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Minarcini v. Strongsville City School District

Joy Koletsky

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FIRST AMENDMENT—FREE SPEECH: RIGHT TO KNOW—LIMIT OF SCHOOL BOARD'S DISCRETION IN CURRICULAR CHOICE—PUBLIC SCHOOL LIBRARY AS MARKETPLACE OF IDEAS


I. INTRODUCTION

Broad discretionary authority to make curricular choices is vested in states and in the local school boards to which the states have delegated that authority. Although the authority is limited by the Federal Constitution, the Supreme Court has not imposed a free speech constraint on school board decisionmaking. In Minarcini v. Strongsville City School District,¹ however, the Court of Appeals for the Sixth Circuit held that the school board's removal of the books the board found objectionable from a public school library was unconstitutional as a violation of the freedom of speech clause of the first amendment.

The freedom of speech clause constrains governmental regulation of speech solely on the basis of content to assure a free flow of communication. Curricular choice involves the regulation of the content of communications to students. Because the free flow of communications in public schools can be restricted for educational purposes, however, school boards have heretofore exercised unfettered discretion over curriculae. In the past, the freedom of speech clause has not been applied in the context of public education when impermissible censorship was found to have motivated a school board's decisionmaking; no clear line of authority supports the Sixth Circuit's conclusion that this first amendment value should henceforth be given protection in the context of curricular choice.²

¹ Minarcini v. Strongsville City School District, 541 F.2d 577 (6th Cir. 1976).
II. THE PROBLEM

A. The Traditional Role of School Boards

In the area of education states have traditionally exercised plenary power. Subject only to the constitutional limitations articulated by the Supreme Court, states are empowered to operate their schools as they see fit. Almost every state prescribes some subject matter, and a good number designate mandatory subjects. In addition, responsibility for formulating details regarding courses and subject offerings has been delegated to school administrators or administrative bodies. The public school curriculum has been used by states and school boards to prescribe courses "plainly essential to good citizenship," and to prohibit courses "manifestly inimical to the public welfare." The stated objective has been to inculcate students with values considered necessary to develop productive citizens.

Until recently, decisionmaking by school administrators and administrative bodies has, for the most part, escaped scrutiny by the legal profession and the general public. The judicial process has only been invoked when school board decisions result in a curriculum which expresses political, social, and religious values not shared by some members of the community or when teachers have employed unauthorized materials or have challenged subject matter prohibitions. For several reasons, courts have traditionally been reluctant to intervene in curricular disputes. Recognizing their lack

4. Seitz, supra note 3, at 104.
5. Reutter, supra note 3, at 92-95.
11. Project, supra note 3, at 1425.
12. See, e.g., Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969); Parducci v. Rutland, 316 F. Supp. 352 (M.D. Ala. 1970) (both cases involved the discharge of high school teachers who refused to comply with orders from school authorities to desist from assigning materials for outside reading which school officials found offensive and inappropriate).
of expertise, courts have hesitated to encroach upon the educational expertise of school administrators, especially where judgments of educational value may be required.\textsuperscript{14} There has also been a reluctance to substitute the value judgment of a nonelected judiciary for that of an elected school board which theoretically reflects community values.\textsuperscript{15} Because the curricular decisionmaking process is not based solely on quantitative or even objective data, there is a considerable amount of latitude for deliberation and for complex political interaction in resolving value conflicts among groups and individuals.\textsuperscript{16} Finally, this hesitancy to intervene is motivated by a respect for the autonomy of educational institutions.\textsuperscript{17} Thus, school boards have been afforded a preferred position in curricular disputes.\textsuperscript{18}

\textbf{B. The Facts of Minarcini}

In \textit{Minarcini v. Strongsville City School District}\textsuperscript{19} the Sixth Circuit, in a unique decision, refused to grant complete deference to the curricular choices of the board of education. In \textit{Minarcini}, a class action suit was brought by five public high school students through their parents as next friends to challenge the school board's authority to determine what books could (1) be selected as high school textbooks, (2) be purchased for the high school library, (3) be removed from the high school library, and (4) be banned from the high school classroom.\textsuperscript{20} The case was simplified since in the lower court the parties conceded the literary value of the novels and eliminated obscenity as an issue.\textsuperscript{21}

There were three parts to the plaintiff's complaint. Part I charged that the school board had violated plaintiff's first and fourteenth amendment rights by refusing to approve Joseph Heller's \textit{Catch-22} and Kurt Vonnegut's \textit{God Bless You, Mr. Rosewater}, despite faculty recommendation of these books. On this issue the district court ruled in favor of the school board,\textsuperscript{22} reasoning that discretion as to selection of books had to be lodged somewhere, and there was no constitutional prohibition to prevent its being lodged in elected school board officials.\textsuperscript{23} The district court perceived the

\begin{itemize}
\item \textsuperscript{14} \textit{Id.} at 1426, \textit{citing Developments in the Law: Academic Freedom, 81 HARV. L. REV. 1048, 1050 (1968) [hereinafter cited as Developments] (footnote omitted).}
\item \textsuperscript{15} \textit{Id.,} \textit{citing Miller, Teachers Freedom of Expression Within the Classroom: A Search for Standards, 8 GA. L. REV. 837, 847 (1974).}
\item \textsuperscript{16} F. \textsc{WIRT} \& M. \textsc{Kirst}, \textit{supra} note 10, at 205-07.
\item \textsuperscript{17} \textit{Developments, supra} note 14, at 1050.
\item \textsuperscript{18} \textit{Project, supra} note 3, at 1454.
\item \textsuperscript{19} 541 F.2d 577 (6th Cir. 1976).
\item \textsuperscript{20} \textit{Id.} at 578.
\item \textsuperscript{21} \textit{Id.} at 580.
\item \textsuperscript{22} 384 F. Supp. 698, 704 (N.D. Ohio 1974).
\item \textsuperscript{23} \textit{Id.} at 704-05.
\end{itemize}
issue to be one of procedural due process.24 It found the board's selection decisions to have been neither arbitrary nor capricious.25 The Sixth Circuit affirmed the decision of the district court, approving both its findings and reasoning.26

