Not on *Our* Shelves: A First Amendment Analysis of Library Censorship in the Public Schools

Arlen W. Langvardt

*University of Nebraska College of Law*, langvard@indiana.edu

**Follow this and additional works at:** [https://digitalcommons.unl.edu/nlr](https://digitalcommons.unl.edu/nlr)

**Recommended Citation**


Available at: [https://digitalcommons.unl.edu/nlr/vol61/iss1/6](https://digitalcommons.unl.edu/nlr/vol61/iss1/6)
Comment

Not on Our Shelves: A First Amendment Analysis of Library Censorship in the Public Schools

I. INTRODUCTION

The vast variety of literature and other reading material sold in this country indicates the diversity of taste characteristic of the American reading public. This diversity often engenders conflicting views concerning the quality of certain literary works and the merit of reading them. When the readers are students at the secondary school level and the decisions concerning the literature to which those students should be exposed are being made by school officials, the potential for conflict may be intensified. The school officials' determinations of the quality and value of certain works may or may not mirror the views of the students or their parents. Not surprisingly, litigation has sprung from this fertile source of potential conflict.

Since the United States Supreme Court's historic decision in Tinker v. Des Moines Independent Community School District1 in 1969, significant student rights litigation has occurred. This litigation has included cases in which varying tastes in literature have played a central role. In these cases, which can for convenience be labeled the "library censorship" cases,2 student plaintiffs have challenged public school officials' decisions to remove certain books from the schools' libraries or curricula or both.3 Such chal-

2. The cases dealing with removals of books from libraries and/or curricula of secondary public schools have, for purposes of this Comment, been labeled the library censorship cases.
The student plaintiffs have been successful in some cases, but in others, the courts have found no first amendment issues or violations of any magnitude.

This Comment will analyze the library censorship cases, focusing on the inherent conflict in book removal litigation between the traditional authority of the public school administration to control school operations and the first amendment rights asserted by students. Now that the United States Supreme Court has granted certiorari in a book removal case, a definitive resolution of the conflict may be imminent.

4. The first amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

The first amendment is made applicable to the states through the fourteenth amendment, which reads, in pertinent part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.


7. The scope of this Comment is restricted to the issues presented by book removal cases involving public schools at the secondary level. No attempt is made to discuss the probable or desirable results of such a conflict at the collegiate level. Courts and commentators have agreed that factors such as college students' age and increased maturity in comparison to high school students militate in favor of more expansive first amendment protection for college students and, accordingly, less judicial tolerance of university officials' acts tending to infringe upon college students' first amendment guarantees. See, e.g., Baughman v. Freienmuth, 478 F.2d 1345, 1348 (4th Cir. 1973); Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 808 n.5 (2d Cir. 1971); Wright, The Constitution on Campus, 22 VAND. L. REV. 1027, 1052-53 (1969).

II. TRADITIONAL CONTROL OF SCHOOL OPERATIONS

Unquestionably, schools play a vital role in helping individuals develop capacities for thinking and analysis. Education, besides awakening the student to cultural and societal values, aids the child in adjusting to his environment. While the student must remain free to inquire if his educational experience is to be truly fruitful, it is generally thought that the first amendment guarantee of free speech cannot be viewed as an absolute in the secondary school environment if these schools are to operate effectively. The potential conflict between the students' interests in first amendment expression and inquiry and the school officials' authority to control school operations and maintain discipline lies at the heart of the library censorship cases. Consequently, some background discussion of the judicial attitude toward the authority of school officials and the emerging constitutional freedoms of secondary school students is essential.

A. Power of Boards of Education

A conventional basis for respecting the discretion exercised by local boards of education and school officials in determining how to manage public schools has been the in loco parentis doctrine. The term "in loco parentis" has been said to mean "[i]n the place of a parent; instead of a parent; charged factitiously, with a parent's rights, duties, and responsibilities." However, the inflexibility of this doctrine has undermined its usefulness as a legitimate, modern-day basis for actions of boards of education and school officials which affect students.

A theoretical basis more commonly relied upon today for respecting decisions of school officials is the view that public schools serve an indoctrinative function; they instill in students basic

15. Freeman, supra note 13, at 186.
concepts, skills, knowledge, and values which the community considers important. This indoctrinative function can be termed the prescriptive model of education, which stands in contrast to the analytic model of education:

In the prescriptive model, information and accepted truths are furnished to a theoretically passive, absorbent student. The teacher's role is to convey these truths rather than to create new wisdom. Both teacher and student appear almost as automatons. Analytic education, however, signifies the examination of data and values in a way that involves the student and teacher as active participants in the search for truth. While these polar models represent only a theoretical paradigm that can never exist in pure form, we have traditionally conceived of pre-college public education as essentially prescriptive, and college and post-graduate studies as analytic.

Because of this indoctrinative function of education, some curtailment of students' first amendment rights of expression and inquiry is inherent in public school systems.

The states have granted local boards of education almost exclusive control over public education. The boards are afforded broad discretion with respect to school operations, especially in the areas of classroom standards, student and teacher conduct, and curricula. Under ordinary circumstances, the public school administration has ultimate control over curriculum, the manner in which subject matter is to be presented, and the materials to be used in the teaching process. By statute, most states include book selection as one of the powers of the local boards.

While the broad discretion afforded local boards of education is generally respected by the judiciary, it would seem unsound to...
suggest that the discretion in the areas of book selection and removal may be exercised wholly without regard to the constitutional safeguards which protect students. Although some courts view a local board's power to select books as implicitly accompanied by the power to remove from use undesirable books and materials, there is debate as to whether the discretion to remove books may be exercised independently of students' first amendment rights. However, even when the actions of school officials infringe upon the first amendment freedoms of students, courts generally place great weight on the officials' decisions and are predisposed, though clearly not irrevocably so, to uphold their actions. Only the view that the judiciary must remain "profoundly skeptical" of any state assertion that an action significantly affecting first amendment rights can withstand constitutional scrutiny keeps courts from deferring entirely to the judgment of school officials.

Courts view the decisions of school officials after the fact, and judges do not possess the educational expertise which school officials are presumed to have; thus courts are hesitant to intervene in the management of day-to-day school affairs. Nevertheless, where fundamental constitutional guarantees are implicated, courts will intervene to remedy past violations and to prevent further violations of those guarantees. Courts are sensitive to the constitutional problems created when school boards, perhaps under the guise of concern for students' welfare, allow community prejudices to override the expression of contrary viewpoints in the

26. See notes 201-04 & accompanying text infra.
27. See notes 141-253 & accompanying text infra. See also Eisner v. Stamford Bd. of Educ., 440 F.2d 803 (2d Cir. 1971), in which the Second Circuit held that a policy requiring school officials' approval before students could distribute a publication on campus was not automatically unconstitutional. Id. at 805. However, in this particular case the court struck down the policy statement at issue as constitutionally deficient. Id. at 810-11. Employing language which arguably would support school officials' power to remove undesirable books and other materials, the court stated that the school administration "has authority to minimize or eliminate influences that would dilute or disrupt the effectiveness of the educational process as the state conceives it." Id. at 807.
31. Schauer, supra note 21, at 314.
schools, or when the freedom of inquiry is unduly stifled. The boards, through the exercise of their discretionary powers, may not, as Justice Jackson put it, "strangle" the independent thinking of students:

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

B. Parental Challenges to Local Board Control of School Operations

While the great tide of student plaintiff cases has occurred since the 1969 Tinker decision, there were much earlier parental challenges to the authority of boards of education and school officials to control school operations as they saw fit. In the 1923 case of Meyer v. Nebraska, the Supreme Court struck down a Nebraska statute which prohibited both teaching a subject in a foreign language and teaching a foreign language to students below the eighth-grade level. The Court held that the statute unconstitutionally deprived parents of a liberty interest in raising their children and directing their education.

Two years later, in Pierce v. Society of Sisters, the Supreme Court held that the same liberty interest was impermissibly infringed by an Oregon law which provided that no child between the ages of eight and sixteen could attend a private school.

35. See Sweezy v. New Hampshire, 354 U.S. 234 (1957), in which the Supreme Court, in extolling the virtues of academic freedom, noted that "[s]cholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." Id. at 250.
36. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943). In Barnette, the Supreme Court struck down a state board of education regulation requiring students to salute the flag and recite the pledge of allegiance. Id. at 642.
37. 262 U.S. 390 (1923).
38. Id. at 409-01.
40. Id. at 534-35. While the Court recognized and gave effect to the liberty interests of parents, the case actually was brought by the Society of Sisters, which alleged that its business and property—the private school which it operated—were being injured and threatened with destruction by the state's interference with the parents' rights. Id. at 535.
More recently, parents successfully challenged an aspect of state regulation of education in *Wisconsin v. Yoder*. In an opinion authored by Chief Justice Burger, the Court held unconstitutional the application of Wisconsin's compulsory school attendance law to certain Amish children. Enforcement of the law would have required all school-age children to attend school until the age of sixteen, against the wishes of Amish parents who desired to send their children to school only through the eighth grade. The Chief Justice opined that enforcement of the law would "gravely endanger if not destroy" the Amish's first amendment right of free exercise of religion.

The success parents have enjoyed in cases such as *Meyer*, *Pierce*, and *Yoder* generally has not carried over to parental challenges of local school board control of curriculum content. The discretion vested in local school officials has been said to control in that area. Nor have parental challenges to local school districts' selections of books been successful. Courts generally accord school officials a relatively free hand in selecting books. In one notable challenge of a board of education's book selection, a parent sought to remove Dickens' *Oliver Twist* and Shakespeare's *The Merchant of Venice* from use in the New York City public schools. The parent alleged that the works were objectionable because they kindled hatred of Jewish persons. The court held that the board of education had not abused its discretion in selecting the works, and thus their use could not be suppressed. The court reasoned that school officials must be free to foster free inquiry and learning, and that public education, coupled with instruction in the home, would do much more to remove religious and racial intolerance than would suppression of the literature. Absent facts demonstrating that "a book ha[d] been maliciously written for the apparent purpose of promoting and fomenting a bigoted and intolerant hatred against a particular racial or reli-

42. Id. at 219.
43. See, e.g., *Cornwell v. State Bd. of Educ.*, 314 F. Supp. 340 (D. Md. 1969), *aff'd per curiam*, 428 F.2d 471 (4th Cir.), *cert. denied*, 400 U.S. 942 (1970), in which it was held that parents possessed no constitutional right which gave them exclusive control over teaching their children about sexual matters and no constitutional right which would prohibit sex education in the schools. Id. at 342.
44. T. Van Geel, *Authority to Control the School Program* 147-48 (1976). It is not clear whether student challenges in this area would meet with any more success. See notes 263-72 & accompanying text infra.
46. Id. at 543, 92 N.Y.S.2d at 345.
47. Id. at 544, 92 N.Y.S.2d at 346.
48. Id. at 543-44, 92 N.Y.S.2d at 346.
igious group," the court found that the public interest could not tolerate the suppression sought by the plaintiff.

