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COMMENTS

CONSTITUTIONAL ASPECTS OF REMOVING BOOKS FROM SCHOOL LIBRARIES

INTRODUCTION

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us. . . . That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the "marketplace of ideas."¹

The states, usually through elected local school boards, enjoy almost exclusive authority over public education within their jurisdictions. This power encompasses, among other things, broad control by each school board over curriculum and student conduct within the local school system. This authority is not unfettered, however—it cannot infringe on rights protected by the first amendment,² which is applicable to the states via the due process clause of the fourteenth amendment.³

Recently, in spite of the sweeping pronouncement of Mr. Justice Brennan quoted above, school boards in New York, New York and Strongsville, Ohio ordered the removal of certain books from the libraries of their public high schools. In each case, the sole justification for removal was the controversial content of the books. *President's Council, District 25 v. Community School Board No. 25*⁴ involved a New York School Board decision to remove all copies of *Down These Mean Streets* by Piri Thomas from junior high school libraries in District 25. In a similar case a year later, *Minarcini v. Strongs-*

¹ *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)(emphasis added).

² The first amendment reads in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press. . . ." U.S. CONST. amend. I.

³ The fourteenth amendment reads in part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law" U.S. CONST. amend. XIV, § 1. The first amendment was made applicable to the states through the due process clause in *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

⁴ 457 F.2d 289 (2d Cir. 1972), *cert. denied*, 409 U.S. 998 (1972).

ville City School District,⁵ the local board had ordered removal of *Catch 22* by Joseph Heller and *Cat's Cradle* by Kurt Vonnegut, Jr. from the Strongsville Schools Library.

These cases raise the issue to be analyzed here: Is the removal of a book from a public school library a violation of the first amendment rights of the students involved under these circumstances? To date *President's Council* and *Minarcini* are the only judicial interpretations of the problem, and although the *Minarcini* Court hinted at a reconciliation of the two holdings, the conclusions reached were diametrically opposed. The Second Circuit held that no constitutional issue was involved,⁶ while the Sixth Circuit held that the school board's action violated the first amendment.⁷

An analysis of this conflict will entail a discussion of the general power of school boards and the corresponding constitutional limits on this power. An examination of two constitutional doctrines which have only recently reached an accepted level of development—"academic freedom" and the "right to know"—will be helpful. Unfortunately there is "no clear [line of] judicial precedent[s] by which one could hold the removal of a library book from general circulation violative of constitutional liberties."⁸ Thus the conclusion of the forthcoming discussion, a workable constitutional rule, must be reached largely by analogy.

Before going on, a word is required about what is not involved here. First, the authority of school boards to set curricula and select library books is conceded.⁹ Second, the rights in issue are primarily those of public school students to receive information; the rights of parents, teachers,¹⁰ and librarians¹¹

⁵ 541 F.2d 577 (6th Cir. 1976).

⁶ *President's Council, Dist. 25 v. Community School Bd. No. 25*, 457 F.2d 289 (2d Cir. 1972), cert. denied, 409 U.S. 998 (1972).

⁷ *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577 (6th Cir. 1976).

⁸ O'Neil, *Libraries, Liberties and the First Amendment*, 42 U. CIN. L. REV. 209, 211 (1973).

⁹ In *Minarcini* the court recognized this authority, upholding the School Board's textbook selection procedure as consistent with procedural due process.

¹⁰ For a discussion of the rights of teachers, see Comment, *Personality Control and Academic Freedom*, 1975 UTAH L. REV. 234.

¹¹ For a discussion of the rights of librarians, see O'Neil, *Libraries, Librarians and First Amendment Freedoms*, 4 HUMAN RIGHTS 295 (1975), [hereinafter cited as O'Neil, *Libraries, Librarians*]; O'Neil, *supra* note 8.

will be treated peripherally for the sake of analogy. Finally, the discussion will be limited to public secondary education, although the same basic principles apply at the university level.¹²

I. SCHOOL BOARDS AND ACADEMIC FREEDOM

A. *Power of the School Board*

As indicated above, responsibility for education is centered in the general police power of each state. Due to the large number of people involved in the public high school system, there is a need for a central body to set policy and promulgate administrative rules to implement this policy. "Most often this body is a locally elected board of education. The board's function is to govern school system affairs, ordinarily pursuant to a legislative enabling statute."¹³ The school board enjoys broad discretion in all matters involving the educational environment, including structure of curricula, selection of library books, and maintenance of order on the school premises. This wide school board authority has been recognized by the United States Supreme Court:

By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of the school systems and which do not directly and sharply implicate basic constitutional values.¹⁴

It is to these basic constitutional values that this discussion now turns.

B. *Academic Freedom*

The concept of academic freedom is somewhat nebulous; because it applies to many subjects it is incapable of exact definition. "Ultimate inspiration for the system goes back to the concept of the medieval university as a community of

¹² Since private education is largely contractual, involving no state action, principles applicable to public schools have little relevance to private schools. For information concerning the public universities, see Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027 (1969).

¹³ Note, *Students' Constitutional Rights in Public Secondary Education*, 14 WASHBURN L.J. 106, 106 (1970) (footnotes omitted).