In Part II plaintiffs charged that the board had also violated first and fourteenth amendment rights by ordering Vonnegut's *Cat's Cradle* and Heller's *Catch-22* to be removed from the library. The district court dismissed this portion of the complaint by extrapolating from the board's authority to select books for the library a complementary power to remove books from the library.27 On this issue the Sixth Circuit reversed, holding:

> A library is a storehouse of knowledge. When created for a public school it is an important privilege created by the state for the benefit of students in the school. That privilege is not subject to being withdrawn by succeeding school boards whose members might desire to "winnow" the library for books the contents of which occasioned their displeasure or disapproval.28

The appeals court ordered the district court to declare the two school board resolutions banning *Catch-22* and *Cat's Cradle* null and void and to direct the board to return the books to the school library.29

In Part III of their complaint plaintiffs alleged deprivation of first and fourteenth amendment rights because the school board resolutions effectively prohibited teacher and student classroom discussion of the books and their use as supplemental reading material. The district court found the facts to be insufficient to support this allegation.30 The Sixth Circuit affirmed this finding.31

The reasoning applied by the Sixth Circuit in *Minarcini* was unique in invoking the first amendment freedom of speech to attack a curricular choice of a local school board. The Supreme Court, in striking down legislative curricular prohibitions, has limited discretion in curricular choice through the due process clause of the fourteenth amendment and the establishment and free exercise clauses of the first amendment,32 but the Court has not yet

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27. Id. at 580–81.
28. Id. at 581.
29. Id. at 584.
31. 541 F.2d at 584.
adopted the freedom of speech clause as a constraint on the curricular choice of states or school boards. Therefore, in order to understand the potential impact of Minarcini it is necessary to review the prior state of the law governing a school board's power to determine curricular choices.

III. LIMITING THE CHOICE

A. Due Process and Free Exercise

In Meyer v. Nebraska the Supreme Court acknowledged the states' power to prescribe school curriculum and recognized as valid the state purpose of promoting civic cohesiveness through curricular planning. Nevertheless, the Court held that a law making it a crime to teach young children in any language other than English was an unconstitutional means of achieving the stated purpose of inculcation of civic virtues; that state interest is not adequate to support restrictions upon the liberty of parent, teacher, and pupil guaranteed by the fourteenth amendment. Because "mere knowledge of the German language cannot reasonably be regarded as harmful," the Court struck down the statute as arbitrary and not reasonably related to a valid state goal. Thus, Meyer stands for the proposition that there are fundamental rights in parents and the state to control the education of children, in teachers to teach, and in students to learn, all embodied in the concept of liberty under the fourteenth amendment. Meyer also imposed on the state a strict burden of justification when it would infringe upon these rights. The significance of the substantive due process analysis of Meyer on curricular choice has been debated, but if read expansively, it seems to support broad academic freedom.

33. See, e.g., Nahmod, supra note 13, at 1504. Underlying the inquiry into the applicability of the freedom of speech clause to curricular choice is the controversy over where responsibility for making educational policies should lie. See, e.g., Project, supra note 3, at 1422 n.258, which further reflects "an upheaval in social, political and cultural values that has . . . brought into question the efficacy of education."

34. 262 U.S. 390 (1923).

35. Id. at 400.

36. Id. at 403.

37. The Court said: "No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed." Id.


39. Compare Goldstein, supra note 39, at 1308 n.48, 1321 n.94.
In *Epperson v. Arkansas*, the Supreme Court expressly rejected the broad premise furnished by *Meyer*, preferring instead to rest its decision that an Arkansas anti-evolution statute was unconstitutional on narrower ground—the establishment and free exercise clauses which mandate state neutrality with respect to religion. The Court said that “[n]o suggestion has been made that Arkansas’ law may be justified by considerations of state policy other than the religious views of some of its citizens,” and that “[t]he law’s effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read.” Thus, the State’s undoubted right to prescribe the “curriculum for the institutions it supports” did not include the right to bar “the teaching of a scientific theory or doctrine where that prohibition is based on reasons that violate the first amendment.”

**B. Freedom of Speech**

Dicta in a concurring opinion in *Epperson* is the only indication that the Court may feel that a curricular prohibition may violate the freedom of speech clause. Nonetheless, commentators have contended that speech values are implicated when a state or school board expressly prohibits the teaching of certain subject matter. Moreover, Professors Emerson and Haber would apply principles of freedom of speech not only to curtail

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41. 393 U.S. 97 (1968).
42. *Id.* at 105–06. The Court also refused to “explore the implications of that decision in terms of the justiciability of the multitude of controversies that beset our campuses today.” *Id.* at 106.
43. *Id.*
44. *Id.* at 107 (footnote omitted). Earlier in the opinion the Court said: “The overriding fact is that Arkansas’ law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular interpretation of the Book of Genesis by a particular religious group.” *Id.* at 103 (footnote omitted).
45. *Id.* at 109. Although the language was less explicit than that of the Tennessee statute upheld in the Scopes trial, *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927), the Court ascertained that the motivation for the law was the same—“to suppress the teaching of a theory which, it was thought, ‘denied’ the divine creation of man”—and that it would in fact have that effect. *Id.*
48. Justice Stewart in a concurring opinion said that to make it a criminal offense for a public school teacher to mention evolution would impinge on first amendment guarantees of free communication. 393 U.S. at 116. *See Nahmod, supra* note 13, at 1504.
censorship, but to mandate a balanced classroom presentation of diverse views.\textsuperscript{50}

