

July 2012

## First Amendment Limitations on the Power of School Boards to Select and Remove High School Text and Library Books

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### Recommended Citation

Smith, Richard P. (1978) "First Amendment Limitations on the Power of School Boards to Select and Remove High School Text and Library Books," *St. John's Law Review*. Vol. 52 : No. 3 , Article 4.  
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol52/iss3/4>

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# FIRST AMENDMENT LIMITATIONS ON THE POWER OF SCHOOL BOARDS TO SELECT AND REMOVE HIGH SCHOOL TEXT AND LIBRARY BOOKS

“In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.”<sup>1</sup>

## INTRODUCTION

In a number of decisions during the 1960's, the Supreme Court emphasized society's duty to safeguard individual rights<sup>2</sup> and, in the process, broadened the first amendment freedoms of teachers and students.<sup>3</sup> Although the Court stressed that the judiciary should refrain from becoming embroiled “in the resolution of conflicts which arise in the daily operation of school systems,”<sup>4</sup> it became clear that arbitrary interference with basic constitutional rights would not be tolerated.<sup>5</sup> For example, in 1969 the Supreme Court

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<sup>1</sup> *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 511 (1969).

<sup>2</sup> *See, e.g., Stanley v. Georgia*, 394 U.S. 557 (1969) (right to receive information and ideas protects private possession of obscene material); *Miranda v. Arizona*, 384 U.S. 436 (1966) (police must inform accused of right to remain silent and right to counsel during custodial interrogation); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (use of contraceptives within protected “zone of marital privacy” may not be prohibited); *Escobedo v. Illinois*, 378 U.S. 478 (1964) (confessions obtained without constitutionally mandated access to counsel suppressed); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (indigents have right to court-appointed counsel in criminal proceedings); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (peaceful expression of unpopular views is protected first amendment activity); *Engel v. Vitale*, 370 U.S. 421 (1962) (schools may not compose official prayers). *See also Reynolds v. Sims*, 377 U.S. 533 (1964) (under fourteenth amendment, “one man, one vote” required in legislative district apportionment).

<sup>3</sup> *See Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

<sup>4</sup> *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). Although the *Epperson* Court struck down Arkansas' anti-evolution statute, its admonition concerning the harmful effects of excessive judicial intervention into educational disputes represents the general reluctance with which courts view educational litigation. *See Shanley v. Northeast Indep. School Dist.*, 462 F.2d 960, 967 (5th Cir. 1972). The courts generally are willing to exercise judicial restraint due to the expertise of school administrators, the political legitimacy of the elected school boards, and the nature of the educational institution. Project, *Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373, 1426 (1976) [hereinafter cited as Project]; 27 CASE W. RES. L. REV. 1034, 1036 (1977). *See also Goss v. Lopez*, 419 U.S. 565, 597-600 (1975) (Powell, J., dissenting); *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1051-55 (1968) [hereinafter cited as *Developments*].

<sup>5</sup> The change in the attitude of courts toward public education can be attributed to an increasing awareness of the importance of education, to a mounting proclivity to resort to the courts to resolve disputes and to the inability of legislative bodies to effectively deal with controversial issues. Shannon, *The New Tactics Used by Plaintiffs in Imposing Their Views*

held that the wearing of black armbands by students was a form of expression "closely akin to pure speech" and therefore protected by the first amendment.<sup>6</sup> In holding that students had a right to freedom of expression,<sup>7</sup> the Court used particularly sweeping language and thus left open the possibility that first amendment guarantees might be available to students in other areas of potential conflict with school authorities.<sup>8</sup>

The purpose of this Note is to analyze the recently emerging "schoolbook" controversy in which students have begun to challenge the power of school boards to control the acquisition and retention of textbooks and other instructional materials.<sup>9</sup> First, a historical overview of the constitutional limitations on school board authority will be presented. This overview will be followed by a synopsis of conflicting decisions on the schoolbook issue in the Second and Sixth Circuit Courts of Appeals. Next, separate consideration will be given to analysis of the issues of book removal and book selection in light of limitations which the courts have placed on the government's right to restrict first amendment freedoms. Finally, some general guidelines will be suggested to make judicial review of book selection decisions feasible, with allowance made for the fact that selection procedures vary from state-to-state and district-to-district.

### BACKGROUND

Historically, school authorities had broad discretionary powers to make decisions affecting the educational process.<sup>10</sup> This authority

on, or *Enforcing Their Rights Against, Public School Boards—A Commentary*, 2 J.L. & Educ. 77, 77-80 (1973).

<sup>6</sup> *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 505-06 (1969); see notes 26-31 and accompanying text *infra*.

<sup>7</sup> 393 U.S. at 506.

<sup>8</sup> See note 32 *infra*.

<sup>9</sup> See, e.g., *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577 (6th Cir. 1976); *Presidents Council v. Community School Bd.*, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972); *Pico v. Board of Educ.*, No. 77-217 (E.D.N.Y., argued Feb. 2, 1978).

<sup>10</sup> Some early decisions reflected the view that the courts had virtually no jurisdiction over educational matters. E.g., *Bishop v. Inhabitants of Rowley*, 165 Mass. 460, 43 N.E. 191 (1896); *Watson v. Cambridge*, 157 Mass. 561, 32 N.E. 864 (1893). Supporting this view was the theory that attending school was a privilege that could be conditioned on the waiver of constitutional liberties. See *Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245 (1934). *But see Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 n.2 (1969) (narrowly viewed, *Hamilton* "cannot be taken as establishing that the State may impose and enforce any conditions that it chooses upon attendance at public institutions"). An exhaustive study of school board authority to oversee the entire educational process is contained in Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct*

initially was derived from the common-law doctrine of *in loco parentis*<sup>11</sup> and later expressly and impliedly granted through state enabling acts.<sup>12</sup> Education was viewed as the vehicle through which the existing knowledge and values of the community could be transmitted to the young and thus was a primary tool in the socialization process.<sup>13</sup>

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*and Status: A Nonconstitutional Analysis*, 117 U. PA. L. REV. 373 (1969) [hereinafter cited as *Nonconstitutional Analysis*].

<sup>11</sup> E. REUTTER, *THE COURTS AND STUDENT CONDUCT* 3 (1975) [hereinafter cited as E. REUTTER]. Since the school authorities "stand in the place of the parent while the child is at school," they have broad discretion in establishing curriculae and in regulating student conduct. *Id.*; see *Nonconstitutional Analysis*, *supra* note 10, at 377-84. It has been argued that the *in loco parentis* doctrine does not give school authorities the same right of control over the student that the parent has, but instead gives only the degree of authority necessary for the school to function properly. H. PUNKE, *SOCIAL IMPLICATIONS OF LAWSUITS OVER STUDENT HAIRSTYLES* 241 (1973) [hereinafter cited as H. PUNKE]. Another writer contends that the pluralism of modern society militates against the validity of *in loco parentis*. McNeil, *Student Rights and the Social Context of Schooling*, in *SCHOOLING AND THE RIGHTS OF CHILDREN* 57 (V. Haubrich & M. Apple ed. 1975).

<sup>12</sup> E. REUTTER & R. HAMILTON, *THE LAW OF PUBLIC EDUCATION* 108 (1970) [hereinafter cited as *THE LAW OF PUBLIC EDUCATION*]. See also *Nonconstitutional Analysis*, *supra* note 10, at 384-87; Project, *supra* note 4, at 1423-26.

<sup>13</sup> Nahmod, *First Admendment Protection for Learning and Teaching: The Scope of Judicial Review*, 18 WAYNE L. REV. 1479, 1480 (1972) [hereinafter cited as *Judicial Review*]. The inculcation of essential ideas, skills and knowledge is viewed by those favoring the "prescriptive" approach to education as a justification for shielding students from controversial ideas. Nahmod, *Controversy in the Classroom: The High School Teacher and Freedom of Expression*, 39 GEO. WASH. L. REV. 1032, 1033 (1971) [hereinafter cited as *Controversy*]; cf. Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293, 1350-55 (1976) [hereinafter cited as Goldstein] (*Tinker* is in error if it weakens the validity of the prescriptive model of education). Professor Goldstein argues that socializing students is a proper function of the school and that the elected school board rather than the teachers should have the authority to determine curriculum content. *Id.*

Virtually every state requires that patriotism be fostered through required study of American history and the United States Constitution. See, e.g., ALA. CODE tit. 52, § 545 (1960); ARIZ. REV. STAT. § 15-1021 (1974); MICH. STAT. ANN. § 15.41166 (1976); MINN. STAT. ANN. § 126.06, .08 (West 1960); N.J. STAT. ANN. § 18A:35-1 to -2 (West 1968 & Supp. 1977-1978); R.I. GEN. LAWS § 16-22-2 (1970); TENN. CODE ANN. § 49-1307(7), -1903, -1907 (Cum. Supp. 1975). Some states go as far as to require instruction in the benefits of capitalism and the evils of communism. See, e.g., ALA. CODE tit. 52, § 545(1) (Cum. Supp. 1973); ARIZ. REV. STAT. § 15-1025 (1975); FLA. STAT. ANN. § 233.064 (West 1977); MISS. CODE ANN. § 37-13-13 (1972); UTAH CODE ANN. § 53-14-7.5 (Supp. 1975). In addition to the transmission of desired values through substantive classroom discussion, the "hidden" curriculum of school rules and regulations also may have an indoctrinary effect. Project, *supra* note 4, at 1424 n.265.

The prescriptive or indoctrination model has been attacked by many in the educational community. See, e.g., I. ILLICH, *DESCHOOLING SOCIETY* (1970); H. KOHL, *THE OPEN CLASSROOM* (1969); N. POSTMAN & C. WEINGARTNER, *TEACHING AS A SUBVERSIVE ACTIVITY* (1969); C. SILBERMAN, *CRISIS IN THE CLASSROOM* (1970). See also P. SLATER, *THE PURSUIT OF LONELINESS: AMERICAN CULTURE AT THE BREAKING POINT* (1970). Those advocating the "progressive" approach view the educational arena as a market place where the goal of intellectual stimulation

In time, however, limits were imposed on the decision-making powers of state education authorities. In *Meyer v. Nebraska*,<sup>14</sup> a 1923 decision, the Supreme Court declared unconstitutional a statute that was designed to promote linguistic homogeneity in the schools.<sup>15</sup> While the Court acknowledged the desirability of the statute's purpose, it indicated that such a goal could not be effectuated at the expense of fundamental individual rights.<sup>16</sup> This view was reiterated in *West Virginia State Board of Education v. Barnette*,<sup>17</sup> wherein the Court held that the first amendment prohibits compelling a student to salute the flag.<sup>18</sup> In so holding, the Court recognized the role of the first amendment in preserving individualism and cultural diversity in our society<sup>19</sup> and stated that fundamental rights cannot be made subordinate to the whims of the majority.<sup>20</sup> In the *Barnette* Court's view,

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requires at least minimal restrictions on the power of school authorities to affirmatively indoctrinate students. Note, 30 VAND. L. REV. 85, 90 n.40 (1977).