¹⁴ *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (footnote omitted).

scholars dedicated to the pursuit of knowledge.”¹⁵ The birth of the concept in this country centered around freedom of teachers, both within the university and outside. From this limited area the idea of academic freedom gradually expanded and was extended to new areas, including freedom of students from administrative coercion.¹⁶

Since academic freedom is not mentioned in the Constitution, one must look to the “penumbras” of several constitutional provisions, particularly the free expression clause of the first amendment and the due process clause of the fourteenth, to derive a constitutional right to academic freedom.¹⁷ The rationale for this constitutional right has been advanced by Professor Thomas Emerson:

The basic concepts of freedom of expression embodied in the First Amendment are readily applicable to many aspects of academic freedom. . . . Ultimately any system of freedom of expression depends upon the existence of an educated, independent, mature citizenry. Consequently realization of the objectives of the First Amendment requires educational institutions that produce graduates who are trained in handling ideas, judging facts and argument, thinking independently, and generally participating effectively in the marketplace of ideas. Hence the First Amendment could be said to require the kind of educational institutions that are capable of producing such results.¹⁸

1. *Evolution of the Concept*

The foundation for a right to academic freedom was laid by the Supreme Court in 1923 in *Meyer v. Nebraska*.¹⁹ A teacher convicted under the Nebraska “Simian language law,” which prohibited the teaching of foreign languages below the ninth grade level,²⁰ attacked the statute as unconstitutional. The Court held that the statute violated the due process clause of the fourteenth amendment, stating that it was arbitrary and

¹⁵ T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 593 (1970).

¹⁶ For a discussion of administrative coercion in the context of academic freedom, see note 36 *infra* and accompanying text.

¹⁷ T. EMERSON, *supra* note 15, at 613.

¹⁸ *Id.*

¹⁹ 262 U.S. 390 (1923).

²⁰ 1919 Neb. Laws ch. 249.

tended impermissibly to "interfere with the calling of modern language teachers, and with the opportunities of pupils to acquire knowledge. . . ." ²¹ Thus, at an early date it became established that state legislation concerning public education was not absolute and could not conflict with the Constitution.

Two decades later, in *West Virginia State Board of Education v. Barnette*,²² the Court held unconstitutional a flag salute rule promulgated by the state board of education. This time, however, the first amendment was relied on to preserve academic freedom. Mr. Justice Jackson said, "We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."²³

The next phase in the evolution of a right to academic freedom involved cases dealing with loyalty regulations, which were used to keep public educational systems free of communists and subversives. In *Wieman v. Updegraff*,²⁴ faculty members of Oklahoma A. & M. College challenged the validity of the loyalty oath required for state employees. The majority held that the oath offended due process since it indiscriminately penalized "innocent" along with "knowing" activity.²⁵ Mr. Justice Frankfurter, concurring, joined by Mr. Justice Douglas, commented on the principles of academic freedom involved:

[Teachers] cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma.²⁶

In the next loyalty case, *Sweezy v. New Hampshire*,²⁷ the theme developed by Mr. Justice Frankfurter was central to the

²¹ 262 U.S. at 401.

²² 319 U.S. 624 (1943).

²³ *Id.* at 642.

²⁴ 344 U.S. 183 (1952).

²⁵ *Id.* at 191.

²⁶ *Id.* at 196 (Frankfurter, J., concurring).

²⁷ 354 U.S. 234 (1957).

majority's holding. The case involved the refusal of a college professor to answer questions by the Attorney General of New Hampshire, who was conducting an investigation of subversive activities, concerning the content of his lectures. The Supreme Court reversed his contempt conviction as an "invasion of petitioner's liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread."²⁸ The opinion stressed the rights of both teachers and students to inquire, study and evaluate.²⁹ The Court concluded that the state interest involved would not justify infringement of these first amendment rights.³⁰

In 1967, the Supreme Court again gave strong support to academic freedom in *Keyishian v. Board of Regents*,³¹ another loyalty case. The majority declared New York's loyalty program unconstitutionally vague, and commented that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment. . . ."³² Thus, the loyalty cases are important in two respects. First, they indicate express recognition of the concept of academic freedom by the Supreme Court; and second, while all the cases involved teachers, the Court had no difficulty in extending the rights involved to students as well in dicta.

2. *Application to the Book Removal Problem*

Two recent decisions involving academic freedom are especially relevant to the book removal issue. The first is *Epperson v. Arkansas*,³³ a 1968 decision. An Arkansas public high school teacher sought a declaration that the state "anti-evolution"

²⁸ *Id.* at 250.

²⁹ "Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Id.*

³⁰ *Id.* at 251. Whenever fundamental rights such as those rights guaranteed by the first amendment are infringed upon by state action, such infringement must be justified by a "compelling state interest" in order to be valid. *See, e.g., Sherbert v. Verner*, 374 U.S. 398, 406-09 (1963).

³¹ 385 U.S. 589 (1967).

³² *Id.* at 603.