Although the free speech clause has been extended to protect the expression of both student\textsuperscript{51} and teacher in public schools in some instances,\textsuperscript{52} the assumption that a classroom functions as a "free marketplace of ideas," a precondition to the applicability of the clause, has not been universally accepted. States and school boards are neither obligated to open the curriculum to all views or academic theories,\textsuperscript{53} nor to permit teachers to use methods and materials not included in the prescribed curriculum.\textsuperscript{54} Because one function of public education is indoctrinative, some amount of public regulation of classroom conduct—speech, materials, and methods—inheres in public education.\textsuperscript{55} Moreover, judicial oversight which would require evaluation of the validity of the state's goals and the suitability of its methods poses the problem for the courts of articulating justiciable standards.\textsuperscript{56} Yet, recent cases have attempted to define a qualified right which grants elementary and secondary school teachers limited freedom to determine their classroom teaching methods.\textsuperscript{57}

IV. PRESIDENTS COUNCIL AND MINARCINI:
CONSTRAINTS ON REMOVAL

The difficulties of controlling curricular choice through the freedom of speech clause were encountered both in \textit{Minarcini} and in \textit{Presidents Council, District 25 v. Community School Board No. 25}.\textsuperscript{58} The Court of Appeals for the Second Circuit, in \textit{Presidents Council}, confronted as an issue of first impression the question of whether there was any prohibition in the free speech clause that should prevent a school board from removing a book it

\textsuperscript{50} Emerson & Haber, \textit{The Scopes Case in Modern Dress}, 27 U. Chi. L. Rev. 522, 527 (1960). Emerson and Haber suggest that public education involves a "sector of communication which has many of the elements of a closed system." \textit{Id.} at 526. Since the government maintains enormous control over the educational process at the elementary and secondary school levels, and "the government is assuming an affirmative function in the system of education," \textit{id.}, Emerson and Haber would apply first amendment principles to curtail censorship and to mandate a balanced presentation of diverse views.


\textsuperscript{52} See, e.g., \textit{James v. Board of Educ.}, 461 F.2d 566 (2d Cir.), cert. denied, 409 U.S. 1042 (1972).

\textsuperscript{53} Shauer, supra note 39, at 303-04; Canby, supra note 47, at 1136.

\textsuperscript{54} Shauer, supra note 39, at 305-06; see Canby, supra note 47 at 1136.

\textsuperscript{55} See, e.g., \textit{Developments}, supra note 14, at 1050.

\textsuperscript{56} \textit{Id.}

\textsuperscript{57} Shauer, supra note 39, at 303-04.

\textsuperscript{58} 457 F.2d 289 (2d Cir.), cert. denied, 409 U.S. 988 (1972).
found objectionable from a public junior high school library. Affiliates of parent and parent-teacher associations, three junior high school students, seven parents and guardians of minors attending schools in the district, two teachers, a librarian, and a principal sought to enjoin the school board from removing all copies of Piri Thomas' *Down These Mean Streets* from the libraries of all the junior high schools in the district. The school board subsequently modified its removal order, allowing the book to remain available in those junior high schools whose libraries had purchased the book before the board's decision.69

In deciding the case the Second Circuit began by stating:

> [E]vidently 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. If it did, there would be a constant intrusion of the judiciary into the internal affairs of the school.60

The court rejected the plaintiffs' assertion that *Epperson v. Arkansas* was relevant to *Presidents Council*:

> [P]atently we have no religious establishment or free exercise question, and neither do we have the banning of the teaching of any theory or doctrine. The problem of the youth in the ghetto, crime, drugs and violence have not been placed off limits by the Board. . . . The intrusion of the Board here upon any first amendment constitutional right of any category of plaintiffs is not only not "sharp" or "direct", it is miniscule.61

The Second Circuit concluded that there was no legally relevant distinction between the school board's authority to select books for the library initially, in which case it was not obligated to select any and all books, and the board's authority to remove books. That a book had already been shelved was not relevant because both acquisition and removal entailed selection.62

The court stated:

59. 457 F.2d at 292-93. The court addressed itself to both resolutions.
60. Id. at 291-92.
61. 457 F.2d at 292. The Second Circuit seemed to suggest that had it found that there had been a ban on the teaching of problems of ghetto youth it would have considered finding a violation of the freedom of speech clause.
62. With regard to initial purchase of the books, the court said: "The public school library obviously does not have to become the repository, at public expense, for books which are deemed by proper authorities to be without merit either as works of art or science, simply because they are not obscene within the statute." *Id.* at 292-93. The statute which was found to
This concept of a book acquiring tenure by shelving is indeed novel and unsupportable under any theory of constitutional law we can discover. It would seem clear to us that books which become obsolete or irrelevant or where improperly selected initially, for whatever reason, can be removed by the same authority which was empowered to make the selection in the first place.\textsuperscript{63}

The court distinguished the situation in Presidents Council from previous cases on the basis of the type of injury to the plaintiffs. In Tinker v. Des Moines Independent School District,\textsuperscript{64} the Supreme Court had found a regulation banning the wearing of black armbands in classrooms to be an unconstitutional infringement of the students' freedom of speech. School authorities had tried to justify the regulation on the grounds that wearing the armbands was likely to cause disruption and disorder. The Supreme Court held that fear of disturbances was not a constitutionally valid justification for the ban.\textsuperscript{65} The Second Circuit held that Tinker was inapposite because in Presidents Council there was no problem of freedom of speech or expression of opinions on the part of any of the plaintiffs. Discussion of Down These Mean Streets and its subject matter in or out of the classroom was not prohibited by the board's actions in removing it from the library.\textsuperscript{66}

Finally, the court considered the motive of the school board in removing the books, allowing some latitude for pragmatic problems of administration.