Realistically, there is no clear prescriptive/progressive dichotomy in education. A certain amount of "egalitarianism" is present in education, Project, *supra* note 4, at 1373, with the judiciary sometimes called upon to achieve a proper balance between state interests and individual rights. *Id.* at 1382. In *James v. Board of Educ.*, 461 F.2d 566 (2d Cir. 1972), *cert. denied*, 409 U.S. 1042 (1973), the Second Circuit noted that "a principal function of all elementary and secondary education is indoctrinative," 461 F.2d at 573, yet upheld the right of a teacher to wear a black armband as a symbolic protest to the war in Vietnam. *Id.* at 574-75.

A common judicial attitude is reflected in a recent federal district court opinion: "I suggest that secondary schools involve a mixture of these elements in the progression toward the ultimate goal of education. As the student advances in age, experience, information, and skills, the need for controlling the educational environment diminishes." *Cary v. Board of Educ.*, 427 F. Supp. 945, 953 (D. Colo. 1977); *see Scoville v. Board of Educ.*, 425 F.2d 10, 13 & n.5 (7th Cir.) (en banc), *cert. denied*, 400 U.S. 826 (1970); *Gambino v. Fairfax County School Bd.*, 429 F. Supp. 731, 734-35 & n.2 (E.D. Va. 1977). *See generally* *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>14</sup> 262 U.S. 390 (1923).

<sup>15</sup> *Id.* at 403. The Nebraska statute prohibited teaching a foreign language to students who had not completed the eighth grade. Its purpose was to minimize the danger to society of immigrants rearing their children in their native language. *Id.* at 398.

<sup>16</sup> *Id.* at 401-03. Other attempts by states to strictly control the program of private schools were similarly struck down. *E.g.*, *Farrington v. Tokushige*, 273 U.S. 284 (1927) (state statute unreasonable in its control of teachers, curriculum, and textbooks in foreign language schools); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (state could not forbid enrollment in private schools); *see* T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 598-600 (1970) [hereinafter cited as T. EMERSON].

<sup>17</sup> 319 U.S. 624 (1943).

<sup>18</sup> *Id.* at 642. The principles of *Barnette* were applied to high school teachers in *Hanover v. Northrup*, 325 F. Supp. 170 (D. Conn. 1970). There, the teacher refused to lead her class in the salute to the flag because she disagreed with the phrase "with liberty and justice for all." *Id.* at 171. Since the court found that no discipline problems resulted, the teacher's action, as a form of expression, was protected by the first amendment. *Id.* at 173.

<sup>19</sup> 319 U.S. at 641-42.

<sup>20</sup> *Id.* at 638.

[t]he Fourteenth Amendment, as now applied to the State, 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.<sup>21</sup>

Although the *Barnette* Court emphasized the existence of individual rights within the school, subsequent decisions indicated that the state nonetheless retained broad discretion to regulate educational affairs.<sup>22</sup> It was not until the 1960's that the courts began to place specific constitutional restrictions on the exercise of this broad authority.<sup>23</sup>

At the university level, the Supreme Court adopted the view that the first amendment would not permit laws casting "a pall of orthodoxy over the classroom"<sup>24</sup> since the campus was peculiarly the

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<sup>21</sup> *Id.* at 637. Later quoted approvingly in *Tinker*, *Barnette's* recognition that the fourteenth amendment also protects the student's freedom of thought established a direct limit on the state's power to indoctrinate. T. VAN GEEL, *AUTHORITY TO CONTROL THE SCHOOL PROGRAM* 23 (1976) [hereinafter cited as *SCHOOL PROGRAM*]. See also *Wisconsin v. Yoder*, 406 U.S. 205, 243-45 (1972) (Douglas, J., dissenting in part and concurring in part); *Presidents Council v. Community School Bd.*, 409 U.S. 998, 998-99 (1972) (Douglas, J., dissenting).

<sup>22</sup> See, e.g., *Board of Directors v. Green*, 259 Iowa 1260, 147 N.W.2d 854 (1967) (exclusion of married students from extracurricular activities); *Rosenberg v. Board of Educ.*, 196 Misc. 542, 92 N.Y.S.2d 344 (Sup. Ct. Kings County 1949) (refusal to act pursuant to parental demand that "objectionable" book be removed); *In re Kornblum*, 70 N.Y. Dep't R. 19 (1949) (refusal to purchase periodical for use in the library); *State ex rel. Idle v. Chamberlain*, 12 Ohio Misc. 44, 175 N.E.2d 539 (1961) (exclusion of pregnant student).

<sup>23</sup> Prior to the 1960's, the only first amendment freedom to receive extensive judicial consideration in the context of education was religion and the requirement that the educational system accommodate differing religious values. Project, *supra* note 4, at 1426-42; see, e.g., *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (state may provide books and educational materials to parochial schools); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (state may not forbid teaching of Darwinian theory); *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (textbook loans may be made by state to parochial school students); *School Dist. of Abington v. Schempp*, 374 U.S. 203 (1963) (bible reading may not be required); *Engel v. Vitale*, 370 U.S. 421 (1962) (school authorities may not compose official prayers); *Zorach v. Clauson*, 343 U.S. 306 (1952) ("release time" program permitting public schools to release students for religious instruction does not violate "free exercise" and "establishment" clauses); *McCollum v. Board of Educ.*, 333 U.S. 203 (1948) ("release time" program utilizing schools for religious instruction violates "establishment" clause); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (bus transportation to sectarian schools may be provided by state).

<sup>24</sup> *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). In *Keyishian*, the Court struck down New York's teacher loyalty laws and regulations as overbroad restrictions on fundamental personal liberties. *Id.* at 602. Offering valuable philosophical guidance for future

“marketplace of ideas.”<sup>25</sup> A similar philosophy was evident in *Tinker v. Des Moines Independent Community School District*<sup>26</sup> wherein the Court considered the extent to which the activities of secondary school students are protected by the first amendment.<sup>27</sup> Finding that the wearing of a black armband to express a political view was a form of symbolic speech,<sup>28</sup> the *Tinker* Court held that such conduct could be curtailed only when necessary to protect the school environment.<sup>29</sup> The burden of justifying restraints on the exercise of this protected “speech” was imposed upon the school authorities.<sup>30</sup> Significantly, the Court rejected the argument that mere apprehension of physical disturbance or a desire to avoid ideological controversy was sufficient justification for restricting the students’ freedom of expression.<sup>31</sup> It is against this judicial background that

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educational disputes, the Court said 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.’” *Id.* at 603 (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff’d*, 326 U.S. 1 (1945)).

Similarly, in *Wiemann v. Updegraff*, 344 U.S. 183 (1952), a loyalty oath for college professors was declared unconstitutional because failure to take such an oath gave rise to a presumption of disloyalty. *Id.* at 190-92. In his concurring opinion, Justice Frankfurter focused on the special nature of education and noted that universities must be a forum for open dialogue and the sifting of ideas if teachers are to be able to foster critical thinking. *Id.* at 196-97 (Frankfurter, J., concurring). The same type of reasoning was evident in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957). Both Chief Justice Warren and Justice Frankfurter stated that free societies need free universities. *Id.* at 250; *id.* at 262 (Frankfurter, J., concurring).

<sup>25</sup> *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). The language in *Keyishian* was later quoted approvingly by the *Tinker* Court which apparently extended the “market place of ideas” model to the high school level. 393 U.S. at 512; see *Trachtman v. Anker*, 563 F.2d 512, 521 (2d Cir. 1977) (Mansfield, J., dissenting, *cert. denied*, 46 U.S.L.W. 3582 (U.S. Mar. 21, 1978)). This aspect of *Tinker* has been criticized by those who argue that the rights of high school students are not co-extensive with the rights of adult college students. See 393 U.S. at 514-15 (Stewart, J., concurring); Goldstein, *supra* note 13, at 1350-55. See also note 116 *infra*. It may be argued, however, that *Tinker* neither repudiates the importance of value inculcation nor demands an absolute “market place.” Rather, it emphasizes the need for both models to co-exist to the extent practicable. *Cary v. Board of Educ.*, 427 F. Supp. 945, 952-54 (D. Colo. 1977). This balancing of state and individual interests is most readily apparent in the student press cases. See note 83 *infra*.

<sup>26</sup> 393 U.S. 503 (1969).

<sup>27</sup> *Id.* at 507.

<sup>28</sup> *Id.* at 505-06; cf. *James v. Board of Educ.*, 461 F.2d 566 (2d Cir. 1972), *cert. denied*, 409 U.S. 1042 (1973) (extending *Tinker*’s protection of symbolic speech to teachers).

<sup>29</sup> 393 U.S. at 505-06; accord, *Healy v. James*, 408 U.S. 169, 180 (1972); cf. *Procunier v. Martinez*, 416 U.S. 396 (1974) (Marshall, J., concurring) (prisoners do not shed all first amendment rights at the prison gate).

<sup>30</sup> See *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 158 (1969) (quoting *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 526 (Harlan, J., dissenting)).

<sup>31</sup> 393 U.S. at 508-10. Compare *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966), with *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966). The *Tinker* Court

the consumers of educational services have begun to challenge the scope of a school board's power to censor the reading material available to students in the public schools.<sup>32</sup>

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further stated that government's interest in inculcating social values must yield to the constitutional rights of the students. 393 U.S. at 511.

The scope of the *Tinker* decision has been the subject of considerable discussion. Compare Gyory, *The Constitutional Rights of Public School Pupils*, 40 *FORDHAM L. REV.* 201, 212-13 (1971), with Nahmod, *Beyond Tinker: The High School as an Educational Public Forum*, 5 *HARV. C.R.-C.L.L. REV.* 278, 279-81 (1970). One commentator has observed: "[W]hatever one's view of the *Tinker* decision may be, it is a given in any discussion of the constitutional aspects of student expression." Haskell, *Student Expression in the Public Schools: Tinker Distinguished*, 59 *GEO. L.J.* 37, 51 (1970).

<sup>32</sup> *Tinker* resulted in increased litigation involving educational disputes that traditionally were considered beyond the scope of judicial review. For example, regulations similar to those at issue in *Tinker* have been challenged by students, with mixed results. Compare *Guzick v. Drebus*, 431 F.2d 594 (6th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971) (ban on all non-school related emblems held lawful due to strong possibility of disruption), and *Wise v. Sauer*, 345 F. Supp. 90 (E.D. Pa. 1972), *aff'd without opinion*, 481 F.2d 1400 (3d Cir. 1973) (ban on armbands urging violation of attendance laws upheld due to "tense" situation), with *Butts v. Dallas Indep. School Dist.*, 436 F.2d 728 (5th Cir. 1971) (inquiry by school authorities needed before determination may be made that wearing of armbands would cause disruption), and *Aguirre v. Tahoka Indep. School Dist.*, 311 F. Supp. 664 (N.D. Tex. 1970) (*Tinker* violated when ban on armbands not based on evidence of disruption). For a discussion of these and similar cases, see E. REUTTER, *supra* note 11, at 12-18.

Student hairstyles presented another area of litigation. In *Ferrell v. Dallas Indep. School Dist.*, 261 F. Supp. 545 (N.D. Tex. 1966), *aff'd*, 392 F.2d 697 (5th Cir.), *cert. denied*, 393 U.S. 856 (1968), although constitutional protection was accorded students' choice of hair length, their rights were found to be subordinate to the state's interest in maintaining effective and efficient schools.

