See Chiras v. Miller*, 432 F.3d 606, 616 (5th Cir. 2005) (holding that a school's rejection of a textbook for use in a classroom did not exclude the author from a limited public forum); *see also Student Gov't Ass'n v. Board of Trustees of Univ. of Mass.*, 868 F.2d 473, 480 (1st Cir. 1989) (considering the school library in *Pico* as a "channel[] of communication" to which a forum analysis was applicable).

43. *Griswold*, 625 F. Supp. 2d at 64 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) and *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998)).

44. *Id.* at 65.

45. Brief of Plaintiff-Appellants at 30, *Griswold v. Driscoll*, No. 09-2002 (1st Cir. Oct. 5, 2009).

voting for a remand for trial, must have believed that it was possible for the *Pico* plaintiffs to prove some set of facts at trial that would enable them to prevail, otherwise a remand for trial would have been futile.⁴⁶ Indeed, the plaintiffs contend that three of the dissenting Justices appeared to countenance a constitutional claim against the removal of books from a library in order to suppress “one particular opinion.”⁴⁷ Although those Justices believed the record in *Pico* did not disclose such an action, the *Griswold* plaintiffs believe their complaint does allege a desire to suppress a contra-genocide opinion.⁴⁸ Second, they contend that, as in *Pico*, the removal of the websites from the draft guide was “procedurally suspect,” in that it occurred after the formal comment period on the Guide was closed and based allegedly on pressure from elected officials on political, not educational, grounds.⁴⁹

The plaintiffs also challenge the district court’s conclusion that the Guide was government speech. They point out that, unlike a decision about what subjects must be taught or what textbooks must be used in a classroom, the Guide is “advisory”; it provides only “recommendations” to be made available to local school boards and educators, who ultimately will decide what to teach and what materials to use. The plaintiffs note that, under Chapter 276, the board was not *required* to include materials about the Armenian Genocide at all—the statute uses the words “may include”—so the statute cannot have restricted the board’s ability to include materials that advocated different positions on the issue. Moreover, the Guide does contain a disclaimer that the board “does not endorse or mandate any curriculum materials,” a statement that the plaintiffs say dissociates the Commonwealth from any of the viewpoints expressed in the materials it recommends. The plaintiffs also point to the fact that the Guide contains materials that take differing views of the Great Hunger Period in Ireland and, notably, on the extent to which it was the result of a deliberate policy of the British government.⁵⁰ Plaintiffs also appealed the dismissal of ATAA’s claims as time-barred, contending that the removal of references from the draft guide was a “continuing” violation.⁵¹

The defendants, represented by the Attorney General of Massachusetts, emphasized in response that the plaintiffs do not allege that their own speech has been limited in any way. The Guide does not “require the plaintiffs (or any school district, teacher, or student) to say, or refrain from

46. *Id.* at 14–19.

47. *Id.* at 23. (citing *Pico*, 457 U.S. at 918 (Rehnquist, J., dissenting)).

48. *Id.* at 21–23.

49. *Id.* at 20.

50. *Id.* at 23–28.

51. Brief of Plaintiff-Appellants at 35–37.

saying, anything.”⁵² The defendants argued that the Guide’s recommendations—including the inclusion of certain recommended materials and the exclusion of others—is government speech, the content of which the Commonwealth is free to determine, even in response to supposed political pressure. The Commonwealth argued that neither the First Amendment nor *Pico* empowers private citizens to force the government to adopt particular viewpoints in its own speech. The Commonwealth additionally defended the district court’s view that *Pico* was not binding precedent even on its own facts.⁵³

E. ISSUES OF INTEREST

The First Circuit is likely to decide the *Griswold* case sometime this year and it would be inappropriate, and likely futile, to speculate as to the outcome.⁵⁴ For present purposes, it suffices to note three issues of interest regarding the ability of state governments to take positions on the Armenian Genocide and other matters of public importance.