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 creates a constitutional issue, particularly where there is no showing of a curtailment of freedom of speech or thought, is a proposition we cannot accept.\textsuperscript{67}

\textsuperscript{63} be constitutional in Ginsburg v. New York, 390 U.S. 629 (1968), made it a crime to sell obscene materials to minors under 17 years of age, irrespective of whether the material would be obscene for adults. With regard to removal, the Second Circuit said: "If someone authored a book advocating that the earth was flat, it could hardly be argued that the work could not be removed from the public school library unless it was also obscene." 457 F.2d at 293. Appellants had conceded, or at least chose not to attack, the board's authority to select library books, but had suggested that the situation differed with respect to removal. \textit{Id.}

\textsuperscript{64} 393 U.S. 503 (1969).
\textsuperscript{65} \textit{Id.} at 511.
\textsuperscript{66} 457 F.2d at 293.
\textsuperscript{67} \textit{Id.}
Removing books because of "financial and architectural realities" is different from removing books because they reportedly disturb the moral atmosphere nurtured in public schools. Accordingly, the Sixth Circuit in Minarcini refused to read into the preceding quotation from Presidents Council an absolute right of the school board to remove books from the library, and further stated that "if it [the above cited paragraph] were unqualified, we would not follow it." Thus discarding Presidents Council, the only precedent involving a substantially similar fact pattern, the Sixth Circuit chose to base its reasoning on a different set of precedents.

In Minarcini, the court began its analysis by examining the minutes of the school board meetings at which the books were banned. In the absence of any explanation of the school board’s actions that was neutral in first amendment terms, the Court assumed that the board removed the books because it objected to their content and felt it had the power to censor the school library unfettered by the first amendment. Although the court recognized that neither the State of Ohio nor the Strongsville School Board was constitutionally compelled to provide a library for the high school or to choose any particular books, once having created this privilege, it was barred from placing "conditions on the use of the library which were related solely to the social or political taste of school board members."

The court emphasized the value of a public school library as an adjunct to classroom discussion:

If one of the English teachers considered Joseph Heller’s Catch-22 to be one of the more important modern American novels . . . we assume that no one would dispute that the First Amendment’s protection of academic freedom would protect both his right to say so in class and his students’ rights to hear him and to find and read the book. Obviously, the students’ success in this last endeavor would be greatly hindered by the fact that the book sought had been removed from the school library. 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

68. The lower court cited this language from Presidents Council as establishing an absolute right of removal in the board. The Sixth Circuit, however, qualified that reading.
69. 541 F.2d at 581.
70. Id. at 582.
71. Id. The court cited Keyishian v. Board of Regents, 385 U.S. 589 (1967); Pickering v. Board of Educ., 391 U.S. 563 (1968); Douglas v. California, 370 U.S. 353 (1963); and Griffin v. Illinois, 351 U.S. 12 (1955), for the proposition that "[i]t is too late in the day to doubt that liberties of religion and expression may be infringed by the denial of or placing conditions upon a benefit or privilege." 541 F.2d at 582. The court seemed to suggest that a right of access to the books arose once the books were shelved.
That the disputed book might be available from sources outside the school was not found to obviate that burden. The court saw the library as "a mighty resource in the free marketplace of ideas," and "a forum for silent speech"—in its view an indispensable component for preserving freedom of speech.

The court recognized that it was dealing "with a somewhat more difficult concept than a direct restraint on speech," because the question of removal of books from the school library did not directly entail curtailment of expression. Rather, it was "concerned with the right of students to receive information which they and their teachers desire them to have."

In Minarcini the conclusion that the students had a constitutionally cognizable right to be the unobstructed recipients of Vonnegut's and Heller's expression (through their books) was supported by citing cases that have developed "the right to know." The Sixth Circuit concluded that any doubt as to the existence of this right was laid to rest by the Supreme Court's analysis in Virginia State Board of Pharmacy v. Virginia Citizens Council, Inc., which, along with Kleindienst v. Mandel and Procunier v. Martinez, "serve[s] to establish firmly both the First Amendment right to know which is involved in our instant case and the standing of student plaintiffs to raise the issue."

72. Id. The court's reference to Tinker, in which the banning of armbands from the classroom was found to be an unconstitutional infringement of freedom of speech, is unsupported and puzzling. See the discussion of Presidents Council, accompanying notes 64-66 supra. The Sixth Circuit seemed to be using Tinker to justify application of other first amendment principles to the case since the Sixth Circuit found that classroom discussion was enhanced by the presence of the books in the library and, therefore, students had a first amendment interest in the books.

73. 541 F.2d at 582. The Court relied on freedom of speech cases and applied the doctrine from them to the right to know. See note 81 infra.

74. 541 F.2d at 582.

75. Id. at 583. The Sixth Circuit apparently considered the school library to be more important to a student's education than did the Second Circuit. See notes 62-63 supra. Perhaps the Sixth Circuit felt it was less of an intrusion on curricular choice to scrutinize library acquisitions than to scrutinize textbook decisions.

76. Id. at 583.

77. Id. (emphasis added).


79. 408 U.S. 753 (1972).


81. Id. The court apparently felt compelled to go through the freedom of speech rationale to reach the right to know. Such preliminary analysis was, however, unnecessary. See note 92 infra.
Thus, the Minarcini court, unlike the court in Presidents Council, found a violation of the board's exercise of discretion based on the freedom of speech clause. It would seem, therefore, that the Sixth and Second Circuits reached opposite results on this important issue of law. To analyze the relative strength of their views it is necessary to understand the developing right to know on which the Sixth Circuit placed so much emphasis.