Since decisions concerning what occurs in the classroom, as a practical matter, are delegated to school administrators and teachers who are remote from the electoral process and thus less receptive to parental influence, challenges by parents to curriculum content are not uncommon. *SCHOOL PROGRAM*, *supra* note 21, at 173-75. These suits are generally unsuccessful. See, e.g., *Cornwall v. State Bd. of Educ.*, 428 F.2d 471 (4th Cir.), *cert. denied*, 400 U.S. 942 (1970); *Davis v. Page*, 385 F. Supp. 395 (D.N.H. 1974); *Citizens for Parental Rights v. San Mateo School Bd.*, 51 Cal. App. 3d 1, 124 Cal. Rptr. 68 (1975), *appeal dismissed*, 425 U.S. 908 (1976); *Hopkins v. Hamden Bd. of Educ.*, 29 Conn. Supp. 397, 289 A.2d 914 (1971), *aff'd*, 165 Conn. 793, 305 A.2d 536 (1973); *Medeiros v. Kiyosaki*, 52 Haw. 436, 478 P.2d 314 (1970); see *Project*, *supra* note 4, at 1433-42.

Judicial recognition of the teacher's right to be free of state intervention in the classroom has been gradual. The concept of academic freedom can be traced to the nineteenth century German concepts of *lehrfreiheit* and *lernfreiheit*. Goldstein, *supra* note 13, at 1299. For an early discussion of its development in the United States, see R. HOFSTADTER & W. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* (1955). Recognition by the Supreme Court of some of the basic principles of academic freedom can be seen in the *Wiemann* and *Sweezy* cases, discussed in T. EMERSON, *supra* note 16, at 601-03; see note 24 *supra*. Prior to *Keyishian* and *Tinker*, most of the support for the concept of academic freedom was found in dicta and was seemingly limited to the university setting. See generally *Developments*, *supra* note 4. Judicial reluctance to intervene in educational disputes, together with the fear of improper influence upon students by teachers, hindered teacher efforts to obtain recognition of a right to academic freedom. *Judicial Review*, *supra* note 13, at 1495.

The leading cases upholding teachers' rights in this area are *Keefe v. Geanokos*, 418 F.2d



## THE EMERGING CONTROVERSY

In 1971, Community School Board No. 25 of Queens, New York, voted five to three to remove *Down These Mean Streets* from all junior high school libraries in the district.<sup>33</sup> Objections to the book's presence in the library had been voiced by parents who claimed that obscenities and sexual episodes in the book would adversely affect their children.<sup>34</sup> Subsequently, teachers, parents, librarians, and students brought suit in federal court, alleging violations of their first amendment rights.<sup>35</sup> In *Presidents Council v. Community*

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359 (1st Cir. 1969), and *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970). In *Keefe*, the context in which the teacher used a "vulgar term for an incestuous son" was found to be "scholarly, thoughtful and thought-provoking." 418 F.2d at 361. Crucial to the decision was the relevance of the word to the class discussion of a magazine article. *Controversy*, *supra* note 13, at 1037. In *Parducci*, the assignment of Kurt Vonnegut's *Welcome to the Monkey House* to an eleventh grade English class was found to have caused no substantial disruption as alleged by the school superintendent. Since the court found the book to be appropriate for high school students, the teacher's right of academic freedom protected her right to assign it. 316 F. Supp. at 355. There has been some uncertainty concerning whether these decisions are truly supportive of academic freedom or whether they instead address only the importance of procedural due process for teachers. Compare Goldstein, *supra* note 13, with *Controversy*, *supra* note 13. See also *Judicial Review*, *supra* note 13, at 1492-1503; Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841 (1970) [hereinafter cited as Van Alstyne]; Note, *Academic Freedom in the Public Schools: The Right to Teach*, 48 N.Y.U.L. Rev. 1176 (1973). An extensive consideration of these and more recent decisions concerning academic freedom may be found in Project, *supra* note 4, at 1447-54 & n.433.

A recent district court opinion gives explicit recognition to academic freedom. *Cary v. Board of Educ.*, 427 F. Supp. 945 (D. Colo. 1977). In a dispute over control of textbook selection, the court stated that "[t]he selection of the subject books as material for these elective courses in these grades is clearly within the protected area recognized as academic freedom." *Id.* at 955. Since the teachers gave up the right to select textbooks in their collective bargaining agreement, however, final authority was found to rest with the school board. *Id.* at 955-56. Professor Emerson argues that the needs of our democratic society demand inclusion of the "system of academic freedom" within our legal doctrine. T. EMERSON, *supra* note 16, at 593-626.

<sup>33</sup> *Presidents Council v. Community School Bd.*, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972). *Down These Mean Streets*, by Piri Thomas, is an autobiographical account of growing up in Spanish Harlem. See 457 F.2d at 291. Three months later, the board's resolution to remove the book was modified to make the book available on a direct loan basis to parents. *Id.* at 290.

<sup>34</sup> 457 F.2d at 291.

<sup>35</sup> Suit was brought pursuant to 42 U.S.C. § 1983 (1970) and 28 U.S.C. § 1343(3) (1970). 457 F.2d at 289. Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1970).

*School Board*,<sup>36</sup> a unanimous Second Circuit panel dismissed the plaintiffs' complaint, holding that the removal of the book from the school library did not rise to the level of a constitutional violation.<sup>37</sup> The court reasoned that since the responsibility for selection of public school library materials was vested solely in the school board,<sup>38</sup> it was inappropriate for the court to review "the wisdom or the efficacy of the determinations by the Board."<sup>39</sup> Judicial restraint in library and curriculum matters was urged by the court, which noted that any decision concerning the contents of the school library invariably would be subject to objection from some person or group.<sup>40</sup>

A similar but broader controversy arose in 1972 in Strongsville, Ohio over the selection and removal of high school library books and the selection of textbooks.<sup>41</sup> The Strongsville Board of Education, after receiving recommendations from committees representing faculty, community members, and the board itself, decided not to purchase *Catch 22* by Joseph Heller and *God Bless You, Mr. Rosewater* and *Cat's Cradle* by Kurt Vonnegut, Jr.<sup>42</sup> The board also voted to remove existing copies of *Catch 22* and *Cat's Cradle* from the high school library.<sup>43</sup> Students challenged these decisions in federal district court, claiming that their first amendment freedoms had been abridged.<sup>44</sup> In *Minarcini v. Strongsville City School District*,<sup>45</sup> the District Court for the Northern District of Ohio held that the school board's actions in rejecting and removing the books

<sup>36</sup> 457 F.2d 289 (2d Cir.), cert. denied, 409 U.S. 998 (1972).

<sup>37</sup> 457 F.2d at 291.

<sup>38</sup> *Id.* at 290 (quoting N.Y. Educ. Law § 2590-e(3) (McKinney 1970)).

<sup>39</sup> 457 F.2d at 291.

<sup>40</sup> *Id.* In dissenting from the Supreme Court's denial of certiorari in *Presidents Council*, Justice Douglas stressed the dangers inherent in permitting school boards to exercise unlimited authority over the contents of school libraries. 409 U.S. 998, 999-1000 (Douglas, J., dissenting). Of particular concern to Justice Douglas was the possibility that the personal values of school board members would be imposed on students:

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 (Douglas, J., dissenting). Justice Douglas also found that the New York statute empowering the school board to make textbook selections was constitutionally defective in that it was overbroad. *Id.* at 1000 (Douglas, J., dissenting); see *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

<sup>41</sup> *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 578 (6th Cir. 1976), *rev'g* 384 F. Supp. 698 (N.D. Ohio 1974).

<sup>42</sup> 541 F.2d at 579.

<sup>43</sup> *Id.*

<sup>44</sup> 384 F. Supp. 698 (N.D. Ohio 1974), *rev'd*, 541 F.2d 577 (6th Cir. 1976).

<sup>45</sup> 384 F. Supp. at 698.

presented no violation of the students' constitutional rights.<sup>46</sup> Since the state had given school boards the authority to choose textbooks,<sup>47</sup> their determinations would not be overturned by the court unless found to be arbitrary and capricious.<sup>48</sup> Relying on the analysis in *Presidents Council*,<sup>49</sup> the court found the selection and removal procedure to be "fair, equitable and logical."<sup>50</sup> On appeal, the Sixth Circuit agreed with the district court that there was no constitutional violation in the board's decision not to purchase the books.<sup>51</sup> Significantly, however, the Sixth Circuit held that first amendment rights were violated when the board removed existing copies of *Catch 22* and *Cat's Cradle* from the library.<sup>52</sup> After reviewing the removal procedures used by the board,<sup>53</sup> the *Minarcini* court found that the sole basis for removing the books had been the social and political tastes of the school board members.<sup>54</sup> Although factors such as deterioration, obsolescence and architectural necessity would have been adequate justification for removing a book,<sup>55</sup> the court stated that removal based on ideological considerations was inconsistent with the students' first amendment rights.<sup>56</sup>

In the *Minarcini* court's view, the Second Circuit's decision in *Presidents Council* did not require a different result since the holding in *Presidents Council* did not confer upon school authorities absolute power to remove books from the school library.<sup>57</sup> Most com-

<sup>46</sup> *Id.* at 708-09.

<sup>47</sup> *Id.* at 700 (citing OHIO REV. CODE § 3329.07 (Page 1972)).

<sup>48</sup> 384 F. Supp. at 704.

<sup>49</sup> *Id.* at 704-05.

<sup>50</sup> *Id.* at 706.

<sup>51</sup> 541 F.2d at 579-80.

<sup>52</sup> *Id.* at 583.

<sup>53</sup> *Id.* at 582. The court quoted extensively from the board minutes. *God Bless You, Mr. Rosewater* was referred to in the minority report, the only "official clue" to the school board's reasoning, as "completely sick." The report continued, "[o]ne secretary read it for one-half hour and handed it back to the reviewer with the written comment, 'GARBAGE.'" *Id.* at 581 (emphasis added). Instead, the report recommended adoption of an autobiography of Captain Eddie Rickenbacker, a biography of Herbert Hoover, and *Reminiscences of Douglas MacArthur*. "It is also 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.* at 581-82.

<sup>54</sup> *Id.* at 582.

<sup>55</sup> *Id.* at 581.

<sup>56</sup> 541 F.2d at 582-83. In *Gambino v. Fairfax County School Bd.*, 429 F. Supp. 731 (E.D. Va. 1977), the school board was enjoined from prohibiting publication of an article in the school paper entitled "Sexually Active Students Fail to Use Contraception." The court approvingly cited *Minarcini* for the proposition that "material is not suppressible by reason of its objectionability to the sensibilities of the School Board or its constituents." *Id.* at 736.

<sup>57</sup> 541 F.2d at 581. The court further stated that if *Presidents Council* stood for an unqualified right on the part of the school board to remove books, then it would not be followed. *Id.*

mentators, however, are of the opinion that *Presidents Council* did indeed hold that school boards have absolute authority to remove books.<sup>58</sup> If this view is correct, the *Minarcini* decision would appear to place the Sixth and Second Circuits in conflict on the issue of book removal, although they appear in accord on the related issue of book selection.<sup>59</sup> In light of this conflict, the decisions in *Presidents Council* and *Minarcini* have engendered some uncertainty and have left open the following questions: (1) Does the first amendment prohibit school authorities from removing library books that offend their political and moral beliefs and, if so, is such a prohibition in accord with sound public policy? (2) Are there constitutional limits on the discretionary powers of school authorities to select books for use in the schools? (3) If discretion in the selection process is limited, what standards should the courts apply in reviewing the decisions of school authorities? These questions will be fully explored in the discussion that follows.