1. THE SCOPE OF GOVERNMENT AUTHORITY TO RECOMMEND “NON-MANDATORY” CURRICULAR MATERIALS

All parties in *Griswold* agree that government speech is generally not limited by the First Amendment; the Supreme Court reaffirmed that principle as recently as last Term.⁵⁵ It is also undisputed that state governments have full authority to determine a school curriculum, another principle repeatedly recognized by the Court.⁵⁶ One of the principal

52. Brief of Defendants-Appellees at 21, *Griswold* (1st Cir. Nov. 25, 2009).

53. Two *amicus curiae* briefs were filed in support of Plaintiffs: one by the American Civil Liberties Union of Massachusetts and one by the Turkish American Legal Defense Fund. Three *amicus* briefs were filed in support of the Commonwealth, on behalf of: (1) the Armenian Bar Association, the Armenian National Committee of America, the Irish Immigration Center, Inc., the Jewish Alliance for Law and Social Action, Inc., the Genocide Education Project, and the Zoryan Institute for Contemporary Armenian Research and Documentation, Inc.; (2) the International Association of Genocide Scholars; and (3) the Armenian Assembly of America and six Armenian-American residents of Massachusetts. The author represents the following *amici* in the case: the Armenian Bar Association, the Armenian National Committee of America, the Genocide Education Project, and the Zoryan Institute for Contemporary Armenian Research and Documentation, Inc.

54. The case was argued on March 2, 2010, and remains under submission at the time of writing.

55. See *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1138 (2009); *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005); *Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995).

56. See *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 674 (1998) (comparing a broadcaster’s permissible content-based choices to “a university selecting a commencement speaker . . . or a public school prescribing its curriculum”); *Rosenberger*, 515 U.S. at 833 (noting

questions in *Griswold* is whether an *advisory* recommendation regarding curriculum is constitutionally different from a decision regarding *compulsory* curricular reading. The plaintiffs argue that it is, because the state is not determining what *will* be taught, but simply listing materials that are *available* while disclaiming any endorsement of or agreement with them. There does not appear to be any precedent applying the First Amendment in that precise context. Nonetheless, it is difficult to see why the First Amendment would limit a state's choice of what content to *recommend* for a curriculum, when it imposes no limitation on what content to *mandate*.

Indeed, the education guide is arguably similar to a commemorative statement made by a public official or to a monument in a public park. As Michael Walzer put it, the commemorative function of the state includes “the full set of political doctrines, historical narratives, exemplary figures, celebratory occasions, and memorial rituals through which the state impresses itself on the minds of its members.”⁵⁷ In selecting events or ideas to be celebrated or commemorated, governments are not required to give equal recognition to opposite or even different points of view. The City of Boston commemorates several events, including some identified by Chapter 276 as “recognized human rights violations and genocides,” by displaying (for example) the Irish Famine Memorial, the New England Holocaust Memorial, and monuments on Boston Common that commemorate fallen Union troops, including the Massachusetts 54th, the first African-American Civil War Regiment.⁵⁸ Boston is not required to erect monuments of equal stature or prominence to other people or events that many may consider no less worthy of commemoration. It is certainly not required to match its remembrance of fallen Union troops and Holocaust victims with memorials to the Confederacy and the Third Reich.⁵⁹

There are strong reasons to analogize the Guide to a memorial. The Guide represents a determination by the Commonwealth that the Armenian Genocide happened, that it was genocide, that it should be remembered, and that an effective means of remembrance is to consider including it in a school curriculum. The Guide is not mandatory, but neither are monuments; they do not require citizens to take any particular action, to hold or express a particular view, or even to look at them. However, their non-mandatory

that when the state “determines the content of the education it provides, it is the [state] speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker”); *see also* *Chiras v. Miller*, 432 F.3d 606, 609–10 (5th Cir. 2005).

57. MICHAEL WALZER, *ON TOLERATION* 76 (1997).

58. 1998 Mass. Acts 1154.

59. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (“When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism.” (citation omitted)).

nature does not make them any less government speech, nor does it give a private citizen a First Amendment right to insist on judicial control of their content.