V. THE RIGHT TO KNOW

Using the "reciprocal rights," or "right to know" rationale, courts have determined that listeners or other recipients of expression who have been denied access to expression protected by the first amendment have a right to contest the denial. The Supreme Court, dealing with the right to receive advertising in Virginia State Board, summarized the theory of the right to know:

Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases. In Lamont v. Postmaster General . . . the Court upheld the First Amendment rights of citizens to receive political publications sent from abroad. More recently, in Kleindienst v. Mandel . . . we acknowledged that this Court has referred to a First Amendment right to "receive information and ideas," and that freedom of speech "necessarily protects the right to receive." And in Procunier v. Martinez . . . where censorship of prison inmates' mail was under examination, we thought it unnecessary to assess the First Amendment rights of the inmates themselves, for it was reasoned that such censorship equally infringed the rights of noninmates to whom the correspondence was addressed. There are numerous other expressions to the same effect in the Court's decisions.

82. See generally Emerson, Legal Foundations of the Right to Know, 1976 WASH. U.L.Q. 1. Emerson suggests three situations in which "the right to know should receive direct constitutional protection under the first amendment," id. at 6: firstly, "when the government attempts to control expression by applying a sanction directly against the recipient, in lieu of or in addition to one against the communicator," id.; secondly, "when the speaker is not in a position to assert his rights," id. at 7, or "where the speaker does have standing but fails to take action to vindicate his interests," id.; thirdly, "in certain situations when the government itself engages in expression," id. at 6. The Supreme Court has not utilized the right to know doctrine in the third way, id. at 8, and the right to know "ordinarily plays a secondary role" in cases under the first category. Id. at 6.

Therefore the Court concluded that if "there is a right to advertise, there is a reciprocal right to receive the advertising," and that the potential recipients could assert that right.85

Two of the three cases which the Court cited dealt with situations where the party whose expression was being curtailed could not adequately enforce his right. In Kleindienst v. Mandel,86 for example, a Belgian journalist and Marxist theoretician, who had been invited to the United States by university groups and professors to present his views in various forums, was precluded from entering this country pursuant to the Immigration and Nationality Act of 1952;87 as a foreign national, he had no constitutional right of entry into this country. The Court concluded that the American citizens who were party to the suit to allow his entry could assert their own first amendment right to receive the information the speaker would express in order to preserve the first amendment goal of maintaining a free marketplace of ideas.88

Similarly, in Procunier v. Martinez89 the Supreme Court looked at censorship of prisoners' mail from the standpoint of the citizens who received the mail. Although the prisoners whose mail was being censored might not have been entitled to full first amendment protection, the Court suggested that "[i]n the case of direct personal correspondence between inmates and those who have a particularized interest in communicating with them, mail censorship implicates more than the right of prisoners."90 Thus, the Court's free speech analysis centered on according full first amendment liberties to the recipients of the correspondence rather than treating the case as one "involving questions of prisoners' rights."91

The Court in Virginia State Board extended the rationale beyond the protection of particularized communications between a delineated speaker and recipient, to allow the recipient directly, through the right to know, to assert the rights of an unspecified speaker.92 Minarcini suggests that in

85. Id. at 757.
86. 408 U.S. 753 (1971).
87. Ch. 477, 66 Stat. 163.
88. 408 U.S. at 763.
89. 416 U.S. 396 (1976).
90. Id. at 408.
91. Id.
92. Thus, consumers, rather than the pharmacists themselves, vindicated the rights of the pharmacists. Justice Rehnquist objected to the decision's extension of "standing to raise First Amendment claims beyond previous decisions of the Court," 425 U.S. at 782-83 (Rehnquist, J., dissenting). He maintained that the right to receive had not been denied because consumers had alternative means of obtaining the information. Id. Therefore the consumers were really asserting publishing rights of a third party. The majority responded that it knew of no case in which speakers' rights had been abridged because their listeners had alternative means to receive their messages. Nor was the majority aware of any such limitation on the independent right of the listener to receive the information. Id. at 757-58 n.15. Thus the Court extended the right-to-receive rationale.
some instances, the right to receive information, as developed in the
described cases, may allow students to vindicate the rights of contem-
porary novelists by insuring that curricular decisions are made for proper
educational purposes.

VI. MINARCINI AND THE RIGHT TO KNOW

Although the Sixth Circuit ultimately labeled the students' right as the
right to know, the court was unclear as to how the right should be applied.
The rights of the students in this case were treated as being coextensive
with those of the authors. As stated in Virginia State Board, "where a
speaker exists . . . the protection afforded is to the communication, to its
source and to its recipients both."93 The conclusion that the court consid-
ered primarily the rights of the students is bolstered by its reference to
Procunier in which the Supreme Court felt it unnecessary to consider the
extent of prisoners' first amendment rights, but rather looked to the rights of
the recipients of the prisoners' letters.

The reference to Tinker v. Des Moines Independent Community School
District94 also implied consideration of the first amendment rights of stu-
dents. The Sixth Circuit, comparing the facts in Tinker95 and Minarcini,
concluded that removal of a library book was a more serious burden on
classroom speech than the banning of armbands. In other words, students
had a first amendment interest in having the books available.

Freedom of speech, however, is not always absolute. Analysis of the in-
terest or goal asserted to support an infringement upon the right is often
required to ascertain its extent.96 In Minarcini, the school board claimed
that orderly administration required that it have discretion to remove books
from the library. The court did not conclude that the students' right to know
precluded the school board's exercise of this discretion entirely. Based on
the minutes of the school board meetings, however, the court concluded
that there was no indication of a neutral rationale for the removal of the
books at issue; rather the decision had been based on the personal objec-
tions of the board members to the books' contents.97 This rationale the
court deemed inadequate to support infringement of the students' right to
know.