#### BOOK REMOVAL AND THE RIGHT TO RECEIVE INFORMATION

Due to the reciprocal nature of communication, it could be argued that the first amendment has always protected the right to receive information as well as the right to transmit it.<sup>60</sup> Only in recent years, however, have both aspects of the communication process received explicit constitutional recognition.<sup>61</sup> This acknowledg-

<sup>58</sup> See, e.g., Goldstein, *supra* note 13, at 1331-35; Note, 55 TEX. L. REV. 511, 516-18 (1977); Note, 30 VAND. L. REV. 85, 93-94 (1977). *But cf.* Note, 27 CASE W. RES. L. REV. 1034, 1053 (1977) (the board in *Presidents Council* was not clearly motivated by personal value judgments).

<sup>59</sup> See 457 F.2d at 291-92; 541 F.2d at 579-80. Whether *Minarcini* stands for the proposition that school boards have unlimited authority in selecting books is not entirely clear:

To the extent that this suit concerns a question as to whether the school faculty may make its professional choices of textbooks prevail over the considered decision of the Board of Education empowered by state law to make such decisions, we affirm the decision of the District Judge in dismissing that portion of plaintiffs' complaint. In short, we find no federal constitutional violation in this Board's exercise of curriculum and textbook control as empowered by the Ohio statute.

*Id.* at 579-80 (emphasis added).

<sup>60</sup> "A popular government, without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives." Letter from James Madison to W. T. Barry, August 4, 1822, *quoted in* Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. L.Q. 1, 1 & n.1; see *Whitney v. California*, 274 U.S. 357, 375-77 (1926) (Brandeis, J., concurring); O'Neil, *Libraries, Liberties and the First Amendment*, 42 U. CIN. L. REV. 209, 220-22 (1973) [hereinafter cited as O'Neil].

<sup>61</sup> See, e.g., *Procunier v. Martinez*, 416 U.S. 396 (1974); *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965); *Martin v. Struthers*, 319

ment reflects the view that the marketplace of ideas would be a barren one if it had only "sellers"<sup>62</sup> and is rooted in the belief that a democratic government thrives on open inquiry and debate.<sup>63</sup>

In considering the first amendment rights of students when books are removed from a school library, the *Minarcini* court relied heavily on the reasoning in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>64</sup> wherein the Supreme Court stated that the first amendment encompasses the right to receive information and ideas.<sup>65</sup> Although the *Minarcini* court did

U.S. 141 (1943); note 65 *infra*. See also *Marsh v. Alabama*, 326 U.S. 501 (1946); *Thomas v. Collins*, 323 U.S. 516 (1944).

<sup>62</sup> *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

<sup>63</sup> *Procurier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring). See also *Pickering v. Board of Educ.*, 391 U.S. 563, 573 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

<sup>64</sup> 425 U.S. 748 (1976); see 541 F.2d at 583.

<sup>65</sup> 425 U.S. at 756-57. Although early references to a right to receive information and ideas were made in the 1940's, see note 61 *supra*, only in the 1960's was this right clearly expressed.

For early discussions of the emerging right to receive information and ideas, see Green, *The Right to Communicate*, 35 N.Y.U.L. Rev. 903 (1960), and Meiklejohn, *Freedom to Hear and to Judge*, 10 LAW. GUILD REV. 26 (1950). A more recent and exhaustive study is contained in Comment, *Freedom to Hear: A Political Justification of the First Amendment*, 46 WASH. L. REV. 311 (1971). In *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965), the detention of incoming mail from communist countries until a request was made in writing by the addressee, was found to be an unconstitutional limitation on the first amendment rights of addressees. *Id.* at 305. Although the majority opinion did not specify precisely what rights were violated, Justice Brennan was more explicit in stating that the first amendment protects the right to receive: "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." *Id.* at 308 (Brennan, J., concurring). Later that year, Justice Douglas unambiguously stated that the first amendment includes the "right to receive." See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

The right to receive information is not limited to conventional ideas. In *Stanley v. Georgia*, 394 U.S. 557 (1969), possession of obscene materials within the home was found to be protected under the first amendment. Though *Stanley* emphasized the individual's right to privacy, it was declared that the right to receive information and ideas is not conditioned on their social worth. *Id.* at 564. In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), broadcast listeners were found to have a right to receive suitable access to a variety of ideas. See notes 107-112 and accompanying text *infra*.

Any doubt concerning the vitality of the "right to receive" was eliminated in two recent cases. *Procurier v. Martinez*, 416 U.S. 396 (1974); *Kleindienst v. Mandel*, 408 U.S. 753 (1972). In *Kleindienst*, the Supreme Court upheld the federal government's refusal to grant a nonimmigrant visa to Ernest Mandel, a Marxist writer and theorist who wished to enter the United States to lecture at various colleges. While denying Mandel the requested relief, the Court explicitly recognized a right to receive information that "is 'nowhere more vital' than in our schools and universities." *Id.* at 763 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (citations omitted)). It was only because Congress has plenary power to control immigration that the Court did not find the rights of the listeners dispositive. 408 U.S. at 766.

In *Procurier*, the Court upheld a prisoners' challenge to the California Department of Corrections' censorship of mail. In finding for the prisoners, the Court stated:

Communication by letter is not accomplished by the act of writing words on paper.

not fully discuss the applicability of the *Virginia State Board of Pharmacy* reasoning to the educational setting, its conclusion is amply supported by a comparison of the two cases. In *Virginia State Board of Pharmacy*, a statute imposed civil fines on any pharmacist who violated his professional code by advertising prescription drug prices.<sup>66</sup> The effect of this virtual ban on advertising was to effectively preclude the dissemination of prescription drug price information in the state.<sup>67</sup> Among the issues facing the Court was whether consumers, as potential recipients, had a first amendment right not to be deprived of the price information.<sup>68</sup> Writing for the majority, Justice Blackmun reasoned that freedom of speech embraces both the source and the recipient,<sup>69</sup> and therefore consumers had standing to challenge the ban.<sup>70</sup> Reaching the merits of the case, the majority weighed the consumers' right to receive information against the state's asserted interest in protecting both pharmacists and consumers.<sup>71</sup> Since less restrictive methods for regulating this form of commercial speech<sup>72</sup> were available, the Court found a total prohibition on advertising constitutionally impermissible.<sup>73</sup> Significantly, the majority refused to consider the position, urged by the dissent, that the right to receive information was not impaired since

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Rather, it is effected only when the letter is read by the addressee. Both parties to the correspondence have an interest in securing that result, and censorship of the communication between them necessarily impinges on the interest of each.

416 U.S. at 408. The fact that the prisoners were not "free persons" did not deter the Court from finding that first amendment constraints existed. *Id.* at 409. Analogizing the prison setting to the school setting in *Tinker*, the Court determined that, even under unusual environmental conditions, the rights conferred by the first amendment cannot be abrogated entirely. *Id.* at 410-12.

<sup>66</sup> 425 U.S. at 750-52.

<sup>67</sup> *Id.* at 752.

<sup>68</sup> *Id.* at 756. A constitutional challenge made by the drug advertisers was rejected by the Court. *Id.* at 754-55.

<sup>69</sup> 425 U.S. at 756-57 (citing *Proconier v. Martinez*, 416 U.S. 396 (1974); *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965)).

<sup>70</sup> 425 U.S. at 757.

<sup>71</sup> *Id.* at 761-70.

<sup>72</sup> The primary significance of the *Virginia State Board of Pharmacy* decision lies in its application of the first amendment to commercial speech. *See id.* at 758-61. For an application of *Virginia State Board of Pharmacy* and the "right to receive" cases in a similar commercial context, see *American Meat Inst. v. Ball*, 424 F. Supp. 758 (W.D. Mich. 1976).

<sup>73</sup> 425 U.S. at 766-71. The Board justified its ban on the ground that it was in the state's interest for pharmacists to maintain a high degree of professionalism and for the state to monitor the profession as a whole. *Id.* at 766-68. Finding other safeguards available that would serve the state's interest without infringing on the consumers' right to receive the information, the Court held that complete suppression based upon fears of the information's effects was unconstitutional. *Id.* at 770-73. The Court did note that under certain circumstances advertising could be regulated. *Id.* at 771 n.24.

the state regulatory scheme in question did not prevent consumers from obtaining the same information through independent price-shopping.<sup>74</sup> Although on their face the precedents supported the dissent's analysis,<sup>75</sup> the majority refused to recognize "any such limitation on the independent right of the listener to receive the information sought to be communicated."<sup>76</sup>

This reasoning is equally applicable to school libraries, which are an important, although not exclusive, source of literary information for students.<sup>77</sup> Thus, in view of the *Virginia State Board of Pharmacy* rationale, the availability of a particular book from another source outside the school,<sup>78</sup> or the fact that classroom discussion of the book is not prohibited,<sup>79</sup> would not justify its removal from the library.

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<sup>74</sup> 425 U.S. at 757 n.15. In his dissenting opinion, Justice Rehnquist argued that where the information is available from other uncensored sources, no infringement on the "right to receive" exists. 425 U.S. at 782 (Rehnquist, J., dissenting). The majority, however, rejected this view:

Our prior decisions . . . are said to have been limited to situations in which the information sought to be received "would not be otherwise reasonably available," . . . [E]mphasis is also placed on the appellees' great need for the information, which need, assertedly, should cause them to take advantage of the alternative of digging it up themselves. We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means, such as seeking him out and asking him what it is. Nor have we recognized any such limitation on the independent right of the listener to receive the information sought to be communicated.

*Id.* at 757 n.15. *But cf.* *Presidents Council v. Community School Bd.*, 457 F.2d 289, 293 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972) (removal of book presented no first amendment problem since discussion of the book's contents was not prohibited).

<sup>75</sup> See Note, 27 CASE W. RES. L. REV. 1034, 1046 (1977); Note, 55 TEX. L. REV. 511, 516 (1977). See also O'Neil, *Libraries, Librarians and First Amendment Freedoms*, 4 HUMAN RIGHTS 295, 300-04 (1975) [hereinafter cited as HUMAN RIGHTS].

<sup>76</sup> 425 U.S. at 757 n.15.

<sup>77</sup> Although *Virginia State Board of Pharmacy* involved commercial speech, the Supreme Court has expressly recognized that the right to receive information applies equally to the educational field. See *Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972).

<sup>78</sup> "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. Irvington*, 308 U.S. 147, 163 (1939). The existence of private sources where a person may readily obtain controversial books is immaterial to the constitutional question of whether the right of access to information contained in public libraries may be restricted. HUMAN RIGHTS, *supra* note 75, at 306; see *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972); *cf.* *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (rejection of applications to use public forum violative of first amendment despite the availability of other forums).

<sup>79</sup> Nor is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them. He must know them in their most plausible and persuasive form; he must

Clearly, the library of a public high school is a "forum for silent speech" with communication evidenced by the presence of a source (books) and a recipient (student-reader).<sup>80</sup> Since such communications are protected by the first amendment, any justification offered for denying student access to particular books must meet constitutional standards. Thus, in justifying restrictions on students' right to receive information, school authorities must bear the burden of showing a substantial government interest to be served by the restriction.<sup>81</sup> Admittedly, the burden is less stringent than when such restrictions arise in a truly public form, since students' first amendment rights must be limited to some extent due to the special administrative needs of the school environment.<sup>82</sup> Nevertheless, the decision to remove a book from library use should be based upon "educational" considerations, obsolescence or architectural necessity.<sup>83</sup> Such objective criteria would minimize the danger that book removal will be based upon constitutionally impermissible grounds, such as the political and social tastes of board members.