³³ 393 U.S. 97 (1968).

statute,³⁴ which prohibited the teaching that man evolved from other species of life, was unconstitutional. Although the Court held the law invalid as violative of the religion clauses of the first amendment, the rationale for the decision seemed to be directed to a right of academic freedom. Mr. Justice Fortas, writing for the majority, said:

The State's undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit . . . the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment. It is much too late to argue that the State may impose upon the teachers in its schools any conditions that it chooses, however restrictive they may be of constitutional guarantees.³⁵

The second case, *Tinker v. Des Moines Independent Community School District*,³⁶ is of special importance to the problem, since it was the Supreme Court's first and only pronouncement concerning academic freedom of high school students. Black armbands were worn by students to express opposition to the Vietnam conflict in violation of a regulation which prohibited the wearing of such armbands while on school premises. Invalidating the regulation as an unconstitutional abridgment of the first amendment freedom of expression, Mr. Justice Fortas, again writing for the majority, recognized the "comprehensive authority" of school officials to control conduct in the schools.³⁷ But this authority cannot infringe upon first amendment rights which, "applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of

³⁴ ARK. STAT. ANN. §§ 80-1627, 80-1628 (1960). This statute was an adaptation of the famous Tennessee "monkey law," TENN. CODE ANN. § 49-2008 (1974), which was involved in *Scopes v. State*, 289 S.W. 363 (Tenn. 1927). The Tennessee Supreme Court upheld the validity of the statute, but the teacher's conviction under this anti-evolution law was reversed since the judge set the fine, which was a jury function. Recently, similar Tennessee statutes have been held invalid as violations of the establishment clause of the first amendment. *Daniel v. Waters*, 515 F.2d 485 (6th Cir. 1975); *Steele v. Waters*, 527 S.W.2d 72 (Tenn. 1975).

³⁵ 393 U.S. at 107.

³⁶ 393 U.S. 503 (1969).

³⁷ *Id.* at 507.

speech or expression at the schoolhouse gate."³⁸ Mr. Justice Fortas went on to describe the academic freedom of students:

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. . . . *They may not be confined to the expression of those sentiments which are officially approved.*³⁹

But, the Court added, "conduct by the student . . . which . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."⁴⁰ Thus, for school authorities to regulate expression of student opinion, they must have specific evidence that such regulation is necessary to avoid material and substantial interference with school discipline.⁴¹ The importance of *Tinker* lies in the express recognition by the Supreme Court of student academic freedom, and its protection by the first amendment from school board interference.⁴²

II. THE RIGHT TO KNOW

The book removal problem concerns the right of students "to receive information which they and their teachers desire

³⁸ *Id.* at 506.

³⁹ *Id.* at 511 (emphasis added).

⁴⁰ *Id.* at 513.

⁴¹ *Id.* at 511. This "material and substantial interference" test was borrowed by the Court from *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966), wherein a school regulation prohibiting the wearing of "freedom buttons" was struck down as an impermissible interference with freedom of expression. The court said such a regulation could be upheld only upon a showing that the prohibited conduct or activity substantially and materially interfered with the discipline necessary to operate the school.

⁴² From the foregoing academic freedom cases, Professor Charles Alan Wright has drawn two basic rules which are helpful in resolving the book removal issue. First, "Expression cannot be prohibited because of disagreement with or dislike for its contents." Wright, *supra* note 12, at 1043. This rule was followed by the Supreme Court in *Healy v. James*, 408 U.S. 169 (1972). The Court, reversing a college president's decision to deny a local SDS Chapter recognition as a campus organization, declared that "[t]he College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent." *Id.* at 187-88. The second rule drawn by Wright is that "[e]xpression can be prohibited if it takes the form of action that materially and substantially interferes with the normal activities of the institution or invades the rights of others." Wright, *supra* note 12, at 1043.

them to have.”⁴³ This right of the recipient to receive information and ideas has been loosely termed the “right to know” by Mr. Justice Douglas.⁴⁴ This right is consistent with evidence that the framers of the first amendment meant to include both ends of the communication process within the amendment’s scope.⁴⁵

The genesis of the right to know occurred in 1943, in *Martin v. City of Struthers*,⁴⁶ wherein the Supreme Court struck down a city ordinance prohibiting door-to-door distribution of handbills.⁴⁷ In holding the ordinance to be an invalid restraint of freedom of speech and press protected by the first amendment, the Court said:

The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed to be essential if vigorous enlightenment was ever to triumph over slothful ignorance. This freedom embraces the right to distribute literature . . . and necessarily protects the right to receive it.⁴⁸

In the 20 years following the decision in *Martin*, the Court expanded the theme of the right to know to various contexts,⁴⁹ and in 1965 decided *Lamont v. Postmaster General*,⁵⁰ which involved the validity of a federal statute that required postal officials to detain and destroy unsealed mail determined to be communist political propaganda from foreign countries unless

⁴³ *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 583 (6th Cir. 1976).

⁴⁴ 409 U.S. 998, 999 (1972), *denying cert. to President's Council, Dist. 25 v. Community School Bd. No. 25*, 457 F.2d 289 (2d Cir. 1972) (Douglas, J., dissenting).