Parents have been similarly unsuccessful in challenging book selections on the grounds that school board decisions to use certain books violated their right to privacy, constituted an establishment of religion, and tortiously inflicted injury on them. Occasionally, however, parental challenges based on the content of

49. Id. at 543, 92 N.Y.S.2d at 346.

50. Williams v. Board of Educ., 388 F. Supp. 93 (D. W.Va.), aff'd mem., 530 F.2d 972 (4th Cir. 1975). In Williams, summary judgment was granted against the parent plaintiffs who alleged that certain of the board of education's book approval decisions constituted an establishment of religion, inhibited their free exercise of religion, and violated their right of privacy, 388 F. Supp. at 96. The court observed that while some of the books and materials selected were offensive to the parents' beliefs, there clearly were no constitutional violations of the sort claimed. Id.

51. Todd v. Rochester Community Schools, 41 Mich. App. 320, 200 N.W.2d 90 (1975). Todd involved a parent's challenge to the board's approval of the Kurt Vonnegut novel, Slaughterhouse Five. The parent's petition, which sought mandamus to force removal of the book from use in the school, alleged that Slaughterhouse Five "contains and makes reference to religious matters" and that its use in the public schools therefore violated the first amendment. Id. at 323-24, 200 N.W.2d at 91. The Michigan Court of Appeals indicated that summary judgment should have been granted to the defendant board and reversed the trial court's granting of a writ of mandamus to remove the book from use in the public school curriculum. Id. at 328, 200 N.W.2d at 93.

The court of appeals noted that there simply was no authority for the proposition that the establishment clause of the first amendment was violated merely because religion was referred to in literature used in a public school system. Id. at 328-29, 200 N.W.2d at 93. Disturbed because the trial judge apparently let his low personal opinion of the quality of Slaughterhouse Five preempt the principled constitutional adjudication he should have made, the court of appeals observed that the Constitution "will tolerate no supreme censor nor allow any man to superimpose his judgment on that of others so that the latter are denied the freedom to decide and choose for themselves." Id. at 338, 200 N.W.2d at 98. Further, the court stressed that "[g]overnment has no legitimate interest in controlling or tabulating the human mind nor the fuel that feeds it." Id. at 336, 200 N.W.2d at 97. Such sweeping language seemingly could be relied upon by student plaintiffs in challenges of school boards' book selection or removal decisions.

52. Carroll v. Lucas, 39 Ohio Misc. 5, 313 N.E.2d 864 (1974). In Carroll, an eighth grade student's parents sought damages from school officials for a tort which allegedly caused emotional distress to the daughter and the parents' loss of the daughter's companionship. Id. at 9, 313 N.E.2d at 866-67. The alleged tortious act was a school music teacher's assigning a book which the parents objected to, causing the daughter to be exposed prematurely to matters from which the parents had tried to protect her. According to the plaintiffs, the book at issue, Trips: Rock Life in the Sixties, by Ellen Sander, included vulgarity and approvingly portrayed promiscuous sexual activity. Id. at 6, 313 N.E.2d at 866. The court held there could be no recovery for the parents. Id. at 9, 313 N.E.2d at 866-67.
books selected by the school board succeed.\textsuperscript{53}

Unsuccessful challenges in the courts, however, do not mean that the views of parents are disregarded by school boards when deciding whether to approve the use of certain books. It would be naive to assume that school officials, whether elected or appointed, are not sensitive to the views and preferences of the students' parents.\textsuperscript{54} There have been numerous instances in which school officials have banned the use of certain books in their school systems without court challenge,\textsuperscript{55} making it difficult to assess the effect of parental pressure.

III. THE EMERGENCE OF STUDENTS' FIRST AMENDMENT RIGHTS

A. The \textit{Tinker} Legacy and its Relevance to Library Censorship Cases

No discussion dealing with students' constitutional rights

\textsuperscript{53} In Grosser v. Woollett, 45 Ohio Misc. 15, 341 N.E.2d 356 (1974), the plaintiffs, both parents and students, obtained an injunction against the use of Claude Brown's \textit{Manchild in the Promised Land} and Ken Kesey's \textit{One Flew Over the Cuckoo's Nest} in the local school system. \textit{Id.} at 16-17, 341 N.E.2d at 359, 367-68. The court found that the injunction was warranted because use of the works would have violated the Ohio statute dealing with the distribution of harmful material to minors. In accordance with provisions in the statute, the court did not ban outright the use of the books, but issued an injunction prohibiting their use by individual students unless the students' parents knew of the character of the books and consented to their children's use of them. The court stated that the statute was in accordance with existing United States Supreme Court pronouncements on obscenity. \textit{Id.} at 27-28, 341 N.E.2d at 365. Taking an unenlightened view, the court stated that both \textit{Manchild} and \textit{Cuckoo's Nest} "have no literary, artistic, political or scientific value whatsoever," \textit{id.} at 30, 341 N.E.2d at 367, and that "the books were designed by the authors to appeal to the base instincts of persons and to shock others for the purpose of effectuating sales of the books." \textit{Id.} at 30-31, 341 N.E.2d at 367. The \textit{Grosser} decision is a departure from the results generally reached in cases involving parental challenges of school officials' book selections, but that apparently can be attributed to the trial judge's inexplicable impressions of the content of the literature at issue in the case.

\textsuperscript{54} See Thomas v. Board of Educ., 607 F.2d 1043, 1051 (2d Cir. 1979), \textit{cert. denied}, 444 U.S. 1081 (1980), and James v. Board of Educ., 461 F.2d 566, 575 (2d Cir.), \textit{cert. denied}, 409 U.S. 1042 (1972), in which the court expressed concern about school officials who attempt to win community approval by making decisions impinging upon the first amendment rights of students.

\textsuperscript{55} Among the works which have at one time or another been banned from use in public school systems are: William Shakespeare's \textit{The Merchant of Venice}, Samuel Clemens' \textit{Tom Sawyer} and \textit{Huckleberry Finn}, Ernest Hemingway's \textit{The Sun Also Rises} (in one school system in 1960, all works by Hemingway were removed from use), J.D. Salinger's \textit{The Catcher in the Rye}, John Griffin's \textit{Black Like Me}, and Howard Fast's \textit{Citizen Tom Paine}. A. \textsc{Haight}, \textsc{Banned Books} 22, 57, 89-90, 99, 101, 102 (3d ed. 1970).
would be complete without some treatment of the landmark case of _Tinker v. Des Moines Independent Community School District_.

In its narrowest sense, the decision held that public school students peacefully wearing black arm bands as a vehicle for protest were expressing themselves in a constitutionally protected manner. Viewed in a broader sense, _Tinker_ established that students have significant first amendment rights which are not merely to be "grudgingly tolerated," and that the first amendment is of fundamental importance to American education. With the statements that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," and that school officials must exercise their control over school operations in a manner "consistent with fundamental constitutional safeguards," _Tinker_ set off a flurry of student rights litigation. This litigation may be parceled into the principal areas of hair length cases, student suspension cases, control over student newspaper cases, and library censorship cases.

What came to be known as the _Tinker_ test was formulated. Under the test, student expression is protected and cannot be prohibited unless it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." The test can be met by a showing of either actual disruption or disorder, or "facts which might reasonably have led school authorities to fore-

---

57. Id. at 509.
59. 393 U.S. at 506.
60. Id. at 507.
61. The hair length cases, which flourished in the early 1970's, produced a split between courts which found that students had a constitutionally protected interest and those which saw no constitutional issue. For a discussion of this split, see J. Hogan, _The Schools, The Courts, and The Public Interest_ 96-108 (1974); A. Levine, _supra_ note 58, at 47-48.
63. Since the _Tinker_ decision, the most significant cases dealing with students' first amendment rights have involved student newspapers, both officially recognized school publications and those of the "underground" variety. The newspaper cases collectively seem to have worked an accommodation between the students' interests in expression and the school officials' interests in maintaining order within the school. For discussions of the newspaper cases, see A. Levine, _supra_ note 58, at 31-32, 34-41; Letwin, _Regulation of Underground Newspapers on Public School Campuses in California_, 22 UCLA L. REV. 141 (1974); Note, _Beyond the Schoolhouse Gate: Protecting the Off-Campus First Amendment Freedoms of Students_, 59 Neb. L. REV. 790 (1980).
64. See notes 141-251 & accompanying text _infra_.
65. 393 U.S. at 513.
cast substantial disruption of or material interference" with school operations. The Tinker test is not particularly relevant in the library censorship context, because such cases generally hinge upon the student's purported first amendment right to know or receive information. In the exercise of this right, the receiver often plays only a passive role rather than an active one. The Tinker test appears more applicable to cases in which active instances of expression are sought to be suppressed.

The chief value of Tinker for student plaintiffs in book removal cases is the Court's recognition that students possess first amendment rights which cannot be curtailed merely because school officials deem it desirable to do so. Of additional value is the Court's broad admonition that school officials' desires to avoid "the discomfort and unpleasantness that always accompany an unpopular viewpoint" or "urgent wish[es] to avoid . . . controversy" are

66. Id. at 514. Most cases in which the Tinker test has been employed have focused on the "material and substantial disruption" portion of the test. See Note, supra note 63, at 796-98.