Applying such a test, the *Presidents Council* decision arguably

feel the whole force of the difficulty which the true view of the subject has to encounter and dispose of; else he will never really possess himself of the portion of truth which meets and removes that difficulty.

J. Mill, *On Liberty*, in *THE ENGLISH PHILOSOPHERS FROM BACON TO MILL* 977 (E. Burt ed. 1939); see *Presidents Council v. Community School Bd.*, 409 U.S. 998, 999 (1972) (Douglas, J., dissenting). See also *Healy v. James*, 408 U.S. 169, 196-97 (1972) (Douglas, J., dissenting).

<sup>80</sup> *Minarcini v. Strongsville City School Dist.*, 542 F.2d 577, 583 (6th Cir. 1976); cf. O'Neil, *supra* note 69, at 240, wherein the author states: "the public library is as integral a part of the public forum as the municipal park or auditorium, and access to its intellectual resources should be unfettered for comparable reasons."

<sup>81</sup> See *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 98-99 (1972); *Kleindienst v. Mandel*, 408 U.S. 753, 774-85 (1972) (Marshall, J., dissenting). It has been suggested that "[t]he burden of justification for school censorship actions approaches, in practice if not in rhetoric, a 'clear and present danger to educational objectives' standard." Note, 55 *Tex. L. Rev.* 511, 522 (1977). See generally *SCHOOL PROGRAM*, *supra* note 21, at 24-26.

<sup>82</sup> *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969); accord, *Healy v. James*, 408 U.S. 169, 180 (1972).

<sup>83</sup> *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 581 (6th Cir. 1976). Reasonable regulations regarding time of access to the library are justifiable in the interest of efficient management. The courts have upheld such restrictions in analogous situations. For example, use of public forums may be subject to reasonable regulations as to time, place, and manner when necessary to protect general societal interests. *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972). Selective exclusions from a public forum, however, must serve a substantial government interest. *Police Dep't v. Mosley*, 408 U.S. 92, 98-99 (1972). Regulations broadly denying access to public forums for exercise of first amendment rights will not be upheld, *Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 315 (1968), nor may the government act as censor and discriminate solely according to content. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975) (citing *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972)). See generally *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); see also *Brown v. Louisiana*, 383 U.S. 131, 143 (1966); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943).



is justified by the fact that the school board's decision was motivated by concern for possible adverse moral and psychological effects on the 11 to 15-year-old junior high school students.<sup>84</sup> While broad paternalistic reasons offered as justification for restricting first amendment rights should be closely scrutinized by the courts,<sup>85</sup> concern for the psychological well-being of students is quite properly a factor in educational decision-making.<sup>86</sup> Since the facts suggest that the board exercised its powers with propriety, the holding in *Presidents Council* is not entirely inconsistent with the notion that the first amendment prohibits unlimited censorship.<sup>87</sup>

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While more stringent limits on youth access to constitutionally protected materials have been allowed by the courts, the circumstances must be narrow and well defined. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211-12 (1975).

Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors.

*Id.* at 213-14 (footnote and citations omitted). *See also* *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968).

In the educational environment, the courts are divided over whether school officials may exercise prior restraint or are limited instead to imposing time, place, and manner restrictions on access to student-published materials. The Seventh Circuit, viewing *Tinker* as dispositive, clearly denies any right on the part of school authorities to invoke prior restraints. *See* *Fujishima v. Board of Educ.*, 460 F.2d 1355, 1358 (7th Cir. 1972). *See also* *Jacobs v. Board of School Comm'rs*, 490 F.2d 601 (7th Cir. 1973), *vacated on other grounds*, 420 U.S. 128 (1975); *Scoville v. Board of Educ.*, 425 F.2d 10 (7th Cir.) (en banc), *cert. denied*, 400 U.S. 826 (1970). The Second Circuit, however, has upheld the right of school authorities to require prior approval of printed matter to be distributed on school grounds. *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803 (2d Cir. 1971). In the Second Circuit's view, such prior restraint is permissible if procedural safeguards are present and if the school authorities demonstrate a reasonable anticipation of serious disruption. *Id.* at 808-11. The Fourth and Fifth Circuits have generally followed the lead of *Eisner*. *See, e.g.*, *Nitzberg v. Parks*, 525 F.2d 378 (4th Cir. 1975); *Shanley v. Northeast Indep. School Dist.*, 462 F.2d 960 (5th Cir. 1972); *Quarterman v. Byrd*, 453 F.2d 54 (4th Cir. 1971). *See also* *Riseman v. School Comm. of Quincy*, 439 F.2d 148 (1st Cir. 1971) (per curiam); *Cintron v. State Bd. of Educ.*, 384 F. Supp. 674 (D.P.R. 1974). *See generally* E. REUTTER, *supra* note 11, at 18-35; Note, *Prior Restraints in Public High Schools*, 82 *YALE L.J.* 1325 (1973).

<sup>84</sup> 457 F.2d at 291.

<sup>85</sup> *See, e.g.*, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumers Council, Inc.*, 425 U.S. 748, 770 (1976); *Trachtman v. Anker*, 563 F.2d 512, 520 (2d Cir. 1977) (Mansfield, J., dissenting), *cert. denied*, 46 U.S.L.W. 3582 (U.S. Mar. 21, 1978); *Breen v. Kahl*, 296 F. Supp. 702, 708-09 (W.D. Wis.), *aff'd*, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970).

<sup>86</sup> *See* *Trachtman v. Anker*, 563 F.2d 512 (2d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3582 (U.S. Mar. 21, 1978).

<sup>87</sup> It should be noted that *Presidents Council* was decided prior to the Supreme Court's decisions in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), *Procurier v. Martinez*, 416 U.S. 396 (1974), and *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumers Council, Inc.*, 425 U.S. 748 (1976), *discussed in* notes 64-76 and accompanying text *supra*.

In addition to constitutional considerations, a requirement that book removal be guided by educational concerns, and not subjective political judgments, represents sound public policy. The danger of enforced conformity within the school has been opposed for its possible adverse effects on students.<sup>88</sup> Fostering individual autonomy is the essence of American ideology<sup>89</sup> and is a value that has been reflected in a generation of Supreme Court decisions that view the student as a person possessed of constitutional rights.<sup>90</sup> The importance of individualism to the democratic system mandates that students retain their first amendment rights to the fullest, most practical extent possible within the educational environment.<sup>91</sup> The power

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Judicial mistrust of paternalistic rationales for government interference with first amendment rights has been expressed as follows:

The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from false for us.

Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) (citation omitted). See generally *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Brandeis, J., dissenting); see also *Marsh v. Alabama*, 326 U.S. 501, 508 (1946); *Martin v. City of Struthers*, 319 U.S. 141, 146-47 (1943).

In *Stanley v. Georgia*, 394 U.S. 557 (1969), a statute making it a crime to possess obscene matter was defended on the theory that the statute protected the individual's mind from the effects of obscenity. The Court rejected this reasoning, suggesting that it amounted to a claim that the state has the power to control the contents of people's minds. "To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment." *Id.* at 565-66.

<sup>88</sup> *James v. Board of Educ.*, 461 F.2d 566, 574 (2d Cir. 1972), cert. denied, 409 U.S. 1042 (1973). Emphasizing that the constitutional rights of students must be respected by school authorities, one court has stated: "It is most important that our young become convinced that our Constitution is a living reality, not parchment preserved under glass." *Shanley v. Northeast Indep. School Dist.*, 462 F.2d 960, 972 (5th Cir. 1972) (footnote omitted). See generally, *McNeil, Student Rights and the Social Context of Schooling*, 57-58, in *SCHOOLING AND THE RIGHTS OF CHILDREN* (V. Haubrich & M. Apple ed. 1975).

<sup>89</sup> *Burt, Developing Constitutional Rights Of, In, and For Children*, 39 *LAW & CONTEMP. PROB.* 118, 124 (Summer 1975); see *Procunier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring); *Wieman v. Updegraff*, 344 U.S. 183, 193 (1952) (Black, J., concurring).

<sup>90</sup> See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 243-45 (1972) (Douglas, J., dissenting in part and concurring in part); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 511 (1969); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 630-31, 637 (1943). See also *Wood v. Strickland*, 420 U.S. 308, 326 (1975).

<sup>91</sup> *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 511 (1969); cf. *Parker v. Levy*, 417 U.S. 733 (1974) (military personnel have first amendment rights which may be limited only if exercise of such rights would undermine effectiveness of command); *Procunier v. Martinez*, 416 U.S. 396, 407 (1974) (quoting *Carothers v. Follette*, 314 F. Supp. 1014, 1024 (S.D.N.Y. 1970)) (restriction of prisoner freedom of expression must be reasonably and necessarily related to purposes of prison administration). See also *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975); *James v. Board of Educ.*, 461 F.2d 566, 571 (2d Cir. 1972), cert. denied, 409 U.S. 1042 (1973).

of school authorities to regulate student conduct,<sup>92</sup> course offerings, and book selection is broad.<sup>93</sup> Such pervasive power over the student's educational life suggests the need to draw a clear line between the necessary regulation of conduct for purposes of school management and unnecessary restriction of activities protected by the first amendment. Just as society at large must strike a balance between individual freedom and the security of its institutions, so too must the school.<sup>94</sup>

### BOOK SELECTION AND THE BALANCED PRESENTATION OF IDEAS

While the Sixth Circuit in *Minarcini* recognized a right to receive information which precludes removal of library books based on the personal tastes of school board members, it rejected a challenge to the authority of the school board to select textbooks.<sup>95</sup> The case, therefore, has been interpreted as supporting the view that with statutorily derived authority, a school board has virtually absolute power not to purchase books.<sup>96</sup> This interpretation leads to an anomalous result: student access to controversial books already on library shelves would be protected while school boards would be permitted carte blanche authority to refuse to purchase any such books for future use in the school.<sup>97</sup> The principles of American

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<sup>92</sup> Usually the school board is delegated broad power to maintain discipline in the school. See, e.g., IOWA CODE ANN. § 279.8 (West 1972); MICH. STAT. ANN. § 15.41300 (1976); N.H. REV. STAT. ANN. § 189:15 (1964); N.J. STAT. ANN. § 18A:25-2 (West Supp. 1977-1978); PA. STAT. ANN. tit. 24, § 13-1317 (Purdon Supp. 1977-1978); W. VA. CODE § 18A-5-1 (1977).

The need for broad authority over student conduct is evidenced by a recently released study by the National Institute of Education. The study reports that 25% of American schools suffer from "moderately serious to serious" problems of crime. For example, in a typical month, 1 of every 9 secondary school students will be victimized by theft and 1 of every 80 by a physical attack. Of the nation's 1,000,000 teachers, 5,200 will be attacked each month and another 6,000 robbed. TIME, January 23, 1978, at 73. See generally *Goss v. Lopez*, 419 U.S. 565, 590-97 (1975) (Powell, J., dissenting).