⁴⁵ James Madison, who was instrumental in drafting the first amendment, once wrote that “[k]nowledge will forever govern ignorance; and a people who mean to be their own Governors, must arm themselves with the power which knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or tragedy, or perhaps both.” Letter from James Madison to W.T. Barry (Aug. 4, 1882), *reprinted in 9 WRITINGS OF JAMES MADISON* 103 (G. Hunt ed. 1910).

⁴⁶ 319 U.S. 141 (1943).

⁴⁷ *Id.* at 142.

⁴⁸ *Id.* at 143.

⁴⁹ *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception advice); *Marsh v. Alabama*, 326 U.S. 501 (1946) (handbill distribution in company town); *Thomas v. Collins*, 323 U.S. 516 (1945) (public speech to enlist membership in labor union).

⁵⁰ 381 U.S. 301 (1965).

the addressee returned a reply card requesting receipt of the mail in question.⁵¹ The majority held the statute unconstitutional because it required "an official act (*viz.*, returning the reply card) [which functioned] as a limitation on the unfettered exercise of the addressees' First Amendment rights."⁵² In a concurring opinion, Mr. Justice Brennan, joined by Mr. Justice Goldberg, further developed the underlying constitutional issues: "I think the right to receive publications is . . . a fundamental right. 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."⁵³

The right to know also surfaced in the broadcasting field, in *Red Lion Broadcasting Co. v. FCC*.⁵⁴ Broadcasters attacked the fairness doctrine and its component "personal attack" rules promulgated by the FCC,⁵⁵ as infringing upon the rights of free speech and press guaranteed by the first amendment. The Court, per Mr. Justice White, upheld the regulations as enhancing the first amendment freedoms of listeners and viewers:

It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. . . . It is the right to receive suitable access to social, political, esthetic, moral; and other experiences which is crucial here. That right may not constitutionally be abridged. . . .⁵⁶

In *Kleindienst v. Mandel*,⁵⁷ university professors sought to compel the Attorney General to grant a visa to Ernest Mandel, a Belgian Marxist journalist and theoretician, to enable him to participate in conferences to which he had been invited by a number of American universities. The Court upheld denial of the visa, citing the plenary congressional power to exclude

⁵¹ Postal Service and Federal Employees Salary Act of 1962, § 305(a), 39 U.S.C. § 4008(a) (1962).

⁵² 381 U.S. at 305.

⁵³ *Id.* at 308 (Brennan, J., concurring).

⁵⁴ 395 U.S. 367 (1969).

⁵⁵ 47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679 (1976). These regulations derive their authority from the Communications Act of 1934, *as amended*, 47 U.S.C. § 315(a) (1970).

⁵⁶ 395 U.S. at 390.

⁵⁷ 408 U.S. 753 (1972).

aliens. But the Court did admit by way of dictum that "[i]n a variety of circumstances this Court has referred to a First Amendment right to 'receive information and ideas'. . . . [T]his right is 'nowhere more vital' than in our schools and universities."⁵⁸

In 1974, the Court decided *Procunier v. Martinez*,⁵⁹ a case from which one can draw a clear analogy to the book removal issue. There the question involved the constitutionality of prisoner mail censorship regulations of the California Department of Corrections. The Supreme Court held the regulations invalid since they allowed prison officials to "apply their own personal prejudices and opinions as to standards for prisoner mail censorship. . . ." ⁶⁰ The Court again expressly relied upon the right to know:

[M]ail censorship implicates more than the rights of prisoners.

. . . Both parties to the correspondence have an interest . . . and censorship of the communication between them necessarily impinges on the interest of each. . . . [T]he addressee as well as the sender of direct personal correspondence derives from the First and Fourteenth Amendments a protection against unjustified governmental interference with the intended communication.⁶¹

Thus, the regulations were invalid for failure to further a compelling state interest unrelated to the suppression of expression.⁶²

The most recent Supreme Court opinion concerning the right to know, one which was crucial to the Sixth Circuit decision in *Minarcini*, is *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*⁶³ The Court overturned a Virginia statute which had classified the practice by licensed pharmacists of advertising the price of prescription drugs as unprofessional conduct.⁶⁴ At issue was "whether a State may

⁵⁸ *Id.* at 762-63.

⁵⁹ 416 U.S. 396 (1974).

⁶⁰ *Id.* at 415.

⁶¹ *Id.* at 408-09.

⁶² See note 30 *supra* for an explanation of the compelling state interest requirement.

⁶³ 425 U.S. 748 (1976).

⁶⁴ VA. CODE § 54-524.35(3) (1974).

completely suppress the dissemination of concededly truthful information about entirely lawful activity, [being] fearful of that information's effect upon its disseminators and its recipients."⁶⁵ Mr. Justice Blackmun, writing for the majority, declared that freedom of speech protected the recipient of a communication as well as the source, and concluded that the state could not suppress this information.

From the foregoing analysis, one can assume that there is a well-defined right to know. In the words of Mr. Justice Marshall, "It is now well established that the Constitution protects the right to receive information and ideas. . . . This right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society."⁶⁶ The next task involves application of this right to know, as well as the concept of academic freedom, to the removal of books from a public school library.