2. THE VITALITY OF PICO AS A LIMITATION ON GOVERNMENT ACTION

Both the district court and the Commonwealth conclude that *Pico* has no precedential value and accordingly would not dictate the outcome even in a case involving the politically motivated removal of books from a school library. It is accordingly possible that the First Circuit could indicate in this case that local school authorities may remove materials even from a library for political or partisan reasons, notwithstanding the view of a plurality of the Court in *Pico*. Such a ruling would be dicta in this case and would not necessarily be welcome: one could imagine various hypotheticals in which, for example, a school's library—or perhaps its Internet terminals—severely restricted student access, such that even students engaged in a voluntary inquiry outside of the classroom setting could only find materials that espoused a particular political viewpoint. That would give students a very impoverished impression of the marketplace of ideas. The counterargument would be that local authorities are empowered to structure the school environment as they wish, even if it is partisan or prejudiced, and that the appropriate remedy is the ballot box.

But this would be a poor case in which to resolve those arguments, especially through an articulation of a potentially wide-ranging principle, given that narrower grounds of decision are readily at hand. The *Griswold* plaintiffs do not allege their access to materials—whether in a library or on the Internet—has in any way been restricted. As far as the complaint goes, students are free to view the contra-genocide websites on school computers, and school boards and teachers may use them in designing their classroom curricula. Because there is no limitation in access to ideas, it does not appear that a First Amendment violation is stated even under Justice Brennan's opinion in *Pico*. Accordingly, it is open to the First Circuit to affirm the judgment in *Griswold* without deciding whether *Pico* would recognize a First Amendment claim in a genuine reduction-of-access case.

3. THE RELEVANCE OR IRRELEVANCE OF PREEMPTION TO STATE GOVERNMENT SPEECH

A final intriguing question arises from a footnote in the plaintiffs' brief, which contends that an official endorsement of the Armenian Genocide by the Commonwealth might be preempted by the plenary power of the federal government over foreign affairs. The plaintiffs based this argument on the Ninth Circuit panel decision in *Movsesian v. Victoria Versicherung AG*.⁶⁰

60. 578 F.3d 1052 (9th Cir. 2009), *pet. for reh'g & reh'g en banc filed* (Sept. 10, 2009).

Movsesian struck down a California statute that extended the statute of limitations for insurance claims brought by Armenian Genocide victims. The panel held, by a 2-1 vote, that the California statute conflicted with a federal policy “refusing to provide official recognition” to the Armenian Genocide.⁶¹ Most interestingly, the panel majority stated that the conflict arose from the fact that the California Legislature had “use[d] the phrase ‘Armenian Genocide.’”⁶² In the court’s view, it was “[t]he symbolic effect of the words” that conflicted with a supposedly conscious federal decision not to use the word genocide.⁶³

There are many reasons for the First Circuit in *Griswold* not to engage with the preemption theory at issue in *Movsesian*. In the first place, the *Griswold* plaintiffs never asserted preemption before the district court, so the issue is not properly before the court of appeals. Moreover, there is arguably a meaningful substantive difference between a statute like California’s that authorizes a cause of action—thus imposing actual litigation and financial burdens on defendants—and government speech in an *educational* context, where state prerogatives are considered absolute and where the state’s position does not injure anyone in the Article III sense. Furthermore, the Ninth Circuit panel expressly did *not* consider numerous state resolutions and proclamations, some adopted on an annual basis by state legislatures and governors, recognizing and commemorating the Armenian Genocide, all without any objection by the federal government.⁶⁴ The First Circuit, by contrast, does have evidence of those commemorative statements before it.⁶⁵

F. CONCLUSION

While one cannot foretell the ultimate outcome in *Griswold*, the Commonwealth’s authority to control the content of its own speech, especially in curricular matters, is sufficiently settled and applicable to suggest that the district court’s judgment was correct. That is not to short-change the ability of students to explore and access new ideas—that is important, and it may well be “difficult,” as Justice White put it, to determine its appropriate place in our Constitution. Fortunately, *Griswold* does not require such a determination. Massachusetts has left its citizens and its students free to investigate and express differing views on the Armenian Genocide, all while being crystal clear about its own view: that

61. *Id.* at 1060.

62. *Id.*

63. *Id.* at 1061.

64. *Id.* at 1061–62.

65. See Corrected Brief of Amici Curiae Armenian Bar Ass’n et al. Supporting Affirmance, *Griswold v. Driscoll*, No. 09-2002 (1st Cir. Jan. 10, 2010).

the Genocide happened, that it was genocide, and that it is worth remembering.