The court enumerated hypothetical rationales that, in its opinion, would
have effectively negated any attack on the board's removal of books: the

93. Id. at 756.
95. See text accompanying note 65 supra.
96. See, e.g., Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); Cox v. New
Hampshire, 312 U.S. 569 (1941).
97. 541 F.2d at 581.
board could have removed a book without violating any rights when a copy of the book wore out, when the book became obsolete, or lack of shelf space demanded removal.\textsuperscript{98} These reasons for removing books relate to the nature of the facility—in other words, they involve educational purposes or needs. To remove books solely because the board objects to content is to censor ideas, and censorship is not a valid educational objective. Because this last motive was found to be operative, the court found that the Strongsville board’s decision to remove books was unconstitutional.\textsuperscript{99}

Had a valid educational objective accompanied the board’s unconstitutional motivation, the protection afforded the constitutionally protected communication, the book, could be analogized to that given constitutionally protected conduct of a teacher.\textsuperscript{100} In \textit{Mount Healthy City School District v. Doyle},\textsuperscript{101} for example, the Supreme Court held that even though a teacher has limited rights in certain circumstances—he can be discharged for no reason and has no right to a hearing prior to a decision not to rehire him—he might establish a claim to reinstatement if a decision not to rehire him was made by reason of his exercise of constitutionally protected first amendment freedom.\textsuperscript{102} The Court continued:

Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a “substantial factor”—or to put it in other words, that it was a “motivating factor” in the Board’s decision not to rehire him. Respondent having carried that burden... the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would

\textsuperscript{98} Id.

\textsuperscript{99} Although courts are generally reluctant to inquire into motivation, in this case motive was clear. The court drew the permissible inference that the board exercised its discretion to make student reading conform to the orthodox social and political views of school board members. \textit{See generally} Ely, \textit{Legislative and Administrative Motivation in Constitutional Law}, 79 \textit{YALE L.J.} 1205 (1970); Brest, \textit{Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motivation}, 1971 \textit{SUP. CT. REV.} 95.

\textsuperscript{100} See, e.g., \textit{Maybey v. Reagan}, 537 F.2d 1036 (9th Cir. 1976):

The potential for subterfuge exacerbates our dilemma. On the one hand, our reluctance to intrude deeply into the administrative process may permit an ill-motivated decision-maker to cite apparently legitimate grounds for non-retention. On the other hand, solicitude for First Amendment rights, and the need for prophylactic rules to prevent encroachments on them, may aid an incompetent employee... Although motivational analyses may be slippery, the only way to erect adequate barriers around First Amendment freedoms is for the trier of fact to delve into the motives of the decision-maker.

\textit{Id.} at 1045.

\textsuperscript{101} 97 S. Ct. 568 (1977).

\textsuperscript{102} \textit{Id.} at 574. If the school board were to depart from established procedure, it might be called upon to justify its actions even in the absence of a requirement that it give reasons for its decisions. \textit{See} text accompanying note 109 \textit{infra}. 
have reached the same decision as to respondent's reemployment even in absence of the protected conduct.\textsuperscript{103}

The decision to ban books in Minarcini is analogous to the refusal to rehire—neither were motivated by valid educational objectives. The only explanation offered by the board in Minarcini was a minority report which stated that one of the books was "garbage." No necessity, such as inadequate space, made removal of books from the library necessary. The board did not follow its established procedure for textbook selection. The books had continuing faculty approval and further, literary value was conceded by the parties. Thus, plaintiffs met their burden of showing that the content of the books was constitutionally protected and that the content alone played a substantial role in the board's decision to remove. The board offered no further justification; therefore the decision was invalidated.

The Sixth Circuit suggested that there was no right-to-know issue involved in the board's decisions concerning the purchase of books for the school library.\textsuperscript{104} However, if, as the court's construction of the available precedent suggests, the relevant inquiry with respect to the right to know is unconstitutional motivation, the exercise of discretion in purchasing books cannot be distinguished from its use in removing books from the shelves. Because censorship can be present in either context, principles of free speech would entitle the absent speakers (the authors) to a fair consideration of whether the books would further valid educational purposes.\textsuperscript{105}

The only apparent distinction between a case involving selection of books and one involving removal is an evidentiary problem in the former. It would appear far easier to show or to infer censorship when a book is removed than to show or to infer censorship when a book is not purchased.\textsuperscript{106} This

\textsuperscript{103} Id. at 576. The Supreme Court referred to its decision in Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S. Ct. 555 (1977), for elaboration of "motivating factor." See text accompanying notes 108-09 infra.

\textsuperscript{104} The Sixth Circuit recognized that students could assert their teachers' freedom of speech rights but refused to consider whether teachers could make their choices prevail in the purchasing process. 541 F.2d at 579-80.

\textsuperscript{105} Assuming that the library of a public high school is a public forum, the refusal to select, motivated by improper educational purposes, would constitute an unconstitutional prior restraint. Cf. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); Cox v. New Hampshire, 312 U.S. 569 (1941) (enumerating circumstances qualifying established exceptions to the doctrine of prior restraint: rejection of application must be based on regulation of time, place, or manner related to the nature of the facility or applications from other users). The Sixth Circuit assumed the library is a public forum. See text accompanying note 75 supra.

\textsuperscript{106} See Comment, Schoolboards, Schoolbooks and the Freedom to Learn, 59 YALE L.J. 928 (1950). Meaningful inquiry into constitutional motivation in curricular choice is difficult to achieve. School boards have authority to inculcate students with good citizenship values. See notes 3-18 supra. However, it is difficult for judges to distinguish instilling good citizenship from compelling orthodoxy without substituting their value judgment for that of a board. For approaches to unconstitutional motivation in curricular choice, see generally Ely, supra note 99; Brest, supra note 99. The difficulty of achieving value inculcation while preserving a free marketplace in the public schools underlies Minarcini.
does not mean, however, that it would be impossible to set standards to be applied in determining motivation in a case of purchase. It has been suggested that where a school board delegates authority to select books to librarians or committees, and only participates in the selection process when it wishes to control content in a specific instance, "it does not seem unreasonable to require the Board when challenged to justify the incursion in terms of its educational policy and the editorial structure [i.e., the policies governing the libraries] that it has created." 107

A recent Supreme Court opinion, Village of Arlington Heights v. Metropolitan Housing Development Corporation, 108 supports the contention that unconstitutional motivation, or a censorship orientation, can be inferred from a departure from procedure. In Arlington Heights the Court listed a number of factors useful to an inquiry into motivation:

The historical background of the decision is one evidentiary source . . . . The specific sequence of events leading up (sic) the challenged decision also may shed some light on the decisionmaker's purposes . . . . Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.