III. DIFFERING POSITIONS ON THE BOOK REMOVAL ISSUE

To fully understand the issue involved, a discussion of the facts and reasoning behind the two conflicting opinions is necessary. This will allow analysis of the comparative strengths and weaknesses of the positions taken by the Second and Sixth Circuits, which will serve as guidelines for the ultimate goal of formulating a constitutional rule.

A. *President's Council, District 25 v. Community School Board No. 25*⁶⁷

In 1971, Community School Board Number 25 voted (five to three) to remove all copies of *Down These Mean Streets* from junior high libraries in the district.⁶⁸ This resolution was modified by a resolution to keep the book on the shelves, but only for direct loan to parents of students.⁶⁹ The book is an autobiographical account of a Puerto Rican youth growing up in Spanish Harlem, containing obscenities and descriptions of sex,

⁶⁵ 425 U.S. at 773.

⁶⁶ *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

⁶⁷ 457 F.2d 289 (2d Cir. 1972), *cert. denied*, 409 U.S. 998 (1972).

⁶⁸ 457 F.2d at 290.

⁶⁹ *Id.*

violence, and drug encounters.⁷⁰ Apparently the School Board thought it would have an "adverse moral and psychological effect"⁷¹ on the students. The resolution resulted in a class action (brought by parents, students, teachers, a librarian, and a principal) under the Civil Rights Act⁷² seeking declaratory and injunctive relief. The District Court for the Eastern District of New York dismissed the complaint without opinion.

The Court of Appeals for the Second Circuit affirmed, denying that any first amendment issue was involved:

Since we are dealing not with the collection of a public book store but with the library of a public junior high school, evidently some authorized person or body has to make a determination as to what the library collection will be. It is predictable that no matter what choice of books may be made by whatever segment of academe, some other person or group may well dissent. The ensuing shouts of book burning, witch hunting and violation of academic freedom hardly elevate this intramural strife to first amendment constitutional proportions.⁷³

The court, per Judge Mulligan, went on to distinguish the case at bar from several academic freedom cases cited by the petitioners. *President's Council* was different from *Epperson* because no religious issue was involved and because there was no ban on the teaching of any theory or doctrine: "The problems of the youth in the ghetto, crime, drugs and violence have not been placed off limits by the Board."⁷⁴ Judge Mulligan explained that teachers remained free to discuss the book in class and that students could read the book if their parents saw fit to check it out for them. Thus, the court concluded that infringement of first amendment rights was only "miniscule."⁷⁵ Distinguishing *Tinker*, the Second Circuit again maintained that no problems involving freedom of speech or expression existed since classroom discussion of *Down These Mean Streets* was not banned. Finally, Judge Mulligan disposed of *Keefe v.*

⁷⁰ *Id.* at 291.

⁷¹ *Id.*

⁷² 42 U.S.C. § 1983 (1970).

⁷³ 457 F.2d at 291-92.

⁷⁴ *Id.* at 292.

⁷⁵ *Id.*

*Geanakos*⁷⁶ and *Parducci v. Rutland*,⁷⁷ in which teachers were discharged⁷⁸ for assigning material which school officials considered objectionable. In both cases the dismissals were invalidated due to infringement of academic freedom protected by the first amendment. The Second Circuit differentiated the case at bar on the basis that no teachers were discharged.

The rationale of *President's Council* is contained in a sweeping statement which the Sixth Circuit in *Minarcini v. Strongsville City School District*⁷⁹ would later refuse to follow:

The administration of any library, whether it be a university or particularly a public junior high school, involves a constant process of selection and winnowing based not only on educational needs but financial and architectural realities. To suggest that the shelving or unshelving of books presents a constitutional issue, particularly where there is no showing of a curtailment of freedom of speech or thought, is a proposition we cannot accept.⁸⁰

B. *Minarcini v. Strongsville City School Board*⁸¹

This case, brought by five public high school students (through parents as next friends), involved a first amendment claim under the Civil Rights Act similar to the claim in *President's Council*. The Strongsville Board of Education passed resolutions to remove *Catch 22* and *Cat's Cradle* from the district's school library.⁸² The sole explanation for the School Board's action is contained in the minutes of a Board meeting: *God Bless You Mr. Rosewater* was described as "completely sick" and "garbage" and it was 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 and

⁷⁶ 418 F.2d 359 (1st Cir. 1969).

⁷⁷ 316 F. Supp. 352 (M.D. Ala. 1970).

⁷⁸ See generally *Perry v. Sindermann*, 408 U.S. 593 (1972); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *Adams v. Campbell County School Dist.*, 511 F.2d 1242 (10th Cir. 1975); *Hetrick v. Martin*, 480 F.2d 705 (6th Cir. 1973); *Wilson v. Chancellor*, 418 F. Supp. 1358 (D. Ore. 1976). For further discussion on teacher discharge cases, see Comment, *Personality Control and Academic Freedom*, 1975 UTAH L. REV. 234.

⁷⁹ 541 F.2d 577 (6th Cir. 1976).