<sup>93</sup> Project, *supra* note 4, at 1447. Broad statutory grants of power over course offerings and selection of textbooks exist in many states. See, e.g., CONN. GEN. STAT. ANN. § 10-221, -228 (West 1977); IOWA CODE ANN. § 301.1 (West Supp. 1977-1978); MICH. COMP. LAWS ANN. § 340.881 (West 1976); NEB. REV. STAT. §§ 79-4,118 (1971); PA. STAT. ANN. § 8-801, -803 (Purdon 1962 & Supp. 1977-1978); R.I. GEN. LAWS § 16-23-1 (1970).

<sup>94</sup> See *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); Connecticut State Fed'n of Teachers v. Board of Educ., 538 F.2d 471, 478-79 (2d Cir. 1976); *James v. Board of Educ.*, 461 F.2d 566, 567-68 (2d Cir. 1972), *cert. denied*, 409 U.S. 1042 (1973).

<sup>95</sup> *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577 (6th Cir. 1976); see notes 41-59 and accompanying text *supra*.

<sup>96</sup> See Note, 55 TEX. L. REV. 511, 519 (1977). See also *The Law of Public Education*, *supra* note 12, at 112.

<sup>97</sup> See Note, 55 TEX. L. REV. 511, 519 (1977). See generally *Healy v. James*, 408 U.S. 169, 183 (1972).

education, however, require a weighing of the interests of the state, the child and the parent.<sup>98</sup> To allow school boards to make purchasing decisions without balancing those interests seems an affront to the purpose for which school boards initially were conceived.<sup>99</sup>

Education originally was vested in the control of local authorities because it was thought that the formulation of policy at the local level would be freer of partisan politics than was possible at the state legislative level.<sup>100</sup> That school board decisions often do not reflect this laudable goal, either in the decision-making process<sup>101</sup> or in the results of that process,<sup>102</sup> is only too clear. It has been argued that the probability of political interference and local prejudice at

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<sup>98</sup> See *Judicial Review*, *supra* note 13, at 1492-93; Note, *The Right to Education: A Constitutional Analysis*, 44 U. CIN. L. REV. 796, 799 (1975). See also *Wisconsin v. Yoder*, 406 U.S. 205, 242-45 (1972) (Douglas, J., dissenting in part and concurring in part); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 515-26 (1969) (Black, J., dissenting). It has been questioned whether cases such as *Tinker* and *Yoder* really represent "a symbolic battle between adults, each using children as sacrificial pawns." Burt, *Developing Constitutional Rights Of, In, and For Children*, 39 LAW AND CONTEMP. PROB. 118, 123 (Summer 1975). Interestingly, suits by community members seeking to compel a board to purchase a particular book or have one removed from classroom use have consistently been unsuccessful. See, e.g., *Williams v. Board of Educ.*, 388 F. Supp. 93 (S.D. W. Va. 1975) (textbooks did not violate individual privacy and religious rights); *Todd v. Rochester Community Schools*, 41 Mich. App. 320, 200 N.W.2d 90 (1975) (reference to religious matters insufficient to justify removal of book); *Rosenberg v. Board of Educ.*, 196 Misc. 542, 92 N.Y.S.2d 344 (Sup. Ct. Kings County 1949) (books depicting Jews in a derogatory manner would not be removed absent showing of "malicious intent" of authors); *In re Mitchell*, 13 N.Y. Dep't Ed. R. 228 (1973) (use of book containing material on human sexuality within discretionary powers of board); cf. *In re Kornblum*, 70 N.Y. Dep't R. 19 (1949) (school board cannot be compelled to purchase a particular periodical for use in high school libraries).

<sup>99</sup> While school boards are subject to electoral accountability, this check on their power may not be adequate. See note 141 *infra*. An administrative law analysis of textbook selection in Kanawha County, West Virginia, posits that the rule-making authority of school boards does not include content; rather, the legislature intended that content be determined in an adjudicative setting. Sember, *Textbook Censorship—The Validity of School Board Rules*, 28 AD. L. REV. 259 (1976). The author also argues that the presence of serious constitutional questions mandates a closer scrutiny of school board rules and rule-making. *Id.* at 276.

<sup>100</sup> *Developments*, *supra* note 4, at 1149.

<sup>101</sup> See *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 581-82 (6th Cir. 1976); note 53 *supra*. In *Pico v. Board of Educ.*, No. 77-217 (E.D.N.Y., argued Feb. 2, 1978), three board members attended a conservative-sponsored educational conference where they viewed excerpts from a selected group of books. Later, seven of the nine "suspect" books in the high school library were removed. Brief for Defendant at 1, *Pico v. Board of Educ.*, No. 77-217 (E.D.N.Y., argued Feb. 2, 1978). See generally G. SNYDER, *THE RIGHT TO BE INFORMED* 53-75 (1976).

<sup>102</sup> When the Board of Education of Kanawha County, West Virginia, voted to purchase certain books despite citizens' petitions urging rejection, "homes were firebombed, schools were dynamited, gunfire was exchanged, anti-textbook organizations, rallies, and picket lines were formed, and the controversy received national attention." Sember, *Textbook Censorship—The Validity of School Board Rules*, 28 AD. L. REV. 259, 259 (1976); See O'Neil, *supra* note 60, at 213 n.14; Project, *supra* note 4, at 1422-23 & n.258.

the public school decision-making level necessitates increased judicial scrutiny and first amendment protection.<sup>103</sup> Recognizing, therefore, that book selection decisions can be highly controversial and have an important effect on the education students receive, it seems proper that the admittedly broad scope of school board power be limited to decisions based on educational and fiscal considerations.<sup>104</sup> Further, there is a need to recognize that implicit in this authority is the affirmative obligation to provide a balanced spectrum of ideas in academic disciplines where truth is not a given.<sup>105</sup>

The requirement of a balanced presentation of ideas does not require that a particular book be countered with a book of an opposing viewpoint. Rather, it demands that a good faith attempt be made by educational decision-makers to expose students to varying ideas and concepts, including "controversial" ones. While it may be impractical to require that textbooks selected for use in the classroom reflect all points of view, there appears to be no justification for limiting or precluding access to diverse areas of thought in the library. Quite simply, when a text or library book is selected by a school board, the first amendment requires that educational considerations and the goal of a balanced presentation of ideas be the determinative criteria.<sup>106</sup>

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<sup>103</sup> Le Clercq, *The Monkey Laws and the Public Schools: A Second Consumption?*, 27 VAND. L. REV. 209, 236 (1974).

<sup>104</sup> "[T]he law requires that the school rules be related to the state interest in the production of well-trained intellects with constructive critical stances, lest students' imaginations, intellects and wills be unduly stifled or chilled." *Scoville v. Board of Educ.*, 425 F.2d 10, 14 (7th Cir.) (en banc), cert. denied, 400 U.S. 826 (1970). See also *James v. Board of Educ.*, 461 F.2d 566, 574 (2d Cir. 1972), cert. denied, 409 U.S. 1042 (1973); Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. L.Q. 1, 11 (1976); *Nonconstitutional Analysis*, supra note 10, at 426.

<sup>105</sup> The idea that education is a democracy which necessitates that the student be exposed to a balanced presentation of ideas has been discussed by many commentators. See T. EMERSON, supra note 16, at 613, 623-26; Emerson & Haber, *The Scopes Case in Modern Dress*, 27 U. CHI. L. REV. 522, 526-28 (1960); Van Alstyne, supra note 32, at 856-58; Project, supra note 4, at 1446. See also SCHOOL PROGRAM, supra note 21, at 180-84; *Judicial Review*, supra note 13 at 1504-05.

An explicit recognition that a balanced presentation of ideas is mandated by the first amendment would prevent the difficulties that occurred in *Cary v. Board of Educ.*, 427 F. Supp. 945 (D. Colo. 1977), wherein it was held that the teachers had surrendered their right to academic freedom through their collective bargaining agreement. *Id.* at 955. The result was that any interest the students had in reading books, selected free of value judgments by the book selectors, had been bargained away by the teachers.

<sup>106</sup> Additional limits on school board discretion in selecting books clearly exist. Textbooks cannot be used to promote religion. See *Daniel v. Walters*, 515 F.2d 485 (6th Cir. 1975). Racially and sexually discriminatory books would also appear to be proscribed. See THE LAW OF PUBLIC EDUCATION, supra note 12, at 108; SCHOOL PROGRAM, supra note 21, at 33, 63-65; cf. *Jackson v. Godwin*, 400 F.2d 529 (5th Cir. 1968) (act of denying black inmate access to black

The concept of balance was previously approved by the Supreme Court in a case involving the content of radio programming. In *Red Lion Broadcasting Co. v. FCC*<sup>107</sup> the Court upheld the fairness doctrine which mandates that equal time to opposing voices and views be provided by the licensee in the discussion of controversial political issues.<sup>108</sup> Because a limited number of radio frequencies existed, the licensee was held to operate the frequency as a fiduciary for the community at large.<sup>109</sup> The Court found that the interest of the viewers and listeners in receiving balanced material overrode the rights of the broadcaster.<sup>110</sup> Although the distinctions between the situation in *Red Lion* and the issue of book selection are readily apparent,<sup>111</sup> the case is significant in that listeners were afforded a "collective right to have the medium function consistently with the ends and purposes of the First Amendment."<sup>112</sup> Like the radio stations that control the airwaves, the school is in many respects a closed system,<sup>113</sup> with the school board determining the content of

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newspapers and magazines while permitting white inmates to receive white newspapers and magazines must meet heavy burden of justification).

<sup>107</sup> 395 U.S. 367 (1969).

<sup>108</sup> *Id.* at 396. The fairness doctrine makes it the duty of broadcast licensees to provide adequate coverage of issues of public importance. Such coverage must fairly reflect opposing viewpoints. See Communications Act of 1934, tit. III, 48 Stat. 1081, as amended by 47 U.S.C. § 315 (1959) (amended 1974). See generally F. FRIENDLY, *THE GOOD GUYS, THE BAD GUYS, AND THE FIRST AMENDMENT: FREE SPEECH VS. FAIRNESS IN BROADCASTING* (1976).

<sup>109</sup> 395 U.S. at 389-90.

<sup>110</sup> *Id.* at 390.

<sup>111</sup> See O'Neil, *supra* note 69, at 232-33.

<sup>112</sup> 395 U.S. at 390; see *Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642, 655 (D.C. Cir. 1971), *rev'd on other grounds sub nom.*, *C.B.S., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973), discussed in R. O'NEIL, *FREE SPEECH: RESPONSIBLE COMMUNICATION UNDER LAW* 63-64 (2d ed. 1972).

<sup>113</sup> "Any such closed, or virtually closed, system of communication [i.e. elementary and secondary schools] creates obvious issues for a democratic society which are not comprehended within the traditional principles of free speech applicable to an open or free-for-all system." Emerson & Haber, *The Scopes Case in Modern Dress*, 27 U. CHI. L. REV. 522, 526-27 (1960).

A public high school is not a public forum. Van Alstyne, *supra* note 32, at 856; see Ferrell v. Dallas Indep. School Dist., 261 F. Supp. 545 (N.D. Tex. 1966) (Godbold, J., concurring), *aff'd*, 392 F.2d 697 (5th Cir.), *cert. denied*, 393 U.S. 856 (1968) (reasonable restraints for the classroom are distinguishable from what are reasonable restraints for the street corner); cf. Connecticut State Fed'n of Teachers v. Board of Educ., 538 F.2d 471, 480 (2d Cir. 1976) (school mailboxes, bulletin boards, and meeting rooms are not public forums).