The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action . . . . 109

The district court in Minarcini found the purchasing process set up by the board to be "fair, equitable and logical." 110 The court found further that the record did not disclose arbitrary or capricious acts in administering the procedure. Moreover, the district court stated:

The reasons expressed by Board members in support of their action refusing the purchase of the initially proposed novels are not unreasonable. Those reasons in substance reflect an attitude that the proposed novels were adult-orientated and, therefore, less suitable for use as curriculum text for grades 10 through 12 than other available novels, and that the books were better suited for college level instruction and study. 111

109. Id. at 564-65 (footnote omitted).
110. 384 F. Supp. at 706.
111. Id. at 703.
Thus, although the books had been recommended by the faculty, neither the district court nor the circuit court could infer unconstitutional motivation in the purchasing process when such motivation was not clearly shown.

Presuming, however that the same considerations that governed the removal of *Catch-22* governed the board’s refusal to purchase *Catch-22*, the Sixth Circuit might still have refused to draw an inference of unconstitutional motivation. Invalidating a board decision not to select books may be more of an invasion by the judiciary into the social and political process than interfering with removal. As emphasized in the district court’s opinion in *Minarcini*:

> Ideological conflicts within communities of a free society exacerbate and subside with the ever changing moods and structure of its population. The endless cycle moves from thesis to antithesis through synthesis and back to thesis only to renew itself from ever evolving dissent. Peaceful transition through the cycle, i.e., synthesis of antithesis, is insured in an open society by proportionate legislative representation founded in the elective process . . . .

> . . . The Board, as constituted in 1972, moved from its original decision to exclude the purchase of certain controversial novels as curriculum text . . . to a decision of the Board, as presently constituted, to include a controversial novel of similar substantive and literary composition . . . .

112. This statement by the district court may represent the essential motivating factor in its resolution of this case. Based on the result in the circuit court, this reasoning carried great weight. The circuit court acknowledged the school board’s right, through its control over the curriculum, to have a significant input in determining values that the public schools instill in students. However, the court felt that there should be a limit to this right. A school board may exercise an affirmative input; however, it cannot control the overall indoctrination process through censorship. Apparently the board can choose new books for the library based on their content, but cannot remove books based on their content. Society’s values are supported by the cumulative ideas of past generations—including past generations of school boards. Although arguably the court should have qualified selection as well as removal, the court did refuse to allow the Strongsville board to erase the imput of past boards from this ongoing growth process. Thus, either due to evidentiary difficulties or judicial deference manifested by a refusal to draw an inference of unconstitutional motivation, the right to know will be more difficult to vindicate in the selection process than in removal.

112. 384 F. Supp. at 704–05.
Judicial consideration of the validity of the board’s removal of a book does not necessarily end once the board’s decision is found to have been based on a valid determination of the educational value of the book. The court may still have to evaluate the basis for that determination. For instance, had obscenity been offered as a reason why the books in Minarcini were educationally inappropriate or had the board said that it feared the books would cause disruption or disorder and therefore had minimal educational value, the court would have been competent to make its own determination of the validity of these premises. If, however, a school board merely postpones the student’s exposure to the books until later in the student’s career, the court may be more willing to defer to the school board’s judgment.

One commentator described the boundaries of the free speech protection accorded to teachers in the classroom setting. “Generally speaking, what the first amendment does in the classroom is, first, protect the teacher from board decisions which are unrelated to educational considerations and, second, protect him from good faith board determinations of educational value based on constitutionally impermissible considerations.” It would appear that the court has concluded that the right to know should accord the student in the classroom the same protection.

VII. Conflict in the Circuit Courts

Minarcini correctly suggests that the right to know imposes constitutional constraints upon the school board’s exercise of discretion in curricular choice. Because the decision is unprecedented, it will be consulted by courts facing similar situations in the future. Unfortunately, the precedential value of the decision may be undermined because the opinion is vague and leaves much to inference. Yet it sustains intervention by the courts in curricular choice on the basis of the freedom of speech clause and reaches the correct conclusion.

Judicial intervention in curricular choice is consistent with a growing disenchantment with reliance upon administrative expertise and with the courts’ willingness to look behind administrative decisionmaking in order to prevent arbitrary and capricious actions. The Sixth Circuit concluded

114. See Nahmod, supra note 113, at 1503.
115. Commentators predict that the current wave of curriculum litigation will continue. See generally Nahmod, supra note 113; Schauer, supra note 39.
that assertion by students of the first amendment right to know at least avoids censorship of constitutionally protected expression. The court avoided defining the limits of the school board's discretionary authority to structure the curriculum by carefully limiting consideration to the particular curricular decision to remove specific books from the school library.

In contrast to the Sixth Circuit in *Minarcini* the Second Circuit in *Presidents Council* felt that if it ruled for the plaintiffs it would be reaching beyond the limits of its power. The court in *Presidents Council* emphasized that it found no violation of freedom of speech in the school board's action. Had the Supreme Court already announced *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* which went beyond the right to receive particularized communications to the broader right to know, the Second Circuit might have been more amenable to the *Minarcini* result. Nonetheless, the cases are distinguishable. In *Presidents Council*, unlike *Minarcini* where it was clear that the board was motivated by personal value judgments, the board's motivation in removing the books was unclear. Moreover, the Second Circuit emphasized that the books were still available to the parents of the students through the school system. One cannot know how the court would have reacted had this not been the case.