The "interference with the rights of others" portion of the Tinker test was resurrected in a 1977 Second Circuit case, Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977), cert. denied, 435 U.S. 925 (1978). In that case, school officials denied student newspaper staff members permission to distribute a questionnaire surveying the sexual attitudes, knowledge, experience, and preferences of ninth through twelfth grade students. Id. at 514-15. The staff members intended to publish the results of the survey in the school newspaper. Id. The court found no constitutional defect in the denial of permission to distribute the questionnaire because school officials reasonably could have believed that the questionnaire could cause significant emotional harm to some students. Id. at 519-20. In stating that "[t]he First Amendment right to express one's views does not include the right to importune others to respond to questions when there is reason to believe that such importuning may result in harmful consequences," id., the court apparently was relying upon the "interference with the rights of others" portion of the Tinker test.

The Trachtman decision has been roundly criticized by commentators who call it an example of undue deference to school officials. See, e.g., Diamond, Interference With the Rights of Others: Authority to Restrict Students' First Amendment Rights, 8 J.L. & Educ. 347, 355-56 (1979). However questionable the wisdom of Trachtman, it would seem that school officials who are defendants in library censorship cases might want to assert the kind of rationale recognized in Trachtman as justification for the removal of certain books from use in the school.

67. See notes 110-85 & accompanying text infra.

68. While the literal formulation of the Tinker test may not be appropriate in the library censorship cases, other language in Tinker suggests that in such cases, the board of education, to justify book removal, must demonstrate some state interest which is at least as substantial as the particular "material and substantial" interests referred to in the Tinker test. See notes 70-73 & accompanying text infra.

69. See notes 58-60 & accompanying text supra.

70. 393 U.S. at 509.

71. Id. at 510.
not sufficient to justify curtailment of students' first amendment rights. Such desires may well be at the heart of many decisions by school officials to remove certain books from use in the school system. Offering a further statement relevant to library censorship cases, Justice Fortas, writing for the majority, observed that “students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.”72 Student plaintiffs in book removal cases thus may argue that students are in danger of becoming just what the Court was concerned about if school officials are given sweeping latitude in book removal decisions. School systems cannot, cautions Tinker, become “enclaves of totalitarianism.”73

These statements in Tinker are reminiscent of statements in earlier Supreme Court cases which dealt with education and the first amendment, but did not deal directly with students. In Shelton v. Tucker,74 a 1960 case, the Court struck down an Arkansas statute which required teachers to reveal every organization to which they belonged or contributed within the preceding five years, calling the statute overly broad75 and violative of the teachers' freedom of association.76 Employing language expansive enough to apply to students as well as teachers, Justice Stewart stated that “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”77

Seven years later, the Court, in Keyishian v. Board of Regents,78 struck down a New York regulation designed to prevent the appointment of subversive persons to positions of state employment, including teaching positions. The Court held that the vagueness of the plan unconstitutionally chilled the exercise of first amendment rights,79 that the plan was overly broad,80 and that the plan infringed upon associational freedoms.81 As in Shelton, the Court extolled the virtues of academic freedom82 and stated that the first amendment “does not tolerate laws that cast a pall of

72. Id. at 511.
73. Id.
74. 364 U.S. 479 (1960).
75. Id. at 490.
76. Id. at 485-87.
77. Id. at 487.
78. 385 U.S. 589 (1967).
79. Id. at 604.
80. Id. at 609.
81. Id. at 607.
82. “Academic freedom” can be defined as “the teacher's freedom from external control in order to foster free discussion and interchange of ideas in an academic environment.” Schauer, supra note 21, at 288-89. Under the right to receive information theory advanced in the library censorship cases, see notes 143-85 & accompanying text infra, the teacher's right to academic free-
orthodoxy over the classroom.\footnote{83} Student plaintiffs in library censorship cases should be able to rely upon this principle and maintain that if such orthodoxy cannot constitutionally be prescribed for the classroom, it cannot constitutionally be prescribed for the library. The Court in \textit{Keyishian} labeled the classroom “peculiarly the ‘marketplace of ideas,’” stating that “[t]he Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.”\footnote{84} The same marketplace of ideas theory has been seized upon by student plaintiffs in library censorship cases.\footnote{85}

Both \textit{Shelton} and \textit{Keyishian} were cited in another pre-\textit{Tinker} decision which is sometimes regarded as supplying the test to be applied in library censorship cases.\footnote{86} In \textit{Epperson v. Arkansas},\footnote{87} the Supreme Court addressed the constitutionality of an Arkansas statute which prohibited the teaching of evolution in public schools and universities.\footnote{88} While the law was held unconstitutional only on the narrow ground of establishment of religion,\footnote{89} the opinion included portions which implicated the entire first amendment. The Court formulated a test for determining when the judiciary should intervene in the resolution of school conflicts:

\begin{quote}
Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. Our courts, however, have not failed to apply the First Amendment’s mandate in our educa-
\end{quote}

\footnote{83. 385 U.S. at 603.}
\footnote{85. See notes 162-64 & accompanying text \textit{infra}.}
\footnote{86. See notes 206-32 & accompanying text \textit{infra}. Perhaps the explanation for the occasional reliance on the \textit{Epperson} test in library censorship cases is that \textit{Epperson} was a case requiring the Court to determine whether to regulate curriculum content, and curriculum is an area logically related to book choice.}
\footnote{87. 393 U.S. 97 (1968).}
\footnote{88. \textit{Id}. at 103. The law constituted an establishment of religion because it deleted from the curriculum a particular body of knowledge which purportedly conflicted with a particular religious doctrine.}
\footnote{89. See Nahmod, \textit{First Amendment Protection for Learning and Teaching: The Scope of Judicial Review}, 18 WAYNE L. REV. 1479 (1972), wherein the author noted that \textit{Epperson}, having been decided only on the narrow establishment ground and not on the broader free speech ground which conceivably could have been relied upon, did nothing to dispute the validity of the statement that the Supreme Court has never disposed of a curriculum matter on a free speech basis. \textit{Id}. at 1504. It is important to remember that \textit{Meyer v. Nebraska}, a case dealing with curriculum content, was decided not on a first amendment basis, but on the basis of the parents’ liberty interest under the due process clause. See notes 37-38 & accompanying text \textit{supra}.}
tional system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief. By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.

While Epperson reiterated the Court's apparent concern for the preservation of the first amendment in schools, its test would require that the courts not overturn the decisions of school officials unless those decisions "directly and sharply" infringe a first amendment right.

B. The Scope and Extent of Students' Constitutional Rights

When read liberally, the cases discussed in the preceding subsection suggest that student rights are the virtual equivalents of rights accorded adults. There are cases, however, which restrict this apparently broad scope of student rights and which indicate that interference with student rights will be tolerated to a much greater extent than interference with the rights of adults. The courts which assert that students' first amendment rights are not coextensive with those of adults have seized upon a statement to that effect by Justice Stewart in his concurrence in the Tinker case and other Supreme Court cases involving minors, but not pertaining to the school environment.

In Ginsberg v. New York, the Court upheld the conviction of a merchant who sold certain magazines to a youth in violation of a New York law prohibiting the sale of "harmful" materials to minors, even though the magazines would not have been regarded as obscene with respect to adults. The Court observed that the statute did not invade an area of expression which the Constitution

90. Epperson v. Arkansas, 393 U.S. 97, 104 (1968). Following the enunciation of this apparent test, the Court cited the Shelton and Keyishian language discussed earlier. Id. at 104-05. See text accompanying notes 78-84 supra.
91. See, e.g., Williams v. Spencer, 622 F.2d 1200, 1205 (4th Cir. 1980) (while students do not lose all first amendment rights at school, their first amendment rights are not coextensive with those of adults); Baughman v. Freienmuth, 478 F.2d 1345, 1348 (4th Cir. 1973) (same); Hernandez v. Hanson, 430 F. Supp. 1154, 1159 (D. Neb. 1977) (same). See also Garvey, Children and the First Amendment, 57 Tex. L. Rev. 321 (1979), wherein the author stated: "[T]here is no denying that the child's speech right is different in kind as well as degree from the right of free speech possessed by adults." However, the author further noted that the student does have a right to freedom of expression which forms part of "the fundamentally just claim all children have against the state—that it should respect and leave open the possibilities of choice that they will have on reaching maturity." Id. at 339.
92. 393 U.S. at 515 (Stewart, J., concurring).
94. Id. at 633-34.
had secured for minors. It held that the state had the power to regulate for the well-being of children and could constitutionally prescribe different standards for obscenity as related to minors. Thus under Ginsberg the broad scope of first amendment protection of the expression of adults may not extend to minors because of the state's power to protect the well-being of minors.

The 1975 case of Erznoznik v. City of Jacksonville renewed the Ginsberg rationale, even though the Court struck down an ordinance prohibiting drive-in theatre operators from exhibiting movies containing nudity. Unconstitutionality was based, in part, on the ground that if the ordinance was intended to regulate expression accessible to minors, it was fatally overbroad. Justice Powell stated that, after Ginsberg, "[i]t is well-settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults." The opinion stressed, however, that in view of cases such as Tinker, "minors are entitled to a significant measure of First Amendment protection," and that "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them."

The somewhat puzzling, often-criticized decision in FCC v. Pacifica Foundation further indicates that minors may not enjoy first amendment rights to the same extent as adults. The plurality opinion by Justice Stevens upheld the FCC's authority to impose sanctions on broadcasting stations airing broadcasts which, although not obscene, contained "indecent" language. The plurality expressed concern over the ready accessibility of such language to children in the audience, and apparently authorized the withholding of some forms of offensive expression from children. Courts have relied on the foregoing cases to determine that the

95. Id. at 637-38.
96. Id. at 638.
97. 422 U.S. 205 (1975).
98. Id. at 213.
99. Id. at 212.
100. Id.
101. Id. at 213.
102. See, e.g., L. Tribe, AMERICAN CONSTITUTIONAL LAW 67-68 (Supp. 1979), wherein Professor Tribe characterized the decision as an unfortunate one and stated its rationale should be discarded before any significant imprint is left on first amendment doctrine.
103. 438 U.S. 726 (1978). The case stemmed from a radio station's playing, during the afternoon, a recording of "Filthy Words," a comedy monologue by George Carlin. Id. at 729.
104. Id. at 738.
105. Id. at 749.
first amendment rights of students are not coextensive with those of adults. Some commentators have regarded such a view as unwise. Stating that the essence of the first amendment is “the mandate of free mind,” one commentator has stressed that if we are to “develop the powers of independent thought rather than those of the patient plowman or the diligent housewife,” minors cannot be excluded from the free discussion inherent in the adult realm. It has been argued that secondary school students must have the same first amendment rights as adults and that Tinker points the way to such a conclusion: An enlightened decision like Tinker cannot alone do the job. If its promise is to be realized, it must be accompanied by a refusal to tolerate any denial of rights based merely on unadorned proclamations that children are immature, in need of protection from themselves or from others, or simply that they are “different.”