⁸⁰ 457 F.2d at 293.

⁸¹ 541 F.2d 577 (6th Cir. 1976).

⁸² *Id.* at 581.

all copies disposed of”⁸³ The Court of Appeals for the Sixth Circuit reversed the district court⁸⁴ which had upheld the removal of the books.

The Court of Appeals objected to the reliance by the district court upon *President's Council*:

The District Judge in our instant case appears to have read this paragraph as upholding an absolute right on the part of this school board to remove from the library and presumably to destroy any books it regarded unfavorably without concern for the First Amendment. We do not read the Second Circuit opinion so broadly [the court referred to the qualification in the *President's Council* holding which limited the power of removal to situations wherein there is no curtailment of freedom of speech or thought]. If it were unqualified, we would not follow it.⁸⁵

Judge Edwards then proceeded to explain that public school libraries are a privilege created by the state for the benefit of the students, a privilege “not subject to being withdrawn by succeeding school boards whose members might desire to ‘winnow’ the library for books the content of which occasioned their displeasure or disapproval.”⁸⁶ The court was not satisfied by the argument that the removal was valid since the books were not banned from classroom discussion and were available from other sources, for the public school library is “a valuable adjunct to classroom discussion.”⁸⁷ With the books banned from the library, the students’ academic freedom would be hindered. “The removal of books from a school library is a much more serious burden upon freedom of classroom discussion than the action found unconstitutional in *Tinker*. . . .”⁸⁸ Finally, the court found that, although book removal is a more difficult constitutional problem than a direct restraint on speech, the right of a student to receive information under the protection of the first amendment was well established by the right to know cases.⁸⁹ The court then held:

⁸³ *Id.* at 581-82.

⁸⁴ 384 F. Supp. 698 (N.D. Ohio 1974).

⁸⁵ 541 F.2d at 581.

⁸⁶ *Id.*

⁸⁷ *Id.* at 582.

⁸⁸ *Id.*

⁸⁹ *Id.* at 583. The court relied particularly on *Virginia State Bd. of Pharmacy, Procunier*, and *Kleindienst*. The right to know cases are discussed in Part II *supra*.

In the absence of any explanation of the Board's action which is neutral in First Amendment terms, we must conclude that the School Board removed the books because it found them objectionable in content and because it felt that it had the power, unfettered by the First Amendment, to censor the school library for subject matter which the Board members found distasteful.⁹⁰

C. *The Correct Approach*

As mentioned above, the Second Circuit in *President's Council* attempted to distinguish the academic freedom cases, *Epperson* and *Tinker*, on the grounds that classroom discussion and outside reading of *Down These Mean Streets* were not prohibited, and there was therefore no first amendment infringement. This reasoning is flawed for a variety of reasons. First, the basic flaw was the court's failure to differentiate the decision to place a book in the library from the decision to remove it. The budget and the amount of shelf space available must be taken into account when a decision is made on whether to purchase a book. Financial and space considerations will prevent some books from being purchased. But this is quite a different situation from removing a book already purchased and placed in the library because some school board members feel the content of the book is objectionable. Yet the broad language⁹¹ used by the court in *President's Council* fails to distinguish adequately the removal decision from the decision not to purchase. Second, as the *Minarcini* opinion pointed out, simple removal of books from the library would hinder the academic freedom of students by forcing them to seek an alternative source. In addition, a banned book would be accessible only to those students having the financial ability to purchase the book. Third, as Mr. Justice Douglas points out, the theory that the students can do anything but read the book "lessens somewhat the contention that the subject matter of the book is not proper."⁹² Finally, the Supreme Court has already made

⁹⁰ 541 F.2d at 582.

⁹¹ See note 80 and accompanying text *supra* for the broad language used by the *Minarcini* court. See also O'Neil, *supra* note 8, at 211.

⁹² 409 U.S. 998, 999 (1972), *denying cert. to President's Council*, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 289 (2d Cir. 1972) (Douglas, J., dissenting).

clear its stance on the validity of an alternate access theory: "[W]e are loath to hold . . . that existence of other alternatives extinguishes altogether any constitutional interest on the part of the appellees in this particular form of access."⁹³

President's Council described the infringement of first amendment rights as "miniscule," but

[t]he restraint is not small when it is considered what was restrained. . . . If the restraint were smaller than it is, it is from petty tyrannies that large ones take root and grow. . . . Seedlings planted in that soil grow great and, growing, break down the foundations of liberty.⁹⁴

Although the Second Circuit did not have before it any of the aforementioned right to know cases, the inescapable logic of *Procurier v. Martinez*⁹⁵ negates the rationale of the *President's Council* holding. It cannot be argued seriously that the governmental interest in control and censorship is stronger in the public schools than in the prison system.

As Mr. Justice Douglas explained:

The First Amendment is a preferred right and is of great importance in the schools. . . . 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?⁹⁶

Of course, the rational answer is the latter alternative, the one chosen by the Sixth Circuit. All that remains is the definition of a constitutional rule based on *Minarcini*.