The exercise of first amendment rights, even in public places, is subject to reasonable regulation when necessary to protect the community at large. See, e.g., *Cameron v. Johnson*, 390 U.S. 611 (1968); *Cox v. New Hampshire*, 312 U.S. 569 (1941). Utilization of publicly-owned facilities in the exercise of first amendment rights is clearly protected subject to such reasonable regulations. See, e.g., *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (sidewalks); *Brown v. Louisiana*, 383 U.S. 131 (1966) (public library); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (grounds of state capitol); *Fowler v. Rhode Island*, 345 U.S. 67 (1953)

communication within its walls.<sup>114</sup> The state, through the school board, enjoys a virtual monopoly over the exposure students get to various ideas.<sup>115</sup> These circumstances, which place special limitations upon the rights of students,<sup>116</sup> also give rise to corresponding responsibilities, analogous to those imposed upon broadcasters by the *Red Lion* Court.<sup>117</sup> It has been suggested that teachers have a duty to present a balanced view in the classroom;<sup>118</sup> there appear

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(parks); *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968) (bus terminal). See also *Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) (privately-owned shopping center); *Marsh v. Alabama*, 326 U.S. 501 (1946) (privately-owned company town).

<sup>114</sup> It also should be noted that the status of students in the classroom is distinguishable from the status of students using the library. Compulsory education laws require student presence in the classroom and official control over student conduct in the classroom is broad. Thus, to a great extent, students are a captive audience of the teacher. Van Alstyne, *supra* note 32, at 856. Use of the library, however, has no such coercive features, except to the extent that the student's receipt of information is limited to the books present on the shelves. This distinction was recently recognized by a federal district court in *Gambino v. Fairfax County School Bd.*, 429 F. Supp. 731 (E.D. Va.), *aff'd*, 564 F.2d 157 (4th Cir. 1977) (*per curiam*), wherein the school board argued that suppression of a school newspaper article on student sexual conduct was justified on the ground that the student-readers constituted a "captive audience." The court rejected application of the "captive audience" principle, noting that students are under no compulsion to read the article since they must voluntarily pick up the paper. 429 F. Supp. at 736. See also *Packer Corp. v. Utah*, 285 U.S. 105 (1932).

<sup>115</sup> T. EMERSON, *supra* note 16, at 623-26; *Judicial Review*, *supra* note 13, at 1509.

<sup>116</sup> The Supreme Court has noted that "a State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults." *Interstate Circuit v. Dallas*, 390 U.S. 676, 690 (1968), *discussed in* Comment, *Exclusion of Children From Violent Movies*, 67 COLUM. L. REV. 1149 (1967); *accord*, *Ginsberg v. New York*, 390 U.S. 629 (1968); see *Prince v. Massachusetts*, 321 U.S. 158 (1944) (regulation of economic activities of minors).

Justice Powell has urged judicial restraint in recognizing rights for high school students, reasoning that their rights are not analogous to those of adults. See *Goss v. Lopez*, 419 U.S. 565, 590-97 (1975) (Powell, J., dissenting). *But cf. Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975) (Powell, J.) (minors have significant first amendment rights which cannot be broadly restricted). See also *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 505, 514-15 (1969) (Stewart, J., concurring).

<sup>117</sup> Implicit in *Red Lion* is the view that in the area of broadcasting, a balanced presentation is constitutionally mandated. O'Neil, *supra* note 60, at 231, 233. The fairness doctrine has been analogized to numerous educational contexts. See, e.g., *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973) (college press); *Judicial Review*, *supra* note 13, at 1508-10 (curriculum); O'Neil, *supra* note 60, at 233 (public libraries). See generally *In re James*, 10 N.Y. Dep't Ed. R. 58 (1970), *rev'd on other grounds*, 461 F.2d 566 (2d Cir. 1972), *cert. denied*, 409 U.S. 1042 (1973).

<sup>118</sup> It is a matter of fundamental educational policy that whatever subject of instruction may be involved, the teacher must present the entire range of information available in relation to each subject. If the subject matter involves conflicting opinions, theories or schools of thought, the teacher must present a fair summary of the entire range of opinion so that the student may have complete access to all facets and phases of the subject.

*In re James*, 10 N.Y. Dep't Ed. R. 58, 63 (1970), *rev'd on other grounds*, 461 F.2d 566 (2d

to be no valid reasons why book selectors should not be similarly constrained.

Under both the prescriptive and progressive theories of education, optimum development of the student's intellect is sought to be achieved.<sup>119</sup> Ideological proselytizing through book selection hardly seems an effective method for achieving this goal.<sup>120</sup> Although practical educational considerations require that some degree of control over curriculum content be tolerated, the educational objectives sought to be achieved by this control, and the means used in effectuating control, should not be beyond judicial scrutiny.<sup>121</sup> Thus, a

Cir. 1972), *cert. denied*, 409 U.S. 1042 (1973).

In upholding the dismissal of a teacher for wearing an armband in class to protest the Vietnam conflict, the New York Commissioner of Education noted that the Joint Code of Ethics, adopted by the New York State School Boards Association and the New York State Teachers Association, "specifically considers as unethical the use of schools by teachers and boards 'to promote personal views on religion, race or partisan politics' and to 'deny the student access to varying points of view.'" 10 N.Y. Dep't Ed. R. at 63 (emphasis in original).

A similar view was expressed by a New York State court in *Nistad v. Board of Educ.*, 61 Misc. 2d 60, 304 N.Y.S.2d 971 (Sup. Ct. Richmond County 1969). The New York City Board of Education adopted a resolution permitting students to be excused from school if they desired to attend the "War Moratorium" of October 15, 1969. *Id.* at 61, 304 N.Y.S.2d at 972-73. In granting an injunction, the court noted that the resolution placed the affirmative support of government behind the moratorium and compelled students to declare their views on the subject. *Id.* at 63, 304 N.Y.S.2d at 973. Acknowledging the good, subjective intent of the school board, the court concluded that such good intent could not justify violation of personal liberties and the Constitution. *Id.* at 64, 304 N.Y.S.2d at 973.

<sup>119</sup> See note 13 *supra*.

<sup>120</sup> Affirmative use of the classroom by a teacher for propagandizing jeopardizes the state's interest in protecting the impressionable minds of the young. *James v. Board of Educ.*, 461 F.2d 566, 573 (2d Cir. 1972), *cert. denied*, 409 U.S. 1042 (1973); *Parducci v. Rutland*, 316 F. Supp. 352, 355 (M.D. Ala. 1970). See also *Goldwasser v. Brown*, 417 F.2d 1169 (D.C. Cir. 1969). The traditions of the first amendment warrant extension of this principle to include school officials when they insist upon ideological conformity. *Burt, Developing Constitutional Rights Of, In, and For Children*, 39 LAW & CONTEMP. PROB. 118, 123 (Summer 1975).

<sup>121</sup> See, e.g., *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1972); *James v. Board of Educ.*, 461 F.2d 566 (2d Cir. 1972), *cert. denied*, 409 U.S. 1042 (1973).

The Constitution requires that the flow of ideas in a democracy be free of government control. *Cary v. Board of Educ.*, 427 F. Supp. 945, 949 (D. Colo. 1977); see *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 564 (1975) (Douglas, J., dissenting in part and concurring in part); *Police Dep't v. Mosley*, 408 U.S. 92, 95-96 (1972); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969). While government may not restrict expression because of its content, reasonable restrictions as to time, place, and manner are generally permissible. *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972); see note 83 *supra*. Thus, the circumstances surrounding any regulation of communication are crucial to any inquiry into the constitutionality of such action. Some censorship, or editorial judgment based upon various considerations, including content, is recognized as unavoidable in operating a school system. *Minarcini v. Strongsville City School Dist.*, 384 F. Supp. 698, 704 (N.D. Ohio 1974), *rev'd on other grounds*, 541 F.2d 577 (6th Cir. 1976); see *Presidents Council v. Community School Bd.*, 457 F.2d 289, 291-92 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972). Judicial review of the factors considered and the procedures used in restricting first amendment freedoms has occurred in various contexts. See, e.g., *Freedman v. Maryland*, 380 U.S. 51 (1965) (prior restraint of



judicial declaration that the first amendment requires that books be selected to reflect a balanced spectrum of ideas would appear appropriate.

The discretionary power of school authorities to select books would not seem to be unduly hampered by requiring selection to be in accord with the spirit of the first amendment. In other situations, the danger of infringements on constitutional rights has caused courts to intercede in the educational arena and review a particular exercise of discretion.<sup>122</sup> Judicial review does not offend traditional notions of deference to professional expertise;<sup>123</sup> it simply reflects a recognition of the importance of holding school authorities accountable under the Constitution.<sup>124</sup>

### JUDICIAL REVIEW OF THE SELECTION PROCESS

Neither lack of judicial expertise in educational matters, nor fear of burgeoning court calendars, should cause judicial reluctance to review challenges to book selection procedures.<sup>125</sup> Acknowledging

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motion pictures); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) (prior restraint of distribution of books and magazines); *Speiser v. Randall*, 357 U.S. 513 (1958) (requirement that property tax exemption claimant sign statement on tax return declaring he will not engage or advocate overthrow of the United States). See also *Procunier v. Martinez*, 416 U.S. 396, 404-06 (1974).

<sup>122</sup> See, e.g., *Goss v. Lopez*, 419 U.S. 565 (1975); *Healy v. James*, 408 U.S. 169 (1972); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969); *Gambino v. Fairfax County School Bd.*, 429 F. Supp. 731 (E.D. Va.), *aff'd*, 564 F.2d 157 (4th Cir. 1977) (per curiam); *Richards v. Thurston*, 304 F. Supp. 449 (D. Mass. 1969), *aff'd*, 424 F.2d 1281 (1st Cir. 1970).

<sup>123</sup> *James v. Board of Educ.*, 461 F.2d 566, 573 (2d Cir. 1972), *cert. denied*, 409 U.S. 1042 (1973); see *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

<sup>124</sup> See *James v. Board of Educ.*, 461 F.2d 566, 574 (2d Cir. 1972), *cert. denied*, 409 U.S. 1042 (1973). Since individual rights may be subordinated to the legitimate interests of the school board in regulating curriculum, any regulations promulgated by the board should be "reasonably related to the needs of the educational process." *Id.* See also Gyory, *The Constitutional Rights of Public School Pupils*, 40 *FORDHAM L. REV.* 201, 215-16 (1971).

Conformity with procedural due process has been held necessary to protect the property interests of students in education when deprivation via suspension or expulsion is threatened. *Goss v. Lopez*, 419 U.S. 565 (1975); see *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961); *Cordova v. Chonko*, 315 F. Supp. 953 (N.D. Ohio 1970). See also *Wood v. Strickland*, 420 U.S. 308 (1975). For a discussion of the boundaries of school official control and their responsibilities toward students in other areas, see note 83 *supra*. See generally Leekley, *The Nature of Claims for Student Rights*, in *SCHOOLING AND THE RIGHTS OF CHILDREN* 118-29 (V. Haubrich & M. Apple eds. 1975).