Thus *Minarcini* and *Presidents Council* are not necessarily irreconcilable. In fact, similar themes run through both: the judicial reluctance to "intervene in the resolution of conflicts which arise in the daily operation of school systems," the failure to confront the limits of school board authority over the content of curriculum, and the lack of precedent with which to protect these constitutional claims. Assuming courts reconcile the Sixth and Second Circuit opinions based upon factual difference, then it is likely that in future cases dealing with removal of books from a public school library the school

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117. The court reaffirmed the school board's, rather than the professional teaching staff's, power to choose curriculum.

118. This is not to say that the limits of a school board's discretion are unascertainable. Unconstitutional motivation can define limitations on school board authority because once unconstitutional motivation is shown a board's decision is unjustifiable.

119. See text accompanying notes 61-63 supra.

120. Id.

121 425 U.S. 748 (1976).

122. See note 92 supra.

123. Id. *Procunier v. Martinez*, 416 U.S. 396 (1974), was also decided after *Presidents Council*, and in that case the Supreme Court found "a narrower basis for decision," by considering the rights of free citizens, as opposed to those of prisoners. *Id.* at 408.

124. See text accompanying notes 61-63 supra.

125. Id.

126. *Epperson v. Arkansas*, 393 U.S. 97, 104-05 (1968). In both cases the Court quoted from *Epperson* which stated the Court's hesitancy to involve the judiciary in the operation of public schools.
board’s motivation will be the essential issue. This will require a case-by-case factual analysis.

VIII. CONCLUSION: BEYOND MINARCINI

As early as 1950, potential dangers in local selection of books and teaching materials were being anticipated:

Suppression of opinion in a public school is the antithesis of education. . . . Administratively, its inherent evil is an incapacity to draw the line. Once a book banning precedent is established, future exclusions are made simpler. . . .

. . . A recent study conducted by the American Council on Education indicates that current teaching materials are “guilty of failing to come to grips with basic issues in the complex problems of human relations.” Perhaps school boards might better devote their energies towards establishment of school programs wherein basic controversial issues would be openly studied and discussed. . . .

But for those who have less faith in the Freedom to Learn, an exemplary legal sanction is urgent. . . .

While the issues and the basis for legal action have not changed since the 1950’s, the Freedom to Learn theory has been replaced by the right to know.

Courts have not undertaken to establish academic freedom as a constitutional right in itself. Ideals of academic freedom—the right of an individual member of the faculty to teach, research, and publish without interference—apply to higher education more readily than to public elementary and secondary schools. The traditional view has been that public school students are less mature and therefore the emphasis at that level is on transmitting rather than discovering knowledge. In the absence of the development of a unified theory of academic freedom, the courts have assimilated problems encountered in public education into established legal categories.

128. The basis for legal action is the assertion that the discretion of school boards is limited. Id. at 944-53.
129. See, e.g., T. Emerson, The System of Freedom of Expression 607-08 (1970). Emerson explores the possibility of establishing academic freedom as an independent constitutional right analogous to privacy or freedom of association. Alternatively, he suggests the possibility of construing the first amendment to support academic freedom. (However, neither approach would fully satisfy him.).
130. See, e.g., Project, supra note 3, at 1440 and authorities cited therein.
131. See Developments, supra note 14, at 1050-51.
Although courts have attempted to construe the first amendment so as to give students and teachers some measure of protection, the more difficult issues have not yet been faced.\textsuperscript{132} It has generally been accepted judicially that the university is a free marketplace of ideas, but the notion that public school students are capable of dealing with controversial subjects has only recently been recognized by the courts.\textsuperscript{133} While it has become apparent that the lines between high school and college students may not be so firmly drawn as once believed, line drawing between high school and junior high and elementary school pupils may pose more complex issues.\textsuperscript{134} Finally, in view of the fact that one function of the public school is to indoctrinate, curricular choice involves more than freedom of speech; evaluation of content and textbook selection must involve an exercise of discretion.\textsuperscript{135} The state, rather than the public school teacher or student, presently has the power to make these judgments.\textsuperscript{136}

Thus, the real conflict underlying Minarcini is the tension between popular control of education by the local community and the professional autonomy of teachers and librarians to determine what students may learn and read.\textsuperscript{137} A further complication involved is the right of parents to participate in educational decisionmaking and the responsiveness of school administrators to the wishes of parent and community organizations.\textsuperscript{138} And finally, recognition of the rights of students themselves to determine what to learn adds an additional factor to the complexity of interests involved in curricular choice.\textsuperscript{139}

Thus, the issues facing courts beyond Minarcini are varied and complex. Deference to the judgment of public school administrators is advisable. But where it is shown that a particular action has no demonstrable educational purpose, the courts should intervene to protect constitutional rights and the integrity of public education.

\textbf{Joy Koletsky}

\textsuperscript{132} See, e.g., T. Emerson, supra note 129, at 607-08.
\textsuperscript{133} See, e.g., Project, supra note 3, at 1444-47.
\textsuperscript{134} See, e.g., Nahmod, supra note 113, at 1491.
\textsuperscript{135} See, e.g., Canby, The First Amendment and the State as Editor: Implications for Public Broadcasting, 52 Tex. L. Rev. 1123, 1136 (1974).
\textsuperscript{136} Id. at 1136. See text accompanying note 8 supra.
\textsuperscript{137} See, e.g., F. Wirt & M. Kirst, The Political Web of American Schools 95 (1972).
\textsuperscript{138} Goldstein, The Asserted Constitutional Right of Public School Teachers to Determine What They Teach, 124 U. Pa. L. Rev. 1293, 1321 n.94 (1976). Goldstein contends Presidents Council was clearly correct in its accommodation of the interest involved. Id. at 1334.
\textsuperscript{139} In Minarcini the interests of student and teacher coincided. Query whether the court would have reached the same result had teachers rejected the books.