IV. A WORKABLE STANDARD

A. *The Rule*

Applying both the foregoing discussions concerning academic freedom and the right to know and the rationale of *Minarcini*, one can construct a constitutional rule which should

⁹³ *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972). See also *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939).

⁹⁴ *Thomas v. Collins*, 323 U.S. 516, 543 (1945).

⁹⁵ 416 U.S. 396 (1974).

⁹⁶ 409 U.S. 998, 999-1000 (1972), *denying cert. to President's Council*, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 289 (2d Cir. 1972) (Douglas, J., dissenting).

resolve future questions concerning the validity of book removal. The rule is stated as follows: *In the absence of an explanation neutral in first amendment terms, removal of a book from a public high school library by a school board will be held violative of the freedoms guaranteed to the students involved by the first and fourteenth amendments, namely academic freedom and the right to know.* Examples of permissible removal "neutral in first amendment terms" are obscenity, conduct control, and practical physical limitations. Of course, removal for any of these reasons must satisfy procedural due process.

1. *Obscenity*

The Supreme Court made its landmark decision concerning obscenity in 1957, in *Roth v. United States*.⁹⁷ There the Court held that "obscenity is not within the area of constitutionally protected speech or press."⁹⁸ This statement is, in the words of one scholar, "the cornerstone of American obscenity law."⁹⁹ Mr. Justice Brennan, writing for the majority, enunciated the standard as "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."¹⁰⁰ In 1973 the Burger Court redefined the standard in *Miller v. California*.¹⁰¹ The new test had three prongs:

- (a) [W]hether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.¹⁰²

Thus, since obscenity is not protected by the first amendment, a school board may constitutionally remove an obscene book from a public high school library. However, the procedure em-

⁹⁷ 354 U.S. 476 (1957).

⁹⁸ *Id.* at 485.

⁹⁹ F. SCHAUER, *THE LAW OF OBSCENITY* 39 (1976).

¹⁰⁰ 354 U.S. at 489.

¹⁰¹ 413 U.S. 15 (1973).

¹⁰² *Id.* at 24.

ployed must be consistent with the due process clause of the fourteenth amendment—it cannot be arbitrary and capricious. Since the line separating material protected by the first amendment from material that is obscene is imprecise, “the courts have imposed the idea of the adversary hearing over all of obscenity law to insure that no actual suppression of speech occurs until after it has been determined that the speech to be suppressed is in fact not protected by the First Amendment.”¹⁰³ It follows that before a school can ban a book as obscene, the students are entitled to a hearing in which the school board must satisfy the trier that the book in question fits into the tripartite test of *Miller v. California*.¹⁰⁴

2. Conduct Control

The Supreme Court announced in *Tinker* that student conduct which materially disrupts classwork or substantially interferes with school discipline or the rights of others is not immunized by the first amendment. In this context, severe psychological harm to students caused by a book would fall under interference with the rights of others. Administration of the *Tinker* test is difficult, but cases dealing with prior restraint of student publications can be examined for guidance.¹⁰⁵ In *Shanley v. Northeast Independent School District*,¹⁰⁶ the Fifth Circuit declared:

[E]xpression by high school students can be prohibited altogether if it materially or substantially interferes with school activities or with the rights of other students or teachers or if the school administration can demonstrate reasonable cause to believe that the expression would engender such material and substantial interference. . . . It is not necessary that the school administration stay a reasonable exercise of restraint “until disruption actually occur[s].”¹⁰⁷

¹⁰³ SCHAUER, *supra* note 99, at 206.

¹⁰⁴ For further information on obscenity, see Annot., 41 L.Ed.2d 1257 (1975); Annot., 5 A.L.R.3d 1158 (1966); Fahringer & Brown, *The Rise and Fall of Roth—A Critique of the Recent Supreme Court Obscenity Decisions*, 62 Ky. L.J. 731 (1974).

¹⁰⁵ For a discussion of prior restraints on student publications, see Annot., 16 A.L.R.Fed. 182 (1973); Note, *Prior Restraints in Public High Schools*, 82 YALE L.J. 1325 (1973).

¹⁰⁶ 462 F.2d 960 (5th Cir. 1972).

¹⁰⁷ *Id.* at 970.

Hence, another permissible rationale for book removal is "material and substantial interference" of school activities caused by the book. *Shanley* explains that this standard includes both disruption in fact or a reasonable forecast of such disruption. In either case, the school authorities must provide concrete facts supporting their decision.

Once again, the process of removal must satisfy procedural due process. The burden of proof is on the state, through the school board,¹⁰⁸ to show that the removal of a book for conduct control was not arbitrary and capricious. This would include demonstrable evidence of disruption in fact or a reasonable forecast thereof. A factor that may weigh heavily is consistency of regulation. In *Tinker*, it was significant that all symbols of controversial nature (political campaign buttons, Iron Crosses) were not banned.¹⁰⁹ And in *Vought v. Van Buren Public Schools*,¹¹⁰ the dismissal of a student for possession of a book containing four-letter words was struck down as denial of due process since the same words were also contained in several books in the school library. The district court said, "We decline to become involved here in a discussion of obscenity. . . . We profess no expertise whatsoever in this field, but we do recognize rank inconsistency when we see it. And we see it here. And the inconsistency is so inherently unfair as to be arbitrary and unreasonable. . . ." ¹¹¹

3. *Practical Exceptions*

As the Sixth Circuit recognized in *Minarcini*, books may be removed for reasons concerning the physical condition of the particular books or library involved. These practical exceptions would include worn or defaced books, obsolete books, and removal of books due to simple lack of shelf space. As long as the removal is based in good faith upon one of these physical limitations, and not merely upon the controversial nature of the

¹⁰⁸ *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969); *Shanley v. Northeast Independent School Dist.*, 462 F.2d 960 (5th Cir. 1972); *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966).