IV. EVOLUTION OF THE RIGHT TO RECEIVE OR KNOW

One of the primary arguments relied upon by student plaintiffs in the library censorship cases is that they have a first amendment right—variously termed the right to receive information, the right of access to information, the right to know, or the right to read—which has been infringed by the school officials’ removal of certain books from use in the school system. This asserted right has as its theoretical basis a string of United States Supreme Court cases which dealt with the right to receive information. Although these cases did not involve student plaintiffs, some discussion of them is necessary for a complete understanding of the library censorship cases.

The right to receive cases began with Martin v. City of Struthers, a 1943 case in which a city ordinance making it unlawful to ring doorbells and distribute literature was held invalid under the first amendment. The ordinance was held invalid in part because it failed to distinguish between potential recipients who were willing to receive the information and those who were not. While the Martin decision was grounded chiefly on the plaintiff’s first amendment right to distribute information, stress was also

107. Id.
108. Letwin, supra note 63, at 144.
109. Id.
110. See notes 144-94 & accompanying text infra.
111. 319 U.S. 141 (1943).
112. Id. at 147-49.
113. Id. at 145-47.
placed on the right of the willing recipient to receive information.\textsuperscript{114} In his plurality opinion, Justice Black observed that the authors of the first amendment "chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. This freedom embraces the right to distribute literature, \ldots and necessarily protects the right to receive it."\textsuperscript{115}

The second significant case dealing with the right to receive information was \textit{Lamont v. Postmaster General},\textsuperscript{116} decided in 1965. In \textit{Lamont}, the Court considered the constitutionality of a federal law which required the postal service to detain and destroy unsealed foreign mail which was determined to be communist political propaganda, unless the addressee, after notification from the postal service, returned a separate reply card requesting delivery of the mail.\textsuperscript{117} The Court held that the statute was unconstitutional because it required "an official act (viz., returning the reply card) as a limitation on the unfettered exercise of the addressee's First Amendment rights."\textsuperscript{118} The Court appeared to rely upon a right to receive information rationale,\textsuperscript{119} noting that the statute's reply card requirement as a condition precedent to receiving the mail amounted to "an affirmative obligation which we do not think the Government may impose on [the addressee]."\textsuperscript{120}

The next stage in the development of the right to receive information theory occurred in \textit{Stanley v. Georgia}.\textsuperscript{121} In this 1969 decision, a statute which made the private possession of obscene material in one's home a criminal offense was held to violate the first and fourteenth amendments.\textsuperscript{122} The Court called the right to receive information and ideas, "regardless of their social worth," both "well established" and "fundamental to our free society."\textsuperscript{123} The Court also expressed concern that judicial condoning of state action which diminished this right would lead to government control of the minds of men and women, a concept abhorrent to basic

\begin{itemize}
\item \textsuperscript{114} \textit{Id.} at 149.
\item \textsuperscript{115} \textit{Id.} at 149 (footnotes omitted).
\item \textsuperscript{116} 381 U.S. 301 (1965).
\item \textsuperscript{117} \textit{Id.} at 302-03.
\item \textsuperscript{118} \textit{Id.} at 305.
\item \textsuperscript{119} Justice Brennan's concurring opinion expressly stated that the right to receive publications is a fundamental right and warned that "[t]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them." \textit{Id.} at 308 (Brennan, J., concurring).
\item \textsuperscript{120} \textit{Id.} at 307.
\item \textsuperscript{121} 394 U.S. 557 (1969).
\item \textsuperscript{122} \textit{Id.} at 558.
\item \textsuperscript{123} \textit{Id.} at 564. Additionally, the Court viewed the law as an unwarranted intrusion into the privacy of persons desiring to read such material in their own homes. \textit{Id.}.
\end{itemize}
The Court again relied upon the right to receive information rationale in *Red Lion Broadcasting Co. v. FCC*, in which it held that FCC regulations mandating the reservation of broadcasting time for rebuttal of personal attacks and political editorializing arising out of discussions of controversial public issues did not inhibit the first amendment freedom of speech. The Court determined that the regulations would actually advance the first amendment rights of the listening public, and stated: "It is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences . . ." The 1974 case of *Procunier v. Martinez* involved another application of the right to receive information theory, and focused on the freedom to participate in the communication process. In striking down certain prison mail censorship rules as violative of the first amendment, the Court's opinion, written by Justice Powell, included the following observation:

Whatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech. And this does not depend on whether the non-prisoner correspondent is the author or intended recipient of a particular letter, for the addressee as well as the sender of personal correspondence derives from the First and Fourteenth Amendments a protection against unjustified governmental interference with the intended communication.

The foregoing cases, particularly *Martinez*, set the stage for the case which solidified the right to receive information: *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* There the Court struck down a Virginia statute which provided that a licensed pharmacist who advertised the price of a drug available only by prescription was guilty of unprofessional conduct. The statute was found to be an invalid suppression of

124. Id. at 565. The right to receive information asserted by student plaintiffs in library censorship cases has sometimes been termed the "right to read." The *Stanley* opinion twice made reference to a "right to read" as part of a right to further intellectual and emotional interests. *Id.* at 565, 568.


126. *Id.* at 375. The regulations, designed to further the fairness doctrine, required that one personally attacked during a broadcast dealing with a controversial public issue be given an opportunity, by the station broadcasting the program, to respond. *Id.* at 373-74.

127. *Id.* at 390.


129. *Id.* at 415.

130. *Id.* at 408-09.


132. *Id.* at 773. The case is primarily notable for its holding that commercial speech is not entirely removed from first amendment protection. *Id.* at 762.
truthful speech about lawful commercial activity. The significance of *Virginia Board of Pharmacy* to the library censorship cases is that the plaintiffs challenging the law were not pharmacists who wished to advertise, but were prospective recipients of the advertising prohibited by the law.\(^{133}\) The Court held that their right to receive the advertising gave them the right to maintain the action.\(^{134}\) In reaching this result, the Court recognized that the right to receive information and ideas had received protection in prior cases.\(^{135}\) Then, apparently picking up on the *Martinez* reference to protecting intended communication,\(^{136}\) the Court stated: “Where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both.”\(^{137}\) The Court observed that “[i]f there is a right to advertise, there is a reciprocal right to receive the advertising,” and that this separate right to receive information could be asserted by the plaintiffs, who were potential recipients of advertisements.\(^{138}\) The Court’s holding has been offered by student plaintiffs in the book removal cases as authority for their suits contesting the removals even though the “speakers,” the authors whose works were removed from use, were not also plaintiffs.\(^{139}\) The scope of the right to know after the *Virginia Board of Pharmacy* case has been summarized as follows:

A right to know at times means nothing more than a mirror of such a right to speak, a listener's right that government not interfere with a willing speaker's liberty. But the right to know at times means more: it may include an individual's right to acquire desired information or ideas free of governmental veto, undue hindrance, or unwarranted exposure. Such a right to know may entail no correlative right in any particular source to originate the communication.\(^{140}\)

### V. THE LIBRARY CENSORSHIP CASES

The library censorship cases may be divided into three groups:

---

133. *Id.* at 756.

134. *Id.* at 757.

135. *Id.* at 756-57.

136. See note 130 & accompanying text supra.

137. 425 U.S. at 756 (footnote omitted).

138. *Id.* at 757.


140. L. Tribe, AMERICAN CONSTITUTIONAL LAW 675-76 (1978) (footnotes omitted). As authority for the final sentence quoted in the text, Professor Tribe cited *Virginia Board of Pharmacy* and observed that the consumer plaintiffs vindicated the right to receive the information through advertising. He added that no pharmacist or seller was a party to the action, and “it is not clear that such a party would have had a personal right to disseminate the information.” *Id.* at 676 n.7.
LIBRARY CENSORSHIP

first, the Sixth Circuit’s decision of Minarcini v. Strongsville City School District141 and the decisions which have followed its lead in protecting student rights in book removal situations; second, the Second Circuit’s three book removal cases which have culminated in inconsistent results; and third, the Seventh Circuit’s decision upholding the actions of the defendant school officials in Zykan v. Warsaw Community School Corp.142

A. The Minarcini Approach

The 1976 Minarcini decision was the first case in which it was held that a school board’s decision to remove certain books from use in a secondary school violated the students’ first amendment rights.143 Central to the Minarcini approach is the theory that when a book removal by school officials cannot be explained in content-neutral terms, there has been an infringement of the students’ first amendment rights to receive information.144 Under the Minarcini approach, school officials do not have unfettered discretion in determining whether to remove certain books from use.145

In Minarcini, five high school students in Strongsville, Ohio, brought a class action under 42 U.S.C. § 1983 against the school district,146 the board of education, and the school superintendent.147 The plaintiffs alleged that their first and fourteenth amendment rights had been infringed by: (1) the board of education’s refusal, contrary to the recommendation of the faculty, to approve the use of Joseph Heller’s Catch 22 and Kurt Vonnegut’s God Bless You, Mr. Rosewater as texts or library books; and (2) the board’s orders removing Catch 22 and Vonnegut’s Cat’s Cradle from the library and prohibiting both class discussion and supplemental reading use of the books.148 The Sixth Circuit held in favor of the students on the second part of their claim,149 but found no constitutional infirmity in the board’s withholding approval of the first two books listed above.150

141. 541 F.2d 577 (6th Cir. 1976).
142. 631 F.2d 1300 (7th Cir. 1980).
143. 541 F.2d at 584.
144. See notes 158-61 & accompanying text infra.
145. See notes 154-55 & accompanying text infra.
146. This was not the first time the Strongsville City School District had been involved in a case relating to a book controversy. In the prior instance, however, the plaintiffs’ complaint was diametrically opposed to the plaintiffs’ complaint in Minarcini. See note 53 supra.
147. 541 F.2d at 578-79.
148. Id. at 579.
149. Id. at 584. The court directed the district court to order that the removed books be replaced in the library. Id.
150. Id. at 589, 584. The Minarcini court briefly addressed the board’s refusal to give initial approval to certain works. It noted that Ohio law placed upon
With regard to the book removal issue, the court considered the conclusion inescapable that the board removed the books because it found their contents objectionable and felt it had unrestricted freedom to "censor the school library for subject matter which the Board members found distasteful." The court could find no explanation for the board's action which was neutral in first amendment terms.