<sup>125</sup> In *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970), the court found that students have a constitutional right to wear a hairstyle of their own choice. The argument that such a holding would open the floodgates of litigation was rejected on the ground that failure to hold an arbitrary regulation unconstitutional "would be an abdication of the judiciary's role of final arbiter . . . and protector of the people." 419 F.2d at 1038. See generally *Blount v. Rizzi*, 400 U.S. 410, 418 (1971).

that a balanced education is a basic constitutional value requiring student exposure to a diversity of ideas through balanced book selection, however, may pose some practical difficulties for the courts. What is needed are reasonably precise standards of selection with adequate procedural safeguards so as to provide a record of the selection process for the reviewing court.<sup>126</sup>

The mechanism for providing such a record already exists within most school systems.<sup>127</sup> Teachers and librarians are frequently requested to submit recommendations for proposed book purchases to the school board.<sup>128</sup> Depending on various factors, these recommendations are made directly, by the individual faculty member, or indirectly, through a faculty committee representing the various academic disciplines.<sup>129</sup> In practice, recommendations

<sup>126</sup> Le Clercq, *The Monkey Laws and the Public Schools: A Second Consumption?*, 27 VAND. L. REV. 209, 242 (1974).

It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under the law.

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 179 (1951) (Douglas, J., concurring). See also *Interstate Circuit v. City of Dallas*, 390 U.S. 676, 682-85 (1968).

The New York State Board of Regents recently adopted textbook selection guidelines that stress the need for critical thinking in schools. The board stated that the presence of sex and profanity should not automatically disqualify a book; rather, the test should be whether the book has literary merit. The guidelines recommended development of a "materials-selection policy" within each school district by representatives of the various segments of the community. Among the criteria to be included in district selection policies are materials presenting a balance of opposing sides of controversial issues. N.Y. Times, Oct. 30, 1976, sec. 1, at 27. It is submitted that such specific book selection policies have two positive effects: they tend to prevent attempts at censorship and they provide consistency in book selection. See L. MERRITT, *BOOK SELECTION AND INTELLECTUAL FREEDOM* 25 (1970).

<sup>127</sup> In assessing the feasibility of recognizing a distinct constitutional right of academic freedom, Professor Emerson noted the practical importance of having an existing system into which the right could be assimilated, thus making unnecessary the exercise of affirmative legislative powers by the courts. Instead the courts merely would be using their negative powers of judicial supervision. T. EMERSON, *supra* note 16, at 612.

<sup>128</sup> See, e.g., *Minarcini v. Strongsville City School Dist.*, 384 F. Supp. 698, 700-03 (N.D. Ohio 1974), *rev'd*, 541 F.2d 577 (6th Cir. 1976); *Cary v. Board of Educ.*, 427 F. Supp. 945, 947-48 (D. Colo. 1977).

<sup>129</sup> See, e.g., *Minarcini v. Strongsville City School Dist.*, 384 F. Supp. 698, 700-03 (N.D. Ohio 1974), *rev'd*, 541 F.2d 577 (6th Cir. 1976); *Cary v. Board of Educ.*, 427 F. Supp. 945, 947-48 (D. Colo. 1977).

Professor van Geel notes that the process of selecting textbooks varies from state to state. Among the areas where variations are found are: the grades to which the system for selecting textbooks applies; the kinds of textbooks subject to the selection system; the level at which the ultimate decision is made; the selection criteria to be followed; and the procedure to be used in establishing the approved book list. *SCHOOL PROGRAM*, *supra* note 21, at 80.

Increasingly, curriculum control is becoming part of the collective bargaining process between teachers' unions and school boards. A 1968-1969 National Education Association study of 978 collective bargaining agreements revealed that 54% dealt with curriculum review

made by the staff are accepted without examination by the school board unless a politically controversial choice is made.<sup>130</sup> Thus, while in most cases there will be no separate record of the board's reasons for making a particular decision, its approval or disapproval of recommendations should provide the court with ample indications of whether choices were calculated to result in a balanced presentation.

In applying the concept of "balanced presentation of ideas" as the appropriate standard for judicial review, the courts will have to distinguish between permissible and impermissible content considerations. If a book of conceded literary merit is rejected and the justification has socio-political overtones,<sup>131</sup> the court should scrutinize the decision closely.<sup>132</sup> If, on the other hand, the rejected book is arguably too difficult or beyond the maturity level of the students,<sup>133</sup> the court should be reluctant to overturn the board's decision where it is adequately supported by the facts. In addition, in evaluating a particular decision, the court may examine past decisions of the board to determine whether a pattern of partisan book selection exists.

Generally, the decision of the school board should be afforded a presumption of validity<sup>134</sup> and close questions should be resolved

and textbook selection. *Id.* at 133 & n.52; see *Cary v. Board of Educ.*, 427 F. Supp. 945 (D. Colo. 1977), discussed in note 32 *supra*.

<sup>130</sup> SCHOOL PROGRAM, *supra* note 21, at 118-19.

<sup>131</sup> In 1976, the school board of Island Trees, New York, banned nine books from use in the classroom and library, terming the books "[a]nti-American, anti-Christian, anti-Semitic and just plain filthy." *Newsday*, Feb. 3, 1978, at 19. Counsel has argued that the dominating factor in their decision was their "conservative philosophy of morals and traditional values" and not "religious and political" considerations. Defendant's Reply Memorandum of Law to Amicus Curiae (American Jewish Committee) at 4-5, *Pico v. Board of Educ.*, No. 77-217 (E.D.N.Y., argued Feb. 2, 1978). It is submitted that the distinction made by counsel is an illusory one.

<sup>132</sup> See *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969). See generally *Emerson & Haber, The Scopes Case in Modern Dress*, 27 U. CHI. L. REV. 522, 528 (1960).

<sup>133</sup> The amount of exposure students should get to various ideas and experiences arguably depends upon his or her level of maturity. Compare *Wisconsin v. Yoder*, 406 U.S. 205, 245 n.3 (1972) (Douglas, J., dissenting in part and concurring in part), and *Russo v. Central School Dist.*, 469 F.2d 623, 633 (2d Cir. 1972), cert. denied, 411 U.S. 932 (1973), with *Ginsberg v. New York*, 390 U.S. 629, 641-42 (1968), and *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803, 808 n.5 (2d Cir. 1971). Professor Nahmod, however, states that "little is known about what significantly affects intellectual development at any age level." *Controversy*, *supra* note 13, at 1048.

<sup>134</sup> THE LAW OF PUBLIC EDUCATION, *supra* note 12, at 506; see, e.g., *East Hartford Educ. Ass'n v. Board of Educ.*, 562 F.2d 838, 861 (2d Cir. 1977) (en banc) (school board dress code requiring teachers to wear a tie is presumptively constitutional with the burden on the plaintiff challenging the code to show that it is "so irrational" as to be termed "arbitrary"). JUDICIAL REVIEW, *supra* note 13, at 1502; note 4 *supra*.

in its favor. Judicial restraint should be exercised, since both the educational system and the judiciary would suffer from excessive involvement by the courts in educational decision making.<sup>135</sup> When there has been a clear abuse of discretion,<sup>136</sup> however, the courts must not hesitate to provide relief.<sup>137</sup> It is evident that a myriad of constitutionally permissible reasons exist to justify the rejection of a particular book or the selection of one book in favor of another. It is only when social and political tastes enter the process that judicial intervention is necessary.<sup>138</sup>

### CONCLUSION

Judicial inquiry into decisions concerning the selection and removal of books is necessary if the spirit of *Tinker* and its progeny is to retain its vitality. It would seem an unwarranted stretching of the principle of judicial restraint to deny the existence of serious first amendment implications in book removal and rejection situations. Recognizing a student right to receive information and a balanced presentation of ideas need not overly involve the courts in educational affairs. Instead, school authorities would be on notice of the presence of constitutional constraints which govern their actions. The burden of including constitutional considerations in the decision-making process has been imposed on school authorities

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<sup>135</sup> See note 4 *supra*. See also *Goss v. Lopez*, 419 U.S. 565, 590-97 (Powell, J., dissenting); *Epperson v. Arkansas*, 393 U.S. 97, 109-14 (Black, J., concurring).

<sup>136</sup> Professor Jaffe has described abuse of discretion in the following manner:

Broadly stated an abuse of discretion is an exercise of discretion in which a relevant consideration has been given an exaggerated, an "unreasonable" weight at the expense of others. The "letter" has been observed; the "spirit" has been violated. Discretion implies a "balancing"; where the result is eccentric, either there has not been a balancing, or a hidden and mayhap improper motive has been at work.

L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 586 (1965).

<sup>137</sup> Professor Emerson argues that fears of excessive judicial involvement in educational affairs

are probably overstated, just as were the fears that Federal judicial supervision over State criminal proceedings would destroy the Federal-State relationship. The role of the courts would be simply to enforce "the fundamental principles of academic order." They would leave the actual implementation of such principles to those charged with that function. There is grave doubt that the courts would find it possible as an administrative matter to do anything else.

T. EMERSON, *supra* note 16, at 615.

<sup>138</sup> One author has argued that the applicability of a fairness doctrine to school libraries could lead to a "situation in which courts might unconsciously use constitutional issues as a pretext for substituting their own educational judgment for that of the school board's." Note, 55 *TEX. L. REV.* 511, 521 (1977). The possibility of a court improperly substituting its own judgment for that of the state authority, however, exists whenever there is judicial review of discretionary state action.

when controlling student conduct<sup>139</sup> and restricting student expression;<sup>140</sup> imposition with respect to book removal and selection would not be an intolerable intrusion into or burden on the educational process.

In addition, placing emphasis on the procedural aspects of book removal and selection would represent an improvement over the present reliance on the electoral accountability of local school boards. The political process cannot adequately protect the first amendment interests of the various parties affected<sup>141</sup> and such deference therefore seems to represent an abdication of the judiciary's role as the final arbiter of constitutional disputes.

In *Tinker*, the Supreme Court implicitly rejected the view that the inculcation of the majority's values could be used as justification for limiting student expression.<sup>142</sup> This argument should be similarly rejected when urged as a reason for limiting student access to information. The educational environment should be one where ideas are exchanged freely. Greater perspective on the part of school authorities and increased scrutiny on the part of the judiciary would represent positive, important steps toward this goal.

*Richard P. Smith*

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<sup>139</sup> See note 124 *supra*.

<sup>140</sup> See note 32 *supra*.

<sup>141</sup> *But see* *Minarcini v. Strongsville City School Dist.*, 384 F. Supp. 698 (N.D. Ohio 1974), *rev'd*, 541 F.2d 577 (6th Cir. 1976), wherein the school board's action in removing some books and not purchasing others was upheld by the district court. The court noted that 18 months after the dispute arose, a newly composed board selected a highly controversial novel for classroom use. 384 F. Supp. at 705. The court stated that ideological conflict within communities is cyclical and concluded that "[t]he events of the two years since the Board's initial action in 1972 dramatically demonstrates the dynamics and the pragmatism of the cycle in operation." *Id.* at 704-05. The argument that the electoral process is an acceptable method for resolving schoolbook controversies has been urged in a recent federal district court case. See Defendant's Memorandum of Law in Support of Motion for Summary Judgment at 32, *Pico v. Board of Educ.*, No. 77-217 (E.D.N.Y., argued Feb. 2, 1978).

<sup>142</sup> See *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969).