¹⁰⁹ 393 U.S. at 510.

¹¹⁰ 306 F. Supp. 1388 (E.D. Mich. 1969).

¹¹¹ *Id.* at 1396.

author or content of the removed book, there is no first amendment infringement.¹¹²

4. *Age and Maturity*

Mr. Justice Stewart, concurring in *Tinker*, took the position that the rights of children under the first amendment are not as strong as those of adults.¹¹³ This has led several commentators¹¹⁴ and one court to conclude: "Free speech under the First Amendment, though available to juveniles and high school students, as well as adults, is not absolute and the extent of its application may properly take into consideration the age or maturity of those to whom it is addressed."¹¹⁵ Does it follow that the above-mentioned rule must be tempered by evaluation of the age and maturity of the students affected? Although the issue is not settled, analysis of a 1968 Supreme Court decision leads to the conclusion that this factor is of questionable relevance.

In *Ginsberg v. New York*,¹¹⁶ a bookseller was convicted under a New York statute prohibiting sale to minors of material defined to be obscene on the basis of its appeal to them.¹¹⁷ The bookseller violated the statute by sale of two "girlie" magazines to a minor (the magazines were not obscene by adult

¹¹² An additional but peripheral exception is incitement. The concept surfaced in *Schenck v. United States*, 249 U.S. 47 (1919). The Court said that the first amendment will not prevail where spoken or printed words are "used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Id.* at 52. The modern version of the clear and present danger test was announced in *Brandenburg v. Ohio*, 395 U.S. 444 (1969):

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Id. at 447. Thus, a book directed to and likely to incite imminent illegal activity could be removed without constitutional infringement. However, the importance of the exception is only minimal since this activity would also fit into the material disruption test.

¹¹³ *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 515 (1969) (Stewart, J., concurring).

¹¹⁴ Wright, *supra* note 12, at 1052-53; *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1053 (1968).

¹¹⁵ *Quarterman v. Byrd*, 453 F.2d 54, 57 (4th Cir. 1971).

¹¹⁶ 390 U.S. 629 (1968).

¹¹⁷ N.Y. PENAL LAW § 484-h (McKinney 1909).

standards). In upholding the statute against the bookseller's first amendment claim, Mr. Justice Brennan, writing for the plurality, explained that the statute "simply adjusts the definition of obscenity 'to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests . . . of such minors.'"¹¹⁸ Thus, the "average person" component was made variable to read "average minor." While on the surface *Ginsberg* seems to require some assessment of age in the book removal question, two limiting factors tend to refute this position. First, it is important to understand that while *Ginsberg* allows a variable "average person" standard, it "still requires a finding of obscenity."¹¹⁹ The second factor pointing toward a single standard for adults and minors is the questionable validity of the *Ginsberg* opinion in light of *Miller*. Mr. Chief Justice Burger, author of the *Miller* decision, stated therein: "Nor does [Mr. Justice Brennan] indicate where in the Constitution he finds the authority to distinguish between a willing 'adult' 1 month past the state law age of majority and a willing 'juvenile' 1 month younger."¹²⁰ These factors tend to diminish the need to include an age or maturity standard in the book removal decision.¹²¹

CONCLUSION

From the foregoing analysis the following conclusions may be drawn. Local school boards have wide discretion in formulation of policy and regulations involving the public high school system within their districts. This broad power includes control over curriculum, school system libraries, and student conduct. This authority is not unfettered, however; it is tempered by the concepts of academic freedom (freedom of students from administrative coercion) and the right to know (the right of students to receive information). These concepts have been developed by the Supreme Court as rights implicitly guaranteed by

¹¹⁸ 390 U.S. at 638.

¹¹⁹ SCHAUER, *supra* note 99, at 89.

¹²⁰ *Miller v. California*, 413 U.S. 15, 27 (1973).

¹²¹ This position is supported by the Seventh Circuit in *Scoville v. Bd. of Educ.*, 425 F.2d 10 (7th Cir. 1970), which concerned expulsion of students for distributing material critical of school officials: "We think the district court should not have been concerned over the immaturity of the student readers." *Id.* at 13 n.5.

the first and fourteenth amendments. As one scholar commented, "the risks of repression and censorship—the stifling of a major artery of free inquiry and public debate—cannot be minimized simply because adequate precedent is lacking."¹²²

Wm. Kennedy Simpson

¹²² O'Neil, *Libraries, Librarians*, *supra* note 11, at 311-12.