In addressing whether the board of education had an unfettered power to remove books from use, the Minarcini court found it necessary to examine the only prior book removal case, Presidents Council, District 25 v. Community School Board No. 25, in which the school officials' actions were upheld. The court observed that it would be unwise to read Presidents Council for the proposition that school boards had absolute authority, unlimited by the first amendment, to remove books from use. The court added that if Presidents Council had been intended to stand for such a proposition, the Sixth Circuit would regard it as incorrect and decline to follow it. Instead, the Minarcini court stated that the first amendment prohibited board members from randomly removing books from the library because the contents of the books occasioned the displeasure or disapproval of certain board members. However, the board could have removed a book because the library's copy of it had worn out, because the book had become obsolete, because there was a shortage of shelf space, or because of some other justification neutral in first amendment terms. But Minarcini made clear that even though a school district did not have an obligation to provide a library for its students, once it provided a library, the school board could not unreasonably condition local boards of education the duty to select the books for use in the school system, and stated that it found no constitutional problem with the discretion exercised by the board when it refused to select the works cited by the plaintiffs. Id. at 579-80. For further discussion of the book selection issue, as opposed to book removal once selection has been made, see notes 261-72 & accompanying text infra.

151. Id. at 582. According to the court, the only evidence of the reasons for the board's decision to remove the books was in a citizens book review committee minority report, which had been read into the record of a board meeting by a board member. That report referred to God Bless You, Mr. Rosewater, one of the books the board refused to approve, as "'completely sick'" and "'GARBAGE.'" Id. at 581. In addition, the same report recommended that "'Cat's Cradle, which was written by the same character (Vennegutter) [sic] who wrote, using the term loosely, God Bless You, Mr. Rosewater, . . . be withdrawn immediately.'" Id.

152. Id. at 582.


154. 541 F.2d at 581.

155. Id.

156. Id.
and restrict the use of the library by such actions as removing books for reasons “related solely to the social or political tastes of school board members.”

Significant in the Minarcini determination that the book removals were unconstitutional was the recognition that the student plaintiffs possessed a first amendment right to receive the information contained in the removed books. The court, stating that it was dealing with a more difficult concept than a direct prohibition of speech, stressed that “we are concerned with the right of students to receive information which they and their teachers desire them to have.” In extending this right to students in secondary schools, the court relied on Virginia Board of Pharmacy and its forerunners. This extension of the right to receive information to students has been hailed as a recognition of the vital role a free flow of information, unimpeded by government interference, plays in the educational process.

Under the Minarcini analysis, a school board could not successfully argue that because students were able to obtain the removed books from other sources, their right to receive information had not been impaired. The Minarcini court’s statement that the school library constitutes a “mighty resource in the free marketplace of ideas” implies that the students’ rights to receive information has also been recognized in a context other than the school library. In Paton v. LaPrade, 469 F. Supp. 773 (D.N.J. 1978), a high school student who sought information for a social studies class wrote to the Socialist Workers Party and was investigated by the FBI. Id. at 774-75. The court held that a postal regulation authorizing “mail covers” (which involved the copying down of all information on the outside of the envelope) by the FBI to protect the national security was unconstitutionally vague and overbroad. Id. at 774. The court found that freedom of speech protects the right to receive information and that the recipient “had a right to receive her requested information free of government interference.” Id. at 777-78.

A student’s right to receive information has also been recognized in a context other than the school library. In O’Neil, Libraries, Liberties and the First Amendment, 42 U. Cin. L. Rev. 209, 211, 239 (1973) (advocating recognition of students’ rights to receive information and criticizing the Presidents Council decision for failing to recognize them); Comment, Right to Read Defense Committee of Chelsea v. School Committee of the City of Chelsea, 14 N. Eng. L. Rev. 288, 315 (1978).
mation and the school library's role as an unbiased resource in the marketplace of ideas are inextricably intertwined: if the library is not free to operate and offer a variety of viewpoints, the exercise of the right to receive is necessarily impaired. Thus the availability of books from other sources is immaterial.

The Minarcini approach to book removal cases was adopted and solidified in two district court cases from the First Circuit. In the first of these cases, Right to Read Defense Committee v. School Committee, students challenged the school board's removal of an anthology entitled Male and Female Under 18 from the library. The removal was precipitated by a parental complaint about a poem contained in the anthology and by the school board chairman's campaign to remove the book because of the poem. The poem, written by a fifteen-year old New York City girl and titled "The City to a Young Girl," presumably was objectionable because of the poem's sexual overtones and the terms used to refer to parts of the female anatomy.

The court concluded that Male and Female Under 18 was impermissibly removed from the library because the school board regarded the disputed poem's theme and language as offensive. Following the Minarcini lead, the court noted that while not every book removal necessarily implicated first amendment interests, a removal predicated on the subjective determinations of the board

Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (describing the classroom as the marketplace of ideas). The classic marketplace model centers around the theory that where debate and the flow of information are free and uninterfered with by government, truth will be discovered and insight gained. See Baker, Scope of the First Amendment Freedom of Speech, 25 UCLA L. Rev. 964, 967 (1978).

On the other hand, it has been noted that the notion that the school is a marketplace of ideas has not been universally accepted and that school boards are under no obligation to open up the school curriculum to each view which someone would like to further. Note, supra note 16, at 1040.


454 F. Supp. at 704-05.

454 F. Supp. at 704-05, 707. In editorials in the newspaper of which he was editor, the board chairman referred to the poem as "obviously obscene," "filthy," and "vile and offensive garbage." Id. at 707. At a board meeting, he called the poem "low down dirty rotten filth, garbage, fit only for the sewer." Id. at 708.

Id. at 704-05.

Id. at 710-11.
members that the theme and language were offensive entitled students to seek the court's aid in vindicating their first amendment rights. The Right to Read court further mirrored Minarcini by stressing the importance of the students' first amendment rights to read and be exposed to controversial ideas, and by refusing to interpret the Presidents Council decision as granting school officials an absolute, unfettered power to remove books from use.

Probably the only significant addition made to the Minarcini calculus by the Right to Read court was the formulation of a test to be employed in book removal cases. The court held that although the Tinker standard of material and substantial disruption of school operations was not especially useful in the book removal context, the principles underlying Tinker pointed to an appropriate test for determining the validity of a book removal. For the school officials' actions to be constitutionally valid, the officials must demonstrate "some substantial and legitimate government interest" in removing the book, and that interest must be comparable in significance to school discipline. According to the court, no such interest had been shown by the board in Right to Read. Expert testimony had established that the removed book had had no damaging effect on students and was of at least some value. Moreover, the court noted that parental objections to the language employed in a book were not determinative of the book's value.

170. Id. at 712.
171. Id. at 714.
172. Id. at 711. The court expressed grave concern about any arm of government "having such an unreviewable power of censorship." Id. at 714. It stated that to condone the book removal at issue would be to set a dangerous precedent for future removals and to run the risk of gradually "sanitizing" the school library of views divergent from those of the board. Id. The court also expressed fears that mind control would be the inevitable result if actions such as that taken by the defendants were approved by the courts: "The most effective antidote to the poison of mindless orthodoxy is ready access to a broad sweep of ideas and philosophies. There is no danger in such exposure. The danger is in mind control." Id. at 715. This language is reminiscent of that of the Supreme Court in several cases. See Stanley v. Georgia, 394 U.S. 557 (1969); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Sweezy v. New Hampshire, 354 U.S. 234 (1957); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
173. See notes 65-66 & accompanying text supra.
174. 454 F. Supp. at 713.
175. Id.
176. Id.
177. Id. The Right to Read court saw a legitimate purpose behind the language employed in the poem at issue: City is not a polite poem. Its language is tough, but not obscene. Whether or not scholarly, the poem is challenging and thought-provoking. It employs vivid street language, legitimately offensive to
In the second district court case to follow the Minarcini approach, Salvail v. Nashua Board of Education, students challenged the validity of the school board’s decision to remove certain issues of MS magazine from the library and to place excised versions of other issues of the magazine in the library. The Salvail court concluded that the issues of MS magazine had been ordered removed from the library because of their political content. This amounted to an impermissible restriction on the use of the library for reasons related solely to the board members’ social and political tastes. The court followed the path broken by Minarcini and Right to Read by rejecting the proposition that school officials have an absolute power to remove library materials from use, and by recognizing that students have a right to receive information which would be infringed by a publication’s removal based on the board members’ personal objections to its political content. The Salvail court adopted the Right to Read test that officials must justify the removal of a publication by demonstrating a substantial and legitimate government interest furthered in doing so. The court concluded that no such interest had been demonstrated by the school board, and as such, “the action taken by the defendants contravened the plaintiffs’ first amendment rights and was plainly wrong.”

The following conclusions can be drawn from the approach

---

some, but certainly not to everyone. The author is writing about her perception of city life in rough but relevant language that gives credibility to the development of a sensitive theme. City’s words may shock, but they communicate.

*Id.* at 714.

See Keefe v. Geanokos, 418 F.2d 359 (1st Cir. 1969), in which the court held in favor of a teacher whom school officials sought to dismiss after he had assigned his high school English class an Atlantic Monthly article containing the word “motherfucker” and had discussed the word’s origin, context, and use by the author. *Id.* at 361. The court initially remarked that the word clearly was known by many high school students, and that if the “shock [would be] too great for high school seniors to stand,” the court feared for the students’ future. *Id.* It added that with the “greatest of respect” for parents offended by the use of the word, “their sensibilities are not the full measure of what is proper education.” *Id.* at 361-62. The court saw a valid educational purpose in discussing the word in the context in which the author had used it. *Id.* at 361.

179. *Id.* at 1274.
180. *Id.* at 1272, 1274.
181. *Id.* at 1274.
182. *Id.*
183. *Id.* at 1275. See note 174 & accompanying text supra.
184. 469 F. Supp. at 1275.
185. *Id.* at 1275-76 (emphasis in original).
taken in Minarcini, as supplemented by the Right to Read and Salvail decisions:

1. School officials do not have unlimited authority to remove books from libraries when the books have been previously placed in use;186

2. Students possess a first amendment right to receive information and to have access to diverse viewpoints, and this right is infringed where school officials remove materials from use because of those officials' personal objections to the ideas expressed in the materials;187 and

3. Where school officials appear to have removed a book previously in use for reasons other than the lack of shelf space or because the book is worn out or obsolete,188 the school officials must demonstrate a substantial and legitimate government interest furthered by the removal.189

The vitality of the Minarcini decision and its progeny depends upon the approach which the Supreme Court takes in deciding the book removal case now before it.190

B. The Second Circuit Approach

The Second Circuit's 1972 decision in Presidents Council, District 25 v. Community School Board No. 25191 was the first decision rendered in the library censorship area. The seemingly rigid stance of Presidents Council192 has been weakened by the Second Circuit's recent companion decisions in Pico v. Board of Education193 and Bicknell v. Vergennes Union High School Board of Directors.194 Whether there will be a return to the Presidents Council approach of allowing school officials sweeping authority to remove books will be determined by the Supreme Court when it decides Pico.

In Presidents Council, a number of plaintiffs, including junior high school students and their parents,195 brought suit under 42

188. See note 156 & accompanying text supra.
189. See notes 174, 183-84 & accompanying text supra.
192. Its holding that no first amendment infringement occurred when the defendant school board removed a book has been characterized as insensitive. O'Neil, supra note 161, at 212.
194. 638 F.2d 438 (2d Cir. 1980).
195. Other plaintiffs included teachers, a librarian, a school principal, and a parent-teacher association. 457 F.2d at 290.
U.S.C. § 1983, alleging that the school board's removal of a book from the libraries of junior high schools in the district violated their first amendment rights. The book removed was the novel *Down These Mean Streets* by Piri Thomas.196 After its removal decision, the board decided to allow schools which already had the book to keep it, and to allow those schools to loan the book to parents, but not students.197 The court held that plaintiffs had not made out a claim of a first amendment violation198 and affirmed the trial court's dismissal of their complaint.199

Two facts were central to the court's determination that there had been no first amendment violation. First, the subject portrayed in the removed book still could be discussed in class, and second, the parents who wanted their children to be exposed to the book could borrow it from the school and make it available to them.200 Probably the most significant aspect of the case was the court's willingness to accept sweeping book-removal authority on the part of school boards. The court noted that state law had given the board the power to make book selections,201 and indicated that the board had to remain free to manage the library collection without intermeddling by the judiciary.202

Under the *Presidents Council* approach, school officials have a virtual free rein in matters such as book removal:

The administration of any library, whether it be a university or particularly a public junior high school, involves a constant process of selection and winnowing based not only on educational needs but financial and architectural realities. To suggest that the shelving or unshelving of books presents a constitutional issue, particularly where there is no showing of a curtailment of freedom of speech or thought, is a proposition we cannot accept.203

The court again manifested its deference to the board's judgment by rejecting the plaintiffs' argument that once a book was shelved, it could not be removed absent a showing of some significant government interest. According to the court, there was no basis for such a “book tenure” argument, because “books which become obsolete or irrelevant or where improperly selected initially, for whatever reason, can be removed by the same authority which was

196. 457 F.2d at 289-90. The court called the novel an account of a boy's growing up in Spanish Harlem, and stated that it contained considerable profanity, as well as episodes dealing with violence, sex, and drug use. *Id.* at 291.
197. *Id.* at 290.
198. *Id.* at 291-92.
199. *Id.* at 289-90.
200. *Id.* at 292.
201. *Id.* at 290.
202. *Id.* at 291-92.
203. *Id.* at 293 (footnotes omitted).
empowered to make the selection in the first place.”

What seemed an unbending approach in *Presidents Council* was altered in the *Pico* and *Bicknell* cases, decided concurrently by the Second Circuit late in 1980. The panel deciding the two cases consisted of Judge Mansfield, who opted to continue to approach such cases along the lines established in *Presidents Council*, and Judges Newman and Sifton, who were willing to depart from the rigid *Presidents Council* posture but could not agree on when to do so and why.

In *Pico*, some board of education members attended a conference held by a conservative New York parents group and received written information concerning certain allegedly objectionable books. This written information contained comments of a political or social nature by book reviewers connected with the conservative group, as well as quotations of allegedly indecent language and descriptions of sexual behavior that were contained in the books. Upon returning from the conference, the board members determined that eleven of the books referred to in this information were in use in the school district, and the board directed the school principals to remove them from use.

At a later meeting, the board, chiefly because of the protests of the superintendent of schools, appointed a committee composed of staff members and parents to review the books the board had ordered removed. Although the committee reviewed the books and

204. *Id.* The vast sweep of *Presidents Council* and its implicit deep bow to school officials’ determinations troubled Justice Douglas, who dissented from the Supreme Court’s denial of certiorari in the case. *Presidents Council, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 289 (2d Cir.), cert. denied, 409 U.S. 998 (1972)* (Douglas, J., dissenting from denial of cert.) Justice Douglas referred to a right “to hear, to learn, [and] to know” which is of “great importance in the schools,” *id.* at 999, and called the issues raised in the case “crucial to our national life.” *Id.* at 1000. He emphasized his displeasure with the Second Circuit’s approach in *Presidents Council* by posing a series of questions:

What else can the School Board now decide it does not like? How else will its sensibilities be offended? Are we sending children to school to be educated by the norms of the School Board or are we educating our youth to shed the prejudices of the past, to explore all forms of thought, and to find solutions to our world’s problems?

*Id.* at 999-1000.

205. Judge Sifton is a district judge who was sitting by designation. 638 F.2d at 406, 440.

206. *See* notes 212-32 and accompanying text *infra*.

207. 638 F.2d at 407-08.

208. *Id.* at 409. When newspapers began covering the story, the board issued a press release stating that the allegedly offensive books contained material “offensive to Christians, Jews, Blacks, and Americans in general. In addition, these books contain obscenities, blasphemies, brutality, and perversion beyond description.” *Id.* at 410.
recommended that eight of them be returned to use in the classroom or library, the board voted to return only two of them and again voted to remove the other nine.\textsuperscript{209}

The students filed suit and, in a class action, alleged that the removals of the books from the curriculum and the library infringed their first amendment rights. The district court granted a summary judgment for the defendant board,\textsuperscript{210} but on appeal the Second Circuit, departing from the rigidity of Presidents Council, reversed and remanded for trial.\textsuperscript{211}

Judge Sifton, authoring the court's opinion,\textsuperscript{212} disposed of the obstacle posed by Presidents Council by classifying it as an ordinary book removal situation in which a student's allegation that a controversial book had been removed from use would be insufficient to state a prima facie case of a first amendment violation.\textsuperscript{213} However, in the extraordinary circumstances in Pico,\textsuperscript{214} the court found plaintiffs had stated a prima facie case by showing the fact of the book removal, an irregular intervention by the board in library operations, and the questionable explanations given by the board to support its actions.\textsuperscript{215} Judge Sifton attempted to clarify his test for a prima facie case:

\begin{itemize}
\item \textsuperscript{209} Id. at 410-11. The nine books which remained banished were: \textit{Slaughterhouse Five}, by Kurt Vonnegut; \textit{The Naked Ape}, by Desmond Morris; \textit{Down these Mean Streets}, by Piri Thomas; \textit{Go Ask Alice}, by Anonymous; \textit{A Hero Ain't Nothing But A Sandwich}, by Alice Childress; \textit{Soul on Ice}, by Eldridge Cleaver; \textit{The Fixer}, by Bernard Malamud; \textit{A Reader for Writers}, edited by Jerome Archer; and \textit{Best Short Stories by Negro Writers}, edited by Langston Hughes.

Vonnegut's works have frequently been the object of parental or school board complaints when they have been used in the public schools. \textit{See, e.g.}, Minarcini v. Strongsville City School Dist., 541 F.2d 577 (6th Cir. 1976) (\textit{God Bless You, Mr. Rosewater} and \textit{Cat's Cradle}); Parducci v. Rutland, 316 F. Supp. 352 (M.D. Ala. 1970) (teacher dismissal case in which teacher had assigned Vonnegut's short story \textit{Welcome to the Monkey House}); Todd v. Rochester Community Schools, 41 Mich. App. 320, 200 N.W.2d 90 (1972) (parental complaint about \textit{Slaughterhouse Five}).

\item \textsuperscript{210} Id. at 406.

\item \textsuperscript{211} Id. at 407. It is surprising that the Supreme Court has agreed to hear Pico in view of the fact that no trial record has been developed. Professor Alan Dershowitz has been quoted as terming the Supreme Court's taking of the Pico case despite the absence of a trial record as "another example of the absurd hypocrisy of 'judicial restraint'" espoused by various members of the largely conservative Supreme Court. Lauter, \textit{Can School Board Ban Library Books?}, Nat'l L.J., Oct. 26, 1981, at 5, col. 1.

\item \textsuperscript{212} 638 F.2d at 406. Judge Newman concurred in the result on grounds similar to those stated by Judge Sifton. \textit{Id}. at 432. Judge Mansfield dissented. \textit{Id}. at 419.

\item \textsuperscript{213} Id. at 414.

\item \textsuperscript{214} Id. at 414-15.

\item \textsuperscript{215} Id.
In this case . . . we are presented with more than the inferences to be drawn from the act of removing controversial texts from library shelves, and more than the clearly understood, routine and regular task of selecting titles for a school library. What we have instead is an unusual and irregular intervention in the school libraries' operations by persons not routinely concerned with such matters. Moreover, this intervention has occurred under circumstances, including the explanations for their actions given by the participants, which so far from clarifying the scope and intentions behind the official action, create instead grave questions concerning both subjects. In circumstances of such irregularity and ambiguity, a *prima facie* case is made out and intervention of a federal court is warranted because of the very infrequency with which it may be assumed such intervention will be necessary and because of the real threat that the school officials' irregular and ambiguous handling of the issue will, even despite the best intentions, create misunderstanding as to the scope of their activities which will serve to suppress freedom of expression.\[216\]

According to the court, once the plaintiff established a *prima facie* case under the complicated test set forth above, the burden of persuasion shifted to the defendant school officials to show that their actions had a substantial basis, were procedurally regular;\[217\] and did not burden free expression any more than was necessary to further substantial government interests. The allegations of the plaintiffs in *Pico* tended to show that the board acted in what Judge Sifton called an "erratic, arbitrary and free-wheeling manner"\[218\] seemingly indicative of an intent to establish certain orthodox ideas for the community while suppressing others.\[219\] Judge Sifton's focus appeared to be on whether the board members were seeking to establish their own ideas as the doctrine of the community with the intention of suppressing the expression of contrary ideas.

In his concurrence, Judge Newman took a stance similar to that

---

\[216\] *Id.*

\[217\] *Id.* at 416-17.

\[218\] *Id.*

\[219\] *Id.* at 417. Examples of the board's irregular actions cited by Judge Sifton included: the board's removal of the books only on the basis of the information provided, without the board members having read them; the board's apparent attempt to create public uproar by bringing the issue into an upcoming election and by conducting a district-wide poll; the board's confusion and incoherence regarding its reasons for removal; the board's ex post facto appointment of a committee to review the books and subsequent disregard of the committee's recommendation without reason; the board's failure to heed the strong objections of the professional staff to the procedures it employed; and the board's "substantive" irregularity in ordering the removal of works by recognized authors. *Id.* at 416-18.

Judge Sifton appeared to state that board members were free to make decisions based on their personal political views or views concerning taste and morality, so long as those decisions were not accompanied by outrageous acts by the board or by an attempt to suppress all ideas but those of its members. *Id.* at 417.
of Judge Sifton. Judge Newman focused on the danger that book removals would lead to suppression of ideas and stated that while a book removal was not per se a violation of the first amendment, there was a first amendment violation where the book removal suppressed certain ideas and placed them beyond the realm of free discussion.220 He indicated that a removal of a previously selected book was much more likely to convey the idea that certain ideas were off-limits than was the initial failure or refusal to select a book.221 Where ideas contained in books were suppressed, students perceived an "official message" that those ideas were unacceptable or wrong, and they were impermissibly chilled from expressing those ideas.222 It is interesting to note that Judge Newman's opinion merely cited the Minarcini line of cases, without any significant discussion,223 and that Judge Sifton's opinion made no mention whatsoever of those cases. Neither opinion devoted any discussion to the students' purported rights to receive information.

In Bicknell v. Vergennes Union High School Board of Directors,224 the companion case to Pico, the Second Circuit held that the student plaintiffs failed to state a cause of action by their allegations that the board's decision to remove Richard Price's The Wanderers from the library and to place Patrick Mann's Dog Day Afternoon on a restricted shelf violated their first amendment rights. The students had sought to enjoin the board's actions on the grounds that they were motivated by the board members' desires to impose their personal tastes and values on the students, thereby impairing the students' rights to receive information.225 Judge Newman's opinion in Bicknell revealed three factors

220. Id. at 432-33, 434 (Newman, J., concurring in result).
221. Id. at 435-36.
222. Id. at 434. While Judge Newman indicated that school officials have considerable latitude in regulating vulgar language and explicit sexual descriptions, id. at 436, he felt that the facts showed a distinct possibility that ideas were being suppressed. Id. at 437.

In dissent, Judge Mansfield stated that Presidents Council could not be distinguished from the case at hand and that Judges Sifton and Newman were implicitly overruling the 1972 decision. Id. at 419 (Mansfield, J., dissenting). He cited Supreme Court cases such as Ginsberg v. New York and FCC v. Pacifica Foundation as authority for the proposition that children may be protected from exposure to indecent language. Id. at 427. See notes 93-105 and accompanying text supra. Judge Mansfield felt that the defendant acted on such a basis and not with the intent to suppress ideas. 638 F.2d at 427. Choosing to follow the previously trodden ground of Presidents Council, Judge Mansfield saw no unconstitutional action in the removal of "a handful of books containing indecent expressions." Id. at 429.

223. 638 F.2d at 435.
224. 638 F.2d 438, 440-41.
225. Id. at 441 n.2.
which compelled a result different from that reached in *Pico*. First, the board action was taken following parental complaints concerning "the vulgarity and indecency" of language in the books. Second, the plaintiffs' complaint acknowledged "that the Board acted in both instances because of the books' vulgar and indecent language." Third, school officials had the power to regulate vulgarity and explicit sexual content.

According to the court in *Bicknell*, the *Pico* case "recognized a First Amendment right of members of a school community to be free of the inhibiting effects upon free expression that result when the circumstances surrounding the removal of books create a risk of suppressing ideas." However, Judge Newman observed no facts tending to indicate a risk of idea suppression in *Bicknell*. The complaint contained no allegations that the books were removed because of the ideas contained in them or that the board "acted because of political motivation."

The plaintiffs' argument that the determination of vulgarity and indecency could not be based on the board members' personal tastes was rejected by Judge Newman. He stated that "so long as the materials removed are permissibly considered to be vulgar or indecent, it is no cause for legal complaint that the Board members applied their own standards of taste about vulgarity." He also disposed of the plaintiffs' right to receive argument on the ground that "young students have no constitutionally protected right of access on school property to material that, whatever its literary merits, is fairly characterized as vulgar and indecent in the school context."

After *Pico* and *Bicknell*, the following observations can be

226. Id. at 440.
227. Id. at 440-41.
228. Id. at 441.
229. Id.
230. Id.
231. Id. (footnote omitted).
232. Id. at n.2. Judge Mansfield offered a one paragraph concurrence, stating that while he accepted the *Bicknell* result, he did not see any difference between *Bicknell* and *Pico*. Therefore, he would have dismissed both complaints. Id. at 442. (Mansfield, J., concurring in result). Judge Sifton, in dissent, agreed with Judge Mansfield that there was no basis for distinguishing *Bicknell* from *Pico*. Therefore, he would have held that the *Bicknell* plaintiffs had also made out a prima facie case and that trial was necessary in order to determine whether the board was suppressing ideas under the guise of regulating indecency and vulgarity. Id. at 442-43 (Sifton, J., dissenting). Judge Sifton noted that the board in *Bicknell* had failed to follow its own library policies and that this was the kind of procedural irregularity which, in *Pico*, had been regarded as an indication that the board was suppressing ideas. Id. at 443.
made concerning the Second Circuit's approach to book removal cases:

1. School officials are no longer viewed as having unlimited power to remove books;\textsuperscript{233}

2. Where a book removal is accompanied by facts showing irregular intervention by the school board in library operations and an intent to establish certain ideas as proper and to suppress others, the book removal is impermissible;\textsuperscript{234} and

3. Where school officials remove a book from use because of the book's vulgar language or explicit sexual content, the removal is a permissible exercise of the officials' discretion.\textsuperscript{235}

The Supreme Court's decision in \textit{Pico} should reveal whether the Second Circuit's current approach will become the standard to be followed in book removal cases.

C. The \textit{Zykan} Approach

In \textit{Zykan v. Warsaw Community School Corp.},\textsuperscript{236} a 1980 case decided prior to the Second Circuit's tandem decisions in \textit{Pico} and \textit{Bicknell}, the Seventh Circuit approached the student plaintiffs' book removal and related claims primarily through an academic freedom theory. The court held that none of the claims made by the students were sufficient to constitute a cause of action; accordingly, it affirmed the lower court's dismissal of the amended complaint.\textsuperscript{237} However, the court held that the plaintiffs should have been given leave to amend their complaint again because their claims were novel, and it was possible that a constitutional claim could have been stated along the lines the plaintiffs were pursuing.\textsuperscript{238}

Among the actions alleged unconstitutional by the \textit{Zykan} plaintiffs were the school board's removal of the book \textit{Go Ask Alice} from the high school library, the board's discontinuance of the use of the textbook \textit{Values Clarification}, and the principal's order to an English teacher not to use \textit{Growing Up Female in America}, \textit{Go Ask Alice}, \textit{The Stepford Wives}, and \textit{The Bell Jar} in a course dealing with women in literature.\textsuperscript{239} In addition, the plaintiffs alleged that the board's policy against using reading material that "'might be objectionable"'\textsuperscript{240} led to the impermissible excision of parts of \textit{Stu-
dent Critic, a long-used book. Plaintiffs claimed the above actions were taken solely because the contents of the books offended the board members' tastes and that the students' rights to read and to academic freedom had been violated.

The Zykan court viewed the students' claims primarily from an academic freedom standpoint. It stated that academic freedom was a concept which recognized the importance of keeping the academic community free from ideological coercion. However, the court noted that academic freedom had limited relevance at the secondary school level because of the students' limited intellectual and emotional maturity and because of the public school's traditional role in encouraging and instilling basic community values.

Contrary to the position taken in the Minarcini line of cases (and perhaps that taken in Pico), the Zykan court stated that in an effort to transmit their community values, local boards of education were relatively free "to make educational decisions based upon their personal, social, political and moral views." However, the court pointed out that the board does not have completely unfettered discretion in the areas of curriculum and instructional materials. If there were a "flagrant abuse of discretion," indicating that the board was not merely making choices concerning educational matters of legitimate dispute, but was attempting to impose exclusive indoctrination into one way of thinking, the court im-

241. Id. The students also claimed constitutional violations in the board's elimination of several courses from the curriculum and its decision not to rehire two teachers. Id. at 1302-03. The plaintiffs alleged that the courses were eliminated because their contents offended the board members' social, political, and moral beliefs. The students alleged that the decision not to rehire the teachers infringed upon the academic freedom of both students and teachers. Id. at 1302-03. The court matter-of-factly rejected the students' argument concerning the teacher dismissals, stating that the students possessed no right to be taught by those teachers. Id. at 1307.

242. Id. at 1302.

243. Id. at 1302-03. Plaintiffs sought to have the books restored to use and the curriculum changes reversed. Id. at 1303.

The plaintiffs' amended complaint alleged that the board went beyond the mere removal of the books from the school. Purportedly the board, at the request of a local senior citizens group, conveyed the books to the group for a public burning. Id. at 1302 n.2. While the court regarded the burning as a "contemptible ceremony" of which "no self-respecting citizen" would approve, it stated that the book burning had only a tenuous relationship to the students' claims and that the students' book removal and related claims did not sufficiently state constitutional violations, regardless of whether the court took the book burning incident into account. Id.

244. Id. at 1304.

245. Id. For a discussion of this traditional role played by the public schools, see notes 15-19 & accompanying text supra.

246. 631 F.2d at 1305. According to the court, actions based on such views generally are "neither capricious nor arbitrary nor unreasonable." Id. at 1307 n.8.
plied that it would intervene.247

Although the court indicated that its discussion of the limited role of academic freedom at the secondary school level and the importance of giving the board latitude in its attempts to inculcate community values would adequately dispose of the book removal issue, it chose to address that issue separately.248 The court appeared to set up a stiff standard for student plaintiffs in book removal cases by requiring allegations to the effect that the book was made completely unavailable to the students, that the students were prohibited from discussing the contents of the removed book, or that the removal “was part of an action to cleanse the library of materials conflicting with the School Board’s orthodoxy.”249 The court concluded that the school board not only may, but should, appraise the contents of books already selected in order to determine whether retaining them on library shelves was a warranted use of limited shelf space.250 However, the board could not, according to the court, remove a certain book “as part of a purge of all material offensive to a single, exclusive perception of the way of the world, anymore than [it] may originally stock the library on that basis.”251

VI. IMPLICATIONS OF THE APPROACHES TAKEN IN LIBRARY CENSORSHIP CASES

A. The Preferable Approaches

After the Pico and Bicknell cases, the apparent rigidity of the Presidents Council approach has softened. The Second Circuit no longer sanctions unlimited power on the part of school boards to remove books from libraries and curricula. Pico’s recognition that the impermissible suppression of ideas may well be at the heart of a decision to remove a book252 is a realistic approach and, accordingly, more desirable than Presidents Council’s deference to the school board’s judgment, even where there may be serious questions concerning the board’s motivation. But if the Pico suppression of ideas rationale is to be effective in vindicating the first

247. Id. at 1306.
248. Id. at 1308.
249. Id. See Cary v. Board of Educ., 598 F.2d 535, 543-44 (10th Cir. 1979), in which the court appeared to impose a similar test on teachers who sought to challenge book removals. Cary’s holding in favor of the board of education in a book removal case in which teachers were the plaintiffs offers a good indication of the probable outcome in the Tenth Circuit of a case in which students would be the plaintiffs.
250. 631 F.2d at 1308.
251. Id.
252. See notes 212-23 & accompanying text supra.
amendment rights of students, courts should take a hard look at any fact tending to show the board's attempt to suppress ideas under the guise of a seemingly innocuous book removal. As Judge Sifton pointed out in *Pico*, plaintiffs must be free to show that the ostensible justifications offered by a school board for its removal of a book "were simply pretexts" for impermissible suppression of speech and ideas.253

The *Minarcini* line of cases, based in part on the student's right to receive information,254 and in part on the rationale that school boards cannot remove books solely because their contents offend the subjective tastes of the board members,255 is also preferable to allowing school boards unfettered discretion regarding book removals. The easily-offended board member who is capable of influencing his fellow board members to agree that an offensive book should be removed would be free to deprive students of the possible benefit to be gained from reading the book, unless a court intervened to check the board's emotional or irrational decision. The facts of the book removal cases make it clear that if works regarded in literary circles as valuable literature can be removed from libraries because uninformed, impulsive board members call the literature "garbage" or "filthy,"256 students are being deprived of important educational opportunities. This is not to say that the judiciary should constantly be looking over the shoulders of school board members, most of whom undoubtedly act constitutionally and in good faith. What is to be desired is that the courts look closely at actions such as book removals which cannot readily be explained by reasons neutral in first amendment terms. In this way, the first amendment is not sacrificed in favor of platitudes such as the trite statement that courts are reluctant to intervene in the day-to-day operations of schools.257

*Zykan* is not entirely an anti-student rights case, despite its result. While the Seventh Circuit's requirements for a student plaintiff's constitutional claim in a book removal situation seem strict,258 the court indicated that school boards will not be permitted to pursue a rigid orthodoxy in the procurement of instructional materials nor allowed to present a one-sided view of the world.259

The approach the Supreme Court takes in *Pico* will, of course, control the resolution of future book removal cases. For that rea-

---

253. 638 F.2d at 417.
254. See notes 158-64 & accompanying text supra.
255. See notes 155, 170, 182 & accompanying text supra.
256. See, e.g., note 151 supra.
257. See notes 30-32 & accompanying text supra.
258. See note 249 & accompanying text supra.
259. 631 F.2d at 1306, 1308.
son, it is to be hoped that the Court will not authorize a return to the comfortable Presidents Council approach of mechanically de-
ferring to the wisdom of local school officials. While such an ap-
proach may relieve the courts of the burden of deciding some difficult cases, it reflects a lack of sensitivity for students' rights. The rationale employed in Pico, in the Minarcini line of cases, and, to a lesser extent in Zykan, offers student plaintiffs the opportu-
nity to make a constitutional claim in a book removal situation. Each of these three approaches is superior to that in the unen-
lighted Presidents Council decision. Accordingly, the Supreme Court should not, in deciding Pico, effectively turn the clock back to 1972, the year Presidents Council was decided.

While the Supreme Court now has an opportunity to clarify the unsettled law in book removal litigation, it would have been prefer-
able if the Court had waited for a case with a trial record. Real-
istically, prospective plaintiffs in book removal litigation cannot expect from a largely conservative Supreme Court language more favorable than that in the Second Circuit's opinion in Pico. The question left to be answered probably is not whether the Supreme Court will expand the Second Circuit's approach, but rather whether the Court will cut back on the potential scope of the Sec-
ond Circuit's decision, and if so, how much.

Two issues which have not been adequately discussed in the book removal cases are: (1) whether different standards should apply to the removal of an assigned or required book as opposed to the removal of an optional library book, and (2) what impact the book removal cases have with respect to a school board's failure to initially select a given book.

The book removal cases have not differentiated between as-
signed and optional books. Instead, they have tended to lump the two categories together for purposes of analyzing the constitu-
tional validity of the removal. A distinction between the two cate-
gories would seem, however, to have merit. In the case of an assigned book, there is a captive audience problem because the students are required to read the book. Therefore, it would not be unreasonable to lessen the board's burden in justifying the re-
moval of assigned material and thus pay greater deference to the board's decision. On the other hand, when an optional library book is involved, no student is being forced to read the book. It merely rests on the shelf, available to those who want to read it. Since the captive audience interest is no longer present, the school board should have a more substantial burden to carry in attempting to justify the removal of such a book.

260. See note 211 supra.
The impact of the book removal decisions on initial book selection has been addressed sparingly in the book removal cases. While both Minarcini and Right to Read can be interpreted to indicate that a board’s failure to select a particular book cannot give rise to a constitutional question, it is not clear why failure to select cases cannot be governed by the same criteria as removal cases. The school board still should be required to exercise its discretion in selecting books within constitutional limitations.

The only practical difference between a removal case and a failure to select case would seem to be that a failure to select case would be significantly more difficult to prove. This is true because an inference of impermissible motive can often be drawn when a book is removed, while in a failure to select case, there may be many permissible reasons why a book was not selected. Nevertheless, difficulty of proof is not a sufficient justification for refusing to allow a prospective plaintiff to try to make out a claim.

One commentator has suggested that where a book of literary merit is rejected by the board in its selection process, and the apparent justification does not appear neutral but instead has “socio-political overtones,” the court should closely scrutinize the decision. However, if the refusal to select the book can reasonably be explained by neutral, education-related reasons such as the difficulty level of the book, the board’s decision should be respected. The board should be obligated to create a balanced presentation of ideas in its selection of instructional materials. Where the plaintiff raises an inference that the board had an impermissible motive in refusing to approve a certain book, perhaps by alleging facts tending to show that past book selections have been one-sided, or that the board consciously disregarded recommendations given to it by professional staff members, the plaintiff should be held to have stated a prima facie case. The school board should then be called upon to rebut the inference of impermissible motive. Recognizing that student plaintiffs might, under the right set of circumstances, state a cause of action for an unconstitutional

261. See Minarcini v. Strongsville City School Dist., 541 F.2d 577, 577 (6th Cir. 1976); Right to Read Defense Comm. v. School Comm., 454 F. Supp. 703, 711 (D. Mass. 1978). In view of the courts’ outspoken opposition to book removals, it is somewhat surprising that they appeared to indicate that the book selection process is outside constitutional scrutiny.


264. Id.

265. Id. at 476.
failure to select certain books does not, of course, mean there will be a flood of such cases. One would expect that only rarely would such a case be brought, primarily because of the proof difficulty.

One recent case where plaintiffs successfully sued based upon an unconstitutional failure to select a book was *Loewen v. Turnipseed*. There the court held in favor of a group of plaintiffs, which included students, who alleged that the refusal of the defendant state textbook committee to recommend and adopt a particular history book for use in a required history course violated their first, thirteenth, and fourteenth amendment rights. With respect to the student claims, the court held that the state educational officials did not have unfettered authority to decide what children may read in school, and that the officials' decisions had to be exercised within the limits of the first amendment. Additionally, the court held that the refusal to approve the book was based on a racially discriminatory purpose and evinced an intent to perpetuate segregation and discrimination. It ordered that the book be approved and placed on the state list for purchase and distribution to students.

While *Loewen* included the racial discrimination factor in addition to the first amendment interests, the case nevertheless exemplifies a successful claim based on the failure to select a book. Of course, if the Supreme Court's decision in *Pico* speaks disapprovingly of book removal litigation, failure to select cases probably will not be brought.

**VII. CONCLUSION**

Book removal cases present two competing interests, both of which are significant: the traditional interest of local school officials in controlling public school operations with a relatively free hand, and the countervailing student interest in receiving information and being exposed to the total spectrum of ideas. Grave danger would be posed to students' rights if school officials' authority to remove books were viewed as unfettered by first amendment
limitations. The Sixth Circuit, followed by two district courts in the First Circuit and now, apparently, the Second Circuit, have come to this conclusion and have taken steps to vindicate student rights while still preserving ample school board authority over book removals. Such steps are necessary to assure that students will not become "closed-circuit recipients of only that which the state chooses to communicate." Now that such steps have been taken, it is to be hoped that the Supreme Court, in deciding Pico, does not retreat.

Arlen W. Langvardt '81